

**Appellate Procedure:  
Common Questions and  
Effective Use of The Rules**

**Glenn Gerding  
Appellate Defender  
123 W. Main St.  
Durham, NC 27701  
(919) 354-7210**

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**NC Rules of Appellate Procedure**

- N.C. Constitution, Art. IV, sec. 13(1): "The Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division."

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**NC Rules of Appellate Procedure**

- Changing the rules can be a painstakingly slow process or happen quickly without input from stakeholders.
- NCBA Appellate Rules Committee provides input and suggestions.

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### Following the Rules

- Protects your client from defaulting issues or an appeal.
- Bolsters your credibility as an advocate.
- Shows you know what you're doing.

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### Interpreting the Rules

- If the rule is clear, then follow it to the letter.
- If the rule is not clear on how to proceed, or if there is no rule covering your situation:

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### Interpreting the Rules

- Research cases that have cited the rule in question.
  - Be prepared to find no cases.
- Ask colleagues for advice.
  - Be prepared for different interpretations of the rule.
- Contact me.
- Contact the clerk's office.

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## Interpreting the Rules

- If violating the rule could result in default, follow a conservative interpretation of the rule.
- If there is no rule, take an ethical, conservative, reasoned approach.
  - Document your interpretation or reasons in the record and your notes.
  - Be prepared to defend your interpretation and actions if necessary.

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## Interpreting the Rules

- Ultimately, you are trying to protect your client, but you should consider:
  - Am I doing what's practical?
  - Is it ethical?
  - Is it fair to the other side?
  - Does it make sense?

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## Interpreting the Rules

- If you are doing something that the rules don't explicitly allow, or if you are violating a rule:
  - Explain the extraordinary circumstances.
  - Fall on your sword if necessary.
  - Invoke Rule 2.

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## Rule 9 – Transcript Designation

- Statement of transcript – use the form prescribed in Appendix B:
- “Per Rule 9(c) of the Rules of Appellate Procedure, the transcript of proceedings in this case, taken by (name), court reporter, from (date) to (date) and consisting of (# of volumes) volumes and (# of pages) pages, numbered (1) through (last page #), is electronically filed pursuant to Rule 7.”

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## Rule 9 – Transcript Designation

- List ALL court reporters and hearing dates separately:
  - Forces you to organize multiple court reporters and multiple hearing dates to ensure all are submitted.
  - Provides clerks and judges a ready reference.
  - Allows substitute counsel to pick up the case.

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### STATEMENT OF TRANSCRIPT

Per Rule 9(c) of the Rules of Appellate Procedure, the transcript of the trial proceedings, taken by Mr. Gina Macchio, on 29 September 2011, 13 June 2013; Mr. Linda Bowden, on 4 and 7 February 2014, 22 April 2013, 3 July 2013; Mr. Susan Gugga on 5 and 16 December 2011, 26 July 2012, 16 August 2012, 11 April 2013; Mr. Carrie Rice on 13 November 2012, 20 December 2012, 20 May 2013; Mr. Jackie Sullivan on 1 March 2013, 16 August 2013; Mr. Tom Graham on 15 May 2012; Mr. Maude Constantino on 18 October 2012; and Mr. Jane Huxley on 15 August 2013; bound in 15 volumes, and numbered non-sequentially will be electronically filed by the court reporters once a docket number has been assigned to this appeal.

Per Rule 9(c) of the Rules of Appellate Procedure, the transcript of the trial proceedings, taken by Mr. Gina Macchio, court reporter, on 26 to 30 August 2013, consisting of 1,229 pages, numbered as pages 1 - 1229, and bound in five volumes will be electronically filed by the court reporter once a docket number has been assigned to this appeal.

Per Rule 9(c) of the Rules of Appellate Procedure, the transcript of the trial proceedings, taken by Mr. Linda Bowden, court reporter, on 3 to 6 September 2013, consisting of 805 pages, numbered as pages 1230 - 2135, and bound in four volumes will be electronically filed by the court reporter once a docket number has been assigned to this appeal.

Testimonial evidence contained in the transcripts designated above shall be presented in the transcript of trial in lieu of narrating the evidence and other trial proceedings as permitted by Rule 9(c)(1). The verbatim transcript pages designated above shall also be used to present 1041 direct, statements and events at evidentiary and non-evidentiary hearings or other trial proceedings.

Transcripts will not be reproduced with the record on appeal but will be treated and used as an exhibit.

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## Rule 9(c)(1) – Narratives

- Rule 9(c):
- “statements and events at evidentiary and nonevidentiary hearings, and other trial proceedings necessary to be presented for review by the appellate court may be included either in the record on appeal in the form specified in Rule 9(c)(1)”

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## Rule 9(c)(1) – Narratives

- Rule 9(c)(1):
- “voir dire, statements and events at evidentiary and non-evidentiary hearings, and other trial proceedings required by Rule 9(a) to be included in the record on appeal shall be set out in narrative form..”

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## Rule 9(c)(1) – Narratives

- When and how to use a narrative:
  - Procedural background not evident from any available documents in the file
  - Voir dire
  - Opening statements
  - Closing arguments
  - Events in court not reflected in the transcript
  - Testimony that cannot be transcribed due to equipment malfunctions.

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## Rule 9(c)(1) – Narratives

- Label the section as: "Rule 9(c)(1) Narrative."
- Deficiencies in notice of appeal cannot be fixed by narrative or stipulation. See *State v. Brown*, 142 N.C. App. 491, 493 (2001).
- Material establishing jurisdiction not included in the record, but appellate counsel's affirmative statement about that matter included in the record -- Appeal dismissed. See *State v. Shoemaker*, No. COA09-1440, 2010 N.C. App. LEXIS 1106, at \*4 (2010).

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## Rule 9(c)(1) – Narratives

- Where do you get the information?
  - Your client, or client's family
  - Trial attorney
  - DA
  - Trial judge
  - News reports
  - Look for clues in the transcript or record that something happened that isn't in the transcript.

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## Rule 9(c)(1) – Narratives

- Do not label the narrative as a stipulation, and do not put the information in the Organization of the Trial Tribunal.
- "The 'Organization of Trial Tribunal' is merely a statement in the record for informational purposes and is not binding on the parties." *State v. Brown*, 142 N.C. App. 491, 493 (2001).

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## Rule 9(c)(1) – Narratives

- *State v. Wardrett*, 261 N.C. App. 736 (2018)
- A juror walked into the courtroom during the charge conference.
- Transcript shows the court reporter saying “a juror is coming in.”
- COA said the transcript and record do not reveal if the juror got past the courtroom door and, if so, how long the juror was in the courtroom.

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## Rule 9(c)(1) – Narratives

*State v. Simpson*, 2015 N.C. App. LEXIS 912, 2015

### NARRATIVE OF MATTERS NOT CONTAINED IN TRANSCRIPT

Pursuant to N.C.R.App.P. Rule 9(c)(1), the record on appeal shall include the following narrative of matters that are not included in the transcript because there was no motion for complete recordation pursuant to N.C. Gen. Stat. §15A-1241:

During the State's closing argument, the State argued that Mr. Simpson's testimony that he did not move the money and envelopes depicted in state's exhibits 6 and 7 from the kitchen to his daughter's bedroom, and that because Mr. Simpson's testimony on this point was not credible, the jury should also not consider the remainder of his testimony to be credible. Defense counsel objected to this argument and defense counsel's objection was overruled.

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## Rule 9(c)(1) – Narratives

*State v. Mackey*, 241 N.C. App. 586 (2015)

### Narrative Pursuant to Appellate Rule 9(c)

During the trial, the jury sent out three notes to the court that were ultimately filed with the Superior Court Clerk and that appear in the Record on Appeal. Two of those notes – the first beginning, “What is the expected length . . .” (dated January 30, 2014; page 200 of the record), and the second beginning, “Do we have any concern for our safety . . .” (dated February 4, 2014; page 202 of the record) – were not brought to the attention of the defendant or his counsel during the trial, and the trial court did not address the notes on the record.

“We note that the record unfortunately does not provide the exact time that the jury submitted this note.”

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Rule 9(c)(1) – Narratives

Rule 9(c)(1) Narrative Regarding State's Exhibit 33

The State informed the trial court that they intended to show a PowerPoint presentation to the jury during Detective Camacho's testimony. (T pp 901-02)

Instead of submitting a digital copy of the PowerPoint into evidence, the State introduced a black and white paper printout of the PowerPoint as State's Exhibit 33. The State published the PowerPoint presentation to the jury on a screen during Detective Camacho's testimony. (T pp 917-952)

The PowerPoint published to the jury had an embedded video file that is not reflected in the hard copy print out of the PowerPoint admitted as State's Exhibit 33. During Detective Camacho's testimony, the State played the embedded video to the jury. (T p 947)

On 16 July 2020, Judge Collins ordered that a copy of the digital PowerPoint report be filed with the Wake County Clerk of Court and provided to Mr. [redacted]'s appellate counsel. The digital PowerPoint shall be part of the record. While this copy may not be the exact version that was displayed to the jury, it fairly reflects what was displayed for the jury.

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Rule 9(c)(1) – Narratives

Rule 9(c)(1) Narrative

After issuance of our Supreme Court's opinion in *State v. Grady*, 372 N.C. 509 (2019), the North Carolina Conference of District Attorneys rendered guidance to elected District Attorneys regarding the effect of the Grady decision. A copy of an email sent by Executive Director Peg Dargatzis to elected District Attorneys was forwarded by Ms. Dargatzis to the Executive Director of Indigent Defense Services. That email is included in the Record on Appeal in this case.

As part of its email guidance the Conference, in consultation with the Attorney General's Office, prepared a memorandum for District Attorneys entitled "Best Practices for Satellite Based Monitoring Review Hearings in Response to Grady II (Nov 2019)." That memorandum is included in the Record on Appeal in this case.

Per Ms. Dargatzis's email, the Department of Public Safety developed two lists of SBM enrollees potentially affected by Grady. Those lists are included in the Record on Appeal in this case. Mr. [redacted]'s name appears on one of the lists.

Before Mr. [redacted]'s SBM review hearing on 2 March 2020, the State served him with a notice of hearing. The State did not file a written motion, application, or other pleading.

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Rule 9(c)(1) – Narratives

No. COA \_\_\_\_\_ DISTRICT \_\_\_\_\_

NORTH CAROLINA COURT OF APPEALS

\*\*\*\*\*

IN THE MATTER OF: )

(Initials) ) From \_\_\_\_\_ County

) J File Number \_\_\_\_\_

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NOTICE OF RECONSTRUCTED TESTIMONY

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In accordance with Rule 9(c)(1) of the North Carolina Rules of Appellate Procedure, Appellant hereby submits a narration of testimonial evidence in lieu of a verbatim transcript as the recording device in use on \_\_\_\_\_ (date of hearing(s)) failed to capture the proceedings. The narration of the testimony is included as part of the Proposed Record on Appeal and the Record on Appeal.

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Rule 9(c)(1) – Narratives

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE  
COUNTY OF \_\_\_\_\_ DISTRICT COURT DIVISION  
FILE NO. \_\_\_\_\_

IN RE: \_\_\_\_\_  
A.A., B.B., C.C. and D.D. )  
 )  
 )  
 )

NARRATIVE OF THE PROCEEDINGS IN THE  
REITER HEARING  
Pending: The Honorable [NAME], Presiding District Court Judge  
Date of Hearing: [DATE]

Appearances:  
\_\_\_\_ For the Department of Social Services  
\_\_\_\_ For the Respondent Mother  
\_\_\_\_ For the Respondent Father  
\_\_\_\_ Guardian Ad Litem Attorney/Advocate

WITNESS: [SOCIAL WORKER] FOR THE DSS  
DIRECT EXAMINATION BY DSS COUNSEL  
Me, \_\_\_\_\_ is the Foster Care Social Worker assigned to the case of  
AA, BB, CC, and DD. He was assigned in April or May 2001. He studied the  
case with \_\_\_\_\_ who had been the supervisor of the case since  
October 2000. SW recommended guardianship of AA to AA's maternal aunt  
and uncle, who had been the child's caretakers.  
He recommended visitation for AA with the Respondent Mother for 2

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Rule 9(c)(1) – Narratives

CROSS EXAMINATION BY FATHER'S COUNSEL

SW testified that the Department had on going safety concerns for AA while she was in father's care. He testified that he, nor anyone to his knowledge, had counseled father about any safety concerns. He testified that he had not been to father's new home; nor had he been to the home of his mother, for which there had been a positive home study almost immediately after the filing of the Petition. He further testified that he first spoke to father in late April and had not met him prior to the Court Hearing. He acknowledged that father had full time employment and there were no substance abuse issues or issues regarding his housing. He had concerns about the visitation with AA and father's ability to coordinate the visits with the caretakers. He also testified that father had not attended AA's Child and Family Team Meetings but acknowledged that he had not spoken to father directly about either meeting but had left a telephone message advising him about the May meeting. He admitted that the Department had planned reunification with the Respondent Father; the Permanent Plan changed again to custody.

SW testified that the Department was concerned that father did not report the accident in May at the time it occurred. He admitted that the accident occurred on Friday evening and it was reported to the Department

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Rule 9 – Exhibits

- It is your responsibility to ensure the Court has a record on appeal that contains items that support the issues you raise in the appeal.
- It is your responsibility to transmit most exhibits to the Court.

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## Rule 9 – Exhibits

- Exhibits may be made a part of the record on appeal through several methods:
- Rule 9(d)(1): physically include them in the printed ROA
- Rule 9(d)(2): file a copy of a documentary exhibit with the court, paginated and with an index
- Rule 9(d)(2): file a request with the county clerk to send a “tangible object” or exhibit that cannot be copied without impairing its legibility

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## Rule 9 – Exhibits

- What do you do if the DA wants exhibits (or anything else) in the record?
- Try to work it out if possible.
- Sometimes it's easier just to acquiesce and include whatever it is the DA wants.

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## Rule 9 – Exhibits

- Remind the DA of Rule 9(b)(2):
- Inclusion of Unnecessary Matter; Penalty. It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the issues presented on appeal. The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion.

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## Rule 9 – Exhibits

- Suggest alternatives for the DA and remind the DA that the AG can take these actions if the AG deems the current ROA insufficient:
- Rule 9(b)(5)a: opposing party can submit
- Rule 9(b)(5)b: any party may move the court for an order, or the court may sua sponte order the county clerk to send exhibits
- Rule 11(c) supplement

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## Rule 9 – Exhibits

- **PRACTICE TIPS:**
- Include the Exhibit Log in the ROA.
- You no longer send 3 copies of each exhibit.
- You no longer ask the clerk to send documentary exhibits to the Court.
- You cannot attach an exhibit to your brief as an appendix item unless you have also properly made it part of the record on appeal under Rule 9.

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## Rule 9 – Exhibits

- The clerk can send you pictures of exhibits that you can then file.
- You can and should e-file a Rule 9(d)(2) record supplement.
- If you ask the county clerk to send exhibits to the Court of Appeals, regularly check the docket to ensure the items have been received and noted on the docket.
- Consider contacting the COA to determine if they received the originals.

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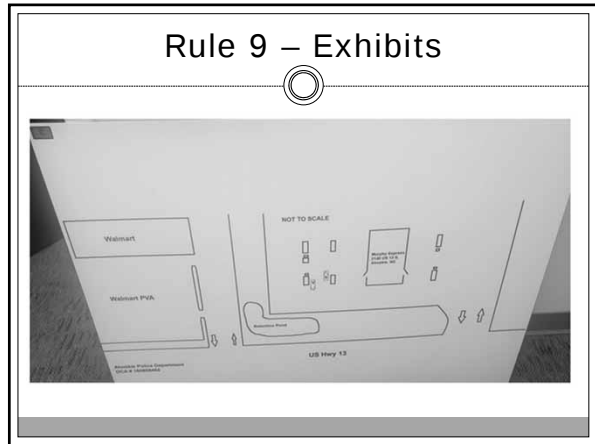
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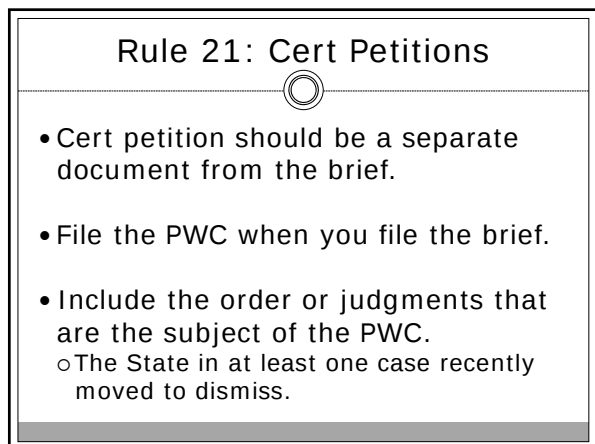
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## Rule 23: Stays

- Probation, including a split sentence, is stayed by operation of N.C.G.S. 15A-1451.
- Check judgments immediately. If your client was sentenced to a split or just probation, find out if the client is in custody or supervised. If so, then you need to immediately seek relief.
- If you lose at the COA and plan to file a PDR or have a dissent and plan to appeal, you need to file a motion for a stay and supersedeas in order to keep your client from having to start probation.

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## Rule 42: Protecting Identities

- Three ways for items to be sealed:
- 42(a) Those already sealed by the trial court.
- 42(b) Those sealed by operation of Rule 42.
- 42(c) Those sealed pursuant to a motion in the appellate court.
- 42(e) Identification numbers

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## Rule 42(a)

- Items sealed in the trial tribunal remain under seal in the appellate courts.
- "When these items are filed with the appellate courts, counsel must attach a copy of the order, statute, or other legal authority that sealed the item below."
- Consider filing sealed documents separately from the settled record on appeal under Rule
- On the e-file site you must click the box indicating the item was sealed in the trial court. THIS IS ONLY FOR RULE 42(a) ITEMS.

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## Rule 42(b)

- Cases in which all items are automatically sealed by operation of rule:
- 7B-1001 (Abuse, Neglect, Dependency)
- 7B-2602 (Juvenile Delinquency)
- 7A-27 cases involving a sex offense committed against a minor
- 122C-272 (Involuntary Commitment)
- Do not click the box for "sealed in the trial court" when e-filing.

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## Rule 42(c)

- Items not sealed in the trial court and not subject to Rule 42(b) that you should consider asking the Court to seal under 42(c):
  - Medical records
  - Mental health records
  - Records of expunctions
  - Competency evaluations

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## Rule 42

- Place a banner at top of ALL sealed pleadings, whether sealed by 42(a), (b), or (c).
- Literally, at the top, above the caption
- Copy verbatim from the rule:  
"UNDER SEAL AND SUBJECT TO PUBLIC  
INSPECTION ONLY BY ORDER OF A COURT OF  
THE APPELLATE DIVISION"

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## Rule 42

- The banner goes on records on appeal too.
- Don't forget to put the banner on cert petitions, motions, MAAs, exhibit supplements.
- The banner should be on transcripts.
- In the ROA and other pleadings, you redact all "identification numbers."
- You do not redact names in the ROA.

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## Rule 42(b) - names

- In your record on appeal, add a paragraph stating that you will be using initials or a pseudonym to protect the identity of the person.

### Stipulation as to Pseudonyms

In all documents filed, the minor Joe Smith will be referred to as John. N.C.R. App. P. 42.

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## Record on Appeal Reminders

- Include:
  - Jurisdictional documents – notice of appeal from District Court to Superior Court
  - exhibits log
  - exhibits that are specifically the subject of a proposed issue or that you want to highlight for the Court, otherwise use Rule 9(d)(2)

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## Record on Appeal Reminders

- Include:
  - all jury instructions and re-instructions
  - all questions by jurors during the trial and during deliberations
  - a Rule 42 stipulation
  - All orders extending time for transcript and PROA
  - an indication that the ADA agreed to e-mail service of the proposed record on appeal

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## Resources

- IDS website
  - Training Presentations
  - <http://www.aoc.state.nc.us/www/ids/>
- SOG website
  - Defender Manual
  - <http://defendermanuals.sog.unc.edu/>
- OAD on-call attorneys

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## Appellate Procedure: Common Questions and Effective Use of The Rules

**Glenn Gerding  
Appellate Defender  
123 W. Main St.  
Durham, NC 27701  
(919) 354-7210**

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# Criminal Record on Appeal

**Documents that should be included in cases where a defendant appeals from a judgment entered upon a criminal conviction:**

**(See Rule 9 and Appendix C, Table 3)**

- ☐ Index of Contents (Rule 9(a)(3)(a))
- ☐ Organization of the Trial Tribunal (Rule 9(a)(3)(b))
- ☐ All charging documents
  - *Examples:* Arrest warrant, information, indictment, superseding indictment, probation violation report(s)
- ☐ Appearance of counsel (trial counsel)
- ☐ Statement specifying verbatim transcript(s) to be filed
- ☐ Statement regarding exhibits (Rule 9(d))
- ☐ Substantive pretrial motions
- ☐ Written Orders (entered pretrial or during trial)
- ☐ Oral orders (from transcript)
- ☐ Documentary Exhibits (if relevant to possible issues on appeal)
- ☐ Jury Instructions
- ☐ Jury Question (from transcript and exhibit, if any)
- ☐ Verdict Sheet(s)
- ☐ Transcript of Plea
- ☐ Prior Record Level Worksheet
- ☐ Judgment and Commitment Order(s)
- ☐ Findings of Aggravating / Mitigating Factors
- ☐ Restitution Worksheet / Order
- ☐ Criminal Bill of Costs
- ☐ Any order from which the appeal is being taken.
  - *Examples:* Order denying motion to suppress, Satellite Based Monitoring Order, Post-Conviction DNA Testing Order
- ☐ Notice of Appeal
  - If notice of appeal was in open court, include relevant page(s) from transcript
  - If written notice of appeal was filed, include file-stamped notice of appeal and certificate of service
  - If misdemeanor appeal from District Court, include NOA from District to Superior Court
- ☐ Appellate Entries Form
- ☐ Appointment of Appellate Counsel
- ☐ All Transcript Extension Orders (from trial court and Court of Appeals)
- ☐ All Proposed Record on Appeal Extension Orders (from trial court and Court of Appeals)
- ☐ Agreement / Stipulation / Order Settling the Record on Appeal
- ☐ Proposed Issues on Appeal (Rule 10(b))

- ☐ Names of Counsel
  - Names, addresses, phone numbers, state bar numbers, and email addresses of all parties to the appeal
- ☐ Certificate of Service of Proposed Record on Appeal
- ☐ Certificate of Filing Settled Record on Appeal

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### Documents in the Record on Appeal should be:

- ☐ In chronological order
- ☐ File-stamped
- ☐ Signed / dated
- ☐ Include certificates of service and affidavits, when applicable

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### Make sure:

- ☐ All Social Security, Drivers' License, Tax ID, and Financial Account Numbers are redacted
- ☐ Pages of Record are numbered using a dash, - 8 -
- ☐ To protect the identity of juveniles:
  - ☐ N.C. R. App. P. 42(a) and (b) require that the identities of juvenile clients and juvenile victims of sex offenses be protected
  - ☐ In juvenile delinquency appeals; juvenile abuse, neglect, dependency appeals; involuntary commitment appeals, and appeals that involve a sexual offense committed against a minor, or other cases involving juvenile victims, the cover of the record must contain the statement specified in Rule 42.

**Remember→** The Record on Appeal is important because appellate review is limited to the items contained within the Record.

- In appeals from the trial division of the General Court of Justice, appellate review is “solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9.” N.C. R. App. P. 9(a).