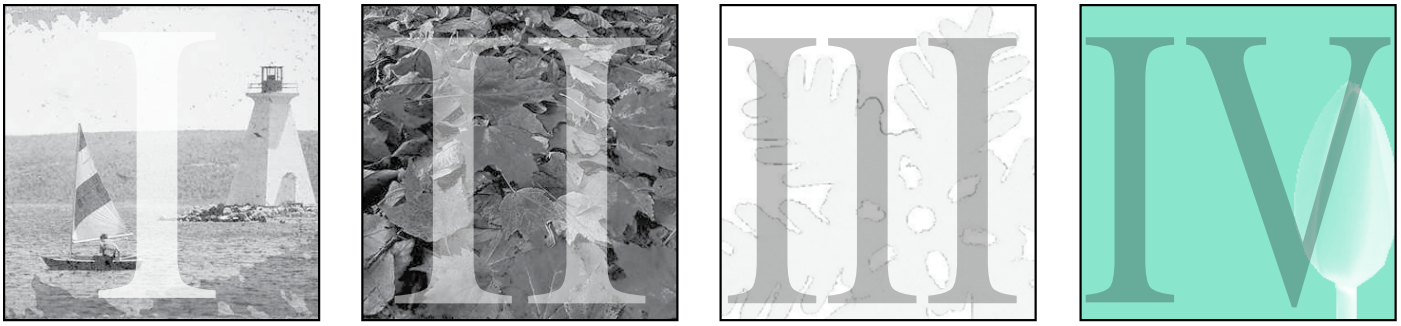
MICHIGAN DEFENSE
QUARTERLY

Volume 34, No. 4 - 2018



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Appellate Practice Report

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Effect of Delayed or Non-Service of a Judgment or Order on Appeal Deadline

In the age of e-filing, parties usually know right away when a judgment or order has been entered. But many Michigan courts still do not use e-filing,[1] and there may be other reasons why a party did not receive timely notice of entry of a judgment or order. Fortunately, both the Michigan Court Rules and Federal Rules of Appellate Procedure provide mechanisms for securing a timely appeal nonetheless.

State Court

The Michigan Court Rules require that an appeal of right in a civil case must be filed within 21 days of the judgment or order being appealed, MCR 7.204(A)(1)(a), or 21 days after the entry of an order denying a timely "motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed." MCR 7.204(A)(1)(b).[2] Under MCR 7.204(A), "'entry' means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions." This means that if a judge signs a judgment or order on one day, but then the court clerk delays entering the order on the court's docket for a few days, the appellant in a civil case can rely on the later date in calculating the appeal periods under MCR 7.204(A)(1).

But what if service of the judgment or order is delayed, or a party doesn't receive notice of it at all? MCR 7.204(A)(3) provides the answer. The rule instructs that the party should file its claim of appeal along with an affidavit "setting forth facts showing that the service was beyond the time stated in [the court rules]."[3] The appellee then has the right to file an opposing affidavit within 14 days of being served with the claim of appeal. *Id*. "If the Court of Appeals finds that service of the judgment or order was delayed beyond the time stated in MCR 2.602 and the claim of appeal was filed within 14 days after service of the judgment or order, the claim of appeal will be deemed timely." *Id*.

Federal Court

The federal rules also provide a process for securing a timely appeal when a party does not receive timely notice of a judgment or order. Generally, civil appeals under Federal Rule of Appellate Procedure 4 must be filed "within 30 days after entry of the judgment or order appealed from." FR App P 4(a)(1)(A). Under Rule 4(a)(6), however, if "a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry," the district court may "reopen the time to file an appeal" if (1) the party files a motion either "180 days after the judgment or order is entered" or 14 days after the party received notice, whichever is earlier, and (2) "no party would be prejudiced." FR App P 4(a)(6). Alternatively, Rule 4(a)(5) provides that the losing party can seek an extension if it files a motion "no later than 30 days after the [appeal period] expires" and shows "excusable neglect or good cause." FR App P 4(a)(5).[4]

A recent decision from the Sixth Circuit Court of Appeals provides a word of caution when it comes to exercising these options. In *Martin v Sullivan*, 876 F3d 235 (CA 6, 2017), the plaintiff filed a late notice of appeal claiming "that he did not receive timely

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notice of the underlying judgment." *Id.* at 236. But he never sought relief from the district court by filing a motion under Rule 4(a)(5) or (6). The Sixth Circuit held that this was a fatal error, depriving the court of appellate jurisdiction. The court found the rule's plain text to govern, mandating that "if a losing party wants more time to file an appeal, it must file a motion in the district court asking for more time." *Id.* at 237. In reaching that decision, *Martin* specifically rejected the notion that the court could simply construe the plaintiff's late notice of appeal as a motion to reopen his time to appeal. *Id.* at 237. Because the appeal was untimely, it had to be dismissed. *Id.* at 238.

Conclusion

Although the state and federal rules are designed to provide parties with timely notice of a judgment or order, sometimes that doesn't happen. By carefully following the rules' safeguards, a losing party has ample opportunity to avoid any prejudice and ensure that a timely appeal is filed.

Endnotes

1 The Michigan Supreme Court is currently working on implementing a statewide e-filing system.

2 There are certain exceptions to the 21-day time period (e.g., appeals from certain agency decisions where a different time period is prescribed by statute), but they are beyond the scope of this article.

3 MCR 2.602(D)(1) requires that a judgment or order be served within seven days of its entry.

4 Rules 4(a)(5) and (6) derive from 28 USC 2107(c).

Sharing Oral Argument Time with Co-Defendants

When you're defending civil appeals, it's not uncommon to have other parties on your side of the "v." And that means you'll find co-defendants jockeying for podium time. Usually, that's not an issue at the trial-court level. Most trial-court judges are generous about giving each defendant a chance to speak its piece. But time is a scarcer resource at the appellate level.

In the Michigan Court of Appeals, each side gets thirty minutes, unless only one side reserved the right to oral argument. In that case, the side with the right to oral argument gets fifteen minutes. (Whatever the amount of time allotted under the Michigan Court Rules, arguments at the Michigan Court of Appeals rarely take the full allowance. And you can expect encouragement from the bench to wrap up your argument as quickly as possible.)

> "If the Court of Appeals finds that service of the judgment or order was delayed beyond the time stated in MCR 2.602 and the claim of appeal was filed within 14 days after service of the judgment or order, the claim of appeal will be deemed timely." *Id.*

The Michigan Supreme Court has the same rules for oral-argument time: thirty minutes per side where both sides have the right to oral argument, and fifteen minutes when only one side has the right to argument. The Court can also order oral argument on whether to grant an application, in which case each side gets fifteen minutes.

At the Sixth Circuit Court of Appeals, each side gets only fifteen minutes.

For each court, the rules allot time to each *side,* not each *party*. When there's more than one defendant, defense attorneys have to divide that time between themselves.

Of course, each court allows parties to move for additional time. But it doesn't take much experience at the appellate podium to learn that judges rarely yearn for more oral argument. Filing a motion for more time is an option that should be exercised infrequently—at least if you're interested in keeping your panel happy.

The better practice is to talk beforehand with the other defense attorneys and agree on a plan for splitting your time. A number of factors may play a role in that conversation:

- Is there a logical order to defense arguments? For instance, does one defendant's argument depend on the Court's response to another defendant's argument? Are there issues of indemnification or vicarious liability, to name two examples?
- Do you have any insight into the Court's likely questions? If there's an obvious weakness in the defense, you should anticipate that an appellate panel will pick up on it. And you should put the attorney best equipped to field those questions first.
- Do the individual attorneys have strong preferences about arguing first or last? Some attorneys will insist on going first; others prefer to hear all of the questions directed to other attorneys before stepping to the podium.
- Are any of the defense attorneys going to take a position adverse to another defendant? If so, it may make sense to have the attorney in the attacking role speak before the attorney in the defensive position.

Are there glaring differences in monetary or legal stakes? It's not unusual for one defendant to have much more at stake than other defendants. When that's the case, it may be wise to give the defendant with the most at stake the lion's share of the defense time.

Whatever your decision about splitting time, work it out beforehand and tell the Court as soon as possible. The first defense attorney at the podium should advise the Court about the order of argument. In the Sixth Circuit Court of Appeals, you'll want to share your plan with the clerk before the Court takes the bench.

Deciding these issues beforehand and notifying the Court promptly will help give the defendants an air of professionalism—which never hurts.

Endnotes

1 MCR 7.214(B)(1);

2 MCR 7.214(B)(1).

3 MCR 7.314(B)(1).

4 MCR 7.305(H)(1)

5 MCR 7.314(B)(2).

6 6 Cir. R. 34(f)(1).

7 MCR 7.214(B); MCR 7.314(B); 6 Cir. R. 34(f)(2).