A Guide to Illinois Interlocutory Appeals

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Like every jurisdiction, Illinois has a process for appealing some issues while litigation is still underway in the trial court. In Illinois, most requirements for interlocutory appeal are laid out in Illinois Supreme Court Rules 306, 307, and 308. Here's a step-by-step overview.

TAKEAWAYS >>

- In Illinois, the requirements for matters that are appealable prior to the conclusion of the litigation in the trial court are principally contained in Illinois Supreme Court Rules 306, 307, and 308.
- Rule 306 provides for the interlocutory appeal *by permission* of a disparate collection of trial court orders. Similarly, Rule 307 applies to a variety of interlocutory trial court orders. But unlike Rule 306, Rule 307 allows a party immediately to appeal *as of right*.
- Rule 308 operates as a mechanism of last resort for the appeal of an interlocutory order. It differs from Rules 306 and 307 in that the subject matter scope of the appealable interlocutory order is not specified and is potentially unlimited so long as the parameters of the rule are met.

EVERY JURISDICTION ALLOWS APPEALS OF SPECIFIED MATTERS to an appellate court before the litigation is over in the trial court. In Illinois, most of those requirements are found in Illinois Supreme Court Rules 306, 307, and 308. Rule 306 governs interlocutory appeal by trial court permission, Rule 307 applies to interlocutory appeals of right, and Rule 308 allows interlocutory appeals by certified question. Here's a step-by-step overview of each.

Rule 306: Interlocutory appeals by permission

Appealable orders. Rule 306 allows the interlocutory appeal by permission of a disparate collection of trial court orders. They can be broken down by category as follows:

New Trial	Jurisdiction & Venue	Collateral Orders	Specialized Matters
306(a)(1): Grant of order for new trial	306(a)(2): Grant or denial on forum non conveniens motion for (i) dismissal, or (ii) transfer within state 306(a)(3): Denial of motion to dismiss for lack of personal jurisdiction 306(a)(4): Grant or denial of motion to transfer venue based on non-residence	306(a)(7): Grant of motion to disqualify attorney 306(a)(8): Grant or denial of class certification	306(a)(5): Order affecting parental responsibilities for unemancipated minor 306(a)(6): Order remanding proceeding to administrative agency for a de novo hearing 306(a)(9): Denial of motion to dispose under Citizen Participation Act

Consequences of not appealing under 306. In some case where appealing under 306 might not always be required, it's still a best practice to do so to avoid disappointed expectations.

New trial under Rule 306(a)(1). A postjudgment order for a new trial is interlocutory because it does not terminate the litigation. Illinois procedure usually permits non-final orders to be attacked on appeal of a final judgment. At least two appellate districts, however, the first and second, have stated that Rule 306 provides the exclusive means to appeal a new trial order.[1]

1. *Simmons v. Chicago Housing Authority*, 267 Ill. App. 3d 545, 554 (1st Dist. 1994); *In re Marriage of Clark*, 232 Ill. App. 3d 342, 346 (2d Dist. 1992).

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AN IMPORTANT CONSEQUENCE OF A RULE 306(A) APPEAL IS THAT THE TRIAL COURT PROCEEDINGS ARE STAYED WHEN THE PETITION FOR LEAVE TO APPEAL IS GRANTED.

The fourth and fifth districts are on record to the contrary. The cases from those districts both involved an initial denial of a 306(a)(1) petition for leave to appeal, followed by the appellant attacking the new trial order going to damages only, on appeal of the final judgment.[2]

Given the uncertainty in the case law, and depending on the appellate district, there's a chance that failing to pursue a Rule 306(a)(1) appeal will count as a waiver of the right to attack the new trial order. Consequently, if you're the party opposing the new trial order you should always appeal under Rule 306(a)(1).

Interlocutory appeals under Rule 306(a)(2)-(9). Issues falling under the remaining sub-parts of Rule 306(a) more clearly come within the general rule of being subject to review following final judgment, even if there's no appeal under Rule 306.[3]

But failing to seek interlocutory appeal might nonetheless have the practical effect of making relief harder to obtain. This is particularly true for orders allowing or denying motions based on the *forum non conveniens* doctrine, which are permitted by Rule 306(a)(2). In appeals following a trial on the merits, two cases have found that reversing the denial of the motion and thereby requiring a second trial in a different county is contrary to the doctrine, which seeks to accommodate the "convenience" of the parties.[4] Thus, the best practice is to appeal under Rule 306(a).

Effect of denial of leave to appeal. Does the denial of a Rule 306 petition for leave to appeal preclude a decision on the merits of the order sought to be appealed following final judgment? Probably not.

In a 1978 decision, the Illinois Supreme Court suggested possbile preclusion.[5] Without referring to that decision, however, the supreme court held in 1986 that the denial of a petition for leave to appeal an order denying a motion to dismiss on *forum non conveniens* grounds would not foreclose relitigation of the matter.[6] Though subsequent case law hasn't fully resolved the issue, denial of a Rule 306 petition today probably is not preclusive.

Consequences of appealing under Rule 306. Two consequences of taking an appeal under Rule 306 are evident from the rule itself.

One applies only to the appeal of a new trial order under Rule 306(a)(1). The last sentence of Rule 306(a) states that when such an appeal is taken, "all rulings of the trial court on the posttrial motions are before the reviewing court without the necessity of a cross-petition."[7] Thus, an appeal under Rule 306(a)(1) resembles an appeal after entry of an otherwise final and appealable judgment.

The second main consequence of a Rule 306(a) appeal is that the trial court proceedings are stayed when the petition for leave to appeal is granted. The stay is provided for under Rule 306(c)(5), which applies to all Rule 306 appeals except Rule 306(a)(5) (regarding care and custody of minors). As set forth in Rule 306(c)(5), the stay is automatic on the granting of the petition for leave.

Procedures for taking an appeal. The basic procedural steps for taking an appeal under Rule 306(a), except for Rule 306(a)(5), are set forth in Rule 306(c) and may be summarized as follows:

- The petition for leave must be filed within 30 days of entry of the order being attacked, under Rule 306(c)(1).
- The 30-day period is jurisdictional, absent an extension of time under Rule 306(c)(4).[8] Extensions of time for any deadline must be sought before expiration of the original time.
- A motion to reconsider the order in question does not extend the time for the petition.[9] A motion directed to the order that is based on new or different facts, however, could re-start the 30-day period for seeking leave.[10]
- Under Rule 306(c)(1) and (3), the petition must contain a statement of facts

2. *Craigmiles v. Egan*, 248 Ill. App. 3d 911, 913-19, 930 (4th Dist. 1993); *Koenig v. National Super Markets, Inc.*, 231 Ill. App. 3d 665, 667, 672 (5th Dist. 1992).
3. See *Crouch v. Smick*, 2014 IL App (5th) 140382, ¶ 27 (dealing with issues under Rule 306(a)(5)).
4. *Spiegelman v. Victory Memorial Hospital*, 392 Ill. App. 3d 826, 845-47 (1st Dist. 2009); *Brdar v. Cottrell, Inc.*, 372 Ill. App. 3d 690, 707 (5th Dist. 2007).
5. *Robbins v. Professional Construction Co.*, 72 Ill. 2d 215, 222 (1978).
6. *Kemner v. Monsanto Co.*, 112 Ill. 2d 223, 241 (1986).
7. Ill. S. Ct. R. 306(a).
8. *In re Marriage of Kostusik*, 361 Ill. App. 3d 103, 109-10 (1st Dist. 2005).
9. *People v. Deborah D.*, 351 Ill. App. 3d 172, 174 (1st Dist. 2004).
10. *Kemner*, 112 Ill. 2d at 241-42.

ISBA RESOURCES >>

- ISBA Free CLE, *Civil Practice & Procedure: Trial Practice 2017* (recorded May 12, 2017), http://onlinecle.isba.org/store/seminar/seminar.php?seminar=93107.
- Christine Olson McTigue, *Rule 307(a)(1) Appeals – Not for Injunctions Only*, 102 Ill. B.J. 12 (Dec. 2014), https://www.isba.org/ibj/2014/12/rule307a1appeals%E2%80%93notinjunctionsonly.
- Christopher T. Polilo, *Can Supreme Court Rule 308 Keep Your Case Alive?*, 96 Ill. B.J. 632 (Dec. 2008), https://www.isba.org/ibj/2008/12/cansupremecourtrule308keepyourcasea.

with references to a supporting record conforming to Rule 328, and also an appendix.

• The respondent's answer is due under Rule 306(c)(2) within 21 days of the filing of the petition, along with a supplementary supporting record if necessary.

• No replies are permitted except with leave of court.

• Under Rule 306(c)(7), if leave to appeal is granted, briefing follows the general requirements of Rules 341-343. Either side, however, may allow its petition or answer to stand as its brief.

The different procedures for petitions under Rule 306(a)(5) (care and custody of minors) are set forth in Rule 306(b).

Rule 307: Interlocutory appeals as of right

Appealable orders. Like Rule 306, Rule 307 applies to a variety of interlocutory trial court orders. But unlike Rule 306, it allows a party immediately to appeal as of right. These orders can be broken down as follows:

Injunctive Nature	Control of Assets	Specialized Matters
307(a)(1): Grant or denial of an injunction 307(d): Grant or denial of a temporary restraining order	307(a)(2): Grant or denial of order appointing receiver or sequestrator 307(a)(3): Grant or denial of order giving additional powers to receiver or sequestrator 307(a)(4): Grant or denial of order placing mortgagee in possession of property 307(a)(5): Grant or denial of order appointing receiver or similar officer for financial institution	307(a)(6): Order terminating parental rights or grant or denial of temporary commitment in adoption proceedings 307(a)(7): Order determining issues under § 20-5-10 of the Eminent Domain Act

Most of these are self-explanatory, but the provisions allowing immediate appeals of injunctive orders and orders under the Eminent Domain Act require explanation.

Injunctive orders. The Illinois Supreme Court has written that injunctive orders under Rule 307(a)(1) include "a judicial process, by which a party is required to do a particular thing, or to refrain from doing a particular thing."[11] Not included are "'ministerial' or 'administrative' orders" because they "do not affect the relationship of the parties in their everyday activity apart from the litigation."[12]

The court further found that "the traditions peculiar to equity jurisprudence and the historical powers of chancery courts" help determine what an injunction is and cautioned that "[n]ot every nonfinal order of a court is appealable, even if it compels a party to do or not do a particular thing."[13]

Within these broad parameters, the following types of orders have been found sufficiently injunctive to be immediately appealable under Rule 307(a)(1):

• Stay of court proceedings, arbitration proceedings, and administrative orders.[14]

• Order dismissing a claim seeking arbitration.[15]

• Interlocutory restraints on publication of information.[16]

• Civil contempt type order that may not have been appealable under Rule 304(b)(5).[17]

RULE 308 DIFFERS FROM RULES 306 AND 307 BECAUSE ITS SUBJECT MATTER IS NOT SPECIFIED AND IS POTENTIALLY UNLIMITED IF THE DICTATES OF THE RULE ARE MET.

On the other hand, the following types of orders are not appealable under Rule 307(a)(1):

• Discovery orders, including an order requiring a FOIA respondent to index documents.[18]

• An order staying discovery (although an order staying the litigation would be appealable).[19]

• An order directing payment of money into court.[20]

Eminent domain orders. The supreme court has held that the only eminent-domain matters subject to interlocutory appeal are those described in 735 ILCS 5/7-104(b) of the Eminent Domain Act, which has been recodified as 735 ILCS 30/20-5-10, as referenced in the current Rule 307(a)(7). Appeals are limited to (1) the government's right to exercise the power of eminent domain, (2) whether the property in question is subject to that right, and (3) whether the right is being

11. *In re A Minor*, 127 Ill. 2d 247, 261 (1989).
12. *Id.* at 262; *People v. Philip Morris*, 198 Ill. 2d 87, 110 (2001).
13. *In re A Minor*, 127 Ill. 2d at 261-62.
14. *Cholipski v. Bovis Lend Lease, Inc.*, 2014 IL App (1st) 132842, ¶¶ 30-35.
15. *Glazer's Distributors of Illinois, Inc. v. NW- Illinois, LLC*, 376 Ill. App. 3d 411, 420 (1st Dist. 2007).
16. *In re A Minor*, 127 Ill. 2d at 263.
17. *People v. Sheldon*, 2015 IL App (4th) 140857 ¶¶ 23-32.
18. *Goodrich v. Clark*, 361 Ill. App. 3d 1033, 1038-40 (4th Dist. 2005).
19. *Khan v. BDO Seidman, LLP*, 2012 IL App (4th) 120359, ¶¶ 53-55.
20. *People v. Philip Morris*, 198 Ill. 2d 87, 102 (2001).

improperly exercised.[21]

Consequences of not appealing under Rule 307. According to the supreme court, appeals under Rule 307 are not mandatory and a party "has the option of waiting until after final judgment has been entered to seek review of the circuit's interlocutory order."[22] The exception: the three appealable matters in eminent domain proceedings referenced above.[23]

There can, however, be practical reasons to pursue an immediate appeal under Rule 307(a). Under some circumstances, delaying the appeal until conclusion of the case could lessen your chances of success.

For example, the requirements for a permanent and a preliminary injunction are similar in that the plaintiff must establish irreparable harm for each.[24] A failure to appeal an adverse finding of irreparable harm at the preliminary injunction stage could result in the court making the same finding for the permanent injunction.

No stay under Rule 307. A Rule 306 appeal stays trial court proceedings. A Rule 307 appeal does not. Discovery and other trial court proceedings can move forward. The only restriction is that the trial court may not modify the challenged order or do anything else that would interfere with appellate review.[25]

Procedures for taking a Rule 307 appeal. Rule 307 encompasses the basic procedures for taking an interlocutory appeal as of right, with additional considerations given to ex parte orders and temporary restraining orders. The basic procedural steps are provided for in Rule 307(a) and (c) as follows:

• The notice of interlocutory appeal must be filed in the circuit court within 30 days of the interlocutory order being attacked, under Rule 307(a). The 30-day period is jurisdictional.[26] The rule makes no provision for extensions of time.

• A motion to reconsider the order in question does not extend the time to file the notice of appeal.[27] But an order granting or denying a motion to reconsider could be independently appealable.[28]

• A Rule 328 supporting record must be filed in the appellate court within the 30-day period, although that time may be extended. In parental rights termination cases, a Rule 323 record must be filed.

• Briefing takes place on an expedited schedule under Rule 307(c): Seven days for the appellant's brief, seven for the appellee's, and seven for the reply, timed from the filing of the record.

For ex parte orders, the same rules generally apply. The procedural nuance under Rule 307(b), however, is that the appealing party must first file a motion to vacate the order in the trial court. An appeal can then be taken from the denial of the motion or, alternatively, may be taken seven days after presentation of the motion if the court does not act within that time.

Interlocutory appeals of TROs take place on an even more expedited schedule detailed under Rule 307(d).

Rule 308: Certified questions

Appealable orders. Rule 308 is a last resort for the appeal of an interlocutory order. It differs from Rules 306 and 307 in that the subject matter of an appealable interlocutory order is not specified and is potentially unlimited if the dictates of the rule are met. Rule 308 also differs from discretionary appeals provided for in Rule 306 in that both the trial and appellate court – rather than just the appellate court – must rule that the order can be appealed.

The three initial findings for appealability under Rule 308(a) are that (1) the order being appealed "involves a question of law," (2) the question of law is one "as to which there is substantial ground for difference of opinion," and (3) an immediate appeal would "materially advance the ultimate termination of the litigation."

In the absence of one of these three findings, a court may find that it lacks jurisdiction for the appeal.[29] Here's an exploration of each.

Question of law. A "question of law" does not become appealable under Rule 308 solely because of the absence of a question of fact. Something more is required. Illinois courts have said that Rule 308 "was never intended to serve as a vehicle to appeal interlocutory orders involving little more than an application of the law to the facts of a specific case."[30] The question should have importance that transcends the particular case.

Illinois courts have also said that a matter phrased as a purely legal issue is not appropriate for resolution under Rule 308 if it is contingent on underlying facts that are unresolved. Such questions are regarded as "hypothetical...with no practical effect" or "advisory and provisional."[31] The appellate court may, but is not required to, re-formulate an improper question.[32]

Substantial ground for difference of opinion. Rule 308(a)'s difference-of-opinion requirement is self-explanatory. It is most often applied where conflicting court decisions on an issue dictate different outcomes. For example, the conflict might be between an appellate court decision and the Illinois Supreme Court or between two appellate courts.[33]

Differences of opinion providing a basis for a Rule 308 appeal might also arise by virtue of the following:

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21. *Department of Transportation ex rel. People v. 151 Interstate Road Corp.*, 209 Ill. 2d 471, 479 (2004).
22. *Salsitz v. Kreiss*, 198 Ill. 2d 1, 11 (2001).
23. 735 ILCS 30/20-5-10 (stating that the three matters are appealable "within 30 days after entry of the order, but not thereafter.").
24. *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52 (2006) (elements for a preliminary injunction); *Kopchar v. City of Chicago*, 395 Ill. App. 3d 762, 772-73 (1st Dist. 2009) (elements for a permanent injunction).
25. See, *e.g.*, *Hall v. Melton*, 321 Ill. App. 3d 823, 827 (1st Dist. 2001).
26. *Fuqua v. Svox AG*, 2014 IL App (1st) 131429, ¶ 16.
27. *Craine v. Bill Kay's Downers Grove Nissan*, 354 Ill. App. 3d 1023, 1028 (2d Dist. 2005).
28. See, *e.g.*, *Fuqua*, 2014 IL App (1st) 131429 at ¶ 15.
29. See, *e.g.*, *Kincaid v. Smith*, 252 Ill. App. 3d 618, 623 (1st Dist. 1993).
30. *Thomas v. Page*, 361 Ill. App. 3d 484, 494 (2d Dist. 2005).
31. *Spears v. Ass'n of Illinois Electric Cooperatives*, 2013 IL App (4th) 120289, ¶ 15.
32. *Rozsavolgyi v. City of Aurora*, 2017 IL 121048, ¶¶ 21, 23, 28.
33. *Id*. at ¶ 32.

• Ambiguous statutory language;[34]

• questions of first impression;[35] or

• doubts raised by a circuit court about the validity of a controlling appellate court decision, if the judge then follows that decision.[36]

Materially advance the ultimate termination of the litigation. The material-advancement requirement is the key justification for allowing an exception to the general rule prohibiting "piecemeal" appeals. Because Rule 308 does not require that the appeal completely resolve the litigation, it's important to understand what constitutes a "material" advancement.

Voss v. Lincoln Mall Management Co. is the most extensive discussion of "material advancement" analysis.[37] In summary, a court must consider whether the sought-after appeal

• involves an issue whose resolution could significantly lengthen or shorten the litigation;[38]

• involves the rights of third-party defendants who may be necessary to the case;[39] or

• comes at a stage in the litigation, such as shortly before trial, where it could delay or hasten the resolution of the case.[40]

Thus, both practical and legal considerations are important in determining whether an issue is appropriate for Rule 308 review.

No consequences for not appealing or denial of appeal under Rule 308. No waiver occurs if a party decides not to appeal under Rule 308.[41] Similarly, relitigation is not precluded by an appellate court's decision to deny leave to appeal under the rule.[42]

No automatic stay. Unlike under Rule 306, no automatic stay applies to the granting of leave to appeal under Rule 308. Rule 308(e), however, provides that either the circuit or appellate court may order a stay pending appeal. A decision by the appellate court on the certified question becomes the law of the case.[43]

Procedures for taking a rule 308 appeal. The basic procedures for taking an appeal under Rule 308 are as follows:

• First, the trial court must make the three findings discussed above. The findings can be made upon motion by a party or the court's own volition. They also can be a part of the interlocutory order giving rise to the findings or be made separately thereafter.

• Along with the three findings, the court must identify the question of law – the "certified question" – to be addressed. The question is usually drafted by a party and presented to the court, which may make modifications. The question itself must be a bona fide question of law.[44]

• An application for appeal must be filed within 30 days after entry of the interlocutory order or findings, whichever is later, under Rule 308(b). The time period is jurisdictional.[45]

• Under Rule 308(c), the application should include the question itself, facts necessary to understand it, and statements supporting the difference-of-opinion and material-advancement criteria. The application should be accompanied by a Rule 328 supporting record.

• An opposition to the application may be filed within 21 days from the due date of the application.

• If the application is allowed, Rule 308(d) gives the appellant 35 days to file a supporting brief and whatever additional record is necessary under Rule 321. Briefing follows the general appellate briefing rules. IBJ

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34. See, *e.g.*, *Italia Foods, Inc. v. Sun Tours, Inc.*, 2011 IL 110350, ¶ 1.
35. See, *e.g.*, *Chicago Hospital Risk Pooling Program v. Illinois Medical Inter-Insurance Exchange*, 325 Ill. App. 3d 970, 975 (1st Dist. 2001).
36. See, *e.g.*, *United States Bank National Ass'n v. Clark*, 348 Ill. App. 3d 856 (1st Dist. 2004), *rev'd on other grounds*, 216 Ill. 2d 334 (2005).
37. *Voss v. Lincoln Mall Management Co.*, 166 Ill. App. 3d 442 (1st Dist. 1988).
38. *Id.* at 447-48.
39. *Id.*
40. *Id.* at 449.
41. See, *e.g.*, *Crouch v. Smick*, 2014 IL App (5th) 140382, ¶ 27.
42. See *infra*, p. 44, section titled "Effect of denial of leave to appeal."
43. *Rommel v. Illinois State Toll Highway Authority*, 2013 IL App (2d) 120273, ¶ 16 (stating that by answering the certified questions, "an appellate court renders a final judgment.").
44. *Walker v. Carnival Cruise Lines, Inc.*, 383 Ill. App. 3d 129, 133 (1st Dist. 2008).
45. *People ex rel. Pressol GmbH & Co. KG v. Pressl*, 328 Ill. App. 3d 274, 277 (1st Dist. 2002) (referring to a 14-day time limit, now 30 days).