Finality in State Trial Courts

by Jocelyn Drennan

After a trial court rules on an issue, a question which often arises is whether the ruling or decision is appealable. The answer depends upon whether the ruling is final. Arriving at the answer requires case-specific analysis. This article provides guidelines for navigating the analysis and identifies options for pursuing an appeal of a non-final ruling.

Informal, non-final rulings are not appealable. "No appeal will lie from anything other than an actual written order or judgment signed by a judge and filed with the clerk of the court." State v. Lohberger, 2008-NMSC-033, ¶ 6, 144 N.M. 297, 187 P.3d 162.[1] An order or a judgment "is generally not final for purposes of appeal if it contains neither decretal language nor provisions directing the entry of judgment." Burris-Awalt v. Knowles (In re Guardianship of Ware), 2010-NMCA-083, ¶ 8, 148 N.M. 616, 241 P.3d 617 (internal quotation marks & citation omitted); but see *id.* (lack of decretal language not conclusive). Decretal language has been described as that which "carries the decision into effect by ordering that something happen, or when appropriate, by entering judgment for a sum certain in favor of one party" (Khalsa v. Levinson, 1998-NMCA-110, ¶ 13, 125 N.M. 680, 964 P.2d 844) or which signals that a document is "intended to be the appealable final order of dismissal." Lohberger, 2008-NMSC-033, ¶ 31.

"Generally speaking, for purposes of an appeal, an order or judgment is not considered final unless all issues of law and facts have been determined and the case disposed of by the trial court to the fullest extent possible." Sunwest Bank v. Nelson, 1998-NMSC-012, ¶ 6, 125 N.M. 170, 958 P.2d 740 (internal quotation marks, citation & brackets omitted); see also Lohberger, 2008-NMSC-033, ¶ 19 (similar final judgment rule for a criminal case). Consequently, interlocutory rulings which "may be revised at any time prior to final judgment" (Sims v. Sims, 1996-NMSC-078, ¶ 59, 122 N.M. 618, 930 P.2d 153), ordinarily are not appealable.[2]

Certain post-judgment motions may render a ruling non-final. If, for example, the trial court has not entered an order which expressly rules on a timely motion to alter or amend a judgment that was filed before a notice of appeal, the pendency of the motion renders the underlying ruling non-final; e.g., Dickens v. Laurel Healthcare, LLC, 2009-NMCA-122, 147 N.M. 303, 222 P.3d 675 (involving a Rule 1-059(E) NMRA motion). Other examples appear in Rule 12-201(D) NMRA which mentions motions filed pursuant to Section 39-1-1 (1917), Rule 1-050(B), Rule 1-052(D), and, more generally, Rule 1-059.

The definition of a final judgment is flexible. The flexibility arises from the need to balance competing policies. One policy is to avoid piecemeal appeals which impede efficient resolution of disputes. City of Sunland Park v. Paseo Del Norte Ltd. P'ship, 1999-NMCA-124, ¶ 8, 128 N.M. 163, 990 P.2d 1286. The other policy is to avoid depriving a party of meaningful review. Kelly Inn No. 102, Inc. v. Knapison, 113 N.M. 231, 240, 824 P.2d 1033, 1042 (1992), holding limited on other grounds by Trujillo v. Hilton of Santa Fe, 115 N.M. 397, 851 P.2d 447 (1993).

Consequently, in analyzing finality, the Supreme Court and the Court of Appeals give the term "a practical, rather than a technical construction." *Id.* at 236, 824 P.2d at 1038. They look not to the form of a judgment or an order but rather its substance. Khalsa, 1998-NMCA-110, ¶ 12; accord State v. Ahasteen, 1998-NMCA-158, ¶ 10, 126 N.M. 238, 968 P.2d 328. "[T]he practical effect" of a court's determination on the rights and interests of a party may influence the determination. San Juan 1990-A, L.P. v. El Paso Prod. Co., 2002-NMCA-041, ¶ 17, 132 N.M. 73, 43 P.3d 1081. But, ultimately, the determination lies within the discretion of the reviewing court.

To help guide the analysis, the Supreme Court laid down the following precept. "Where a judgment declares the rights and liabilities of the parties to the underlying controversy, a question remaining to be decided thereafter will not prevent the judgment from being final if resolution of that question will not alter the judgment or moot or revise the decisions embodied therein." Kelly Inn No. 102, 113 N.M. at 238, 824 P.2d at 1040.

Distilled, the following guidelines emerge:

- Analyze each ruling individually.
- Identify and review all potentially applicable statutory provisions and judicial rules, including local rules, and the accompanying annotations.[3]
- Ensure that a statutory provision, rule, or principle, as the case may be, applies equivalently in civil and criminal cases. If not, look for an alternative route to appeal.
- Research case law within New Mexico which may clarify how statutory language and rules operate or that otherwise may help answer whether a ruling is final.

- Look to secondary sources (e.g., appellate and procedural treatises, law reviews), and case law from courts elsewhere (federal and state) for guidance.
- Consider consulting counsel who practices appellate law for guidance.

If in doubt, the safest course is to file a protective notice of appeal. The consequences of filing a premature notice of appeal are far less damaging than filing a notice of appeal too late. When a party files a notice too early, if the final order is entered during "the early pendency of the appeal," the appeal may ripen, enabling the reviewing court to exercise jurisdiction. Healthsource, Inc. v. X-Ray Assoc. of N.M., 2005-NMCA-097, ¶¶ 11-15, 138 N.M. 70, 116 P.3d 861; see also State v. Boblick, 2004-NMCA-078, ¶¶ 6-7, 135 N.M. 754, 93 P.3d 775 (exemplifying similar approach in a criminal case). Absent such circumstances, an order dismissing a premature appeal may provide guidance on the order or judgment which must be entered before a right to appeal arises.

Even if a trial court's ruling is not final, options exist for pursuing an immediate appeal. Whether a party may avail itself of an option again requires issue-specific analysis. When more than one option appears potentially viable and worth pursuing, thought should be given to the sequence in which the options should be pursued. Options for pursuing an immediate appeal include the following:

- Seek leave to pursue an interlocutory appeal. Counsel can ask a trial court to include language in an order which certifies an issue for interlocutory appeal. The ideal time to request such language, if circumstances permit, is immediately after the trial court announces its ruling, to save the time and trouble of later seeking to amend the court's order to include the requisite language. Counsel must comply with the statutory provision which applies (NMSA 1978, § 39-3-3(A) (1972) and § 39-3-4(A) (1999)), and an appellate rule of procedure (Rule 12-203 NMRA). Interlocutory appeals, which stay the underlying proceedings pending the outcome of the appeal unless the appellate court otherwise orders (Rule 12-203(E)) are seldom granted.
- Consider whether stipulating to a final judgment is a possibility; e.g., Gates v. N.M. Taxation & Revenue Dep't, 2008-NMCA-023, 143 N.M. 446, 176 P.3d 1178 (filed 2007) (parties' agreement to dismiss remaining, undecided claims converted trial court's partial summary judgment ruling into a final, appealable order).
- Evaluate whether a partial final judgment creates an opening. Rule 1-054 NMRA. Keep in mind, however, that a reviewing court may find that the requirements are not met; e.g., Khalsa, 1998-NMCA-110, ¶¶ 18-24 (Rule 1-054[B] scenario).
- Apply for a writ of error. The collateral order doctrine, "whose reach is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal," guides the availability of the writ. Carrillo v. Rostro, 114 N.M. 607, 613, 845 P.2d 130, 136 (1992) (internal quotation marks & citation omitted). The Supreme Court left an opening for use of the writ to evolve but the writ primarily has been used when immunity from suit is at issue.[4] Three criteria must be met. Handmaker v. Henney, 1999-NMSC-043, ¶ 9, 128 N.M. 328, 992 P.2d 879; see also Rule 12-503 NMRA (procedural requirements).
- Petition for an extraordinary writ. The Supreme Court possesses authority to grant writs of mandamus, superintending control, prohibition, habeas corpus, injunction "and all other writs necessary or proper for the complete exercise of its jurisdiction." N.M. Const. art. VI, § 3; see also Rule 12-504 NMRA (procedural requirements).
- If an interlocutory ruling compels an action, incur contempt of court. While perhaps not the ideal option, a contempt ruling in a civil case gives rise to an immediate appeal allowing review of the underlying order. Chavez v. Lovelace Sandia Health Sys., Inc., 2008-NMCA-104, 144 N.M. 579, 189 P.3d 711; see also NMSA 1978, § 39-3-15(A) (1966). In the circumstances specified in Section 39-3-15, an appeal may be pursued in criminal contempt and habeas corpus proceedings.
- Consider whether the "sufficiently aggrieved rationale" applies. The rationale may apply if "the consequences of an order 'are sufficiently severe that the aggrieved party should be granted a right to appeal to alleviate the hardship that would otherwise accrue if the appeal were delayed.'" Burris-Awalt, 2010-NMCA-083, ¶ 13 (quoting State v. Durant, 2000-NMCA-066, ¶ 8, 129 N.M. 345, 7 P.3d 495).
- Evaluate whether Article VI, Section 2 of the New Mexico Constitution, which states "that an aggrieved party shall have an absolute right to one appeal," provides a basis for seeking an immediate appeal. State v. Heinsen, 2005-NMSC-035, ¶ 9, 138 N.M. 441, 121 P.3d 1040.

In assessing which, if any, of these options to pursue, counsel should research each potentially applicable option thoroughly. Case law, for example, may provide ideas on how to craft an argument which will persuade the Supreme Court or the Court of Appeals to grant discretionary review of an issue.

Do not despair, but understand that this article provides but a glimpse into the complexity that may be involved in analyzing whether a trial court ruling is final and, absent a final order or judgment, identifying options for seeking immediate review. Keep the guidelines in mind and, always, err on the side of caution.

Endnotes

[1] Accord Lohberger, 2008-NMSC-033, ¶ 20 (oral ruling insufficient); High Ridge Hinkle Joint Ventures v. City of Albuquerque, 119 N.M. 29, 37, 888 P.2d 475, 483 (Ct. App. 1994) (court's letter to parties, same).

[2] Routine discovery rulings, see Bartow v. Kernan (In re Bartow), 101 N.M. 532, 534, 685 P.2d 387, 389 (Ct. App. 1984), and evidentiary rulings, see In re Larry K., 1999-NMCA-078, ¶ 11, 127 N.M. 461, 982 P.2d 1060, fit within this principle.

[3] Key statutory provisions to review include: NMSA 1978, § 39-3-2 (1966) (final judgment requirement for a civil case); id. § 39-3-3 (1972) (same, criminal case). Key rules to review include: Rule 1-054(B) NMRA (partial final judgments); Rule 1-058 (entry of orders and judgments); Rule 1-059 (new trial and motion to amend/alter judgment), Rule 1-060 (relief from order or judgment); Rule 12-201 (appeal as of right).

[4] See King v. Allstate Ins. Co., 2004-NMCA-031, ¶¶ 13-16, 135 N.M. 206, 86 P.3d 631; cf. State v. Augustin M., 2003-NMCA-065, ¶¶ 40-44, 133 N.M. 636, 68 P.3d 182 (not used for denial of motion to quash indictment) with State v. Robinson, 2008-NMCA-036, ¶ 1, 143 N.M. 646, 179 P.3d 1254 (used for order disqualifying prosecutor's office).

About the Author
Jocelyn Drennan is a member of the Appellate Practice Group at the Rodey Law Firm.