

Appellate Practice Corner

By: *Brad A. Elward*
Heyl, Royster, Voelker & Allen
Peoria

Appellate Motion Practice

The most frequent questions I hear raised concerning appellate practice relate to motions. What does a motion for such-and-such look like? How do we ask for more time? What should I attach to my motion? These are all common inquiries. Fortunately, there are few rules governing appellate motions. As a rule of thumb, motions should seek to further or resolve some issue in the appeal. Indeed, the only serious limitation is that the appellate court be capable of granting the type of relief requested. *See* Supreme Court Rule 366(a). The appellate court can enter any judgment or make any order that “ought to have been given or made.”

Whether filed with the supreme court or the appellate court, a specified motion judge hears most motions. As noted below, the supreme court has different rules depending on whether the motion is a single judge or full-court motion. In the supreme court, the justice of the district from which the motion arose handles motions (though motions filed from cases in the First District rotate among the three justices). Motions are granted or denied and are at times taken with the case. However, after hearing the full arguments, an appellate court may nevertheless grant a motion it previously denied. *See Hwang v. Tyler*, 253 Ill. App. 3d 43, 625 N.E.2d 243 (1st Dist. 1993). If a motion is taken with the case, the court is simply saying that it is not prepared to decide the motion at that time, but that it will rule on the motion in conjunction with the appellate briefs and argument.

Appellate motions frequently handled by the motion or single judge include motions for extensions, motions to strike parts of the brief, and motions relating to the timing or need for oral argument. Where the matters raised by motion relate to the actual issues in the case, or relate to jurisdictional issues, the motion may be given to the panel and taken with the case at oral argument.

Motion Procedures

Supreme Court Rule 361 outlines the general procedures for appellate motions. In its simplest terms, a motion must state the relief sought and supporting grounds. In this respect, counsel should concisely state what it wants the appellate court to do and why, with citation to legal authority. Although there are no page limitations, long motions do not generally sit well with the appellate court. Memoranda may also be filed, but my experience suggests that a single, comprehensive motion is more appropriate.

Rule 361(b) provides that all motions must be accompanied by a proof of service indicating that all parties have been served. If the motion is filed with the supreme court when it is in session, an original and one copy is to be sent to the court in Springfield. Motions to the appellate courts require an original and three copies unless the appeal is to the Appellate Court, Illinois Workers' Compensation

Commission Division, which requires an original and five copies (to reflect the additional justices). Supreme Court Rule 361(b)(3).

Where the supreme court is not in session, Rule 361(c) mandates different procedures. Since the court is only in session part of the year, counsel should first call the clerk's office and verify its present status. Once the "in-session" status is determined, the next question is to decide if the motion is one for the full court or whether it may be decided by a single judge, which in turn determines the method of filing. If the motion is one that may be granted by a single judge, filing is as follows: for cases arising out of the First District, an original and one copy of the motion (with proof of service and a proposed order) must be filed with the justice designated to hear motions at the supreme court clerk's Chicago office. Responses are filed in the same manner and are due within three (3) days of personal service or within five (5) days of service by mail. Rule 361(c) (1).

Single judge motions filed in the remaining districts are to be served on the justice for that district at his or her district office, with an original filed with the clerk in Springfield. The proof of service for the clerk's motion should indicate the name of the justice served and that a proposed order was filed with the motion. Responses must be filed in Springfield within five (5) days of personal or fax service or ten (10) days of service by mail, with a copy to the named justice.

If the supreme court motion requires full court disposition, the procedures are slightly different. Motions for cases arising out of the First District must be filed as an original and five copies in Chicago, with a copy sent to each justice at his or her district office. Responses are filed in the same manner, and are due within five (5) days of personal or fax service, and ten (10) days of service by mail. Rule 361(c)(2). For cases arising outside the First District, counsel should send an original and one copy to the clerk in Springfield, with service on the individual justices at their personal offices. The response time is the same as for full-court motions filed in First District cases.

Types of Motions

"Housekeeping" Motions

Certain appellate motions can be thought of as "housekeeping" in nature. These include motions for extension, motions relating to the record or report of proceedings, and motions relating to oral argument. Motions seeking an extension of time to file a brief should be filed as soon as possible and should state reasonable grounds for the additional time - other commitments, emergencies, prepaid vacation, etc. Counsel should also indicate if previous extensions have been granted and the reasons for those rulings. Rule 361(f). Filing an affidavit is suggested. Also, if you are asking for the extension because of other pending matters, specifically reference those cases by title, case number, and court, and also note the due date and nature of the commitment. For example:

Counsel has other pre-existing appellate commitments in the following cases:

Appellant Brief, due June 12, 2005, *Milano v. State of Illinois*, No. 4-05-1000, Appellate Court, Fourth District;

Petition for Leave to Appeal, due June 16, 2005, *Hingis v. Sharapova*, No. 19225, Supreme Court.

Using this format gives your motion more credibility and informs the court of the true nature of your other commitments. If you believe that your opponent will not object, call him and then indicate in your motion that you have spoken with opposing counsel, who has no objection to your motion. You can also label your motion as "Stipulated" or "Agreed," and note the same in your cover letter. Doing so often results in a quicker order, as the court does not need to wait for an objection.

Similar motions relate to the record on appeal. A party may wish to supplement the current record with materials omitted from the circuit court record or obtain an extension of time to file the record or report of proceedings due to a delay in preparation. *See* Rules 323(e) (reports of proceedings) and 325 (records on appeal). If supplementing the record, include an affidavit of counsel indicating that the documents were part of the circuit court record and considered by the circuit court, but somehow were omitted. In the latter instance, use an affidavit from the court reporter or the circuit clerk to support your motion. Although the rules say that a “reasonable excuse” justifying the extension is needed only when the motion is made after the record or report of proceedings due date, good practice dictates always including a description of the grounds. Examples include: a lengthy multi-week trial, a court reporter backlog, or a voluminous court record.

Another housekeeping motion relates to additional or supplemental authority. Such a motion should be used to notify the court of recent decisions that may have been handed down since the filing of the briefs, or to cite a case that was simply overlooked. While the court may frown upon your failure to discover the case in your initial research, justices would nevertheless prefer to make their decision with the benefit of accurate law. In any event, copies of the additional authority, especially if a new decision, should be attached to the motion. Most of my motions to supplement simply provide the additional authority, note that it was recently handed down, and indicate to which issue the case relates. Some attorneys will provide a more detailed argument, but that might provoke an objection or an attempt to file a written argument by your opponent.

Counsel may also file motions concerning oral argument. The most common motion is one that seeks additional time (most appellate courts limit argument time to 15 or 20 minutes) pursuant to Rule 352(b), or seeks to distribute time among multiple attorneys (only two attorneys may argue one side of a case) pursuant to Rule 352(d). Such motions should reference the rule and should specifically ask for the desired time distribution. Note that a simple request for a divided argument may not result in additional time without a specific request by the movant. Moreover, the motion should be filed well in advance of the argument date. If counsel is going to be gone during a portion of a month when he or she believes that oral argument might be set, counsel should simply forward the clerk a letter indicating the dates he will be gone, and then copy opposing counsel.

Other motions include those seeking substitution of counsel, motions for leave to obtain additional pages for the brief, motions to substitute a party (Rule 366(a)(2)), motions to dismiss due to settlement, and motions for publication (Rule 23(f)). Motions to expedite an appeal are governed by Rule 311 and should be filed immediately after or in conjunction with the filing of the docketing statement and should be supported by an affidavit and good cause.

Substantive Motions

Substantive motions are rare and in many cases are represented by motions to dismiss for lack of jurisdiction. For these, a supporting record must be provided. The courts generally recommend raising dispositive jurisdictional issues as soon as possible so that the issues may be addressed before the parties incur the time and expense of preparing a brief. In appropriate cases, a motion to stay the briefing schedule pending disposition of the motion may accompany such a request. If the motion to dismiss is denied, you may wish to continue to preserve the issue by raising it in your brief.

Emergency Motions

A few instances might arise justifying an emergency motion. While there is no set procedure in Illinois for emergency motions, all districts recognize that in certain cases, emergencies arise that requires immediate attention. Where possible, call the clerk of the court to see how the emergency motion should be handled. Motions for a stay of an underlying proceeding sometimes fall within the emergency category. Rule 305 governs motions for stays and requires that the movant show either that

a motion was made and denied by the circuit court, or that such a motion is impracticable. In any event, emergency motions should be hand-delivered or filed with overnight mail and the cover letter should plainly indicate that the enclosed matters are being presented on an emergency basis. Again, appropriate supporting record documents must be filed with the motion. If you are asking the court for emergency relief, give it the courtesy of providing it with all materials necessary to address the issues.

What to Attach to Motions

In addition to an affidavit, where required, and a proposed order stated in the alternative, a movant should also include with the motion copies of all relevant documents necessary for the appellate court to rule on the motion. Supreme Court Rule 328 states that if the record on appeal has not yet been filed, the movant must provide those portions of the record that will aid the court in ruling on the motion. It is also helpful to include as an attachment a copy of the underlying order and the notice of appeal. Examples of the documents for a supporting record include copies of relevant correspondences, lower court orders, or other pleadings. In the case of a motion seeking substantive relief, relevant documents from the record should be attached, with the record citation mark clearly visible. Counsel's affidavit should also indicate that the documents attached to the motion represent true and accurate copies of those found in the record on appeal. *See* Rule 328. Facts that are not in the record must always be supported by an affidavit. Rule 361(a).

Responses to Motions

As a general rule, responses should only be filed to substantive motions. Motions requesting additional pages for a brief, extensions of time, and other routine matters should be responded to only when some overriding need exists, such as a party's third motion for extension of time. Also, if you chose to respond, it sometimes helps to call the clerk's office and let them know that a response is forthcoming. In the unusual event that the court rules prior to receipt of your response, you can file a motion to reconsider. A similar call informing the clerk you are not opposing the motion is also welcomed. The courts do not allow replies to responses nor oral argument, except by permission of the court.

ABOUT THE AUTHOR: **Brad A. Elward** is a partner in the Peoria office of *Heyl, Royster, Voelker & Allen*. He practices in the area of appellate law, with a sub-concentration in workers' compensation appeals and asbestos-related appeals. He received his undergraduate degree from the University of Illinois, Champaign-Urbana, in 1986 and his law degree from Southern Illinois University School of Law in 1989. Mr. Elward is a member of the Illinois Appellate Lawyers Association, the Illinois State, Peoria County, and American Bar Associations, and a member of the ISBA Workers' Compensation Section Counsel.