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Briefly: The continuing challenges of electronic filing

By: Eric Magnuson and Luke Hasskamp May 21, 2018


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Over the years, the ways in which we commence appeals in Minnesota courts have changed substantially. It used to be that parties had to deliver a bunch of paper to the appellate court and serve equally voluminous copies on opposing counsel. Now, we've moved to electronic filing.

This transition was supposed to make filing easier, and in many ways it has. The reduced amount of paper necessary for filings, the elimination of the need to deliver documents all around, and the general ease of filing are examples. Yet, as this column has discussed repeatedly, the advent of electronic filing has also introduced a new set of challenges, and there are hidden traps that we all have to learn to avoid.

Traps for the unwary are one thing; traps for the very wary are even more frightening. We are about as wary as can be, but recently we experienced just such a trap. In a recent (and pending) appellate matter, our law firm filed a respondent's filed merits brief on the day it was due. However, when we submitted the brief through the Minnesota appellate court's electronic filing system, E-MACS, we used the filing account of an attorney who was not the one who "signed" the brief with an "s/." The filing attorney was listed on the brief, so there should not have been a problem, right? Not so fast.

The next day, the clerk of the appellate courts rejected the brief due to this discrepancy. We immediately resubmitted the brief on the correct E-MACS account, along with a motion to accept the untimely brief.

Luckily, in this instance, the appellate court accepted the late-filed brief, noting that the "failure to timely file a brief is a technical, nonjurisdictional matter." Yet, it is possible that the filer of another document – such as a notice of appeal or a petition for further review – may not be so fortunate and might find themselves out of court, at least on that appeal.

This issue presents a significant risk, especially for attorneys working in larger firms with multiple attorneys and multiple E-MACS accounts. Electronic filing can create a false sense of security. Filing is instantaneous, or at least seems to be, so waiting until the last minute is

now easier than ever. And it is a worse hazard than ever before. What it the electrons don't travel at the speed of light, or, more likely, what if your clock does not sync with the court's? Being a minute late is as bad as not filing at all. Indeed, Judge Frank Easterbrook of the 7th Circuit (never one to be shy in his comments about lawyer conduct) famously weighed in on the limitations of electronic filing. In Justice v. Town of Cicero, 682 F.3d 662 (7th Cir. 2012), a party argued that its filing should be considered timely, despite being filed only minutes after midnight of the deadline day. After all, it was just a little late, and no one was around at that hour to read the thing.

Easterbrook rejected the argument out of hand, noting "it does not take a reference to "Cinderella" to show that midnight marks the end of one day and the start of another." Id. at 664. Despite (perhaps) making filing more convenient for the parties, while "[e]lectronic filing systems do extend the number of hours available for filing," Judge Easterbrook stressed that electronic filing "does not increase the number of days available for filing." Id. (emphases added). "A document entered into the electronic system at 12:01 AM on a Thursday has been filed on Thursday, not on 'virtual Wednesday.'" Id.

One of the easiest ways to avoid many of these problems is to not wait to file until the day of any deadline. Filing a day early – or even the morning of the day a filing is due – may give you the time needed to identify mistakes and correct the deficiencies before a deadline runs. This is especially true if the problems are not discovered until the clerk of courts rejects your filing, sometimes the following day. As Easterbrook recognized, "Computers can crash, and a court's e-filing software can have bugs." Id. However, if you such technical issues do arise, they may not be discovered until after a filing deadline, and the courts may not be receptive to efforts to remedy these problems.

Last year this column addressed a failed attempt to serve the parties with a notice of appeal through E-MACS. See Eric J. Magnuson & Luke Hasskamp, "E-filing May Be Easy, But It's Not That Easy," Minn. Lawyer (Apr. 13, 2017). The legal assistant for the appellant's counsel electronically filed the requisite documents but failed to electronically serve the notice of appeal on the respondent through E-MACS, mistakenly believing that "after you entered the information for all the parties in the EMACS system that those parties would be served by the system." The assistant also sent an email to the respondent with an electronic copy of the notice, but the respondent had not expressly consented to receive service via email. Accordingly, although it may have seemed like a mere technicality, the Court of Appeals dismissed the appeal, emphasizing the rules addressing proper service.

The bottom line is that electronic filing – while it has simplified our jobs in many respects – still has a lot of tricks and traps just waiting to spoil your day or night. Exacerbating these dangers is the fact that in recent years, the Minnesota appellate courts seem to have taken an increasingly strict view on what constitutes a jurisdictional defect. Last month, this column discussed a case in which the Minnesota Supreme Court rejected a petition for review because it was not accompanied by a word count certificate. See Kelvin D. Collado & Eric J. Magnuson, "Word Counts Count When Attorneys File for Review," Minn. Lawyer (Apr. 12, 2018). The petition was otherwise proper but for the omitted word count certificate, yet the court refused to accept the petition when it was resubmitted the next day (the day after the filing deadline) with the certificate. The court reasoned that the Rules of Civil Appellate Procedure do not permit any extension for filing a petition for review, asserting that the time for filing was "jurisdictional." We would never have guessed that an omitted word count certificate constituted a jurisdictional defect (see last month's column if you missed it for an explanation of our surprise), but this appears to be the trend that Minnesota's appellate courts are on, so practitioners should pay attention.

Similarly, this column has also discussed a Supreme Court order that rejected another petition for review because the attached documents required under Rule 117 were labeled "Appendix" rather than "Addendum." See Eric J. Magnuson & Lisa L. Beane, "Appendix-itis

and Other Potentially Fatal Appellate Diseases," Minn. Lawyer (Nov. 16, 2015). In that case, Quinn v. Johnson, No. A15-0322, there was no functional difference between the two documents – the distinction was typographical – one wrong word, "appendix" instead of "addendum." Yet, the court rejected the filing, concluding such a typo meant the document as a whole failed to comply with Rule 117, subd.3 and Rule 130.02.

Not every problem is insurmountable. If your filing is challenged, even on jurisdictional grounds, there are arguments you can make. For example, in Hunter v. Anchorbank N.A., A14—1599, the appellant tried to serve her notice of appeal by fax, but the Court of Appeals dismissed the appeal, concluding it was not an acceptable form of service under Rule 103.01. On petition for review, the Minnesota Supreme Court granted the petition "[b]ased on the peculiar facts of this case, and in the interests of justice," vacated the appellate court's order and remanded with instructions to accept the appeal. Order filed Jan. 20, 2015. But your client should never have to depend on the mercy of the court, or how the appellate court might judge "justice" on a particular day. On that point, you need to keep in mind that the court did not think justice required relief from a missing word count certificate or a mislabeled addendum.

The point of these anecdotes is not just "follow the rules explicitly or you could be in trouble," although that is pretty good advice. The better lesson is probably that in these days of electronic filing, you should take advantage of the ease and speed of that system to file early, and not see it as a reason to wait even longer. While it is possible that the appellate courts will grant a break to litigants who miss deadlines for technical reasons, that kind of generosity is rare – and seems to be growing even more rare.

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