Trial Law TIPS

Roy D. Wasson's
TIP #38

Roy D. Wasson is board certified in Appellate Practice with extensive courtroom experience in more than 750 appeals and thousands of trial court cases, civil, criminal, family and commercial. AV-rated.

Dealing with 120-Day Deadline for Service of Process Under Rule 1.070(j)—Some Things Are Getting Easier

Introduction

Trial practice seems to constantly grow more complicated and filled with procedural pitfalls which serve as traps for the unwary. Such traps render it more difficult and less satisfying to handle litigation matters, as laws and rules proliferate. Strict time deadlines imposed by rules and statutes are high on the list of such dangerous annoyances.

It was not all that long ago that the only time deadline that a trial lawyer had to worry about seriously were the one imposed by the statute of limitation. One author noted the modern proliferation of other time deadlines and the problems they generated as follows:

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> For many years, plaintiffs would simply file a complaint to toll the statute of limitations and then go about their business of investigating and negotiating their case. In the 1980s, in an effort to improve judicial efficiency, the Florida Supreme Court mandated that cases on dockets needed to be expeditiously handled and moved forward. The one-year failure to prosecute statute [sic, Rule 1.420] assisted in this regard and the various circuits implemented case management conferences and other devices to move cases forward. In 1989, Fla. R. Civ. P. 1.070(j) was adopted as another measure to move cases forward. Rule 1.070(j) requires that all lawsuits have to be served within 120 days of filing the initial pleading.
>
> Plaintiffs' lawyers were not accustomed to this idea and many of the early cases in which the complaints were dismissed for a failure to timely serve involved Plaintiffs' attorneys who simply forgot to serve the complaint after filing.

Jerrold D. Schackow, Trial Lawyers Forum: The 120-Day Rule: What You Need To Know, 73 Fla. Bar J. 91 (1999).

Too many cases were dismissed based upon trial attorneys' inability to effectuate service within the 120 day deadline, some of which led to tragic results because statutes of limitation had expired and the actions could not be refiled. See, e.g., Morales v. Sperry Rand, 601 So. 2d 538 (Fla. 1992). (Ask me some day about the "bad old days" ten years ago when the courts would cruelly deny an extension of the 120 day period in a malpractice case to allow us to serve an Italian doctor working on a Greek cruise ship on a route between New York and Bermuda[1]. (On second thought, don't ask.)

The cruel irony about such results is that they were visited on the party who always sought to move cases to judgment: the plaintiff. By requiring trial lawyers to accelerate the pace of pretrial

[1]*See Uvanni v. Gallenga*, 619 So. 2d 31 (Fla. 3d DCA 1993)

activities beyond that self-imposed schedule which we already follow, the advantage shifted to defendants.

Such artificial deadlines distract us from preparing for events which require our utmost focus. Worse yet, arbitrary scheduling rules provide the defense with unjust tools they can use to defeat our clients' meritorious claims without trial by jury. The courts in applying the old version of Rule 1.070(j) were not at all sympathetic to the practical realities of plaintiffs' attorneys' trial practice. See, e.g., Hernandez v. Page, 580 So. 2d 793 (Fla. 3d DCA 1991)(pending settlement negotiations coupled with mistake or inadvertence of counsel did not constitute good cause to avoid dismissal for failure to meet 120 day deadline).

Finally, after seeing the unfortunate and unfair consequences of such a harsh rule, the federal courts and the Florida Supreme Court made changes which make this area of trial practice a little less complicated and less dangerous. If you are facing expiration of the 120 day deadline soon or if, worse yet, you have recently received a motion to dismiss your complaint for failure to effectuate timely service under Rule 1.070, there is much more hope than there was a few years ago. Don't panic and you should still get to trial on the merits of your case.

Feds Lead the Way For A Change

Rule 1.070(j) was patterned after Fed. R. Civ. P. 4(j), which for years resulted in the same sort of unfair results as were caused by the later state court rule. In a rare example of the federal system ameliorating the harsh injustice of a procedural rule, and doing so ahead of the Florida state courts' action to rectify the situation, Federal Rule of Civil Procedure 4 was amended in 1993 to permit the trial court to extend the time for service of process, even absent a showing of good cause for the delay.

Additionally, that amendment ***required*** that an extension of time be given if the reason for the plaintiff's attorney's delay was "good cause." The revised federal rule reads as follows:

> (m) **Time Limit for Service** If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the

> complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant ***or direct that service be effected within a specified time***; provided that if the plaintiff shows good cause for the failure, the court ***shall extend the time for service*** for an appropriate period.

Fed. R. Civ. P. 4(m)(emphasis added).

It took five years for Florida Supreme Court to follow suit and to make a similar amendment to Rule 1.070, but "better late than never." In a decision entitled *Amendment to Florida Rule of Civil Procedure 1.070(j)—Time Limit for Service*, 720 So. 2d 505 (Fla. 1998) the Court *sua sponte* proposed an amendment in keeping with the amendment to the federal rule, noting that the prior version of "this rule sometimes acts as a severe sanction," such as where "a plaintiff would be unable to refile suit . . . where the statute of limitations has expired." *Id.*

Like the revised federal rule, the amendments to Rule 1.070 direct trial courts to ***always*** grant additional time for service of process where good cause for the original delay was shown. In addition, the new amendment to the rule permits trial courts to extend that time deadline, even absent a showing of good cause.

Recent Florida Cases Exhibit Common Sense Fairness Approach

The pendulum has begun to swing the opposite direction of the prior trend in which plaintiffs were knocked out of court based upon technical non-compliance with the 120-day rule. One court noted that decisions interpreting Rule 1.070(j) should recognize that the rule is intended to be "a case management tool, not an additional statute of limitations cutting off liability of a tortfeasor." *Root v. Little*, 721 So. 2d 836, 837 (Fla. 5th DCA 1998).

In *Totura & Company, Inc. v. Williams*, 754 So. 2d 671 (Fla. 2000), the Court discussed the evolution of the amendments to Rule 1.070, and held: "With the flexibility of this new rule, courts will have greater latitude to deal with cases such as these where

technical defenses become the centerpiece of litigation and the merits are obscured, if not totally overshadowed." *Id*. at 678.[2]

In *Chaffin v. Jacobsen*, 793 So. 2d 102 (Fla. 2d DCA 2002), the court held that where a plaintiff demonstrates good cause or excusable neglect for the failure to make service of process within 120 days, the trial court ***must extend*** the time for service and has no discretion to do otherwise.

One of the most recent cases discussing the new approach under Rule 1.070(j) is *Kohler v. Vega-Maltes*, 838 So. 2d 1249 (Fla. 2d DCA 2003). The court in that decision echoed the *Chaffin* holding and went further to require that additional time be granted to effectuate service, even where good cause for the delay has not been shown, if service is accomplished before dismissal, and if the result of the dismissal would be to effectively bar recovery due to the expiration of the statute of limitations.

The Second District in the *Kohler* case reversed the trial court's dismissal of a complaint based upon untimely service, finding that good cause for the delay had been shown. In addition, the court held: "further even if there had not been a showing of good cause or excusable neglect, the trial court abused its discretion in granting the motion to dismiss where the statute of limitations had run and an affidavit of compliance had been filed at the time of the hearing on the motion to dismiss." *Id*. at 1250-51. *See also Gary J. Rotella & Assocs., P.A. v. Andrews*, 821 So. 2d 468 (Fla. 4th DCA 2002)(reversing order denying second motion for enlargement of

[2]The *Totura & Company* case also is important authority for plaintiffs seeking to amend their complaints to join a new defendant and add a cause of action which soon will be barred by the statute of limitations. That case held that the statute is tolled by filing the motion to amend. But, in the "having-your-cake" department, be careful to note that the filing of the ***motion*** in such a situation is the trigger event which starts the 120-day period for service, rather than entry of the order granting leave to amend. *See id.* at 674-75. That should not be too much of a problem in light of the courts' more liberal approach to extending the deadline for service of process, but counsel should not overlook the need to document their efforts to timely serve process.

time to serve process, which motion was filed thirty days after the expiration of the first extended period, holding that "plaintiff established good cause and that the trial court had no discretion to deny appropriate additional time to effect service").

Suggestion for a Proactive Procedure

If the 120-day time period already has expired in one of your cases, or if that deadline is close at hand, here is a suggestion that you take some action in addition to continuing your efforts to get service on the defendant. Instead of waiting for a motion to dismiss to be filed by the defendant or an order to show cause to be issued by the trial judge, go ahead and file a motion to extend the time and obtain an order granting that motion. Such a procedure is authorized by the amended rule itself.

The rule provides that the trial judge may *sua sponte* extend the time for service, but also may extend the deadline at the request of the plaintiff. That part of the rule provides as follows: "If service of the initial process and initial pleading is not made upon a defendant within 120 days after filing of the initial pleading with the court, on its own initiative after notice ***or on motion, shall direct that service be effected with a specified time*** or shall dismiss the action without prejudice or drop the defendant as a party . . . ." (Emphasis added).

Of course, if you have not yet perfected service on the defendant, you have no one to notify of your motion to extend, so you need not schedule a formal hearing on your motion (at least not one where the defense attorney will be present).

Trial courts are likely to initiate automatic procedures similar to the show cause orders which issue after a year of no record activity, which provide some period of extension to complete service of process. However, the amount of additional time which is granted in such a form will at best be arbitrary, instead of suited to your particular needs and situation. At worst that extended period will be too short. Instead of waiting for the court to act, file your own motion explaining how much more time you need, and detailing the efforts of your process server to date.

Conclusion

It is highly frustrating and discouraging when the plaintiff is punished with dismissal or other sanctions as a result of the Defendant throwing up roadblocks to getting the case at issue and tried. Now when you have a case of a globe-trotting defendant who refuses to accept service of process, you have a fair mechanism to get the additional time you need without worrying about dismissal of your complaint effectively with prejudice.

Not everything in the practice of law is growing more difficult and dangerous. Under the new approach of Rule 1.070(j) you will savor the rare experience of some aspect of trial practice getting a little ***less*** complicated, and a lot more fair. The courthouse doors should remain open to your clients, so long as you and I . . .

Keep Tryin!

Roy

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