EFFECTIVE APPELLATE ADVOCACY

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District court judges refer to termination of parental rights cases as their "death penalty." Court of Appeals judges agonize over the unfamiliar issues, the statutory requirements, and the troubling consequences of the opinions in cases appealed under Rule 3A of the Rules of Appellate Procedure. All judges are asked to decide significant procedural and substantive issues in an expedited manner. Effective appellate advocacy is critical both (1) for the children and (2) the development of the law.

I. GENERAL APPELLATE CONSIDERATIONS

The single most important step for an attorney doing an appeal is to read the appellate rules. Make sure that you have the most recent version. In recent years, revisions have been made annually. You cannot assume that there will be a "grace period" in which you will be forgiven for failing to comply with an amendment to the rules. Judges have expressed a willingness to impose sanctions based on violations of an amendment that has been in effect for merely weeks. That may not seem fair, but avoid the problem. The most current version of the rules is available on the official website for the Supreme Court.http://www.nccourts.org.

When reading the rules, do not forget the appendices to the rules. They can be very helpful, but there is a caveat: the appendices are not necessarily updated when the rules themselves are amended, so you cannot rely exclusively upon the appendices, but rather must also carefully read the applicable rules.

Appendix A sets out time tables and deadlines for all the actions required in appeals.

Appendix B sets forth details about formatting and style for documents filed in the appellate courts. It provides information about captions, indexes to the brief, use of the transcript, tables of cases and authorities, topical headings, numbering pages, and the format for your signature and address.

Appendix C sets out the proper arrangement of the record on appeal. Table 4 of Appendix C sets out examples of proper assignments of error. Even if your particular error is not included in the examples, you may be able to find an example that you can use as a model.

Appendix D includes forms for documents regularly used in the appellate courts. There are models for different types of notices of appeal, petitions for discretionary review, petitions for writ of certiorari, and petitions for writ of supersedeas/motion for temporary stay.

Appendix E addresses the content of briefs. It explains the proper organization of the brief, providing examples of what the index (table of contents), table of cases and authorities, and questions presented should look like. It explains what the "statement of the case" and the "statement of the grounds for appellate review" should include and provides a sample statement of the case. It also discusses the statement of the facts, argument, and conclusion sections. **PLEASE NOTE: The appendix has not been updated to reflect the need for the standard of review.**

As an additional resource, you may wish to consult the North Carolina Bar Association's website. The Appellate Rules Committee of the Bar Association has created a style manual with numerous examples that is of tremendous help in pursuing an appeal. The manual is updated regularly to reflect amendments to the rules. It is accessible regardless whether you are a member of the Bar Association: www.ncbar.org/about/committees/appellate.aspx.

II. ANTICIPATING THE APPEAL AT THE TRIAL LEVEL

If you are the appellant, preservation of issues and objections is usually the focus of any discussion about anticipating an appeal while trying a case. Rule 10(b)(1) of the Rules of Appellate Procedure states: "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion." In the recent Supreme Court decision, *Dogwood Dev. & Mgt. Co. v. White Oak Transport Co.*, 362 N.C. 191, 195-96, 657 S.E.2d 361, 364 (2008), that Court stated: "In light of the practical considerations promoted by the waiver rule [set out in Rule 10(b)], a party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal."

Nevertheless, for Social Services Attorneys, who usually represent the appellee, the most important trial issue will not usually be compliance with Rule 10. Instead, the most significant issue at the trial level will be the drafting of the orders. Although there are district court judges who draft their own orders in abuse/neglect/dependency or TPR cases, it is the practice of most of our trial judges to have the prevailing party draft the court's order or judgment. Based on my experience at the Court of Appeals, it is apparent that, in many instances, counsel does not give a great deal of thought to the order or judgment. **The order is the single most important document in the case.** If the order is inadequate or incorrect, the case will be remanded almost every time – no matter how strong the evidence in support of the ultimate decision.

A. The Need for Comprehensiveness in the Order

The written order must include all findings of fact and conclusions of law. When, as in cases involving DSS, the trial judge is required to make written findings of fact and conclusions of law, it is the written order that is controlling. *In re Hawkins*, 120 N.C. App. 585, 590, 463 S.E.2d 268, 271-72 (1995). It is immaterial if the trial judge made additional oral findings or

conclusions in open court – the appellate courts only review the written order. When a particular finding of fact is mentioned from the bench, but is not then included in the written order, it is the same as if the trial judge never made the finding. In other words, if, on appeal, the appellant contends that the order does not contain adequate findings of fact, the appellee cannot supplement the written order by pointing to oral findings. The Court will vacate the order and remand for further findings. Although the new order will undoubtedly contain the omitted findings, the result will be additional delay in achieving permanency.

Similarly, if the order, as signed by the trial judge, does not contain findings regarding certain evidence, it is as if that evidence was never presented. In other words, if an appellant argues that the conclusions of law are not supported by the findings of fact, an appellee cannot supplement those findings by pointing to evidence, not addressed in the order, as providing further support for the conclusions of law. The bottom line is: If the trial judge does not find a particular fact, then that fact does not exist for purposes of the appeal. *See In re J.S.L.*, 177 N.C. App. 151, 162, 628 S.E.2d 387, 394 (2006) ("While the guardian *ad litem* cites to various other evidence of domestic violence, the court made no findings of fact regarding that evidence and it cannot be considered.").

In drafting an order, you should review the case law and statutes to determine what the trial judge must find in that particular case. Then, make sure that the order contains a finding of fact on each fact necessary to the conclusion. Although you need to include the ultimate findings of fact, do not rely upon those exclusively. Include a finding on each fact that you – and the trial judge (if he or she indicated the facts in the hearing) – believe is important. Do your legal research before drafting the order – do not wait until the appeal, when you will discover that you omitted some critical finding of fact or conclusion of law. There is no way to fix that problem once you are already in the Court of Appeals.

The focus on "ultimate findings of fact" frequently means that lawyers simply repeat the allegations in the petition or parrot the language of the statute. You need to state the specific facts that support the ultimate determination that the statutory standard has been met. Set out the facts that support a conclusion of neglect. When there has been a failure to make reasonable progress, set out the requirements of the parent's plan, the specifics of any pertinent court orders, and then the facts that show the parent did not make progress on the requirements. If you are basing a TPR on a failure to pay the reasonable share of the cost of care, then you need a finding of fact as to the ability to pay. The order cannot simply say that the parent did not pay. There also need to be facts establishing that the parent had the ability to pay something.

Copying the petition's allegations is dangerous. First, they are allegations and sound like allegations rather than findings of fact. Second, the petition's allegations tend not to be as specific as an order should be. Finally, and most importantly, it is rare that the evidence presented at trial matches up with what an attorney anticipates being able to prove at the time of the petition – sometimes, the evidence is better; sometimes, the evidence is not as good as hoped; and sometimes, the evidence is just different.

In the dispositional order, the order should include sufficient findings to demonstrate that the trial court considered every factor required by statute to be considered. *In re L.L.*, 172 N.C. App. 689, 705, 616 S.E.2d 392, 402 (2005) (remanding in part because of trial court's failure to make findings of fact on factors set out in N.C. Gen. Stat. § 7B-906(c)). In addition, although the disposition is reviewed for abuse of discretion, that review cannot occur if the order does not set out the trial court's reasoning for making the decision it made. The most common reason that a discretionary decision is sent back to the trial court is a failure to explain the basis for the decision. *See Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005) (holding that, even under an abuse of discretion standard, "[t]he trial court must ... make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law"). Although there are opinions that may suggest that a trial court does not need to give a reason, I would not bank on them – there are opinions going the other way as well.

B. Recitation of Testimony is not a Finding of Fact

Frequently, orders simply recite what witnesses said in the course of their testimony. For example, the order may state: "Dr. Smith evaluated the mother and found her to be depressed and needing regular mental health treatment." This finding of fact simply finds that Dr. Smith made that statement. It is not a finding of fact that the mother is depressed or that the mother needs any treatment. The order must state, in addition: "The mother is depressed and needs regular mental health treatment."

It may be helpful to include a recitation of the evidence supporting the trial judge's ultimate finding of fact, but those evidentiary findings are not sufficient in and of themselves. *See Peoples v. Cone Mills Corp.*, 316 N.C. 426, 449 n.7, 342 S.E.2d 798, 800 n.7 (1986); *In re Green*, 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195 n.1 (1984). While the appellate court might deem such findings to be assertions of fact, as in *Peoples*, the court also might not. Why take the chance? If the order describes a social workers' testimony regarding a parent's unwillingness to work with DSS, the order must then go on to say that the trial judge finds that the parent was unwilling to cooperate with DSS.

C. No Findings of Fact through Incorporation by Reference

A related issue comes up when an order incorporates a report by reference "as its findings of fact." In abuse, neglect, and dependency proceedings, this Court has held that because a trial court "may not delegate its fact finding duty[,]" a court "should not broadly incorporate . . . written reports from outside sources as its findings of fact." *In re J.S.*, 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004) (emphasis added). This Court has explained that "although the trial court may properly incorporate various reports into its order, it may not use these as a substitute for its own independent review." *In re M.R.D.C.*, 166 N.C. App. 693, 698, 603 S.E.2d 890, 893 (2004), *disc. review denied*, 359 N.C. 321, 611 S.E.2d 413 (2005).

In other words, a trial court can incorporate a report by reference if the intent of the finding is simply to memorialize the evidence – instead of summarizing the report, the finding incorporates the report. An evidentiary finding of fact of that nature is acceptable. The order cannot, however, then say that the trial court finds all the facts recited in the report. Instead, the trial court must itself make the necessary findings of fact.

D. Keeping the Adjudication and Disposition Straight

Dramatically different evidence is admissible at the disposition stage. For example, reports of the guardian ad litem or the social worker would be inadmissible hearsay during the adjudicatory hearing, but entirely appropriate at the disposition phase of a hearing. Frequently, when both hearings are held together, the findings of fact for the adjudication will reference "facts" that are contained only in reports admitted solely during the disposition phase.

This problem – which may well result in a remand – usually reflects two lapses at the trial level. First, trial counsel has not used the reports as a checklist during the adjudication hearing to ensure that the social worker or guardian ad litem testified to each fact necessary for the adjudication. Second, trial counsel has not kept careful notes regarding what was admitted at each stage. I suspect counsel uses the reports as an outline for the order without knowing for sure that everything in the report was admitted during testimony at the adjudication phase.

E. Get the Law Right

It is striking how often the conclusions of law do not properly state the law. For example, N.C. Gen. Stat. § 7B-1111(a)(2) was amended eight years ago to eliminate the need for reasonable progress in "the prior 12 months." *See In re C.L.C.*, 171 N.C. App. 438, 447, 615 S.E.2d 704, 709 (2005) (“The focus is no longer solely on the progress made in the 12 months prior to the petition.”), *aff'd per curiam in part, disc. review improvidently allowed in part,* 360 N.C. 475, 628 S.E.2d 760 (2006). Yet, orders repeatedly recite the old law. The conclusions of law must reflect an applicable amendments to the statutes at issue.

III. RECORD ON APPEAL

A. The Contents of the "Record"

Even if you are representing the appellee, the record on appeal matters. Rule 9 of the Rules of Appellate Procedure governs the contents of a record on appeal for most appeals. Rule 3A(b) contains the procedures for settlement of the record on appeal in 3A cases. The Court of Appeals is limited to the "record" transmitted to the Court. The "record" includes the record on appeal, the transcript, and exhibits. We are not allowed to consider any materials outside of that record. Even if a document is part of the record before the trial court, if it is not submitted to the Court of Appeals, technically, it cannot be considered.

Although the rules are fairly clear about the content of the record on appeal and the order of arrangement that should be followed in compiling the record, attorneys frequently adopt a haphazard approach. It will be difficult for you to review, but worse for the Court. Please review the record very carefully to make sure that every document that *DSS* will need on appeal is contained in the record. For example, make sure the record contains all the necessary summonses, the orders appointing guardians ad litem, or reports incorporated by reference in the orders.

In addition, if an exhibit is important, then you need to make sure that three copies of that exhibit will be filed with the Court of Appeals when the record on appeal is filed. Do not assume that the Court will call up from the trial court any exhibit that may be important. Instead, assume, because of our short time limits for opinions, that we will not retrieve the exhibit.

If, however, when you sit down to write your brief, you discover that the record is missing a critical document or exhibit, immediately move to amend the record to add the omitted document/exhibit. So long as the document or exhibit was in fact part of the record before the trial court, that motion will likely be allowed. Do not simply attach the missing document to your brief. It will not be considered in the absence of a motion to amend the record.

B. Cross-Assignments of Error

Even if you are an appellee, do not assume you are off the hook with respect to assignments of error. If you intend to argue an alternative basis for upholding the decision below, you do not need to file a notice of appeal, but you will still need to include cross-assignments of error under Rule 10(d). That alternative basis must have been argued below (Rule 10(a)), and those cross-assignments of error must comply with Rule 10(c) in order to be considered. Without cross-assignments of error, your alternative arguments *will not* be addressed by the Court of Appeals.

IV. THE BRIEF: THE MOST IMPORTANT DOCUMENT OTHER THAN THE ORDER

The briefs filed in the Court of Appeals frequently are not of good quality – this problem is not restricted to 3A appeals although the shortened time frame, cumbersome records, and complex law make it more noticeable. Since there will rarely be oral argument in 3A cases, your brief is your only chance to speak to the Court of Appeals.

A. Motions for Extension of Time

The practices of the Court regarding motions for extension of time to file a brief have varied significantly depending upon who is Chief Judge and the nature of the case. Extensions are not automatic. While at one time, many appellate practitioners believed that they could get a 30-day extension as a matter of course, that is no longer the case.

Rule 27 of the Rules of Appellate Procedure states that "courts *for good cause shown* may upon motion extend any of the times prescribed by these rules or by order of court for doing any act required or allowed under these rules . . . ." (Emphasis added.) You must show "good cause" or the extension will be denied. It is not enough to say that you need the extension and opposing counsel has no objection. You must explain specifically why you need the number of days being sought. If you do not do so, the motion will almost certainly be denied. If you do not attempt to justify the number of days, the extension may be shortened.

In 3A cases, you need to make an even more particular showing. Rule 3A(b)(3) specifies that "[m]otions for extensions of time to file briefs will not be allowed *absent extraordinary circumstances*." (Emphasis added.) The rules are adopted by the Supreme Court, and the Court of Appeals has no choice but to apply the rules as written. As a result, you must show "extraordinary circumstances" to obtain an extension of time.

B. Comply with the Rules

First and foremost, comply with the rules. The requirements for briefs are set out in Rule 28 of the Rules of Appellate Procedure with additional guidance found in Appendix E. Rule 28(b) sets out the required content for the appellant's brief, while Rule 28(c) sets out the content for the appellee's brief. If you are an appellee, you are, however, expected to comply with the requirements set out for the appellant's brief that are relevant to the appellee's brief, such as the specifications for the statement of facts and the argument section. If you are addressing your cross-assignments of error, you should comply with the rules for an appellant.

Historically, font size and formatting have been problems in the Court of Appeals. Revisions to the rules now provide more flexibility. Review Rule 28(j) carefully though. You can continue to follow the traditional approach and use Courier or New Courier 12. Or, if you prefer, you can use the familiar Times New Roman (or other proportionally-spaced type), but you must then use 14-point or larger. In the event that you use Times New Roman or other proportional type, you must – no matter how short your brief – include a certification with a word count, as provided in Rule 28(j)(2)(A)(2). NOTE: The font size applies to footnotes too. You are violating the rules if – as many lawyers do – you have your footnotes in a 10-point font. These requirements are not just technical hoops to make your life difficult. The appellate courts are required to read masses of material, our eyesight is not what it was, and compliance with the font/formatting requirements makes the material easier to read.

If you are the appellant, one of the more commonly overlooked requirements for the appellant's brief is Rule 28(b)(4)'s requirement that there be included "[a] statement of grounds for appellate review," including citation of the statute(s) permitting appellate review. No matter how obvious the basis for appellate review is, you still cannot omit this section of the brief.

C. Questions Presented

If you are the appellee, you do not have to include "questions presented" unless you have cross-assignments of error. For an appellee, they are a waste of space.

If you are an appellant or you have cross-assignments of error, do not simply repeat verbatim your assignments of error as questions presented. Write each "question presented" with an eye towards persuasion. It is an opportunity for advocacy since the question presented is the first matter of substance appearing in the brief. You want to phrase the question presented in a way that fairly suggests the result to the reader.

D. Statement of the Case

This section is particularly important in Rule 3A cases. The statement of the case sets out the procedural history of the case. Make sure that this section includes each significant procedural step, such as the date the initial petition was filed, the date and result of the initial adjudication, review hearings changing the permanent plan, and whether a motion or petition to terminate parental rights was filed. This section is a reference resource if you include citations to the record – the reader does not have to plow through the record on appeal to figure out what happened procedurally.

The appellee is not required to include a statement of the case unless there is a disagreement with the appellant's version. Make sure, however, that the appellant has described the procedural history in a neutral manner and covers each proceeding that you believe is important – if not, then you should include your own statement of the case.

E. Statement of Facts: It's Not Argument

Rule 28(b)(4) specifies that the statement of facts "should be a non-argumentative summary of all material facts" necessary to understand the questions presented for review. Those facts must be "supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be."

Frequently, the statement of facts contains argument rather than a recitation of facts. Improper material includes discussions why evidence is credible or entitled to more weight, evidentiary arguments, even case citations, and complaints about the opposing counsel or parties in the course of the litigation. You can be an aggressive advocate in the presentation of the facts without straying into argument. Set out the facts in the light most favorable to your position.

The facts are critical in these cases. In your statement of facts, tell a story, laying out all the facts that are pertinent to the appeal, as well as any facts that you believe make a compelling case for you. Do not go witness by witness – the Court wants to know what happened to the children and not, in the statement of facts, what happened at trial. If you are the appellee and you have a well-crafted order, then you will want to follow the findings of fact in the order.

Cite to the record! For every fact in your statement of facts, you need a cite to the record on appeal, the transcript, or an exhibit. It is sometimes far easier for the Court to find the

applicable law than it is to find a fact somewhere in the record. If you are the appellee, cite both to the order (the relevant finding of fact) and to the record – this approach demonstrates to the reader that the findings of fact are supported by competent evidence.

If testimony or an exhibit are particularly compelling, use a quotation. An actual quotation from a witness or an exhibit is much more compelling than your representation and paraphrase regarding what the evidence says.

F. Standard of Review

One of the most common mistakes in briefs is the failure to recite the applicable standard of review. Rule 28(b)(6) provides: "The argument shall contain a concise statement of the applicable standard(s) of review for each question presented, which shall appear either at the beginning of the discussion of each question presented or under a separate heading placed before the beginning of the discussion of all the questions presented." Even when you believe the standard of review is obvious, do not omit the standard of review, including citations to cases supporting your position on that standard. Rule 28(b)(6) also provides: "The body of the argument *and the statement of applicable standard(s) of review* shall contain citations of the authorities upon which the appellant relies." (Emphasis added.)

Do not guess at the standard of review. It is a critical component of appellate advocacy. Appellees win appeals based on the standard of review. An appellee would prefer that the appellate court defer to the trial court rather than revisit the issue from scratch. As a result, an appellee wants to emphasize the standard of review if it is "abuse of discretion" or "whether the findings are supported by competent evidence."

A critical error made by attorneys is viewing the standard of review as simply a technical hoop that they must just jump through rather than treating the standard of review as a major issue on appeal. Sometimes, the standard is obvious – such as with the sufficiency of the evidence to support the findings of fact – but then the appellee's brief should emphasize that standard throughout the argument section addressing the findings of fact. Other times, the standard of review may be difficult to identify. You need to take the time to figure it out because it may make the difference between winning or losing.

Do not turn off your brains when researching the standard of review. While there are cases that say that evidentiary rulings are reviewed for abuse of discretion, that statement is overbroad. The reality is that not all evidentiary rulings are reviewed for abuse of discretion. Relevance is a question of law reviewed de novo by the appellate court although great deference is given to the trial court. Depending on the issue, after reciting that standard, you may want to emphasize the "de novo" part or the "great deference" part. Balancing under Rule 403 is reviewed for abuse of discretion, but the admissibility of evidence under other rules is reviewed de novo.

If there is no North Carolina case directly on point regarding the standard of review, do not punt. Do the analysis for the court by considering first the nature of the issue. If it is a question of law, then the standard of review will be de novo. If it involves questions of weighing, balancing, or credibility, etc., the standard will, more likely, be abuse of discretion. Find an analogous issue in which the standard of review has already been determined or look at what other states have done.

G. Argument

1. Citing Authority

There is nearly universal agreement at the Court of Appeals that if you do not cite any authority to support a particular contention, then that contention will not be considered by the Court. Rule 28(b)(6) specifically provides: "Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." In other words, if you do not think your argument is worth the effort to find supporting authority, we will not supply it for you.

While that is especially a problem for appellants, do not make the mistake of believing that an appellee can get away without citing authority. The Court of Appeals is an error correcting court, while the Supreme Court is focusing on the development of the law. The work of both courts is centered on the law. Thus, we cannot decide appeals without citing cases. You will substantially undermine your reputation and credibility by filing a brief that cites no pertinent law and, therefore, requires the appellate court to do your work for you. Cite authority. If there is no directly pertinent authority, cite analogous cases or look to other states. Cite cases that are as similar on the facts as possible.

When citing cases, always include either a quotation or a parenthetical explaining the relevance of the case. Quotations from cases can be particularly effective if they are not too long – it is more persuasive for the Court to see what the case actually said as opposed to reading the attorney's articulation of what the Court held. With respect to parentheticals, unless the reason you are citing a case is obvious from the context, you should include a parenthetical containing a quote, a summary of the holding, or a description of the facts or procedure that show why this case supports your position. You do not want the reader to have to read the case simply to understand why you are citing the case – you want the reader to believe before reading the case that the case is important (at least if the case is in fact important). Also include a pinpoint cite – you want to direct the Court to the precise part of the opinion that matters.

You may now cite unpublished opinions. Rule 30(e)(3) provides that such an opinion "does not constitute controlling legal authority" and citation "is disfavored," but it may be cited "[i]f a party believes, nevertheless, that an unpublished opinion, has precedential value to a material issue in the case and that there is no published opinion that would serve as well . . . ." Since so many 3A cases result in unpublished opinions, you may in fact find unpublished opinions that are important to the issues raised in the briefs. While the opinions are not

controlling, the reasoning of the authoring judge may be persuasive, and the opinion may serve as a useful research tool – pointing the new panel to other pertinent authority. The unpublished opinion must be attached in an appendix to your brief.

2. Discussing the Facts

When discussing the facts in the argument section, do not cut and paste from your fact section. Paraphrase and summarize. Draw inferences – this is the argument section where you can "argue" the facts. You must, however, include references to the record. *See* Rule 28(b)(6) ("Evidence or other proceedings material to the question presented may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal or the transcript of proceedings, or the exhibits."). Do not assume that references in the statement of facts are a satisfactory substitute. Also, remember that quotations can be your most effective way of presenting the facts.

If the appellant has argued that the order does not contain sufficient findings of fact, do not point to evidence in the record from which the finding could have been made. The fact that the trial court could have found the fact does not matter if the trial court did not, in fact, make the finding. You may be able to argue that there was no dispute at trial or, perhaps, there is something in the transcript that suggests that the parent in effect stipulated to the fact, but generally you cannot correct the omission if the finding of fact was truly necessary to support the conclusion of law. You will face a remand unless you can persuade the court that the finding was made elsewhere (as a misnamed conclusion of law) or was not necessary. You may also be able to argue that the finding is necessarily implicit in findings that were actually made. You cannot rely upon a finding of fact in the disposition to support the adjudication, although you may be able to point to a finding in the adjudicatory order to support the disposition (especially if the dispositional order incorporates the findings of fact from the adjudication).

If the appellant has argued that a finding of fact is not supported by competent evidence, you cannot point to evidence that was admitted in a separate proceeding. For example, evidence admitted in the dispositional phase cannot support a finding in the adjudication phase. In addition, a trial court's finding of fact in an A/N/D proceeding cannot support a finding in a TPR order unless the A/N/D order was admitted into evidence or the trial court took judicial notice of that order – judicial notice must be reflected in the record (the transcript or the order).

3. The Substance of Your Argument

Remember who your audience is on appeal. Consider the number of judges on the Court of Appeals and the Supreme Court who have experience in DSS cases – at any given time, the number is quite small. In addition, there is a fair amount of turnover. Do not use jargon or shorthand or assume that the panel, which will hear the appeal will have any serious understanding about how these cases proceed as a practical matter. Do not assume that the judges know about the federal mandate to speed these cases up – Rule 3A notwithstanding.

If a procedural issue is being addressed on appeal, explain the practical and real world consequences of that issue (although be careful not to stray outside the record or the statutory framework). That approach does not mean, however, that you should be explaining – without support in the record – how your particular district handles hearings or any informal practices. If your district is not doing things the correct way, the appellate courts will not just allow that to continue. If the statutes are impractical, then the solution is to ask the General Assembly to amend them – the appellate courts will not ignore a statutory violation.

If a ruling by the appellate court one way or another will have ramifications, you need to set out what those ramifications will be. The Court recognizes that one panel cannot overrule another panel and is concerned that one opinion may have unexpected consequences in other areas. Appellate counsel can be of tremendous service to the Court by pointing out those possible ramifications, although you should not "cry wolf" or claim "the sky is falling."

4. Conclusion

Keep it short and sweet. Simply say: "For the foregoing reason, the Court should . . . ." You do not need to summarize what you have written already.

H. The Appendix to the Brief

In 3A cases, we rarely see an appendix to the brief. Certain material must be included in an appendix, as set forth in Rule 28(d)(1), although violations of that rule are frequently overlooked by the Court. Notably, appendices are supposed to include portions of the transcript necessary to understand any question presented, portions of the transcript relating to the admission or exclusion of evidence, and relevant portions of statutes, rules, or regulations relied upon. Rule 28(d)(2) sets out exceptions to that requirement. While I am not aware of an attorney being sanctioned for failure to include material in an appendix, the day may come. Rule 28(d)(3) explains when an appellee must include material in an appendix. The Rule specifically provides that "[v]erbatim portions of the transcript filed pursuant to this rule in an appeal of a termination of parental rights or juvenile matter must be modified to comply with the confidentiality provisions of Rule 3(b)."

A common problem with appeals is the inclusion in an appendix to the brief of material that is not part of the settled record. If a document is not part of the printed record on appeal, the transcript, a deposition, or exhibits – and properly included as part of the settled record under Rule 11 – then it is not properly included in an appendix. When an exhibit has been inadvertently omitted from the record, although it was in fact considered by the trial court, it cannot be presented to the Court of Appeals by way of attaching it to your brief in an appendix. You must move to amend the record on appeal. If you do not do so, the material will not be considered by the Court.

I. Citations of Additional Authority

You should review rule 28(g), which provides: "Additional authorities discovered by a party after filing his brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties." Please note that the additional authority need not be *decided* subsequent to the filing of the brief. Instead, if you become aware of a case that supports your brief, then you should submit a citation of additional authority. That document "shall simply state the issue to which the additional authority applies and provide a full citation of the authority."

V. CORRECTING RULES VIOLATIONS

Do not assume that the Court will ignore rules violations whether by an appellant or an appellee. Many sanctions to date have been the result of *sua sponte* action by the Court of Appeals. You will not know that the Court considers there to be a problem with your appeal until after you receive the opinion. While appeals will rarely be dismissed, alternative sanctions may be imposed. Or, worse, the Court may disregard an argument that you have made. **As soon as you become aware that you may have violated the rules, take action.** You can rectify many errors by moving to amend the record on appeal or your brief or by moving to file a substitute brief. The likelihood of the motion being allowed increases the earlier you file it.