

SOS is Prudent Backup to Personal Service of Process

By Scott Gray

In cases of suits served upon business entities, particularly in cases where there may be a statute of limitations deadline looming, it is a safe practice to buttress your position with parallel service via the office of the secretary of state of Minnesota.

Minn. Stat. 5.25 provides a mechanism by which valid personal service of process can be made upon a defendant business by serving copies upon the secretary of state. The general theory that makes this all work is that by a business availing itself of the privileges and protections of incorporation with the state of Minnesota, they also agree to maintain a registered address at which an officer, managing agent or registered agent may be found to accept service. In the event that none of these people can be found at the registered address service can then be made upon the secretary of state – in essence on the defendant's behalf. The secretary of state then forwards the process to the defendant business entity via mail to the address they have on file as the registered address, therein providing notice of the suit to the defendant.

Why is a second service at SOS wise even when seemingly valid personal service was made? The answer lies in a number of interrelated circumstances with business registration at SOS, and the way process servers interact with defendant businesses. The SOS basically only requires that a business maintain a registered office. Although names of registered agents and officers can be provided, there is not a requirement for either.

In short, in most cases it is not possible to obtain the name(s) of officers of defendant businesses prior to attempting service. So when a process server goes to the business offices of the defendant entity, frequently they are walking through the door with no information as to who they are looking for. They then must explain to the receptionist that they are there to serve legal process and ask to see an officer. Ideally, an officer then comes out, provides their name and title and maybe even provides a business card.

Done deal right? Not necessarily. We have had circumstances where the defendant's officers or management decided to play games with the process server where someone identifies themselves as an officer, but really isn't. We have also had a case where someone identified himself as the president of the company, and even provided a business card, later to

learn that the real president sent someone in his stead and then argued that he was never served.

The point is that just because someone says they are an officer, we don't really know that they are, and just because someone has a business card, we don't really know that they are the person named on it. All of these circumstances, however infrequently encountered, can lead to expensive and time consuming, if not fatal, challenges to service that could easily be avoided by parallel service through the SOS.

A scary case to any process server occurred some years back involving a medical malpractice case against a large hospital. The process server went to the hospital informing the receptionist that he had a summons and complaint to serve. The receptionist phoned the legal department of the hospital and said, "There is a guy here with a summons to serve, can you send someone down?" After a brief wait, a woman approached the receptionist's desk and asked him if he was the process server. She accepted service of the summons and complaint, specifically stated that she had authority to accept service, took the process from him, and handed him a business card identifying her as assistant to the corporate counsel.

Within the 20 days to answer the complaint, the statute of limitations expired. The hospital then answered alleging insufficient service as the process was not left with an officer, and the scope of the responsibilities of the assistant to the corporate counsel did not meet the standards to qualify her as a managing agent. During discovery, the woman who accepted service admitted that she told the process server that she had authority to do so and in fact truly believed she did as she had accepted service in the past.

Nonetheless, the service was thrown out with the appeals court ultimately suggesting that the onus is on the process server to ensure that proper service occurs which given the potential shenanigans outlined earlier, is not necessarily practicable. Using a knowledgeable process server is a good start, but simply talking the added step of also serving the SOS would have saved the day in this case.

Scott Gray is the vice president and operations manager for Metro Legal Services with over 30 years of process service experience. Metro Legal Services, in its 43rd year of operation, is the leader in the upper Midwest in providing ancillary services to the legal community. Questions/comments welcome at (612) 349-9512, or visit www.metrolegal.com.