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Magnuson: Crossing the t's and dotting the i's

By: Eric J. Magnuson March 15, 2013


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One of the things that I came to miss most while I served as chief justice was the regular phone calls I had received in private practice from lawyers around the state who had questions on appellate practice and procedure.

The conversation usually started with something like, "I just want to buy five minutes of your time." While an attractive offer, I explained that doing a conflict search, opening a file and billing for five minutes of work was probably not cost effective.

But more importantly, the problem was generally something that could be solved with just a little discussion and some thinking on both our parts. I quickly turned the conversation to a colleague to colleague consultation. The deal was simple: Don't tell me anything confidential, and we will simply talk about your problem lawyer to lawyer, colleagues sharing thoughts.

That doesn't mean the consultation was free; the "fee" was a copy of the order or other disposition resolving the issue that had prompted the call. As I explained to the lawyers with

whom I spoke, every time I help someone else solve a problem, I almost always learn something. That helps me with all of the writing and teaching I do and often provides me with valuable material with which to update the appellate rules treatise or some other work that I am publishing.

After stepping down from the bench, I eagerly looked forward to receiving the calls again. Perhaps it had something to do with the notion that I had "retired" (not true; I simply stepped down from the court and returned to practice), but the calls didn't come with same frequency as before I served on the court. This column is one step in reviving the dialogue.

I hope that by writing on a regular basis, I can help promote discussions among lawyers in Minnesota who handle appeals, either as a principal part of their practice or in the ordinary course of representing their clients. I hope to include helpful discussions of appellate issues and nuances that are not readily identified or resolved simply by the reading the rules.

My further hope is that if you have an appellate question or want to share an experience for me to pass on to others, you will get in touch with me.

So, now for the first bit of unsolicited advice.

Service according to the rules matters

Everyone knows that appellate deadlines are jurisdictional. What we sometimes lose sight of, however, are the other jurisdictional requirements in the rules. When filing an appeal or responding to an appeal, always make sure that you and the other side have dotted all the

i's and crossed all the t's; that check may be a source of opportunity for you or a way to avoid disaster.

After prevailing at trial, a lawyer I know received a notice of appeal from opposing counsel just at the end of the 60-day appeal period. The lawyer noticed that it was served by fax, but since that is common in the District Court, didn't immediately think more about it. However, a few days later, when considering whether to file a respondent's statement of case, the lawyer needed to determine when the submission was due, and for that, needed to determine when service had been made. Wondering, as most lawyers do, if there might be some extra time based on the method of service, the lawyer read the rules and discovered that the appellate rules don't provide for fax or other electronic service.

To make a long story short, the lawyer filed a motion to dismiss the appeal because service was made by fax, which is not authorized by the Rules of Civil Appellate Procedure. The Court of Appeals agreed, and dismissed the appeal. See Gliszinski v. Davisco Foods, Int'l, Inc., A11-2230 (Minn. Ct. App. filed Feb. 8, 2012).

In another case, the appellant's lawyer served the notice of appeal through the District Court electronic noticing system; the Court of Appeals held that service of the notice of appeal through the District Court electronic noticing system was ineffective. Johnson v. BP America, Inc., A12-1983 (Minn. Ct. App. filed Jan. 16, 2013). See generally In re Risk Level Determination of J.M.T., 759 N.W.2d 406, 408 (Minn. 2009) (holding that service in a manner not authorized by the controlling statute or rule is ineffective).

Even a relatively innocent mistake, like mailing to opposing counsel's former address, can be fatal. See Wise v Bix, 434 N.W.2d 502, 503 (Minn. Ct. App. 1989).

In each case, the lawyer who did not follow the rules argued that the error was only technical and that the other side had actual notice of the appeal. In each case, the court rejected that plea.

There are a couple of good lessons here. First, always verify that your opponent has dotted all the i's and crossed all the t's; sometimes the court does not know what actually happened, and you can put an early end to an appeal by letting the court know. Second, make sure that your staff and others are aware of the particular requirements for perfecting

an appeal. Technically improper service can scuttle the appeal, and you don't want to be the one going down with the ship.

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