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Dragged Into the Future: Modernizing the Legal Profession through E-Filing

The Illinois Supreme Court has made clear to practitioners that the manner in which we perform one of the most basic tasks of our profession, file documents with courts, is changing. The e-Business Policy Advisory Board and Technical Committee was tasked by the court with implementing statewide standardization of e-filing. The board recommended implementation of mandatory e-filing for civil cases statewide and a single e-filing management system. Based on that recommendation, on January 22, 2016, the Supreme Court ordered that: (1) e-filing of civil cases shall be mandatory in the Illinois Supreme Court and the Illinois Appellate Court effective July 1, 2017; and, (2) e-filing of civil cases shall be mandatory in the Illinois circuit courts effective January 1, 2018. Circuit courts operating with an approved e-filing program as of January 22, 2016 may continue to use that system, but the Supreme Court may designate a future date at which time all such circuit courts shall utilize the centralized electronic filing manager.

The court's order makes transition to an electronic filing system inevitable, and attorneys and their staff must now adapt. The Illinois Rules of Professional Conduct require that an attorney maintain competence in the field by "keep[ing] abreast of changes in the law and its practice." Ill. Rules of Prof'l Conduct R. 1.1 cmt. 8 (as amended Oct. 15, 2015, eff. Jan. 1, 2016). On October 15, 2015, the Illinois Rules of Professional Conduct adopted an amendment of the comments to Model Rule 1.1 by the American Bar Association which specifically added an understanding of "the benefits and risks associated with relevant technology," to the changes in the practice of law a lawyer should keep abreast of. *Id*. Illinois, by such adoption, is now one of a great number of states to have incorporated this amendment. Lawyers should also take note of Illinois Rule of Professional Conduct 5.3 which provides that with "respect to a nonlawyer employed or retained by or associated with a lawyer . . . [the lawyers] shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations" of the lawyer and firm. *Id*. R. 5.3(a). The following examples highlight the pitfalls of our complex and evolving system.

The State of the Art: Shortcomings of the Current System

While the issues surrounding the filing of documents may seem a mundane part of the practice of law, significant ramifications stem from failing to properly execute this task. For example, in the absence of a properly filed notice of appeal, the appellate court lacks jurisdiction and must dismiss the appeal. *See Huber v. American Accounting Ass'n*, 2014 IL 117293, ¶¶ 17-19. Failure to appropriately follow local and supreme court rules can result in disfavorable outcomes.

For most of the State of Illinois, the process of furnishing the court with motions, notices of appeal, and other filings is accomplished in much the same way as it was just after the American Civil War. *See Hamilton v. Beardslee*, 51 Ill. 478, 480-81 (1869) (an attorney must hand the document to the clerk and the clerk must place a file mark on it). With the court's January 22nd order this process in Illinois will change to a fundamentally different system.

Daniel v. Ripoli

Previous changes to this system have not been without problems. For example, in Cook County, the clerk's office has installed self-service kiosks for the stated purpose of providing more efficient and faster service. These kiosks are a departure from the typical practice of handing a copy of a document to a clerk who retains a stamped copy. While undoubtedly faster, and a reduction on the work load for clerks for non-fee filings where the assistance of a clerk is not necessary, a recent case calls into question this practice when dealing with time-sensitive filings. *Daniel v. Ripoli*, 2015 IL App (1st) 122607-U (unpublished Rule 23 Order).

In *Daniel*, the plaintiff argued that the kiosk stamp on a defendant's notice of appeal was insufficient to prove that the defendant actually filed the notice of appeal timely, and that without a timely filed notice of appeal the appellate court lacked jurisdiction. *Daniel*, 2015 IL App (1st) 122607-U, ¶ 51. By their nature, a document filed using a kiosk does not document when or whether the clerk had exclusive control of the document, rather it only demonstrates that it was stamped at a certain date and time. *Id*. ¶ 52. In addressing this question, the appellate court determined that there was a "high possibility of mischief with the clerk's self-stamping kiosks." *Id*. ¶ 56. Among other hypothetical malfeasance, the appeals court noted that a user could stamp a document, but fail to put a copy in the receptacle, therefore keeping the document in the control of the user and not the clerk. *Id*. ¶¶ 58-59. The court found that it lacked jurisdiction to consider the merits of the appeal. *Id*. ¶ 110. Crucial to the court's determination was the fact that the record on appeal did not contain a copy of the notice of filing or the certificate of service for the notice of appeal. *Id*. ¶ 81. The court cautioned "that relying on the date stamp from a self-service kiosk, particularly on time-sensitive documents, without more, is an invitation to trouble." *Id*. ¶ 83.

While an unpublished order, this decision provides important guidance for practitioners that extends beyond Cook County and beyond notices of appeal. First is the key principle that time sensitive documents should be accompanied by notices of filing and proofs of service. Even when the courts adopt universal electronic filing, there will be litigants who will fall into the exceptions to electronic filing, and those most basic of documents will still be essential. In the *Daniel* case, had the plaintiffs been able to provide a file stamped notice of filing and proof of service, it is unlikely the court would have dismissed the appeal because they would have the sworn verification that the documents were filed and served contemporaneous with the file stamp that appeared. Second, there are few documents as time sensitive as notices of appeal. But there are some, for example counterclaims and third-party complaints for contribution, and responses to requests to admit. Based upon the *Daniel* decision, the careful practitioner will be wary of using any form of filing that does not place the document directly into the possession of the clerk immediately after being file stamped, or filing anything without a notice of filing and proof of service.

Huber v. American Accounting Association

The Illinois Supreme Court recently considered another "kiosk" question. The court was asked if the self-service kiosk postage label of the U.S. Post Office was proof of the date of service under the mailbox rule. The Court held that it was not, because U.S. Post Office self-service kiosks dispense a postage label when it is purchased, and that a self-service postage label is not proof of when the document was actually mailed. *Huber v. American Accounting Ass'n*, 2014 IL 117293, ¶¶ 17-18. Supreme Court Rule 373, which expressly applies to the notice of appeal filed in the trial court, states that if a notice is received after the due date, the time of mailing shall be deemed the time of filing. Ill. S. Ct. R. 373. Rule

373 further states that "[p]roof of mailing . . . shall be as provided in Rule 12(b)(3)." *Id*. Rule 12(b)(3), in turn, states that where service is by mail, service is proved by certificate of the attorney, or affidavit of a person other than the attorney. *Id*. R. 12(b)(3).

As in the *Daniel* case, the plaintiff in *Huber* failed to provide either an attorney certificate or non-attorney affidavit per Rules 373 and 12(b)(3).The plaintiff maintained that the affidavit requirement was not intended to supplant other competent proof of mailing, and that the legible postmark must be accepted as proof of mailing. *Huber*, 2014 IL 117293, ¶ 14. After reviewing the definition of the term postmark by the U.S. Postal Service, the court determined that the envelope in which the plaintiff mailed his notice of appeal did not contain a postmark. *Id*. .15 ¶ Rather, the court noted that the marking was actually a postage label from an Automated Postal Center (APC), being an automated kiosk. *Id*. ¶ 17. As in *Daniel*, the APC label showed only the date of sale, which was not necessarily the date the envelope was placed in the mail. *Id*. ¶ 18.

It is clear that the label or file stamp alone is insufficient to demark the date that a document is placed in the exclusive control of the clerk for the purpose of determining the date a document is served. Strict observance of these rules should be maintained in order to avoid fates similar to that in the *Huber* and *Daniel* cases. It further cannot be emphasized enough the requirement to accompany the document with the notice of filing and proof of service, because, again, it is likely that the presence of these most basic of documents may have been able to save the day for the party whose case was dismissed.

VC&M, Ltd. v. Andrews

The Illinois Supreme Court also addressed questions regarding jurisdiction that are unique to those courts that have instituted electronic filing. *VC&M, Ltd. v. Andrews*, 2013 IL 114445. The plaintiff e-filed a motion to reconsider within the required time, but then subsequently filed a paper copy a month later. *VC&M*, 2013 IL 114445, ¶ 7. Additionally, the plaintiff filed its notice of appeal within 30 days of the denial of the post-judgment motion, but did so through the e-filing system. *Id*. ¶ 8. The defendant argued that the plaintiff's appeal should be dismissed for violation of the 18th Judicial Circuit's local rule prohibiting the electronic filing of certain motions and all notices of appeal. *Id.* ¶ 1.

The appellate court concluded that the plaintiff improperly e-filed its motion to reconsider in violation of local rule 5.03 (18th Judicial Cir. Ct. R. 5.03(b)), and that therefore the e-filed motion was a nullity and ineffective to toll the time for filing a notice of appeal. *Id*. ¶ 9. Additionally, the appellate court further held that plaintiff violated circuit court rule 5.03(d) (18th Judicial Cir. Ct. R. 5.03(d)) by e-filing its notice of appeal. *Id.* The plaintiff did not dispute that it violated local rule 5.03, as the case was never designated as an e-filing case under the pilot program. The Supreme Court noted that the defendant did not claim any prejudice by the e-filing of the documents. *Id*. ¶ 20. Additionally, the Supreme Court held that much as a situation where a plaintiff fails to obtain leave of court to file an amended complaint, interpreting the plaintiff's decision to e-file as a jurisdictional defect would frustrate the aim of doing justice between the parties. *Id*. ¶ 22.

The Supreme Court held that the plaintiff's procedural failure in initially e-filing its motion to reconsider before filing the paper copy did not render the initial filing a nullity, depriving the trial court of the ability to consider the motion, and failing to toll the time for filing a notice of appeal. *Id*. ¶ 25. However, rule 5.03(d) provides that "[a]ll appellate and post-judgment enforcement proceeding documents and notices may be filed and served in the conventional matter and not by means of e-filing." 18th Judicial Cir. Ct. R. 5.03(d). The Supreme Court found no ambiguity in that provision, and

noted that even if plaintiff had permission to e-file in this case, it was prohibited from e-filing its notice of appeal. *VC&M, Ltd.*, 2013 IL 114445, ¶ 32. Nevertheless, the Court held that where the deficiency in the notice of appeal is one of form only and not of substance, the appellate court is not deprived of jurisdiction. *Id*. ¶ 34. The Court held that the e-filed notice of appeal, although improperly filed, was sufficient to confer jurisdiction.

This decision points practitioners to two principles that will come to the fore once e-filing is the norm. First, just because there is e-filing, does not mean that our problems with filing are over. Second, the Illinois Supreme Court is willing to be flexible where a party has demonstrated an honest, but, strictly speaking unsuccessful, attempt to comply with the rules and where the party has actually placed the documents in the possession of the appropriate clerk within the time frame required by the rules. Timely possession seems to be the concept the court has used to guide its decisions in this area. The *VC&M* decision is similar to the principle that has developed in the federal courts that allow documents to file filed shortly after midnight of the day a document is due. Though that filing is technically late, courts are loathe to enforce that technical requirement and often chastise counsel that raises this objection.

Conclusion

The practice of law is evolving, spurred on by the revolution of technology that permeates the world we live in and the clients we serve. Unfortunately, as the procedures we use to conduct our work adapt to the evolving technologies, there may be a tendency for the new procedures to change at a fast pace and reduce uniformity throughout the state. The examples provided above demonstrate the pitfalls that some attorneys may experience. It is no coincidence that the Illinois Supreme Court has ordered a uniform system of electronic filing in Illinois and has also amended the Illinois Rules of Professional Conduct to include a requirement for technological competency. Attorneys should keep abreast of the changes, advise their non-attorney staff, assistants and clerks, and conform their office processes in the way that law is conducted in the near future. The changes are going to be swift, and the consequences of ignorance appear to be significant.

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