

## Briefly: How to get an extension if you really need one

By: Eric Magnuson and Luke Hasskamp ◉ May 17, 2019

You have a brief due soon in the appellate court. At first you think you have plenty of time, but given how crazy your schedule has been, you are worried that something will pop up and keep you from getting to the brief as you planned. Days go by, and your worst nightmare has now been realized: You have been so busy with other matters, you haven't made the progress on the brief that you had anticipated. What do you do? Of course, you get an extension.



Eric Magnuson

Appellate court schedules are a little different from trial court schedules. When you are in the trial court, you have a hearing date, and everybody generally works backward from that date to determine when the briefs are due. Hearing dates rarely change. In the appellate courts, on the other hand, briefing is done well in advance of the argument. In fact, the argument isn't usually set until the briefs are completed. That gives lawyers some flexibility to adjust a briefing schedule, if the circumstances warrant it.

Every appellate advocate should keep in mind that the appellate courts like to move cases along. They have a lot to do, they may be under explicit or implicit time constraints, and delay is frowned upon. On other hand, courts understand that counsel have competing priorities, and courts also want briefs that are helpful, well done, and not thrown together in a desperate effort to meet an inflexible deadline.

For that reason, both state and federal courts allow modification of the briefing deadlines upon a motion, or sometimes with as little as a letter. But what do you have to say in a motion, when do you have to submit it, and what are of your odds of getting it granted?

### Know your deadlines

First, it's important to know your deadlines. In Minnesota appellate courts, briefing deadlines are triggered by delivery of the transcript, or if no transcript, by the filing of the notice of appeal. Generally, the appellant's brief is due 30 days after transcript delivery or the filing of the notice of appeal if no transcript is ordered; the respondent's brief is due within 30 days

of service of the appellant's brief; and the appellant's reply within 10 days of service of respondent's brief. See Minn. R. Civ. App. P. 131.01. (These deadlines may change if there is a cross appeal, if there are multiple parties, or if one or more amicus curiae is granted leave to participate – be sure to check the rules!)

In federal court, briefing deadlines are generally governed by Rule 31 of the Federal Rules of Appellate Procedure, which specifies the following deadlines: (i) appellant's brief due 40 days after the record is filed; (ii) appellee's brief due within 30 days after the appellant's brief is served; and appellant's reply due within 21 days after service of the appellee's brief. In the 8th Circuit, briefing deadlines are typically set by the Clerk of Court, who will issue a briefing schedule soon after the appeal is initiated, which sets calendar dates for when briefs are due.

## **The process for requesting an extension**

### **Minnesota appellate courts**

In Minnesota, appellate courts may grant extensions "for good cause." Requests for an extension must be brought by a motion made within the time specified for the filing of the brief. Minn. R. Civ. App. P. 131.02, subd. 1. The rules require that the motion for an extension: (1) include the date the brief is due; (2) be supported by an affidavit showing due diligence; and (3) set forth factual statements with specificity. Minn. R. Civ. App. P. 131.02, subd. 2. More on this below.

The Clerk of Appellate Courts frequently gets extension motions on the day a brief is due. If you file your motion at 10 o'clock in the morning, don't expect to get a ruling on the motion that day. Motions are considered by the court and not a clerk, and the judges don't drop everything because you have filed a motion asking for more time. However, as long as you have filed the motion before your brief is technically late, then you can safely assume that the brief is not due. The court will either grant your extension as requested, or if it is denied, the court will still set a new due date. If you haven't given the court a good reason for the extension, it might be a very short deadline – a day or two. But technically, your brief will not be late.

### **8th Circuit**

Similarly, the 8th U.S. Circuit Court of Appeals may grant extension requests upon a showing of good cause. Fed. R. Civ. P. 26(b). Generally, extensions are sought by motion. All argument should be included in the motion, as a separate supporting memorandum is not permitted. See Fed. R. App. P. 27(a)(2). The motion should be accompanied by an affidavit containing factual information but not argument. Fed. R. App. P. 27(a)(2)(B)(ii).

As with other motions and briefs, the 8th Circuit requires a certificate of compliance certifying that the filing complies with the type-volume limitations and stating the number of words in the document. Be sure to include this with your extension request otherwise your filing will be rejected. See Fed. R. Civ. P. 32(g).

Unlike Minnesota state court, requests for extensions of time to file a brief are decided in the first instance by the clerk's office. See 8th Cir. L.R. 27A(a)(2). Each case has a case manager, and they often will act on a request for extension immediately. It is common that an extension can be requested in the morning, and the court will grant the request later in the day.

## **Making a showing of good cause**

So, what does it take to demonstrate "good cause"? And how do you state it "with particularity"? See Fed. R. App. P. 27(a)(2)(A); see also Minn. R. Civ. App. P. 131.02, subd. 2

("All factual statements required by this rule shall be set forth with specificity.").

Of course, a life altering and unexpected emergency is a good reason, but less than that is generally acceptable. Sometimes things happen that are outside of your control. There's a delay in getting the record, or maybe you are brought in to handle the appeal and trial counsel is less than enthusiastic about cooperating with you.

Other times, you simply need more time. There may be conflicts with other deadlines, such as other briefs, oral arguments, or hearings. The record may be extremely large and require much more time to fully consider. You may have a long-standing vacation planned that cannot be moved. Or, you simply may find yourself busier than anticipated. Be forthright in your explanation to the court.

Ultimately, it is generally acceptable for you to be able to say, in good faith, "I have given this matter priority, but I am not able to complete the brief that will be most helpful to the Court by the current deadline." It is also helpful to emphasize that there will be no prejudice caused by a modest delay – if that is, indeed, the case. Generally, two to three weeks make no meaningful difference in the life of an appeal.

Although short extension requests are typically more palatable for the court, be sure to ask for enough time to actually complete brief. Courts are less likely to grant a second request.

## **Reach out to opposing counsel**

Another thing to keep in mind is your opposing counsel. Before seeking your extension, you should always contact opposing counsel to see whether they'll consent. They are likely to do so, which makes it that much easier for the court to grant your request. Even if opposing counsel declines to consent, or does not respond by the time you file the request, you can still signal to the court that at least you made the effort to reach out.

When roles are reversed and you are asked to consent to an opposing party's extension request, agree whenever possible. The request is likely to be granted whether or not you consent, so it's generally not a battle worth fighting. Plus, you never know when the shoe will be on the other foot, and a little professional courtesy now may go a long way in the future.

## **Missed deadline**

What if you miss the deadline for filing your brief by a day? It may have been a technical issue, or a miscalculation of the deadline, or you simply couldn't get the final product out the door. At that point, your only option is to file a motion for leave to file out of time. This is a less than ideal approach and may negatively impact your case, as courts have been known to forfeit a party's rights to oral argument in such a case. But, if it cannot be avoided, it is still best to address the issue head on.

## **Bottom line**

At the end of the day, the courts want advocates to be able to put forth the best arguments and, thus, they would rather have a well-done brief than one thrown together simply to make a deadline. Still, be sure to plan ahead. That includes planning for an extension if one is needed

Eric J. Magnuson is a partner at Robins Kaplan LLP and served as Chief Justice of the Minnesota Supreme Court from 2008 to 2010. Luke Hasskamp is an associate at Robins Kaplan.

ABOUT ERIC MAGNUSON AND LUKE HASSKAMP

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