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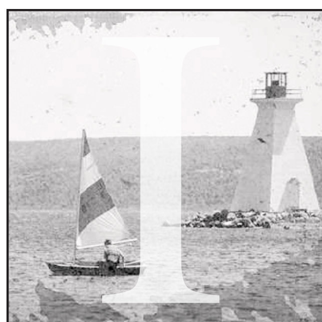

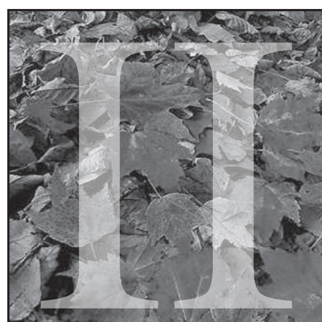

IN THIS ISSUE:

ARTICLES

- Introducing Nuance to the Whistleblowers' Protection Act
- Theoretical Redemption of the Michigan No-Fault Consumer
- Determining Liability In Collisions At Signalized Intersections

REPORTS

- Appellate Practice Report
- Legal Malpractice Update
- Legislative Report
- Medical Malpractice Report
- No-Fault Report
- Supreme Court Update
- Amicus Report

PLUS

- Member to Member Services
- Member News
- Schedule of Events
- Welcome New Members

Appellate Practice Report

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E-Filing Comes to the U.S. Supreme Court—Sort Of.

Change comes slowly to the United States Supreme Court. Each of the Court's sessions still begins with the centuries-old invocation: *Oyez! Oyez! Oyez!* The Court still prohibits video and still photography. Each advocate still begins an argument with, "Mr. Chief Justice, and may it please the Court…." And some court observers are still getting over the shock of the gold stripes that the late Chief Justice Rehnquist added to his robe after seeing a similar robe in a Gilbert and Sullivan production.

So it's no surprise that the Supreme Court has been slow to embrace e-filing. Although federal circuit courts have happily used e-filing for at least a decade, the Supreme Court has continued to require paper briefs, professionally printed in booklet form. It's an expensive process. But the wait for e-filing in the Supreme Court finally ended on November 13, 2017—sort of.

Since November 13, 2017, the Court has required attorneys to e-file copies of their briefs. Any member of the Supreme Court Bar and any attorney appointed under the federal Criminal Justice Act can register to e-file through a link on the Supreme Court's website. It takes a couple days to get a password, so registering in advance is a good idea.

Here's the rub: parties still have to file paper briefs, too. The electronically filed brief is **in addition** to the traditional booklet-form briefs required under the Supreme Court's rules. Although the Court anticipates a time when parties will only need to file briefs electronically, the current rules require parties to file electronic copies "at the time of filing or reasonably contemporaneous" with the filing of a paper brief.

A few caveats about e-filing in the Supreme Court. First, not everything submitted to the Court should be e-filed. The Court's *Guidelines for the Submission of Documents to the Supreme Court's Electronic Filing System* explains that the only letters that parties may e-file are: (1) motions for extensions, (2) notice that a party no longer has an interest in the litigation, (3) amended corporate disclosures, (4) substitutions of public officers, (5) renewed applications to a particular justice under Supreme Court Rule 22.4, (6) waivers of the 14-day waiting period for submission to the Court under Supreme Court Rule 15.5, (7) consents to *amicus* briefs, and (8) letters that respond to a specific request from the Court.

Second, e-filing doesn't count as service. Parties still need to serve briefs in paper form as required under Supreme Court Rule 29.

Third, attorneys don't need to create a separate Notice of Appearance for electronic filing. The Court's *Guidelines for the Submission of Documents* explains that the e-filing system creates a notice of appearance automatically when a filer submits a brief.

Although the Court's e-filing system is just a small step toward paper-free operations, it does offer some advantages. Parties can hyperlink e-filings—both to internal links and to "external source[s] cited in the document." Parties will also receive e-mail notification of new events in a case. The Court provides a technical-support staff during business hours and allows parties to e-mail electronic copies of documents to a specified e-mail address if they encounter technical problems after hours.

But the best feature of the Court's new e-filing system benefits the public at large as much as parties to appeals: The Court will now make briefs available online. And, unlike PACER, the Supreme Court's e-filing system will provide access for free. Although many of these briefs are already available through paid-access services like Westlaw and Lexis,

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the Supreme Court's new system will facilitate public access to court records.

Jurisdictional vs Nonjurisdictional Appeal Filing Deadlines

Most of us think of appeal filing deadlines as absolute. That certainly is the case under the Michigan Court Rules. But as demonstrated by a recent decision from the United States Supreme Court, *Hamer v Neighborhood Housing Serv of Chicago*, ___ US ___ (Nov 8, 2017), it is not always so when it comes to the Federal Rules of Appellate Procedure.

State Court

It is well established under the Michigan Court Rules that the "time limit for an appeal of right is jurisdictional." MCR 7.204(A). In general, this means that an appeal of right in a civil case must be filed within 21 days of the judgment or order appealed from, 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).[1] If an appeal as of right is not filed in accordance with the court rules, it will be dismissed for lack of jurisdiction. See *Baitinger v Brisson*, 230 Mich App 112, 113; 583 NW2d 481 (1998) ("We dismiss defendant's appeal for lack of jurisdiction under MCR 7.203 because it was not filed within the period provided in MCR 7.204(A)(1).").

Federal Court

But the analysis is more nuanced under the federal rules. 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). And just as under the Michigan Court Rules, the federal courts of appeals lack jurisdiction over appeals that are not filed within the 30-day period. *Bowles v Russell*, 551 US 205, 209-210 (2007) ("This Court has long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'").

Unlike MCR 7.204, however, Rule 4 allows the 30-day appeal period to be extended even in cases where the losing party received timely notice of the judgment.[2] This is where things become somewhat complicated. Under Rule 4(a)(5), a district court "may extend the time to file a notice of appeal" if the losing party files a motion "no later than 30 days after the [appeal period] expires" and shows "excusable neglect or good cause." Rule 4(a)(5) also limits the length of an extension of time to appeal to "30 days after the [prescribed appeal period] or 14 days after the date when the order granting the motion is entered, whichever is later." FR App P 4(a)(5)(C).

At first blush, it would seem that since the 30-day appeal period is jurisdictional, so too must be the time limit that Rule 4(a)(5)(C) places on a district court's extension of the appeal period. Not so, according to a recent decision from the United States Supreme Court. In *Hamer v Neighborhood Housing Serv of Chicago*, ___ US ___ (Nov 8, 2017), the district court granted summary judgment to the defendants and dismissed the plaintiff's age discrimination claims on September 14, 2015. Just before the 30-day appeal period was set to expire on October 14, 2015, the plaintiff's counsel moved to withdraw as well to extend the time for the plaintiff to file a notice of appeal. The district court granted both motions, extending the appeal period by an additional 60 days, from October 14 to December 14, 2015. Based on that extension, the plaintiff filed her notice of appeal to the Seventh Circuit on December 11, 2015.

On its own initiative, the Court of Appeals questioned the timeliness of the plaintiff's appeal and, after requesting briefing on the issue, dismissed it for lack of jurisdiction. The court reasoned that since extensions of the appeal period are limited by Rule 4(a)(5)(C) to 30 days, the plaintiff's notice of appeal was untimely and had to be dismissed.

The Supreme Court, however, reversed. The Court observed that although a district court's ability to extend the appeal period under Rule 4(a)(5) ultimately derives from 28 USC 2107(c),[3] the only **statutory**, and hence "jurisdictional," time limit placed on such extensions is in "cases in which the appellant lacked notice of the entry of judgment." In those cases, the district court can reopen the appeal period for up to "14 days from the date of entry of the order reopening the time for appeal." 28 USC 2107(c)(2). But "for other cases, the statute does not say how long an extension may run."

Consequently, the Court held, Rule 4(a)(5)(C)'s limitation on extensions of time is not a "jurisdictional appeal filing deadline," but rather a "mandatory claim-processing rule" that is subject to "forfeiture" or other "equitable considerations." The Court explained that only statutory time limitations affect a court's "adjudicatory authority over the case," whereas mandatory claim-processing rules such as Rule 4(a)(5)(C) "may be waived or forfeited."

The Court concluded that because the Court of Appeals had "erroneously treated as jurisdictional Rule 4(a)(5)(C)'s 30-day limitation on extensions of time to file a notice of appeal," a remand was necessary for that court to determine whether the defendants' failure to object "effected a forfeiture," or "whether equitable considerations may occasion an exception to Rule 4(a)(5)(C)'s time constraint."

Conclusion

Although the best practice is to follow **any** appeal filing deadline, regardless whether it is contained in a statute or a court rule, the Supreme Court's decision in *Hamer* suggests that, at least in federal court, the failure to do so is not necessarily fatal.

Endnotes

1. 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.
2. MCR 7.204 and Rule 4 are similar in providing for extensions of time in cases in which a party did **not** receive notice of the judgment. Pursuant to MCR 7.204(A)(3), "[i]f 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." Rule 4's analogous provision permits a district court to "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).
3. 28 USC 2107(c) provides that a district court "may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause."