Winning Your Default Judgment Motion

By: Jason Raether

"Default? The two sweetest words in the English language!"

--Homer Simpson, "The Simpsons"[1]

When the defendant has failed to timely answer the complaint, it is time to bring a default judgment motion. Like Homer Simpson in The Simpsons episode quoted above, many attorneys make the assumption that the other party's failure to respond means automatic success. This often leads to exasperated judges denying the motion and confused attorneys wondering why they lost a motion to an empty chair.[2]

Default judgments are addressed in Rule 55 of the Minnesota Rules of Civil Procedure, but an attorney who relies solely on Rule 55 will be ill-prepared when they bring a default judgment motion before a careful judge. Instead, a successful default judgment motion requires knowledge of the General Rules of Practice, case law and common practice. By following the advice below, you are more likely to win your motion and avoid looking like Homer Simpson.

Prove Up Your Case

One of the most common reasons a judge will deny a default judgment motion is the movant's failure to prove up the case. As Judge Carruthers would frequently remind attorneys, "Just because you sue Bill Gates for a billion dollars, and he doesn't answer, you don't get a billion dollars." The requirement to prove up a default judgment is found in Minnesota General Rules of Practice Rule 117.02. This rule requires the moving party to set "forth by affidavit the facts which entitle that party

1 *The Simpsons: Deep Space Homer* (Fox Broadcasting Co. Feb. 24, 1994).

2 This article does not address administrative default judgments brought pursuant to Minn. R. Civ. P. 55.01(a). If the case is one for payment of money under a contract, the attorney should consider and research the process of administrative default judgments, as this will save the time and expense of a hearing.

to relief."[3]

Importantly, this affidavit should be signed by someone who has personal knowledge of the facts. Judges will not look with great favor on an affidavit prepared by an attorney describing an accident, unless the attorney was actually there. The same goes for accounting practices of a business or a commercial transaction that went awry.

Though not specifically provided by the rule, some judges may actually take testimony from a witness who has personal knowledge if the affidavit is lacking. Some judges may also waive the requirement of an affidavit if the lawsuit was initiated with a verified complaint, which has many of the same attributes of an affidavit. These are exceptions to the normal rules, however, and a prudent attorney will provide an affidavit with the motion that supports the allegations in the complaint, as well as the specific relief sought.

"You've Been Served"[4]

By the time you are bringing a default judgment, you should be absolutely certain you have effective service. A discussion on proper service is outside the scope of this article, but Minn. R. Civ. P. Rules 4.1 through 4.7 are a good place to start.

If there are any unusual aspects regarding the service of the summons and complaint, be prepared to discuss those at the hearing on the default judgment motion. If you have served the defendant by publication, be prepared to defend that decision. In particular, you should be able to describe in detail the steps you took in attempting to locate the defendant before resorting to publication.

If there are unresolved issues with service, those should be addressed before you bring a default

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3 Minnesota case law also supports the proposition that a party seeking default judgment must prove it is entitled to relief. *See, e.g.*, *Hill v. Tischer*, 385 N.W.2d 329, 332 (Minn. Ct. App. 1986) (holding a party was not entitled to default judgment because she had not proved "every essential element of her case, including damages by a fair preponderance of the evidence"); *Wiethoff v. Williams*, 413 N.W.2d 533, 537 (Minn. Ct. App. 1987) (vacating a default judgment where insufficient evidence supported the damages award).

4 *Pineapple Express* (Columbia Pictures 2008).

judgment motion. Improper service is fatal to a default judgment motion and judges will be highly critical of attorneys who seek judgment before verifying the defendant was properly served.

Service of the Motion

The rules say nothing about serving the default judgment motion on a non-answering defendant. Arguably, this service is not required because the defendant has not made an appearance in the case and service of the complaint should suffice to put a party on notice. Even when a party has appeared, Minn. R. Civ. P. Rule 55.01(b) only requires the movant to provide the defendant a three day notice before the hearing.

That said, failing to provide notice to the defendant is contrary to an unwritten rule requiring attorneys to treat the other side with fairness and good faith. You should thus consider serving the defendant with the default motion paperwork at least two weeks before the hearing. Obviously, this should include a notice stating when and where the hearing will be held. Some judges may rely on the rules governing dispositive motion practice and will expect a full 28 day notice period before the hearing.[5] Unless time is of the essence to your client, you may want to provide 28 days notice regardless since your motion will never be denied for providing too much notice.

This service can be done through U.S. Mail. If the complaint was served personally, the address for service of the motion should usually match the address for personal service. If these do not match, be prepared to explain this to the judge, e.g. "the defendant moved and we located this new address using a skip-tracing service."

Of course, there may be times when it is not possible to put the defendant on notice of the motion hearing. If that is the case, be prepared to offer an explanation to the judge besides merely stating it's not required under the rules.

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5 This stance is actually contrary to Minn. Gen. R. Prac. Rule 117.01, which excepts default judgment motion from the usual briefing deadlines. As described below, however, you should carefully consider whether you want to debate the application of these rules with the judge.

"In the Navy"[6]

Though the practice has made recent news, unscrupulous creditors have been taking advantage of active-duty military members going back to the Civil War.[7] Concerned with these despicable tactics, Congress passed the Soldiers' and Sailors' Relief Act in 1940. This act was revised in 2003 and is now referred to as the Servicemembers Civil Relief Act.[8]

Under the Act, before a court enters judgment for the plaintiff, the plaintiff must file an affidavit with the court

> (A) stating whether or not the defendant is in military service *and showing necessary facts to support the affidavit*; or
> (B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service.[9]

As emphasized above, an attorney who states the defendant is not in military service "upon information and belief" is not complying with the Act. Luckily, it is easy to determine the active duty status of an individual.

The Department of Defense allows the public to check the military status of a person for free at: https://www.dmdc.osd.mil/appj/scra/single_record.xhtml. This check requires the individual's social security number or birth date, as well as a last name. The results of this search can then be attached to an affidavit as an exhibit.

As shown above, the Act contemplates the possibility the plaintiff is unable to determine the military status of the defendant. In those cases, however, counsel for the moving party should be prepared to fully explain why this information could not be obtained.

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6 *The Village People*, *In the Navy* (Casablanca Records Dec. 24, 1979).
7 American Forces Information Service, "Soldiers' and Sailor's Civil Relief Act of 1940: A Brief History," U.S. Department of Defense, (last visited March 15, 2015), http://www.defense.gov/specials/Relief_Act_Revision/history.html.
8 50 U.S.C. § 501 (2012).
9 50 U.S.C. § 521(b)(1) (emphasis added).

Who's this person sitting in the courtroom?

Many times, a defendant who has ignored countless calls and letters, the summons and complaint, and has done nothing after receiving the motion, shows up at court on the day of the default judgment hearing. Many unsophisticated defendants believe they may go to jail if they do not appear at court at the designated time and date. Despite the (hopefully) clear language in the summons requiring an answer, they may not even realize a response to the complaint was necessary.

Do not let this throw your game. This is an opportunity to talk to someone who may have been previously unreachable. You may be able to settle the case before it is even called to hearing. Alternatively, you may be able to obtain some information from the defendant that may be helpful should you need to proceed with collections. Of course, make sure the defendant knows you are not his or her attorney and that you represent the adverse party. Failing to do so is unethical and a sanctionable violation of the Rules of Professional Conduct.

Do not be surprised if the judge gives the defendant an opportunity to speak at the hearing. This may seem unfair, since the defendant never responded to your motion, but you will not help your case telling the judge how to run her or his courtroom. The judge may just want a defendant to feel he or she had a fair hearing before granting your motion.

When going to a default judgment motion, you should be prepared to find the defendant waiting for you. Decide whether settlement is appropriate and be prepared to strike a deal on the steps of the courthouse. You may not get another chance.

Help! The judge isn't going to grant my motion!

You properly served the defendant and twenty days have passed without an answer. You then set a date with the court for a default judgment motion and served the defendant with all of the motion paperwork. This paperwork includes an affidavit that proves up your case, signed by someone with

personal knowledge, as well as an affidavit stating the defendant is not in military service. For some reason, though, the judge does not seem like he or she is going to grant your motion.

This is not the time to become indignant. Think carefully before you tell the judge why he or she is wrong. If you feel it is necessary, briefly explain why the judge should grant the motion despite an indication to the contrary, and then move on. What's more important at this stage is determining the judge's expectations.

Often times, problems with your motion can be solved without bringing another motion. Perhaps the judge will allow you to submit a supplementary affidavit. Ideally, you can find a solution that makes the judge happy without the need for another full-blown hearing and without another motion filing fee.

Conclusion

All judges are different and will have different perspectives on default judgment motions. Any judge who has spent significant time with a civil case load has seen dozens, if not hundreds, of these motions come across his or her desk. As such, lecturing a judge on how his or her colleagues handle these motions will rarely get the results you desire. Instead, make sure you have thoroughly prepared the motion and that you know your case before going to the hearing. If you have questions, consider reaching out to members in your network who do collections work. These attorneys will likely have more experience with default motions than attorneys many years their senior, and they may even have specific advice regarding your judge.

Finally, remember to be respectful to both the court and to the opposing side throughout this process. Though a default judgment motion may not seem as important as a fully briefed summary judgment motion or a week-long jury trial, they are often one of the first opportunities for new attorneys to appear in court and to argue before a judge. Make sure you make a great first impression.

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