TEXAS LAWYER

Avoid These Common Notice of Appeals Pitfalls

Martin J. Siegel, Texas Lawyer

March 31, 2014

No phase of an appeal causes angst quite like the very first step: the notice of appeal. Forget to order the appellate record? The court will send helpful reminders. Blow that briefing deadline? You can always seek more time.

But the notice of appeal is different from everything that follows. Because filing it on time confers jurisdiction on the court of appeals, botching it can strangle the appeal in its cradle. Given the potentially dire consequences involved, beware these common pitfalls that can trip up even experienced practitioners.

First, the good news: The notice of appeal is simple, and courts will bend over backwards to construe it in favor of permitting the appeal. Under Federal Rule of Appellate Procedure 3(c)(1), the notice only has to identify the party taking the appeal, the order or judgment being appealed, and the appellate court. The rules even include a handy form for cribbing.

Texas Rule of Appellate Procedure 25.1(d) is similar: The notice must state that the party desires to appeal, identify the trial court and the case's number and style there, give the date of the judgment or order being appealed, state the court to which the party is taking the appeal and identify the appealing party.

When it comes to interpreting notices, the U.S. Court of Appeals for the Fifth Circuit described the reigning approach in 1939 in *Crump v. Hill*: It would "be a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty upon justice, to hold that the extremely simple procedure required by the Rule is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with it defeats substantial rights."

Consequently, Federal Rule 3(c)(4), added in 1993, precludes dismissing an appeal "for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice." Any functional equivalent of the filing will do if it provides the required information. The Fifth Circuit wrote in 2010 in Williams v. Henagan that the appeal will proceed as long as "the intent to appeal an unmentioned or mislabeled ruling is apparent [from the

notice] and there is no prejudice to the adverse party."

Texas procedure is even looser. The cases hold that a defective filing suffices if it evinces a bona fide attempt to invoke the appellate court's jurisdiction. Texas Rule 25.1(g) also allows amendment of the notice to cure defects or supply missing items any time up to the filing of the brief, and courts typically notify appellants of facially apparent defects and extend time to make the correction.

This is one place where federal law diverges. While Federal Rule 4(a)(4)(B)(ii) allows the appellant to amend the notice to appeal new, post-judgment orders, amendments to fix errors in the first notice must occur within the original deadline to notice the appeal.

Danger Ahead

Yet for all this wonderful lenience, fatal errors are still possible. Perhaps the biggest minefield involves identifying what the appellant wants the court to review.

In general, interlocutory orders merge into the final judgment, so a notice indicating the appellant's intention to appeal the final judgment also preserves appeal from earlier rulings intertwined with it.

The trouble starts when the appellant designates specific orders in the notice, rather than a final judgment. That can happen because the appeal is interlocutory or because the appellant prefers to specify for some reason.

"Where a notice of appeal lists particular orders only (and not the final judgment), we are without jurisdiction to hear challenges to other rulings or orders not specified in the notice of appeal," noted the Fifth Circuit in *Jordan v. Ector County* (2008).

Likewise, in Texas courts, a party can't use amendment to change the judgment or order that was originally designated in a notice or add other ones for review.

For example, assume that a notice of appeal identifies an order disposing of particular claims as the decision the appellant wants the court to review. What happens if the notice fails to mention a final judgment or previous orders resolving other claims? In that case, the notice may not extend appellate jurisdiction over the earlier orders.

A related mishap occurs when the loser notices an appeal from the final judgment before the trial court denies a motion for new trial or grants fees. Postjudgment decisions like these cannot merge into the judgment because they come later. As a result, a party interested in appealing a postjudgment order must file a new notice—or, in federal court, an amended notice under Federal Rule 4(a)(4)(B)(ii)—even if her previous appeal is pending.

Then there are troubles with parties. Naming an appellant in his individual capacity in the notice does not preserve appeal for that person in a representative capacity. While there is no requirement that a notice identify the appellee, naming some may be construed to exclude appeal of the judgment in favor of others not listed.

Finally, cause numbers also can complicate things. Appellants who previously severed interlocutory orders into separate causes sometimes find it tempting to use the old cause number when

appealing the newly severed final judgment. While misstating the cause is normally correctible error, the Texas Supreme Court has suggested in *City of San Antonio v. Rodriguez* (1992) that the mistake could constitute grounds for dismissal if it makes it hard for parties and courts to determine what the appellant wants reviewed.

Other issues at the outset of an appeal can produce heartburn, too. Was the notice or request for an extension filed in time? Is the order in question properly appealable?

Slowing down, deactivating autopilot and closely reviewing the text of the notice of appeal within the context of the overall case is well worth the time. When the consequences of error are so important, even simple items bear a second look.

Martin J. Siegel handles complex civil appeals and trial court briefing and argument with the Law Offices of Martin J. Siegel in Houston. His email address is martin@siegelfirm.com.
