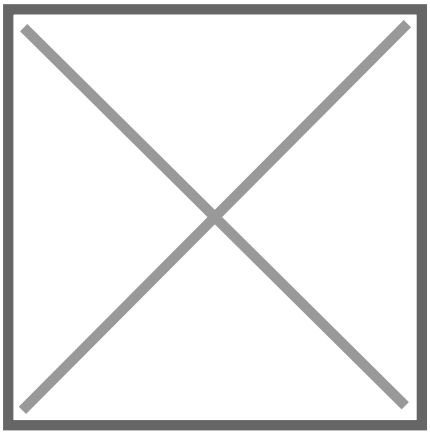

Where Can My Case Be? It's Run Afoul Of Rule 3(c)

One of my hobbies as an appellate lawyer is collecting appellate horror stories. (I know, I know, only an appellate lawyer would have such a hobby.) Here's one that makes my skin crawl every time I think of it.

The federal government indicted six individuals for conspiring to distribute cocaine. Just before trial, two of the defendants pled guilty and agreed to testify against the remaining defendants. In response, one of the remaining defendants — call him Earl — also pled guilty. The next day, however, Earl argued that he was pressured into entering his plea and asked to withdraw it. The trial court rejected the request. Earl filed a timely notice of appeal, claiming that the court abused its discretion in refusing to allow him to withdraw the plea.

Now, I don't know exactly what was said during oral argument on the appeal, but I've always imagined it went something like this: The appellate panel appeared sympathetic to Earl's plight. Earl's lawyer may even have been hopeful about his chances of prevailing. Then, the following unexpected exchange occurred:

"Excuse me counselor, but I've just noticed that the notice of appeal you filed does not name the court to which you were appealing."

"Well, your Honor, as this case was filed in federal court in Michigan, the 6th Circuit is the only court to which we could have appealed."

"True, but the rules of appellate procedure say that a notice of appeal must contain the name of the court to which the appeal is taken. Your notice does not comply with the rule. You are the weakest link. Goodbye."

Thereafter, the court dismissed the appeal for lack of appellate jurisdiction.

Should Earl's lawyer have put his malpractice carrier on notice? You bet. Rule 3(c) of the Federal Rules of Appellate Procedure requires an appellant to: 1) specify the party or parties taking the appeal; 2) designate the judgment order, or part thereof, appealed from; and 3) name the court to which the appeal is taken. In *Torres v. Oakland Scavanger Co.*, 487 U.S. 312 (1988), the Supreme Court held that Rule 3(c) is jurisdictional. Therefore, counsel's inadvertent failure to include in the notice of appeal the name of one of several appealing parties deprived the court of jurisdiction to consider the merits of the appeal as to the unnamed party. In *U.S. v. Webb*, 157 F.3d 451 (6th Cir. 1998)-which is the particular "appellate horror story" I described above-the 6th Circuit relied on *Torres* when it dismissed a criminal defendant's appeal for want of jurisdiction. The notice of appeal filed on his behalf did not identify the 6th Circuit as the court to which he was appealing.

Fortunately, our own 2nd Circuit and other federal appellate courts bend over backward to construe a notice of appeal as consistent with Rule 3(c). Even the 6th Circuit has backed off its draconian interpretation of the rule. See, e.g., *Dillon v. United States*, 184 F.3d 556 (6th Cir. 1999) (rejecting *Webb* and holding that, where party could only appeal to a particular court, failure of notice of appeal to name the appellate court is not a jurisdictional defect).

Nevertheless, *Torres* remains the law. Therefore, a failure to comply strictly with the dictates of Rule 3(c) when filing an appeal in federal court-here in the 2nd Circuit or elsewhere — can still result in the dismissal of the most meritorious of appeals on jurisdictional grounds.

The moral of the story? Start your federal appeal off on the right foot and avoid that dreaded call to your malpractice carrier. Make sure your notice of appeal conforms exactly to the requirements of Rule 3(c). You'll sleep better at night.