Legal Summit

HELPING YOU REACH THE PEAK OF YOUR PRACTICE

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WHY ARE WE WRITING THIS NEWSLETTER?

About five years ago, a young lawyer asked me if I could serve as her mentor. I declined, explaining that I was effectively serving as a mentor to the four young lawyers in our firm and my schedule simply did not permit me to assume the responsibility of mentoring anyone outside of the firm.

I continue to feel guilty about that decision.

The fact of the matter is that, for a host of reasons, more and more young lawyers are working without the benefit of the oversight and guidance of an experienced lawyer. I had the benefit of a great mentor, and I like to think that the young lawyers in our firm have the benefit of what I have learned from my mentor and from my work for the past thirty-six years in the Bar. But too, too many lawyers, armed with good intentions, are forced to try to figure out things on their own or by following the example of those who may not set the best example of how to do what lawyers should do.

The result? Stress. Bad results. Impact on one's reputation which may be irreparable. Stress. Harm to clients. Bar complaints. And, did I say, stress?

So, aided by the other lawyers in our firm, this newsletter is an effort to share some tips to assist lawyers who practice civil law. There will be articles about civil procedure, evidence, technology, ethics, and practical items of practicing law. Although we practice primarily plaintiff's personal injury and wrongful death law at our firm, very little of this newsletter will address tort law or other substantive law. (As you have learned or will learn in the future, understanding the substantive law is the easiest thing for lawyers to do.) Readers interested in tort law can learn more on our website (www.johndaylegal.com), on my blog (www.dayontorts.com), or in my books (www.johndaylegal.com/publications).

Each newsletter will be available for viewing on our website at www. johndaylegal.com/newsletter. We will also have links to any materials and forms referenced in each newsletter. If you have a topic you would like us to address in a future edition, send me an email at newsletter@johndaylegal.com and we will make an effort to do so.

We hope this and future editions of this newsletter help you reach the summit of your potential as a lawyer.

QUICK TIP

If you serve a second set of interrogatories or requests for production, number them consecutively, one set to the other. So, if your first set of interrogatories ended with Interrogatory 14, start your second set with Interrogatory 15.

Why? Because it will be easier to refer to the interrogatory at trial. Rather than saying "let me direct your attention to your response to Interrogatory 2 in our Second Set of Interrogatories and Requests for Production of Documents," you can say "let me direct your attention to your response to Interrogatory 16." Doing so will also simplify motions to compel.

IN THIS EDITION

NOTICES OF APPEAL

NOW GO TO APPEALS COURT CLERK

by
Liz Sitgreaves

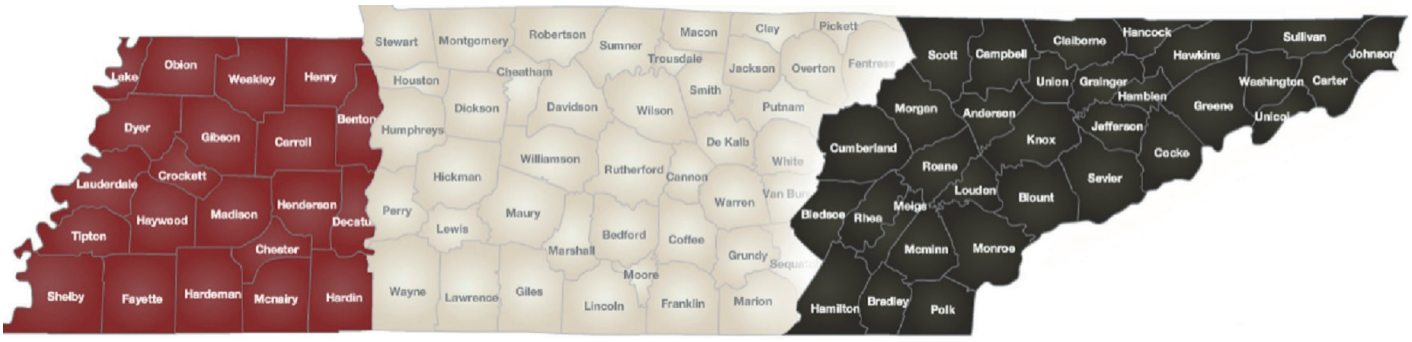
If you have not heard the big change in appellate practice, now is time to take note. Effective July 1, 2017, all notices of appeal filed with the Court of Appeals, Court of Criminal Appeals or Supreme Court must be filed with the Clerk of the Appellate Courts. To which Appellate Court Clerk's office do you send your notice of appeal? It should be filed in the office of the Appellate Court Clerk in the Grand Division in which the trial court from which the appeal rises is located. Some of you may have the Grand Divisions and corresponding counties memorized. If you don't, there is an interactive map of the Grand Divisions on the Tennessee Courts website located here: www.tncourts.gov/administration/judicial-resources/judicial-district-map.

Trial court clerks are not permitted to accept the notice of appeal any longer. What happens if you file in the trial court and you are up against your thirty-day deadline to file the notice of appeal? The transitional provision of Tennessee Rule of Appellate Procedure 4(a) provides that if you incorrectly attempt to file the notice of appeal with the trial court clerk, the trial court clerk "shall note the date and time of the receipt of the attempted filing," and "shall immediately notify the party attempting to file the notice" to file the notice of appeal with the appellate court clerk.

If you timely attempted to file your notice of appeal with the trial court clerk, i.e. you attempted to file it within 30 days from the entry of the judgment, the party has an additional 20 days from the 30th day after the entry of the judgment within which to file the notice of appeal with the appellate court clerk. Notices of appeal filed within this 20-day period allowed by the transitional provision will be deemed timely filed. Since this 20-day period is contingent upon an attempt to improperly file it with the trial court clerk, one would assume that you would need to make certain you have the notice of appeal with the trial court's notation of the date and time of the receipt of the attempted filing (and may want to make sure that the trial court clerk themselves follows Rule 4(a)'s mandate).

The transitional provision expires on 11:59 p.m. of the appellate court clerk's local time on June 29, 2018, after which it is automatically repealed. So, practitioners have a solid year to figure out the new filing rules before it is too late.

Why this major change to the filing rules? The Advisory Commission Comment to the 2017 amendment provides that in 2017, the Appellate Court Clerk's office will implement the much-anticipated electronic filing and begin charging fees at the initiation of an appeal.



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CONFIRMING CONVERSATIONS

WITH OPPOSING COUNSEL

by
John Day

Many of the problems in the world are linked to failures of oral communication. Problems with adverse counsel are no exception.

Communication problems lead to honest (or less than honest) differences about the substance of communications. This leads to a flurry of letters and emails, motions, hurt feelings and soured relationships. You may end up in the position of standing in open court challenging the veracity of a fellow lawyer – and he or she will be challenging yours.

So how do you avoid this problem? Follow the conversation up with an email or letter that confirms the conversation. Documentation of conversation is not necessarily a sign of distrust – it is an effort to avoid future misunderstandings.

It can be as simple as this. "Sally, this will follow-up on our conversation earlier today. We have agreed that (insert substance of agreement). If I have inadvertently misstated any aspect of our agreement, please let me know as soon as possible."

Now, you may say "The conversation was clear. And I was talking with opposing counsel whom I know to be honest and in fact we are friends. An email confirming the conversation will offend her." Well, it should not. Anyone can have a failure of recollection after a conversation, especially over the length of time it takes cases to get to trial. And friendship makes no difference – friends can make mistakes, too, and you do not want to challenge a friend's credibility or forfeit your client's position to avoid doing so. A letter or email accurately summarizing an oral discussion should offend no one.

What happens when you are drafting the confirming email and you realize you have forgotten the exact substance of an agreement reached in the discussion? First, be thankful you are writing a confirming email – you now can clear up. Second, say this: "Sally, this will follow-up on our communication. We have agreed that (insert substance of agreement on points 1, 2 and 3). Finally, we also discussed [Point 4] but candidly I cannot remember how we agreed to resolve that issue. Do you recall?"

Alternatively, you can say: "Finally, we also discussed [Point 4] but my recollection on that is a little unclear. I believe we agreed that (insert substance). Do you agree?"

What you should not do is simply guess about the terms of the agreement without drawing attention to your uncertainty – don't risk your credibility.

What happens if you reached an oral agreement but there is another point that you want addressed that did not get specifically mentioned, or if it was, it was not resolved? If there was no discussion say it this way: "There is one last point that we did not discuss. I would like you to agree that [state terms]. I think this is consistent with our other agreements because [insert]. Please let me know if you can agree on this point. "

If there was discussion but no agreement, say this: "In addition to the agreement on the issues discussed above, we also discussed [issue]. Please discuss this with your client and let me know if you can agree that [proposed agreement]."

You should also memorialize any point on which you disagree. For example: "We also agreed to disagree on the following items. [List] I will be preparing a motion to address these matters with the Court."

A few last pointers. First, do not summarize an agreement or conversation unfairly. You will get in a battle that will only hurt your credibility with the opposing lawyer. Second, write your email with the expectation that it may be attached to a motion. Thus, be polite and professional. Third, if you used an email (as opposed to a letter) appropriately title it in the subject line and save it so you can readily find it if the need arises.

Documentation of communications avoids misunderstandings, brings an early awareness of misunderstandings, and serves as proof of agreements or agreements to disagree. Do not worry about offending a friend by documenting a communication – documentation enhances friendships because it avoids innocent miscommunication.

PREPARING YOUR CLIENT

FOR A DEPOSITION

by
Liz Sitgreaves

When preparing clients for a deposition, many lawyers may prepare clients for expected questions about the case, but we may forget to prepare our clients for the very process that is a deposition. Most of our clients have likely never been deposed and their only example of a deposition may be over the top scenes from films or movies. You need to educate your client on what a deposition is and how it will and can be used. Be sure to explain how the deposition room will be laid out and the role of each of the participants in the deposition.

Below are some guidelines to go over with your client when prepping them for a deposition. While these guidelines may seem obvious or simplistic to us as lawyers, these tips are designed to prepare your client for the process of the deposition and put them at ease so that they can give a good deposition.

- Tell the truth. Again, this may seem obvious, but you want your client to feel at ease and the truth is always the best answer.
- Sometimes the truthful answer is "I don't know." Many deponents feel compelled to have a substantive answer to every question, and instead of truthfully saying they don't know the answer will speculate on what the answer "should" be.
- If you don't hear a question, ask that it be repeated.
- If you don't understand a question, ask that it be rephrased. Your client may feel obligated or pressured to answer every question, even if it is one they do not understand. Let them know before the deposition that it is ok to ask for clarification if they don't understand.
- Answer with words. Verbal communication is all that can be recorded by the court reporter. Similarly, don't talk over the lawyer asking the questions. (Ok, these tips are also so you get a good transcript, but it still helps to tell your client.)
- If the lawyer asking the questions pauses, do not feel obligated to fill the silence. This is not a date. Simply sit there in silence until a question is asked.
- If you need to take a break, say so, and one can be taken. Let your client know they won't be held hostage in a 5-hour deposition with no breaks.
- Dress appropriately, but comfortably. This is especially important if the deposition is being recorded on video. Again, this may seem obvious, but you never know when your client will show up in a cut-off t-shirt.
- Don't ask the other lawyer questions.
- Watch your conversations and behavior during the entire deposition, even during breaks. Tell your client that they are also being evaluated as a possible witness so getting angry or defense is not helpful.

Finally, remind them one more time that telling the truth is the most important thing. This simple deposition prep with your client is worth the extra time and can really help your client feel less nervous about their deposition and hopefully help their case.

DID YOU KNOW?

Tenn. R. Civ. P. Rule 5A.02(5) was revised effective July 1, 2017 to increase the number of pages that may be fax-filed from 10 to 50.

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The Law Offices of John Day, P.C., with offices in Brentwood and Murfreesboro, serves plaintiff personal injury and wrongful death clients across the state of Tennessee in truck and car wrecks, medical malpractice, products liability, premises liability and other tort cases. Our highest honor is to be called to assist other lawyers in pursuing cases outside their practice area, or which require the investment of time or money beyond their comfort zone. Referral fees are paid in accordance with the Rules of Professional Conduct.

To discuss a case referral, call John Day at (615)742-4880 or email referral@johndaylegal.com. To request a free copy of our book about the process and ethics of case referrals, email referral@johndaylegal.com, request a copy of "Win Win," and give us your contact information. It will be sent by return mail.