

On Notice: How to Avoid Improper Notices of Appeal

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Rule 3 of the North Carolina Rules of Appellate Procedure seems pretty clear.

A Notice of Appeal must "designate the judgment or order from which appeal is taken." But what might seem clear on its face isn't always so clear in practice.

What does it mean to "designate the judgment or order" that you're appealing? Does the appealing party need only designate the judgment or other order that gives appellate jurisdiction, or should it also designate all judgments or orders that will be challenged in the appeal?

The answers to these questions are easy in the case of an appeal from a "final" judgment, one that can be appealed of right. In that case, the Notice of Appeal simply needs to reference that judgment. For instance, if the court dismissed your case or awarded the opposing party summary judgment, then you simply identify the order ended the case.

The answer gets harder when the appeal challenges an interlocutory order. That is, an appeal from an order that did not resolve all the issues in the case. Some interlocutory orders, like those that affect "substantial rights," are immediately appealable. For example, an order determining that your client waived the attorney-client privilege and requiring the production of a privileged document can be appealed immediately. In that case, the Notice of Appeal needs to designate the immediately appealable interlocutory order.

But what happens when you want to appeal an interlocutory decision at the end of the case? This could happen, for instance, if the trial court denied your motion for leave to amend the complaint. That decision typically doesn't affect a substantial right, making an immediately appeal unlikely. But that decision does hamper your trial strategy. Without the benefit of the amended complaint, your client goes to trial and has an adverse outcome. How do you bring that interlocutory order denying the motion for leave to amend before the Court of Appeals?

The North Carolina Court of Appeals recently answered that question in *Manley v. Maple Grove Nursing Home*. In an opinion by Judge Allegra Collins, the Court determined that to challenge an interlocutory order in an appeal taken after final judgment, the notice of appeal "must designate both the interlocutory order and the final judgment rendering the interlocutory reviewable in its notice of appeal."

Here's what the Court's opinion means in practice. If you're angling to appeal the Court's decision denying your motion for leave to amend, your Notice of Appeal should designate *both* the order denying you leave to

amend and the order disposing of your case. Each order or judgment that a party intends to challenge on appeal must be identified in the Notice of Appeal.

In appellate lawyer-speak, the Court's opinion makes clear that North Carolina does not adhere to the "merger rule." Put another way, all of the trial court's interlocutory orders do not "merge" into one judgment at the end of the case.

Manley is consistent with North Carolina's historical practice. While this may not be new, North Carolina's rejection of the merger rule might soon be added to the list of things that distinguish state from federal appellate practice. In August 2019, the Federal Appellate Rules Committee—the body that oversees the Federal Rules of Appellate Procedure—issued proposed changes to the Federal Rules of Appellate Procedure, including a proposed change to Rule 3. Proposed Rule 3(c)(4) makes clear that the federal courts of appeals may adhere to the merger rule in the future. The proposal provides, "The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal." That means that, unlike in North Carolina's appellate courts, the Notice of Appeal in federal court will need only reference the trial court's final judgment.

It is worth monitoring whether proposed Rule 3(c)(4) of the Federal Rules of Appellate Procedure is ultimately adopted. Regardless, the *Manley* decision is another reminder that North Carolina state court practitioners must include every order or judgment to be challenged on appeal in the Notice of Appeal.

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