Volume 2 | Issue 8 | 2014

APPELLATE LAW JOURNAL

# U.S. Court of Appeals for the Seventh Circuit: A Closer Look at Circuit Rule 28(a) – Jurisdictional Statements

*By: Lindsay C. Cloonan, Esq. | Sr. Appellate Counsel | Counsel Press | lcloonan@counselpress.com*

Seventh Circuit Rule 28(a) governs the content of the jurisdictional statement in the appellant's opening brief. The Court is looking for very specific information. This rule should be read very carefully. When a brief is initially filed electronically, a staff member at the Court reviews the brief to make sure all the correct components are present and that the brief is a native pdf. A short time later, another staff member at the Court will review the jurisdictional statement specifically. If your jurisdictional statement is considered deficient, your brief will be rejected at this later date after the second review. By this time, you may have already filed your paper copies with the Court. You will then need to correct the brief, refile it electronically and, once it has been accepted, refile the paper copies. That is a lot of work to go through. Therefore, focusing on the jurisdictional statement in the beginning can save you a lot of work later.

### Main components to the jurisdictional statement

The main components to the jurisdictional statement are broken down into two categories: district court jurisdiction and appellate court jurisdiction. You also need to make sure you include all the necessary dates and that you are able to show the appeal was timely made. The rule goes into specifics dealing with different scenarios that may



***The Appellate Law Journal*** *focuses exclusively on rules, practices and procedures of federal and state appellate courts nationwide. Edited by the appellate experts at Counsel Press,* ***The Appellate Law Journal*** *is designed to provide a forum for creative thought about the procedural aspects of appellate practice and to disclose best practices, strategies and practical tips.*

CP

COUNSEL PRESS

apply to your appeal. I will not go into each example here, but will instead highlight one of the most common mistakes I encounter. This has to do with jurisdiction which depends on diversity of citizenship. It is necessary to not only identify the amount in controversy, but also the citizenship of all parties to the litigation. If the party is a corporation, you must identify the state of incorporation and the state in which the corporation has its principal place of business. If the party is an unincorporated association or partnership, the statement needs to identify the citizenship of all the members. There have been many times that I have seen some or all of this information missing.

### How does this rule apply to an appellee?

Don't think if you are an appellee in the Seventh Circuit that you have escaped the requirements of the jurisdictional statement. Circuit Rule 28(b) applies to the appellee. The appellee is required to have a jurisdictional statement that includes one of the following two statements:

- The appellant's jurisdictional statement is complete and correct.
- The appellant's jurisdictional statement is not complete and correct.

If you choose to assert the latter statement, you, as the appellee, are required to set out a full jurisdictional statement as if you were the appellant. It is incorrect to simply point out the mistakes in the appellant's jurisdictional statement. If the appellee does not fully set forth the jurisdictional statement when they are claiming the appellant's jurisdictional statement is not complete and correct, their brief will be rejected and a deficiency will be issued.

### Final thought

The advice to take away from this is to pay attention to the jurisdictional statement in your brief whether you are representing the appellant or appellee. The Court focuses on this section of the brief and wants you to review the circuit rule on the subject.

## Practical Guidelines for Masterful Brief Writing: Five Briefs to Avoid

*By: Cameron W. Gilbert, Esq. | Group Director | CP Legal Research Group | cgilbert@counselpress.com*

Legal writing, or any writing for that matter, is a mentally demanding and complex activity requiring sustained effort and attention. Lawyers often face difficulty in providing that effort and attention within court-imposed deadlines for multiple reasons. Solo practitioners or small-firm lawyers have to wear many hats each day and have multiple administrative tasks that divert their attention from their caseload. Similarly, attorneys that practice in multiple areas are often required to mentally "shift gears" to entirely different subject matters as they move from file-to-file in a given day or project-to-project in their practice, preventing the kind of structured focus needed to write well. Many attorneys

are deadline-driven, and, when competing deadlines overlap, it becomes difficult to juggle them all. Whatever the reason, the inability to devote full attention to legal writing causes the writing to suffer.

This is especially so with appellate brief writing, which is a special type of advocacy that most attorneys do not specialize in or have a great deal of experience in preparing. When an attorney inevitably finds himself or herself against a deadline to file a brief, the rush to get the job done often has adverse consequences. Here, at CP Legal Research Group, we have assisted thousands of attorneys with their briefs. We frequently see the results of a looming deadline and inadequate time to provide the required focus on the brief. Below are five briefs to avoid, even when faced with a filing deadline:

### 1. The See-What-Sticks Brief:

This brief usually appears when the attorney has not taken the time to properly review the record and do some preliminary research on the potential issues to narrow down those issues with a moderate chance of success from the hopeless ones. Therefore, the attorney feels compelled to "throw everything against the wall and see what sticks." The results are almost always dismal, and the brief reflects the lack of focus and direction.

Too many issues make a bad brief. An appeal is not a law school examination, where extra points are given for spotting and discussing every legal question buried in the case. Make sure that you properly evaluate the issues in your case and don't waste time and valuable real estate discussing esoteric points of law that have little chance of obtaining the desired result.

### 2. The Remix Brief:

This brief appears when an attorney procrastinates to the point that the filing deadline is imminent, and decides to just convert trial memoranda into a brief. Besides the obvious observation that merely recycling already rejected arguments is generally poor strategy, this tactic ignores the differences between appellate and trial advocacy. The way arguments are presented to a trial court differs from the way they are presented to an appellate court. This is especially so of "jury arguments," which are generally ineffective on an appeal. Good legal writing considers the audience and tailors the presentation to that audience. The same way that reading an appellate brief as a closing argument would be a terrible choice, so, too, is repackaging trial arguments to an appellate panel and hoping they fair better the second go-around. Make sure you take the time to do more than just rehash your trial

arguments, and carefully tailor the contentions to your new audience.

### 3. The Frankenstein Brief:

This monster raises its head when an attorney attempts to cobble together a brief by cutting and pasting from various other documents, including PDF files. The result is a stitched-together document that lacks cohesion and structure. Numerous "cut and paste" errors appear, such as subject-verb agreement, misidentified courts, inconsistent naming conventions for parties and formatting problems. Indeed, attorneys often unwittingly manufacture formatting problems in their document when some code or electronic command is inadvertently picked up and copied into the new document. These hard-to-correct formatting errors transform what was intended as a timesaving shortcut into hours of struggling to properly format the new document. This causes numerous distracting errors that divert the reader's attention from the arguments.

Whenever you cut and paste, you need to ensure that sufficient time remains to carefully review the brief and eliminate these pitfalls.

### 4. The Too-Many-Cooks Brief:

This brief appears when multiple lawyers collaborate on a brief, with each attorney responsible for one or more sections. Division of labor is a great way to tackle a difficult multi-issue appeal and to maximize the

time you have by preparing multiple sections at once. The only caveat is that you need to leave sufficient time to harmonize all of the sections into one coherent document. Otherwise, you end up with parties and other players being identified by different names in different sections of the brief, crude transitions from section-to-section because writing styles clash, a lack of uniform citation because the same cases cited in different sections revert back-and-forth from short form to full form and other integration problems. In cases of too many cooks, you must have a master chef to unify the various sections and ensure that theme, style and naming conventions remain consistent.

### 5. The Un-Brief:

The "un-brief" results from the failure to leave sufficient time to edit out unnecessary verbiage and focus and sharpen the arguments. The result is a wordy, rambling document that lacks focus and clarity and is filled with run-on sentences. The length and lack of focus makes the "un-brief" hard to read and distracts the reader from the arguments.

It is called a "brief" for a reason! Take the time to be concise and avoid repetition. Appellate judges dislike unnecessarily long briefs!

(This article was published on July 30, 2014 in *The Recorder,* California's leading legal news and analysis publication.)

# New and Proposed Changes to the Illinois Appellate Landscape

*GUEST ARTICLE*

*By: Matthew Davison, Esq. | Law Office of Matthew R. Davison, LLC | info@matthewrdavison.com*

Below is a summary of new implementations by the Second District Appellate Court and proposed changes to several Illinois Supreme Court Rules addressing appeals.

### 1. Filing Fee Increase - Statewide

As of January 1, 2015, filing fees in the reviewing courts will go up and will be as follows:

- $50.00 for Appellants
- $30.00 for Appellees

### 2. Electronic Records on Appeal - Second District

In all cases in which the notice of appeal is filed on or after June 1, 2014, the circuit clerks of Boone, Carroll, De Kalb, Du Page, Jo Daviess, Kendall, Lake, Lee, McHenry, Ogle, Stephenson and Winnebago Counties shall electronically transfer records on appeal (common-law records and reports of proceedings) to the clerk of the Court via i2file.net. In all cases in which the notice of appeal is filed on or after October 1, 2014, the circuit clerk of Kane County shall electronically transfer records on appeal (common-law records and reports of proceedings) to the clerk of the Court via i2file.net. The electronic reports of proceedings shall be formatted with text-searchable by both word and phrase. Except as provided by Local Rule 104(a), the circuit clerks shall transfer exhibits physically, not electronically. Paper Records may be generated by filling out a "Paper on Demand Request" and e-mailing it to the clerk of the Illinois Second District Appellate Court.

### 3. Proposed Supreme Court Rule Changes via Proposal 14-02

The Chicago Bar Association has offered Proposal 14-02 which details multiple amendments to certain Illinois Supreme Court Rules:

- ***Amendment to 303(a)(1):*** "The notice of appeal may be filed by any party or by any attorney representing the party appealing, regardless of whether that attorney has filed an appearance in the circuit court case being appealed."
- ***Amendment to 308(c):*** Provides 21 days (replacing 14) after the due date of the application, an adverse party may file an answer in opposition, with copies in the number required for the application, together with an original of a supplementary supporting record containing any additional parts of the record the adverse party desires to have considered by the Appellate Court.
- ***Amendment to 315(a):*** Deletes the provision that takes into account in deciding whether to grant a Petition for Leave to Appeal whether the matter is final or interlocutory.
- ***Amendment to 315(f):*** Changes the time to answer from 14 days to 21 days.
- ***Amendment to 318(b):*** Deletes the sentence that review of cases at an interlocutory stage is not favored.

### 4. Proposed Supreme Court Rule Changes via Proposal 13-09

The Appellate Lawyers Association has offered Proposal 13-09 which details changes to Rule 361 and 367:

- ***Amendment to Rule 361(b)(2):*** Provides a five-day response window for when a motion in the reviewing court is served via e-mail; adds email as a form of service.
- ***Amendment to Rule 367(d):*** Addresses answers to Petitions for Rehearings, detailing that "unless authorized by the Court or a judge thereof, the answer shall be limited to 27 pages, the reply shall be limited to 10 pages, and each must be supported by a Certificate of Compliance in accordance with Rule 341(c)."

(The links for 13-09 and 14-02 are available in the online version of this article. To view, visit Counsel Press' Blog, the *Appellate Law Journal* section.)

# Complexities of Illinois Appellate Court Procedure: Preparing a Supporting Record

*By: Lindsay C. Cloonan, Esq. | Sr. Appellate Counsel | Counsel Press | lcloonan@counselpress.com*

There are instances in which a party is required to compile a supporting record instead of relying on the circuit court to compile the record. Most of these instances occur when you are petitioning for leave to appeal to the appellate court. The Illinois Supreme Court rule regarding supporting records is rule 328. However, there is a little more involved than just following the language in rule 328. Practitioners should also refer to rule 324 which sets out how the circuit clerk should prepare and certify the record, and it outlines the form of the supporting record.

### Three sections of the record

The supporting record should be arranged in three sections: the common law record, the report of proceedings and the trial exhibits. The common law record consists of the motions, pleadings orders and documents filed in the circuit court during the course of the litigation. The common law record and report of proceedings should be consecutively numbered beginning with the letter "C" and should be arranged into volumes of no more than 250 pages each. The trial exhibits do not need to be numbered as long as you provide a list of exhibit numbers.

### Order of the documents

The supporting record should be organized in chronological order beginning with the oldest document. You should create a table of contents to the supporting record that identifies all the documents, their filing date and the page number upon which the document begins. We typically set up a master table of contents that identifies all the documents and where the volumes begin, and this table of contents is inserted into the beginning of each volume of the supporting record.

### Authentication affidavit

An authentication affidavit from the attorney, who compiled the supporting record, should be drafted which identifies the following:

- The affiant is an attorney in good standing, licensed to practice law by the Supreme Court of Illinois;
- A statement that the documents contained in the supporting record are true and correct copies of the pleadings, orders and motions entered and filed below in the circuit court; and
- A statement that the record has been prepared and certified in the proper form and the number of volumes the supporting record consists of: the common law record, report of proceedings and exhibits.

This affidavit should be placed at the beginning of the first volume of the supporting record before the table of contents.

An original and three copies of the supporting record should be filed with the appellate court and one copy sent to each service party. This supporting record will accompany your filing to the appellate court.

# *Town of Greece* and *Hobby Lobby* – Religion in America Under the Robert's Court

*By: Roy I. Liebman, Esq. | Director | U.S. Supreme Court Department | Counsel Press | rliebman@counselpress.com*

In *Town of Greece v. Galloway*, which was decided about six months ago, the Supreme Court held in a 5-4 decision that a town board's practice of beginning its public sessions with a Christian prayer did not violate the Establishment clause of the Constitution. The Court reversed the Court of Appeals' decision and, in light of this decision, one is hard-pressed to think of an Establishment claim that would now prevail at the Court. (Decisions barring school prayers, clergy-led prayer at a public high school, student-led prayer at football games, etc., may be in jeopardy unless the Court views prayers in a school setting in a different light.)

Fast-forward to June 27 and we have the *Burwell v. Hobby Lobby* case decided by the same five Justices. This opinion held that owners of a closely held, for-profit, corporation may exercise their religious beliefs by refusing to provide contraception coverage for employees, as required by the Affordable Care Act. The suit in *Hobby Lobby* was brought under the Religious Freedom Restoration Act passed by Congress to overrule a Supreme Court decision in which Congress felt the Court had overstepped its bounds relating to a particular Free Exercise exemption. Justice Samuel J. Alito, Jr., writing for the majority, held that Congress intended to expand and provide broader protection for religious liberty and not merely to restore the balance that had existed before.

Justice Alito, writing for the 5-4 majority, and Justice Anthony Kennedy concurring, reasoned, in part, that the employees would still be covered for all forms of contraception through a process created by the Obama administration to accommodate religious nonprofit organizations. That process allows religious nonprofits to obtain an exemption by signing a short form certifying its religious objections and sending a copy to its third-party insurance administrator, which then is obligated to provide the coverage separately to

employees without charge.

A few days later, however, those same Justices signed a temporary order that appears to backtrack from the assurances given by Justices Alito and Kennedy. The Court's new action temporarily (the Court could reverse its order) frees Wheaton College, a Christian college in Illinois, from having to go through the exemption process. Wheaton filed a lawsuit arguing that the mere signing of the form would burden its religious exercise rights by making it complicit in providing certain forms of contraception which it objects to.

The Court's order in the Wheaton matter stated that no form or notification to insurance providers was needed — all Wheaton had to do is tell the government in writing "that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraception services."

The difference between the opt-out procedure relied upon in the *Hobby Lobby* case and the notice allowed by the Court's subsequent order in the Wheaton matter may not seem like much, but it could have a substantial effect in hampering contraception coverage.

Now, in the wake of *Hobby Lobby*, President Obama is under increased pressure from religious groups demanding that they be excluded from an expected executive order barring discrimination against gays and lesbians by companies with government contracts.

There is no telling how far this will go, but clearly *Town of Greece v. Galloway* and *Hobby Lobby* appear to be just the opening salvos. For a more in-depth analysis of the *Town of Greece* and *Hobby Lobby* decisions, please see an article in *The New York Times* written by Linda Greenhouse on July 9, 2014: "Reading Hobby Lobby in Context." (Link availble in the electronic version of this article. To view, visit Counsel Press' Blog.)

Please contact Roy Liebman with any questions regarding the U.S. Supreme Court rules. Mr. Liebman is the Director of Counsel Press' U.S. Supreme Court Department; he specializes exclusively in U.S. Supreme Court practice and has an in-depth knowledge of what is happening at the Court, at all times.