Five Easy Pieces: Advice for Getting Your Case to the Appellate Court (and Back Again) Intact

by Charles Tyler Cone

The appellate process is, in theory, a model of simplicity: a maximum of three briefs and maybe an oral argument. Even an appeal suffering from "acute motion sickness"[1] is less procedurally complex than the average trial.

But the devil, as they say, is in the details. Several of the more diabolical details of the appellate process concern the interplay between the trial and appellate courts before, during, and after the actual appeal.

In other words, the transition of a case to and from the appellate court can quickly become a series of stumbling blocks. To avoid these obstacles, trial lawyers—even those who send their appeals to other attorneys down the hall or up the street—should keep in mind the following pieces of advice.

> Successfully getting a case to the appellate court begins by knowing how the case will proceed once it gets there.

All Types of Appellate Review Not Created Equal

Successfully getting a case to the appellate court begins by knowing how the case will proceed once it gets there. Virtually every decision a Florida trial court makes in a typical civil case is reviewable in at least one of these ways:

1) A "final-order"appeal taken at the end of the case;[2]

2) An "interlocutory" appeal taken immediately after the entry of certain nonfinal orders;[3]

3) Review by certiorari (or some other extraordinary writ).[4]

Which decisions are reviewable by which methods is beyond the scope of this article. For present purposes, the key is knowing that several aspects of the appellate process will vary according to the type of review.

Know When and How to Start the Appellate Process

Potential stumbling blocks come up at the beginning of the appellate process. In fact, if the appellate court's jurisdiction is not properly invoked, the appellate process can be over *before* it begins.[5]

The proper method of invoking an appellate court's jurisdiction depends on the type of review. Final-order appeals are commenced "by filing 2 copies of a notice, accompanied by filing fees prescribed by law, with the clerk of the lower tribunal within 30 days of rendition of the order to be reviewed."[6] Interlocutory appeals are commenced in exactly the same way.[7] Review by extraordinary writ, by contrast, is commenced "by filing a petition, accompanied by a filing fee if prescribed by law, with the clerk of the court deemed to have jurisdiction."[8] The most common type of petition, a petition seeking a writ of certiorari, must be filed "within 30 days of rendition of the order to be reviewed."[9]

Right from the beginning, the type of review matters. (I told you it would be important!) More specifically, at this stage the type of review determines:

1) *Which court.* Notices of appeal (of both final and nonfinal orders) are filed with the trial court. Petitions are filed directly with the appellate court.

An error in this regard is not fatal; the notice or petition is deemed filed when first received and then transferred to the correct court.[10] The error is nevertheless to be avoided, as it can create confusion and delay the appellate process.

2) *Notice or petition.* Commencement of a final order or interlocutory appeal requires a notice of appeal. Commencement of an extraordinary writ proceeding, on the other hand, requires a petition.

Do not underestimate the difference between the two. A notice of appeal is a one-paragraph document the content of which is largely a matter of form.[11] A petition is the functional equivalent of an initial brief.[12]

Confusing the two *may* not be fatal to the actual appeal.[13] However, anyone who sits down to draft a petition the day before it is due will quickly discover that the error may

well be fatal to his sanity or — if he delegates this task to an appellate attorney with access to a blunt instrument — his personal safety.

3) *For Whom the Motion Tolls.* The 30-day time limit for filing both notices of appeal and petitions for writs of certiorari begins to run upon "rendition" of the order to be reviewed. Rendition usually occurs "when a signed, written order is filed with the clerk of the lower tribunal."[14]

Filing a motion for rehearing from the order (or a motion for new trial from a jury verdict) can effectively suspend rendition of the order.[15] But — and this is an important "but" — only if the motion is authorized by the Florida Rules of Civil Procedure.[16]

Fla. R. Civ. P. 1.530 authorizes motions for new trial. Rule 1.530 also authorizes motions for rehearing, but only motions for rehearing directed to "orders and judgments which are final in nature."[17] Motions for rehearing directed to nonfinal orders are *not* authorized by Rule 1.530 or any other rule.[18]

In other words, a motion for rehearing will toll the time for appealing a final order, but will *not* toll the time for seeking review (whether by appeal or certiorari) of an interlocutory order.[19] Immediate review of a nonfinal order must therefore be sought within 30 days after the signed, written order is filed with the clerk.

Making a mistake about the tolling effect of a motion for rehearing can delay review of an otherwise immediately appealable order,[20] and can be outright fatal to review by certiorari. So, never be afraid to ask for whom the motion tolls. It may not toll for thee.

Recognize What Trial Court Can Do Pending Review

Correctly invoking appellate jurisdiction begins the appellate court's involvement in the case. It does not necessarily, however, end the trial court's role. There may still be things you want the trial court to do, and other things you definitely do *not* want it to do. What a trial court can and can't do pending review depends once again on the type of review.

Taking an appeal from the final order in a case almost completely terminates the trial court's jurisdiction pending the appeal. The trial court retains jurisdiction only to enforce its judgment,[21] and to adjudicate collateral matters such as attorneys' fees and costs.[22] Asking the trial court to consider any other issues pending review means first asking the appellate court to relinquish its jurisdiction over the case to allow the trial court to do so.[23]

A nonfinal appeal, on the other hand, leaves a trial court's jurisdiction virtually intact. The trial court may not interfere with the appellate court's jurisdiction by taking action that would affect the subject matter of the appeal,[24] and it may not enter a final order disposing of the case pending the appeal.[25] Otherwise, the trial court "may proceed with all matters, including trial or final hearing."[26]

A trial court's jurisdiction pending review by certiorari may be even broader. At common law, filing a petition for certiorari did not affect the trial court's jurisdiction at all; only issuance of the actual writ stayed proceedings.[27] Under the current system (in which the writ does not issue unless and until the order under review is quashed), at least one court has held that a trial court may even enter final judgment while a petition for a writ of certiorari is pending.[28]

Of course, you can always request a stay pending review.[29] In some circumstances, the stay may even be automatic.[30] But, absent such a stay, don't assume that your appeal or petition will stop the trial court proceedings. In most cases, the case will proceed simultaneously (although perhaps on different issues) in both courts.

Understand Concept of "Record on Appeal"

By this point, your case should be proceeding smoothly, albeit in two different courts. But before you hand the file off to an appellate attorney or sit down to draft your initial brief, take a minute to think about the record on appeal.

Everything an appellate court can know about a case must come from the record on appeal. An appellate court simply cannot and will not consider matters outside the record.[31]

In theory, the record on appeal is a record of everything that happened in the trial court. So, as long as you have adequately developed the record in the trial court, you should have no problems with the record on appeal.

In theory.

In reality, the record on appeal requires a little more attention. First, you need to know who will be in charge of preparing the record. In final order appeals, the clerk of the trial court prepares an actual record and transmits it to the appellate court.[32] In interlocutory appeals and extraordinary writ proceedings, an official record is not usually prepared.[33] Instead, the parties must prepare and transmit appendices containing the portions of the record relevant to the issues before the appellate court.[34]

Second, you need to pay attention to what goes in the record on appeal, especially if you're not the one preparing it. Unless otherwise directed by the parties, the clerk will include "the original documents, exhibits, and transcript(s) of proceedings, if any, *filed in the lower tribunal.*"[35] So, if hearings or trial proceedings are relevant to the issues in your appeal, you need to make sure those proceedings are transcribed and filed with the trial court.[36]

By the same token, the clerk will usually *exclude* "summonses, praecipes, subpoenas, returns, notices of hearing or of taking deposition, depositions, other discovery, and physical evidence."[37] If any such items are relevant in your appeal, you need to direct the clerk to include them.[38]

In short, you need to remember that the record you developed in the trial court is not automatically transformed into the "record on appeal." There are ways of making this happen;[39] it just requires a

little effort.

Don't Forget about Appellate Fees and Costs

There's no such thing as a free ride, and the appellate process is no exception. Fortunately, there are ways of making the process at least a little bit cheaper for your client.

As in the trial court, certain costs are taxable.[40] And if there's a statutory or contractual basis for attorneys' fees, it probably covers attorneys' fees incurred on appeal.[41]

There are, however, a couple of tricks to recovering appellate attorneys' fees and costs. Recovering appellate attorneys' fees requires a separate motion filed with the *appellate court*.[42] Failure to file a motion in accordance with Rule 9.400(b) is grounds for denial of appellate attorneys' fees.[43] Without an order from the appellate court granting the motion, a trial court has no authority to award appellate attorneys' fees.[44]

So if you're handling your own appeal, remember to file the motion. If another attorney is handling the appeal, remember to tell that attorney that there's a basis for fees.

Taxable appellate costs do not require a motion in the appellate court; they are usually automatically (and implicitly) awarded to the prevailing party on appeal.[45] However, they are actually taxed by the trial court.[46]

Thus, a motion to tax appellate costs must be filed with the *trial court* within 30 days after the appellate court issues its mandate.[47] Once that 30 days expires, the trial court loses jurisdiction to award appellate costs.[48] Until that happens, the appellate process isn't truly complete.

Conclusion

So that's it: five easy pieces of advice for getting your case to the appellate court and back again intact. Some of them are easier than others. At least they were all free.

Advice on actually *winning* the appeal? Now that'll cost you . . . . ❑

[1] *Dubowitz v. Century Vill. East, Inc.*, 381 So. 2d 252, 253 (Fla. 4th D.C.A. 1979).
[2] *See* Fla. R. App. P. 9.110.
[3] *See* Fla. R. App. P. 9.130.
[4] *See* Fla. R. App. P. 9.100. Review by certiorari or another extraordinary writ is technically an original proceeding, not an appeal. *See id.* However, as used in this article, the term "appellate process" includes this method of review.
[5] *See, e.g., Peltz v. Dist. Court of Appeal, Third Dist.*, 605 So. 2d 865 (Fla. 1992) (prohibiting district court of appeal from entertaining appeal because notice of appeal was untimely).
[6] Fla. R. App. P. 9.110(b).
[7] *See* Fla. R. App. P. 9.130(b).
[8] Fla. R. App. P. 9.100(b).
[9] Fla. R. App. P. 9.100(c)(1).
[10] *See Alfonso v. Dep't of Envtl Regulation*, 616 So. 2d 44 (Fla. 1993) (citing Fla. R. App. P. 9.040(b).
[11] *See* Fla. R. App. P. 9.900(a-c).
[12] *See* Fla. R. App. P. 9.100(g).
[13] *See* Fla. R. App. P. 9.040(c).
[14] Fla. R. App. P. 9.020(h).
[15] *Id.* The rule lists other motions that will also suspend rendition. *See id.* A motion *not* listed in the rule will usually not suspend rendition. *See, e.g., Fire & Cas. Ins. Co. v. Sealey*, 27 Fla. L. Weekly D428 (Fla. 1st D.C.A. Feb. 19, 2002).
[16] *See* Fla. R. App. P. 9.020(h); *Deal v. Deal*, 783 So. 2d 319 (Fla. 5th D.C.A. 2001) (citing *Wagner v. Bieley, Wagner & Assocs., Inc.*, 263 So. 2d 1 (Fla. 1972)). The motion must also be timely under the appropriate rule. *See* Fla. R. App. P. 9.020(h). "A motion for new trial or for rehearing shall be served not later than 10 days after the return of a verdict in a jury action or the date of filing of the judgment in a non-jury action." Fla. R. Civ. P. 1.530.
[17] *Deal*, 783 So. 2d at 321.
[18] *See id.*
[19] *See id.* (dismissing interlocutory appeal); *Newell v. Moore*, 27 Fla. L. Weekly D312 (Fla. 1st D.C.A. Feb. 1, 2002) (dismissing petition for writ of certiorari).
[20] *See* Fla. R. App. P. 9.130(g) (allowing for review of immediately appealable nonfinal orders on appeal "from the final order in the cause").
[21] *See, e.g., Wassman v. Travelers Cas. & Surety Co.*, 797 So. 2d 626 (Fla. 5th D.C.A. 2001); *State ex rel. Amer. Home Ins. Co. v. Seay*, 355 So. 2d 822 (Fla. 4th D.C.A. 1978).
[22] *See McGurn v. Scott*, 596 So. 2d 1042 (Fla. 1992) (citing cases).
[23] *See* Fla. R. App. P. 9.600(b).
[24] *See, e.g., Ward v. Gibson*, 340 So. 2d 481 (Fla. 3d D.C.A. 1976); *Waltham A. Condo. Ass'n v. Village Mgmt, Inc.*, 330 So. 2d 227 (Fla. 4th D.C.A. 1976).
[25] *See* Fla. R. App. P. 9.130(f).
[26] *Id.*
[27] *See e.g., State ex rel. Tullidge v. Driskell*, 158 So. 277 (Fla. 1934).
[28] *See Spielvogel v. Crown Realty Assocs.*, 465 So. 2d 532 (Fla. 4th D.C.A. 1985). The Florida Rules of Appellate Procedure do, however, provide for an automatic stay of proceedings upon issuance of a show-cause order in prohibition proceedings. *See* Fla. R. App. P. 9.100(h).
[29] *See* Fla. R. App. P. 9.310; *see also* Fla. Stat. §59 (authorizing supersedeas upon filing of a petition for a writ of certiorari).
[30] *See* Fla. R. App. P. 9.310(b).
[31] *See, e.g., Thornber v. City of Fort Walton Beach*, 534 So. 2d 754, 755 (Fla. 1st D.C.A. 1988).
[32] *See* Fla. R. App. P. 9.110(e).
[33] *See* Fla. R. App. P. 9.130(d); Fla. R. App. P. 9.110(i).
[34] *See* Fla. R. App. P. 9.220.
[35] Fla. R. App. P. 9.200(a)(1) (emphasis added).
[36] *See id.* 9.200(b) (outlining procedure for designating portions of proceedings to be transcribed and filed).
[37] *Id.* 9.200(a)(1).
[38] *See id.* 9.200(a)(3) (outlining procedure for directing clerk to include or exclude specific documents).
[39] In addition to the procedures outlined in the text, *see* Fla. R. App. P. 9.200(f), which provides for correcting and supplementing the record.
[40] *See* Fla. R. App. P. 9.400(a).
[41] *See* Fla. Stat. §59.46.
[42] *See* Fla. R. App. P. 9.400(b).
[43] *See United Servs. Auto. Ass'n v. Phillips*, 775 So. 2d 921 (Fla. 2000); *Salley v. City of St. Petersburg*, 511 So. 2d 975 (Fla. 1987),
[44] *See, e.g., Computer Task Group, Inc. v. Palm Beach County*, 27 Fla. L. Weekly D111 (Fla. 4th D.C.A. Jan. 2, 2002); *Garcia v. Garcia*, 570 So. 2d 357 (Fla. 3d D.C.A. 1990); *Real Estate Apartments, Inc. v. Bayshore Garden Apartments, Ltd.*, 530 So. 2d 977 (Fla. 2d D.C.A. 1988). Upon granting a motion for appellate attorneys' fees, the appellate court will usually remand the issue to the trial court for a determination of amount. *See* Fla. R. App. P. 9.400(b).
[45] *See* Fla. R. App. P. 9.400(a).
[46] *See id.*
[47] *See id.*
[48] *See, e.g., Mulato v. Mulato*, 734 So. 2d 477 (Fla. 4th D.C.A. 1999); *Executive Motors, Inc. v. Strack*, 527 So. 2d 286 (Fla. 1st D.C.A. 1988); *Thornburg v. Pursell*, 476 So. 2d 323 (Fla. 2d D.C.A. 1985).

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This column is submitted on behalf of the Appellate Practice Section, Hala A. Sandridge, chair, and Jacqueline E. Shapiro, editor.