

Briefly: Appendix-itis and other potentially fatal appellate diseases

By: Eric Magnuson and Lisa Beane © November 12, 2015

Most everyone knows by now that the Rules of Civil Appellate Procedure have been amended to eliminate the appendix and substitute a much shortened collection of documents, which is now labeled "addendum." While most lawyers understand that rule change on an intellectual level, old habits die hard, and people sometimes forget to review the rules to remind themselves of changes. It doesn't help that Thomson Reuters somehow forgot to include the current version of the rules in the newest edition of the Appellate Rules Annotated. That's probably fodder for a completely different article.



Lisa Beane



Eric Magnuson

In any event, the fact of the matter is that the rules have changed. Whereas the old rules required the filing of an appendix (with no limit on length and not much direction on content), the amended Rule 130 prohibits the filing of an appendix (which the court frequently found bulky and unhelpful) and instead requires an addendum. The addendum must include "(1) a copy of any order, judgment, findings, or trial court memorandum in the action directly relating to or affecting the issues on appeal; (2) any agreed statement of the record; and (3) if the constitutionality of a statute is challenged, proof of compliance with Rule 144." Minn. R. Civ. App. P. 130.02(a). The addendum may also include up to 50 pages of other materials. Minn. R. Civ. App. P. 130.02.

As it turns out, there are consequences for not toeing the line when it comes to complying with the new rules. In July of this year, the Clerk of Appellate Courts put this announcement on its website: "Effective immediately, petitions for review submitted to the Clerk of Appellate Courts for filing with the supreme court that include an appendix rather than an addendum will no longer be accepted for filing, and will be returned to the filer." Minn. Judicial Branch, <http://www.mncourts.gov/Clerk-of-Appellate-Courts.aspx>. The message is clear — failure to comply with the revised appellate rules may now be fatal to your appeal.

Not too long ago, this space featured a column about the "interests of justice" as they related to relief from the appellate court when a lawyer has missed a deadline or otherwise failed to follow the rules. Eric J. Magnuson & Matthew J.M. Pelikan, "Briefly: In the Interest of Justice," Minn. Lawyer (Feb. 20, 2015). In a string of recent cases, the Minnesota Supreme Court has sometimes, but not always, handed out this sort of justice to parties who have failed to comply with the new rules regarding addenda, but it isn't necessarily easy to get.

The problem generally manifests itself like this: A party seeking further review files a petition and, improperly, an appendix instead of an addendum. As is so often the case, the petition is filed either at the deadline or just a day or two prior to the due date. The clerk's office reviews the filing, concludes that it fails to comply with the rules, and unceremoniously bundles up the submission and sends it back to the lawyer who thought the filing was done. The rejected petition is received in the mail some time later, and nearly always after the filing deadline has passed. The date of the original filing is not saved for any subsequent filing, and the appeal is, at that point, dead.

Until recently, quick remedial attention to the attack of appendix-itis, like emergency medical treatment, could avoid the fatal result. For example, the Minnesota Supreme Court permitted the untimely filing of a corrected petition for review and addendum in *In re the Matter of Scherman ex rel. A.S.*, No. A14-1029, order (Minn. filed July 15, 2015). In *Scherman*, the petitioner filed a petition with an addendum that did not comply with the length limitation in Minn. R. Civ. App. P. 130.02. The clerk accepted the petition for filing but rejected the addendum. Nearly a month after the addendum was rejected, counsel for the petitioner filed a motion asking the court to accept a corrected petition and addendum. The motion to file the corrected petition and addendum was granted, but the petition for review was denied. *In re the Matter of Scherman ex rel. A.S.*, No. A14-1029, order (Minn. filed Aug. 25, 2015).

In other recent cases, the court has been less forgiving. The petitioner in *In re the Estate of Leonard J. Marihart*, No. A14-1799, filed an appendix rather than an addendum with his petition for review. The filing was rejected by the Clerk of Appellate Courts for failure to comply with Minn. R. Civ. App. P. 130. The petitioner filed a motion asking the court to accept a late petition for review with an addendum, but the court denied that motion without further explanation. *In re the Estate of Leonard J. Marihart*, No. A14-1799, order (Minn. filed Sept. 2, 2015).

Similarly, the petitioners in *Quinn v. Johnson*, No. A15-0322, timely filed a petition for review that complied with the Minnesota Rules of Civil Appellate Procedure in all respects, except that their properly prepared addendum was incorrectly titled "Appendix." The Clerk of Appellate Courts rejected the Johnsons' filing for failure to comply with Minn. R. Civ. App. P. 130. Because the clerk's office rejected the filing after the time had expired to seek further review, they couldn't timely file a corrected petition. Instead, they asked the court for permission to file a corrected petition after the filing deadline.

Despite the fact that the only error in the Johnsons' original petition was essentially typographical — one wrong word, "appendix" rather than "addendum" on the table of contents of the properly constituted attachment to the petition — the court denied their motion for leave to file the corrected petition. The court concluded that it lacked the authority to extend the time to seek review of a decision of the court of appeals. That conclusion is, of course, in conflict with the court's recognition in other cases that it may permit the late filing of an appeal "in the interests of justice." See *In Re Welfare of J.R., Jr.*, 655 N.W.2d 1, 3 (Minn. 2003); *E.C.I. Corp. v. G.G.C. Co.*, 306 Minn. 433, 434, 237 N.W.2d

627, 629 (1976) (“The rules of this court are designed to effectuate the orderly administration of justice and do not control its jurisdiction, for it retains the constitutional power to hear and determine, as a matter of discretion, any appeal in the interest of justice.”); see also, e.g., *Hunter v. Anchorbank N.A.*, No A14-1599, order (Minn. Jan. 20, 2015) (directing the Minnesota Court of Appeals to accept an appeal that was deemed untimely due to improper service by facsimile).

The court also distinguished the Johnsons’ mislabeling of the addendum from the petitioner’s filing of an over-length addendum in *Scherman* because in *Scherman*, the petitioner sought leave to file a corrected addendum rather than an untimely petition. Of course, that procedure was unavailable to the Johnsons because the clerk’s office rejected their entire filing rather than giving them notice of a deficiency.

It is difficult to see why a petitioner should be permitted to correct an over-length, improper “addendum” that was, in fact, an appendix as defined by the old rule, but not to correct a properly prepared addendum that is merely mislabeled. Strict compliance with Minn. R. Civ. App. P. 130 either is required, or it isn’t. But as a practical matter, the court gets the last word in these cases, and the only way to ensure that your appeal won’t be rejected is to timely file a petition prepared in strict compliance with the rules. It doesn’t hurt to file your petition well before the deadline, either, to give yourself time to cure any defect identified by the clerk’s office.

The moral of this story is not a new one: read the rules, read the rules, read the rules and then comply with them. However, there is a subtext as well. Form probably shouldn’t control over substance. An honest effort to comply with the rules should be treated with respect by the court. And sometimes, even plain old ignorance will be excused. But at the end of the day, the surest way to avoid succumbing to “appendix-itis,” or another of the host of potentially fatal appellate diseases, is to simply follow the rules.

Eric J. Magnuson is a partner at Robins Kaplan LLP and served as Chief Justice of the Minnesota Supreme Court from 2008 to 2010. He has more than 35 years of experience practicing law and he focuses his practice almost exclusively in appellate courts.

Lisa Beane is an associate at Robins Kaplan LLP. She focuses on business litigation.

ABOUT ERIC MAGNUSON AND LISA BEANE



Copyright © 2021 Minnesota Lawyer, 222 South Ninth Street, Suite 900, Campbell Mithun Tower, Minneapolis, MN
55402 (612) 333-4244