THE ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL
IDC QUARTERLY

Appellate Practice Corner

Scott L. Howie
Pretzel & Stouffer, Chartered, Chicago

Breaking Down the Appellate Brief

Appellate briefs are governed by detailed rules concerning their content. In the Illinois reviewing courts, the rules require each party's initial brief to include certain sections in a specific sequence. In an effective appellate brief, each section plays an important role in making a persuasive case. This edition of the Appellate Practice Corner examines the required sections of an appellate brief as set forth in Supreme Court Rule 341(h) and explains the role of each.

Points and Authorities. Rule 341(h)(1) describes this as a "summary statement," but it's really an outline of the point headings in the brief's Argument section that also lists the court decisions and other legal authorities cited under each heading. Ill. S. Ct. R. 341(h)(1) (eff. Nov. 1, 2017). As a combined table of contents and table of authorities, the Points and Authorities is a useful guide to the reader. For the author, it can also be a good way to see at a glance if any part of the Argument section might benefit from added legal support.

Nature of the Action. The substantive part of the brief begins with a "You Are Here"-style opener, a capsule summary of what the case was about in the lower court and how it became an appeal. *See* Ill. S. Ct. R. 341(h)(2). It should clearly explain the procedural posture of the case, especially whether the appeal is from a final or interlocutory order. Rule 341 says it should be a paragraph, which can seem like a draconian restriction in a complicated case—but it's a useful exercise to boil the case down to its essentials, especially when you'll be telling a much more detailed story elsewhere in the brief.

The Nature of the Action is also your first chance to hint at aspects of the appeal that might favor your side. A summary judgment, for instance, is ordinarily reviewed *de novo*, a relatively favorable standard of review for the appellant. In an appeal of a summary judgment, the brief should identify it as such at this first opportunity, even in the first sentence: "This is an appeal of a summary judgment in a medical-malpractice action." In other circumstances, an appellee can subtly communicate that the chance of reversal is slim because the procedural posture suggests a deferential standard of review: "This is an appeal of a judgment entered on a jury's verdict."

Of course, the standard of review isn't always favorable, and even when it is, describing the procedural posture in the Nature of the Action doesn't mean you shouldn't expressly identify the standard of review elsewhere in the brief; indeed, the appellant is required to do so. *See* Ill. S. Ct. R. 341(h)(3). But giving an early impression of a favorable standard may affect the way the court views the brief even before it reaches that express statement.

The Nature of the Action should also state whether there is any question raised on the pleadings, and if so, the nature of the question. *Id.* The pleadings are at issue, for instance, if the complaint was dismissed, and this is the place to tell the court why—that the parties dispute the timeliness of the complaint, for instance, or whether it states a cause of action.

Issues Presented for Review. This section boils the issues down still further, to the most basic questions about what the challenged rulings were and whether they were proper. Rule 341 says the statement of these issues should be "without detail," and the examples given in the rule fit that description: "Whether the plaintiff was guilty of contributory negligence

as a matter of law." "Whether the trial court ruled correctly on certain objections to evidence." "Whether the jury was improperly instructed." Ill. S. Ct. R. 341(h)(3).

Despite this admonition, the Issues Presented may include enough background to set the stage for the Argument to come. While the author should make no argument here, the Issues Presented should be phrased in a way that suggests an answer favorable to the party on whose behalf the brief is filed.

The rule also says the Issues Presented should include citation to authority. *Id.* This is not the place to query whether the trial court followed certain case law, or which competing line of authority should carry the day—just whether the ruling or result should be upheld.

While Rule 341(h)(3) includes the appellant's requirement of identifying the standard of review, it directs the appellant to do so elsewhere—"either in the discussion of the issue in the argument or under a separate heading placed before the discussion in the argument." *Id.* (Underscoring that the standard of review should not be expressly identified here, the rule also requires that the standard of review be stated "with citation to authority," something the same rule says not to include in the Issues Presented. *See id.*) Still, the Issues Presented can be used to hint at a favorable standard. Rather than stating the question as whether the trial court was "correct" to admit or exclude certain evidence, for instance, an appellee can phrase it in terms of whether the court was within its discretion—gently reminding the court of the high standard for reversal.

Statement of Jurisdiction. What gives the reviewing court the power to hear this appeal? This might not directly affect the issues before the court, but it's the reason the court is able to consider those issues at all—so if you're the appellant, it's important enough to get right. The rule requires the appellant to identify the rule or law that confers jurisdiction on the reviewing court, as well as any facts that bring the case within that jurisdiction, including the dates of any events that make the appeal timely. Ill. S. Ct. R. 341(h)(4). Each of these facts should be supported with citations to the record on appeal. *Id.* The statement and the cited pages of the record should answer any questions the court might have about its own jurisdiction. Be sure to cite any extensions of time for post-trial filings that affect jurisdiction.

By contrast, the appellee—who typically has little interest in confirming that the appellate court has jurisdiction to hear the appeal, and potentially reverse—need not include a jurisdictional statement at all. *See* Ill. S. Ct. R. 341(i). Of course, if the appellee challenges appellate jurisdiction, it should say so here, providing dates and citations to the record that support that position.

Ordinarily, an appellee who contends that the appellate court lacks jurisdiction will have moved to dismiss the appeal long before filing an appellate brief; if such an appellee is filing a brief, the appellate court presumably either denied the motion or took it with the case so as to address jurisdiction in its decision. If the motion was taken with the case, the appellee has an obvious reason to restate its position on jurisdiction, perhaps as part of its substantive argument. Even if the motion was denied, the appellee may want to reiterate its jurisdictional argument in both the Jurisdiction and Argument sections. The justices reading the briefs may not be those who denied the motion, and since a reviewing court always has an independent obligation to consider its own jurisdiction, the decision panel may see the jurisdictional issue differently. Indeed, the appellate court has been known to dismiss appeals for lack of jurisdiction at the decision stage, even after motions panels denied earlier motions to dismiss. *See In re Marriage of Waddick*, 373 Ill. App. 3d 703, 705 (2d Dist. 2007); *Hwang v. Tyler*, 253 Ill. App. 3d 43, 45 (1st Dist. 1993). In the interest of candor, the appellee should acknowledge that the court, or some portion of it, has previously rejected the jurisdictional argument—while citing the importance of jurisdiction as justification for raising it again.

Statutes Involved. If the issues on appeal involve "the construction or validity of a statute, constitutional provision, treaty, ordinance, or regulation"—or any codified legal requirement, such as a court rule—the provision at issue should be stated here. Ill. S. Ct. R. 341(h)(5). (Lengthy provisions may be placed in the appendix. *Id.*) It is ordinarily unnecessary to include a procedural provision that governed the summary judgment or dismissal of the complaint, unless there is some dispute about how to interpret it or whether it was applicable.

Statement of Facts. This is where you flesh out the bare-bones description you gave in the Nature of the Case, providing a detailed account of the events that led to the action being filed in the first place, and those of the events during the litigation that are important to the issues before the court. Ill. S. Ct. R. 341(h)(6). How much detail, and which details, will depend on what's at issue on appeal. Like any part of the brief, the facts should be given in a way that favors the party filing it. At the same time, the facts must be stated "accurately and fairly," which implicitly requires that they be complete. *See id.* While there may be room for disagreement as to which facts are "necessary to an understanding of the case," *see id.*, it never helps to hide or omit potentially relevant material that is adverse to one's position, especially when an adversary is likely to emphasize it in a response. Indeed, such an omission can be effectively exploited to impeach an opponent's credibility and candor.

In an appeal of a jury verdict, it is common to include a distinct account of each witness's testimony. If the adequacy of the evidence is in dispute, either as an issue itself or as the basis for another argument, this can be an effective way to apprise the appellate court of the facts it needs to assess the argument. It may be too much detail, however, if the issues on appeal are more narrow. Indeed, the appellee sometimes has the luxury of letting the appellant's stated facts provide the big picture, while using its own statement to give a more focused presentation that emphasizes the evidence supporting the ruling at issue.

Whatever the level of detail, it is crucial to support each detail with a citation to the record on appeal. *See id.* If something is not contained in the record or supported by it, it might as well not have happened—and making a factual statement without providing support in the record is as good as admitting that it's not there. It is not the court's job to search the record for material supporting an argument; that's the job of the advocate, and doing it well is essential to the advocate's credibility.

Argument. This is the most important part of the brief, its very reason for being; the other sections play important supporting roles, but the Argument section takes center stage. *See* Ill. S. Ct. R. 341(h)(7). While the prior sections of the brief may have contained veiled suggestions about a favorable standard of review or broad hints about how the case should be resolved, the Argument is the place to be open and explicit about what you want the court to do and why it should.

Any good lawyer knows how to make an argument, and since you're limited to the issues that were raised in the lower court, much of the argument in an appellate brief will echo what was argued below. But there are important differences, largely rooted in the fact that the appellate court is reviewing a ruling already made rather than making the ruling itself. Rule 341(h)(3) requires a statement of the standard of review for each issue, with supporting authority, either within the argument on that issue or under a separate point heading. Ill. S. Ct. R. 341(h)(3). But in addition to identifying the standard, the argument should be phrased in terms of that standard. This is especially true if the standard is favorable to you. If you're defending a trial court's discretionary ruling, for instance, weave the concept of discretion through the argument. The argument shouldn't be about whether the trial court *should* have acted as it did; that's more than an appellee needs to prove, and sometimes more than you might be able to prove. What matters is whether the ruling was within the range of the trial court's discretion. Indeed, under a discretionary standard of review, the appellee need not

establish that the trial court would have been wrong to do what the appellant wanted it to do—so long as the court was within its discretion to do what it actually did. (Of course, if there's legal authority that it would have been an abuse of discretion for the trial court to do otherwise, it's worth saying so. But that argument goes above and beyond what's necessary, and if it's a stretch to take it that far, it might be unwise to do so.)

When possible, break the argument down into its component parts, and give each component a separate subsection under a clear and distinct point heading. A broad argument for a major principle can be difficult to defend in total; it is often more effective to offer a series of smaller uncontested principles that point to a seemingly inevitable result.

The organization is always an important part of the argument, but in many cases, the organization *is* the argument. It's a cliché to say that when there's more than one issue, you should lead with your best argument—but consider what it means to be the "best" argument. For the appellant, the "best" argument might not be the one that's most likely to succeed. If the multiple arguments call for different forms of relief, an argument that seeks a better form of relief is generally superior to one that seeks a lesser form, despite their relative legal merits. Consider the message sent by a brief that argues first for a new trial, and second for a judgment notwithstanding the verdict. It's illogical for an appellant to begin with an argument for a new trial—a lesser form of relief, since a retrial might end in another adverse verdict—when there's also an argument for a favorable result without another trial.

If the argument for the better relief is so poor on the merits that it can't reasonably be placed first in the brief, then you should consider whether it belongs in the brief at all. Leading with the argument for the lesser relief shows the court you think very little of the argument for the better relief. Moreover, the illogical sequence gives the court a reason to question your powers of reasoning and hurts your credibility even on more-promising arguments.

Conclusion. This is a chance to wrap up the argument with a big finish. *See* Ill. S. Ct. R. 341(h)(8). Don't waste it with a ponderous "wherefore" paragraph that says nothing about why the court should affirm or reverse. A concise summary of the brief's major arguments—alluding to a favorable standard of review, if possible—is a way to end on a note of conviction that the court should rule in your favor.

Appendix. Rule 341 also requires the appellant's initial brief to include an appendix conforming to the requirements of Rule 342, which include the judgment being appealed, any findings of fact made by the lower court or administrative agency, the notice of appeal, a table of contents of the record, and "any pleadings or other materials from the record that are the basis of the appeal or pertinent to it." Ill. S. Ct. R. 341(h)(9); Ill. S. Ct. R. 342 (eff. July 1, 2017). Similarly, an appellee's brief may include an appendix with "other materials from the record that also are the basis of the appeal or are essential to any understanding of the issues raised in the appeal." Ill. S. Ct. R. 342.

These catch-all categories invite the brief-writer to include items from the record that the party thinks will be useful. But to be useful, the "other materials" in the appendix should be strictly limited to items that are important for a reader to have while reading the brief. If the challenged ruling is a dismissal of the plaintiff's complaint for failure to state a cause of action, a reader is likely to want to see the complaint; including it in the appendix, and citing to the appendix in the argument, is one way to ensure that it's readily available. By contrast, it's ordinarily not useful to include the motion to dismiss, let alone the supporting and opposing legal memoranda. (This is also the place to include any statute or similar provision at issue in the appeal, if it is considered too lengthy to include under the Statutes Involved section. Ill. S. Ct. R. 341(h)(5).)

Even with the advent of electronic records on appeal, there's no way to know if a reader will have internet access at any given time, or can quickly and easily locate a specific page in what may be a voluminous record. The Illinois Appellate Court, First District, requires appellate briefs to be filed in hard copy, in addition to the electronic version,

suggesting that briefs are still read in settings without access to the record. If something in the record is particularly important to your position, you should make it easy for the reader to see. Including it in the appendix is a good way to do so.

Conclusion

While each of these sections is a required part of an appellant's initial brief, the appellee need only include the Points and Authorities, the Argument, and the Conclusion. An appellee might reasonably conclude that there's no reason to include a Jurisdiction section; by contrast, it's hard to imagine any party passing up the chance to give a Statement of Facts from its own perspective. On both sides of the appeal, understanding the purpose of each section enables the attorney to use them to the greatest effect, making the best use of the limitations on the court's time and attention.

About the Author

Scott L. Howie is a partner at *Pretzel & Stouffer, Chartered*, in Chicago, specializing in post trial and appellate practice in the state and federal courts. He received his undergraduate degree from Northwestern University in 1989 and his law degree from Chicago-Kent College of Law in 1994. Mr. Howie is a member and past director of the Illinois Appellate Lawyers Association, where he co-chairs the Moot Court Committee.

About the IDC

The Illinois Association Defense Trial Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation. For more information on the IDC, visit us on the web at www.iadtc.org or contact us at PO Box 588, Rochester, IL 62563-0588, 217-498-2649, 800-232-0169, idc@iadtc.org.