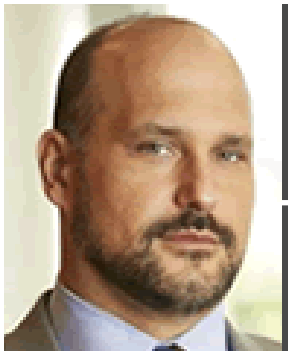


WHEN A RULING GOES WRONG: SHOULD WE SETTLE, PROCEED TO TRIAL, OR SEEK INTERLOCUTORY REVIEW

Moheeb Murray
Bush Seyferth & Paige (Troy, MI)
248.822.7809 | murray@bsplaw.com

You May Have Lost the Battle, But You Can Still Win the War: Using Motions for Reconsideration and Interlocutory Appeals to Your Client's Advantage
Moheeb Murray, Stephanie Douglas, and Brittney Kohn

It happens to the best of us. You wore your power suit and argued your strongest evidence. But sometimes rulings do not go your way. While there is always the option to accept the court's decision and buckle down for a difficult trial, the good news is that this is not the end of the road and you may have worthwhile options at your disposal to turn a negative ruling around for your client.

Motion for Reconsideration

Motions for reconsideration are generally disfavored and, because you have already lost once, the odds are necessarily stacked against you. But if the court made a clear mistake, or an intervening change in law or fact has occurred, you should consider bringing the issue to the court's attention. The Federal Rules of Civil Procedure do not expressly permit motions for reconsideration, but district courts tend to consider them when filed under Rules 59 or 60.

A. What are the Applicable Federal Rules and Requirements for a Sustainable Motion for Reconsideration?

Rule 59(e) allows a party to move to "alter or amend a judgment" within 28 days after the entry of the judgment. Rule 60(b), meanwhile, offers relief from a final order under various circumstances, including mistake, excusable neglect, newly discovered evidence, and fraud by an opposing party. Rule 60(b) also offers a catch-all circumstance of "any other reason that justifies relief," but courts rarely apply the catch-all . It is essential to not simply reiterate your prior position and ask the judge to re-decide the same matter. Instead, directly educate your judge about the reasons why reconsideration is appropriate under the circumstances of your case. And do not fail to overlook that local rules may impose limitations regarding the availability of reconsideration.

B. Think Strategically about Whether a Motion for Reconsideration is the Right Move.

The first step in deciding whether to move for reconsiderations is to reflect on whether there really is a supportable basis for requesting reconsideration. Have all federal procedural rules been met? What about application of any local rules? Any judge-specific practices or preferences? The rule requirements are usually only met if the trial court missed important facts or law, or if there has been an intervening change in the law or facts of the case. Alternatively, if the court ruled on a basis not briefed or argued by the parties, this may raise due-process concerns, which are often considered unpreserved if not presented to the trial court in a motion for reconsideration.

The next step is to consider what effect your motion for reconsideration may have on how the judge views you and your client going forward. Obviously, if the order kicks your client out of court, whether the judge will be frustrated by a motion for reconsideration matters less. But if the order keeps your client in court, or imposes oppressive discovery burdens on your client, you should be judicious with accusations that the court palpably erred. Regardless how artful your spin, the motion essentially asks the judge to review his own decision, and judges

(like anyone else) do not typically like to acknowledge mistakes. Meanwhile, the court may also invite opposing counsel to respond, thus introducing a potential array of new issues that you may have otherwise avoided in the record. The court could also issue a reconsidered opinion that "fixes" the problem with the original ruling that might have provided an appealable issue but still goes against your client. This is an especially troublesome outcome, because an order denying reconsideration is reviewed only for abuse of discretion (while the original order may have been reviewed de novo). The court could also issue a written opinion, where the original order was oral and thus unsearchable.[1]

Timing is another element to take into account. Ask yourself whether there is sufficient time to seek reconsideration rather than an interlocutory appeal if an important date, such as trial, is imminent and the trial court is unlikely to extend dates. And be careful: Not all motions for reconsideration will extend the time to file an appeal.[2] If you do move for reconsideration, and are unsuccessful, you must appeal from both the underlying order and the order denying reconsideration.

Generally, reconsideration of an interlocutory order is considered an extraordinary remedy and will be granted sparingly. This leads us to Option B—the interlocutory appeal.

Interlocutory Appeal

Some decisions are appealable on an interlocutory basis. Although interlocutory appeals are difficult to obtain if the adverse order does not fall within one of the categorical entitlements, it may be worth the time to consider that option and advise your client accordingly.

A. What Orders Qualify for an Interlocutory Appeal?

The first step is to check whether the decision qualifies for an interlocutory appeal as a matter of statutory right. In federal courts, such orders include (among other things) an order denying arbitration, 9 U.S.C. § 16, an order granting, modifying, or denying a preliminary injunction, 28 U.S.C. § 1292(a), and an order appointing a receiver, 28 U.S.C. § 1292(a).

Second, consider whether the adverse decision fits within the collateral order doctrine. Under that doctrine, a small class of collateral rulings are appropriately deemed "final," even though they do not actually end the litigation. While the categories of rulings that fit within the doctrine are limited, they include decisions that are conclusive, resolve important questions separate from the merits, and are effectively unreviewable on appeal from the final judgment.[3]

Third, ask yourself whether a writ of mandamus is appropriate. Courts traditionally apply a multi-factor balancing test to determine whether a case presents the type of extraordinary circumstance that warrants mandamus relief.[4] Suffice it to say, mandamus will almost never be an appropriate avenue for interlocutory relief from a bad ruling.

If your adverse order does not fit into one of these categories, the federal rules also provide for discretionary interlocutory appeals. A party can ask the trial court to certify under 28 U.S.C. § 1292(b) that: (1) the adverse opinion involves a controlling question of law; (2) there is a substantial ground for a difference of opinion on the matter; and (3) an immediate appeal from the adverse order may materially advance the ultimate termination of the litigation. Importantly, Section 1292(b) certifies the entire order for interlocutory appeal—not just a particular question of law formulated by the district court.[5]

Keep in mind that timing matters. If the district court certifies the interlocutory appeal, Section 1292(b) provides a 10-day window to file a second petition, this time asking the court of appeals for permission to accept the interlocutory appeal the district court just certified.[6] The court of appeals has complete discretion as to whether to accept the appeal. Meanwhile, if the district court denies certification, the decision is not reviewable.

B. What Issues are Appropriate for Interlocutory Relief?

Some petitions for interlocutory relief are more likely to be granted than others. The standard for certification is quite high, as Congress intended that interlocutory relief be sparingly applied and used only in exceptional cases. Any petition to the district court must establish the requirements under Section 1292(b), as well as convince the court that it would be efficient to have the appellate court resolve the issue now, in a piecemeal fashion, rather than waiting until any other issues are ready to be reviewed after a final judgment. Meanwhile, by arguing to the district court that this is an issue on which there is substantial difference of opinion, you are essentially

1 See Smith v. Gen. Motors, LLC, No. 17-14146, 2019 WL 1651378 (E.D. Mich. Apr. 17, 2019).

2 See Nutraceutical Corporation v. Lambert, 139 S.Ct. 710, 717 (U.S., 2019); Gutierrez v. Johnson & Johnson, 523 F.3d 187, 194 (3d Cir. 2008); Kennedy v. City of Cleveland, 797 F.2d 297, 301 (6th Cir. 1986).

3 See Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106, 130 S. Ct. 599, 605, 175 L. Ed. 2d 458 (2009).

4 See John B. v. Goetz, 531 F.3d 448, 457 (6th Cir. 2008).

5 See In re Trump, 874 F.3d 948, 951 n.3 (6th Cir. 2017). But see, Little v. Louisville Gas & Elec. Co., 805 F.3d 695, 698–99 (6th Cir. 2015).

6 See Woods v. Baltimore & O. R. Co., 441 F.2d 407, 407-08 (6th Cir. 1971); Libertarian Party of Ohio v. Husted, 808 F.3d 279, 280 (6th Cir. 2015).

asking the court to acknowledge that its opinion might be wrong.

Some issues are more appropriate for interlocutory relief than others. For example, discovery sanctions, such as an adverse-inference instruction, dismissal of some claims, or contempt are ripe for interlocutory appeal. A bad ruling on a motion in limine, such as excluding key evidence or experts, is another common example. Denials of dispositive motions where the trial court created a new law or a new cause of action, or misinterpreted the law in a way that will make trial difficult, are sometimes contenders for interlocutory relief.

Other examples of issues that may be appropriate for interlocutory relief include:

- Orders denying motions to dismiss for lack of personal jurisdiction;
- Orders denying venue transfer;
- Orders granting or denying remand of a class action;
- Orders granting a new trial (rarely, if ever, available in federal court, but may be available in state court);
- Orders compelling or prohibiting speech; and
- Orders compelling production of privileged material, trade secrets, or burdensome discovery (although an appeal of these issues is likely moot once the party has produced discovery).

Each of these issues—assuming they involve a controlling question of law, involve a substantial ground for difference of opinion on the matter, and may materially advance the ultimate termination of the litigation—are candidates for seeking interlocutory certification from the trial court.

c: What Arguments do Appellate Courts Find Persuasive in Granting Interlocutory Review?

Once you get past district-court certification, the next hurdle is to persuade the appellate court to accept the interlocutory appeal. Certain arguments are more enticing to the court of appeals than others. Appellate courts are not persuaded that proceeding without interlocutory review will cost your client money or time. A constitutional or statutory basis for appeal should be argument number one. A novel legal issue or issue of first impression may also garner the court's attention. If, for example, in denying your dispositive motion, the trial court created a new cause of action, that could get you in the door. Explain the difficulties of proceeding forward without review for the court and the public: How will you draft jury instructions? How broadly does the ruling sweep? How accessible is it to other litigants? Does it create a split among trial-level courts in the jurisdiction that leaves other litigants and courts with insufficient guidance? Will it create a cascade of consequences beyond your case? Think bigger picture; that's what the appellate court will be thinking about.

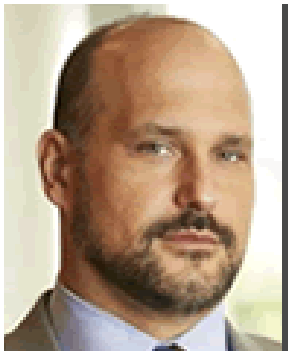
D. Don't Forget to Seek a Stay of the Trial-Court Proceedings.

Even if both courts certify the case for appeal, proceedings in the lower court will continue because the application to file an interlocutory appeal does not itself stay the trial court proceedings. The federal rules provide a means to avoid this problem. Under Federal Rule of Appellate Procedure 8(a)(1), a party must "ordinarily move first in the district court" for a stay pending appeal. If an order certified for and accepted on appeal, opposing counsel may actually stipulate to the stay to avoid the risk of re-trying the case later.

Should the district court deny the request to stay proceedings, the federal rules permit a party to seek a stay from the appellate court itself. Under Federal Rule of Appellate Procedure 8(a)(2), a party can file a motion that either shows that moving first in the district court would be impracticable or states that, a motion having been made, the district court denied the motion or failed to grant the requested relief and state any reasons given by the district court for its action. The motion must also include: (i) the reasons for granting the relief requested and the facts relied on; (ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and (iii) relevant parts of the record. Normally, the motion under Rule (8)(a)(2) is reviewed by a panel of the court, but, in exceptional cases in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge. Again, make sure to press the urgent need for relief, the unjust result should the stay not be granted, and the inefficiencies should the lower court continue with the case.

Conclusion

Litigators know they can lose some battles, but still win the war. Strategic motions for reconsideration and interlocutory appeals can help you get there.



MOHEEB H. MURRAY
Member
BUSH SEYFERTH & PAIGE (Troy, MI)

248.822.7809 | murray@bsplaw.com

Moheeb H. Murray represents clients in complex commercial disputes and leads BSP's insurance coverage practice group. In commercial litigation matters, his extensive experience includes complex breach of contract and breach of warranty claims, shareholder actions, and cases involving misappropriation of trade secrets and covenants not to compete. In his insurance coverage practice, Moheeb represents leading insurers in life, health, disability, ERISA, long-term care, annuity, P&C, commercial general liability, and auto-insurance no-fault matters.

He advises and represents clients from pre-litigation strategy through final verdict and on appeal. Moheeb has helped clients obtain favorable awards and outcomes at trial and in arbitrations involving claims of breach of contract, breach of warranty, construction, and design-professional malpractice. Moheeb is also a trained civil litigation mediator.

Related Services
- Business and Commercial
- Class Actions
- Construction Litigation & Counseling
- Insurance Litigation
- Product Liability
- Securities / Finance

Representative Matters
- Michigan statewide counsel for leading national do-it-yourself moving and vehicle-rental company for insurance coverage, tort liability, and commercial litigation matters.
- Lead counsel and also Michigan counsel working with national counsel for several leading life insurance and annuity companies in interpleader cases.
- Lead counsel for national insurance company in defense of accidental-death claims.
- Counsel for automotive original equipment manufacturer against supplier for breach of warranty and indemnity based on supply of nonconforming component parts.

Honors and Awards
- Inclusion in The Best Lawyers in America, Insurance Law, 2018 – present
- Leading Lawyers, 2017
- Oakland County Bar Association Distinguished Service Award, 2017
- Oakland County Executive's Elite 40 Under 40, 2015
- Michigan Super Lawyers, Rising Star, 2011-2015, Business Litigation, 2018
- Michigan Lawyers Weekly, Leader in the Law, 2014
- American Arab Professional of the Year Award in the Legal Category, 2013
- Martindale Hubbel® AV Peer Review Rating

Education
- University of Michigan Law School, J.D., cum laude, 2001
- University of Michigan Ross School of Business, B.B.A., with high distinction, 1997 - James B. Angell Scholar; William J. Branstrom Freshman Prize for academic excellence
- Civil Litigation Mediation Training