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Guide for Tribal Appeals by Pro Se Litigants and Lay Advocates

Gregory D. Smith

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Guide for Tribal Appeals by Pro Se Litigants and Lay Advocates

Cover Page Footnote

Gregory D. Smith, [J.D., Cumberland School of Law, 1988; B.S., Middle Tennessee State University, 1985; Special Courts Certification, National Judicial College, 2014], is a Justice on the Pawnee Nation Supreme Court in Oklahoma and the Alternate Judge on the Gila River Indian Community Court of Appeals in Arizona. Each court is the highest appellate court in their respective tribal nations. Both positions are part-time judgeships. Mr. Smith also has a law practice in Clarksville, Tennessee and is the part-time municipal judge for Pleasant View, Tennessee. Judge Smith has presented between 650–700 appeals for courts all over the United States. He is a former president of the Tennessee Municipal Judges Association and served on the Tennessee Court of the Judiciary from 2004–2009. In 2013, he wrote the Tennessee Municipal Judges Benchbook for the Tennessee Administrative Office of Courts. In 2012, Judge Smith compiled and edited the Tennessee Judicial Ethics Opinions Handbook for the Tennessee Judiciary. Judge Smith has also acted as a special adjunct professor at the Cumberland School of Law at Samford University in Birmingham, Alabama and as an adjunct professor in the field of law at Austin Peay State University in Clarksville, Tennessee. In March 2015, he was inducted into the National Trial Lawyers’ “Top 100” Attorneys for the field of Criminal Law and is regularly included in Who’s Who in American Law. The proposals made in this article reflect the author’s own personal opinions and do not speak as official positions for any of the above named courts.

GUIDE FOR TRIBAL APPEALS BY PRO SE LITIGANTS AND LAY ADVOCATES

Gregory D. Smith

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INTRODUCTION

This Article serves as a continuation of Mr. Smith’s article, *A Streamlined Model of Tribal Appellate Court Rules for Lay*

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Advocates and Pro Se Litigants.¹ The purpose of these two articles is to assist lay advocates and pro se litigants in navigating tribal courts. In this Article, Mr. Smith outlines a guide that tribal courts can use to assist lay advocates and pro se litigants.² Tribal courts should feel open to use all or portions of this guide in their courts.

¹ Gregory D. Smith, *A Streamlined Model of Tribal Appellate Court Rules for Lay Advocates and Pro Se Litigants*, 4 AM. INDIAN L.J. 27 (2015).

² This guide should not be considered legal advice and cannot be cited as legal authority. It is not a substitute for hiring an attorney and anyone seeking to appeal is invited to seek legal counsel.

THE PRO SE LITIGANT AND LAY ADVOCATE GUIDE TO PRESENTING
APPEALS TO THE {TRIBE'S NAME} NATION SUPREME COURT³

Published by:
{Tribe's Name} Supreme Court Clerk
Address
City, State and Zip
Phone: (____) ____ - _____

³ This should serve as a sample cover sheet for the guide. Tribal courts should plug in information affiliated with the tribal nation.

I. THE CONCEPT BEHIND APPELLATE REVIEW

An appeal is designed to determine if the lower court, in this case the tribal court which heard the case, correctly applied the law and whether the trial court and/or jury found and applied the facts of the case in a reasonable manner. An appeal is not a retrial of the case, but instead seeks to make sure the trial was held fairly. Even if the appellate court might have ruled differently from the trial court if it was conducting the trial, if the facts found by the judge or jury can reasonably be supported by the evidence presented at trial, an appeals court will not “second-guess” the factual findings from the trial court. On the other hand, an appellate court will review the legal findings of the trial court, (how the trial court applied the statute or ordinance in question), “de novo” which means the trial court’s interpretation of a statute or ordinance is not binding on the appellate court.

There are certain rules which normally apply to appeals. The first, and most important rule, is the presumption that whichever person or party won at the trial court level should prevail on appeal. It is the burden of the person or party who is appealing the trial court’s decision, called the “Appellant,” to show two things: 1) an error was made during the trial, and 2) the error that occurred at trial, whatever that error may be, must have affected the outcome of trial. An error at trial that didn’t adversely impact the outcome of a trial is called “harmless error.” An extreme example of harmless error is the movie clips from the shooting of President John F. Kennedy. In one clip, shortly before President Kennedy was shot, a police officer crossed the street about a block ahead of President Kennedy’s car without crossing at the corner, an illegal act commonly called “jaywalking.” While jaywalking is illegal, the police officer’s act of jaywalking had nothing to do with President Kennedy’s death. The jaywalking was harmless error.

A second important appellate rule is that the anything discussed on appeal must be “on the record.” What this means is if a factual point wasn’t discussed at the trial court, it cannot be discussed on appeal because the unmentioned point would be “off the record.” Consider this concept to be like looking at a photograph. The photograph was taken and developed at the trial court. On appeal, the Supreme Court cannot add or subtract anything related to that

photograph. The Supreme Court merely reviews the photograph taken by the Trial Court and determines if it was correctly developed.

An appellate court is designed to ensure that the structure of the case is fundamentally fair. If an appellant wishes to prevail on appeal, the appellant must show both trial error and that the error probably changed the outcome of the trial. While the Supreme Court can completely overturn, dismiss or rewrite the trial court's decision, the most likely outcome if an appellant prevails on appeal is for the case to be sent back to the trial court for a new trial. This is called a remand. An appellant should always be sure to tell the appellate court exactly what outcome the appellant is requesting from the Supreme Court.

II. THE COURT MEMBERS

The {Tribe's Name} Nation Supreme Court consists of {#} members. These justices were either appointed by the Tribal Council or elected. Most tribal appellate judges have some sort of legal experience and many have law degrees. Absent extraordinary circumstances, the decision by the {Tribe's Name} Nation Supreme Court will be the last court to review the case currently on appeal.

The {Tribe's Name} Nation Supreme Court also has a court clerk who is {name}. The court clerk can help with filing papers, providing forms and scheduling court dates. Neither the {Tribe's Name} Nation Supreme Court nor the Clerk of the {Tribe's Name} Nation Supreme Court can, or will, give litigants legal advice. If legal advice is needed, consider contacting an attorney.

III. GLOSSARY OF TERMS

Abuse of Discretion:	<i>See</i> "Standard of Review."
Affirm:	When an appeals court upholds, confirms, or agrees with the decision decided by the trial court.
Amicus:	Friend of the Court. A third party that is not a party to the case, but has a position they believe would help the

appellate court decide the pending appeal. *See* Rule 7(e) of the Rules of Appellate Procedure for information regarding amicus briefs.⁴

- Appeal: The request by a litigant who lost at the trial court to have another, higher, court review the trial court's decision to see if the decision made by the trial court was correct or should be modified in some manner.⁵ *See* Sections II⁶ and V⁷ of the Rules of Appellate Procedure for this Supreme Court for information regarding how to seek an appeal.
- Appellant: The party appealing a decision from the trial court.
- Appellee: The party that usually won at the trial court.
- Brief: A written argument setting out the position of a party. The Appellant's brief is filed first and sets out why the trial court was in error for its decision. The Appellee's brief argues why the trial court's decision is correct.⁸ *See* Section VIII of the Rules of Appellate Procedure of this Supreme Court for information about briefs.⁹

⁴ For an example of language that a tribal nation can use for Rule 7(e) *see* Gregory D. Smith, *A Streamlined Model of Tribal Appellate Court Rules for Lay Advocates and Pro Se Litigants*, 4 AM. INDIAN L.J. 27, 46 (2015).

⁵ Smith, *supra* note 1, at 49 (providing a sample form of a notice of appeal).

⁶ Smith, *supra* note 1, 41–42.

⁷ *Id.* at 44–45.

⁸ *Id.* at 50–51 (providing a form appellate brief).

⁹ *Id.* at 47.

Certificate of Service:	A statement at the end of all briefs, motions or other pleadings that a copy of what was filed with the Supreme Court was mailed, postage pre-paid in the U.S. Mail or e-mailed to all other parties involved in the case. All pleadings, briefs, motions or other papers filed with the Supreme Court must be sent to all other parties involved with the appeal and a certificate of service shall be included on all pleadings, briefs, motions, or other papers filed with Supreme Court.
Citation:	A reference to a case, statute, constitution or ordinance that applies to a pending appeal. A citation tells the court where to look to find the law cited to support an argument.
Civil Case:	An appeal involving issues such as contracts, property, divorce, juvenile, child custody, or personal injuries where a party is usually not facing jail or prison as a potential punishment.
Contempt:	Disrespect or disregard shown to a court.
Court of Appeals:	<i>See</i> Supreme Court.
Criminal Case:	A case involving the violation of a criminal law or ordinance where the person is facing either potential time in jail or prison or a fine. A misdemeanor is usually a potential of jail or prison for less than a year. A

felony is a crime where the person charged with a crime is facing a potential of jail or prison for more than a year.

- Decision: The written basis for a court's ruling.
- Defendant: The person sued or charged with a crime at the trial court level.
- De Novo: *See* "Standard of Review."
- Docket: The list of cases a court hears on a day or the list of proceedings that occurs in a case.
- File Stamp: The time/date stamp a clerk puts on all filed orders, pleadings, briefs, and orders that prove a document reached the court file. To keep proof a document was filed, the litigant filing should request a "true copy" of the filed document, which is simply an extra stamped copy of a pleading for the litigant's personal files.
- Final Judgment: The order of a trial court that completely concludes a case. Normally, appellate courts only consider final judgments. For further information on appealable decisions, *see* Section III of the Rules of Appellate Procedure of this Supreme Court.¹⁰
- Indigent: A person who cannot afford to pay court costs up front or cannot afford

¹⁰ *Id.* at 42.

to hire an attorney. An attorney may possibly be appointed at the tribe's expense for criminal cases, but an attorney is usually not appointed for civil cases. Most courts do not appoint attorneys for civil cases. *See* Rule 9(a) of the Rules of Appellate Procedure for this Supreme Court for information regarding indigent criminal appeals.¹¹

In Forma Pauperis:

This is the civil court answer to a party being indigent in a criminal case. *In Forma Pauperis* means "acting as a pauper." If the Court finds a party is a pauper (poor), the Court can waive or delay the prepayment of filing fees and court costs. *See* Rule 9(b) of the Rules of Appellate Procedure for this Supreme Court for information regarding *in forma pauperis* civil appeals.¹²

Interlocutory Appeal:

An appeal filed prior to a trial court entering a final judgment. *See* Rule 2(b) of the Rules of Appellate Procedure for this Supreme Court for information regarding interlocutory appeals.¹³

Judgment:

See "Final Judgment."

Jurisdiction:

The Court's power to act in a case. The court must have "subject matter jurisdiction" (power to hear a type of

¹¹ *Id.* at 47.

¹² *Id.*

¹³ *Id.* at 41.

case) and “personal jurisdiction” (power over the parties in a case) to proceed. For further information regarding the jurisdiction for this Supreme Court, *see* Section III of the Rules of Appellate Procedure of this Supreme Court.¹⁴

- Lay Advocate: Lay advocates are a concept unique to the tribal court system. A lay advocate is a tribal member who may, or may not, have formal legal training that represents litigants in the tribal courts. A lay advocate is not an attorney.
- Litigant: A party to a pending case.
- Lower Court: *See* “Trial Court.”
- Notice of Appeal: The pleading that is filed to start an appeal.¹⁵ *See* Sections II and Rule V of the Rules of Appellate Procedure for this Supreme Court for information regarding how to start an appeal.¹⁶
- Opinion: The formal written decision from an appellate court.
- Oral Arguments: The personal and spoken argument made to an appellate court. Oral arguments are not required, but are allowed by this Supreme Court. *See* Section VIII of the Rules of Appellate

¹⁴ *Id.* at 42.

¹⁵ *Id.* at 49 (providing a form notice of appeal).

¹⁶ *Id.* at 41–42.

	Procedure of this Supreme Court for information regarding oral arguments.
Order:	An enforceable decision or command by a court. An order can be either written or oral and it tells a party to do, or not do, something.
Party:	<i>See</i> “Litigant.”
Petitioner:	The party who starts a lawsuit. A petitioner can be an individual, a corporation or a government body.
Plaintiff:	Another word for petitioner. <i>See</i> “Petitioner.”
Precedent:	A previously decided case that is similar to the case at hand and may instruct, or influence the Supreme Court on how they should decide the pending appeal.
Pro Se:	A litigant presenting their own appeal without the formal representation of an attorney or lay advocate.
Record on Appeal:	The orders, papers, pleadings, transcript and exhibits presented to the trial court at the trial of the matter now on appeal. Generally, for facts to be reviewed by the appellate court, the evidence had to be presented at trial to be considered on appeal. The evidence presented at the trial is considered “on the record.” Evidence not presented at trial will not

generally be considered by the appellate court because unrepresented evidence is “off the record.” For further information regarding the record on appeal, *see* Section VI of the Rules of Appellate Procedure of this Supreme Court.¹⁷

Remand:	The appellate court’s action of sending a case back to the trial court with instructions to conduct some further action on the case.
Remedy:	The relief requested by a party through legal action.
Reply Brief:	The Appellant’s written reply to the Appellee’s brief. Generally, the reply brief is the final brief presented to the appellate court before an appeal is decided. For further information on reply briefs, <i>see</i> Rule 7(d) of the Rules of Appellate Procedure of this Supreme Court. ¹⁸
Respondent:	<i>See</i> “Appellee.”
Reverse:	The act of an appellate court modifying or changing a trial court’s decision.
Standard of Review:	The rule of review an appellate court must follow when deciding an appeal. There are different standards of review for different types of cases.

¹⁷ *Id.* at 45.

¹⁸ *Id.* at 46.

Several common appellate standards of review are as follows:

A) Abuse of Discretion—The trial court’s decision does not follow the law or greatly diverts its opinion from factual logic;

B) Clear and Convincing Evidence—Very strong evidence usually associated with civil cases such as the tribe or a state agency removing a child from a parent’s custody;

C) De Novo—Review with no presumption that the trial court’s ruling was correct (usually deciding questions of law);

D) Presumption of Correctness—If all things are equal, the appellate court will defer to the trial court’s decisions unless an appellant specifically shows the trial court’s decision was incorrect; and

E) Proof Beyond a Reasonable Doubt—Extremely strong evidence usually associated with criminal case sufficiency of evidence issues.

- Stay:** A court's order delaying or temporarily suspending a legal decision or ruling being implemented. Filing a notice of appeal does not automatically stay a trial court's decision unless a statute or ordinance specifically states a stay automatically takes place if a notice of appeal is filed. Otherwise, a litigant must request a stay from the court.
- Supreme Court:** The highest court in a tribal court appellate system. Some tribes call their Supreme Court the "Court of Appeals." For further information regarding the Supreme Court, *see* Section IV of the Rules of Appellate Procedure of this Supreme Court.¹⁹
- Technical Record:** *See* "Record on Appeal."
- Transcript:** A written record of every word said at trial or in a trial court hearing. Sometimes an appellate court will use an audio record of what was said at trial or the parties might present a written summary of the testimony called a "Statement of the Evidence." For further information on presenting transcript or other witness testimony, *see* Rule 6(a) of the Rules of Appellate Procedure of this Supreme Court.²⁰

¹⁹ *Id.* at 42–44.

²⁰ *Id.* at 45.

Trial Court:	The original (last) court to hear a case prior to the appeal being filed. The Trial Court is sometimes called the “Lower Court” or the “Tribal Court.”
Tribal Court:	<i>See</i> “Trial Court.”
Writ:	An extraordinary order of a court ordering a person, litigant, government body or lower court to either do, or refrain from doing, an act.

IV. FREQUENTLY ASKED QUESTIONS

What is an Appeal?

An appeal is a higher court reviewing the actions of a lower court to make sure the lower trial court’s decision is either justified or supported by the evidence presented at trial.

Who Can Appeal?

Any actual party to a case that is dissatisfied with the ruling of a trial court can normally appeal the trial court’s decision if time limitations on filing a notice of appeal are followed.

What Does it Cost to Appeal?

The court costs to file a notice of appeal to the {Tribe’s Name} Nation Supreme Court is \$__.

How Do I File a Notice of Appeal?

A notice of appeal should be filed with the clerk of the {Tribe’s Name} Nation Supreme Court at {address}.²¹

When is my Brief Due?

The Appellant’s brief is due within thirty (30) days of the record on appeal being filed. The Appellee’s brief is due within thirty (30) days of the Appellant’s brief being filed. A reply brief, if it is to be filed by the Appellant, is due within fourteen (14) days of the

²¹ *Id.* at 49 (providing a form notice of appeal).

Appellee's brief being filed. File all briefs with the clerk of the {Tribe's Name} Nation Supreme Court.

What Happens if the Brief is Due on a Day the Court is Closed?

If a brief is due on a day the court is closed, the brief is actually due on the next day the court is open.

Can I Contact the Justices to Talk About my Appeal?

No.

How Long Will it Take to Get an Opinion from the Supreme Court?

While there is no specific time for an appellate court to render a decision, the {Tribe's Name} Nation Supreme Court strives to make their decisions within ninety (90) days of oral arguments or the Court getting the case if the parties do not request oral arguments.

How Does the Supreme Court Decide Appeals?

The Supreme Court will review the facts and law of your case closely and discuss the case between the justices. The majority decision of the justices will decide the case.

Why Present Oral Arguments?

Oral arguments are designed to allow the litigants to clear up questions left unanswered or presented by the written briefs. Presume the court is very familiar with the facts of your case and the written briefs. Oral arguments invite the Supreme Court to ask questions of the litigants to better understand the issues in an appeal.

Do I Have to Request Oral Arguments?

No. You can waive oral arguments. If oral arguments are waived, the case will be decided solely on the written arguments set out in the briefs.

If I Start my Appeal on my own (Pro Se), May I Later Hire an Attorney to Present my Case if the Appeal is Still Pending?

Yes, however unless permission is granted from the Supreme Court, the attorney cannot re-brief the case or extend the deadlines for filing paperwork.

How Will I Know When the Supreme Court Decides my Appeal?

The Supreme Court will prepare a written opinion and the clerk of the {Tribe's Name} Nation Supreme Court will send a copy of the Supreme Court's opinion to all litigants.

What If I Wish to Appeal the Opinion of the {Tribe's Name} Nation Supreme Court?

For most cases, there are no further appeals after the {Tribe's Name} Nation Supreme Court rules on your appeal. The Supreme Court is called a "court of last resort" for this reason.

V. WHERE ARE FILINGS MAILED?

All pleadings, motions or briefs may be mailed, postage pre-paid in the U.S. Mail, to the Clerk of the {Tribe's Name} Nation Supreme Court at {address}. You may also e-mail your pleadings, motions or briefs to the Clerk of the {Tribe's Name} Nation Supreme Court at {e-mail address}. If you mail the brief, send three (3) copies of the brief to the Supreme Court. If you e-mail your brief, only e-mail a single (1) copy of your brief.

VI. HOW TO SEEK AN APPEAL?

Section V of the Rules of Appellate Procedure of this Supreme Court set out the details for seeking an appeal.²² Basically, felony cases and most civil cases must have the notice of appeal filed within thirty (30) days of the Trial Court deciding a case. The appeal of a criminal misdemeanor case or a "small claims" civil case must be filed within ten (10) days of the Trial Court deciding the case.²³ To start an appeal, one files their notice of appeal with the clerk of the {Tribe's Name} Nation Supreme Court at {address}.

VII. RESEARCHING AND ARGUING AN APPEAL

The more details a litigant/party to an appeal can give to the appellate court as to why the trial court should be reversed (Appellant's argument) or why the appellate court should affirm the trial court (Appellee's argument) the better. Simply arguing "the

²² *Id.* at 44–45.

²³ *Id.* at 49 (providing a form notice of appeal).

decision of the trial court stinks” will not usually convince an appellate court to reverse a trial court. Tell the appellate court where in the transcript or record you are getting the quoted or referenced claim or statement you argue in your brief. Simply telling the appellate court to look at a specific page number to find your point is fine, (e.g., Transcript page 9). As for researching the law, most tribe websites or the court clerk will have a copy of the Tribal Code and possibly previous opinions of the Supreme Court. Also, some private organizations, such as the Tribal Court Clearinghouse and law schools such as Cornell University School of Law, have very good on-line Native American law libraries.²⁴ Many commercial internet sites offer free legal research and they can be found by simply searching “free legal research sites” on the internet.

When arguing a case to the appellate court, either orally or in writing, keep it simple. Tell your story and tell the truth. Remember, whatever you say occurred at trial must appear in the record before the appellate court. If a factual point does not appear in the record, then the Supreme Court will not consider the information as the fact argued is “off the record.” When arguing, inform the court, don’t try to impress the court with fancy language.

VIII. THE APPELLATE RECORD

The appellate record usually includes the transcript of trial evidence, trial court pleadings, exhibits, and court rulings. Consider the appellate record to be like looking at a photograph. The appellate court simply looks at the photograph taken and developed by the trial court and the Supreme Court decides if the photograph was developed correctly. While there may be things included in the photograph the appellate court believes should not be “on the record,” or the appellate court may believe missing information should be included, the appellate court normally does not add or subtract from the information put together by the trial court. Be sure all relevant information is included in the appellate record by simply filing a letter with the trial court clerk stating which items you wish included in the appellate record.

²⁴ See, e.g., *American Indian Law: An Overview*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/american_indian_law (last visited May 12, 2016), TRIBAL COURT CLEARINGHOUSE, <http://www.tribal-institute.org> (last visited May 12, 2016).

IX. BRIEFS

The general rules regarding how to present an appellate brief are set out in Section VII of the Rules of Appellate Procedure for this Supreme Court.²⁵ Basically, tell your story to the appellate court in plain language explaining why you believe the appellate court should either reverse or affirm the trial court. Write to inform the court, not impress the court with fancy terms.²⁶

X. THE SUPREME COURT'S RULING

The Supreme Court will decide the appeal with a written opinion. It may take several months for the opinion to be rendered, but the Court strives to decide cases within ninety (90) days of oral arguments being heard or the Supreme Court getting the case if oral arguments are waived. The written opinion will explain why the Supreme Court decided a case in a certain way. When the Supreme Court decides a case, the majority rules. So, if there are five (5) justices hearing a case, three (3) or more justices agreeing on an outcome decides the “majority opinion” and the outcome of the appeal. Some Supreme Court opinions will include a “concurring opinion,” which means a justice agreed with the majority opinion, but for a slightly different reason or the justice wanted to explain their vote on a specific point. Some Supreme Court opinions will include a “dissenting opinion.” A dissenting opinion, also called “a dissent,” is a justice on the losing side of the case explaining why that justice thinks the majority opinion is wrong. Absent very unusual circumstances, a case concludes when the Supreme Court hands down its opinion.

²⁵ *Id.* at 45–46.

²⁶ *Id.* at 50–51 (providing a form appellate brief).

CONCLUSION

Appeals are difficult to present and difficult to win. The {Tribe's Name} Nation Supreme Court hopes this short guide helps you, (or your lay advocate), present your appeal to this Honorable Court.

(name)

Clerk of the {Tribe's Name} Supreme Court