

## Noting Your Appeal Isn't Always So Simple

A mere misstep in timing can get an appeal dismissed, so litigators must be extremely careful.

BY PATRICIA M. WEAVER

So you thought the trial went well, but somehow, the judge did not see things your way. Now it's time to decide whether to appeal or move on.

If you want time to consider an appeal, you must first preserve the right to appeal. This is done by filing a notice of appeal. The rules and case law of the relevant jurisdiction will control the details, of course, but typically this filing must occur within 30 days of the entry of a final judgment.

Sounds relatively simple and straightforward, right? Preparing a notice of appeal is generally a simple ministerial act of informing

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the court that you intend to appeal and providing basic related information. Identifying and ensuring that the trial court has entered a final

judgment, however, is sometimes neither simple nor straightforward. If you don't pay close attention, you just might find your appeal dismissed.

If that happens, you may be left with a trial verdict that your client does not like, and you—the lawyer responsible for meeting filing deadlines—may face, at the very least, an awkward conversation with your client (and perhaps even with bar counsel and your professional liability insurer).

I have had more than one opponent's appeal dismissed by the Maryland and D.C. appellate courts because the notice of appeal was filed either too early or too late. And though my experience—and this article—is largely derived from Maryland law, the potential pitfalls identified are not endemic to Maryland alone.

### A FINAL JUDGMENT?

Understanding the landscape of appeal must start with defining some basic terms at issue:

A "final judgment" must resolve all claims by all parties. Although the policy against piecemeal litigation is subject to exceptions for interlocutory appeals or for judgments certified

by the trial court as appealable judgments, in general, the trial court must dispose of all matters pending before it before a party secures the jurisdiction of the appellate court.

"Rendition of judgment" is the trial court's announcement of judgment, which generally can occur either in writing or orally in open court.

"Entry of judgment" may be the ministerial act of the clerk preparing and signing a judgment for a sum certain and then recording the judgment on the court's docket. With any form of judgment other than a sum certain, the trial court must sign a separate document embodying the judgment, which then must be recorded by the clerk on the court's docket. A timely appeal is noted within 30 days of the rendition and entry of a final judgment.

As stated, a properly noted appeal is filed after the court has both rendered and entered a final judgment. Over the years, however, some jurisdictions have softened the consequences that befall a litigant who failed to await the entry of the judgment, instead filing the notice of appeal after only the rendition of judgment.

Both Maryland and the District of Columbia have now adopted "savings provisions" that provide that a notice of appeal filed after the court announces a decision—but before the entry of the judgment—is treated as having been filed on the date of and after the entry of judgment. The relevant rules are Md. Rule 8-602(d) and D.C. App. R. 4(a)(2).

These savings provisions, however, do not save all ill-timed notices. For example, I was involved in a case in Maryland in which the trial court was faced with claims of competing creditors under the Uniform Commercial Code. In a lengthy written opinion, the trial court fully addressed and resolved all arguments presented in the cross-motions for summary judgment. It signed a written order granting my client summary judgment and denying the other side's cross-motion. The opposing party then filed its notice of appeal.

A declaratory-judgment claim, however, was among the claims pending before the trial court. Despite its extensive opinion and written order, the trial court had not specifically declared the rights of the parties in a judgment. Subsequently, the court

entered a declaratory judgment, but the opposing party failed to file another notice of appeal.

Although that party argued that the savings provision was intended to save premature appeals, the appellate court disagreed. The appellate court held that no final judgment existed until the declaratory judgment was issued, and the savings provision therefore afforded no relief. It thus dismissed the appeal as untimely, despite the party's initial filing of a notice of appeal.

What's the moral of the story? Make sure that the court has completely disposed of all claims before noting your appeal.

### **BEWARE COLLATERAL MATTERS**

So, it would seem that noting an appeal is simply a matter of ensuring that the trial court has left no matter unresolved.

That's true, unless—and here's the hitch—that matter is determined to be “collateral.” More than a few litigants in Maryland have been caught unaware and improperly delayed filing the notice of appeal while awaiting the resolution of a collateral matter.

Whether a matter is collateral is not always black and white. For example, sometimes an outstanding claim for attorney fees may be deemed collateral, and other times it may not.

If the attorney fees are requested based on bad faith or even, in some cases, requested pursuant to statute, the Maryland appellate courts have deemed them collateral to the main action. If so, courts have held that a final judgment exists despite the fact that a request for fees remains outstanding. In those cases, woe be the litigant who waits for the attorney fees to be resolved before filing the notice of appeal.

Yet if the attorney fees are based on a contract provision or otherwise form part of the substantive damages of one of the claims, they are considered part of the main action and not collateral. In those instances, a notice of appeal filed before the issue of attorney fees is decided is premature. It does not secure the jurisdiction of the appellate court, and the appeal is dismissed.

In domestic-relations cases, the Maryland courts have generally viewed requests for attorney fees (where the request is based on “privileged suitor” statutory authority) as collateral. If that is the sole basis for fees, any appeal must be noted before resolution of the fee issue, and the trial court retains jurisdiction to address the fees issue despite the pendency of the appeal. As one recent example, the Maryland Court of Special Appeals held in the 2006 case of *Ridgeway v. Ridgeway* that while an appeal is pending, a trial court has jurisdiction over a post-judgment request for attorney fees. Under this ruling, the lower court can award the appellee prospective attorney fees for purposes of defending the judgment on appeal.

In short, if either party has filed a request for attorney fees, beware—and be aware of—the collateral matter in determining the proper time to note your appeal.

The District has addressed, through several rules, the effect of a request for attorney fees on the timing of appeals. D.C.

Superior Court Civil Rule 58 provides that the time for appeal shall not be extended in order for the trial court to award fees, except perhaps when a timely Rule 54(d)(2) motion for attorney fees is made. In such event, the trial court, before a notice of appeal has been filed, may order that the request for attorney fees tolls the time for appeal, thereby effectively granting an extension of the time to note an appeal.

This means that to leave nothing to chance in the District, you obviously need to secure this extension within 30 days of entry of judgment or else note your appeal within that time period.

### **POST-JUDGMENT MOTIONS**

In general, properly noting an appeal secures the jurisdiction of the appellate court and suspends the jurisdiction of the trial court over the case (with the exception of collateral matters). The trial court, however, always retains jurisdiction to decide a 10-day motion (that is, a post-judgment motion, such as a motion for a new trial, that must be filed within 10 days of the entry of a final judgment).

Both Maryland and the District have adopted rules making plain that certain post-trial motions, filed within 10 days of the entry of judgment, deprive a judgment of its finality. Yet motions filed beyond this 10-day window do not. If one of the 10-day post-judgment motions is filed, the original judgment loses its finality, and the notice of appeal can be filed within 30 days of the withdrawal or disposition of the motion.

In Maryland, if a notice of appeal has been filed after entry of the original final judgment but before the filing of a 10-day motion, then the notice becomes effective upon disposition of the 10-day motion. The comparable D.C. rule provides a broader window in that it gives the same treatment to any notice of appeal filed between the court's rendition of judgment and its disposition (as opposed to simply the parties' filing) of the 10-day motion.

If you are in doubt in either Maryland or the District, you can and should file a second notice of appeal following the entry of any further judgment in the case. There is no penalty for prudence.

If you make a mistake in timing the notice of appeal, the District offers at least a faint hope. Although Maryland has no comparable provision, the D.C. rules allow a litigant to request an extension of the time for appeal if he or she shows “excusable neglect or good cause.” The D.C. courts, however, have not readily found excusable neglect for a failure to timely note an appeal. Surely this is not the issue that you wish to be litigating on appeal.

So filing the notice of appeal can be trickier than it might appear, and the few pitfalls identified here are not the only ones. For your own sake and the sake of your clients, you need to be careful to get it right.

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