

Appellate Review in Ulex v. 1.2

1.0. Not the Usual Appellate Procedures

The basic procedural rules of [Ulex v. 1.2](#), § 1, provide a framework for the binding resolution of legal disputes. Section 1.1. invokes the Principles of Transnational Civil Procedure published by the ALI & International Institute for the Unification of Law in 2004 as a general guide to fair and efficient adjudication. These conform to widely honored principles of the rule of law. In the initial round of dispute resolution, in the equivalent trial courts, judicial bodies operate in Ulex much like existing private and public institutions. The relevant rules appear in § 1.2.1. through 1.2.3. For appellate level review, though, Ulex eschews the usual device—standing courts staffed by sovereign agents—for a set of rules that allow appellate courts to be created on an as-needed basis. This document explains the why and how of appellate procedure in Ulex v. 1.2.

2.0. The Challenge of Appellate Procedure on the Fly

Ulex cannot presume that users will have recourse to ready-made institutions for resolving their disputes. It must therefore provide default procedural rules for building courts on an as-needed basis. These rules, like those for creating adjudicatory bodies having original jurisdiction over disputes, must provide a way for litigants or their designates to mutually choose the judges that decide and review their disputes. And the appellate process must have enough flexibility to provide needed review of questionable decisions without the risk of indecisive outcomes or endless appeals. In answer to those specifications, Ulex v. 1.2 offers rules for creating self-assembling appellate courts.

3.0. The Answer Found in Self-Assembling Appellate Courts

Ulex v. 1.2's appellate procedures build on the same method it uses to form mutually agreeable, objective, and tie-proof panels for trial court proceedings: "Each party shall choose a judge and those two judges shall choose a third, who shall chair the panel of three judges." Each successive appeal adds four more judges--three chosen by the judges last appointed to decide the dispute and the fourth by two of the newly appointed appellate judges.

These appellate procedure rules, detailed below, allow successive appeals by progressively larger panels. A panel of three judges, chosen according to the rule quoted above, issues the first decision. To form a panel for reviewing that decision on appeal, those three judges add three more, two of whom join in choosing a fourth. That gives a panel of 7 judges (the original 3 plus 4 new judges), for the first appeal. A second appeal would use the same rules to add

another four judges, giving a total of 11 (3+4+4). A panel of 15 (3+4+4+4) would hear any third appeal, and so on.

This method meets the specifications set forth above. It allows users to create courts on an as-needed basis, to appoint judges only by mutual consent of the litigants or their designates (the judges chosen earlier), and to submit contested decisions to review without running the risk of hung panels or interminable appeals. Though the appellate process can in theory continue indefinitely, it by design makes each successive appeal less likely to change an earlier decision, convincing rational parties to terminate litigation relatively quickly.

Rules for the Self-Assembling of Appellate Courts

Ulex v. 1.2, § 1.2.4 provides these rules for appellate review:

Any party to a suit may appeal it to a panel composed of the judges who issued the decision under appeal plus four additional judges:

1. An appellate judge chosen by the chair of the deciding panel and one judge most recently chosen;
2. An appellate judge chosen by the chair of the deciding panel and the other judge most recently chosen;
3. An appellate judge chosen by the two judges of the deciding panel not chairs; and
4. An appellate judge, who shall chair the appellate panel, chosen by the judges chosen under subsections 1 and 2, above.

In broad terms, these rules define a process by which the judges responsible for the decision under appeal help shape the composition of the court that will hear the appeal. They do not wholly determine its composition; the newly selected judges choose the chair of the appellate court. Judges of lower courts join the new judges; the court of appeal retains the judges responsible for decision under review. The following examples illustrate the process.

Example Application of the Appellate Rules

Suppose that a plaintiff and defendant initiate their litigation by choosing a three judge panel following the default in Ulex v. 1.2, the rule set forth at § 1.2.1: “Each party shall choose a judge and those two judges shall choose a third, who shall chair the panel of three judges.” Call the judge the plaintiff chooses *J1*, the one the defendant chooses *J2*, and the third judge chosen, the chair, *CJ3*. Figure 1, below, illustrates.

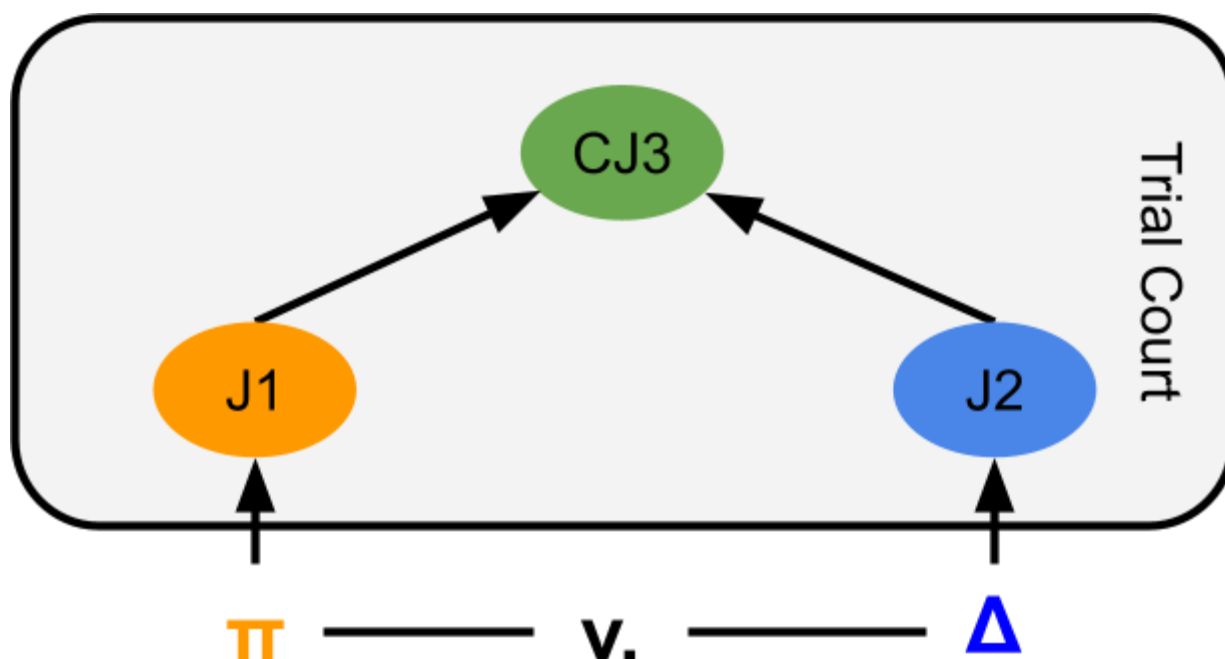


Figure 1: Formation of Trial Court

Key to Figure 1:

Π = Plaintiff
 Δ = Defendant
 J = Judge
 C = Chair

Now further suppose that the panel of J1, J2, and CJ3 issues a decision and that the losing party seeks an appeal. The panel for this first appeal will be composed “of the judges who issued the decision under appeal”—i.e., J1, J2, and CJ3—“plus four additional judges,” according to the rule quoted above. Taking each of the rules’ subsections in turn, those additional judges are:

1. A first appeal judge chosen by CJ3 and J1, called 1AJ4;
2. A first appeal judge chosen by CJ3 and J2, 1AJ5;
3. An appellate judge chosen by J1 and J2, 1AJ6; and
4. An appellate judge chosen by 1AJ4 and 1AJ5, who serves as chair, 1ACJ7.

In total, that makes for a first appellate panel consisting of four judges in total: J1; J2; J3 (no longer sporting a C, given that the court has a new chair); 1AJ4; 1AJ5; 1AJ6; and 1ACJ7. Figure 2, below, illustrates.

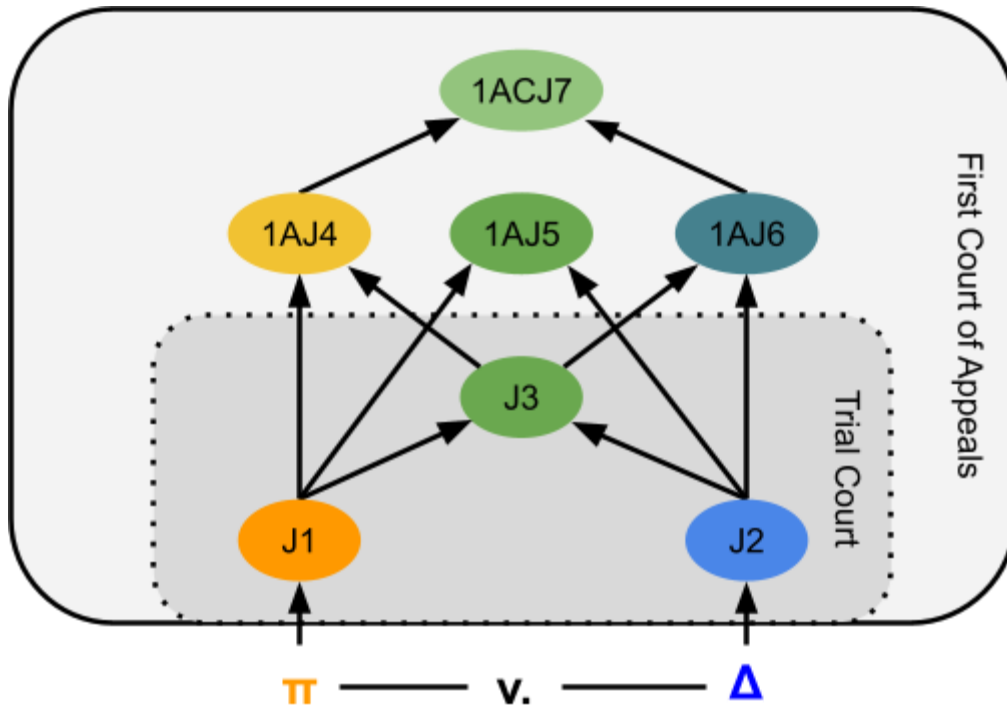


Figure 2: Formation of First Appellate Court

Key to Figure 1:

Π = Plaintiff
 Δ = Defendant
 J = Judge
 C = Chair

Note that all of the judges who issued the decision under appeal remain on this first appellate panel. This pattern holds true regardless of the number of appeals. Such retained judges will likely tend to stick by their earlier decisions but occasionally find new reasoning more persuasive than old change their votes accordingly. The persistence of judges across appeals stabilizes the system and lowers the costs of educating a new appellate panel.

On this first appeal, because the newcomers outnumber the old, they might yet entirely reverse the earlier decision. And if the trial court was decided on a 2-to-1 basis, as will likely prove true in most cases under appeal, only two of the four new appellate judges need side with the former minority to reverse the decision below. With each successive appeal, though, decisions grow more difficult to dislodge.

Suppose that the first appeal goes to a second. The rules remain the same, but generate a larger panel when reapplied. The four new appellate judges are chosen under the same rules as

before, too, but with new parties making the choices. The additional judges needed for the second appeal are chosen as follows:

1. A second appeal judge chosen by 1ACJ7 and 1AJ4, called 2AJ8;
2. A second appeal judge chosen by 1ACJ7 and 1AJ5, called 2AJ9;
3. A second appeal judge chosen by 1AJ4 and 1AJ5, called 2AJ10; and
4. A second appeal judge chosen by 2AJ8 and 2AJ9, called 2ACJ11.

The resulting panel for the second appeal: J1; J2; J3; 1AJ4; 1AJ5; 1AJ6; 1AJ7 (demoted from 1ACJ7 upon the new chair's appointment); 2AJ8; 2AJ9; 2AJ10; and 2ACJ11. Figure 3, below, illustrates.

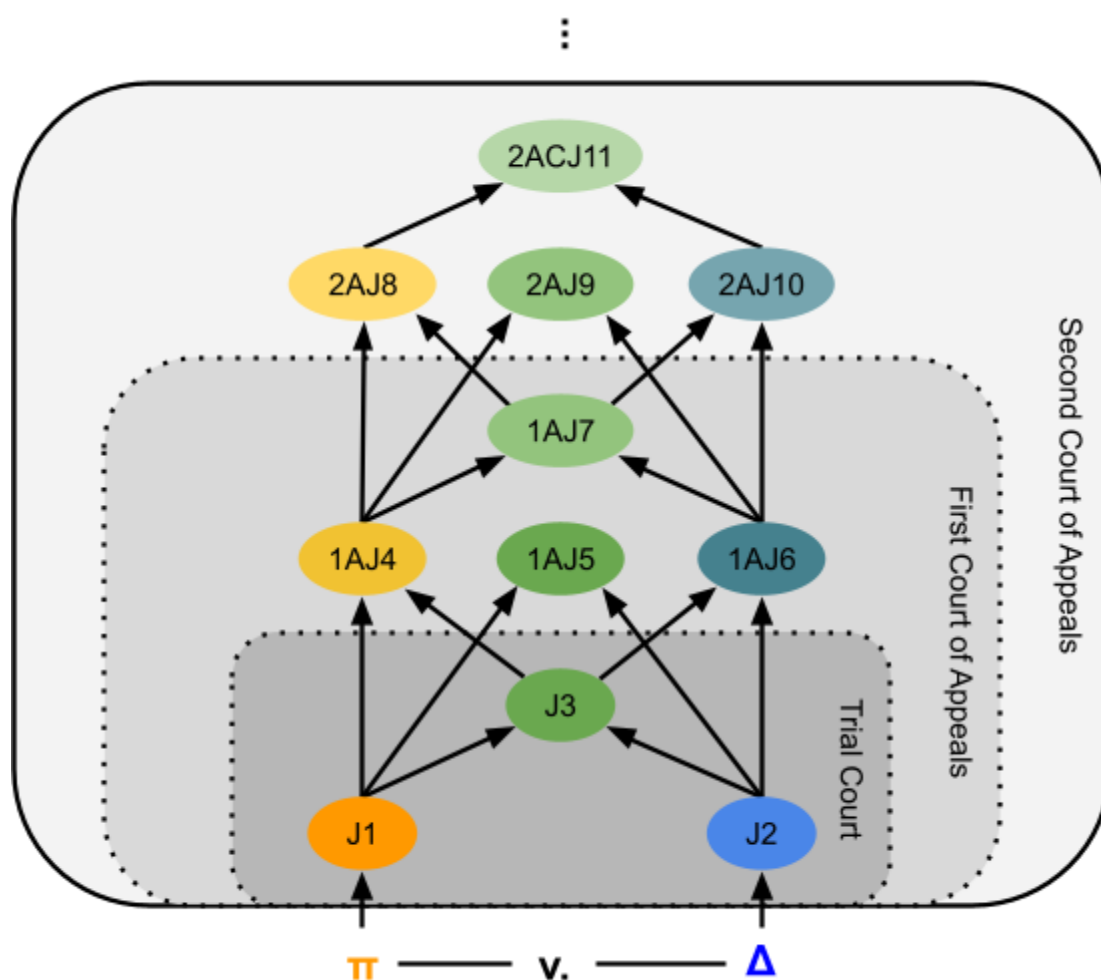


Figure 3: Formation of Second Appellate Court

Note that each court has only one chair, who always comes from the most recently appointed panel of judges. The chair of the trial court, nominated CJ3 when serving in that capacity,

becomes merely *J3* when serving on any subsequent appellate court. When 2ACJ11 steps into the chair position for the second court of appeals, 1ACJ7 cedes the chair position held in the first appeal, becoming merely *1AJ7* to serve as another judge among equals on the subsequent appeal.

As in the first appeal, this second appellate panel retains judges already familiar with the case, adding new ones only incrementally. In contrast to the first appeal, though, this second one does not add enough new judges to entirely reverse an earlier unanimous decision. By design, it gets increasingly difficult with each appeal to entirely reverse the prior decision. Nonetheless, given that parties will tend to appeal only closely decided cases, a second or even third appeal might sometimes prove worth the costs of empanelling many judges (costs which by default the losing party must bear). Notably, however, the decreasing likelihood of reversal helps prevent comparatively wealthier litigants from simply outspending their counterparts into submission.

The color-coding used in these diagrams conveys the notion that, while all judges take enforceable oaths of impartiality, there is no denying that each party will strive to choose judges likely to lean that party's way. So while *J1* is not the plaintiff's judge, assuming that plaintiff's can distinguish between judges' on the basis of philosophies or records, *J1* will more likely rule for the plaintiff than otherwise, even as *J1* adjudicates impartially.

The lower colors in the diagrams appear more intense to indicate when a party's influence is felt most powerfully. Because they must delegate the power to choose new judges to former ones, the parties' influence abates with each successive appeal. The colors thus grow fainter near the top of the figures. The colors various hues reflect the mixing of influences. Green sits between blue and orange on the color spectrum; *CJ3*, chosen by the judges directly chosen by the parties, thus appears as a green-colored compromise between the plaintiff's blue *J1* and defendant's orange *J2*.