Practical Counseling for the Client Considering Appeal

Before filing a notice of appeal, sometimes before entry of a judgment, occasionally even before filing the complaint, an attorney may be required to advise a client about whether an appeal can, or should, be filed.[1] Of course, the particular circumstances of each case lead to unique considerations for each appeal.[2] The trial lawyer whose clients are not "frequent litigants" is probably familiar with the misconceptions that many lay people harbor about litigation—what steps are involved, how long it is likely to take, and how much it will cost. Multiply those misapprehensions by ten and you will approximate the typical level of client confusion about the appellate process.

By Timothy Storm

The most common client misconception relates to the likelihood of success on appeal. Clients who lose at the trial court level often tend to overestimate (or simply have no basis to predict) their chance of prevailing at the appeal stage. The potential appellant often expresses the notion that victory on appeal is nearly certain because the trial court's decision is "obviously wrong." Besides the unavoidable fact that the infirmity of the decision was not so apparent to the judge who rendered it or to the opposing party and counsel who sought it, several other important factors counsel against a belief in the inevitability of an appellate victory.

An appeal is not a level playing field. The attorney for a potential appellant should understand that many advantages to the appellee are built in to the appellate system. The appellant must overcome those hurdles to prevail on appeal. The best time for an appellant to consider whether (and how) he or she can address those issues is before filing the appeal.

Here, then, are some of the key factors that a party thinking about whether to appeal should consider as a way to gauge whether he or she can prevail on appeal:

Considerations on Appeal

Appealable Order

The appellant must assure that there is an appealable order.[3] Without an appealable order, there can be no appellate jurisdiction over the case and any action taken in furtherance of an appeal will be void and a waste of resources.[4]

Timely Appeal

Once the appellant establishes that there is an appealable order, he or she must file a timely notice of appeal to invoke appellate jurisdiction and perfect the appeal.[5] Ordinarily, the notice of appeal must be filed within thirty days after an order becomes appealable.[6] In some types of appeals, the time period to seek appeal is less than thirty days.[7] On the other hand, there are some circumstances under which the time for filing an appeal may be extended.[8]

Sufficiently Complete Record

After satisfying the jurisdictional prerequisites to appeal, it is time to assess the condition of the record. The attorney should be sure to explain to the client that the purpose of an appeal is to review the record that was created in the trial court to determine whether the circuit court committed reversible error.[9] Accordingly, the parties and the appellate court are strictly limited to the record as it existed at the time the trial court ruled.[10] Introduction of additional evidence at the appellate court level is not a feature of the appellate process.[11]

Because of the focus on the record, the appellant must provide a record that is "sufficiently complete" to permit the appellate court to determine whether the trial court committed error.[12] Without a sufficient record, the reviewing court will presume that the trial court's actions were in conformity with the law and had a sufficient factual basis.[13] In many cases, issues cannot be addressed on appeal either because they have been waived in the trial court or because the record is so incomplete that proper appellate review is not possible.[14]

[1] Many of the considerations addressed in this article may be profitably discussed with both potential appellants and potential appellees. Here, they are generally approached from the appellant's perspective because the appellee's initial concern is not whether to file an appeal, but whether to defend an appeal already on file—usually a much easier decision.

[2] This article is geared toward advice that will assist the client in making informed decisions about proceeding with an appeal. The article does not cover all important matters necessary to perfecting the appeal that more properly fall within the professional responsibility of the attorney.

[3] See Ill. Sup. Ct. R. 301, 303, 304, 306, 307, and 308 for categories of appealable orders.

[4] See *Stein v. Krislov*, 405 Ill.App.3d 538, 540, 939 N.E.2d 518, 522 (1st Dist. 2010) (When appellate jurisdiction is lacking, the appellate court must dismiss the appeal.).

[5] See *In re Miller*, 396 Ill.App.3d 910, 913, 920 N.E.2d 1123, 1126 (2d Dist. 2009) (Filing a timely notice of appeal is the only jurisdictional step required to perfect an appeal.).

[6] Ill. Sup. Ct. R. 303.

[7] Ill. Sup. Ct. R. 306(b).

[8] See *Storm, Not Too Late To Appeal: Extensions of Time to Appeal in Illinois and Federal Practice*, 18 DCBABR 10 (Nov. 2005).

[9] *Foutch v. O'Bryant*, 99 Ill.2d 389, 391, 459 N.E.2d 958, 959 (1984).

[10] *Duncan v. Peterson*, 359 Ill.App.3d 1034, 1047, 835 N.E.2d 411, 422 (2d Dist. 2005), appeal denied, 217 Ill.2d 560, 844 N.E.2d 36 (2005).

[11] See, e.g., *McCarty v. Weatherford*, 362 Ill.App.3d 308, 311-12, 838 N.E.2d 337, 339-40 (4th Dist. 2005), appeal denied and reh'g ordered, 218 Ill.2d 542, 844 N.E.2d 424 (2006) (and cases cited there).

[12] *People v. Blankenship*, 406 Ill.App.3d 578, 943 N.E.2d 1111, 1126 (2d Dist. 2010), appeal denied, —- N.E.2d —- (Ill. Mar. 3, 2011).

[13] *Webster v. Hartman*, 195 Ill.2d 426, 432, 749 N.E.2d 958, 962 (2001).

[14] See, e.g., *Jackson v. Naffah*, 241 Ill.App.3d 1043, 1045-46, 609 N.E.2d 958, 960 (1st Dist. 1993).

Preserved Error

When reviewing the record, the appellant must assure that any errors to be raised on appeal are preserved in the record on appeal and not waived or procedurally forfeited.[15] What steps must be taken to preserve an error for appeal depends upon the nature of the error being asserted.[16] In general terms, the key idea is that the appellate court's function is to determine whether the trial court's actions or inactions were erroneous. Therefore, an error is "preserved" for purposes on appeal if the appellant presented the argument to the trial court and the trial court considered the argument and actually entered a ruling against the party.[17]

It is important to note that waiver is a limitation on the parties, not on the court, and the court may consider waived issues under some circumstances.[18] However, because courts rarely consider waived or forfeited issues in civil cases, reliance upon a waived or forfeited error as a primary basis of appeal usually suggests a small chance of success.

Consistent Theory of the Case

As a general matter, the appellant is limited to raising only those legal theories that were first argued in the trial court.[19] Thus, a key limitation on the appellant is the prohibition against advancing a theory of the case on appeal that is different from, or inconsistent with, the theory of the case the party relied upon before the trial court.[20] Put differently, taking a position that is radically different from, or contradictory of, the theory of the case pursued in the trial court is not a likely pathway to victory on appeal.

The Standard(s) of Review

It is somewhat tedious, but nevertheless important, for the attorney to explain to the client that for every issue brought before a reviewing court, the court will apply a standard of review.[21] The standard of review indicates the degree of deference that the reviewing court provides to the decisions of the circuit court.[22] Which standard is applied may be outcome determinative in some cases,[23] and knowing which standard or standards of review will apply may play a significant role in deciding whether to appeal the trial court's ruling.

Four general standards of review are used for appeals of Illinois civil cases: (A) *de novo*; (B) clearly erroneous; (C) manifest weight of the evidence; and (D) abuse of discretion.[24] Even if the decision being appealed is "wrong" in some objective sense, every standard of review except *de novo* provides the trial court with a "margin of error" so that the reviewing court will not reverse the decision unless it is "wrong enough" to meet a certain threshold.[25] Indeed, under the most deferential standard—abuse of discretion—the appellate court affords the trial court's ruling "great deference"[26] and will reverse only where the trial court's decision is "arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the court."[27]

According to the author's analysis, throughout all of the appellate districts and across a significant period of time, the average affirmance rate for issues decided under the least deferential, *de novo*, standard of review stands at about 63%;[28] for the clear error and manifest weight of the evidence standards, the affirmance rate is over 70%;[29] and where the most deferential pure abuse of discretion standard is used, the affirmance rate

[15] *People v. Blair*, 215 Ill.2d 427, 443-44, 831 N.E.2d 605, 615 n.2 (2005).
[16] See *Storm, Planning Ahead: The Trial Lawyer's Guide to Preserving the Trial Record for Appeal in Illinois Civil Cases*, CBA Record (Sept. 2005), at 30.
[17] *City of Chicago v. Latronica Asphalt & Grading, Inc.*, 346 Ill.App.3d 264, 276, 805 N.E.2d 281, 292 (1st Dist. 2004), appeal denied, 209 Ill.2d 578, 813 N.E.2d 221 (2004).
[18] *Montes v. Mai*, 398 Ill.App.3d 424, 427, 925 N.E.2d 258, 261 (1st Dist. 2010), appeal denied, 237 Ill.2d 560, 938 N.E.2d 522 (2010).
[19] *Haudrich v. Howmedica, Inc.*, 169 Ill.2d 525, 536, 662 N.E.2d 1248, 1253 (1996), cert. denied, 519 U.S. 910 (1996).
[20] *Zdeb v. Baxter Int'l, Inc.*, 297 Ill.App.3d 622, 630, 697 N.E.2d 425, 430 (1st Dist. 1998), appeal denied, 179 Ill.2d 623, 705 N.E.2d 451 (1998).
[21] See *Redmond v. Socha*, 216 Ill.2d 622, 633, 837 N.E.2d 883, 890 (2005).
[22] In re D.T., 212 Ill.2d 347, 355, 818 N.E.2d 1214, 1222 (2004).
[23] See *People v. Miller*, 173 Ill.2d 167, 207, 670 N.E.2d 721, 740 (1996) (J. McMorrow, specially concurring), cert. denied, 520 U.S.1157 (1997).
[24] *Dow Chem. Co. v. Department of Rev.*, 359 Ill.App.3d 1, 22, 832 N.E.2d 284, 300 (1st Dist. 2005); Bodine Elec. of Champaign v. City of Champaign, 305 Ill.App.3d 431, 435-36, 711 N.E.2d 471, 474 (4th Dist. 1999).
[25] *Vuagniaux v. Department of Prof. Reg.*, 208 Ill.2d 173, 193, 802 N.E.2d 1156, 1168 (2003).
[26] *Schwalbach v. Millikin Kappa Sigma Corp.*, 363 Ill.App.3d 926, 939, 845 N.E.2d 677, 688 (5th Dist. 2005), appeal denied, 218 Ill.2d 557, 850 N.E.2d 813 (2006).
[27] *People v. Vercolio*, 363 Ill.App.3d 232, 237, 843 N.E.2d 417, 421-22 (3d Dist. 2006).
[28] *Storm, The Standard of Review Does Matter: Evidence of Judicial Self-Restraint in the Illinois Appellate Court*, 34 S. Ill. U.L.J. 73, 104-105 (2002).
[29] Id.

is well over 90%.[30]

The Appellant Must Demonstrate Reversible Error

Another cause for caution in estimating the chance for a reversal is that the appellant is fully responsible for pointing out exactly where and how the trial court erred.[31] Even if the appellee does not file a brief, the appellate court will not reverse the lower court's decision unless the appellant demonstrates that error occurred.[32] In that regard, the reviewing courts are fond of reminding litigants that it is not the "court's duty to search the record for grounds upon which to base a reversal."[33]

Review Focuses on Outcomes, Not Reasoning

Next, a corollary to the rule that the appellant must provide specific reasons and argument supporting a reversal of the judgment is the principle that the judgment may be affirmed on any basis supported by the record, regardless of whether the trial court relied upon that reasoning or ground.[34]

Further adding to the appellant's burden on appeal is that not all errors constitute grounds for reversal. Under the "harmless error" doctrine, the appellant must show prejudice arising from the error, and reversal is required only where it appears that the outcome of the case might have been different had the error not occurred.[35]

Conclusion

The combined effect of a deferential standard of review, the burden on the appellant to demonstrate error in the record, and the appellate court's approach to affirming the judgment on any basis, even one not relied upon or considered by the circuit court judge, tilts the balance strongly in favor of an affirmance. It is not an overstatement to say that a "wrong" decision—even one that the client may believe is "clearly wrong"—may be affirmed for a variety of reasons. Proper counseling requires making the client aware of the factors that may lead to an affirmance even when the order under review is "wrong" by some objective measure. Only a well-informed client can determine whether the time and expense involved in an appeal is justified.

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[30] Id.
[31] *Bielecki v. Painting Plus, Inc.*, 264 Ill.App.3d 344, 359, 637 N.E.2d 1054, 1064 (1st Dist. 1994).
[32] In *re Adoption of G.L.G.*, 307 Ill.App.3d 953, 962, 718 N.E.2d 360, 367 (2d Dist. 1999).
[33] *City of Rockford v. Suski*, 307 Ill.App.3d 233, 247, 718 N.E.2d 269, 280 (2d Dist. 1999), appeal dismissed, 187 Ill.2d 591, 724 N.E.2d 1275 (2000).
[34] *Central Ill. Elec. Serv., LLC v. Slepian*, 358 Ill.App.3d 545, 550, 831 N.E.2d 1169, 1173 (3d Dist. 2005), appeal denied, 217 Ill.2d 559, 844 N.E.2d 36 (2005).
[35] In *re Detention of Traynoff*, 358 Ill.App.3d 430, 441, 831 N.E.2d 709, 719 (2d Dist. 2005).