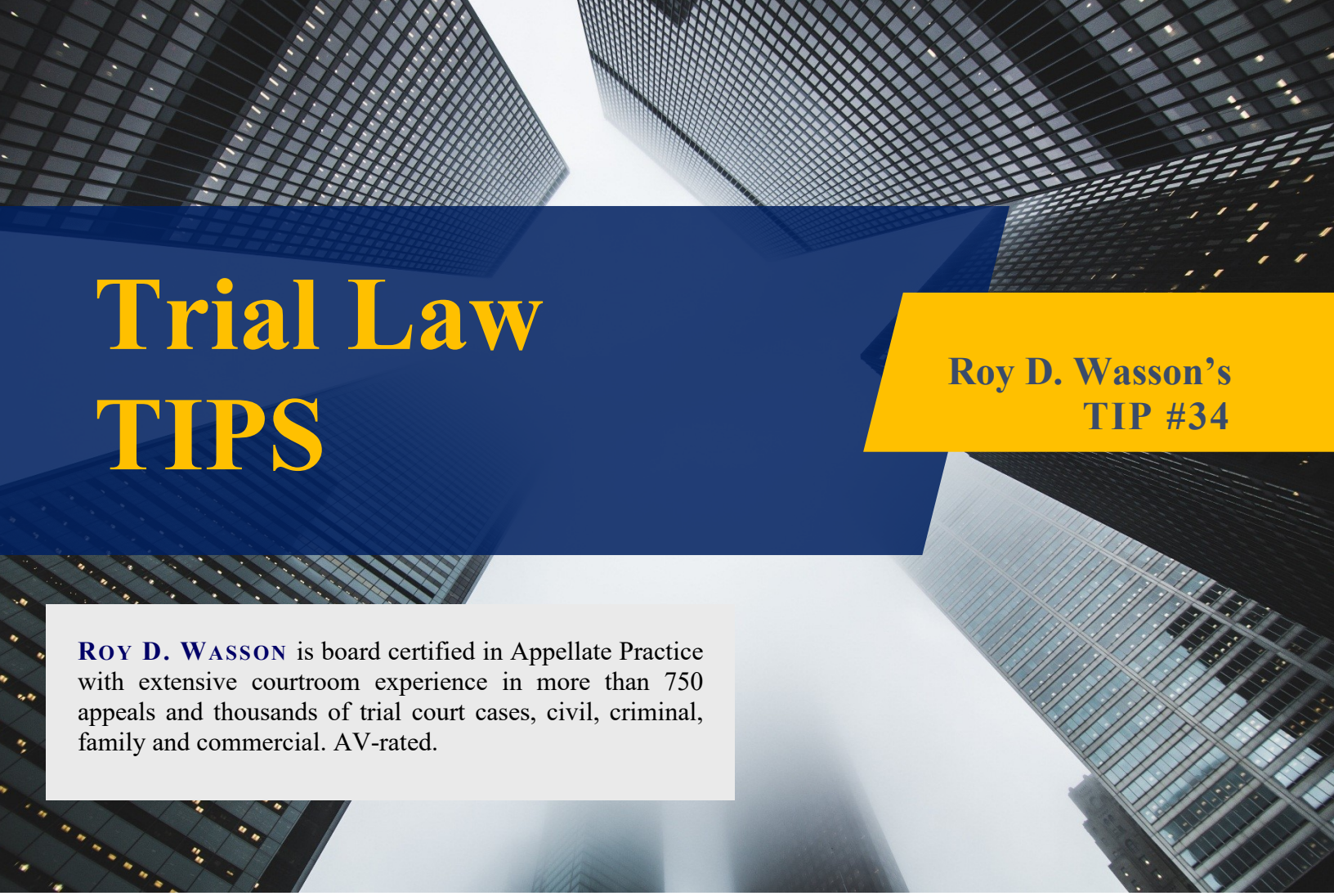

Trial Law TIPS

Roy D. Wasson's TIP #34

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Civil Procedure 101 Revisited— Critical Difference Between "Service" and "Filing" of Documents

Introduction

Most of us casually refer to having "filed" something on the day we mail it out to other counsel and the court and often view all deadlines in litigation as deadlines for "filing" of documents. To "file" a pleading, motion or other paper is such an ingrained part of our professional lives, that we commonly say that we have "filed" items which never come near the courthouse.

For example, haven't you recently told someone that you had "filed" an offer of judgment in a case? No, you didn't, unless it was after a trial you had won. The rule on proposals for settlement/offers of judgment is crystal-clear: "A proposal

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shall be served on the party or parties to whom it is made but ***shall not be filed*** unless necessary to enforce the provisions of this rule." Fla. R. Civ. P. 1.442(d)(emphasis added). Same with those Answers to Interrogatories you say that you have "filed" recently. Bet you didn't, since Rule 1.340(e) contains a similar prohibition on routine filing of such discovery. (Gawd, I am so old that I remember when ***everything*** in discovery was filed, including voluminous depos with foot-thick piles of exhibits, until the Amalgamated Court Clerks' Union went on strike (or something happened) to change the rules.

Be careful because some very important deadlines are not filing deadlines, but deadlines for "service" of the documents. Especially when you are working on a case pending in an out-of-town courthouse, the difference can be critical.

"Filing" Defined—Rule 1.080(e) is Wrong

To "file" a motion or pleading requires it to be delivered to the court. The paper is not filed when copies are delivered to opposing counsel, or even when the original is dropped in the mail to the court. It must get there.

Fla. R. Civ. P. 1.080(e), entitled "Filing Defined" is partially correct, but largely wrong. That rule correctly implies that a document must be received by the clerk or a judge to be filed, but it incorrectly indicates that the date-stamp on a paper is conclusive evidence of the date it was filed. The rule reads as follows:

> (e) Filing Defined. The filing of papers with the court as required by these rules shall be made by filing them with the clerk, except that the judge may permit papers to be filed with the judge, in which event the judge shall note the filing date before him or her on the papers and transmit them to the clerk. The date of filing is that shown on the face of the paper by the

> judge's notation or the clerk's time stamp, whichever is earlier.

Fla. R. Civ. P. 1.080(e)(emphasis added). A somewhat better definition of "filing" is this one from more than sixty years ago:

> Filing a pleading under the modern practice consists simply in ***placing it in the hands of the proper officer***, to be preserved and kept by him in his official custody, as a public record. It is deemed filed when, for that purpose, it is delivered to, and received by, the proper officer who is ordinarily the clerk of court for the county in which the action was brought. But merely putting a paper into the files or leaving it in the clerk's office without handing it to the clerk is not filing it; nor is it filed by placing it with the papers in the case, even though the other party had notice thereof, or by merely stating on another paper that it is filed "herewith.' Handing a paper to the clerk outside his office and obtaining his endorsement of filing thereon does not constitute a filing in his office. When a pleading is mailed to the proper officer for filing, ***the date of its receipt and not the date of mailing is the date of filing and if he never receives it, there is no legal filing.***

Bituminous Casualty Corp. v. Clements, 148 Fla. 175, 3 So. 2d 685 (Fla. 1941).

Contrary to the implication in Rule 1.080, the clerk's date-stamped date on a pleading is not conclusive evidence of when the document was filed. "The file marking on the complaint is evidence of the date of filing, but the same is not conclusive and such evidence is rebuttable." *Brooks v. Elliott*, 593 So. 2d 1209, 1210 (Fla. App., 1992). Sometimes clerks will leave a document lying around for days without stamping it, or mistakenly return it to counsel. In such case, the stamped

date is not controlling, and the date of filing must be established factually.

Such errors by the clerks can be dispositive if not corrected. For example, the date on a notice of appeal is jurisdictional, but an error on the stamped-in date can be corrected, as reflected by the following decision:

> A notice of appeal is generally deemed filed on the date it is actually filed with the clerk of the trial court. This date is presumptively shown by the filing date which the clerk of the trial court stamps on the face of the notice —although ***this is not a conclusive showing and may be rebutted by other evidence***. Where, as here, a notice of appeal is tendered for filing with the clerk of the trial court but is refused by the said clerk, the notice is deemed filed on the date it is so tendered—notwithstanding the appearance of a later filing date which is stamped by the said clerk on the face of the notice.

Weintraub v. Alter, 482 So. 2d 454, 457 (Fla. 3d DCA 1986)(emphasis added).

"Service" Defined—The Rule is Right This Time

"Service" of a pleading, motion or other document in litigation is the act of providing copies to opposing counsel. The most common methods of service are hand delivery and U.S. Mail. If a pleading is served by delivery, it is not when you give it to the runner that it is served, but when it is received by the attorney or left at his or her office.

"Service by mail shall be complete ***upon mailing.***" Fla. R. Civ. P. 1.080 (b)(emphasis added). Contrary to Courthouse Legend, there is no relevance to the postmark date on an envelope which contains a pleading served by mail. If dropped in the U.S. mailbox at 11:59 p.m., that document has been "served" regardless of when it is postmarked or when it is delivered. In my opinion,

service by Federal Express is effective on the date of delivery, not the date of dispatch.

The rule permits service by fax, but also requires that "a copy shall also be served by any other method permitted by this rule," so why bother faxing? One reason may be that you have set a hearing on short notice, and a mailed copy of the notice would be served today, but not received by the other side until too soon before the hearing date. Another reason to serve by facsimile is to meet the time deadlines for "delivering" of affidavits in opposition to motions for summary judgment under Rule 1.510(c).

Some Papers Have Filing Deadlines; Other Deadlines Are For Service

It would be ideal if every pleading, motion and other paper we generate could be both filed and served on the same date. That would solve a lot of the mistaken terminology we use when we say we "filed" a brief in the Supreme Court today, but in light of the realities of practicing in courts throughout the state, it is next to impossible to both file and serve court documents on the same day.

For example, Rule 9.110 "shall be ***served*** within 70 days of ***filing*** the notice [of appeal]." But the notice of appeal "by ***filing*** . . . within 30 days of rendition of the order to be reviewed." (Emphasis added). The distinction can sometimes be critical.

Not too many years ago I was enjoying a social setting in the company of several judges and lawyers which was attended by the then-Chief Justice of the Florida Supreme Court. At about 4:30 in the afternoon, I told the Chief I had to get back to the office, explaining that: "I have a brief due to be served today in a Supreme Court case, subject to an order that says 'no further extensions will be granted.'"

"Ohmigosh," the Chief exclaimed. "How are you gonna get it up to Tallahassee tonight?" I could tell that he was genuinely concerned. "The order does not say that the brief has to be ***filed*** today, only that it must be 'served' today," I assured the head of the court in question. "So long as I mail it before midnight, it will be timely," I explained. "There is no set deadline for filing." I explained to the Chief that I just had to get the brief into the mailbox

for service upon opposing counsel before midnight, and that it would get filed in due course thereafter. "I see what you mean," the Chief Justice responded, pondering those times when he had jumped on an airplane as a practicing lawyer to make sure that a brief was "filed" on time, back when the rules set deadlines for filing instead of service. "I never really thought about that difference before." Most of us don't, but all of us should. If a document must be "served" today, filing it with the court will not suffice; it also must be mailed or delivered to counsel of record. On the other hand, merely serving something that is subject to a filing deadline will not be sufficient either.

When moving for an enlargement of time to finish a legal memorandum, brief, or other document, make sure you use the terminology you really want when explaining what it is that you wish to do in 10 or 20 or 30 more days. Most people seem to move for an enlargement of time to "file" a brief, when the original deadline is only one for "service" of the brief. The appellate courts (other than the Fifth DCA) ordinarily will give you what you ask for, so if you want more time to get the brief into the mail to opposing counsel, then ask for an extension for "service" not "filing."

Of course, a few deadlines cannot be extended, even by consent of your opponent or by order of the court. The ones that are the most inflexible and the most commonly misunderstood are the deadline for a motion for new trial or rehearing and the deadline for filing a notice of appeal. Don't try to get extensions for either service or filing of those deadlines.

The most important "service vs. filing" deadline which often is confused is the deadline for a motion for new trial or rehearing under Fla. R. Civ. P. 1.530. You have ten days to do some act after the return of the verdict in a civil case or after the filing of a judgment entered on summary judgment or after a bench trial. But what must you do within those ten days? Most of us think of this as a deadline for "filing" the motion but listen up.

Imagine that you had a bad verdict on Monday, September 1st. It is now after 5:00 p.m. on September 11th, the tenth day after the verdict. Here are your choices: 1.) you can drop a copy of your

motion for new trial into the mail to the DA before midnight, and send the original by Fedex to the court clerk, which will not arrive for filing until Monday the 15th, 14 days after the verdict; 2.) or you can forget mailing the copies to the DA and instead spend your time on the drive to Pahokee (or wherever) and wake up the Clerk of Court at her home at 11:30 p.m., to go down to the courthouse and date-stamp as filed your Motion for New Trial a few minutes before midnight. Today is Day 10. One choice to make. You choose No. 2.

WRONG CHOICE. YOUR MOTION IS UNTIMELY. EVEN IF GRANTED, THE ORDER WILL BE REVERSED. IF DENIED MORE THAN 20 DAYS FROM NOW, THERE WILL BE NO WAY TO APPEAL BECAUSE THAT MOTION DID NOT EXTEND YOUR TIME TO APPEAL! ***DON'T LET THIS HAPPEN TO YOU!***

The action which must be taken within 10 days for your Motion for New Trial to be valid is not filing, but "service" upon the other lawyers in the case. You do not need to deliver the motion anywhere today (or even tomorrow) for it to be timely.

Most of you are wondering what ol' Roy No. 2 had in his afternoon tea today. "Surely if you only had time to either file something or serve it, you always will be okay by filing it on time," you rationalize. There you go applying logic again. The foregoing example actually happened to such a logical thinker in a case not so long ago. His appeal was dismissed. That case reads as follows:

> We write to warn counsel of the danger posed by the failure to comply with Florida Rule of Civil Procedure 1.530(b). Under the provisions of Rule 9.110(b), Florida Rules of Appellate Procedure, notices of appeal seeking review of final orders of lower tribunals must be filed within 30 days of rendition of the order to be reviewed unless rendition is suspended by "an authorized and timely" motion for new trial or rehearing as provided by Florida Rule of Appellate Procedure 9.020(g). ***In order to be "authorized and timely" under Rule 1.530(b),***

> ***Florida Rules of Civil Procedure, a motion for new trial or rehearing must be served no later than ten days after the date of verdict or date of the filing of the judgment.*** In the instant case the final summary judgments were filed August 10, 1995. Appellant accordingly was required to serve this motion for rehearing within ten days. Due to error or inadvertence, however, this was not done.
>
> Although [appellant] filed his motion for rehearing on August 21, 1995, the rule is clear that service of a motion for rehearing within the ten days . . . is the operative event determining whether a motion for rehearing is timely. Several cases have arisen involving service within ten days but filing beyond ten days. ***It is clear that filing beyond ten days is of no consequence as long as service is timely.*** Behm v. Division of Administration, 288 So. 2d 476, 479-80 (Fla. 1974). Although it may be counter-intuitive for civil lawyers to view service as an event of jurisdictional dimension, in the case of this particular rule, timely filing is of no moment, timely service is everything. Here service was plainly untimely. Accordingly, the appeal of the summary final judgments must be dismissed for lack of jurisdiction.

Pennington v. Waldheim, 695 So. 2d 1269, 1271 (Fla. 5th DCA 1997)(emphasis added).

"Immediately Thereafter" Does Not Mean the Next Day

There's nothing in the rules which expressly or impliedly requires filing on the same day of service, or even the next day. Both the Florida Rules of Civil Procedure and the Florida Rules of Appellate Procedure have provisions which require that "[a]ll original papers shall be filed either before service or ***immediately thereafter***." *See* Fla. R. Civ. P. 1.080(d) & Fla. R. App. P. 9.420(b) (emphasis added). However, the term "immediately" does not mean that you need to worry about filing documents on the very next day after a service deadline.

The controlling case on this subject is forty years old but still good law. In *Miami Transit Co. v. Ford*, 155 So. 2d 360 (Fla. 1963), the unsuccessful litigant in a trial court proceeding timely served its motion for new trial nine days after the verdict, but did not file that motion until six days after it was served, or fifteen days after the verdict. The Third District held that the motion for new trial was not timely, but the Supreme Court reversed in a thoughtful decision which analyzes the difference between service and filing and concludes that there is no deadline for filing the motion other than "reasonable promptness" and before the hearing on the motion. 155 So. 2d at 363.

The *Ford* case is still cited with approval as standing for the proposition that no firm filing deadline is imposed by the "immediately thereafter" language. *See, e.g., Amendments to the Florida Rules of Judicial Administration,* 780 So. 2d 819, 825 (Fla. 2000)(citing comments to 1997 amendment to Fla. R. Jud. Admin. 2.060). Your best bet will still be to send out the original document by Federal Express or another form of delivery which will get it to the courthouse within a couple of days after service. However, it is clear that there is no need to break your neck and get the original filed on the same day or the next day after your copies are served to opposing counsel, where service is the operative deadline.

Conclusion

Pay attention to the difference between deadlines for "service" and "filing" of pleadings, motion, briefs, and other items. Just knowing that there is a difference should give you a leg up on your opponent. Don't be intimidated when you receive a motion to strike some item which has been timely served which simply exhibits your opponent's ignorance of the difference between service and filing but use the occasion to educate the judge to the difference. And most of all,

Keep Tryin!

Roy

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