TO: North Carolina Appellate Practitioners

FROM: Christopher G. Browning, Jr.
Chair, NCBA Appellate Rules Committee

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Re: Recent Amendments to North Carolina Rules of Appellate Procedure

On July 2, 2009, the North Carolina Supreme amended and re-adopted the North Carolina Rules of Appellate Procedure. These changes to the Rules of Appellate Procedure will apply to all appeals taken on or after October 1, 2009. With these amendments, the North Carolina Supreme Court has taken substantial steps to modernize the Rules of Appellate Procedure, increase the efficiency of the appellate process and reduce the costs of an appeal to the litigants. The amendments fall within seven different categories: 1) abolition of assignments of error, 2) appeals involving juveniles, 3) secured leave procedures, 4) narration of evidence, 5) *pro hac vice* motions, 6) filing of transcripts, and 7) technical changes and corrections to the rules. Each of these different changes is briefly summarized below.

Abolition of Assignments of Error

Prior to these amendments, the Rules of Appellate Procedure required the appellant to set out assignments of error (i.e., the issues that will be brought forward in the appeal) in the proposed record on appeal. The purpose of assignments of error was to identify the issues that would be presented in the appeal so that the parties would have a better understanding of the material that should be included in the proposed record on appeal. The Rules and, more importantly, case law set out very specific requirements for the form of assignments of error. *See, e.g., In re Election Protest of Fletcher,* 175 N.C. App. 755, 759, 625 S.E.2d 564, 567 (2006). As a result, assignments of error have plagued practitioners for decades. *See, e.g., Broderick v. Broderick*, 175 N.C. App. 501, 503-09, 623 S.E.2d 806, 807-11 (2006) (Wynn, J., concurring).

The recent amendments abolish assignments of error. In lieu of assignments of error, the appellant must include in the proposed record "proposed issues that the appellant intends to present on appeal." Rule 10(b).[1] Thus, the appellant must, in good faith, attempt to identify the issues that will be brought forward on appeal, thereby allowing the appellee to make an informed decision as to what needs to be included in the proposed record on appeal. Unlike the old rules, however, the new rules expressly provide that failure to include an issue in the proposed record on appeal shall not preclude the appellant from presenting that issue on appeal in his brief: "Proposed issues on appeal are to facilitate the preparation of the record on appeal and shall not limit the scope of the issues presented on appeal in an appellant's brief." Rule 10(b). In the

[1] This memo cites the new rules as "Rule __." Citations to the former rules, which will continue to govern appeals filed prior to October 1, 2009, are set out in this memo as "Former Rule __.".

event the record on appeal is insufficient to respond to the issues presented by the appellant, the appellee may supplement the record. Rule 9(b)(5). The supplement must be filed no later than the time for filing the appellee's brief.

Thus, the amendments with respect to assignments of error are simple and straightforward: 1) assignments of error are abolished; 2) appellants (and cross appellants) must nevertheless include "proposed issues on appeal" in the proposed record; but 3) failure to include an issue in the proposed record will not preclude the appellant from making that argument in its brief on appeal. Despite the simplicity of this change, numerous portions of the former rules had to be amended due to the myriad of references to assignments of error throughout the old rules. The amendments strike all references to assignments of error from the old rules. Accordingly, this global change required amending former Rules 9, 10, 11, 18, 28, and Appendices B, C, D & E.

Rules Relating to Juveniles

The amendments to the rules address an issue that has plagued attorneys in appeals under N.C.G.S. § 7B-1001 (abuse and neglect cases). New Rule 3.1(d) now provides that when an appeal is taken pursuant to N.C.G.S. § 7B-1001, if the appellate counsel concludes that the record reveals no issue that would merit relief, counsel may file a brief that sets out the issues and explain why they lack merit (i.e., the equivalent of an *Anders* brief).

Additionally, the amendments address the confidentiality of juvenile names in criminal cases involving sexual abuse of a minor. Briefs and records on appeal are published electronically by the Administrative Office of the Courts on the Internet (www.ncappellatecourts.org). Although the former rules protected against the disclosure of juvenile names in appeals involving termination of parental rights, juvenile dependency and juvenile abuse, the same protections were not afforded in criminal appeals. As a result, problems arose when the names of juveniles who have been subjected to sexual abuse were posted on the Internet because their names are included in a brief or a record on appeal. The amended rules eliminate this problem. *See* Rule 4(c).

Finally, the revisions to the rules make the process for redaction of juvenile names more efficient. To institute these changes, the Court amended former Rules 3, 3A (now renumbered 3.1), 9, 26, 28, 37, 41 and Appendix B to the Rules of Appellate Procedure.

Secured Leave

Both the General Rules of Practice and the Rules of Appellate Procedure allow attorneys to designate secured leave to facilitate vacations and personal time. Prior to the recent amendments, counsel could designate the period of secured leave by merely sending a letter to the Clerk of the North Carolina Court of Appeals or the North Carolina Supreme Court without

identifying specific cases pending before the appellate courts. This created logistical difficulties for the clerks of the appellate courts. The new rules have amended Former Rule 33A (now Rule 33.1) to require attorneys to designate the cases they have before the appellate courts.

Narration of Evidence

Both the new and the old rules allow trial testimony to be presented to the appellate courts by an agreed-upon narration of the evidence in lieu of a transcript. Narration of the evidence can be essential when a trial transcript, for whatever reason, is unavailable. Read literally, however, the former rule allowed the option of narration only with respect to witness testimony and other "evidence." Former Rule 9(a)(1)(e). In some cases, it may be necessary to present to the appellate court what transpired at non-evidentiary hearings or other trial proceedings. The new rules amend Rules 9 and 18 to expressly provide for narration in such situations.

Pro Hac Vice Motions

Pro hac vice admissions are governed by N.C. Gen. Stat. § 84-4.1. Prior to the recent amendments, however, this statute was not referenced in the Rules of Appellate Procedure. The Court has added a new Rule 33(d) which essentially provides a cross reference to N.C. Gen. Stat. § 84-4.1. As a result, the amendment will assist out-of-state attorneys by pointing them to the applicable statute relating to admission *pro hac vice*. Additionally, the amendments clarify that when an out-of-state attorney pays a fee to be admitted *pro hac vice* in the North Carolina Court of Appeals, he or she need not pay the same fee again if the case is appealed to the North Carolina Supreme Court. (The attorney will, however, have to move for admission separately before each appellate court.) In addition to new Rule 33(d), the North Carolina Supreme Court has amended Rules 9 and 18 to require that the Record on Appeal include all orders granting *pro hac vice* motions if the order is entered prior to the filing of the Record on Appeal.

Filing of Transcripts

The North Carolina Supreme Court has amended the rules to provide that transcripts shall be filed with the appellate courts in electronic format rather than hard copies. Rule 12(c). Additionally, Rule 7(b)(2) was amended to provide that the court reporter, upon completion of the transcript, shall deliver a PDF disk to the parties.

Technical Changes to the Rules

In addition to the six major changes set out above, the North Carolina Supreme Court has combed through the rules to modernize the language of the rules and to identify any inconsistencies that have inadvertently arisen as a result of amendments over time. For example, the phrase "Chair of the Industrial Commission" is now used in lieu of "Chairman of the Industrial Commission." Rule 21(c). As a further example of these technical changes, Rule 3

was amended on December 8, 1988 to eliminate a notice of appeal being given orally in civil cases. Nevertheless, two provisions of the Rules (Former Rule 5(a) and Appendix D) continued to reference oral notice of appeal being given in civil cases. The new rules correct this and various other inconsistencies.

NOTE: PRACTITIONERS SHOULD BE AWARE THAT THESE NEW RULES ONLY APPLY TO APPEALS FILED ON OR AFTER OCTOBER 1, 2009. ADDITIONALLY, IT IS IMPORTANT TO READ THE AMENDMENTS CAREFULLY. THIS MEMO IS ONLY A BRIEF SUMMARY OF THE MORE IMPORTANT CHANGES.