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Briefly: Federal appeals: How much notice is enough?

By: Stephen Safranski and Geoffrey Kozen September 27, 2021

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The humble federal notice of appeal: Most of us probably think of it as the quintessential formality, obtaining judicial review simply by ticking the right boxes. Yes, you have to file it on time; you have to identify the judgment or order being appealed; and of course you have to pay the filing fee. With the exception of filing within the jurisdictional deadline, you don't have to do those things perfectly, or even competently, to obtain review. In the Supreme Court's judgment, "mere technicalities [related to the notice of appeal] should not stand in the way of consideration of a case on its merits." Torres v. Oakland Scavenger Co., 487 U.S. 312, 316 (1988). In light of that, the 8th Circuit has adopted "a policy of liberal construction of notices of an appeal in situations where intent is apparent." Spectra Commc'ns Grp., LLC v. City of Cameron, Mo., 806 F.3d 1113, 1118 (8th Cir. 2015).

Earlier this year the Supreme Court announced that it will be loosening the standards even more by amending Rule 3, effective Dec. 21, 2021. Rather than having to identify all orders being appealed, the rules are now explicit that the "notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal." Proposed FRAP 3(c)(4). Similarly, they now prohibit the courts of appeals from dismissing an appeal "for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment." Proposed FRAP 3(c)(7).

With such forgiving standards in play, the notice of appeal certainly doesn't seem like a potential minefield for practitioners. And while that comfort remains largely true, it turns out it isn't entirely true; it seems that at the same time the Supreme Court is liberalizing the requirements of a notice of appeal, the 8th Circuit may be cracking down a bit. It released an interesting opinion earlier this summer, showing that while the bar is low, there is indeed a bar of drafting coherence and competence beneath which would-be appellants' counsel may not sink. In an unusual move, the court dismissed two appeals for lack of appellate jurisdiction based on serious drafting errors in the notices of appeal. The notices of appeal were timely filed in the district court docket; all filing fees were paid; and the parties had even fully briefed the appeals. But the court sua sponte determined that these notice-of-appeal drafting errors, all by themselves, created "an absolute bar to appeal." Newcomb v. Wyndham Vacation Ownership, Inc. et al., No. 19-3109 (8th Cir. June 8, 2021).

The current FRAP 3(c) does impose a few basic requirements for the contents of the notice of appeal—you have to specify the party or parties taking the appeal by naming each one in the caption or body of the notice, designate the judgment or order being appealed, and name the court to which the appeal is taken. In a case that is unlikely to repeat itself very often, the Newcomb decision illustrates that it is possible to get these components so wrong as to miss the jurisdictional boat. While filing the notices of appeal in a case from the Western District of Missouri, counsel purported to appeal an order of the "Southern District of Missouri" to the "United States Court of Appeals for the Southern District of Missouri," and then misidentified the date of the order being appealed. In the panel's concise summary, the notices of appeal thus purported to relate to "an order entered on a day when no order issued, from a district court that does not exist, to a court of appeals that does not exist." Newcomb at *6.

Still, the appellants' intent was arguably apparent from the overall context. Despite the mislabeling, they filed their appeal in the district court where their case was pending, in the correct district court docket, and the notices said they were appealing an order dismissing the case, resulting in the case being docketed in the proper court of appeals and proceeding all the way through briefing on the merits. Nevertheless, the panel clearly expected more from licensed attorneys:

> "The complete failure by parties who are attorneys engaged in multi-state litigation to comply with multiple essential elements of Rule 3(c)(1) is not 'imperfect but substantial compliance with a technical requirement' that we may excuse; it is an absolute bar to appeal."

Interestingly, the panel was also swayed by what it saw as the prejudice that the defendants would endure if they had to litigate the fully briefed appeal, compared to an apparent lack of prejudice to the plaintiff who could litigate the same issues in another case pending in another jurisdiction.

While Newcomb stands as an appropriate admonition to licensed attorneys that some minimal diligence and proofreading is required in drafting the notice of appeal (the bar is

low, but there is one), we hope that it does not augur new obstacles to appellate review for pro se litigants. After all, the fundamental right to counsel itself owes a debt to Clarence Gideon's handwritten, pro se letter to the Supreme Court on prison stationary, which is a popular exhibit in the National Archives, and to the similar handwritten petitions he submitted to the lower courts. There's no indication that Mr. Gideon deviated from any procedural requirements in perfecting his petition for habeas corpus, his notice of appeal, or ultimately his petition for certiorari. But not all pro se litigants can be expected to have as strong a grasp of procedural requirements as Mr. Gideon appears to have. That lack of comparative sophistication should not preclude those individuals from raising potentially meritorious claims. If Mr. Gideon's intention was ascertainable, do we want review or the development of important precedents to depend on whether he correctly identified the date of his conviction or the court that convicted him?

Newcomb leaves us with an interesting question. On the one hand, the 8th Circuit was express in holding that the errors in the notice of appeal, by "parties who are attorneys engaged in multi-state litigation," were severe to the point of stripping the court of subject matter jurisdiction, "an absolute bar to appeal." On the other hand, the evolving policy of liberal construction of notices of appeal seems most justified in cases involving pro se litigants less likely to consistently adhere to such procedural niceties, so long as their intent is not in doubt. But it would be extremely rare for any court's subject matter jurisdiction to hinge on the legal sophistication of the party filing the notice of appeal. We remain hopeful that, despite the oddity, the 8th Circuit follows the Supreme Court's lead of embracing this new distinction to increase access to the courts.

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