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Appellate briefs and the different standards of review

In prior columns, I discussed the procedural steps to perfect an appeal to the Illinois Appellate Court and the Illinois Supreme Court. Once your case is on the appellate docket, the tool to request your desired relief is the brief.

In writing a brief, your goal should be to make the court's job as easy as possible, from clearly stating the issues, to offering an accurate and focused statement of the relevant facts, to providing a straightforward analysis of the law and its application to the facts, to tying all these strands together to bring the court to the result you seek.

U.S. Supreme Court Chief Justice John G. Roberts Jr. provides an insightful view from the bench: "When the case is new, you want to learn what it's about, and there's nothing better than a well-written brief, and it kind of carries you on. You want to learn more. You want to see what the other side has to say. But it can also be quite a downer to pick up a bad brief in a case, and you know you're not getting the right story, you know you're not getting the full story, you know there's more to it than that, and it's a struggle to get to the result."

In the next series of articles, I will discuss the process of drafting a well-written brief.

The place to start is Illinois Supreme Court Rule 341, which governs the form and content of all appellate briefs. One of the requirements set forth in Rule 341(h)(3) is that for each issue presented, the standard of review must be specifically stated:

"The appellant must include a concise statement of the standard of review for each issue, with citation to authority,

either in the discussion of the issue in the argument or under a separate heading placed before the discussion in the argument."

I begin with a focus on the standard of review because this is the lens through which the appellate or the Supreme Court views your case. Because the standard of review determines the level of deference the reviewing court will afford to the judgment of the lower court, understanding what standard applies is critical.

It can affect not only your decision as to whether to pursue an appeal in the first instance but also the issues you will raise in the appeal. Further, it is critically important that the client understand the effect of the standard of review, especially where it means that the appeal does not start out on a level playing field.

Often, the different issues raised in your brief will have different standards of review. For example, in civil cases the spectrum generally begins with the most deferential standard: abuse of discretion.

(It is critically important that the client understand the effect of the standard of review, especially where it means that the appeal does not start out on a level playing field.)

This category includes decisions made by a trial judge where the judge has considerable latitude, including conducting a trial, supervising the litigation process or overseeing the docket. A trial court is found to have abused its discretion only where it "acts arbitrarily without the employment of conscientious judgment, exceeds the bounds of reason and ignores recognized

ON APPEAL



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principles of law" or where "no reasonable person would take the position adopted by the court."

Less deference is given for review of factual determinations or evidentiary rulings. These decisions are usually subject to a manifest weight of the evidence

review, where reversal is required only when "it is clearly apparent from the record that the trial court should have reached the opposite conclusion." Often, issues of witness credibility fall within this category, and because the review

court has no opportunity to observe the demeanor of the witnesses as did the trial court, it therefore defers to the lower court.

Finally, when an issue is purely legal in nature, the de novo standard is applied, which affords no deference to the lower court's judgment. The reason for non-deferential review of legal issues is that the court of review

is in as good a position as the lower court to determine the law.

Therefore, if you are the appellant, you are in the strongest position when the issues you intend to appeal are issues of law because no deference will be afforded to the judgment of the trial court. Accordingly, the court of review is not constrained to follow the reasoning of the lower court and can arrive at a contrary result. In sum, the higher court has a blank slate upon which to write its opinion.

If, on the other hand, you are considering appealing from a judgment that is afforded a more deferential standard of review, you are on an uneven playing field from the get-go, as it is not enough to simply argue that the judgment was incorrect. Instead, you must establish that the error was so grave to overcome the deferential standard of review that it is afforded. It is important to make this uphill battle crystal clear to your client so that he or she has an informed expectation as to the chances of success.

Of course, if the proverbial shoe is on the other foot and you are the appellee, you benefit from the standard that affords the most deference to the trial court's judgment, as you want that judgment upheld.

If you are the party who benefits from the standard of review, that point should not only be emphasized at the outset of your argument (as required under the rules) but throughout the argument, as well.

Underscore that the trial court's ruling in favor of your client is accorded great deference, and that your opponent cannot show that there was an error of the magnitude sufficient to overcome this deference.

Next time, we will begin our journey through the various parts of an appellate brief.