

The last word

How to handle the appellate process

An unfavorable judgment may not be the final word in a lawsuit, as the appellate process allows businesses to redress errors in the trial court. The appellate process is complex and lengthy, but it can help you avoid costly litigation.

"If you receive an unfavorable final judgment, it is imperative to promptly consider your appellate options," says Sidney Klingler, a partner with Secrest Wardle.

Smart Business spoke with Klingler about how to effectively use the appellate process.

How can a business owner determine whether to use the appellate process?

Whenever an unfavorable judgment or order is entered against your business, you should consider the option of appeal. Unless the judgment is so small that the cost of appeal could not be justified, consultation with an appellate attorney or one specializing in the issues involved in your particular case will be necessary to assess your appeal and determine the likelihood of success.

An appeal entails some cost, although generally much less than protracted litigation. Weighing the likelihood of prevailing on appeal against the cost of the appellate process, you may conclude that an appeal is not worthwhile and that it's better to pay the judgment and avoid the continued accrual of interest.

Be aware, however, that an appeal may not be used for purpose of hindrance or delay, and must be based on a reasonable belief that there is a meritorious issue to be determined. A party may be assessed attorney fees and punitive damages for filing a 'vexatious' appeal.

What should business owners know about the appellate process as it relates to business litigation?

There are two general types of appeals in Michigan courts. When there is a final judgment, a party aggrieved by the decision has the right to appeal to a higher court. An appeal of right to the Michigan Court of Appeals involves a process that is likely to go on for a year or more. A claim of appeal, the initial filing that establishes jurisdiction in the court of appeals, must be filed in a timely manner; if not, your appeal of right is irrevocably lost.

Parties may also seek leave to appeal orders issued in a case prior to trial. This is known as an interlocutory appeal. An interlocutory appeal is discretionary for the Court of Appeals, that is, the court has discretion to decide



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whether it will take up the appeal. Any order issued prior to trial may be appealed by application to the Court of Appeals. When the Court of Appeals grants an application for leave to appeal, it then considers the interlocutory appeal in the same manner in which it would consider an appeal of right.

While a grant of one's leave application is encouraging, it is by no means a guarantee of a favorable outcome. Many legal practitioners are unaware that the panel that ultimately considers an appeal after leave is granted will not be the same panel that decided to grant leave and may view the case differently than did the original panel.

Nevertheless, an interlocutory appeal can be an effective tool to avoid costly litigation.

Can parties appeal decisions made by the Court of Appeals?

Once a case is decided by the Court of Appeals, an aggrieved party may seek leave to appeal to the Michigan Supreme Court. While the Supreme Court is not an 'error correction' court and generally grants leave with respect to issues that have implications and significance beyond the case in which they are presented, it may nevertheless be worthwhile to bring a simple claim of error, as it may act by peremptory order to correct what it perceives as clear error.

Cases can and often do settle during the ap-

pellate process. A plaintiff who has obtained a substantial money judgment may be willing to settle for a lesser amount rather than wait potentially years until the appellate process is exhausted. A prevailing party may also be inclined to settle during appeal if he or she is aware that the victory is subject to serious challenge.

A high-quality appellate brief can aid in this process in several ways. When potential grounds for reversal are effectively presented, the possibility of ultimate loss may become more apparent and a prevailing party thus more inclined to settle. Effective briefing also increases the chances for leave being granted, in the Michigan Court of Appeals as well as in the Michigan Supreme Court. With a grant of leave, a judgment or order becomes that much less secure for the prevailing party, a factor that can again facilitate settlement during the appellate process.

What are the potential benefits and dangers of using the appellate process?

The most immediately 'appealing' benefit is the prospect of relief from an unfavorable judgment. However, a favorable outcome relating to an issue that recurs in your business may very well affect the outcome of future litigation and can also serve to deter future litigation.

If the Court of Appeals decides a case in a published decision, that decision becomes binding on all state trial courts. The judiciary is thus capable of making law that is equally as binding as legislation, a fact that might not be generally appreciated.

The more common unpublished decision is not binding on lower courts but may nevertheless be persuasive in future cases, especially those involving similar factual scenarios. The flip side is that an unfavorable decision may equally establish harmful precedent that could affect your business in the future.

This means that it is important to realistically assess the strength of your appellate claims, from both a factual and legal standpoint. This is especially true where your case involves an issue of significance to the body of law as a whole — a few examples being independent contractor liability, agency and vicarious liability issues, and premises liability issues.

There may be more at stake than the cost of the appeal itself. <<

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