Briefly: How much notice is enough?

By: Eric Magnuson September 16, 2019


Eric Magnuson

Over the course of litigation, trial judges make dozens of rulings that affect a client's case. At the end of day, if your client is dissatisfied with the outcome, you have to file a notice of appeal, being careful to raise all of the issues that might impact the outcome of the appeal. Recently, the federal courts began consideration of an amendment to the rule concerning the contents of the notice of appeal, to resolve a lingering question about how much detail you have to include in the notice to cover all the bases.

First some background. As a general proposition, the appellate rules are structured so there is only one appeal, and it is taken at the end of the case. While there are certain exceptions for important interlocutory appeals, such as injunctions and receiverships, generally the rules contemplate a single appeal raising all issues. Judicial economy is the goal.

Another axiom of appellate practice is that issues not preserved may not be raised on appeal. One of the aspects of error preservation is to provide notice to the opposing party that you intend to challenge a particular ruling of the trial court on appeal. In Minnesota, the general rule is that an appeal from a final judgment brings up for appellate review all orders entered prior to the judgment that affect the judgment. See Minn.R.Civ. App. P. 103.04. This includes not only rulings made during trial (assuming that they are preserved by a proper post-trial motion), but also pretrial orders to the extent that they affect the judgment. Kronzer v. First Nat. Bank, 305 Minn. 415, 235 N.W.2d 187 (1975). So, for example, if the court issues an order before trial refusing to dismiss a case on the statute of limitations, that issue is included in an appeal from the final judgment.

Like every general proposition, however, there are exceptions. When the trial court denies a motion for summary judgment, that denial is generally not subject to appellate review after a trial on the merits, because the question becomes whether there is sufficient evidence in the record to support the judgment, not whether in pretrial proceedings, there was enough evidence to go to trial. Bahr v. Boise Cascade Corp., 776 N.W. 2d 910, 918 (Minn. 2009).

Another exception has to do with change of venue. The Court of Appeals has held that failure to seek review of an order denying a change of venue request as a matter of right is waived unless a writ of mandamus is sought. Peterson v. Holiday Recreational Indus., Inc., 726 N.W.2d 499, 503-04 (Minn. Ct. App. 2007).

It also is not clear whether an appeal from a judgment brings up for review orders issued after the judgment is entered. Compare Konkel v. Fort, 245 Minn. 535, 73 N.W.2d 613 (1955) (stating general rule that only orders issued prior to entry of judgment are reviewable on appeal from the judgment) with Bush Terrace Homeowners' Assoc. v. Ridgeway, 437 N.W.2d 765 (Minn. Ct. App. 1989) and Hackett v. State Dept. of Nat. Res., 502 N.W.2d 425 (Minn. Ct. App. 1993). In those Court of Appeals cases, the court read Rule 103.04 broadly to allow review of post-trial orders on appeal from the judgment alone. But the safer course clearly would have been to include specifically the post-trial decisions in the notice of appeal.

The upshot of this is that you have to exercise some care in drafting the notice of appeal. Some time ago, the United States Supreme Court ruled that if a notice of appeal was filed on behalf a named party, and others were included in the notice by designation "et al.," only the named party had perfected the appeal, and "et" and "al." were not parties to the appeal.

Torres v. Oakland Scavenger Co., 487 U.S.312 (1988). That ruling was pretty quickly overturned by an amendment to the rules, but you can see how precision in the notice of appeal is important.

The Committee on Rules of Practice and Procedure of the United States Judicial Conference has recently proposed an amendment to Federal Rule of Appellate Procedure 3 that is intended to resolve conflicting treatment of notices of appeal by the circuits. Some circuits construe a notice of appeal from a final judgment that mentions only one interlocutory order, but not others, to limit the appeal to that order, rather than all interlocutory orders that have merged into the judgment. The committee's report may be found at https://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment .

The proposed amendment would bring the federal practice more in line with Minnesota state practice. However, until that rule is clarified, it is probably safest to include in your notice of appeal a reference to every order that you think gives rise to appealable issue, and to preface that list by the statement that you are appealing from the final judgment and "all prior orders effecting the judgment, including, but not limited to" your listed orders.

That may give rise to a very cumbersome notice of appeal. You can cut things down a bit if you carefully consider what issues you are going to raise on appeal. Appellate wisdom is that fewer issues are better, and in your brief, you certainly don't want to complain about every single thing that went against you in the trial court. But that is a briefing issue, not a notice of appeal issue, and if the notice of appeal isn't crafted so that an issue can be raised on appeal, then you have already made the decision not to brief it.

It is true that notices of appeal are liberally construed and the courts often reach quite far to conclude that a would-be appellant has provided adequate notice to a would-be responding party of the issues to be raised on appeal. This includes looking at nonjurisdictional documents, like docketing statements and statements of the case, to flesh out an otherwise ambiguous or incomplete notice of appeal. In Minnesota, the statement of case requires parties to list the issues they intend to raise, and while that clearly is not a jurisdictional document, the Court of Appeals has been known to look at the statement of the case to resolve uncertainty concerning the scope of the notice of appeal. However, while some appellate decisions look outside of the four corners of the notice of appeal to ancillary pleadings filed in connection with the appeal to determine the scope of appeal, that seems to be largely a matter of largesse by the appellate courts and not something upon which you want to rely.

Like most things in appellate practice, it is better to be safe than sorry. You should do your best never to put your client in the position where she or he has to ask for lenience from the appellate court in order to have their case fully heard. And remember, notices of appeal cannot be amended. You may be able to file a second notice of appeal if you've missed something, and have enough time, but that is the rare case.

So in the end, what do you do? First of all, before you file an appeal, you should have a clear idea of what issues you want to raise. Not every issue is worth an appeal. You have to consider whether the issue was preserved at trial, and, most importantly, what standard of review applies to that issue. You also have to decide if raising a number of issues weakens your strongest one. Common wisdom among appellate judges is that the more issues they see the less any of them are likely to be very persuasive.

But once you have assessed your appeal, carefully draft the notice of appeal to make sure that there is no doubt that you are raising all the issues that you think are worthy of the appeal. Like most things in appellate practice, a bit of forethought, and some careful drafting, can go a long way towards making the path of appellate justice smoother.

Eric J. Magnuson is a partner at Robins Kaplan LLP and served as Chief Justice of the Minnesota Supreme Court from 2008 to 2010. He has more than 35 years of experience practicing law and he focuses his practice almost exclusively in appellate courts.