

Don't Let Your Granted Appeal Get 'Appendicitis'

by Elwood Earl Sanders Jr.

Rule 5A:25 and its Supreme Court counterpart, Rule 5:32, both of the Virginia Rules of Court, require an appendix in every granted state court criminal appeal.¹ This is a little-noticed but crucial area of appellate practice in Virginia. An appendix is simply a compendium of the pertinent parts of the record for the benefits of the appellate court and the parties. And, much like the appendix in our bodies, it requires little attention until there is a problem.

All appendices in Virginia begin with the designation. A designation of the contents of the appendix is the way the parties notify the court (and each other) of the pertinent items that must be in the appendix. The designation must be filed within a certain time after the appeal is granted (or, in all appeals of right, when the record is received in Richmond). Those time frames are:

- Ten days by agreement, or
- Fifteen days for appellant, and
- Ten days after that for appellee if no agreed designation.

These dates run from the date of the certificate of appeal or the record being received in the office of the clerk of the Court of Appeals. In the Supreme Court, the date of the certificate that the appeal has been granted (unless it is a capital case, in which case there is a special rule about the designation²) is the date the designation deadline starts to run.

An appellant's sole designation gets five additional days to file, to be followed by ten days for the appellee. If the appellee does not file a designation, he or she may lose the right to say what is in the appendix. That may be fatal to the appeal. The designation is not a place for "gotcha" liti-

gation. The appellant should designate all germane material, both favorable and unfavorable, from the record for the appendix. One copy of the designation is to be filed with the clerk of the appellate court and one copy to each party's opposing counsel. The mailing rule³ applies to the designation, the brief, and the appendix.

The appendix is crucial to an appeal; the appeal will be dismissed without a timely filed appendix. The appellant has the duty to prepare the appendix and file it along with the brief. The appendix must be a separate volume in the Supreme Court,⁴ but that is not necessary in the Court of Appeals in the exceedingly rare event the appendix and brief do not exceed the thirty-five page requirement for the brief.⁵ That deadline in granted appeals in both appellate courts is the same as the brief: forty days from the granting of appeal or the record being filed in the clerk's office of the appellate court in Richmond.⁶

The appendix in the Court of Appeals must have the "... basic initial pleading (as finally amended)" as well as the final order.⁷ The Supreme Court of Virginia requires not only the final order in the trial court but also the orders in the Court of Appeals (if there are any) and any opinions of the appeals or circuit court, as well as the assignments of error or cross-error as granted.⁸ All other germane exhibits and transcript excerpts from the record also are included.⁹ The documents in all appendices must be in chronological order; the courts will generally allow a division into pleadings, transcripts and exhibits, but within each the materials must be chronological. The appendix must have a table of contents that states each item.¹⁰ I recommend that exhibits be identified briefly in the table. The appendix cover must be copied or printed on red paper.¹¹

Several rules govern transcripts or excerpts of transcripts in the appendix. The type must be twelve-point or larger.¹² The table of contents of the appendix must state the name of every witness in the transcript.¹³ If it is a partial transcript, it must have the witnesses' names on the top of each page and state whether their questioning was direct, cross-examination, redirect, or other.¹⁴ Breaks in a paper or transcript must be noted with asterisks.¹⁵ The copy quality of the pages must be as clear as possible.

As to more substantive items, the Court of Appeals is not treating the requirement of a designation to be filed on time as fatal to an appeal, as long as the appellant includes all germane items in the appendix.¹⁶ The Supreme Court takes a similar position. The Court in *Wilcox v. Lauterbach Elec. Co.*¹⁷ held that:

Failure to comply with Rule 5:32(d), however, is not ground for dismissal if an appellant includes in his appendix everything germane to the disposition of his appeal and the appellee has not been prejudiced by the failure.¹⁸

There are two elements for this safe harbor to be effective. Everything germane has to be in the appendix and the appellee may not be prejudiced by the omission. If the safe harbor of *Wilcox* is not followed—e.g., if the appendix does not have all the parts of the record germane to the appeal, the cases apply a stricter rule. The Supreme Court of Virginia held in *Thrasher v. Burlage*.¹⁹

In *Vaughan v. Johnson and Miller*, 215 Va. 323, 324, 210 S.E.2d 139, 140 (1974), we held that "(t)he requirements of Rules 5:36 and 5:37²⁰ are mandatory", and since the appellant

failed to designate the transcript, parts of which were essential to adjudication of the issues posed by the errors assigned, we dismissed the writ.²¹

While there is some room to distinguish procedurally the older and stricter cases, the best practice is to file the designation within the time limits. Otherwise, the joint appendix needs to have every document and portion of the transcript germane to the assignment(s) of error or question presented granted by or argued at the court.²² A late designation also can prejudice opposing counsel by denying him the ten days to file an appellee's designation.²³ If the designation is late, consult with opposing counsel and file a designation—preferably a joint designation—as soon as possible.

Ominously, a line of cases, one published, holds that the court does not have to consider any record item not in the appendix.²⁴ The *Patterson* court held that “Because the appendix filed in this case does not contain parts of the record that are essential to the resolution of the issue before us, we will not decide the issue.”²⁵ The *Patterson* case admittedly is not clear if the item was in the record, but since it was not in the appendix it was not considered.²⁶ Both Virginia appellate courts have a rule that states that the court may consider parts of the record not in the appendix.²⁷ This rule was not discussed in *Patterson*.²⁸ If one gets in the “I did not place it in the appendix—oops” situation (especially at the Supreme Court), at least try those rule citations.²⁹ But the *Patterson* case should impel every appellate advocate to ensure that the appendix is correct and complete when filed. If a printing company is used, counsel for the appellant must inspect the approval copy of the appendix to ensure all items designated by both parties are in the appendix and to make sure nothing germane was omitted. An appellant may place additional material from the record in the appendix, if germane, even if not designated, without permission of the court or the opposing party.³⁰

There is a countervailing problem: placing too much in an appendix. If the issue is sufficiency of the evidence in a jury trial, the voir dire is probably not germane.³¹ There is a risk that introducing some of a hearing or trial out of context may confuse the court. However, the rules do allow for cost sharing and sanctions if designated items turn out not to be germane.

The appellee can be asked to pay costs: “If the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issue presented, he may so advise the appellee, and the appellee shall advance the cost of including such parts.”³² The court also may allocate costs for unnecessary parts of an appendix to the party designating such portions.³³ If you are certain a document, exhibit or part of a transcript is not germane to any question presented, do not designate it or place it in the appendix.

To avoid your appeal getting “appendicitis,” the rules governing the preparation of the appendix must be reviewed and observed. All germane items must be designated timely. The appendix must be prepared according to proper format and inspected to make sure all designated items are included. Of course, file timely. It is the fervent hope of this author that all appeals be decided on their merits.³⁴ ☞

Endnotes:

- 1 This article is limited in scope to state court appeals in Virginia.
- 2 See Rule 5:22(b). Capital appeals have become a specialized area of criminal law; these are similarities and differences from the ordinary criminal appeal. Since a capital appeal is an appeal of right, the designation has both the assignments of error to be raised and the appendix contents. *Id.* The appellant's designation must be filed within ten days of the date the record arrives to the clerk of the Supreme Court of Virginia in Richmond.

- The attorney general then has ten days to file. See Rule 5:22(a), (b). The appendix is prepared and filed with the opening brief. Rules 5:31 and 5:32 otherwise [except part (d)] apply to the capital appendix. Rule 5:22(b).
- 3 See Rule 5:5(b); 5A:3(c). The mailing rule summarized is that the original can be mailed certified or registered mail to the clerk of the appropriate appellate court on or before the date it is due to be filed. I recommend that, if counsel uses this rule, its provisions be reviewed each time.
- 4 Rule 5:32(b).
- 5 Rule 5A:25(b). Otherwise the appendix must be a separate volume. *Id.*
- 6 In a pretrial appeal by the commonwealth, the brief (and presumably the appendix) is due twenty-five days after granting. See Va. Code 19.2-404. The order in these cases and the pertinent statutes should be reviewed carefully. Occasionally in cases of rehearing en banc, there are additional appendices due in a certain time. See Rule 5A:35.
- 7 Rule 5A:25(c). Any opinion of the trial court is to be included. Rule 5A:25(c)(2).
- 8 Rule 5:32(c). I would take this opportunity to remind all the readers of this article that the Supreme Court of Virginia requires assignments of error in every petition for appeal or the appeal will be dismissed. In cases arising from the Court of Appeals, the error assigned must be the error of the Court of Appeals, not the trial court. See Rule 5:17(c). In certain cases where appeal is final, including traffic and misdemeanor cases where no jail time (actual or suspended) is imposed, a jurisdictional statement is required stating that the case has a substantial constitutional question and/or a matter of significant precedential value. *Id.* These are irredeemable defaults and cannot be corrected after the due date.
- 9 Rule 5:32(c)(3) and (6); Rule 5A:25(c)(3) and (6).
- 10 Rule 5:32(e); Rule 5A:25(e).
- 11 Rule 5:31 and Rule 5A:24.
- 12 Rule 5:32(a).
- 13 Rule 5:32(e); Rule 5A:25(e).
- 14 Rule 5:32(c)(5); Rule 5A:25(c)(5). The “witnessing” rule only applies to partial transcripts. However, whether partial or entire, the table of contents of the appendix must state the name of each witness.
- 15 Rule 5:32(e); Rule 5A:25(e).
- 16 See *Teague & Little Inc. v. James J. Balchunis*, Record No. 2270-94-1 (Va. App., Unpub., July 25, 1995) (Court of Appeals held that if everything germane to the appeal is cited in the joint appendix, there is no prejudice arising from the failure

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- to designate the appendix). I would note that one of the requirements of the appendix unique to the Supreme Court of Virginia is reference to the assignment or assignments of error granted. See Rule 5:32(c)(7).
- 17 233 Va. 416, 420, 357, S.E.2d 187 (1987).
 - 18 233 Va. at 420, 357 S.E.2d at 199. *Accord Leonard v. Arnold*, 218 Va. 210, 211, 237 S.E.2d at 97 (1977); *Rboten v. United Virginia Bank*, 221 Va. 222, 225, 269 S.E.2d 781, 783 (1980).
 - 19 219 Va. 1007, 254 S.E.2d 64 (1979); *Accord Andrews v. Caboon*, 196 Va. 790, 796, 86 S.E.2d 173 (1955)(filing of the designation is "mandatory and jurisdictional").
 - 20 These are not the presently numbered rules.
 - 21 *Thrasher v. Burlage*, 219 Va. 1007, 1009, 254 S.E.2d 64, 65 (1979).
 - 22 See *Wilcox v. Lauterbach Elec. Co.*, 233 Va. 416, 420, 357 S.E.2d 187, 199 (1987).
 - 23 See *Thrasher v. Burlage*, 219 Va. 1007, 1009, 254 S.E.2d 64, 65 (1979)("Thrasher's delay denied Burlage the 10 days Rule 5:36 allows for cross-designation.").
 - 24 See *Patterson v. City of Richmond*, 39 Va. App. 706, 576 S.E.2d 759 (2003).
 - 25 39 Va. App. at 717, 576 S.E.2d at 765.
 - 26 See *Id. Accord Shaffer v. Shaffer*, No. 1945-03-2 (Va. App., Unpub., June 8, 2004)("Moreover, even were we to accept his position, husband has failed to provide an adequate appendix from which we can conclude that wife failed to file a written motion requesting modification of the protective order. Consequently, we will not consider this argument on appeal."). The Shaffer Court of Appeals also cited Rule 5A:25 and the Patterson case. Also see *Lamberton v. Lamberton*, No. 1713-03-4 (Va. App., Unpub., September 14, 2004)(same holding as Shaffer; Patterson cited with approval).
 - 27 Rule 5A:25(h), 5:32(h).
 - 28 See 39 Va. App. at 717, 576 S.E.2d at 765. There is a helpful, albeit unpublished, case that references the rules about considering other parts of the record as justification (and distinguishes Patterson) for considering items not in the appendix. *Lewis v. Culpeper County Dept. of Social Services*, Rec. No. 2575-06-4, (Va. App. 7/31/2007).
 - 29 I would try first moving the appellate court for leave to file an amended or supplemental appendix. A well-timed call to the Clerk's Office is helpful.
 - 30 See Rule 5A:25(d); Rule 5:32(d).
 - 31 I do agree that when appellate counsel receives the case and has to decide what issues to appeal, the entire transcript must be ordered and filed with the trial court. But that entire transcript does not have to be designated in the appendix.
 - 32 Rule 5:32(f); Rule 5A:25(f).
 - 33 Rule 5:32(g); 5A:25(g). Only the final pleading is to be designated (unless otherwise germane) and parts concerning damages only if damages are the issue in the case. *Id. In Metrocall of Delaware, Inc. v. Continental Cellular Corp.*, 246 Va. 365, 437 S.E.2d 189 (1993), the Supreme Court was severe in its criticism of the preparation of the appendix, finding that two of the appellees refused to use discretion to prevent unnecessary materials from reaching the appendix. See 246 Va. at 376-77, 437 S.E.2d at 195 ("...these appellees were responsible for the printing in the appendices of such irrelevant items as proofs of service of process, proceedings dealing with disqualification of counsel, correspondence relating to designations of trial judges to preside in the matters, notices of hearings, pages of miscellaneous correspondence, subpoenas duces tecum, balance sheets, lease and license agreements, and a multi-page application with amendment for a permit to establish a cellular system, filed with the Federal Communications Commission."). The appellees were taxed the cost of the immaterial portions. This is another way to lose integrity with the court.
 - 34 I finally recommend that those attorneys with interest in appellate practice join the Appellate Practice Subcommittee of the Litigation Section of the Virginia State Bar.