Verdict for the defense: The end of the road, or just another speed bump?

A brief guide for determining when you should appeal a defense judgment (and when you shouldn't)

By Nicholas G. Emanuel

The nature of the zero-sum game of litigation is that whenever an issue is submitted to a judge or jury for decision there is inevitably a winner – and a loser. Which means, as youth sports coaches often remind their players, losing is as much a part of the game as winning. One cannot, as they say, win them all.

That being said, a "final judgment" in a civil action is in many ways like the half-full/empty glass placed before the optimist and the pessimist. The pessimistic plaintiff's attorney sees a final trial court judgment disposing of all plaintiff's claims as just that: final, and an unfortunate end to the litigation. The optimistic attorney sees the same final judgment as simply a prerequisite for filing an appeal and continuing to pursue the claims, this time in front of an entire panel of experienced jurists.

But good attorneys can be neither pessimists nor optimists, and must instead be realists. Optimism may often be warranted when advising a client on the next steps following an adverse trial court decision, but perhaps just as often, a more pessimistic view will lead to the appropriate action.

The decision of whether to appeal an adverse result can be a difficult one, fraught with uncertainty, and requiring the conscientious advocate to simultaneously consider a host of interrelated factors. To make things even more challenging, the decision must be made under extraordinary time pressure: a notice of appeal has to be filed within 60 days of the entry of judgment. Otherwise, the right to appeal is forever forfeited with no possibility of obtaining relief.

In order to make the correct decision under such circumstances, one must first have in place the proper framework for making the decision. The five questions that follow provide such a framework.

First, a threshold matter – who should be the decision maker?

Before even getting to the five question framework, counsel would be

well-advised to first undertake a threshold inquiry: who should have the responsibility of analyzing the facts and answering the questions relating to the possibility of appealing?

In many, if not most, cases, it is trial counsel who evaluates whether the adverse result should be appealed.

To be sure, it is trial counsel who is most familiar with the case and the issues that were raised in the trial court, and trial counsel who can immediately launch into the appellate analysis without first needing to learn the facts of the case.

But these perceived advantages can just as easily turn into disadvantages, in that trial counsel's very familiarity with the case may result in a sort of tunnel vision which prevents a thorough vetting of potentially appealable issues. Turning the case over to a fresh set of eyes will often allow the new attorney to spot an issue that never occurred to the lawyers who have been entrenched in the litigation for an extended period – particularly if the new eyes belong to an attorney with a good amount of appellate experience, who can view the case more from the perspective of a court of appeal.

At the very least, if a complete examination of the record by an experienced appellate attorney is not feasible, trial counsel should give a summary of the case to a trusted colleague to weigh in on potential avenues for appeal.

Familiarity may indeed breed contempt, but in this context it also breeds tunnel vision that leads to missed appealable issues.

The five-question framework for deciding whether to pursue an appeal

(1)• Is the adverse result appealable?

There are many potential adverse results a plaintiff can experience in the course of a lawsuit: the denial of a discovery motion seeking crucial evidence; the granting of a defense motion for summary judgment; and, of course, losing at trial. But not every adverse result is appealable, or at least not immediately so.

Thus it is perhaps obvious, but nevertheless crucial, to first ensure that the adverse result in question can in fact be appealed. (The general rule is that final *judgments* are appealable, whereas interim *orders* are not; but of course there are exceptions.) Once counsel has confirmed that appeal is a procedural option, attention can be turned to more substantive matters.

(2)• Is there an appealable issue?

Although one of the parties loses in every adjudicated case, it does not follow that the losing side will always have an argument to pursue on appeal. Counsel must first identify one or more appealable issues – specific errors of law that were made by the trial court. It is not enough to assert that the court's decision was "wrong," and the losing party would like that decision to be reversed.

Counsel should take great care to identify solid appealable issues before pursuing an appeal. Not only will the identification and framing of the issues dictate the overall chances of success for reversal of the judgment, but failure to identify a legitimate issue exposes one to possible sanctions for filing a frivolous appeal.

An important note: This does not mean that one should never file an appeal regarding an issue that an appellate court has not clearly decided before, or even has previously decided unfavorably. Sanctions are not warranted where counsel makes a good faith argument for the modification or extension of existing law. It is essential that appellate practitioners identify issues based upon what the law is, but without completely losing sight of what the law should be.

(3)• What is the standard of review?

This is perhaps the most overlooked aspect of the appellate analysis, often not even considered until counsel begins drafting her opening brief. It is a mistake, however, to not immediately identify the applicable standard of review and incorporate that information into the equation when deciding whether or not to appeal.

The standard of review, which ranges from abuse of discretion to de novo, can make or break an appeal. A party who faces an abuse of discretion standard of review, which allows for reversal only where the trial court has acted in an essentially arbitrary and unreasonable manner, cannot be overly optimistic about success on appeal. On the other hand, a party who has an issue that will be reviewed de novo, with the reviewing court giving no particular deference to the lower court's decision, has a sizable advantage from the get go.

(4)• What is the probability of success?

Always a difficult question to answer with precision. Predicting the outcome of litigation is not exactly forecasting the weather, and indeed, any competent practitioner will be sure to advise his or her client that a specific outcome cannot be predicted.

But in the context of an appeal, knowing the rules of the game will help: What is the standard of review? How many legitimate appealable issues – if any – can be identified?

Making an informed decision about whether to extend litigation which thus far has proved to be a losing proposition certainly should involve conducting an inquiry into the probability of success on appeal.

(5)• Can significant delay before a final result be tolerated?

Finally, a purely practical consideration: how problematic is delay for the client? State appellate courts are impacted and it is not uncommon for two-year delays between filing of an appeal and the court's issuance of a decision. It is possible to expedite the process by seeking calendar preference, but that is only available in certain circumstances.

Of course, in most cases, just getting a reversal affords no immediate relief for the appellant. The majority of reversals involve an order reversing the trial court's judgment and then remanding the matter *back* to the trial court for further proceedings – perhaps even another trial. So in the case of a "win" that

comes in the form of a reversal and remand, the appellant must wait for the Court of Appeal to issue the remittitur (the order remanding the case back to the trial court), then wait for the trial court to put the matter back on its calendar, and finally complete whatever litigation is necessary on remand.

Only then will the successful appellant achieve the long sought after favorable judgment.

Many times, a party may wish to appeal, or have little choice but to do so, despite the inherent procedural delays. But other situations may dictate that it is not in the client's best interest to file an appeal because even if success is achieved, it will be of little value if it comes only after a very long wait.

The realities of the time it takes to go from filing a notice of appeal to obtaining relief for the client should not be ignored when deciding whether to appeal.

Conclusion

The decision of whether to appeal an adverse result can be difficult because it involves balancing so many pieces of competing information. In the end, the correct answer to the question of "should I appeal?" will of course vary depending on the particular facts of each case.

Implementing a systematic approach which examines each of the important considerations that are unique to the appellate process will assist a plaintiff's attorney in confidently deciding whether or not it is in the client's best interest to appeal an adverse result.


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