

MEMORANDUM

TO: North Carolina Appellate Practitioners

FROM: Elizabeth Brooks Scherer
Chair, North Carolina Bar Association's Appellate Rules Committee

DATE: March 1, 2013

RE: Recent Amendments to North Carolina Rules of Appellate Procedure

On February 28, 2013, the Supreme Court of North Carolina amended Rules 9, 27, and 28 of the North Carolina Rules of Appellate Procedure ("Appellate Rules"), along with conforming amendments to Appellate Rules 13, 14, and 15. These amendments clarify the rules governing documentary exhibits in the appellate courts and how deadlines are calculated when a document is served by email. The amendments also adopt a significant change to the rules governing reply briefs. These changes to the Appellate Rules will be effective on 15 April 2013.

The rule amendments (along with historical context for the rule changes) are briefly summarized below.

I. Change to Appellate Rule 28(h) To Permit Reply Briefs In All Appeals

Prior to these most recent amendments, the right to file a reply brief was limited to 1) cases decided without oral argument, or 2) when an appellee's brief presented "new or additional issues." All other reply briefs could be filed only by permission of the appellate court.

Several practical problems arose under the prior rule. First, whether the appellee had raised "new or additional issues" was often a subjective determination. Second, most cases in the Court of Appeals are decided without oral argument—a notification that triggered the right to file a reply brief under the old rules. However, because the panels assigned to these cases typically reviewed the briefs and begin writing their opinions before these reply briefs were due, reply briefs were being filed too late to have a meaningful impact on the decisional process. Third, appellate courts often granted parties' leave to file reply briefs under the old rules, but these briefs might not be filed until right before oral argument. Thus, the unintended consequence of prior Appellate Rule 28(h) was to delay the preparation and filing of reply briefs until their value to the appellate courts was limited.

The latest Supreme Court amendments simplify the reply brief rule to address the practical concerns and inefficiencies created by prior Appellate Rule 28(h). Under new Appellate Rule 28(h)—along with conforming amendments to Appellate Rules 13, 14, 15, and 28(j)—an appellant may (but is not required to) file a reply brief in all appellate cases. The reply brief may be a maximum of 15 pages or 3,750 words, depending on what type of font is used. The reply brief must be filed within 14 days after the filing of the appellee's brief. The revised rule emphasizes that the reply brief must be limited to a "concise rebuttal" of the appellee's brief, and should not be used to reiterate arguments in an appellant's principal brief. The new rule also

discourages motions for extensions of time or page limits that would defeat the purpose of new Appellate Rule 28(h).

II. Amendment to Appellate Rule 9(d) Governing Documentary Exhibits

New Appellate Rule 9(d) substantially rewrites the prior rule governing the handling of exhibits, whether as part of the printed record on appeal or filed separately under Appellate Rule 9(d)(2). New Appellate Rule 9(d) was adopted to address several practical problems that had arisen with respect to exhibits.

First, new Appellate Rule 9(d) specifies that exhibits must be legible when received by the appellate court. Issues with legibility of exhibits often arise when, for example, color exhibits (such as photographs) or oversized maps are submitted to the appellate courts. The printed record on appeal, however, is reproduced by the appellate courts in black and white. A color photo included in the printed record might therefore look like a black rectangle after it is reproduced in the printed record. One way to comply with new Appellate Rule 9(d) is to submit color photographs in the Rule 9(d) Documentary Exhibit portion of the record prepared and reproduced by the parties. For further guidance on issues that could trigger new Appellate Rule 9(d), see page 33 of the October 2012 NCBA's Appellate Rules Style Manual.

Second, new Appellate Rule 9(d) requires that documentary exhibits be paginated and indexed if multiple exhibits are filed. An example of an indexed and paginated Rule 9(d) Documentary Exhibit can be found on pages 33-35 of the October 2012 NCBA's Appellate Rules Style Manual.

Finally, Appellate Rule 9(d) clarifies that Superior Court clerks must deliver tangible or otherwise non-reproducible exhibits to the clerk of the appellate court upon written request of a party. An order of the appellate court is not necessary to accomplish the transmittal of exhibits.

Other requirements of the prior Appellate Rule 9(d), such as deletion or redaction of social security numbers, remain part of the new Appellate Rule 9(d).

III. Clarifying Amendment to Appellate Rule 27(b) Governing Calculation of Responsive Deadlines When Service Is Made By Email.

Appellate Rule 27(b) now clearly states that three days are added to a period prescribed by the Appellate Rules after service of a document by electronic mail. In other words, response times under the Appellate Rules are calculated the same way whether service is by regular mail or by email. This was a question frequently raised by appellate practitioners. Because this amendment only clarifies the clerks' offices longstanding interpretation of Appellate Rule 27(b), this amendment is not a substantive change to the Appellate Rules and, therefore, is currently in effect.

NOTE: PRACTITIONERS SHOULD BE AWARE THAT THESE NEW RULES BECOME EFFECTIVE ON 15 APRIL 2013. ADDITIONALLY, IT IS IMPORTANT TO READ THE AMENDMENTS CAREFULLY. THIS MEMO ONLY SUMMARIZES THE CHANGES.