THE ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL
IDC QUARTERLY

Appellate Practice Corner

Scott L. Howie
Pretzel & Stouffer, Chartered, Chicago

Little Things Mean a Lot

Whoever said "don't sweat the small stuff" probably wasn't a lawyer. Lawyers obsess over details, whether in the courtroom or on paper. To an outsider, many of those details may seem utterly unimportant; but to those who pay attention to them, they can feel as if they have great significance, and sometimes they do. Some of these details flow from superstition, but others reflect lingering caution based on long-ago bad experiences. Many have elements of both.

Appellate lawyers have their own unique minutiae to obsess over. These can be individual quirks and idiosyncrasies that develop into custom and practice over time, often concerning things that only become apparent after long experience in the reviewing courts. Each reflects somebody's impression about what works, what doesn't, and what couldn't hurt. This edition of the Appellate Practice Corner shares some procedural advice about details that may not be as trivial as they seem.

What to Say in the Notice of Appeal?

The content of a notice of appeal involves details that have potentially significant implications. While a timely notice of appeal is essential to appellate jurisdiction, it can be easy to think of such a notice as a boilerplate procedural document with little substantive importance —a mistaken impression that may be fostered by the easy availability of court-provided forms for this purpose.

But even if you use such a form, the notice of appeal must identify the ruling or rulings that the appellant intends to challenge on appeal and state the relief that will be requested. Ill. S. Ct. R. 303(b)(2) (eff. July 1, 2017). When the appeal will concern only the judgment on a verdict, the notice of appeal need only identify that judgment. In some circumstances, however, there may be additional issues worthy of appeal. You may wish to appeal the dismissal of a counterclaim or a third-party complaint, for instance, if such a dismissal was not originally appealable and only became appealable when the judgment on the verdict resolved the rest of the case. For the sake of completeness, adverse rulings on these or other distinct issues should be included in the notice of appeal if you wish to preserve them for appellate review.

It is generally unnecessary in a notice of appeal to account for each and every instance of a ruling, and many specific rulings need not be expressly identified. A notice of appeal is deemed to embrace not just the rulings or orders it expressly cites, but also any order that is "a step in the procedural progression" leading to those that are cited. In re *Marriage of O'Brien*, 2011 IL 109039, ¶ 23 (citing *Burtell v. First Charter Serv. Corp.*, 76 Ill. 2d 427, 435 (1979)). In an appeal of a judgment on a jury verdict, this typically includes the trial court's rulings on evidence and jury instructions. Similarly, for a summary judgment, it may include evidentiary rulings that were significant to the judgment, such as excluded evidence that would have created a question of fact. It is enough that the notice of appeal identifies the judgment; it need not identify each evidentiary ruling or jury instruction.

The "step in the procedural progression" rule applies only to notices of appeal, and not to posttrial motions. While a posttrial motion also need not identify each individual ruling, it must describe the alleged error in sufficient detail. You cannot preserve an alleged evidentiary error or improper jury instruction by filing a post-trial motion that merely declares the judgment to be in error. See 735 ILCS 5/2-1202(a) (2017) ("The post-trial motion must contain the points relied upon, particularly specifying the grounds in support thereof"); *Brown v. Decatur Mem. Hosp.*, 83 Ill. 2d 344, 348 (1980).

As to the relief being requested on appeal, it is wise to include several options—such as reversal and entry of judgment for the party appealing; reversal and remand for a new trial; and as a general catch-all, such other and further relief as the court deems appropriate. Depending on the grounds for appeal, not all of these options will be proper in all cases; if your only arguments for reversal are claims of trial error, then a new trial is likely to be the most you can expect. Still, a particular form of relief might be deemed forfeited if it's not stated in the notice of appeal or reasonably covered by the language you use there. It is often better to risk erring on the side of caution, and include all possible forms of relief in the notice.

An Appellee Need Not Bother with an Unnecessary Jurisdictional Statement

An appellee ordinarily would rather not have to defend a favorable outcome, and therefore would prefer not to be in the reviewing court at all. Why, then, should it explain to the reviewing court why that court has the power to hear the appeal? The rules don't require it; Rule 341 lists what an appellant's initial appellate brief must contain, including a section stating the basis for the reviewing court's jurisdiction—but it also expressly allows the appellee not to include a section on jurisdiction. Ill. S. Ct. R. 341(h)(4), (i) (eff. May 25, 2018).

If appellate jurisdiction is not in dispute, there is generally no need or reason for the appellee to identify the basis for its jurisdiction. It often adds nothing to the appellee's argument, and may strike a discordant note in a brief otherwise devoted to seeking affirmance. Moreover, if page or word limits are an issue, omitting a jurisdictional statement may free up some valuable space.

There are exceptions. Sometimes appellate jurisdiction *is* in dispute, and if the appellee challenges the reviewing court's power to entertain the appeal, the jurisdictional statement is a good place to concisely explain why (though the brief's argument section is a better place to set forth the jurisdictional challenge more fully). Even when there is no dispute that the reviewing court has jurisdiction, there may be disagreements or misunderstandings about the basis for jurisdiction, and those differences may have implications for the scope of the court's review. See *Lewis v. NL Indus., Inc.*, 2013 IL App (1st) 122080, ¶ 5 ("The appellants' choice of appeal device carries important consequences for the scope of our analysis.")

Your Best Argument Might Not Be the One You Think

It's a common piece of legal-writing advice—so common, in fact, that everyone has heard it—that if you have more than one argument, you should always put the best one first. Since everyone has heard this advice, your reader will almost always know that your first argument is the one you think is your best.

Your "best" argument, however, might not be the one that you consider the one most likely to win. In determining the sequence of arguments in a brief, it's important to consider the relief that each argument seeks. This is especially

important if one of those arguments is that the plaintiff failed to make a *prima facie* case, and that the trial court should have entered judgment *n.o.v.*—an argument that calls for an outright reversal and entry of judgment for the defendant. This outcome is obviously preferable to a new trial, which calls (at least) for trying the case a second time, and thus could lead to another adverse verdict (and conceivably an even larger award).

All else being equal, the argument that can produce the best relief should go first. Consider the alternative: It makes little sense to argue first for a new trial, while arguing for judgment in your favor only afterward, as an implicit fallback. Because the argument for judgment in your favor promises better relief, it belongs first even if it is weaker on the merits.

If the argument for judgment in your favor is so weak on the merits that it can't reasonably go first, you might seriously consider whether it belongs in your brief at all. And you might reasonably decide that it does, even as a secondary argument, in the hope that the reviewing court will see more merit in it than you do. This is particularly true in the posttrial motion, which might be intended chiefly to preserve all arguments for appeal without any meaningful expectation of relief from the trial court. But you should understand that by putting the argument for the better relief last, you're telling the court that you don't think very highly of that argument.

Don't Request Oral Argument Until There's an Appeal

Supreme Court Rule 352 provides that a party who wishes the reviewing court to hold an oral argument "shall request oral argument by stating at the bottom of the cover page of his or her brief that oral argument is requested." Ill. S. Ct. R. 352(a) (eff. July 1, 2018). It is almost routine to include such wording—"Oral Argument Requested"—on the cover of any appellate brief filed in the Illinois reviewing courts. In discretionary appeals, it is not uncommon to include a similar request phrased in conditional terms—"Oral Argument Requested if Leave to Appeal is Allowed," or something to that effect—on the cover of a petition for leave to appeal or an answer, either in the supreme court under Rule 315 or in the appellate court under Rule 306. See Ill. S. Ct. R. 315 (eff. July 1, 2018); Ill. S. Ct. R. 306 (eff. Nov. 1, 2017).

But these conditional requests are unnecessary under Rule 352, which provides ample opportunity to request oral argument after leave to appeal is granted—and gives instructions for how to do so if you stand on your petition or answer and don't file a separate brief. See Ill. Sup. Ct. R. 352. Worse, such a request signals insecurity about your position—and it does so on the cover of your own filing, a poor place to be foreshadowing your own loss.

Why say such a thing? Whether you are the petitioner or the respondent, saying "if leave to appeal is allowed" alludes to the possibility that the court might rule against you—not something you want to emphasize anywhere, let alone on the cover of a document intended to be persuasive.

There's no need to do this, and nothing to be gained from it. If leave to appeal is granted, each party can file a brief on the merits, with an ordinary request for oral argument on the cover. If a party allows its petition or answer to stand as its brief on the merits, as allowed under both Rule 315 and Rule 306, it may file a separate request for oral argument within the time it could have filed a merits brief. Ill. S. Ct. R. 352(a).

So there is ample opportunity to request oral argument after a petition is granted, and no reason to do so when the petition is denied—and no need for the cover of your petition or answer to anticipate an adverse ruling on leave to appeal. And it might not do any good anyway: Even if you worry that you will somehow neglect to request oral argument after the petition is granted, there is nothing in Rule 352 to suggest that a conditional request on the cover of the petition or the answer would be considered an acceptable substitute.

THE ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL
IDC QUARTERLY

Conclusion

Not all of these details are likely to make the difference between winning and losing on appeal. Some, such as the contents of a notice of appeal, can have a significant procedural effect; others, such as whether to include a jurisdictional statement in an appellee's brief, will probably not affect the outcome. But getting the small things right is a way to foster attention to detail, whether the specific issue is significant or trivial, and contributes to the overall quality of your work.

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.