THE ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL
IDC QUARTERLY

Appellate Practice Corner

Scott L. Howie
Pretzel & Stouffer, Chartered, Chicago

Motions in the Illinois Reviewing Courts

The most lasting and visible work of the reviewing courts is in their decisions on the merits—reversing or affirming the results of litigation in lower courts, typically after considering appellate briefs. Some of those appeals are discretionary, requiring the reviewing courts to make preliminary decisions about whether to hear the dispute at all, typically after considering petitions or applications for leave to appeal and responses to those filings. But within the context of appeals, reviewing courts also deal with requests for other sorts of relief—some of it procedural in nature, such as requests for extensions of time, and some that is substantive, such as when an appellee urges the court to dismiss an appeal for lack of jurisdiction.

Requests for such relief, whether procedural or substantive, are nearly always made by motion. Trial attorneys familiar with motion practice in the circuit courts might not recognize some of the procedures unique to the Illinois reviewing courts. This edition of the Appellate Practice Corner compares appellate motion practice to the corresponding aspects of motion practice in the circuit courts, and offers some practice tips that are unique to motions in the appellate setting.

Supreme Court Rule 361

Motion practice in the Illinois reviewing courts is chiefly governed by Illinois Supreme Court Rule 361, which supplies the general procedures for most motions in both the appellate court and the supreme court. Ill. S. Ct. R. 361(a). Rule 361 specifies a motion as the means to apply for an order or other relief, and requires, perhaps obviously, that "[m]otions shall be in writing and shall state the relief sought and the grounds therefor." Ill. S. Ct. R. 361(a). While these requirements may seem obvious, they may be better understood by reference to what need *not* be included in the motion: argument, which the rule allows to be placed in a supporting memorandum. *Id.*

If the record on appeal has not yet been filed, Rule 361(a) requires the movant to file an appropriate supporting record with the motion. *Id.* (citing Ill. S. Ct. R. 328). This provision enables the reviewing court to consider materials that would not otherwise be appropriately considered, since reviewing courts are generally limited to the contents of the actual record on appeal or a supporting record prepared pursuant to Rule 328. This principle makes it improper merely to attach documents to an appellate motion in the way that exhibits might be attached to a motion in the circuit court, unless those documents are part of a proper appellate record. A supporting record should include items that are necessary to establish the facts in support of the motion, such as certain filing dates.

A movant must also supply a proposed order for the court to use when ruling on the motion. The order must be "phrased in the alternative," meaning that it should provide both that the motion is "allowed" and "denied," so as to enable the court to circle the appropriate option or to strike the other one. Ill. S. Ct. R. 361(b)(2). According to the rule, "[n]o motion shall be accepted by the clerk unless accompanied by such a proposed order." *Id.*

The response to a motion is due within five days after the motion is served personally or by e-mail, ten days after mailing of the motion if service is by mail, or ten days after delivery to a third-party commercial carrier for service. Extensions of this deadline are permitted by order of the court or a single judge.

While Rule 361 gives the court no deadline to rule on a motion, it suggests that if the opposing counsel has no objection to the motion, the movant should state that fact in the motion so that the court need not wait for a response before ruling. Ill. S. Ct. R. 361(a). This suggestion is clearly intended for motions that are routine in nature and usually unobjectionable, such as motions for extensions of time.

Motions for extension of time may be the most commonly filed appellate motion. In addition to the general requirements for appellate motions, Rule 361(f) requires a motion for extension of time to be supported by an attorney's or party's affidavit or by verification pursuant to section 1-109 of the Code of Civil Procedure. Ill. S. Ct. R. 361(f); 735 ILCS 5/1-109. The affidavit or verification must state the number of previous extensions granted and the reason for each extension. Ill. S. Ct. R. 361(f).

Dispositive Motions

Rule 361(h) specifically governs "dispositive motions," defined as motions "challenging the appellate court's jurisdiction or raising any other issue that could result in the dismissal of any portion of an appeal or cross appeal without a decision on the merits of that portion of the appeal or cross-appeal." Ill. S. Ct. R. 361(h)(2). In practice, this generally means a motion to dismiss an appeal. Much like a motion to dismiss a complaint, a motion to dismiss an appeal is appropriate when there is some defect that should preclude the appeal from proceeding to a decision on the merits. Most often this will be because the appellate court lacks jurisdiction, either because the order being challenged is not appealable or because the notice of appeal was not timely filed.

Rule 361(h)(3) sets forth specific requirements for a dispositive motion. A dispositive motion must include (a) "a discussion of the facts and issues on appeal necessary for the court to consider the dispositive motion"; (b) "a discussion of the facts and law supporting dismissal"; and (c) "a discussion of the relationship, if any, of the purported dispositive issue to the other issues on appeal." Ill. S. Ct. R. 361(h)(3)(a)-(c).

The rule also requires the movant to file a supporting record containing the parts of the circuit court record necessary for the court to consider the motion if the record on appeal has not been filed, as well as any evidence of relevant matters not of record (such as appellate filings or orders of the reviewing court). Ill. S. Ct. R. 361(h)(3)(d). A supporting record may be used to demonstrate that there are defects not evident from the face of the notice of appeal. It may be necessary to rely on materials other than the notice of appeal to prove that the appellant failed to invoke the appellate court's jurisdiction or that a seemingly final order does not actually resolve the entire case. Similarly, there may be other materials demonstrating that a notice of appeal that appears timely on its face was not actually filed in the prescribed time.

Unique Features of Appellate Motion Practice

Motion practice in the reviewing courts differs from motion practice in the circuit courts in ways that affect the preparation of both motions and responses, chiefly in the far more limited scope of what the courts consider. Unlike in the circuit courts, where replies are routine and attorneys typically present argument on motions, in the reviewing courts

"replies to responses will not be allowed and oral arguments on motions will not be heard"—unless the court so orders, which almost never happens. *See* Ill. S. Ct. R. 361(b)(3).

This means that the reviewing court's review of a motion will consider only the motion itself—perhaps including a supporting memorandum—and the response, as well as any materials of record. This briefing limitation on appellate motions, and the extreme rarity of oral argument, has important implications for the preparation of motions and responses. Without replies or oral arguments, a movant ordinarily does not have the opportunity to directly answer the respondent's arguments against the motion, or to address concerns that might prompt the court to deny the motion. Similarly, without oral argument, a respondent has no opportunity to allay the court's skepticism about arguments for denying the motion. It is therefore necessary for both sides to anticipate these arguments and concerns, and to "answer" them even before they are actually raised.

The parties may have more of an opportunity to respond to each other's arguments after the initial motion and response if the court takes the motion with the case. In such cases, the movant may devote part of its appellate brief to the issue, essentially using the brief as a reply to the response. The adversary, in turn, may offer further argument in its own subsequent brief. Likewise, the parties may use their briefs to further develop arguments relevant to a motion even if the court initially denied the motion outright—especially if the issue concerns jurisdiction, which the court is obligated to examine. The appellate court has been known to deny a motion to dismiss an appeal for lack of jurisdiction, only to dismiss it on that basis after the appeal is fully briefed. *See Won v. Grant Park 2, LLC*, 2013 IL App (1st) 122523, ¶¶ 4-5, 36; *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).

But while these options for further argument on a motion sometimes present themselves, they are never guaranteed at the time the motion and response are filed. Those initial filings therefore should not be written with the expectation that there will be another opportunity to argue for or against the motion. Unless the court chooses to entertain oral argument on the full appeal, for example, there will be no opportunity for a direct exchange of questions and answers with the justices as to the issues relevant to the motion. And while an appellee may renew its arguments for dismissal in a brief if the motion to dismiss is denied, there is no corresponding opportunity for an appellant to bolster an argument against dismissal if such a motion is granted. The closest equivalent would be a petition for rehearing, but given the typically long odds against rehearing, it would be unwise to wait until that point to address concerns that might be the basis for dismissal. *See* Ill. S. Ct. R. 367.

Motions in the Illinois Supreme Court

The 2017 amendments that ushered in electronic filing considerably simplified the procedure for filing motions in the supreme court. Most significantly, when a motion in the supreme court requests relief that may be granted by a single justice, the amended Rule 361(c) requires the court clerk to direct the motion to the justice from the judicial district involved or, in Cook County, to the justice designated to hear motions. Ill. S. Ct. R. 361(c)(1). Before the 2017 amendments, this task was required of the movant, who is now permitted simply to file the motion with the court clerk. *Id.* The amended rule also eliminates former procedural distinctions based on whether the court was in session when the motion was filed. *See id.*

Of course, there are significant additional requirements under Rule 383 for motions for supervisory orders and Rule 384 for the transfer and consolidation of actions pending in multiple circuit courts. *See* Ill. S. Ct. Rs. 383, 384.

The requirements of Rule 383 generally govern motions under Rule 384 as well, but permit slightly more time to respond—seven days if the motion is served electronically or personally and fourteen days if served by mail or third-party commercial carrier—deadlines that may be extended by motion. Ill. S. Ct. R. 383(d). Each rule provides for oral argument at the supreme court's request. Ill. S. Ct. Rs. 383(f), 384(c)(4).

Conclusion

Attorneys skilled in the art of motion practice in the circuit courts can apply those skills to motion practice in the reviewing courts so long as they adjust to the procedural differences at the appellate level. In substance, motion practice does not differ greatly from one setting to the other; persuasion, thoroughness, and credibility are essential in both, but differentiating between their respective rules and practices is critical to success in either court.

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.