Cross-Appeals: Party Postures and Strategic Considerations
By Jennifer L. Swize

Civil litigation, by its nature, produces winners and losers. Appeals afford the losing party an opportunity to correct what it perceives to be a mistake in the judgment. But there is not always one clear winner and one clear loser. Even in a straightforward case with a single claim against a single defendant, the outcome can be split, such as a judgment of liability accompanied by an award of only minimal damages. And many other cases involve multiple parties or counterclaims or cross-claims, for which the overall results can be mixed. In any such case in which the judgment is not entirely one-sided, the cross-appeal mechanism allows each disappointed party to appeal the portion unfavorable to it, with all but the initial appeal being known as “cross-appeals.”

For new lawyers confronting their first cross-appeal, the procedures can be unfamiliar and complicated, yet it is important to be mindful of the rules. Fortunately, if you are new to cross-appeals, there is considerable guidance in the Federal Rules of Appellate Procedure, thanks to Rule 28.1, a provision added in 2005 to specifically address cross-appeals. Rule 28.1 responded to decades of minimal provisions governing cross-appeals and the resulting development of different and conflicting procedures in the individual circuits. Although some circuits, consistent with their authority under the rules, have slightly modified Rule 28.1, these modifications have been at the margins. As a result, the rule has realized its drafters’ intention by establishing largely uniform procedures for cross-appealed cases.

The procedures affect more than the technical aspects of a cross-appeal. They are worth consulting with a strategic eye and as soon as a mixed judgment is entered. Under the rules, a party may wait to appeal after finding out if the other side appeals, or it may prefer to appeal as soon as possible to maximize its likelihood of being the lead appellant—a designation accompanied by more briefing space and the chance to file the first brief and speak first and last at oral argument.

When and Why to File a Cross-Appeal
A party has a longer time to cross-appeal than to appeal in the first instance. Initial appeals are due within 30 days—or, if the party is a U.S. entity, 60 days—of the district court’s entry of judgment. Fed. R. App. P. 4(a)(1). Rule 4(a)(3) extends that period for cross-appeals: A party wishing to file a cross-appeal has the remainder of the applicable 30- or 60-day period, or 14 days after the initial appeal was filed, whichever is later. Fed. R. App. P. 4(a)(3). This avoids the situation in which a party, with no desire to appeal unless its opponent appeals, learns of the opponent’s appeal at or near the end of the ordinary time period for appealing. With the additional time to cross-appeal, the party may take a “wait and see” approach. If its opponent
appeals, the party has a reasonable amount of time (at least 14 days) to make its final decision and prepare and file its cross-appeal.

In the Supreme Court, by contrast, all petitions are due at the same time. A party may, however, file a “conditional cross-petition” within 30 days of an initial petition being filed, but its fate depends on the initial petition: If the initial petition is denied, so too is the cross-petition. Sup. Ct. R. 12.5. To prevent the fate of its questions presented being dependent, the party must file within the original time.

Some courts of appeals similarly recognize a so-called “conditional cross-appeal.” But there, the “conditional” part is whether the cross-appeal’s merits will be reached, because the questions presented in a cross-appeal assume that the appellate court reverses the judgment. If the court upholds the judgment, it will not reach the merits of the cross-appeal. For instance, in the event the appellate court reverses and remands for a new trial, a conditional cross-appeal by the party that prevailed below may challenge evidentiary rulings that could affect the new trial. See, e.g., Godfrey v. Iverson, 559 F.3d 569, 570 (D.C. Cir. 2009). If your client is considering filing a conditional cross-appeal, you should consult the governing circuit law because some direct that these arguments should simply be raised in an appellee’s brief, reserving all cross-appeals for affirmative challenges to the judgment.

It is well settled, however, that if the party merely seeks to defend a judgment, even on grounds other than those embraced by the lower court, an appellee’s brief is sufficient. See United States v. Am. Ry. Express Co., 265 U.S. 425, 435 (1924) (it is “settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record,” even “an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it”). An appeal or a cross-appeal is required only when the party seeks to alter the judgment. See, e.g., Jones v. Bernanke, 557 F.3d 670, 676 (D.C. Cir. 2009) (a cross-appeal is unnecessary when the party seeks “no change in the final judgment in its favor” (citation omitted)); Bailey v. Dart Container Corp., 292 F.3d 1360, 1362 (Fed. Cir. 2002) (in a cross-appeal, “a party seeks to enlarge its own rights under the judgment or to lessen the rights of its adversary under the judgment”). There is less agreement on whether a cross-appeal (even a non-conditional cross-appeal) would actually be prohibited, as opposed to merely unnecessary, if it does not seek to change the judgment. Compare Jones, 557 F.3d at 676 (noting that the D.C. Circuit “encourage[s] such parties not to cross-appeal” when they seek no change in the final judgment), with Praxair, Inc. v. ATMI, Inc., 543 F.3d 1306, 1322 (Fed. Cir. 2008) (“a party lacks standing to cross-appeal unless it is adversely affected by the judgment it seeks to challenge”). Again, the relevant circuit law should be consulted.

To demonstrate an appropriate cross-appeal, if a case is dismissed but without prejudice and the plaintiff appeals the dismissal, the defendant should cross-appeal if it desires dismissal with prejudice, a substantive alteration of the judgment. See, e.g., Bernstein v. Bankert, 702 F.3d 964, 993 (7th Cir. 2012). Similarly, if the defendant appeals a damages award, the plaintiff should cross-appeal if it prefers a higher amount. See, e.g., Int’l Ore & Fertilizer Corp. v. SGS Control Servs., Inc., 38 F.3d 1279, 1285–86 (2d Cir. 1994) (declining to enlarge damages, a “new measure of relief,” without a cross-appeal). But to defend the judgment even on alternative
grounds, such as where the district court relied on an erroneous theory, the party may simply raise a different theory as an appellee if another party appeals.

**Taking the Lead**

Once all appeals in the case have been filed, the lead appellant can be identified. Under Rule 28.1(b), this is ordinarily the first party to appeal, unless the parties filed the same day, in which case it is the plaintiff. All other appellants are “appellees” for purposes of Rule 28.1.

The “first-in-time” rule, however, is not set in stone. Rule 28.1(b) provides that the designations may be modified by party agreement or court order. By internal operating procedure, the Seventh Circuit usually designates the party most aggrieved by the judgment as the lead appellant—a determination the clerk’s office makes. 7th Cir. Oper. Proc. 8. Other courts modify the default based on the facts and circumstances of an individual case. For instance, if a party becomes a cross-appellant by virtue of its later-in-time appeal, but the cross-appeal addresses more issues, more important issues, or issues that logically should be addressed first, that party may be designated the lead appellant. Other than in the Seventh Circuit, however, the default is that the first appellant takes the lead.

Rule 28.1’s use of “appellant” and “appellee” to describe the lead appellant and cross-appellant, respectively, also applies to Rule 30 governing the appendix responsibilities and Rule 34 governing oral argument. Fed. R. App. P. 28.1(b). For any other rule, “appellant” and “appellee” have their ordinary meaning. For instance, bond requirements (Rule 7), the obligation to order relevant transcripts (Rule 10), and voluntary-dismissal rules (Rule 42) apply equally to the lead appellant and all cross-appellants; each remains an “appellant” for purposes of those rules.

**Briefing Cross-Appeals**

The “lead appellant” designation has substantial consequences for briefing cross-appealed cases, which have four rounds instead of the typical three. Most importantly, the lead appellant has more space in which to make its arguments, and it files the first brief. Responsibility for compiling the joint appendix for all of the appeals, pursuant to Rule 30, falls on the lead appellant as well. These features often benefit the lead appellant by giving it greater control over the appeals and allowing it to make the first impression with the court. Parties should consider these strategic aspects when deciding whether to be the first appellant or wait to see whether any other parties appeal.

**Stage one.** The lead appellant files first, submitting a blue brief that complies with the rules for the principal brief in a standard appeal. It has 30 pages or 14,000 words to address all of the issues it is raising on appeal. Fed. R. App. P. 28.1(c)(1), (d), (e)(1), (e)(2)(A).

**Stage two.** The cross-appellant files next, submitting a red “principal and response brief.” Fed. R. App. P. 28.1(c)(2), (d). This brief has two parts: It first addresses the issues it is raising in its cross-appeal, and then responds to the lead appellant’s issues. This does not mean, however, that the cross-appellant has twice the space to lay out both sets of arguments. Although the cross-appellant has some additional space, its limit is 35 pages or no more than 16,500 words—about 20 percent more than the lead appellant’s blue brief. Fed. R. App. P. 28.1(e)(1), (e)(2)(B).
The cross-appellant may save room by omitting the case and facts if satisfied with the lead appellant’s statement (Fed. R. App. P. 28.1(c)), but parties often prefer to include their own formulation. And cross-appellants that attempt to save space in the discussion of their cross-appeal have been found to have waived those issues. See, e.g., Lore v. City of Syracuse, 670 F.3d 127, 171–72 (2d Cir. 2012) (cross-appellant’s one-sentence contention was insufficient); Landrum v. Mitchell, 625 F.3d 905, 913 (6th Cir. 2010) (cross-appellant’s claims not fully addressed in its brief were waived). A cross-appellant therefore must file a succinct and carefully crafted brief to discuss both its own issues and those of the lead appellant.

The other red briefs that are filed are those of any parties that are neither the lead appellant nor a cross-appellant—i.e., any true appellees. These briefs do not receive extra space, because they are not raising any issues themselves but are merely responding to the lead appellant and/or the cross-appellant. They are limited to 30 pages or 14,000 words. Fed. R. App. P. 32(a)(7).

If an appellee is responding only to the lead appeal, its brief will likely be due at the same time as the cross-appellant’s brief. However, if it is also responding to the cross-appeal, the court may delay that brief until after the lead appellant’s and cross-appellant’s briefs have been filed—effectively inserting another briefing stage, for five stages total. In that new stage, the true appellee would respond in toto to all issues on appeal. If your case involves this or another complicated scenario, it may be useful to alert the court to the issue or propose a sensible briefing schedule.

Stage three. The lead appellant next has an opportunity to respond to the cross-appeal and, if it wishes, have the final say on its appeal. Fed. R. App. P. 28.1(c)(3). The length for this yellow “response and reply brief” is the same as the blue brief—30 pages or 14,000 words. Fed. R. App. P. 28.1(d), (e)(1), (e)(2)(A). The result is a total of 60 pages or 28,000 words for the lead appellant to address all issues in the appeals. In addition, the lead appellant may save space by omitting the jurisdictional statement and statements of the issues, case, facts, and standard of review. Fed. R. App. P. 28.1(c)(3). But like cross-appellants preferring their own statements to those of the lead appellant, the lead appellant may prefer its own to those of the cross-appellant when responding on the cross-appeal.

Stage four. In the final stage, the cross-appellant has the option of filing a final reply brief on its issues—putting it, at least here, on the same footing as the lead appellant, because both get the “last word” on their issues. This gray brief may not exceed the scope of the cross-appeal, so it may not address the reply portion of the yellow brief. Fed. R. App. P. 28.1(c)(4), (d). The brief may not exceed 15 pages or 7,000 words. Fed. R. App. P. 28.1(e)(1), (e)(2)(C). The total amount of space for a cross-appellant—50 pages or 23,500 words—is thus less than the lead appellant’s 60 pages or 28,000 words.

Throughout each stage, each party is usually permitted to file its own brief, although parties may join or adopt other briefs by reference. Fed. R. App. P. 28(i). By local rule, the Fourth Circuit has changed that default: Unless the court orders otherwise, all parties on each side of a case file a consolidated brief. 4th Cir. Local R. 28(a), (d); see also, e.g., 7th Cir. Oper. Proc. 8 (ordinarily
requiring a joint opening brief for all appellants that “have the same or a closely related interest in the appeal”). In such instances, cooperation in producing the single brief is critical. If a consolidated brief is not appropriate given the parties’ differing interests, you should ask the court to depart from that rule and propose a reasonable alternative.

**Argument Order**

The lead appellant ordinarily speaks first and last at oral argument. Fed. R. App. P. 34(c), (d). Thus, even though the cross-appellant would have those positions if it were the only party to appeal, it generally loses that opportunity in a cross-appeal. Depending on the case or the way argument proceeds, however, the court may nonetheless want to hear from a cross-appellant after the lead appellant’s rebuttal. Argument is thus an additional factor to consider when deciding whether and when to appeal.

**The “Cost” of Being a Lead Appellant**

Although the lead appellant generally has the more favorable position throughout the appeals—shaping the case by filing and speaking first, having control over the appendix compilation, and getting the last word at oral argument—it does have one unique burden: the expense of compiling the appendix. In a cross-appealed case, a single appendix includes all of the materials from the lead appeal and any cross-appeals. The lead appellant therefore bears the up-front costs of compiling all of those materials and providing the proper number of copies to the court and the parties. If the appendix has many volumes, the cost can be thousands of dollars. Recovery of costs may also be important for any appellant, whether the lead appellant or cross-appellant, who has posted a supersedeas bond to avoid execution of a money judgment during the pendency of the appeal. Fed. R. Civ. P. 62(d).

Rule 39 governs the taxation of appellate costs. Fed. R. App. P. 39. Because Rule 28.1’s definitions of the lead appellant and cross-appellant as the “appellant” and “appellee” do not extend to Rule 39, the ordinary meaning of those terms apply. Thus, for purposes of Rule 39, a cross-appellant is the “appellant” for its appeal, and the lead appellant and any other parties are each an “appellee” in that cross-appeal. Rule 39 provides that when an appeal is dismissed or the judgment is affirmed—i.e., the appellant loses and the appellee wins—the appellee’s appeal costs are taxed against the appellant. If the judgment is reversed—i.e., the appellant wins and the appellee loses—the appellant’s costs are taxed against the appellee. For any other result—the judgment is affirmed in part, reversed in part, modified, or vacated—costs are taxed only upon order of the court. Fed. R. App. P. 39(a).

With cross-appeals, there can be both winners and losers on appeal. For instance, what if the judgment is affirmed in its entirety, so that the lead appellant loses (and the cross-appellant wins) on the lead appeal, and the cross-appellant loses (and the lead appellant wins) on the cross-appeal? There is a paucity of case law on the availability or method of recovering appellate costs in such instances, so creative approaches have potential.

As one example, the court could address each appeal separately and award to each prevailing party the costs it incurred in those appeals. To account for the portion of the appendix related to its success on the cross-appeal, the lead appellant could identify or estimate the portion of the

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appendix included solely or largely for the cross-appeal and seek a proportionate amount of costs.

Of course, a simpler alternative is to order each party to bear its own costs. But this approach is arguably inconsistent with the text of Rule 39, which intends to place the costs of an appeal on the losing party. Imposing all of the costs of the appendix on a lead appellant that prevailed on a cross-appeal, simply because it is the lead appellant, is inequitable. The lack of authority on this issue provides an opportunity for thoughtful and case-specific approaches, although given the lack of precedent, parties should be prepared to absorb all of their costs if the court simply orders each party to bear its own.

**Conclusion**

With a proper understanding of cross-appeals, junior lawyers confronting a mixed judgment can appropriately advise their clients whether they can or should appeal and, if so, when. In making those determinations, the different consequences of being the lead or a cross-appellant are important to consider, not simply to comply with the rules but also to advise clients on the most advantageous posture for their interests.

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