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How Many Mistakes Can a Single Notice of Appeal Contain?

By Benjamin G. Shatz
Focus

A notice of appeal is one of the simplest documents a lawyer can prepare. Usually the only serious attention paid to preparing a notice of appeal is to ensure a timely filing, because as a jurisdictional document, a tardy filing precludes an appeal. *Hohn v. United States*, 524 U.S. 236 (1998) (timely notice of appeal is mandatory and jurisdictional).

Sometimes deeper analysis is needed to confirm that the order or judgment at issue is appealable, or to address calendaring complexities introduced by tolling motions. But apart from these questions, simply filing a notice of appeal is about as easy as it gets.

In federal practice, a notice of appeal typically takes the form of a single sentence on a single page. It need only specify three items: who is appealing (i.e. the appellants must be named in either the case caption or body of the notice); what order or judgment is being appealed; and the court to which the appeal is being taken. Federal Rule of Appellate Procedure 3(c). That's it. And these three items are liberally construed, too, to ensure no appeal is lost on a technicality in the notice of appeal. Thus, errors in notices of appeal typically have no substantive effect.

For example, consider the following true story from last year. A copyright infringement action is pursued in federal district court in the Northern District of California. The plaintiff prevails on summary judgment. The defendants had 30 days after entry of judgment to file a notice of appeal. Federal Rules of Appellate Procedure 4(a)(1)(A). The plaintiff eagerly monitors the district court docket sheet for a notice of appeal, but more than 30 days elapse and no notice appears. Is the plaintiff's judgment necessarily in the clear? Actually, no.

Mistake 1: Apparently, on the last possible day, a notice of appeal *was* filed - but was filed in a Court of Appeals. It therefore did not show up on the district court docket. Notices of appeal, of course, are supposed to be filed in the district court. Federal Rules of Appellate Procedure 3(a)(1) and 4(a)(1)(A). But the mistake of filing in the appeals court has no substantive effect.

In fact, the Federal Rules of Appellate Procedure contemplates precisely this error. Rule 4(d), captioned "Mistaken filing in the Court of Appeals," expressly provides that if a notice of appeal is "mistakenly filed in the court of appeals," the appellate court clerk must note the date it was received and send it to the district court clerk. When it reaches the district court, it is then considered filed as of the date it reached the appellate court. Thus, this mistake was harmless, although it did inject delay in processing while the appellate and trial courts sent the documents back and forth. The lesson, of course, is to file the notice of appeal in the district court.

Mistake 2: A filing fee must accompany a notice of appeal. In this instance, the defendants included a check for $250. But the fee (at the time) was $255. (The filing fee now is $455.) This mistake was harmless too. Although Rule 3(e) requires that an appellant pay the filing fee when the notice of appeal is filed, under Supreme Court precedent a notice of appeal is considered timely even if the fee is paid late. *Parissi v. Telechron Inc.*, 349 U.S. 45 (1944). Again, sound practice dictates following the rules and including the filing fee, in the correct amount, with the notice of appeal.

Mistake 3: There is a further procedural wrinkle to this tale. After the Court of Appeals returned the erroneously filed notice of appeal to the district court, the district court docketed the notice and then sent it back to the Court of Appeals for processing. A notice of appeal must indicate the name of the court to which the appeal is taken. Federal Rules of Appellate Procedure 3(c)(1). In this case, the notice of appeal stated that the defendants appealed to the Court of Appeals for the Federal Circuit. The Federal Circuit is a specialized appellate court in Washington, D.C., that has limited jurisdiction to hear certain types of matters, including patent and trademark cases. 28 U.S.C. Section 1295. But this was a *copyright* action. No patent, trademark or other claim that could give rise to Federal Circuit jurisdiction existed.

Accordingly, any appeal had to be to the circuit embracing the district court, which in this case was the 9th U.S. Circuit Court of Appeals. 28 U.S.C. Section 41. Surely purporting to appeal to the wrong court of appeals invalidates the notice, right? Nope. Again, appealing to the wrong court of appeals is not substantive. *Dillon v. United States*, 184 F.3d 556 (6th Cir. en banc 1999) (where only one proper avenue of appeal exists, a notice of appeal need not name the appellate court); *United States v. Musa*, 946 F.2d 1297 (7th Cir. 1991) (notice of appeal valid despite appealing to wrong circuit).

The only negative consequence was yet more delay and procedural hassle in getting the appeal properly docketed in the correct court. Meanwhile, docketing an appeal in the Federal Circuit requires the filing of several additional forms, from all parties: an entry of appearance form, a certificate of interest and a mediation docketing statement. All of these procedural steps were a wasted effort, given that the Federal Circuit lacked jurisdiction from the outset. In this case, it took almost three months from the time the notice of appeal originally reached the Federal Circuit for that court to order the appeal transferred to the 9th Circuit under the "Transfer to cure want of jurisdiction" statute, 28 U.S.C. Section 1631.

Mistake 4: One might suspect that the error of filing in the Federal Circuit arose because the defendants' lawyer was unfamiliar with the distinctions between the intellectual property doctrines of patents and trademarks on one hand and copyrights on the other hand. In fact, however, the defendants specifically had hired an intellectual property specialist as counsel to file the appeal. But this lawyer, admitted to the patent bar, apparently specialized in patent and trademark matters. Further, this lawyer was not admitted to practice in the Northern District of California or the 9th Circuit. Again, admission status is a technical irregularity the courts are inclined to excuse. *Republican National Committee v. Taylor*, 299 F.3d 887 (D.C. Cir. 2002) (appeal would not be dismissed for technical violation that notice of appeal was not signed by member of district court bar); *cf. Cove/Mallard Coalition v. U.S Forest Service*, 67 Fed. Appx. 426 (9th Cir. 2003) (notice of appeal void where signed by lawyer whose district court pro hac vice admission had been revoked). The lesson: hiring a specialist is a good idea, but make sure the right sort of specialist is retained - preferably one admitted to practice, and with experience, in the relevant court.

Then there is the content of the notice of appeal itself. The defendants used a form notice of appeal, which has only three blanks to fill in. The first is a spot to "name all parties taking the appeal." Federal Rules of Appellate Procedure 3(c)(1)(A). In this instance, the blank was filled in with "the Defendants," instead of specifically naming the appellants, and the caption to the notice read simply "XYZ Inc., et al."

Thus, the only defendant named anywhere on the notice was XYZ Inc., with no indication of who the "et alia" parties might be. The rules and case law do allow an attorney representing more than one party to describe those parties as a group such as "the Defendants." Federal Rules of Appellate Procedure 3(c)(1)(A); *National Center For Immigrants' Rights Inc. v. INS*, 892 F.2d 814 (9th Cir. 1999). But this ability to be imprecise came only with the 1993 amendments to Rule 3(c), designed to liberalize the rule after *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), held that using "et al." in a notice of appeal was fatal to the unspecified parties' appeal. Even so, the better practice is to name the parties.

Next, the form had a blank to fill in to explain what the appeal was from, e.g., a final judgment or appealable order. The form parenthetically, but specifically, states "describe the order." Nonetheless, the defendants completed this blank with only the unhelpful word "order."

This entry is problematic, and not simply because it is entirely undescriptive. Recall that the plaintiff won a summary judgment motion and judgment thereafter was entered. Technically then, the appeal should be taken from the final judgment that was entered, not the order granting summary judgment. Again, however, the federal courts do not consider this error significant.

Ultimately, the defendants' appeal ended up where it belonged: at the 9th Circuit. Once docketed there - a process that took more than a month - the defendants were required to file a civil appeals docketing statement. The defendants failed to do so (despite an express order), forcing the court to issue another order setting a final deadline either to file a civil appeals docketing statement or a voluntary dismissal.

Again, the defendants ignored the court's order. The reason, presumably, was that the case had settled. While the respectful course of action would have been to alert the court to the settlement and then file a dismissal under Rule 42(b), instead the defendants simply abandoned their appeal - which had taken so long to properly docket in the right court - by ignoring it. Eventually - nearly a month later - the 9th Circuit got around to dismissing the appeal on its own.

As recounted above, the notice of appeal at issue crossed the country several times: first it was erroneously filed in the Federal Circuit in Washington, D.C. Next, it was returned to California for proper filing in the district court. Then it was sent back to Washington for appellate docketing. Finally, it was sent back to California again, this time to the 9th Circuit in San Francisco, for docketing in the correct appellate court.

One lesson from this saga could be that the courts are very forgiving of errors - even elementary mistakes - in a notice of appeal. A more valuable moral, however, is that even a simple notice of appeal can cause tremendous procedural hassles if the basics are overlooked. A lawyer can get away with making

mistakes, but no serious practitioner wants to be that lawyer.

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