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Appellate Practice Corner

Scott L. Howie
Pretzel & Stouffer, Chartered, Chicago

Some Friendly Advice: Testing Interlocutory Disclosure Orders on Appeal

Appellate lawyers grow accustomed to telling trial lawyers what cannot be done, often frustrating counsel who have received dubious rulings that unfairly complicate or impede their ability to defend their clients. Such rulings are usually interlocutory rather than final, and except for certain types of rulings that are specifically identified in the Illinois Supreme Court Rules, their interlocutory nature makes them unappealable.

A significant exception, however, concerns discovery rulings that compel the production of material or information. While such rulings are not directly appealable themselves, Supreme Court Rule 304(b)(5) provides a procedure for obtaining appellate review before having to divulge the information at issue and without a final judgment in the case. Ill. S. Ct. R. 304(b)(5) (eff. Mar. 8, 2016). This edition of the Appellate Practice Corner traces the evolution of the process by which interlocutory discovery orders can be reviewed, explains the modern version of that process, and offers some practical guidance in its use.

A Needed Exception to the Rule Against Appeals of Nonfinal Orders

Discovery orders are generally not appealable because they are not final orders. *Norskog v. Pfiel*, 197 Ill. 2d 60, 69 (2001) (citing *People ex rel. Scott v. Silverstein*, 87 Ill. 2d 167, 171 (1981) and *Lewis v. Family Planning Mgmt., Inc.*, 306 Ill. App. 3d 918, 921 (1st Dist. 1999)).The Illinois Constitution provides a right to appeal only final judgments. *Silverstein*, 87 Ill. 2d at 171 (citing ILL. CONST. 1970, art. VI, § 6). While the constitution also allows the supreme court to provide for appeals from nonfinal judgments, the court has not enacted any provisions that make discovery orders directly appealable. Such orders are not among the enumerated classes of interlocutory orders that are appealable by petition under Rule 306, or those that are appealable by right under Rule 307. *See* Ill. S. Ct. R. 306(a) (eff. Mar. 8, 2016); Ill. S. Ct. R. 307(a) (eff. Nov. 1, 2016); *Lewis*, 306 Ill. App. 3d at 921. Some interlocutory rulings on discovery matters may raise issues suitable for review under Rule 308, but most do not involve the sort of legal question that might be answered in a way that could "materially advance the ultimate termination of the litigation," as required for a certified question under that rule. *See* Ill. S. Ct. R. 308 (eff. Jan. 1, 2016).

Still, courts have recognized the need for a way of appealing some interlocutory discovery orders—in particular, those orders that compel the disclosure of information despite a good-faith argument that the party should not be required to divulge it. In such circumstances, an order compelling production poses a unique problem that cannot be solved by a later reversal on appeal. A reviewing court might eventually vindicate the position that the information is privileged, but in the meantime, the forced disclosure of that information has frustrated the public policy that the privilege was meant to serve.

In recognition of this need, the supreme court has long provided a means for a party to obtain appellate review of orders compelling production of materials claimed to be privileged or confidential, or otherwise too burdensome to be

produced. Under this procedure, the party who has been ordered to divulge the information, or that party's counsel, refuses to comply with the order compelling the party to answer the discovery request at issue. *Monier v. Chamberlain*, 35 Ill. 2d 351, 352 (1966). In response to that refusal—and typically at the party's request—the court holds the party or attorney in contempt and imposes a monetary or other sanction. *See Monier*, 35 Ill. App. 3d at 352. That party or attorney, sometimes called the "contemnor," may then file a notice of appeal within 30 days—just as in an ordinary appeal. Ill. S. Ct. R. 303(a)(1) (eff. Jan. 1, 2015).

This procedure is often called "friendly contempt," a recognition that the contemnor has not acted "with contumacious disregard for the court's authority," but requires a contempt finding and sanction for the purpose of obtaining appellate review. *See Klaine v. S. Ill. Hosp. Servs.*, 2016 IL 118217, ¶ 6; *Zagorski v. Allstate Ins. Co.*, 2016 IL App (5th) 140056, ¶¶ 16-17. In many cases, the contemnor has even requested the finding and sanction for that purpose. *See Ctr. Partners, Ltd. v. Growth Head GP, LLC*, 2012 IL 113107, ¶ 20.

The procedure was deemed to confer appellate jurisdiction under Supreme Court Rule 301, on the rationale that the sanction rendered the contempt order final and appealable. *Silverstein*, 87 Ill. 2d at 171-72. A contempt proceeding "is an original special proceeding, collateral to and independent of, the case in which the contempt arises." *Id.* at 172. Reasoning that such a proceeding is finalized by the imposition of a sanction, the supreme court considered such circumstances adequate to confer appellate jurisdiction on the reviewing courts. *Id.* While the contempt order and sanction were the basis for appellate jurisdiction, the scope of review was deemed to include the discovery order whose violation prompted the contempt. *Silverstein*, 87 Ill. 2d at 174 (citing *People ex rel. Hawthorne v. Hamilton*, 9 Ill. App. 3d 551, 553 (3d Dist. 1973)).

The supreme court codified this procedure in 1993 by amending Supreme Court Rule 304, which concerns "Appeals from Final Judgments That Do Not Dispose of an Entire Proceeding." Ill. S. Ct. R. 304 (eff. Mar. 8, 2016); *Lewis*, 306 Ill. App. 3d at 922. That rule provides for appellate jurisdiction over "Judgments As To Fewer Than All Parties or Claims," so long as the circuit court has made "an express written finding that there is no just reason for delaying either enforcement or appeal or both." Ill. S. Ct. R. 304(a). Rule 304(b), however, sets forth several classes of orders that are appealable without that special finding. Ill. S. Ct. R. 304(b). The 1993 amendment added one more such class: "An order finding a person or entity in contempt of court which imposes a monetary or other penalty." Ill. S. Ct. R. 304(b)(5). As the Committee Comments explain, this change "reflect[ed] current practice." *Id.* (Committee Comments) (citing *Silverstein*, 87 Ill. 2d 167).

Despite the wording of Rule 304(b), the heading of that section of the rule is slightly misleading in stating that such appeals may be taken "without special finding." Rule 304(b)(5) expressly does not require "the finding required for appeals under paragraph (a) of this rule," regarding enforcement or appeal, but it does require both a finding of contempt and a sanction for the contempt. Unlike any of the other kinds of orders enumerated under Rule 304(b), the ritualized nature of the procedure contemplated by Rule 304(b)(5) makes it unlikely that the necessary elements will be present unless the judge understands and cooperates in the process. So while it is true that appellate jurisdiction over such orders does not require the court to make the finding described in Rule 304(a), it still requires the court to make the necessary finding of contempt and impose a sanction for that contempt.

Requirements for Appeals of Disclosure Orders

The reviewing courts strictly enforce the requirements of both a finding of contempt and a sanction for that contempt. *See Almgren v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 162 Ill. 2d 205, 214 (1994); *Silverstein*, 87 Ill. 2d at 173. A sanction cannot be treated as implicit evidence of a contempt finding, even when it concerns noncompliance with an order compelling disclosure. *See Lewis*, 306 Ill. App. 3d at 923.

Even when there has been an actual contempt finding, the circuit court must do more than rule that the contemnor is to pay a sum that is still to be determined. *Pedigo v. Youngblood*, 2015 IL App (4th) 140222, ¶¶ 16-17. This reflects the understanding of a contempt proceeding as separate from the broader litigation in which the discovery dispute arises. *See Silverstein*, 87 Ill. 2d at 172. Under that reasoning, the proceeding is final when there is nothing left to be done in the contempt proceeding but enforce the judgment—and that requires an amount that is definite and liquidated. *Id.*; *Pedigo*, 2015 IL App (4th) 140222, ¶ 17.

Despite the strict enforcement of these requirements, the supreme court has overlooked at least one "technical defect" in the process. *Waste Mgmt., Inc. v. Int'l Surplus Lines Ins. Co.*, 144 Ill. 2d 178, 189 (1991). While the contempt order was leveled against one of the plaintiff's attorneys, the notice of appeal had been filed on behalf of the plaintiff itself. *Waste Mgmt.*, 144 Ill. 2d at 188. The court rejected a challenge to its jurisdiction, observing that the notice of appeal identified the contempt order as the subject of the appeal, and that an appeal of that order necessarily required review of the disclosure order upon which the contempt was based. *Id.* at 189 (citing *Silverstein*, 87 Ill. 2d at 174). Because the omission of the attorney-contemnor from the notice of appeal caused no apparent prejudice, the court deemed it a "merely technical" defect that did not deprive the court of jurisdiction. *Id.*

Subjects of Interlocutory Appeals of Disclosure Orders

The "friendly contempt" procedure has been used to test discovery orders compelling disclosure of information claimed to be protected by common-law privileges. *See*, *e.g.*, *Waste Mgmt.*, 144 Ill. 2d at 187 (rejecting application of attorney-client and work-product privileges). It has also been used to advance arguments that certain information is statutorily privileged. *See*, *e.g.*, *Klaine*, 2016 IL 118217, ¶¶ 4, 6 (rejecting defense claims of privilege under Medical Studies Act, 735 ILCS 5/2101, and the Health Care Professional Credentials Data Collection Act, 410 ILCS 517/1); *Brunton v. Kruger*, 2015 IL 117663, ¶ 1 (rejecting third party's claim of privilege under Public Accounting Act, 225 ILCS 450/27); *Reda v. Advocate Health Care*, 199 Ill. 2d 47, 61 (2002) (upholding plaintiff's counsel's claim of privilege under Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/10); *People v. Campobello*, 348 Ill. App. 3d 619, 636 (2d Dist. 2004) (rejecting third party's claim of clergy-member privilege under Code of Civil Procedure, 735 ILCS 5/8-803). "Friendly contempt" is also a proper device for seeking recognition of new common-law privileges. *See, e.g.*, *Harris v. One Hope United, Inc.*, 2015 IL 117200, ¶¶ 1, 40 (declining to recognize "self-critical analysis privilege"); *People ex rel. Birkett v. City of Chicago*, 292 Ill. App. 3d 745, 746 (1st Dist. 1997) (declining to recognize governmental "deliberative process privilege").

"Friendly contempt" may also be used to test a disclosure order on the ground that it is overly broad and unduly burdensome. *See, e.g.*, *Tomczak v. Ingalls Mem. Hosp.*, 359 Ill. App. 3d 448, 450 (1st Dist. 2005). As a general matter, however, a claim of sheer burden alone is not ordinarily an adequate basis for resisting an order to compel, particularly when the circuit court has purported to reduce the claimed burden by imposing a protective order.

Before adopting Rule 304(b)(5), the supreme court hinted that appeals of discovery orders should be limited to circumstances that raise issues of first impression. *See Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 122 (1982) (citing *Sarver v. Barrett Ace Hardware, Inc.*, 63 Ill. 2d 454, 462 (1976)). In vacating the contempt order in *Consolidation Coal*, the supreme court noted that the case involved legal questions that it had not previously addressed, suggesting that it otherwise might not have vacated the contempt finding and sanction. *See Consolidation Coal*, 89 Ill. 2d at 122.

While the committee comments to Rule 304(b)(5) state that it was intended to reflect the practice at the time of its adoption, the language of the rule does not require a question of first impression. Indeed, the rule is not limited to discovery orders, and applies to circumstances that do not raise such questions. At least one court has vacated a contempt finding and sanction that were entered for the purpose of appeal, despite affirming the discovery order and holding that there were "no issues of first impression or close legal questions to be resolved." *Doe v. Twp. High Sch. Dist. 211*, 2015 IL App (1st) 140857, ¶ 122. Still, the courts sometimes mention this factor, apparently to illustrate the "friendly" nature of the contempt. *See, e.g.*, *Birkett*, 292 Ill. App. 3d at 756 (vacating fine "because the issue in question was one of first impression in this court"). In any event, since the contemnor is likely to want the contempt finding vacated once the issue is resolved, it is best to avoid troubling the appellate court with appeals that raise no meaningful argument for reversal and thus might be deemed frivolous.

Practical Concerns

Indeed, the procedural availability of an appeal does not necessarily mean that it is worthwhile to pursue one. Despite the procedural mechanism that enables the appellate court to exercise jurisdiction over discovery orders, such orders remain difficult to overturn on the merits. "Generally speaking, a trial court is afforded great latitude in rulings on discovery matters, and a court of review will not disturb such rulings absent a manifest abuse of discretion." *D.C. v. S.A.*, 178 Ill. 2d 551, 559 (1997) (citing *Maxwell v. Hobart Corp.*, 216 Ill. App. 3d 108, 110 (1st Dist. 1991)). Relevance for discovery purposes includes not only that which is admissible at trial, but also that which is reasonably calculated to lead to admissible evidence. *See In re Estate of Blickenstaff*, 2012 IL App (4th) 120480, ¶ 53. Moreover, rulings on discovery issues are generally reviewed for abuse of discretion, giving broad deference to the circuit court's ruling. *Reda*, 199 Ill. 2d at 54. This standard of review makes it unlikely that a reviewing court will reverse a circuit court's finding that a discovery request is not unduly burdensome.

These twin standards can be significant obstacles to reversal of a discovery order—though depending on the grounds for resisting disclosure, it may be possible to characterize the issue as a dispositive question of law, reviewable under a nondeferential *de novo* standard. "If the facts are uncontroverted and the issue is the lower court's application of the law to the facts, a court of review may determine the correctness of the ruling independently of the lower court's judgments." *Klaine*, 2016 IL 118217, ¶ 13 (citing *Norskog*, 197 Ill. 2d at 70-71, and *Doe*, 2015 IL App (1st) 140857, ¶ 74).

On a related note, since the party held in contempt will want the reviewing court to vacate the contempt finding and sanction no matter how the discovery issue is resolved, that party and its attorney should have the foresight to act in a manner that is not at all contemptuous of the court. In a substantive sense, this means offering the circuit court legitimate and well-substantiated grounds for not complying with the disclosure order. It also means being on one's best professional behavior, and expressly underscoring that the refusal to comply with the order is purely formal and procedural, intended to show no disrespect to the court. In at least one instance, the appellate court rejected the defendants' argument that the

contempt finding against them was "friendly," even though the judge who entered it had previously stated on the record that he intended to make such a finding. *Willeford v. Toys "R" Us–Del., Inc.*, 385 Ill. App. 3d 265, 277 (5th Dist. 2008). Even if that was what the judge intended, the appellate court held, "friendly contempt" was not appropriate. The court criticized the defendants for delaying the proceedings unnecessarily for several years before undertaking the appeal. It was so dismayed by these delays that it affirmed the contempt finding. *Willeford*, 385 Ill. App. 3d at 277.

The individual who seeks the contempt finding should clearly state, in open court and on the record, that the purpose of the finding is to confer appellate jurisdiction under Rule 304(b)(5). There should be ample evidence that the finding was not based on any show of disdain or disrespect. *See Harris*, 2013 IL App (1st) 131152, ¶ 20 ("[T]he record reflects that [the defendant-contemnor] showed no disdain for the court but that it refused to comply with its order in good faith to secure appellate interpretation of this rather novel issue."). Eventually, the contemnor's initial appellate brief should include a request that the appellate court vacate the contempt finding and the sanction regardless of its ruling on the merit of the underlying discovery order.

Conclusion

While Rule 304(b)(5) does not require an issue of first impression or a novel legal question, the appellate court is generally not the proper venue for garden-variety discovery disputes. It is no small matter to be held in contempt, even in a "friendly" way, and this procedure should not be casually used to avoid disclosing information or material that is simply harmful to one's case or inconvenient to produce. Unless the burden of production is so great as to make production virtually impossible, "friendly contempt" should be saved for those circumstances in which compulsory production would violate a broader public policy. Still, when the argument for reversal of a disclosure order is based on something other than relevance or burden, it is worth considering an interlocutory appeal—and Rule 304(b)(5) is the proper device for pursuing such an appeal.

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.

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