

MEMORANDUM

To: Members of the North Carolina Bar

From: Bob Edmunds
Chair, North Carolina Bar Association's Appellate Rules Committee

Date: January 4, 2019

Re: December 2018 Amendments to the North Carolina Rules of Appellate Procedure

On 19 December 2018, the Supreme Court of North Carolina issued an Order amending the North Carolina Rules of Appellate Procedure. These amendments became effective on 1 January 2019 and apply to all appeals currently pending in the appellate courts, no matter when the notice of appeal was filed.

Many of the amendments focus on updates to the Appellate Rules necessitated by the January 2019 statutory changes to appellate jurisdiction in appeals of cases involving termination of parental rights. However, the amendments also streamline and simplify the procedural rules applicable to other Rule 3.1 appeals.

Other amendments apply to all appeals, including: (1) consolidating privacy and confidentiality provisions within a single rule, (2) modifying the procedures and scope of Appeal Information Statements, (3) reducing the number of copies to be filed, and (4) modifying the method for calculating an appellant's briefing deadline in direct appeals.

The changes are found in Appellate Rules 3, 3.1, 4, 9, 11, 12, 13, 18, 26, 28, 30, 37, 41, 42, and Appendices A, B, and D. While this Memorandum describes the major changes, practitioners should review the redline version that shows all the amendments. This version is available at https://www.nccourts.gov/assets/inline-files/Order-Amending-RAP_19-December-2018.pdf!8EZNFPajMsu76PjUJafisSh0B4zaNSL4.

1. Qualifying Juvenile Appeals—Appellate Rule 3.1.

In this revision, Appellate Rule 3.1 has been wholly rewritten to address qualifying juvenile appeals filed under N.C.G.S. § 7B-1001 and similar cases “certified for review by the appellate courts in which the right to appeal under this statute has been lost.”

The prior version of Rule 3.1 addressed only qualifying juvenile cases that were appealed directly to the Court of Appeals. As of January 2019, a subset of

qualifying juvenile cases (*i.e.*, Termination of Parental Rights (TPR) cases) are now required to be appealed directly to the Supreme Court from the trial division. Revised Rule 3.1 now provides a unified procedure for qualifying juvenile appeals taken to either appellate court.

Revised Rule 3.1 also streamlines and updates many of the procedures applicable in Rule 3.1 cases. For example, new Rule 3.1(c) modifies the services terms applicable to transcripts in juvenile appeals. When a transcript is ordered for a Rule 3.1 appeal, the court reporter must serve copies of that transcript on all parties to the appeal, not just the party that placed the order. Moreover, transcriptionists in many instances will have a little extra time to deliver Rule 3.1 transcripts.

Under the previous version of Rule 3.1, parties who could not reach an agreement regarding the contents of a record on appeal could file separate records on appeal. Under amended Rule 3.1, the settling of the record will follow the procedures applicable to any other appeal, though on an expedited schedule. In other words, parties in Rule 3.1 cases are now required to file a single record on appeal using the tools supplied in Appellate Rule 11 (which can include Rule 11(c) supplements or, in rare instances, requests for judicial settlement).

All documents in Rule 3.1 cases must be filed electronically. Counsel in these cases can no longer file documents by hand-delivery or by mail. The amended rules do not distinguish between Termination of Parental Rights appeals to the Supreme Court and other Rule 3.1 appeals to the Court of Appeals. Consequently, the prohibition against e-filing records in the Court of Appeals has been lifted for Rule 3.1 appeals.

Although several sections of Rule 3.1 provide for expedited deadlines applicable to the *parties*, the provision in old Rule 3.1 that required the appellate courts to give Rule 3.1 cases “priority” has been removed.

Finally, while old Rule 3.1(b) addressed the protection of a juvenile’s identity, that process has been moved to Rule 42, discussed below.

2. Sealed and Confidential Information—Appellate Rule 42.

New Appellate Rule 42 consolidates into one place all the rules addressing privacy and confidentiality on appeal that previously had been scattered throughout the Rules of Appellate Procedure. Several aspects of amended Rule 42 merit mention.

Under Rule 42(b), particular types of appeal should automatically be treated by the parties and by the courts as sealed: (1) qualifying juvenile appeals (including TPR appeals), (2) juvenile delinquency appeals, and (3) any appeal filed pursuant to

N.C.G.S. § 7A-27 involving a sexual offense committed against a minor. In fact, both civil and criminal appeals that involve sexual offenses committed against minors are now automatically sealed. When settling the record on appeal, appellate counsel must agree on the pseudonym or initials they will use in appellate filings to identify a covered party and include a stipulation to this agreement in the record on appeal.

In addition, Appellate Rule 42 largely codifies the appellate clerks' long-standing (though unwritten) preference regarding filing information under seal in the appellate courts. When an item is sealed in the trial tribunal, it remains sealed on appeal. No further order from an appellate court is required. However, the parties must submit a copy of the authority under which the item was sealed below when the sealed item is filed in the appellate division.

In contrast, when an item was not sealed in the trial tribunal or does not fall within a category of matters that are automatically sealed, a party must move for permission to file an item under seal in the appellate division.

Rule 42 also provides details about how parties should label sealed items filed with the appellate courts.

Finally, Rule 42(e) expands the category of items ("Identification Numbers") that "must" be excluded or redacted from all filed documents. The prior rule specifically required redaction of social security numbers only. Rule 42(e) expands the list to include driver license numbers, financial account numbers, and tax identification numbers. Even so, when particular identification numbers are "necessary to the disposition of the appeal," counsel may instead move to seal the document in which the numbers appear.

3. Appeal Information Statements—Appellate Rule 41.

Appellate Rule 41, which had previously addressed Appeal Information Statements (AIS) in the Court of Appeals, has been significantly shortened. Amended Rule 41 now requires that an AIS be filed in appeals to both the Court of Appeals and the Supreme Court. The AIS must be filed before the appellant's brief is filed and counsel must use the appellate courts' electronic filing site to submit an AIS.

4. Only One Copy of Records and Memoranda of Additional Authority Need Be Filed—Appellate Rules 9, 11, 12, 18, and 28.

Under the prior version of Appellate Rule 12(c), only one copy of the printed record on appeal was filed, but other record filings (such as documentary exhibits and various record supplements) had to be filed in triplicate. The 2018 amendments to Appellate Rule 12 (along with corresponding changes to Rules

9(b)(5), 9(d)(2), 11(c), and 18(d)) now allow parties to file a single copy of each component of the record with the appellate courts.

Similarly, amended Appellate Rule 28(g) requires a party to file only a single copy of a Memorandum of Additional Authority.

5. New Method for Calculating Appellant’s Opening Brief Deadline—Appellate Rule 13.

Amended Appellate Rule 13, which governs the filing and service of briefs, has been changed to provide that an appellant’s brief must be filed within thirty days (sixty days in capital cases) after the printed record is *filed*. Under the old version of this rule, the thirty-day period was triggered by the clerk’s *mailing* of the printed record to the parties.

6. Electronic Filings Now Mandatory For More Documents.

Prior to 2018, electronic filing in the appellate courts was optional. In the amended rules, electronic filing in the appellate courts was made mandatory for several types of documents. An attorney who might be involved in an appeal should register for e-filing privileges in the appellate division long before an appeal begins.