

REPORTER'S NOTES

MASSACHUSETTS RULES OF APPELLATE PROCEDURE

Rule 3. Appeal - How Taken

Reporter's Notes—2023

Spurred by the 2021 amendments to Federal Rule of Appellate Procedure 3 (c), which clarified and liberalized the requirements for the contents of a notice of appeal, the committee examined, and proposed revisions to, Rule 3 (c). Those revisions are consistent with the goals of liberalization and clarification reflected in the federal rules, but the language employed is not in all cases identical to the Federal rule for reasons particular to State court procedure. The amendments merely clarify what needs (and does not need) to be included in the notice of appeal. The amendments do not expand what is appealable or alter how or when a judgment, decree, adjudication, or order must be appealed. Similarly, the amendments do not change the requirement that any issues a party would like considered on appeal must be briefed. It is the role of the briefs, not the notice of appeal, to raise the issues on appeal.

Former subparagraph (c) (1) has been broken into four new subparagraphs. Subparagraphs (c) (1) (A) – (c) (1) (C) apply to all cases (criminal and civil). Subparagraph (c) (1) (D) applies only to civil cases.

Subparagraphs (c) (1) (A) and (c) (1) (B). Subparagraph (c) (1) (A) reflects that the notice of appeal should be a simple document that provides notice a party is appealing and invokes the jurisdiction of the appellate court. It therefore must state who is appealing and what is being appealed.

To make clear it is not necessary to designate each and every order the appellant may wish to challenge on appeal, former Rule 3 (c) (1) is renumbered as Rule 3 (c) (1) (A) and amended to require the designation of "the judgment, decree, adjudication, or separately appealable order from which the appeal is taken." The phrase "or part thereof" is deleted. Designation of the judgment, decree, or adjudication now encompasses prior interlocutory orders that become appealable only upon entry of such final judgment, decree, or adjudication. This principle, sometimes referred to as the merger principle, is a corollary of the final judgment rule: a party cannot appeal from most interlocutory orders, but must await final judgment, and only then obtain review of interlocutory orders. The reference to "separately appealable order," as opposed to merely "order," is intended to clarify that each order appealable upon final judgment need not be listed in the notice. Only those orders from which an immediate appeal is allowed separate and apart from final judgment need be listed—for example, a preliminary injunction order, *see, e.g.*, G. L. c. 231, § 118; an appeal subject to the doctrine of present execution, *see, e.g.*, *Kent v. Commonwealth*, 437 Mass. 312, 316 (2002) (interlocutory orders that fall within the doctrine of present execution are treated as final for purposes of appeal); or certain other interlocutory orders that are separately appealable, *see, e.g.*, G. L. c. 184, § 15 (d).

Similarly, subparagraph (c) (1) (B) has been added to expressly state, "[t]he notice of appeal need not designate prejudgment orders that are appealable as part of the judgment, decree, or adjudication designated in the notice of appeal." This language differs slightly from the equivalent amendment to Fed. R. App. P. 3 (c) (4), which states the notice "encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. . . ." Because the concept of merger may create confusion in Massachusetts practice, particularly in appeals from certain types of judgments and orders arising out of the Probate and Family Court and the Juvenile Court, Rule 3 (c) (1) (B) does not use the term "merge." Instead, it uses plain language to state that prejudgment orders that are appealable as part of the judgment need not be designated separately in a notice of appeal designating a properly appealable judgment, decree, or adjudication.

Subparagraph (c) (1) (C). There are circumstances in which an appellant may deliberately choose to limit the scope of the notice of appeal, and wish to convey this choice to the other parties. Thus, Rule 3 (c) (1) (C) has been added to allow an appellant to designate only part of a judgment, decree, adjudication, or separately appealable order, as long as the appellant does so expressly in the notice of appeal. This addition to Rule 3 (c) generally tracks the equivalent Federal rule, but omits the second sentence of the Federal rule, which simply restates the same concept in a different way. *See* Fed. R. App. P. 3 (c) (6) ("Without such an express statement, specific designations do not limit the scope of the notice of appeal."). This omission should not be interpreted as a variance from the substance of the Federal rule.

Subparagraph (c) (1) (D). Rule 3 (c) (1) (D), which tracks Fed. R. App. P. 3 (c) (5), has been added to address some potential traps for the unwary in civil cases that occur when a case is decided by a series of orders or when post-judgment motions are filed. The first issue may arise when, for example, some claims are dismissed for failure to state a claim under Mass. R. Civ. P. 12 (b) (6) and then, much later in the case, the remaining claims are resolved on summary judgment. The order ruling on the motion for summary judgment, because it resolves all of the remaining claims, is a final judgment, an appeal from which confers appellate jurisdiction to review the earlier order on the motion to dismiss. But if a notice of appeal describes the second order not as a final judgment but as an order granting summary judgment, some courts might limit appellate review to the summary judgment and refuse to consider a challenge to the earlier motion to dismiss order. This new rule has been added to eliminate that trap for the unwary and clarify the notice of appeal encompasses the earlier order.

Similarly, if a trial court complies with the requirement under Mass. R. Civ. P. 58 that a separate document with a final judgment be entered following an order that resolves all remaining claims in a case, and the notice of appeal designates that order rather than the separate document, some courts might limit appellate review to that order and refuse to consider a challenge to an earlier interlocutory decision that would otherwise be reviewable as part of an appeal of the final judgment. This creates a trap for all but the wariest, because when the trial court issues the order disposing of all remaining claims, a litigant may not know whether the trial court will ever enter the separate document required by Mass. R. Civ. P. 58.

Rule 3 (c) (1) (D) (i) has therefore been added to clarify that a notice of appeal designating the order resolving all remaining claims and the rights and liabilities of all remaining

parties will be treated as having designated a final judgment for purposes of the appeal, regardless of whether that judgment is set out in a separate document.

Second, Rule 3 (c) (1) (D) (ii) is intended to resolve another trap for the unwary that may occur when a party files a post-judgment motion that tolls the time to appeal the judgment under Rule 4 (a) (2) and then notices an appeal of the order on the post-judgment motion without noticing an appeal of the judgment. Some courts treat such a notice as limited to the postjudgment order, rather than as bringing the judgment itself before the appellate court for review.

To reduce the unintended loss of appellate rights in this situation, the amendment clarifies that a notice of appeal designating an order on a post-judgment motion listed in Rule 4 (a) (2) will also encompass the final judgment. This amendment does not alter Rule 4 (a) (3)'s requirement that a new notice of appeal be timely filed following entry of the order disposing of the last remaining post-judgment motion.

Rule 3 (c) (3) has been added to clarify that an appeal should not be dismissed for minor defects in the notice of appeal. The amended rule uses "should" rather than "must," which is used in Fed. R. App. P. 3 (c) (7), to allow the appellate court to rule otherwise in unusual circumstances. Rule 3 (c) (3) clarifies that an appeal should not be dismissed for minor defects such as informality of form or title, or omission of an appealing party's name, or a technical error in how the appealed judgment, decree, adjudication, or separately appealable order is identified, so long as it is clear who is appealing and what is being appealed. The amended rule does not provide an exhaustive list and there may be other minor defects in a notice of appeal that should not result in dismissal.