MEMORANDUM

To: **North Carolina Appellate Bar and Practitioners**
From: **Michelle D. Connell, Chairperson NCBA Appellate Rules Committee**
Date: **1 January 2017**
RE: **2017 North Carolina Rules Appellate Procedure**

I. INTRODUCTION

On 1 January 2017, the newly amended N.C. Rules of Appellate Procedure will come into effect and shall apply to all cases appealed on or after this date. This memorandum is written to alert appellate practitioner to the substantive revisions of the rules and to provide a brief summary of the revisions.

Presumably, if notice of appeal is filed on or after 2 January 2017, then the new rules apply. Appeals pending before the appellate courts are not bound by these rules.

II. RULE 3.1 – APPEAL IN QUALIFYING JUVENILE CASES – HOW and WHEN TAKEN; SPECIAL RULES

Rule 3.1(c)(3) contains new language that "[a]n appellant may file and serve a reply brief as provided in Rule 28(h). Accordingly, reply briefs are allowed as of right in 3.1 appeals. This revision is also reflected in Appendix A – Timetables for Appeals following the deadline for filing appellee's brief.

III. EXTENSION OF TIME TO PREPARE THE TRANSCRIPT – HARMONIZING N.C.R. App. P., RULES 7 and 27.

Previously Rules 7 and 27(c) were inconsistent. The new rules clarify that except in capitally-tried criminal cases which result in the imposition of a sentence of death, the trial tribunal may extend the time to produce the transcript an additional thirty days. (See Rule 7(b)(1) and 27(c)(1) If additional time is needed to produce the transcript, then any subsequent motions to extend may only be made to the appellate court to which the appeal has been taken pursuant to Rule 27(c)(2). Bottom line: First request to extend time to produce a transcript is made in the trial court; all subsequent request to extend time to produce a transcript is made to the appellate court.

IV. RULE 12(c) – FILING "PAPER" DEPOSITION OR ADMINISTRATIVE HEAING TRANSCRIPTS

N.C.R. App. P., Rule 7(b)(2) requires the court reporter or person designated to prepare the transcript to "electronically file the transcript with [the appellate court] using the docket number assigned by that court." This electronic filing is still required by the rules; however, Rule 12(c) now clarifies that the appellant is required to file one copy of the printed record and any paper deposition or administrative hearing transcripts not electronically filed by the court reporter under Rule 7(b)(2). Note that filing one copy of any paper deposition or administrative hearing transcript under Rule 12(c) is different from the requirements of N.C.R. App. P., Rule 9(d) (documentary exhibits) and Rule 11(c) (supplement to the printed record on appeal) both of which require three copies of documentary exhibits and the supplement.

V. RULE 18 – DIRECT APPEALS FROM ADMINISTRATIVE AGENCIES TO APPELLATE DIVISION.

N.C.R. App. P., Rule 18 addresses direct appeals from administrative agencies to the appellate division. The revised rules updates and clarifies that Rule 18 applies not only to "agencies" but to "administrative tribunals." Specifically, Rule 18 states: "Appeals of right from administrative agencies, boards, commissions, or the Office of Administrative Hearings (referred to in these rules as "administrative tribunals") directly to the appellate division under N.C.G.S. §7A-29 shall be in accordance with the procedures provided in these rules for appeals of right from the courts of the trial divisions, except as provided in this Article."

Some specific revisions to Rule 18 state that objections and amendments to the proposed record on appeal are not to be filed, but simply served on the appellant. (See Rule 18(d)(3)) This same section confirms Rule 18(d)(3) is in accordance with Rule 11(c) Supplement. Specifically, in the event the parties do not agree to the inclusion of items in the printed record on appeal, then the disputed items shall not be included in the printed record, but shall be filed by the appellant with the record on appeal in three copies of a volume captioned "Rule 18(d)(3) Supplement to the Printed Record on Appeal."

VI. RULE 26(a)(2) – MOST, BUT NOT ALL, DOCUMENTS MAY BE ELECTRONICALLY FILED WITH THE APPELLATE COURTS.

N.C.R. App. P., Rule 26(a)(2) addresses "filing by electronic means." Some documents –the Record on Appeal and Rule 9(b)(5) Supplements – cannot be filed

electronically with the appellate court. The revised Rule 26(a)(2) clarifies that the electronic filing site at https://www.ncappellatecourts.org "identifies those types of documents that may not be filed electronically."

VII. RULE 26(g)(1) – FONTS and FONT-SIZES

N.C.R. App. P., Rule 26(g)(1) addresses the correct font and font-size to be used in "papers presented to either appellate court for filing" (i.e., briefs.) The new rule disallows the use of non-proportionally spaced fonts, i.e. Courier and New Courier font. Instead, all printed matter to the appellate courts must appear in a "font no smaller than 12-point and no larger than 14-point, using a proportionally spaced font with serifs. Examples of proportionally spaced fonts with serifs include, but are not limited to, Constantia and Century typeface as described in Appendix B to these rules…" (By further way of example, this memo is written in 12-point Century Schoolbook font.) In addition, Rule 28(j) has completely eliminated any references to non-proportionally spaced font.

Because of the exorcism of non-proportionally spaced font, there is no longer the option to choose a 35-page limit over certification of compliance. All briefs must contain a Certificate of Compliance per Rule 28. (See below.)

VIII. RULE 28(j) – CERTIFICATE OF COMPLIANCE, PAGE LIMITS

As stated above, N.C.R. App. P., Rule 28(j) has struck all language allowing non-proportionally spaced fonts. All briefs filed with the North Carolina Court of Appeals shall be written in proportionally spaced fonts. Principal briefs may contain no more than 8,750 words; reply briefs and amicus briefs may contain no more than 3,750 words.

Pursuant to Rule 28(j)(2), parties shall submit with each brief a certification of compliance with the word count. The specifically requires that the certificate of compliance shall appear immediately before the certificate of service and be signed by counsel of record (or pro se parties).

Rule 28(j)(2) allows parties to rely upon word counts reported by word-processing software as long as footnotes and citations are included in those word counts. Rule 28(j)(1) confirms that footnotes and citations must counted towards the word count limits but specifically states that covers, captions, indexes, tables of authorities, certificate service, certificates of compliance with this rule, counsel's signature blocks, and appendixes do not count against these word count limits.

IX. RULE 31.1 – MOTION FOR EN BANC CONSIDERATION BY COURT OF APPEALS

A. N.C.G.S. §7A-30 – Appeals of right from certain decisions of the Court of Appeals

By way of background, on 16 December 2016, the Governor signed into law SB 4, Section 22.C. (now chaptered at Session Law 2016-125.) The pertinent portion of this law for appellate practitioners affects N.C.G.S. §7A-30 – Appeals of right from certain decisions of the Court of Appeals. This statute now reads:

> Except as provided in G.S. 7A-28, an appeal lies of right to the Supreme Court from any decision of the Court of Appeals rendered in a case:
>
> (1) Which directly involves a substantial question arising under the Constitution of the United States or of this State, or
>
> (2) In which there is a dissent <u>when the Court of Appeals is sitting in a panel of three judges.</u> <u>An appeal of right pursuant to this subdivision is not effective until after the Court of Appeals sitting en banc has rendered a decision in the case, if the Court of Appeals hears the case en banc, or until after the time for filing a motion for rehearing of the cause by the Court of Appeals has expired or the Court of Appeals has denied the motion for rehearing</u>.

N.C.G.S. §7A-30. (Revised portion of the law is underlined.)

B. RULE 31.1 – Motion for en banc consideration by Court of Appeals.

In response to amended N.C.G.S. §7A-30(2), the Supreme Court of North Carolina amended the North Carolina Rules of Appellate Procedure on 22 December 2016 in include Rule 31.1; such amendment was effective immediately. This rule, attached and incorporated herein, attempts to codify the procedure for seeking en banc hearings.

The rule states that en banc hearings are not favored and will ordinarily not be order unless a majority of the Court of Appeals deems that en banc consideration is necessary to secure or maintain uniformity of the court's decisions, or the case involves a question of exceptional importance that must be concisely stated.

The addresses the process for moving for an en banc hearing, stay of the mandate, and taking motions seriatim.

X. NOTABLE DELETIONS

N.C.R. App. P., Rule 7(a)(1) completely deletes the sentence and requirement that "[i]f the appellant intends to urge on appeal that a finding or conclusion of the trial court is unsupported by the evidence or is contrary to the evidence, the appellant shall cite in the record on appeal the volume number, page number, and line number of all evidence relevant to such finding or conclusion."