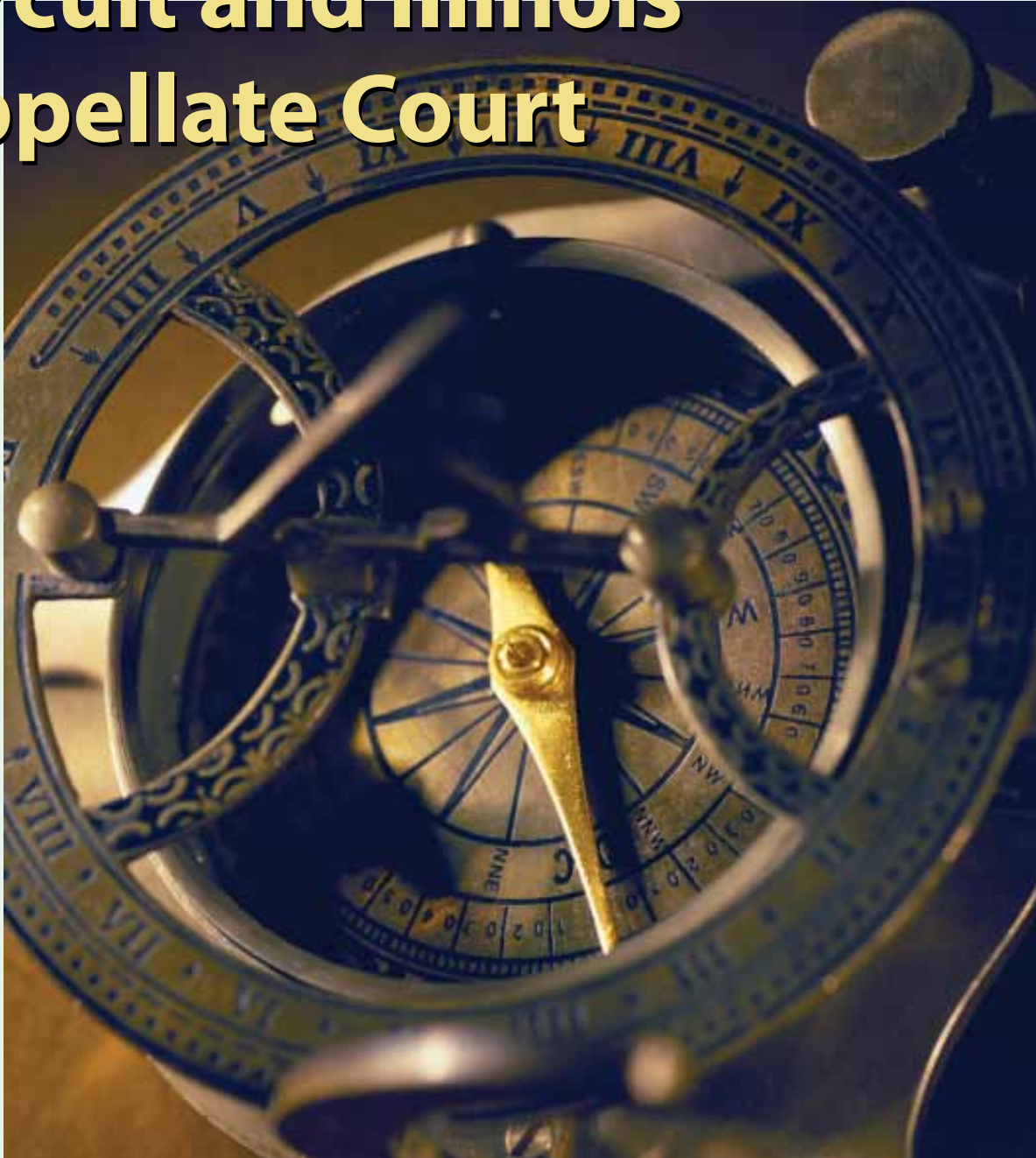


By Mary Patricia Benz and Judge Raymond W. Mitchell

Overview of the Briefing Process in the Seventh Circuit and Illinois Appellate Court



This article focuses on similarities and differences in the “nuts and bolts” of filing briefs in the United States Court of Appeals for the Seventh Circuit and Illinois Appellate Court. Notwithstanding some major differences in the rules of the two courts, the primary objective of briefing—persuasive advocacy in support of a client’s interest—remains the same regardless of the forum. We hope this article will help all practitioners to recognize and avoid frustrating and time-consuming pitfalls which can get in the way of persuasive advocacy. At worst, those problems may have serious consequences for the outcome of the appeal.

A PPEALS IN BOTH THE ILLINOIS APPELLATE COURT and the Seventh Circuit are governed by very specific rules. The applicable Illinois civil appeals rules are found primarily in Illinois Supreme Court Rules 301 through 384, as well as in the local rules of the district of the Appellate Court in which the appeal is filed. The applicable federal rules are found in the Federal Rules of Appellate Procedure (“FRAP”) and in the Rules of the United States Court of Appeals for the Seventh Circuit (“Circuit Rules” or “Cir. R.”). The Circuit Rules are, by definition, consistent with, but not duplicative of, FRAP. *See* Fed. R. App. P. 47. For any procedural issue in the Seventh Circuit, the practitioner must consult both FRAP and the Circuit Rules (which can be found together in printable form on the Seventh Circuit web site, www.ca7.uscourts.gov).

This article addresses primarily civil appeals from final judgments. Different rules may apply in either court to criminal appeals, interlocutory appeals, and to certain specific subjects, e.g., child custody or habeas corpus appeals. In both courts, the civil appeals rules govern many aspects of briefs in criminal appeals, including the form, length, and time for filing the brief. *See, e.g.*, Ill. Sup. Ct. R. 612; Fed. R. App. P. 28.

The Seventh Circuit web site, www.ca7.uscourts.gov, provides a Checklist for Briefs and portions of sample briefs. The Seventh Circuit Practitioner’s Handbook for Appeals (2003 Edition) and the “Requirements And Suggestions For Typography In Briefs And Other Papers” are also available in printable form on the Seventh Circuit web site.

Two excellent articles about appellate practice in the Illinois Appellate Court, First District are: Steven Ravid & Cindy Wile, “A Road Map to the New Local Rules,” **CBA Record**, April 2005, and Steven Ravid & Cindy Wile, “A Road Map to the New Local Rules, Part 2,” **CBA Record**, May 2005. (The First District Rules have been amended since the foregoing articles were published.) The Appellate Court rules for each of the five districts are available on the Illinois Appellate Court web site, www.state.il.us/court/AppellateCourt/default.asp.

The following important advice from the Seventh Circuit Practitioner’s Handbook for Appeals (at page iii) will serve the appellate lawyer well in any court:

...[V]erbiage [per the dictionary: “words in excess of those needed for clarity or precision”] is looked upon with great disfavor by

the Seventh Circuit. Briefs should be kept as short as possible. Motions and all other papers filed should be succinct. Every failure to honor this request reduces the amount of judge time that will be available for work that must be done.

Highlights Of Similarities And Differences

The following discussion focuses on selected key rules that affect the briefing process in all civil appeals.

The expected timeline for appeals may differ markedly between the two courts. (Table 1). As an example, assuming that no orders granting extensions or expediting the appeal are entered, in the Seventh Circuit the time between the filing of the notice of appeal and the filing of the Reply Brief could be as few as eighteen weeks. In the Illinois Appellate Court, the time between the same events will likely be at least seven weeks longer. The difference is primarily due to the longer time for filing the record on appeal in the Illinois Appellate Court. *Compare* Ill. Sup. Ct. R. 326 with Fed. R. App. P. 10 and Cir. R. 10. The time for filing briefs is also extended in the Illinois Appellate Court as compared with the Seventh Circuit. *Compare* Ill. Sup. Ct. R. 343 with Fed. R. App. P. 31, Cir. R. 31.

Contents Of Record On Appeal

Preparation of the record on appeal is one of the most important steps in the briefing process. Illinois Supreme Court Rules 321, 323, 324 and 326 are the principal rules that address the record on appeal. FRAP 10 and 11, and Circuit Rules 10 and 11, are their counterparts in the Seventh Circuit. The trial court clerk prepares the record on appeal in both courts.

The record on appeal usually consists of transcripts of trials and hearings, pleadings and motions (the common law record), and exhibits. Under Seventh Circuit rules, many documents filed in the trial court, such as subpoenas and legal memoranda, are ordinarily omitted from the record. *See* Cir. R. 10(a). A party who seeks to rely on affidavits or exhibits attached to legal memoranda must specifically request that the memoranda be included in the record. In the Illinois Appellate Court, all documents filed in the trial court are ordinarily included in the record, unless the parties stipulate to omit them.

In both courts, relevant exhibits (admitted, or offered but rejected) are usually kept by the attorneys for the parties. The par-

ties must make sure, by stipulation or trial court order, that the exhibits become part of the record if the exhibits are relevant to the arguments of either party. *See* Cir. R. (10)(a).

Transcripts must be ordered promptly in both courts. *See* Ill. Sup. Ct. R. 312, 323; Fed. R. App. P. 10(b), Cir. R. 10. The process for certifying and transmitting transcripts for inclusion in the record is different in the two courts. *Compare* Ill. Sup. Ct. R. 323 with Fed. R. App. P 10(b), 11, and Cir. R. 10(e).

Preparation And Filing The Record

In the Seventh Circuit, the record on appeal must be prepared and transmitted within 14 days of the filing of the notice of appeal, as compared with a 63-day period for filing the record in the Illinois Appellate Court. *See* Fed. R. Civ. P. 10, Cir. R. 10; Ill. Sup. Ct. R. 326. Extensions of time to file the record are generally harder to obtain in the Seventh Circuit. *Compare* Cir. R. 10(c) and Ill. Sup. Ct. R. 323(e).

In appeals from district courts to the Seventh Circuit, the court reporter (ordinarily a court employee) prepares an index to the record that includes an alphabetical list of witnesses (with the initial pages of their direct and other examinations), a list of exhibits (with descriptions and page references), and a list of other important parts of the trial with page references. *See* Cir. R. 10(e). Essentially the same information

must be provided to the Illinois Appellate Court by the Appellant in the index to the record included in the Appendix. *See* Ill. Sup. Ct. R. 342(a).

Failure to provide a complete and orderly record can have serious consequences for both parties. *See Technology Solutions Co. v. Northrop Grumman Corp.*, 356 Ill. App. 3d 380, 384-85, 826 N.E.2d 1220, 1224-25 (1st Dist. 2005) (Burke, J.) ([T]he parties ...have a duty to this court to ensure that the record is in a proper state for efficient review. Specifically, many of the volumes of the record have fallen apart.... In many other instances, the volume was bound too tight and therefore the first few lines of each page were inaccessible, necessitating the court to take the record apart. Also...page holes were punched through text, rendering it unreadable. Lastly, the record contains double sided pages, again impeding review of this case. Given the vastness of this record (110 volumes) and the complexity of the case, we expect a proper record to enable our review...”).

Motion Practice

Illinois Supreme Court Rule 361 and FRAP 27 are the rules that govern motion practice in the two courts. The practice in both courts is similar. Both courts have special rules for some types of motions, such as motions to extend time to file the record (Cir. R. 11(c), Ill. Sup. Ct. R. 323(e), 326), motions to extend time for filing briefs (Ill.

Sup. Ct. R. 343, FRAP 26, and Cir. R. 26), and motions to increase page limits for briefs (Ill. Sup. Ct. R. 341).

Appellant's Brief

Illinois Supreme Court Rule 341, FRAP 28, and Circuit Rule 28 are the principal rules that govern the form of briefs. There are important differences in the form of briefs in the two courts.

The Appellant's Brief in the Seventh Circuit must contain, in order, a corporate disclosure statement, a table of contents, a table of authorities (cases, statutes, rules, and other authorities listed in alphabetical order with page references to the brief), a complete jurisdictional statement, a statement of issues presented for review, a statement of the case, a statement of facts, a summary of argument, an argument (including a statement of the standard of review for each issue), and a short conclusion. The Appellant's Brief may also contain an addendum of relevant statutes, a statement about oral argument, and a certificate of compliance with type and volume limits. *See* Fed. R. App. P. 32 and Cir. R. 32.

In the Illinois Appellate Court, Illinois Supreme Court Rule 341(h) requires, in order, points and authorities (listed under headings used in the argument in order of importance), an introductory paragraph stating the nature of the action and the judgment appealed from and whether questions are raised on the pleadings, a statement of issues and standard of review for each issue, a statement of jurisdiction, quotation of statutes or regulations involved, a statement of facts, argument, and a conclusion. (An amendment to Rule 341 may require “a clear and exact reference to the pages of the record on appeal or abstract, if any, where a party preserved each issue in the trial court.” If the issue was not preserved, counsel must explain why the issue should not be forfeited).

An appendix is required to be included in the Appellant's Brief. *See* Ill. Sup. Ct. R. 342. A certificate of compliance with page limits is also required. *See* Ill. S. Ct. R. 341(c).

Appellee's Brief

In the Seventh Circuit, the Appellee's Brief must contain all of the parts required for



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Table 1.**Comparison of Timelines**

Analysis of the events that start the running of the 30-day period for filing a notice of appeal (“NOA”) is far beyond the scope of this article. See generally Ill. Sup. Ct. R. 303, 304, and FRAP 4.

Illinois Appellate Court	Applicable Rule/ Due Date	Days From Final Order	Seventh Circuit	Applicable Rule/ Due Date	Days From Final Order
Notice of Appeal (“NOA”)	Rule 303	30 days	Notice of Appeal	FRAP 4	30 days
			Docketing Statement	Cir. R. 3; 7 days after NOA	37 days
Docketing Statement, Order Transcript	Rule 312; 14 days from NOA	44 days	File Record on Appeal	FRAP 10, Cir. R. 10; 14 days after NOA	44 days
			Appellant to Serve Record Designations for Appendix	FRAP 30; 10 days after record is filed, absent agreement	54 days
			Corporate Disclosure Statement	FRAP 26.1; 21 days after docketing or earlier	58 days
			Appellant’s Brief	FRAP 31, Cir. R. 31; 40 days after docketing	84 days
File Record on Appeal	Rule 326; 63 days after NOA	93 days			
			Appellee’s Brief	FRAP 31, Cir. R. 31; 30 days after service of Appellant’s Brief	114 days
Appellant’s Brief	Rule 343; 35 days after filing record	128 days	Reply Brief	FRAP 31, Cir. R. 31; 14 days after service of Appellee’s Brief	128 days
Appellee’s Brief	Rule 343; 35 days after Appellant’s Brief was due	163 days			
Reply Brief	Rule 343; 14 days after Appellee’s Brief was due	177 days			

the Appellant's Brief except the statement of the issues, statement of the case, statement of facts, and statement of the standard of review. The foregoing must be included only if the Appellee is dissatisfied with Appellant's statements. *See* Fed. R. App. P. 28(b).

The Appellee must include a jurisdictional statement stating "explicitly whether or not the jurisdictional summary in the appellant's brief is complete and correct. If it is not, the appellee shall provide a complete jurisdictional summary." Cir. R. 28(d).

In the Illinois Appellate Court, the Appellee's Brief must contain points and authorities, argument, and a conclusion. Other parts may be included if the Appellee believes the Appellant's presentation is not satisfactory. *See* Ill. S. Ct. R. 341(i).

Reply Brief

The Seventh Circuit Reply must contain a table of contents with page references and a table of authorities with cases alphabetically arranged, followed by statutes and other authorities, with page references. *See* Fed. R. App. P. 28(c). In the Illinois Appellate Court, only argument is required in a Reply Brief. *See* Ill. S. Ct. Rule 341(j).

Appendix

Illinois Supreme Court Rule 342, FRAP 30, and Circuit Rule 30 are the principal rules that govern the Appendix. The Seventh Circuit relies heavily on the Required Appendix, as evidenced by the requirement that a statement of completeness must be filed by the Appellant. *See* Cir. R. 30(d). The content of the Appendix does not differ significantly between the two courts.

Practice Tips

A few of the differences in the courts' rules are worthy of special attention. The "summary of argument" is considered by some to be the most important part of a Seventh Circuit brief. Further, failure to pay close attention to the detailed jurisdictional statement, required of both Appellant and Appellee in the Seventh Circuit, can have serious consequences for both parties. *See Mortgage Elec. Registration Sys., Inc. v. Estrella*, 390 F.3d 522, 524 (7th Cir. 2004) (Easterbrook, J.) (attorneys for both sides received a "public chastisement" for their failure to disclose, in briefs and at oral argument, a potential lack of federal jurisdiction).

Footnotes and long quotes are expressly "discouraged" in the Illinois Appellate Court. *See* Ill. Sup. Ct. R. 341. Arguments made only in footnotes are waived. *See Technology Solutions Co. v. Northrop Grumman Corp.*, 356 Ill. App. 3d 380, 382, 826 N.E.2d 1220, 1223 (1st Dist. 2005) (all parties' footnotes were stricken). A similar distaste for footnotes and long block quotes is expressed in the Seventh Circuit's "Requirements And Suggestions For Typography In Briefs And Other Papers."

Both courts offer valuable assistance to counsel to help them comply with court rules. Experienced court clerks or staff attorneys will review briefs for errors of form in advance of the filing deadline. Counsel should make every effort to finish the brief in advance of the filing date to take advantage of this important resource.

Electronic Filing

At present, neither the Seventh Circuit nor the Illinois Appellate Court require electronic filing. Electronic filing, known in the federal courts as the Case Management/Electronic Case Filing System ("CM/ECF"), will likely become mandatory in the Seventh Circuit in 2009. While the Seventh Circuit has not yet issued an administrative order addressing CM/ECF, the rules used by other circuit courts of appeal have some features in common, including:

- Briefs, motions, responses, notices, petitions for rehearing, and many other documents *must* be filed using CM/ECF. *Pro se* litigants need not use the CM/ECF system.
- Some documents may not be filed electronically, such as e.g., documents initiating cases in the Court of Appeals, sealed documents, and oversized documents.
- Filing deadlines are not changed, and documents are deemed filed when transmission is completed and a notice of docket activity ("NDA") is issued by the system.
- Whenever possible, documents must be filed electronically in searchable PDF format, i.e., PDF format that is converted from a word processing format, not created by scanning a paper document. (Microsoft Word will convert a Word document to searchable Adobe PDF format).
- The filer must redact documents to protect private information, such as Social Security numbers, home addresses, and minor's names.
- Service on other parties is accomplished automatically through the CM/ECF system if the attorney to be served is a registered electronic filer. Otherwise, conventional service, usually a paper copy and/or CD, is required. Certificates of service are always required.

There are many variations in the CM/ECF procedures followed by the various circuit courts of appeals. Counsel should check the Seventh Circuit web site for announcements about this important topic. The current procedure for filing briefs in the Seventh Circuit is found in Circuit Rule

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but rather because she arguably displayed each attribute in excess. She suffered after “indulging in socially sanctioned behavior to an unsanctioned extent.”

Finally, Carlson also uses each case study to introduce and dissect various narrative concepts such as framing, alchemy of symbols, symbolic perfection, dramatic pentad, and representative anecdote. Her discussions on these topics constitute the weakest part of the book. At times her discussions of concepts and strategies became very technical and disrupted the flow of her own prose.

Overall Carlson’s insights and analysis were eye-opening and thought provoking. Her own narrative and analytical skills result in an entertaining, multi-dimensional book. It is a good read for anyone interested in how the courts have shaped and manipulated views of femininity, or for those interested in understanding the more technical aspects of rhetoric.

More than that, this book is a great for anyone who simply wants to enjoy a bit of salacious 19th century drama and learn how attorneys played upon gender norms to the benefit, or detriment, of the women involved. ■

Unraveling USERRA continued from page 49

and reenter the workforce because of military service should closely heed USERRA’s notice requirements, as failure to do so may preclude the employee’s right to reemployment. Illinois lawyers practicing in this area should also note that the rights afforded under USERRA are substantively different than those provided under state law. ■

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Overview of the Briefing Process continued from page 38

31(e). That rule requires a digital version of each brief and the required appendix to be filed with the paper brief at the time the paper brief is filed. Counsel may certify that some material is not available electronically. The digital version of the brief and required appendix may be furnished on a properly labeled disk or CD-ROM, or via the internet. Instructions for internet uploading are on the Seventh Circuit web site. The digital version should be in searchable PDF format. One digital copy must be served on each party that is separately represented by counsel.

In the Illinois Appellate Court, a paper brief may be filed with a digital version (Adobe Acrobat PDF) that must be served on each party. An electronic copy of a brief must be filed if the Appellate Court or a judge thereof requests one. *See Ill. Sup. Ct. R. 341(e).*

Conclusion

The briefing process in the Seventh Circuit and in the Illinois Appellate Court requires mastery of many rules. The inadvertent violation of any rule can have serious consequences for your client’s case. Counsel should make every effort to take advantage of the services available in each court for pre-filing review of briefs. ■

Raymond W. Mitchell is a Judge on the Circuit Court of Cook County. Mary Patricia Benz has practiced law in Illinois with a concentration in civil litigation and appeals for more than 30 years.

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