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NORTH CAROLINA RULES OF APPELLATE PROCEDURE

These rules are promulgated by the Court under the rule-making authority conferred by Article IV, § 13(2) of the Constitution of North Carolina. They shall be effective with respect to all appeals taken from orders and judgments of the Superior Courts, the District Courts, the North Carolina Industrial Commission, the North Carolina Utilities Commission and the Commissioner of Insurance of North Carolina in which notice of appeal was given on and after July 1, 1975. As to such appeals, these rules supersede the Rules of Practice in the Supreme Court of North Carolina, 254 N. C. 783 (1961), as amended; the Supplementary Rules of the Supreme Court, 271 N. C. 744 (1967), as amended; and the Rules of Practice in the Court of Appeals of North Carolina, 1 N. C. App. 632 (1968), as amended. With respect to all appeals in which notice of appeal was given prior to July 1, 1975, the rules of court and statutes then controlling appellate procedure are continued in force as the Rules of Practice of the Courts of the Appellate Division until final disposition of the appeals.

The Drafting Committee Notes and an Appendix of Tables and Forms prepared by the Committee are published with the rules for their possible helpfulness to the profession in the early stages of experience with these rules. Although authorized to be published for this purpose, they are not authoritative sources on parity with the rules.

Duly adopted by the Court in conference this 13th day of June, 1975.

EXUM, J.
For the Court

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ARTICLE I. APPLICABILITY OF RULES

RULE 1

SCOPE OF RULES; TRIAL TRIBUNAL DEFINED

(a) **Scope of Rules.** These rules govern procedure in all appeals from the courts of the trial divisions to the courts of the appellate division; in appeals in civil and criminal cases from the Court of Appeals to the Supreme Court; in direct appeals from administrative agencies to the Court of Appeals; and in applications to the courts of the appellate division for writs and other relief which the courts or judges thereof are empowered to give.

(b) **Rules Do Not Affect Jurisdiction.** These rules shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law.

(c) **Definition of Trial Tribunal.** As used in these rules, the term *trial tribunal* includes the superior courts, the district courts, the North Carolina Utilities Commission, the North Carolina Industrial Commission, and the Commissioner of Insurance.

Drafting Committee Note

Sources of parallels in former rules or statutes: None.

Commentary.

Subdivision (a) charts the coverage of this unitary set of Rules of Appellate Procedure as promulgated by the Supreme Court effective July 1, 1975. This coverage includes all appeals to and review by the Court of Appeals and the Supreme Court. It does *not* include certain other "appeals" within the General Court of Justice: i.e. appeals from clerk of superior court to judge of superior court under G.S. §§ 1-272 et seq.; from quasi-judicial bodies to superior court, as under G.S. §§ 150A-43 et seq.; and from magistrate to district court for trial de novo under G.S. §§ 7A-228 et seq.

Subdivision (b) expresses a fundamental limitation on the scope of the rule-making power of the Supreme Court under which these Rules are promulgated. The essential rule-making power is grounded in the Constitution which, in Art. IV, § 13(2), confers upon the Supreme Court the "exclusive authority to make rules of procedure and practice for the Appellate Division." The same section forbids exercise of that power in a way which would "abridge substantive rights or abrogate or limit the right of trial by jury." This Rule further disclaims any power or intention by the Court that the Rules be interpreted in any way to alter the jurisdiction of the

courts of the appellate division as prescribed by Constitution and statute. This simply expresses a further restriction on the rule-making power which, though not explicit in the Constitution as is the limitation above noted, is certainly implicit in the general "separation of powers" provision, Art. 1, § 6.

Subdivision (c) is self-explanatory.

RULE 2

SUSPENSION OF RULES

To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

Drafting Committee Note

Sources or parallels in former rules or statutes: None.

Commentary. This Rule expresses an obvious residual power possessed by any authoritative rule-making body to suspend or vary operation of its published rules in specific cases where this is necessary to accomplish a fundamental purpose of the rules. The power does not of course depend upon its express reservation by the Court in the body of the Rules. It is included here as a reminder to counsel that the power does exist, and that it may be drawn upon by either appellate court where the justice of doing so or the injustice of failing to do so is made clear to the court. The phrase "except as otherwise expressly provided" refers to the provision in Rule 27(c) that the time limits for taking appeal laid down in these Rules (i.e. Rules 14 and 15) or in "jurisdictional" statutes which are then replicated or cross-referred in these Rules, i.e. Rules 3 (civil appeals), 4 (criminal appeals) and 18 (agency appeals), may not be extended by any court.

ARTICLE II. APPEALS FROM JUDGMENTS AND ORDERS OF SUPERIOR COURTS AND DISTRICT COURTS

RULE 3

APPEAL IN CIVIL CASES — HOW AND WHEN TAKEN

(a) **From Judgments and Orders Rendered in Session.** Any party entitled by law to appeal from a judgment or order of a superior

or district court rendered in a civil action or special proceeding during a session of court may take appeal by

(1) giving oral notice of appeal at trial, or at any hearing of a timely motion under Rule 59 of the Rules of Civil Procedure for a new trial or to alter or amend a judgment, or under Rule 50 of the Rules of Civil Procedure for judgment notwithstanding the verdict with or without a motion for a new trial; or

(2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.

(b) **From Judgments and Orders Rendered Out of Session.** Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding out of session may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.

(c) **Time When Taken by Written Notice.** If not taken by oral notice as provided in Rule 3(a)(1), appeal from a judgment or order in a civil action or special proceeding must be taken within 10 days after its entry. The running of the time for filing and serving a notice of appeal in a civil action or special proceeding is tolled as to all parties by a timely motion filed by any party pursuant to the Rules of Civil Procedure enumerated in this subdivision, and the full time for appeal commences to run and is to be computed from the entry of an order upon any of the following motions: (i) a motion under Rule 50(b) for judgment n.o.v. whether or not with conditional grant or denial of new trial; (ii) a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) a motion under Rule 59 to alter or amend a judgment; (iv) a motion under Rule 59 for a new trial. If a timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party.

(d) **Content of Notice of Appeal.** The notice of appeal required to be filed and served by subdivisions (a)(2) and (b) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and

the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(e) **Service of Notice of Appeal.** Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules.

Drafting Committee Note

Sources or parallels in former rules or statutes. Subdivisions (a), (b), (c): G.S. §§ 1-279, 1-280. Subdivisions (d) and (e): None.

Commentary.

Subdivision (a) carries forward the traditional code practice which has permitted appeal to be taken from judgments rendered during a session of court by either of two means: 1) oral notice given "at trial," or 2) written notice filed and served within a specified period (10 days from "entry" per subdivision (c)). The opportunity to give oral notice is extended by the Rule to other settings than the traditional "at trial" and "during a session," to include additionally the setting described as "at a hearing" on any of the typical post-verdict motions under Rules 50 and 59 of the Rules of Civil Procedure. The phrases "during a session" and "at trial" are carried forward from the old code statutory sections to describe the traditional setting for oral notice. Although questions could always have existed as to when "trial" begins and ends, bench and bar have always equated "at trial" with "in open court" and there simply has not been this difficulty. See, e.g., *Mason v. Commrs. of Moore County*, 229 N.C. 626, at 627, 628 (1948). The underlying notion behind charging all parties with notice of appeal given orally "at trial" is undoubtedly the same as that which dictates that oral *motions* suffice to charge all persons with notice when made during the course of trial, a principle long recognized in our pre-1970 code practice, *Collins v. N. C. State Hwy. & P.W. Comm.*, 237 N.C. 277 (1953), and now expressly embodied in N.C.R.Civ.P. 7(b)(1). It is in keeping with this principle that the Rule now extends the opportunity for giving oral notice of appeal to these specific, frequently used post-verdict motion hearings. Here too it seems fair to charge with notice, since parties must have been given notice of the hearings themselves. N.C.R.Civ.P. 7(b)(1), 5(a). In any event, an appellant may always elect in either setting to give written notice (within the prescribed period) rather than oral notice. And if, as will frequently be the case, the hearing is adjourned without ruling, the appellant will perforce have to use written notice when the order is later entered.

This Rule does not speak to the related matter of providing a record entry of the fact that appeal has been duly taken by either mode. The code provision, former G.S. § 1-280, cryptically required that, however appeal was taken, the appellant should "cause his appeal to be entered by the clerk on the judgment docket." This requirement of formal entry "on the judgment docket" was early held not mandatory, just so long as the record showed in some adequate way that appeal was duly taken by either mode. *Atkinson v. Asheville St. Ry.*, 113 N.C. 581 (1893). The traditional way of insuring this record entry—particularly appropriate for the oral notice—

came to be by using practically standardized "appeal entries" which, along with recitations concerning security and time-tables for perfecting appeal, contain a notation that appeal has duly been taken. These Rules carry forward the developed requirement of such record entry. See Rule 9(b)(ix). This latter provision clearly authorizes continued use of the customary "appeal entries" to record the taking of appeal by oral notice. In the case of appeal by filing written notice, a copy of the written notice, with filing date per Rule 9(c)(3), will clearly suffice as the record entry of the fact that appeal has been duly taken. See Committee Form 5 "Appeal Entries," with explanatory Note.

Subsection (2) of subdivision (a) requires that service of copies of a written notice of appeal be made by the appellant upon all *other* parties, not just *adverse* parties as under the formerly controlling code provision, now repealed G.S. § 1-280. The primary reason for extending the requirement of notice to other than adverse parties is to tie into the provision of subdivision (c) which tolls the time for taking appeal as to all other parties when any party takes a timely appeal. Another reason is that it may sometimes be difficult to determine just who is such an "adverse" party. Co-parties may in some situations be "adverse." *Rose v. Baker*, 99 N.C. 323 (1888) (interest of co-defendant not given notice of appeal may not be adversely affected upon appellate review). This rule avoids any necessity for making such a determination. Rule 26, which is cross-referred in subdivision (e) of this Rule for the manner of making service, provides such simple and ready means that the requirement of all-party service seems not burdensome.

Subdivision (b) carries forward the traditional practice by which appeals from judgments not rendered in session (hence not subject to appeal by oral notice "at trial") may of course be taken by filing and serving written notice of appeal within the time provided in subdivision (c).

Subdivision (c) provides the timetable for taking appeal by written notice. It thus is in play in all situations where appeal is not taken by oral notice. The basic time limit is the traditional 10 days of code practice. But this time commences to run from a different point than did the period under former statutes (as judicially interpreted). Under former law, the time was stated to run from the date of "rendition" of a judgment in session, and from the date of "notice" of a judgment rendered out of session. G.S. § 1-279. By judicial interpretation these points in time had been fixed, respectively, as the last day of the session and as the date when the judgment was filed in the clerk's office. 2 McIntosh, *North Carolina Practice and Procedure in Civil Cases*, § 1783(1) 2d ed. 1956). Under this Rule 3 the time begins to run with respect to *any* civil judgment, whether rendered in or out of session, from the date of its "entry." "Entry" is a word of art with a precise meaning now dictated by Rule 58 of the Rules of Civil Procedure. However satisfactory the procedure under Civil Rule 58 generally, its clear specification of the act which accomplishes "entry" of a judgment of any kind, coupled with its requirement that this be made a matter of record, provides counsel with sure means of determining for purposes of appeal that judgment has been entered and the time of its entry. This subdivision contains two other important innovations. The first causes the running of appeal time to be tolled by the filing of a post-verdict motion

under either Rule 50, 52 or 59 of the Rules of Civil Procedure, with the period recommencing upon the entry of an order upon the motion. (A result only partially achieved by 1971 amendment to G.S. § 1-279 which gave this effect only to Rule 59 motions.) The second avoids any further need for the so-called "protective" appeal by a party who is content to abide the judgment unless some other party takes appeal, but who wants to go up as an appellant if this transpires, and who therefore has been forced to give notice of appeal against the possibility that another party will take appeal at the last moment. This awkwardness is avoided by the provision that the timely taking of appeal by any party automatically gives all other parties 10 additional days from that time to note appeal.

Subdivision (d) includes a new requirement of specific elements to be included in a written notice of appeal. These conform to generally accepted ideas of what such a notice should contain and, indeed, to customary practice in this state. See F.R.App.P. 3(c) and 3 *Douglas Forms*, Form 1168. In particular, the specification of the exact order or the portion of a judgment from which appeal is taken may save against occasional confusion. Federal courts under a comparable rule have not commonly treated any but the most misleading error in the required specification as vitiating the appeal. See, e.g., *Higginson v. U.S.*, 384 F. 2d 504 (6th Cir. 1967) (wrong order designated; deemed corrected by correct identification in brief); *Graves v. General Insurance Corp.*, 381 F. 2d 517 (10th Cir. 1967) (designation of wrong court harmless under circumstances). See Committee Forms 1 and 2.

Subdivision (e)'s cross-reference to the general "Filing and Service" rule, Rule 26, is made in order to insure counsel's attention to the variety of means by which service of the required copies of the notice of appeal may be made. See Commentary to subdivision (a), section (2). Since "taking" appeal by written notice requires both filing and service within the 10-day period, App. R. 3(a)(2), counsel must be careful to effect *service* as well as filing within the time. The most obvious way to do this is by the use of mail which, properly posted, is effective upon posting, or, where convenient, hand delivery to counsel or to an employee or partner at his office. App. R. 26(c). Service by an officer, though authorized by this same subdivision of Rule 26, is of course less subject to control, and will be effective only upon consummation of service.

General. It should be noted that the statutes which have heretofore been the sole sources for the procedure in "taking" appeal, G.S. §§ 1-279, 1-280 (for civil appeals) and G.S. § 15-180 (which for criminal appeals simply borrowed the civil procedure), have been substantially amended to incorporate the basic changes in this procedure which is now incorporated in this Rule 3 and in following Rule 4 (for criminal appeals). Indeed, the controlling statutes and Rules now simply replicate each other. See G.S. § 1-279, as re-written in 1975, and G.S. § 15-180.3, enacted in 1975, to parallel the two rules in the respects described in the rule commentaries.

RULE 4

APPEAL IN CRIMINAL CASES — HOW AND WHEN TAKEN

(a) **Manner and Time.** Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by

(1) giving oral notice of appeal at trial, or

(2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within 10 days after the last day of the session at which rendered.

(b) **Content of Notice of Appeal.** The notice of appeal required to be filed and served by subdivision (a) (2) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(c) **Service of Notice of Appeal.** Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules.

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. §§ 15-180, 1-279, 1-280.

Commentary.

See the *General Commentary* to Rule 3 which points out the statutory amendments made in conjunction with promulgation of these rules to bring the two into conformity on the procedure for taking appeal from the trial courts.

Subdivision (a) carries forward traditional practice by which in criminal cases (borrowing the code procedure for civil appeals) appeal may be taken either by oral notice given at trial or by written notice within a specified time after judgment. The traditional time of 10 days is also carried forward. Under formerly controlling statutes (G.S. § 1-279, borrowed for criminal appeals by G.S. § 15-180) this time commenced to run upon "rendition" of judgment, and by judicial interpretation this event was fixed as the last day of the session at which rendered. This judicial gloss is now incorporated expressly in the Rule to accord with customary practice. (Note that this differs from the starting point for the running of time in civil appeals, which is the date of "entry" of judgment under Rule 58 of the Rules of Civil Procedure. See commentary to subdivision (a) of Rule 3.)

Taking appeal, when written rather than oral notice is given, involves both *filing* and *service* of the notice, with service of copies required only upon *adverse* parties. (Note again a difference from the procedure in civil appeals, under which per App. R. 3(a) and (b) service is required upon all *other* parties.) Obviously, when a criminal defendant appeals, there is only one such adverse party, the State. G.S. § 1-5. In the infrequent situations in which the State may appeal, G.S. § 15-179, if there are multiple defendants, service must be upon all of them. The reasons for not requiring criminal defendants to serve copies upon any co-defendants are: 1) the practical difficulty of doing so in situations of confinement, and 2) the absence of any provision in criminal appeals similar to that in Rule 3(c) for civil appeals which tolls the running of appeal time for all other parties when timely appeal is taken by any party.

Because it is not the practice to enter any judgments or orders from which appeal would lie in a criminal action except during a session of court, this Rule 4 does not contain any provision like that in App. R. 3(b) which provides for appeals in civil actions from judgments rendered out of session. If an appealable judgment or order were to be entered out of session (whether authorized or not), it is obvious that appeal must then be taken by filing and serving written notice.

Subdivision (b). See commentary to subdivision (d) of Rule 3, and Committee Forms 1 and 2.

Subdivision (c). See commentary to subdivision (e) of Rule 3.

RULE 5

JOINDER OF PARTIES ON APPEAL

(a) **Appellants.** If two or more parties are entitled to appeal from a judgment, order, or other determination and their interests are such as to make their joinder in appeal practicable, they may give a joint oral notice of appeal or file and serve a joint notice of appeal in accordance with Rules 3 and 4; or they may join in appeal after timely taking of separate appeals by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties.

(b) **Appellees.** Two or more appellees whose interests are such as to make their joinder on appeal practicable may, by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties, so join.

(c) **Procedure after Joinder.** After joinder, the parties proceed as a single appellant or appellee. Filing and service of papers by and upon joint appellants or appellees is as provided by Rule 26(e).

Drafting Committee Note

Sources and parallels in rules and statutes: None.

Commentary.

While former statutes and rules obviously contemplated appeals involving multiple parties, and occasionally alluded to the special problems thereby created (as in Sup. Ct. R. 19(2)), they were basically designed to fit the single appellant-single appellee pattern. Specifically, they made no direct provision for joinder on appeal of either appellants or appellees. Since this can be a helpful procedure, this Rule 5 directly authorizes it and lays down quite simple procedures to accomplish joinder. While joinder of appellants will be much more common, appellees may also desire to join on occasion, and subdivision (b) provides for this. The main advantage derived from joinder on either side is reduction in the paper work and effort required, particularly in respect of service of various papers required to be served on all parties. Subdivision (c) cross-refers to a provision in Rule 26, the general filing and service rule, which makes service on any party joined on appeal service on all so joined, thereby insuring this advantage.

Related Rules dealing with other aspects of multiple-party appeals are Rule 11(d) (single record on appeal despite multiple appellants proceeding separately); Rule 26(f) (service on numerous parties proceeding separately); and Rule 11(b) and (c) (procedure for settling record where multiple appellees proceeding separately).

RULE 6

SECURITY FOR COSTS ON APPEAL IN CIVIL ACTIONS

(a) **In Reguar Course.** Except in pauper appeals an appellant in a civil action must provide adequate security for the costs of appeal in accordance with the provisions of G.S. §§ 1-285 and 1-286.

(b) **In Forma Pauperis Appeals.** An appellant in a civil action may be allowed to prosecute an appeal in forma pauperis without providing security for costs in accordance with the provisions of G.S. § 1-288.

(c) **Filed with Record on Appeal.** When security for costs is required, the appellant shall file with the record on appeal a certified copy of the appeal bond or a certificate of the clerk of the trial tribunal showing cash deposit made in lieu of bond.

(d) **Dismissal for Failure to File or Defect in Security.** For failure of the appellant to provide security as required by subdivision (a) or to file evidence thereof as required by subdivision

(c), or for a substantial defect or irregularity in any security provided, the appeal may on motion of an appellee be dismissed by the appellate court where docketed, unless for good cause shown the court permits the security to be provided or the filing to be made out of time, or the defect or irregularity to be corrected. A motion to dismiss on these grounds shall be made and determined in accordance with Rule 37 of these rules. When the motion to dismiss is made on the grounds of a defect or irregularity, the appellant may as a matter of right correct the defect or irregularity by filing a proper bond or making proper deposit with the clerk of the appellate court within 10 days after service of the motion upon him or before the case is called for argument, whichever first occurs.

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. §§ 1-285, 1-286, 1-287, 1-288; Court of Appeals Rule 6(a).

Commentary.

Subdivision (a) simply cross-refers to the statutes which require that ordinarily security for costs be provided as a condition to the right to prosecute an appeal and prescribe the mode of setting and perfecting such security. This basic requirement bears so directly upon the financing of the court system that it seems properly a matter for legislation rather than judicial rule-making as the authoritative source. Cross-reference in these Rules is simply in the interest of the completeness of their coverage of each critical step in the process.

Subdivision (b) similarly cross-refers to the statutory exception to the basic requirement—that of appeals in forma pauperis—and is for the same purpose as stated for subdivision (a).

Subdivision (c) carries forward a requirement of former Court of Appeals Rule 6(a) that the appeal bond be filed *with* the record on appeal. That rule did not, as does this, make alternative provision for filing certificate of the provision of cash deposit in lieu of bond, an alternative clearly permitted by G.S. § 1-286.

Subdivision (d) picks up procedures formerly spelled out in G.S. §§ 1-285 and 1-287 by which failures properly to provide required security or to file evidence thereof with the record on appeal may be brought to the attention of the appellate court and made the basis of dismissal or of correction. These provisions have been removed from the cited statutes by 1975 amendments on the basis that they pertain more properly to the appellate rule-making power. The substance of these procedures is unchanged, so that no change of established practice is involved. The cross-reference is to the general motion practice rule, Rule 37.

RULE 7

SECURITY FOR COSTS ON APPEAL IN CRIMINAL ACTIONS

(a) **In regular course.** Except as provided in subdivision (b) of this rule, a defendant convicted in the superior court of any criminal offense must as a condition of the right to appeal give adequate security for the costs of the appeal. The procedure for setting and perfecting the security is as provided for appeals in civil cases by G.S. §§ 1-285 and 1-286.

(b) **Indigent Appeals.** An indigent entitled to counsel under the provisions of G.S. Chapter 7A, Subchapter IX who has been convicted in the superior court need give no security for the costs of appeal.

(c) **Filed with Record on Appeal.** When security for costs is required, the appellant shall file with the record on appeal a certified copy of the appeal bond or a certificate of the clerk of the trial tribunal showing cash deposit made in lieu of bond.

(d) **Dismissal for Failure to File or Defect in Security.** For failure of the appellant to provide security as required by subdivision (a) or to file evidence thereof as required by subdivision (c), or for a substantial defect or irregularity in any security provided, the appeal may on motion of an appellee be dismissed by the appellate court where docketed, unless for good cause shown the court permits the security to be provided or the filing to be made out of time, or the defect or irregularity to be corrected. A motion to dismiss on these grounds shall be made and determined in accordance with Rule 37 of these rules. When the motion to dismiss is made on the grounds of a defect or irregularity, the appellant may as a matter of right correct the defect or irregularity by filing a proper bond or making proper deposit with the clerk of the appellate court within 10 days after service of the motion upon him or before the case is called for argument, whichever first occurs.

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. §§ 15-180, 15-181, 1-285, 1-286, 1-287, 1-288; Court of Appeals Rule 6(a).

Commentary.

Subdivisions (a) and (b) in effect restate the basic requirements for the provision of security in criminal appeals found in G.S. §§ 15-180, 15-181,

1-285, and 1-286. The purpose of this replication in the rule of provisions found in authoritative statutes is as stated in the Commentary to subdivision (a) of Rule 6.

Subdivision (c). See Commentary to subdivision (c) of Rule 6.

Subdivision (d). See Commentary to subdivision (d) of Rule 6.

RULE 8

STAY PENDING APPEAL IN CIVIL ACTIONS

When appeal is taken in a civil action from a judgment, order, or other determination of a trial court, stay of execution or enforcement thereof pending disposition of the appeal must ordinarily first be sought by the deposit of security with the clerk of the superior court in those cases for which provision is made by law for the entry of stays upon deposit of adequate security, or by application to the trial court for a stay order in all other cases. After a stay order or entry has been denied or vacated by a trial court, an appellant may apply to the appropriate appellate court for a writ of supersedeas in accordance with Rule 23. Application for the writ of supersedeas may similarly be made to the appellate court in the first instance when extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial court for a stay order.

Drafting Committee Note

Sources and parallels in former rules and statutes: Former Sup. Ct. R. 34(2).

Commentary.

The act of taking appeal in a criminal case automatically stays execution of judgment pending disposition of the appeal. G.S. § 15-184. The situation is not as simple with respect to civil judgments, and this Rule speaks to that situation in order to interrelate the procedures for obtaining stay of execution of such judgments at the trial court level with the supersedeas writ practice by which stay may be obtained from an appellate court under the provisions of App. R. 23.

The procedure for obtaining stays at the trial court level is controlled by N.C.R.Civ.P. 62. That rule contains internal provisions for obtaining stays of some judgments by motion, and cross-refers to certain statutes which provide for automatic stays of other specific judgments by deposit of security in the trial court. The basic thrust of this Rule 8 and the interrelated supersedeas rule, App. R. 23, is to require that, ordinarily, a party

must have attempted unsuccessfully to obtain or to hold a stay order at the trial court level under the provisions of N.C.R.Civ.P. 62, before being permitted to seek stay by writ of supersedeas from the appellate court. "Stay order" as used in this rule includes orders which are in effect continuations of injunctive relief which has been vacated by the trial court judgment or order from which appeal has been taken, or which "suspend," pending disposition of an appeal, injunctive relief granted by the judgment or order from which appeal is taken. See N.C.R.Civ.P. 62(c).

RULE 9

THE RECORD ON APPEAL — FUNCTION, COMPOSITION, AND FORM

(a) **Function.** In appeals of right from the district courts and superior courts, review is solely upon the record on appeal constituted in accordance with this Rule 9.

(b) **Composition.**

(1) **In Civil Actions and Special Proceedings.** The record on appeal in civil actions and special proceedings shall contain: (i) an index of the contents of the record, which shall appear as the first page thereof; (ii) a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing; (iii) a copy of the summons with return, or of other papers showing jurisdiction of the trial court over person or property, or a copy of a stipulation of counsel showing the same; (iv) copies of the pleadings, and of any pre-trial order on which the case or any part thereof was tried; (v) so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for understanding of all errors assigned; (vi) where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given; (vii) copies of the issues submitted and the verdict, or of the trial court's findings of fact and conclusions of law; (viii) a copy of the judgment, order, or other determination from which appeal is taken; (ix) a copy of the notice of appeal, or of the appeal entry showing appeal taken orally, and of all other appeal entries relative to the perfecting of appeal; (x) copies of all other papers filed and transcripts of all other proceedings had in the trial court which are necessary to an understanding of all errors assigned, and (xi)

exceptions and assignments of error set out in the manner provided in Rule 10.

(2) **In Appeals from Superior Court Review of Administrative Boards and Agencies.** The record on appeal in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies shall contain: (i) an index of the contents of the record, which shall appear as the first page thereof; (ii) a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing; (iii) a copy of the summons, notice of hearing or other papers showing jurisdiction of the board or agency over the persons or property sought to be bound in the proceeding, or a copy of a stipulation of counsel showing the same; (iv) copies of all petitions and other pleadings filed in the superior court; (v) a copy of any findings of fact and conclusions of law and of the judgment, order, or other determination of the superior court from which appeal is taken; (vi) copies of all items included in the record of administrative proceedings which were filed in the superior court for review; (vii) so much of the evidence taken before the board or agency and in the superior court, set out in the form provided in Rule 9(c)(1), as is necessary for understanding of all errors assigned; (viii) a copy of the notice of appeal from the superior court, or of the appeal entry showing appeal taken orally, and of all other appeal entries relative to the perfecting of appeal; and (ix) exceptions and assignments of error to the actions of the superior court, set out as provided in Rule 10.

(3) **In Criminal Actions.** The record on appeal in criminal actions shall contain: (i) an index of the contents of the record, which shall appear as the first page thereof; (ii) a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing; (iii) copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court; (iv) copies of docket entries or of a stipulation of counsel showing all arraignments and pleas; (v) so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for understanding of all errors assigned; (vi) where error is assigned to the giving or omission of instruc-

tions to the jury, a transcript of the entire charge given; (vii) copies of the verdict and of the judgment, order, or other determination from which appeal is taken; (viii) a copy of the notice of appeal, or of the appeal entry showing appeal taken orally, and of all other appeal entries relative to the perfecting of appeal; (ix) copies of all other papers filed and proceedings had in the trial courts which are necessary for an understanding of all errors assigned, and (x) exceptions and assignments of error set out as provided in Rule 10.

(4) **Order of Arrangement.** The items constituting the record on appeal should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal.

(5) **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 errors assigned. The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion.

(6) **Additions and Amendments to Record on Appeal.** On motion of any party or on its own initiative the appellate court may order additional portions of a trial court record sent up and added to the record on appeal. On motion of any party the appellate court may order any portion of the record on appeal amended to correct error shown as to form or content.

(c) **Form — General Provisions.**

(1) **Evidence — How Set Out.** Where error is assigned with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence required to be included in the record on appeal by Rule 9(b) shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form.

Counsel are expected to seek that form or combination of forms best calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. To this end, counsel may object to particular narration that it does not accurately reflect the true sense of testimony received; or to particular question and answer portions that the testimony might with no substan-

tial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, he shall settle the form in the course of his general settlement of the record on appeal.

(2) **Exhibits.** (i) Maps, plats, diagrams and other documentary exhibits filed as portions of or attachments to items required to be included in the record on appeal shall be included as part of such items in the record on appeal. Where such exhibits are not necessary to an understanding of the errors assigned, they may by stipulation of counsel or by order of the trial court upon motion be excluded from the record on appeal.

(ii) Three legible copies of each documentary exhibit offered in evidence and required for understanding of errors assigned shall be filed as part of the record on appeal. When an original exhibit has been settled as a necessary part of the record on appeal, any party may within 10 days after settlement of the record on appeal in writing request the clerk of superior court to transmit the exhibit directly to the clerk of the court to which appeal is taken. The clerk shall thereupon promptly identify and transmit the exhibit as directed by the party. Upon receipt of the exhibit, the clerk of the appellate court shall make prompt written acknowledgment thereof to the transmitting clerk and the exhibit shall be included as part of the record on appeal.

(3) **Filing Dates and Signatures on Papers.** Every pleading, motion, affidavit or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who verified. Every judgment, order, or other determination shall show the date on which it was entered.

(4) **Pagination; Counsel Identified.** The pages of the record on appeal shall be numbered consecutively. At the end shall appear the names, office addresses, and telephone numbers of counsel of record for all parties to the appeal.

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. §§ 1-282, Sup. Ct. (and Ct. App.) Rules 19, 20, 21, 22, 23, 26.

Commentary:

General. This Rule, in subdivision (b), contains a fundamentally new approach to prescribing the composition of the record on appeal. The tradi-

tional formula of the code and implementing rules of a "record proper," supplemented where required by a "settled case on appeal," is here abandoned in favor of a detailed enumeration of required items for each of the three types of cases which can be appealed from the trial courts to the appellate courts: civil actions, subd. (b)(1); criminal actions, subd. (b)(3); and appeals from superior court administrative agency reviews, subd. (b)(2). Over the years the practice had already essentially moved around the theoretical code design, as the exact composition of the "record proper" became less and less clear. The device of a specific listing of items is designed to make more certain the process of composing the record on appeal and so to reduce some of the confusion clearly indicated in records and court discussions of imperfectly composed records arising to some extent from the code terminology and its related procedures.

While perhaps obvious, it may be worth emphasizing that although this Rule abandons the distinctive code terminology and some of its related technicalities for composing the record on appeal, it retains the two most fundamental features of the code approach: 1) use of authenticated copies of trial court record items (plus reporter's transcript), rather than the original trial court papers themselves; and 2) a forced selection of items for inclusion in the record on appeal, rather than using the entire trial court record. This approach continues therefore to be fundamentally distinguished from the "appeal on the original papers" approach now utilized in the federal and some state procedural systems, where the selection process occurs only in the items included in the appendix to the brief. The selection process under this Rule is dictated with respect to enumerated items which may or may not be relevant from case to case, such as jury instructions and other elements of the trial process, by those provisions which admonish inclusion only "when necessary to understand errors assigned." It is in this way that the case-by-case flexibility of composition of the code's "settled case" is carried forward. Counsel should be alert to one fundamental change which this approach involves. Formerly, if appeal could be prosecuted on the "record proper," appellant need not either obtain agreement of appellee nor make service upon him of a "statement of case on appeal," but could merely have the clerk certify the items constituting the "record proper," and docket this as the complete "record on appeal" in the appellate court. See, e.g., *Edwards v. Edwards*, 261 N.C. 445 (1964) (appeal from judgment on the pleadings). Under the new rule, even in such a case he must either obtain agreement of counsel to these items as the "record on appeal" under Rule 11(a), or serve them upon him in a "proposed record on appeal" for acceptance under Rule 11(b) or judicial settlement under Rule 11(c).

While the Rule requires routine inclusion in the record on appeal of all those items which clearly would have been considered parts of the "record proper" under the code (e.g. items iii, iv, vii, viii of subd. (b)(1) for civil appeals), it should be noted that Rule 12(c) provides that even these items may be excluded from those work copies of the formal record on appeal actually prepared by the appellate court clerk for direct consideration by the members of his court. This lays the basis for a two-stage selection process which if carefully followed will produce: 1) an original record on appeal, available for inspection by the court, which is broad enough in scope to allow fair consideration in relevant context of all errors

properly to be considered; but 2) "work" copies for individual members of the courts from which have been excluded any formally required items in the original record (such as pleadings, jurisdictional statements or papers) which are not relevant to consideration of particular errors assigned by the parties. Cf. former Sup. Ct. R. 22 and see Commentary to Rule 12(c).

Subdivision (b)(1)-(3). While most of the items enumerated for inclusion in the original records on appeal in these three catagories of cases are self-explanatory, it may be helpful to relate some to practice under former statutes and rules.

Item (ii) in subsections (1), (2), (3): "a statement identifying the judge, etc." This is designed to perform the function of the "organization of the court" item indirectly required by former Sup. Ct. R. 22, and traditionally included by counsel in widely varying form in the original record on appeal. The office of this item is simply to permit routine confirmation by the appellate court of the subject matter jurisdiction or "competence" of the particular trial judge and tribunal, whether or not any jurisdictional question has been directly raised by the parties on appeal. See N.C.R.Civ.P. 12(h)(3) (lack of subject matter jurisdiction may be noted by court at any stage of proceedings). The elements enumerated are sufficient for this purpose when rounded out by the court's range of judicial notice. If peripheral questions of "organization" such as the composition of grand or petit jury are to be drawn in question, this should be done by specific assignment of error with relevant parts of the record specially included.

Item (iii) in subsections (1) and (2), "a copy of the summons, etc.". This is designed to provide a record showing of the existence of "judicial" jurisdiction of the trial tribunal, whether personal over the defendant, in rem, or quasi in rem, and however based and exercised. Under Code practice it had consistently been understood that the *summons* constituted a part of the "record proper," so must be included in the original record on appeal. *Cressler v. City of Asheville*, 138 N.C. 482 (1905) ("summons, pleading and judgment"). And Sup. Ct. R. 22 built indirectly upon this by providing that the summons so included need not be included in the "printed" copies prepared by the Clerk. Both of these prescriptions, framed in an earlier day of simple process and jurisdiction rules, were too narrowly confined in terms, seemingly only to cases where personal jurisdiction has been acquired by personal service of process. This new Rule speaks more contemporaneously and accurately to the underlying necessity, which is for a record showing of "judicial" jurisdiction, whether over person or property, and whether acquired by service of summons, publication, notice, appearance, waiver, or however.

Item (ix) in subsection (1); (viii) in subsections (2) and (3), "a copy of the notice of appeal, etc.". This carries forward existing practice, not formerly required by statute or rule but by judicial decision, e.g., *Atkinson v. Asheville St. Ry.*, 113 N.C. 581 (1893), of including in the record on appeal a showing of appeal properly taken and perfected. This establishes as a matter of record the jurisdiction of the *appellate court* in the particular case. The way in which this has traditionally been shown is by the standardized "appeal entries" which show appeal taken orally "in open court," "further notice waived" (unnecessary), accompanied by any judicial extensions of the statutory times for serving "case" and "counter case,"

and the amount of appeal bond. This may certainly be continued under this Rule, but the Rule would also be complied with by inclusion of a copy of a written notice of appeal with proof of service under Rule 3(a)(2), or 3(b) and with separate showing of any judicial orders extending times for perfecting appeal. See Committee Form 5, "Appeal Entries."

Subdivision (b)(4). Self-explanatory. Cf. former Sup. Ct. R. 19(1).

Subdivision (b)(5). Former Sup. Ct. R. 26 provided for recovery of the costs of printing records and briefs by the party prevailing, but limited recovery on a maximum page/maximum per page cost basis. This operated indirectly, and in experience not too successfully, as a deterrent to inclusion in the record on appeal of unnecessary matter. Former Sup. Ct. RR. 26 and 19(5) also provided a more direct sanction of costs against the party responsible for the inclusion of unnecessary matter in the record on appeal, without regard to outcome of the appeal. This sanction had apparently seldom been invoked. This subdivision of the new rule abandons the page/cost per page limitations on recovery of printing costs by a prevailing party, and retains the sanction of imposing costs of unnecessary portions on the offending party. It has two new features: 1) the sanction is not dependent upon an opposing party's objection, but may be imposed by the court on its own initiative; 2) the costs are chargeable directly against *counsel* as well as a party in the court's discretion.

Subdivision (b)(6). Self-explanatory. Cf. former Sup. Ct. R. 19(1).

Subdivision (c)(1). The problem of incorporating evidence in the record on appeal has two aspects: 1) determining that portion of the total received (or offered) to be included, and 2) the mode of setting out *testimonial* evidence. This subdivision addresses the latter aspect.

The best possible incorporation of testimonial evidence in a record on appeal would 1) include no more than is minimally required for reviewing errors assigned; 2) set out in narrative summary form that which merely lays an undisputed factual context or provides an undisputed factual background; and 3) set out in question-and-answer form all that wherein shades of meaning, nuances of expression, and ambiguity of question or response bear obviously upon the sense and credibility of testimony. An all-narrative summary undoubtedly obscures the true sense of much critical testimony, tends to encourage inclusion of unnecessary portions, and is exceedingly time-consuming. An all-verbatim transcript inevitably includes long passages of confused questions and answers frequently leading finally to the establishment of purely peripheral fact which, though necessary as context or background, is not really disputed and could be compressed fairly into summary form. Generally speaking, it is obvious that a narrative form is easier for the reviewing court to use, while a verbatim question-and-answer form is easier for counsel to prepare. The problem has been and remains one of accommodation to these conflicting interests and values. This subdivision attempts a new accommodation. Its first sentence continues, for obvious reasons, the traditional requirement that evidence whose admission or exclusion is assigned as error be included in question-and-answer form. The rest of the subdivision involves a limited relaxation of the former flat requirement of narrative form for all other testimonial evidence included. The idea expressed is that this remains the ordinarily preferred and re-

quired form, but with the option given to use question-and-answer form where the narrative would obscure particular testimony's true sense. With this option given, it may inevitably become the object of disagreement between counsel during the process of composing the record on appeal. To aid both counsel and any judge required to settle such a dispute as to form, the last paragraph of this subdivision is devoted to a general statement of the considerations properly to be used in determining the fitness of the particular mode in dispute. These are to be brought into play in the normal process, set out in Rule 11, of settling the record—whether by agreement, acceptance through adversarial exchange, or judicial settlement. In this process the appellant will obviously have the first opportunity to choose the form or forms to be used (after having first selected those portions of the total evidence which are to be included in any form). This choice might be exercised informally in a proposal to the appellee for an agreed record on appeal, or in a formal "proposed record on appeal" served upon the appellee. In the latter situation an appellee might either formally object to the proposed form, or include a different form in his "proposed alternative record on appeal." In either case, judicial settlement as to the propriety of the disputed form would then be forced.

Subdivision (c)(2) deals in its two subsections with two different kinds of exhibits which may be required items in the record on appeal. Subsection (i) deals with documentary exhibits (which ordinarily will not have been introduced in evidence) which are attached to or are parts of items required to be included in the record on appeal under Rule 9(b) (such as pleadings). On motion these may be excluded as unnecessary to the appeal from the item of which they are a part or to which they are attached, though the item itself must be included in the record on appeal. Subsection (ii) deals with evidentiary exhibits, both documentary and other, which are required items in the record on appeal. If documentary, three copies must be filed with the record. If not documentary only the original, for obvious reasons, need be filed. To protect clerks in their custodial responsibility against the possible loss or damage to such exhibits, G.S. § 7A-106, the rule provides that these may be transmitted directly by the clerk to his appellate court counterpart without relinquishing their custody to counsel.

Subdivision (c)(3). Self-explanatory. From former Sup. Ct. R. 19(1)

Subdivision (c)(4). Self-explantory. From former Sup. Ct. R. 19(1).

RULE 10

EXCEPTIONS AND ASSIGNMENTS OF ERROR IN RECORD ON APPEAL

(a) **Function in Limiting Scope of Review.** Except as otherwise provided in this Rule 10, the scope of review on appeal is confined to a consideration of those exceptions set out and made the basis of assignments of error in the record on appeal in accordance with this Rule 10. No exception not so set out may be made

the basis of an assignment of error; and no exception so set out which is not made the basis of an assignment of error may be considered on appeal. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly raising them in his brief, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law, notwithstanding the absence of exceptions or assignments of error in the record on appeal.

(b) **Exceptions.**

(1) **General.** Any exception which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be set out in the record on appeal and made the basis of an assignment of error. Bills of exception are not required. Each exception shall be set out immediately following the record of judicial action to which it is addressed and shall identify the action, without any statement of grounds or argumentation, by any clear means of reference. Exceptions set out in the record on appeal shall be numbered consecutively in order of their appearance.

(2) **Jury Instructions; Findings and Conclusions of Judge.** An exception to instructions given the jury shall identify the portion in question by setting it within brackets or by any other clear means of reference. An exception to the failure to give particular instructions to the jury or to make a particular finding of fact or conclusion of law which was not specifically requested of the trial judge shall identify the omitted instruction, finding, or conclusion by setting out its substance immediately following the instructions given, or findings or conclusions made. A separate exception shall be set out to the making or omission of each finding of fact or conclusion of law which is to be assigned as error.

(c) **Assignments of Error — Form.** The exceptions upon which a party intends to rely shall be indicated by setting out at the conclusion of the record on appeal assignments of error based upon such exceptions. Each assignment of error shall be consecutively numbered; shall, so far as practicable, be confined to a single issue of law; shall state plainly and concisely and

without argumentation the basis upon which error is assigned; and shall be followed by a listing of all the exceptions upon which it is based, identified by their numbers and by the pages of the record on appeal at which they appear. Exceptions not thus listed will be deemed abandoned. It is not necessary to include in an assignment of error those portions of the record to which it is directed, a proper listing of the exceptions upon which it is based being sufficient.

(d) **Exceptions and Cross Assignments of Error by Appellee.** Without taking an appeal an appellee may set out exceptions to and cross-assign as error any action or omission of the trial court to which an exception was duly taken or as to which an exception was deemed by rule or law to have been taken, and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. Portions of the record necessary to an understanding of such cross-assignments of error may be included in the record on appeal by agreement of the parties under Rule 11(a), or may be included by the appellee in a proposed alternative record on appeal under Rule 11(b).

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. § 1-282; Sup. Ct. Rules 19(3) and 21.

Commentary.

General. A necessary feature of any system of appellate procedure which uses a selectively composed record on appeal rather than the entire trial court record is some such sifting process as that embodied in the "exception/assignment of error/questions presented in brief" process brought forward in these rules from code practice. The function and operation of this essential process have been poorly described in former rules and statutes and erratically applied in practice. It is the purpose of this Rule 10 better to describe both intended function and details of operation in an effort to improve practice in this critical area.

Subdivision (a) seeks to express the intended function of this process, and does so in a paraphrase of various formulae used by the courts over the years in their frequently frustrated attempts to police the practice. See, e.g., *State v. Dishman*, 249 N.C. 759 (1959); *Nye v. Devel. Co.*, 10 N.C. App. 676 (1971). The sifting function which is implicit in this statement might be expressed in more specific form as follows. 1) Every judicial action at the trial court level constitutes potentially prejudicial error to the party disfavored by it; hence the total of such actions which disfavor the eventually losing or "aggrieved" party constitute the pool of potentially reversible errors on appeal. 2) But no such error ought be the subject of

appellate review unless it has been first suggested to the trial judge in time for him to avoid it or to correct it, or unless it is of such a fundamental nature that no such prior suggestion should be required of counsel. The classic way of making a required suggestion of error in the trial court is by the formal "exception" orally announced, or presented in writing in apt time. Other less formal means of suggesting error may of course be equally effective, so that an "exception" may be "preserved" by them. N.C.R.Civ.P. 46(b) ("formal exceptions . . . unnecessary"). Other error may be considered of such serious consequence that it requires no suggestion from counsel, and is by law "deemed excepted to." N.C.R.Civ.P. 46(c) (instructions to jury). 3) Whether an exception to it has been actually taken or merely "deemed" taken, the fact that error will be asserted on appeal in respect of particular judicial action must be noted in the record on appeal, first for the benefit of the adverse party, then for the reviewing court. This requires that each such exception be there "set out" in some way which sufficiently identifies the judicial action to which it is addressed. 4) All such exceptions should then be made the basis of formal "assignments of error" in the record on appeal. These constitute in effect the "pleadings" on appeal, for they signal to the adversary the points of law which will be urged on appeal. Each should be confined to a single issue of law, and all exceptions pertinent to this issue should be visibly "grouped" under that assignment of error. This fixes the potential scope of review, and therefore enables the appellee to assess the appropriateness of the record on appeal as proposed by the appellant. 5) From among these "assignments of error" the appellant may choose in the final stage of the sifting process to use all or less than all as the basis for the questions formally to be presented for review in his written brief. These "questions presented" ultimately define the scope of review. Hence the formula: "questions presented must be supported by assignments of error which must be supported by exceptions." Or, obversely: "exceptions not made the basis of assignments of error, and assignments of error not made the basis of questions in the brief, are deemed abandoned." The last sentence proviso expresses the limited exceptions to this basic scheme. The three defects there identified are all of such fundamental significance—going to the jurisdiction of the court and to the question whether the judgment is supportable on the issues before the court—that no exception or assignment of error is required to permit their consideration on appeal. Cf. former Sup. Ct. R. 21 and see *Burroughs v. Realty Co.*, 19 N.C. App. 107 (1973). This subdivision is designed to highlight the underlying purpose behind the exception/assignment of error process in order to make more understandable the desired form and function of the two devices. These are then addressed in the next two subdivisions.

Subdivision (b)(1). The first sentence builds upon the point developed in the commentary to subdivision (a), that only those "exceptions" may be set out in the record on appeal and so made the basis of assignments of error which were taken in the trial court by the classic mode of the spoken or written word "exception"; or "deemed" taken from other conduct, as by objecting to the admission of evidence, N.C.R.Civ.P. 46(a)(2), or from other action plainly indicating opposition to judicial action taken or proposed, N.C.R.Civ.P. 46(b); or "deemed" taken without *any* action by counsel simply because the error is considered sufficiently fundamental, as in instructions to the jury, N.C.R.Civ.P. 46(c).

It is obvious from this that it is rarely the case that an "exception" set out in the record on appeal will necessarily reflect the actual taking of a formal exception at trial. This points to the true, and limited, function of the exception "set out" in the record on appeal: it is merely to provide a visible reference point in the record on appeal for the reviewing court to locate the particular judicial action assigned as error. Recognition of this quite limited function of the exception in the record on appeal explains the next two sentences in the subdivision. By the first, it is provided that a formal "bill of exceptions" need no longer be filed. Without using the exact term, former Sup. Ct. R. 21(c) plainly contemplated the filing of such a "bill" in all situations "when no case settled is necessary", i.e., when the judicial action to be assigned as error occurred with respect to a matter included in the "record proper"—such as the entering of judgment on the pleadings. When formal exception to such action at the trial court level was required in order to "preserve" exception for inclusion in the record on appeal, a written bill filed with the trial court was obviously necessary. Under N.C.R.Civ.P. 46, however, no "formal exception" to such an order is now necessary just so long as counsel resisted allowance of the motion. An exception may now be set out in the record because by this trial rule it is deemed "preserved" by that action. Of course this does not obviate the necessity that there shall have been such a plain indication by counsel of his opposition, and a written "exception" filed with the court would clearly still perform that function, whether denominated a "bill" or not. The next sentence makes plain this limited function by emphasizing that it consists simply of pointing out in the record on appeal the particular judicial action to be assigned as error, and that this does not require any statement of grounds or argumentation. The last sentence of this subsection carries forward traditional practice of consecutive numeration of the exceptions set out in the record on appeal. See Committee Form 6 A-C for illustrative examples.

Subdivision (b)(2) carries forward in its first sentence traditional practice for the clear identification of portions of the judge's charge to which exception is being set out in the record. The second sentence involves a change in the practice recently required by the court for identifying instructions whose *omission* is to be assigned as error. This requirement has been that at least a paraphrase of the instruction which counsel contends should have been given should be set out in brackets following the instructions actually given, with an appropriately numbered exception identifying it. *Duke Power Co. v. Rogers*, 271 N.C. 318, 321 (1967). By this new rule it is sufficient in such case to give the *substance* of the instruction which allegedly should have been given, rather than attempting even to paraphrase the instruction as it is contended the judge should actually have phrased it. See Committee Form 6 D.2. The same requirement is made applicable to the related subject of an exception to the failure to make certain findings of fact or conclusions of law in a non-jury case. The last sentence carries forward an established rule of decision which has prohibited "broadside exceptions" to multiple findings or conclusions. *Logan v. Sprinkle*, 256 N.C. 41 (1961).

Subdivision (c) in its first three sentences restates in condensed form the basic function and desired form of the assignment of error as developed in judicial decisions over the years. As indicated in the general commen-

tary to this Rule, the essential function of this device is to identify for the appellee's benefit all the errors possibly to be urged on appeal, hence the total possible scope of review, so that the appellee may properly assess the sufficiency of the proposed record on appeal to protect his position on all these points. This being the function, it is sufficient that the assignment of error simply identify without argumentation the basis upon which it is asserted that error was committed, and that it identify, by simply listing ("grouping") them, the various exceptions upon which it is based. The last sentence represents a fundamental change in the required form, as the court in deference to the burden imposed upon counsel abandons the long-standing requirement that each assignment of error contain within itself those portions of the record necessary to its consideration. This rule apparently originated in 1908 in the case of *Thompson v. Railroad,* 147 N.C. 412 (1908) where the Court, faced with a particularly sketchy set of assignments, adopted it in order to avoid the necessity for "making a voyage of discovery" through the record in order to deal with each assignment. This rule has been exceedingly difficult to police consistently, see *Douglas v. Mallison,* 265 N.C. 362 (1965), and *State v. Douglas,* 268 N.C. 267 (1966), and is abandoned in this rule in the hope that counsel will specify the basis of their assignments and identify the exceptions underlying them with sufficient clarity that the Court can fairly and expeditiously consider them as framed. See Committee Form 7 for illustrative examples.

Subdivision (d) introduces a new procedure designed to protect appellees who have been deprived in the trial court of an alternative basis in law upon which their favorable judgments might be supported and who face the possibility that on appeal prejudicial error will be found in the ground upon which their judgments were actually based. There has not been a clear-cut procedure of this sort. Such parties may not protect their judgments by becoming cross-appellants, since they are not parties aggrieved under G.S. § 1-271. *Bethea v. Town of Kenly,* 261 N.C. 730 (1964). Nor has there been a general provision by which they might as appellees "conditionally" assign error in the event the appellate court should "aggrieve" them by its decision depriving them of their favorable judgment below. Such a provision has been worked into the aggrieved party statute, G.S. § 1-271, to protect an appellee in the limited situation where as verdict winner below he wishes to argue conditionally on appeal for new trial as opposed to the judgment n.o.v. sought by appellant. It is undoubtedly the case that on occasion the Court has protected an appellee in this situation by drawing on the principle that "review is to correct judgments and not reasons." See, e.g. *Jamerson v. Logan,* 228 N.C. 540 (1948) (though plaintiff appellee's verdict not supportable on issues submitted, case remanded rather than reversed on basis prima facie case well pleaded and proved on theory not submitted to jury). But in such situations, it may well be that the appellant has not been fairly apprised of this possibility and so enabled to meet this conditional position. Both appellees and appellants should be protected in this situation, and this subdivision seeks to provide this protection by allowing an appellee conditionally to present such issues but only on the basis of cross-assignments of error which will have alerted appellant to this possibility and permitted him to protect himself both in terms of composition of the record on appeal and in preparing his brief and oral argument on the

"cross-questions." Rule 28(c), which prescribes the contents of briefs, follows up on this by permitting an appellee who has made such cross-assignments of error to present in his brief for appellate review the questions thereby raised. And Rule 16, which deals with review by the Supreme Court of Court of Appeals determinations, ties in by permitting a party who as appellee presented such "cross-questions" in the Court of Appeals to present them for further review in the Supreme Court, whether he appears there as appellant or as appellee.

RULE 11

SETTLING THE RECORD ON APPEAL; CERTIFICATION

(a) **By Agreement.** Within 30 days after appeal is taken, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with Rule 9 as the record on appeal.

(b) **By Appellee's Approval of Appellant's Proposed Record on Appeal.** If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within 30 days after appeal is taken, file in the office of the clerk of superior court and serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9. Within 15 days after service of the proposed record on appeal upon him an appellee may file in the office of the clerk of superior court and serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(c) **By Judicial Order or Appellant's Failure to Request Judicial Settlement.** Within 15 days after service upon him of appellant's proposed record on appeal, an appellee may file in the office of the clerk of superior court and serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper.

If any appellee timely files amendments, objections, or a proposed alternative record on appeal the appellant or any

other appellee, within 10 days after expiration of the time within which the appellee last served might have filed, may in writing request the judge from whose judgment, order, or other determination appeal was taken to settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of superior court, and served upon all other parties. If only one appellee or only one set of appellees proceeding jointly have so filed, and no other party makes timely request for judicial settlement, the record on appeal is thereupon settled in accordance with the appellee's objections, amendments or proposed alternative record on appeal. If more than one appellee proceeding separately have so filed, failure of the appellant to make timely request for judicial settlement results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.

Upon receipt of such a request the judge shall by written notice to counsel for all parties set a place and a time not later than 15 days after receipt of the request for a hearing to settle the record on appeal. At the hearing the judge shall settle the record on appeal by order.

Provided, that nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order.

(d) **Multiple Appellants; Single Record on Appeal.** When there are multiple appellants (2 or more), whether proceeding separately or jointly, as parties aligned in interest, or as cross-appellants, there shall nevertheless be but one record on appeal, and the appellants shall attempt to agree to the procedure for constituting a proposed record on appeal. The exceptions and assignments of error of the several appellants shall be set out separately in the single record on appeal and related to the several appellants by any clear means of reference. In the event multiple appellants cannot agree to the procedure for constituting a proposed record on appeal, the judge from whose judgment, order, or other dermination the appeals are taken shall, on motion of any appellant with notice to all other appellants, enter an order settling the procedure, including the allocation of costs.

(e) **Certification of Record on Appeal.** Within 10 days after the record on appeal has been settled by any of the procedures provided in this Rule 11, the appellant shall present the items constituting the record on appeal to the clerk of superior court for certification. The clerk of superior court shall forthwith inspect the items presented and, if they be found true copies and transcriptions, certify them, noting the date of certification on the appropriate docket.

(f) **Extensions of Time.** The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. §§ 1-282, 1-283, 1-284.

Commentary:

General. Using the change of terminology dictated by abandonment of the "record proper"—"case on appeal" function, see Commentary to Rule 9, this Rule carries forward the developed code process whereby the record on appeal is "settled" for filing in the appellate court—by party agreement, adversary approval through exchanges, or judicial order. The Rule also substantially alters the basic timetable for this process. See Table IV in the Committee's Table of Appendix and Forms. This new timetable attempts to accommodate to the realities of contemporary practice—most importantly, to the time required for securing a reporter's transcript—while nevertheless providing minimal basic times for the critical intervals. These basic intervals may of course then be altered in individual cases by extensions of time upon demonstrated necessity therefor. App. R. 27. This Rule leaves off the total process for perfecting an appeal at the time the record on appeal as settled is presented to the clerk of superior court for certification. The next step—filing the record in the appellate division—is picked up by Rule 12.

Subdivision (a) carries forward traditional practice (not heretofore expressly authorized in statute or rule) by which the parties may of course stipulate their agreement to the composition of a record on appeal. The time limit of 30 days expressed in this subdivision is tied to the basic 30-day period within which, by subdivision (b), an appellant must serve proposed record on appeal, or risk dismissal. These times must be related in order to keep the process moving. But the limit does not prevent later settlement by agreement. Obviously, even after adversarial exchange has begun, the parties should be free at any time to stipulate the record, and this is provided in subdivision (c).

Subdivision (b) describes the opening of the traditional adversarial exchange process, but on an altered basic timetable—30 days for appellant to serve his proposed record (against 15 days under former G.S. § 1-282), and 15 days for appellee to respond (against 10 days under

former G.S. § 1-282). The subdivision concludes on the hypothesis that within the time permitted *all* appellees have either affirmatively approved or failed to make proper objection to the appellant's proposed record, whereupon by force of the rule this becomes the record on appeal. The specification of approval by *all* appellees accommodates to the possibility that in a multiple-appellee situation less than all will so approve by either means. That possibility is dealt with in the next subdivision.

Subdivision (c) picks up the adversarial exchange process at the point where a sole appellee or any one or more of multiple appellees have, within the time permitted them, filed objections or proposed alternative records on appeal (formerly "counter case" per G.S. § 1-283). At this point, any one of three different situations may exist: 1) there is a single appellee in the case; 2) there are multiple appellees, only one of whom files objections or a proposed alternative record; 3) there are multiple appellees, more than one of whom file objections or proposed alternative records. Former statutes dealt only with situation 1); this Rule deals with all three. 1) In the single-appellee situation, failure by the appellant to make timely request for judicial settlement results in settlement in accordance with the appellee's objections or proposed alternative record. Former G.S. § 1-283, which expressly dealt only with the single-appellee hypothesis, gave the same result. 2) Where only one of multiple appellees makes objection or serves proposed alternative record, the Rule permits request for judicial settlement either by appellant or by other appellees, failing which the record on appeal is settled in accordance with the one objecting appellee's objections or proposed alternative record. 3) In the third situation, where more than one of multiple appellees timely object or serve proposed alternative records, again the Rule permits request for judicial settlement either by appellant or any other appellees. But if there is failure by all parties in this situation so to request settlement, an impasse is created which cannot be resolved by dictating settlement in accordance with a single set of objections or alternative record. Here there is inevitably inconsistency or conflict between multiple objections and proposed alternatives. The solution of the Rule is a forced one which imposes the penalty for failure to request settlement where it should be, on appellant. The appeal is deemed abandoned by him as to all appellees who did file objections or proposed alternative records. The appeal would stay alive against any approving or non-objecting appellees with the appellant's proposed record on appeal constituting the record. However, if within the time permitted any appellee in this situation requests settlement, the process continues to judicial settlement.

This subdivision also contains alterations in timetables controlling the actions described: 10 days to request settlement, measured from date within which last appellee might have filed objections (against 15 days from date of service of objections under former G.S. § 1-283); 15 days to hold settlement conference, measured from date judge receives request (against 20 days from receipt of request under former G.S. § 1-283).

Subdivision (d) picks up and elaborates upon a provision in former Sup. Ct. R. 19(2) for the composition of a single record on appeal in cases where there are multiple appellants. In any situation where there are both multiple appellants and multiple appellees, the process described

in subdivision (c) would be picked up at the point where the multiple appellants had agreed (by whatever procedure) to a single proposed record on appeal, and had served this upon the several appellees.

Subdivision (e). Former G.S. § 1-284, reflecting the two-component record on appeal of code practice, laid upon the clerk of superior court the literal duty to assemble the two (record proper and case on appeal) as soon as the latter was submitted to him in "settled" form, and then to "transmit" the whole to the appellate court clerk duly certified. In this as in other aspects of the practice built around the record proper-case on appeal model, practice had long since moved around design, and the clerk's function had become a much more modest one—of merely certifying the whole "record on appeal" as presented to him. This subdivision conforms to the developed practice, by its terms so confirming the clerk's function, and leaving to the appellant the responsibility for taking the next step—filing the record on appeal in the appellate division in accordance with succeeding Rule 12.

Subdivision (f) is a reminder that all the times provided in this Rule may be extended for cause under the procedures set out in Rule 27.

RULE 12

FILING THE RECORD; DOCKETING THE APPEAL; COPIES OF RECORD

(a) **Time for Filing Record on Appeal.** Within 10 days after certification of the record on appeal by the clerk of superior court, but no later than 150 days after giving notice of appeal, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.

(b) **Docketing the Appeal.** Prior to or at the time of filing the record on appeal, the appellant shall pay to the clerk the docket fee fixed pursuant to G.S. § 7A-20(b), and the clerk shall thereupon enter the appeal upon the docket of the appellate court. If an appellant is authorized to appeal in forma pauperis as provided in G.S. §§ 1-288 or 15-181, the clerk shall docket the appeal upon timely filing of the record on appeal. An appeal is docketed under the title given to the action in the trial division, with the appellant identified as such. The clerk shall forthwith give notice to all parties of the date on which the appeal was docketed by him.

(c) **Copies of Record on Appeal.** The appellant need file but a single copy of the record on appeal. Upon filing, the appellant shall pay to the clerk of the appellate court a deposit fixed by

the clerk to cover the costs of reproducing copies of the record on appeal. The clerk will reproduce and distribute copies as directed by the court. By stipulation filed with the record on appeal the parties may agree that specified portions of the record on appeal need not be reproduced in the copies prepared by the clerk.

In civil appeals in forma pauperis the appellant need not pay a deposit for reproducing copies, but at the time of filing the original record on appeal shall also deliver to the clerk two legible copies thereof reproduced by typewriter carbon or other means.

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. § 1-284, Ct. App. R. 3, 5.

Commentary:

Subdivision (a). The 150-day outer limit for filing a record on appeal in the appellate court conforms to the 150-day limit to which, under former rules, time might be extended by a trial tribunal for "docketing" appeal, former Ct. App. R. 5. The basic time intervals provided by App. R. 11 for perfecting appeal total 90 days to filing in the appellate division (as contrasted with 60 days under former statutes G.S. §§ 1-282, 283), thus giving a leeway of 60 days. The 150-day limit may itself be extended on motion, but only by the appropriate *appellate* court. App. R. 27(c). As indicated in the commentary to App. R. 11, these time limits are intended to accommodate realistically to minimal constraints of contemporary practice.

Subdivision (b). This subdivision differentiates "filing" the record on appeal (a responsibility and function of the appellant) and "docketing" the appeal (a function of the clerk of appellate court). "Docketing" is the critical reference point in time for continuing the timetable for processing appeals (from this is measured the time for filing appellant's brief, App. R. 13), hence the requirement of this subdivision that the clerk give immediate notice to the parties of the date on which this ministerial act has been performed by him.

Subdivision (c). This subdivision continues the developed practice under which the responsibility for preparing printed "work-copies" of the formal record on appeal is routinely placed upon the appellate court clerk. (Cf. former Sup. Ct. Rules 22, 23, and 25, which in terms gave an option for prior printing by the appellant.) Hence the provision that only a single copy need be filed. This subdivision also contains the important provision alluded to in the General Commentary to Rule 9 for a further paring down of the "work-copies" from the original record on appeal by stipulation of parties. Cf. former Sup. Ct. R. 22. The mode of reproducing "work-copies" is not specified in this subdivision, in order to accommodate possible alternatives to the mimeographing specified by former rules. This as well as the number of copies is simply left to administrative direction of the particular court to its clerk.

RULE 13

FILING AND SERVICE OF BRIEFS

(a) **Time for Filing and Service.** Within 20 days after the appeal is docketed in the appellate court, the appellant shall file his brief in the office of the clerk of the appellate court, and serve copies thereof upon all other parties separately represented. Within 20 days after appellant's brief has been served on an appellee, the appellee shall similarly file and serve copies of his brief.

(b) **Copies Reproduced by Clerk.** A party need file but a single copy of his brief. At the time of filing the party shall pay to the clerk of the appellate court a deposit fixed by the clerk to cover the cost of reproducing copies of the brief. The clerk will reproduce and distribute copies of briefs as directed by the court.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original brief shall also deliver to the clerk two legible copies thereof reproduced by typewriter carbon or other means.

(c) **Consequence of Failure to File and Serve Briefs.** If an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve his brief within the time allowed, he may not be heard in oral argument except by permission of the court.

Drafting Committee Note

Sources and parallels in former rules or statutes: Sup. Ct. Rules 25, 26, 27, 27½, 28, 29 (and Ct. App. counterparts).

Commentary.

General. This Rule deals directly only with the filing and service of briefs in appeals from the trial courts. It does not apply to intra-appellate division appeals under Article III, which contains its own provisions on the subject. Administrative agency appeals under Art. IV incorporate the provisions of this Rule by reference. This Rule does not deal with the form, function, and content of briefs, a matter which App. R. 28 controls.

Subdivision (a) is self-explanatory as to operation. Freed from the "district call" mode of hearing appeals, this rule simply continues the open-ended timetable for taking the various steps in the appellate process.

Subdivision (b) is self-explanatory. For general background, see the Commentary to App. R. 12(c).

Subdivision (c) carries forward in minor restatement certain provisions of former Sup. Ct. Rules 28 and 29.

ARTICLE III. REVIEW BY SUPREME COURT OF APPEALS ORIGINALLY DOCKETED IN COURT OF APPEALS: APPEALS OF RIGHT; DISCRETIONARY REVIEW

RULE 14

APPEALS OF RIGHT FROM COURT OF APPEALS TO SUPREME COURT UNDER G.S. § 7A-30

(a) **Notice of Appeal; Filing and Service.** Appeals of right from the Court of Appeals to the Supreme Court are taken by filing notices of appeal with the Clerk of the Court of Appeals and with the Clerk of the Supreme Court and serving notice of appeal upon all other parties within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. The running of the time for filing and serving a notice of appeal is tolled as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for appeal thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days after the first notice of appeal was filed. A petition prepared in accordance with Rule 15(c) for discretionary review in the event the appeal is determined not to be of right may be filed with or contained in the notice of appeal.

(b) **Same; Content.**

(1) **Appeal Not Presenting Constitutional Question.** In an appeal which is not asserted by the appellant to involve a substantial constitutional question, the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken and shall state the basis upon which it is asserted that appeal lies of right under G.S. § 7A-30.

(2) **Appeal Presenting Constitutional Question.** In an appeal which is asserted by the appellant to involve a substantial constitutional question, the notice of appeal shall contain the elements specified in Rule 14(b)(1) and in addition shall specify the articles and sections of the Constitution asserted to be involved; shall state with particularity how appellant's rights thereunder have been violated; and shall affirmatively state that the constitutional issue was timely raised (in the trial tribunal if it could have been, in the Court of Appeals if not) and either not determined or determined erroneously.

(c) **Record on Appeal.**

(1) **Composition.** The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court many note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) **Transmission; Docketing; Copies.** Upon the filing of a notice of appeal, the Clerk of the Court of Appeals will forthwith transmit the original record on appeal to the Clerk of the Supreme Court, who shall thereupon file the record and docket the appeal. The Clerk of the Supreme Court will procure or reproduce copies of the record on appeal for distribution as directed by the Court, and may require a deposit from appellant to cover the cost of reproduction. In appeals in forma pauperis, the Clerk of the Court of Appeals will transmit with the original record on appeal the copies filed by the appellant in that Court under Rule 12(c).

(d) **Briefs.**

(1) **Filing and Service; Copies.** Within 20 days after filing notice of appeal in the Supreme Court, the appellant shall file with the Clerk of the Supreme Court and serve upon all other parties copies of a new brief prepared in conformity with Rule 28, presenting only those questions upon which review by the Supreme Court is sought. Within 15 days after service of the appellant's brief upon him, the appellee shall similarly file and serve copies of a new brief.

The parties need file but single copies of their respective briefs. At the time of filing a brief, the party shall pay to the Clerk a deposit fixed by the Clerk to cover the cost of

reproducing copies of the brief. The Clerk will reproduce and distribute copies as directed by the Court.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the clerk two legible copies thereof reproduced by typewriter carbon or other means.

(2) **Failure to File or Serve.** If an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve his brief within the time allowed, he may not be heard in oral argument except by permission of the court.

Drafting Committee Note

Sources or parallels in former rules or statutes: Supp. Rules 3, 5, 6, 7, 8.

Commentary:

General. This Rule 14 and succeeding Rule 15 cover in general all matters covered by former Supplementary Rules 1-13. This rule deals comprehensively with appeals of right under G.S. § 7A-30, and Rule 15 with discretionary appeals upon certification either prior to or following Court of Appeals' determination. Various rules in *General Provisions* Article VI apply to different aspects of the practice covered by these two rules: App. R. 25 (dismissal for failure to perfect appeal); App. R. 26 (filing and service); App. R. 27 (computation and extension of time); App. R. 28 (function and content of briefs); App. R. 29 (calendaring and call of appeals); App. R. 30 (oral argument); App. R. 31 (petition for rehearing); App. R. 37 (motion practice).

Subdivision (a) carries forward the time limit provided in former Supp. R. 3(a). The provisions for tolling by filing of a petition for rehearing and for tolling as to all other parties by filing a notice of appeal by any party are new. Reciprocally, a notice of appeal or petition for discretionary review waives the rehearing option. App. R. 31(f). Note changed language "issuance of mandate" rather than "certificate of the clerk," to conform to the language of App. R. 32.

Subdivision (b) carries forward in unchanged substance the provisions of former Supp. R. 3(b).

Note that the only requirement as to substantive content of the notice of appeal is for the jurisdictional basis (in fact and law) for the asserted right to have Supreme Court review. It is not necessary in the notice of appeal to specify the whole range of questions which the appellant is entitled to present and intends to present if the appeal is entertained as properly based jurisdictionally. This is the office of the new brief required by subdivision (d)(1) of this rule to be filed in the Supreme Court. By Rule 16(a) the scope of Supreme Court review is not limited to "those questions upon whose existence the appeal of right . . . is based," but

extends to all questions "properly presented in the new briefs." See, so holding independently of a direct rule provision, *State v. Colson,* 274 N.C. 295, at 305 (1968) (appeal properly grounded in substantial constitutional question entitles to review on any other questions properly presented) ; but cf. *State v. Horn,* 285 N.C. 82, at 84 (1974) (dictum apparently *contra;* but Court indicated consideration nevertheless of the non-constitutional questions). The Rules herein cited, by clearly codifying the rule announced in *Colson,* remove any question on the point.

See, for an illustrative form of notice of appeal under this Rule, Committee Form 3.

Subdivision (c). The first sentence of subsection (1) carries forward unchanged in substance the provisions of former Supp. R. 5(a). The last sentence of this subsection is new and preserves to the Supreme Court the opportunity to enforce these Rules independently of any prior acceptance by the Court of Appeals of a record on appeal. Subsection (2) is designed to conform to developed clerical practice under the former Supplementary Rules, and makes the transmission and docketing of records on appeal within the appellate division purely a ministerial function of the respective clerks. Details of the manner of procurement or reproduction of copies of the record and of the number and recipients of distribution remain to administrative direction of the court.

Subdivision (d). Subsection (1) alters the timetable for filing and service provided by the former Supplementary Rules: from 10 days to 20 days from date of docketing the record for the appellant's brief; from 20 days after docketing of the record to 15 days after service of appellant's brief, for the appellee's brief. The provision for filing but single copies of briefs for reproduction of copies by the clerk conforms to the practice described in the Commentary to Rule 13(b) for filing briefs in appeals from the trial courts. While this subsection deals basically only with filing and service requirements, leaving function and content to App. R. 28, which covers that subject as to *all* briefs, there is the important requirement in this subsection that the briefs filed under this Rule 14 in the Supreme Court shall be *new.* This removes the option given by former Supp. R. 8 to file a brief which merely *supplements* the Court of Appeals brief. The reason for requiring new briefs in all cases is developed in detail in the Commentary to App. R. 28(d). That subdivision permits incorporation in whole or in part of all or portions of the *argument* section of the briefs filed in the Court of Appeals into the argument section of the *new* brief required by this subdivision.

Subsection (2) carries forward unchanged in substance a comparable provision in former Sup. Ct. RR. 28 and 29.

RULE 15

DISCRETIONARY REVIEW ON CERTIFICATION BY SUPREME COURT UNDER G.S. § 7A-31

(a) **Petition of Party.** Either prior to or following determination by the Court of Appeals of an appeal docketed in that court, any

party to the appeal may in writing petition the Supreme Court upon any of the grounds specified in G.S. § 7A-31 to certify the cause for discretionary review by the Supreme Court; except that a petition for discretionary review of an appeal from the Industrial Commission, the Utilities Commission, or the Commissioner of Insurance may only be made following determination by the Court of Appeals; and except that no petition for discretionary review may be filed in any post-conviction proceeding under G.S. Chap. 15, Art. 22.

(b) **Same; Filing and Service.** A petition for review prior to determination by the Court of Appeals shall be filed with the Clerk of the Supreme Court and served on all other parties within 15 days after the appeal is docketed in the Court of Appeals. A petition for review following determination by the Court of Appeals shall be similarly filed and served within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. Such a petition may be contained in or filed with a notice of appeal of right, to be considered by the Supreme Court in the event the appeal is determined not to be of right, as provided in Rule 14(a). The running of the time for filing and serving a petition for review following determination by the Court of Appeals is terminated as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for filing and serving such a petition for review thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely petition for review is filed by a party, any other party may file a petition for review within 10 days after the first petition for review was filed.

(c) **Same; Content.** The petition shall designate the petitioner or petitioners and shall set forth plainly and concisely the factual and legal basis upon which it is asserted that grounds exist under G.S. § 7A-31 for discretionary review. The petition shall be accompanied by a copy of the opinion of the Court of Appeals when filed after determination by that court. No supporting brief is required; but supporting authorities may be set forth briefly in the petition.

(d) **Response.** A response to the petition may be filed by any other party within 10 days after service of the petition upon him. No supporting brief is required, but supporting authorities may be set forth briefly in the response.

(e) **Certification by Supreme Court; How Determined and Ordered.**

(1) **On Petition of a Party.** The determination by the Supreme Court whether to certify for review upon petition of a party is made solely upon the petition and any response thereto and without oral argument.

(2) **On Initiative of the Court.** The determination by the Supreme Court whether to certify for review upon its own initiative pursuant to G.S. § 7A-31 is made without prior notice to the parties and without oral argument.

(3) **Orders: Filing and Service.** Any determination to certify for review and any determination not to certify made in response to petition will be recorded by the Supreme Court in a written order. The Clerk of the Supreme Court will forthwith enter such order, deliver a copy thereof to the Clerk of the Court of Appeals, and mail copies to all parties. The cause is docketed in the Supreme Court upon entry of an order of certification by the Clerk of the Supreme Court.

(f) **Record on Appeal.**

(1) **Composition.** The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) **Filing; Copies.** When an order of certification is filed with the Clerk of the Court of Appeals, he will forthwith transmit the original record on appeal to the Clerk of the Supreme Court. The Clerk of the Supreme Court will procure or reproduce copies thereof for distribution as directed by the Court. If it is necessary to reproduce copies, the Clerk may require a deposit of the petitioner, to cover the costs thereof.

(g) **Filing and Service of Briefs.**

(1) **Cases Certified Before Determination by Court of Appeals.** When a case is certified for review by the Supreme Court before being determined by the Court of Appeals, the times allowed the parties by Rule 13 to file their respective briefs are not thereby extended. If a party has filed his brief in the Court of Appeals and served copies before the case is certified, the

Clerk of the Court of Appeals shall forthwith transmit to the Clerk of the Supreme Court the original brief and any copies already reproduced by him for distribution, and if filing was timely in the Court of Appeals this constitutes timely filing in the Supreme Court. If a party has not filed his brief in the Court of Appeals and served copies before the case is certified, he shall file his brief in the Supreme Court and serve copies within the time allowed and in the manner provided by Rule 13 for filing and serving in the Court of Appeals.

(2) **Cases Certified for Review of Court of Appeals Determinations.** When a case is certified for review by the Supreme Court of a determination made by the Court of Appeals, the appellant shall file a new brief prepared in conformity with Rule 28 in the Supreme Court and serve copies upon all other parties within 20 days after the case is docketed in the Supreme Court by entry of its order of certification. The appellee shall file a new brief in the Supreme Court and serve copies upon all other parties within 15 days after a copy of appellant's brief is served upon him.

(3) **Copies.** A party need file or the Clerk of the Court of Appeals transmit, but a single copy of any brief required by this Rule 15 to be filed in the Supreme Court upon certification for discretionary review. The Clerk of the Supreme Court will thereupon procure from the Court of Appeals or will himself reproduce copies for distribution as directed by the Supreme Court. The Clerk may require a deposit of any party to cover the costs of reproducing copies of his brief.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the clerk two legible copies thereof reproduced by typewriter carbon or other means.

(4) **Failure to File or Serve.** If an appellant fails to file and serve his brief within the time allowed by this Rule 15, the appeal may be dismissed on motion of an appellee or upon the court's own initiative. If an appellee fails to file and serve his brief within the time allowed by this Rule 15, he may not be heard in oral argument except by permission of the Court.

(h) **Discretionary Review of Interlocutory Orders.** An interlocutory order by the Court of Appeals, including an order for a new trial or for further proceedings in the trial tribunal, will

be certified for review by the Supreme Court only upon a determination by that Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm to a party.

(i) **Appellant, Appellee Defined.** As used in this Rule 15, the terms *appellant* and *appellee* have the following meanings:

(1) With respect to Supreme Court review prior to determination by the Court of Appeals, whether on petition of a party or on the Court's own initiative, *appellant* means a party who appealed from the trial tribunal; *appellee,* a party who did not appeal from the trial tribunal.

(2) With respect to Supreme Court review of a determination of the Court of Appeals upon the Court's own initiative, *appellant* means the party aggrieved by the determination of the Court of Appeals; *appellee,* the opposing party. Provided, that in its order of certification, the Supreme Court may designate either party *appellant* or *appellee* for purposes of proceeding under this Rule 15.

Drafting Committee Note

Sources and parallels in former rules and statutes: Supp. Rules 1, 2, 4, 5, 6, 7, 8, 11, 13.

Commentary:

General. For coverage of this rule in conjunction with that of App. R. 14, see General Commentary to the latter. Note that this Rule 15 deliberately avoids use of the term "certiorari" to describe the procedure by which under the jurisdictional statute, G.S. § 7A-31, the Supreme Court exercises its discretionary power to review cases originally docketed for review in the Court of Appeals. Instead, the terms "certification," "certify for review," "petition for discretionary review," are used to conform directly to the statutory language and the procedure therein described, and to distinguish this procedure from that for review by the extraordinary writ of certiorari, which is dealt with in App. R. 21.

Subdivision (a) lays the basis for the rule's coverage of both by-pass and post-determination review procedures.

Subdivision (b) carries forward the time limits for petition for discretionary review provided in former Supp. R. 1 (by-pass) and Supp. R. 2 (post-determination). For commentary on the provision for tolling by filing a petition for rehearing in the Court of Appeals and the reciprocal effect of waiver of rehearing by petition for discretionary review, see Commentary to App. R. 14(a).

Subdivision (c). The provision for accompanying a post-determination petition with a copy of the Court of Appeals' opinion is from former Supp.

R. 5(b). The other provisions supplant and serve the function of those provisions of former Supp. Rules 1 and 2 which borrowed certiorari writ practice by reference to former Sup. Ct. R. 34.

Note that the rule requires only that the petition contain a statement of the jurisdictional basis (in fact and law) for the review being sought. It is *not* necessary in the petition to specify the whole range of questions which the petitioner is entitled to present and intends to present if the case is certified for review. That is the office of the new brief required by subdivision (g)(2) of this rule to be filed upon certification. By Rule 16(a) the scope of Supreme Court review is not limited to "those questions upon whose existence . . . the discretionary review is based," but extends to all questions then "properly presented in the new briefs."

See, for an illustrative form of a petition for discretionary review under this Rule, Committee Form 4.

Subdivision (d). Former Supp. Rules 1 and 2 in effect borrowed the certiorari *writ* practice sketched in former Sup. Ct. R. 34 for the discretionary review practice which is the subject of this new Rule 15. One of the former rule's features was a provision for response by other parties to such a petition. This subdivision carries this forward by direct statement.

Subdivision (e). Subsections (1) and (2) state directly what was merely implicit in former Supplementary Rules, which did not speak directly to the decision process on petitions for discretionary review. Subsection (3) carries forward, unchanged in substance but with some elaboration, the provision of former Supp. Rules 6, 8, and 13.

Subdivision (f). Subsection (1), first sentence, carries forward, unchanged in substance, the provisions of former Supp. R. 5(a). The second sentence is new. See Commentary to comparable App. R. 14(c)(1).

Subsection (2) conforms to developed clerical practice not directly stated in former Supplementary Rules. See Commentary to App. R. 14(c)(2).

Subdivision (g). Subsection (1) carries forward, unchanged in substance, the provisions of former Supp. RR. 6 and 11 controlling the filing and service of briefs in "by-pass" review situations whether on party or court initiative.

Subsection (2) carries forward the essential provisions of former Supp. RR. 7 and 8 controlling the filing and service of briefs in cases involving review by the Supreme Court of Court of Appeals determinations, but with two significant alterations from former practice: 1) The timetable for filing and service is changed: as to the appellant's brief, from 10 days to 20 days after docketing in the Supreme Court (see App. R. 15(e)(3) for time when docketing occurs); as to the appellee's brief, from 20 days after docketing in the Supreme Court to 15 days after service of appellant's brief. 2) The option to file *supplementary* briefs is removed; filing of *new* briefs is required. See Commentary to App. R. 14(d)(1).

Subsection (3) covers the filing of briefs in both by-pass and post-determination review cases. In by-pass review situations the responsibility for filing in the Supreme Court will depend upon whether the party has

already filed his brief in the Court of Appeals before the case is certified for review. App. R. 15(g)(1). In post-determination situations filing will always be by the party and will be of the *new* brief required by App. R. 15(g)(2). This subdivision (3) is simply saying that in whatever situation only one copy of that brief need be filed in the Supreme Court to satisfy the *filing* requirement.

Subsection (4) carries forward, unchanged in substance, a comparable provision in Supp. RR. 28 and 29.

Subdivision (h) carries forward the comparable provision in former Supp. R. 2, and is drawn ultimately from G.S. § 7A-31.

Subdivision (i). From former Sup. Ct. R. 4.

RULE 16

SCOPE OF REVIEW OF DECISIONS OF COURT OF APPEALS

(a) **How Determined.** Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals. Review is limited to consideration of the questions properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court. No assignments or cross-assignments of error to the decision of the Court of Appeals are required as the basis for the presentation of questions for review by the Supreme Court. A party who was an appellant in the Court of Appeals, and is either an appellant or an appellee in the Supreme Court, may present in his brief any question which he properly presented for review to the Court of Appeals, and is not limited to those actually determined by the Court of Appeals nor to those questions upon whose existence the appeal of right or the discretionary review is based. A party who was an appellee in the Court of Appeals and is an appellant in the Supreme Court may present in his brief any questions going to the basis of the Court of Appeals' decision by which he is aggrieved, and any questions which, pursuant to Rule 28(c), he properly presented for review to the Court of Appeals. A party who was an appellee in the Court of Appeals and is an appellee in the Supreme Court may present any questions which, pursuant to Rule 28(c), he properly presented for review to the Court of Appeals.

(b) **Appellant, Appellee Defined.** As used in this Rule 16, the terms *appellant* and *appellee* have the following meanings when applied to discretionary review:

(1) With respect to Supreme Court review of a determination of the Court of Appeals upon petition of a party, *appellant* means the petitioner, *appellee* means the respondent.

(2) With respect to Supreme Court review upon the Court's own initiative, *appellant* means the party aggrieved by the decision of the Court of Appeals; *appellee,* the opposing party. Provided, that in its order of certification the Supreme Court may designate either party *appellant* or *appellee* for purposes of proceeding under this Rule 16.

Drafting Committee Note

Sources and parallels in former rules and statutes: Supp. R. 2 (only first sentence of subdivision (a)).

Subdivision (a) is designed to give hitherto lacking detailed guidance to counsel in dealing with the special problems posed by second review in a two-tiered appellate court system. The first sentence is drawn directly from the last sentence of former Supp. R. 2, and expresses the critical feature of second review by the higher court: that it is the decision of the first reviewing court which is under direct review. The rest of the subdivision is new and lays down certain corollaries to this root principle. These take into account the following points: 1) that the parties may or may not have changed positions as appellant and appellee on the second review; 2) that, following App. RR. 10(d) and 28(c), questions may properly be presented for review at both levels by both appellants and appellees; 3) that the *potential* scope of review by the higher court is limited only by the questions properly presented on first review in the first reviewing court, and not by the scope or basis of the latter's decision. See *State v. Colson,* 274 N.C. 295 (1968); 4) that within this *potential* scope of second review, the *actual* scope should be limited to those precise questions chosen and identified by the parties in their briefs as those for review by the higher court. Other rules which operate in important conjunction with this Rule 16 are cross-referred to emphasize the interrelation: 1) App. Rules 14(d)(1) and 15(g)(2) both force the conscious choice of precise questions for higher court review by their requirements that in both appeals of right and in discretionary appeals, both parties shall file *new* briefs in the Supreme Court; 2) App. R. 28, dealing with the function and content of briefs, requires both parties to state the questions being presented for review by the court to which appeal is taken, and in subdivision (c) spells out the procedure by which appellees in the Court of Appeals may in their briefs present questions for review. See Commentary to App. Rules 10(d) and 28(c). Notice that neither party is required to make assignments of error or cross-assignments of error with respect to the Court of Appeals decision.

Subdivision (b), by its forced definition of terms, permits a single set of descriptives "appellant" and "appellee" to be used in designating the parties in discretionary review cases as well as appeals of right, and within the discretionary review category, to both party-initiative and court-initiative situations. It is drawn from former Supp. R. 4.

RULE 17

APPEAL BOND IN APPEALS UNDER G.S. §§ 7A-30, 7A-31

(a) **Appeal of Right.** In all appeals of right from the Court of Appeals to the Supreme Court, the party who takes appeal shall, upon filing the record on appeal in the Supreme Court, file with the Clerk of that Court a written undertaking, with good and sufficient surety in the sum of $200, or deposit cash in lieu thereof, to the effect that he will pay all costs awarded against him on the appeal to the Supreme Court.

(b) **Discretionary Review of Court of Appeals Determination.** When the Supreme Court on petition of a party certifies a case for review of a determination of the Court of Appeals, the petitioner shall file an undertaking for costs in the form provided in subdivision (a). When the Supreme Court on its own initiative certifies a case for review of a determination of the Court of Appeals, no undertaking for costs shall be required of any party.

(c) **Discretionary Review by Supreme Court Before Court of Appeals Determination.** When a case is certified for review by the Supreme Court before being determined by the Court of Appeals, the undertaking on appeal initially filed in the Court of Appeals shall stand for the payment of all costs incurred in either the Court of Appeals or the Supreme Court and awarded against the party appealing.

(d) **Appeals in Forma Pauperis.** No undertakings for costs are required of a party appealing in forma pauperis.

Drafting Committee Note

Sources and parallels in former rules and statutes: Supp. R. 18.

Commentary:

This rule simply carries forward, in slightly re-stated form, the provisions of former Supp. R. 18. It does state explicitly, in the second sentence of subdivision (b), what is only implied in the former Supplementary Rule—that upon certification for review of a Court of Appeals determina-

tion on initiative of the Supreme Court, no appeal bond is required. Notice that these provisions for securing costs in intra-Appellate Division appeals are independent of those of App. Rules 6 and 7 for securing the costs of initial appeal from the trial courts, except to the extent that security there given stands good on the by-pass appeal under subdivision (c).

ARTICLE IV. DIRECT APPEALS FROM ADMINISTRATIVE AGENCIES TO COURT OF APPEALS

RULE 18

TAKING APPEAL; RECORD ON APPEAL — COMPOSITION AND SETTLEMENT

(a) **General.** Appeals of right under G.S. § 7A-29 to the Court of Appeals from the Utilities Commission, the Industrial Commission, and the Commissioner of Insurance (hereinafter "agencies" or "agency") shall be in accordance with the procedures provided in these rules for appeals of right from the courts of the trial divisions, except as hereinafter provided in this Rule 18, Rule 19, and Rule 20.

(b) **Time and Method for Taking Appeals.** The times and methods for taking appeals from the agencies shall be as provided respectively in G.S. § 62-90(a) for appeals from the Utilities Commission; G.S. § 97-86 for appeals from the Industrial Commission and G.S. § 58-9.5(1) and (2) for appeals from the Commissioner of Insurance.

(c) **Composition of Record on Appeal.** The record on appeal in appeals from any of the agencies shall contain: (i) an index of the contents of the record, which shall appear as the first page thereof; (ii) a copy of the summons with return, notice of hearing, or other papers showing jurisdiction of the agency over persons or property sought to be bound in the proceeding, or a copy of stipulation of counsel showing the same; (iii) copies of all other notices, pleadings, petitions, or other papers required by law or rule of the agency to be filed with the agency to present and define the matter for determination; (iv) a copy of any findings of fact and conclusions of law and of the order, award, decision, or other determination of the agency from which appeal was taken; (v) so much of the evidence taken before the agency or before any division, commissioner, deputy commissioner, or hearing officer of the agency, set out in the form pro-

vided in Rule 9(c)(1), as is necessary for understanding of all errors assigned; (vi) where the agency has reviewed a record of proceedings before a division, or an individual commissioner, deputy commissioner, or hearing officer of the agency, copies of all items included in the record filed with the agency which are necessary for understanding of all errors assigned; (vii) copies of such other papers filed and transcripts of such other proceedings had before the agency or any of its individual commissioners, deputies, or divisions as are necessary for understanding of all errors assigned; (viii) a copy of the notice of appeal from the agency, and of all appeal entries relative to the perfecting of appeal; and (ix) exceptions and assignments of error to the actions of the agency, set out as provided in Rule 10.

(d) **Settling the Record on Appeal.** The record on appeal may be settled for certification and filing in the Court of Appeals by any of the following methods:

(1) **By Agreement.** Within 30 days after appeal is taken, the parties may by agreement entered in the record on appeal constitute a proposed record on appeal prepared by any party in accordance with this Rule 18 as the record on appeal.

(2) **By Appellee's Approval of Appellant's Proposed Record on Appeal.** If the record on appeal is not settled by agreement under Rule 18(d)(1), the appellant may, within 30 days after appeal is taken, file in the office of the agency and serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 18(c). Within 15 days after service of the proposed record on appeal upon him, an appellee may file in the main office of the agency and serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal. If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(3) **By Conference, Referee, or Agency Head; Failure to Request Settlement.** If any appellee timely files objections, amendments, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have filed, may in writing request the Chairman of the Utilities Commission or the

Commissioner of Insurance to convene a conference to attempt settlement of the record on appeal in appeals from their respective agencies, or the Chairman of the Industrial Commission to settle the record on appeal in appeals from that agency. A copy of such request shall be served upon all other parties. If only one appellee or only one set of appellees proceeding jointly have so filed and no other party makes timely request for agency conference or settlement by order, the record on appeal is thereupon settled in accordance with the one appellee's, or one set of appellees', objections, amendments, or proposed alternative record on appeal. If more than one appellee proceeding separately have so filed, failure of the appellant to make timely request for agency conference or for settlement by order results in abandonment of the appeal as to those appellees, unless within the time allowed any appellee makes request in the same manner.

Within 20 days after receipt of a request for agency-supervised conference in appeals from the Utilities Commission and the Commissioner of Insurance, the agency head shall convene a conference of all parties to the appeal by written notice. At the conference the agency head or his delegate shall attempt to accomplish a settlement of the record on appeal by agreement of the parties. If no such agreement is accomplished, the agency head shall forthwith request the Chief Judge of the Court of Appeals to appoint a referee to settle the record on appeal. The referee so appointed shall proceed after conference with all parties to settle the record on appeal in accordance with the terms of the reference order.

Upon receipt of a request for settlement of the record on appeal the Chairman of the Industrial Commission shall by written notice to counsel for all parties set a place and a time not later than 20 days after receipt of the request for a hearing to settle the record on appeal. At the hearing the Chairman shall settle the record on appeal by order.

(e) **Certification of Record on Appeal.** Within 10 days after the record on appeal has been settled by any of the procedures provided in Rule 18(d), the appellant shall present the items constituting the record on appeal to the agency head for certification. The agency head or his delegate shall forthwith inspect the items presented and if they be found true copies and transcriptions, so certify them, noting the date of certification on the appropriate docket of the agency.

(f) **Further Procedures.** Further procedures for perfecting and prosecuting the appeal shall be as provided by these rules for appeals from the courts of the trial divisions.

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. §§ 62-90(a) (Utilities Commission appeals); 97-86 (Industrial Commission appeals); 58-9.5(1) and (2) (Commissioner of Insurance appeals).

Commentary.

General. The statutes referred to in the sources and parallels noted above have provided details of the appellate procedure for appeals from the three state agencies indicated directly to the Court of Appeals. In conjunction with promulgation of these rules, those provisions have been stripped from the respective statutes by amendment, and are now incorporated in this Rule 18 as a practically comprehensive procedure for appeals from all three agencies. That procedure is uniform except in one respect, spelled out in subsection (3) of subdivision (d), concerning the mode of settlement of the record on appeal where the parties fail to agree. See the Commentary to that provision. The prescribed procedure substantially parallels, as did the statutory provisions, that provided for appeals from the trial courts. There are a few deviations, which are specifically identified in the Rule and App. R. 20 as matter retained in the governing statutes.

Subdivision (a) "borrows" in general the appellate procedure prescribed in these rules for appeals from the trial courts, except as that procedure is specifically spelled out in this Rule 18, or is retained in statutory prescriptions which are in turn identified in this and the succeeding two rules which make up this Article IV. This Rule 18 takes the procedure, including that left to statutory prescription, generally down to the point of certification of the record on appeal. At that point subdivision (f) specifically defers to the subsequent procedures provided in these rules for appeals from the trial courts.

Subdivision (b) defers to the retained statutory provisions because of their possible jurisdictional significance.

Subdivision (c) follows the format of App. R. 9(b) in specifying for agency appeals the items constituting the record on appeal. The items identified either duplicate or are appropriate analogues to comparable items specified for civil appeals.

Subdivision (d) parallels, practically identically, the procedure for settling records on appeal from the trial courts as specified in App. R. 11. There is one variation among the three agencies, which is dealt with in subsection (3): the mode of "judicial" settlement in the event of failure to settle by party agreement or exchange. Here, taking into account the possible involvement of the agency itself in appeals from the Utilities Commission and the Commissioner of Insurance, settlement is to be attempted first by an agency-supervised conference, and if this fails, by a referee appointed by the Chief Judge of the Court of Appeals. In Industrial Commission appeals, wherein the agency is not potentially a party in interest, settlement

is to be by the agency head in the manner of the judge of a trial court. There is also a related variation in the timetable for settling records in agency appeals from that provided for trial court appeals: the agency head has 20 days rather than 15 days to call a settlement conference. Cf. App. R. 11(c).

Subdivision (e) parallels the comparable procedure for certification of trial court records. Cf. App. R. 11(e), substituting the agency head or his delegate as the certifying authority.

Subdivision (f) borrows all necessary further procedures—which would include those provided in App. R. 12 for filing the record on appeal and in App. R. 13 for filing and serving briefs—from the trial court appeal procedures. While this subdivision does not specifically refer to them, the procedures laid down in the rules found in Art. VI, "General Provisions," governing such matters as filing and service, extensions of time, content of briefs, etc. are by their terms also applicable, as appropriate, to these agency appeals.

RULE 19

PARTIES TO APPEAL FROM AGENCIES

(a) **From Utilities Commission.** The complainant in the original complaint before the Commission, each of the other parties to the proceeding before the Commission, and the Commission may be parties of record to and participate in the appeal as appellants or appellees according to their respective interests.

(b) **From Industrial Commission.** The claimant before the Commission and the employer against whom claim is made and any other parties to the proceeding before the Commission may be parties of record to and participate in the appeal as appellants or appellees according to their respective interests.

(c) **From Commissioner of Insurance.** The complainant in the original complaint before the Commissioner, each of the other parties to the proceeding, and the Commissioner may be parties of record to and participate in the appeal as appellants or appellees according to their respective interests.

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. § 62-90(a) (Utilities Commission); 97-86 (Industrial Commission); 58-9.5(1) and (2) (Commissioner of Insurance).

Commentary.

These provisions are simply borrowed from the statutes which have hitherto completely controlled appeals from these three agencies. They are

included in these rules because of the rather unique alignments of parties in agency appeals, including the agencies themselves in Utilities Commission and Commissioner of Insurance appeals. Cf. Commentary to App. R. 18(d).

RULE 20

MISCELLANEOUS PROVISIONS OF LAW GOVERNING IN AGENCY APPEALS

Specific provisions of law pertaining to stays pending appeals from any agency to the Court of Appeals, to pauper appeals therein, and to the scope of review and permissible mandates of the Court of Appeals therein shall govern the procedure in such appeals notwithstanding any provisions of these rules which may prescribe a different procedure.

Drafting Committee Note

Sources or parallels in former rules or statutes: None.

Commentary.

This rule is necessitated by the fact that as to the matters specified statutory procedures peculiar to the three agencies and differing from parallel procedures provided in these rules continue to control. This disclaimer of rule authority avoids any possible conflict. The matters specified are deemed to pertain so closely to legislative control of these quasi-judicial bodies, including their financing and the limits of the powers delegated to them by the legislature vis-a-vis those of the legislature and the courts (i.e. scope of judicial review, and permissible mandates of the reviewing court) that they must continue to be controlled by statute rather than appellate rule-making authority.

ARTICLE V. EXTRAORDINARY WRITS

RULE 21

CERTIORARI

(a) **General.** The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right to appeal from an interlocutory order exists; or by the Supreme Court in appropriate circumstances to permit review of the judgments and orders of the Court of Appeals when

the right to prosecute an appeal of right or to petition for discretionary review has been lost by failure to take timely action.

(b) **Petition for Writ; to Which Appellate Court Addressed.** Application for the writ of certiorari shall be made by filing a petition therefor with the clerk of the court of the appellate division to which appeal of right might lie from a final judgment in the cause by the tribunal to which issuance of the writ is sought.

(c) **Same; Filing and Service; Content.** The petition shall be filed without unreasonable delay and shall be accompanied by proof of service upon all other parties. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk will docket the petition.

(d) **Reponse; Determination by Court.** Within 10 days after service upon him of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The Court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 34.

Commentary.

General. This rule builds upon and attempts to clarify the certiorari writ practice provisions of former Sup. Ct. R. 34. As indicated in the General Commentary to App. R. 15 dealing with discretionary review by the Supreme Court under G.S. § 7A-31, that practice is by these Rules clearly differentiated in form and in terms from the extraordinary writ practice described in this Rule 21. The former Supplementary Rules in effect "borrowed" the Sup. Ct. R. 34 certiorari writ practice as the procedure by which determinations were made by the Supreme Court to "certify" Court of Appeals determinations for discretionary review under G.S. § 7A-31. Former Supp. R. 2(a)(3). In these rules, App. R. 15 prescribes internally a "certifi-

cation" practice for such cases; and this Rule 21 is confined in terms and in form to the traditional extraordinary writ function of classic certiorari as a means of review outside the regular appeal route.

Subdivision (a) establishes that certiorari may lie from either appellate court to permit review of trial tribunal judgments when ordinary appeal right has been lost or does not exist because of the interlocutory character of the judgment. ("Trial tribunal" includes, per App. R. 1, the district and superior courts, and the three state agencies from which appeals lie to the Court of Appeals.) Further, that certiorari may lie from the Supreme Court to review Court of Appeals determinations when the right to regular appeal has been lost. Specification of which of the appellate courts may properly issue the writ to trial tribunals is left to subdivision (b). And the practice within either court is left to subdivision (c).

Subdivision (b) points to the correct appellate court to petition for the writ in any case. It is that court to which either party *might* have a right to appeal from any final judgment of the tribunal sought to be reviewed. This means that the petition must always be addressed to the Court of Appeals in any case before the three state agencies of Article IV, and in any case before the trial courts except a criminal case wherein a sentence of death or life imprisonment is possible or has been entered. In the latter case the petition must be addressed to the Supreme Court. In any case in the Court of Appeals wherein the writ may be sought, it must obviously by this Rule be sought in the Supreme Court. In cases where the writ is denied by the Court of Appeals, the petitioner must seek review of that determination under the general appeal provisions of App. R. 14 (of right) or App. R. 15 (discretionary review) as the case may dictate. Only if the right to seek regular review by either of these routes has been lost by failure to take timely action could a petitioner refused certiorari in the Court of Appeals seek review of that refusal by a second petition to the Supreme Court.

Subdivision (c), following traditional practice in the use of this discretionary writ, provides no specific time limit for filing the petition. The question of timeliness in a particular case is to be determined as a part of the general question of its propriety as an extraordinary mode of review. The other provisions of this subdivision elaborate upon the more sketchy descriptions of the practice contained in former Sup. Ct. R. 34.

Subdivision (d) carries forward in restated form, but unchanged in substance, the provisions of former Sup. Ct. R. 34.

See Committee Form 8, "Petition for Writ of Certiorari Under Rule 21", for an illustrative form.

RULE 22

MANDAMUS AND PROHIBITION

(a) **Petition for Writ; to Which Appellate Court Addressed.** Applications for the writs of mandamus or prohibition directed

to a judge, judges, commissioner, or commissioners shall be made by filing a petition therefor with the clerk of the court to which appeal of right might lie from a final judgment entered in the cause by the judge, judges, commissioner, or commissioners to whom issuance of the writ is sought.

(b) **Same; Filing and Service; Content.** The petition shall be filed without unreasonable delay after the judicial action sought to be prohibited or compelled has been undertaken, or has occurred, or has been refused, and shall be accompanied by proof of service on the respondent judge, judges, commissioner, or commissioners and on all other parties to the action. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and certified copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk shall docket the petition.

(c) **Response; Determination by Court.** Within 10 days after service upon him of the petition the respondent or any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The Court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

Drafting Committee Note

Sources and parallels in former rules and statutes: None.

Commentary:

General. Presumably because of the essentially liberal and flexible formula for determining appealability of interlocutory orders found in G.S. § 1-277, an extensive use of mandamus and prohibition to review such orders has not developed in our practice. Nevertheless, there are interlocutory orders from which appeal of right is held not to lie even under this formula. And in particular cases there may be need for immediate review of such orders to permit the affected party effectively to continue, such as discovery orders denying access to material deemed essential by the party. See, e.g., *Carolina Overall Corp. v. East Carolina Linen Supply, Inc.*,

1 N.C. App. 318 (1968) for such a possibility. Here mandamus and prohibition have traditionally provided an available means of review, particularly in systems such as the federal with fairly rigid "final judgment" constraints on appealability, and may be useful in our practice under such occasional circumstances as those above suggested. On occasion it would appear that certiorari has been used in circumstances where mandamus or prohibition would have been more appropriate (though they come eventually to the same thing, it must be admitted). See, e.g., *Brice v. Salvage Co.*, 249 N.C. 74 (1958).

The functions of mandamus and prohibition are similar and may well be interchangeable. (In jurisdictions where they have widespread usage it is common to petition for a "writ of mandamus or, alternatively, prohibition"). However, they have traditionally served different functions and are strictly appropriate for different situations. Mandamus lies most appropriately to compel a judicial action erroneously refused, or to correct judicial action erroneously taken, or to compel the exercise of judicial discretionary action when the taking of any action has been refused. Prohibition lies most appropriately to prohibit the impending exercise of jurisdiction not possessed by the judge to whom issuance of the writ has been sought.

Mandamus by appellate writ under this rule is to be distinguished from that procedure (now abolished) by which under former G.S. §§ 1-511 et seq. a "civil action in the nature of mandamus" was available as an original proceeding in the superior courts to compel the performance of purely ministerial duty by a public official. That office is now performed by a straightforward civil action for injunctive relief against the official.

Subdivision (a). As indicated, the petition for mandamus and prohibition is technically against the judicial officer sought to be controlled in respect of judicial action taken or refused, and is in form an original proceeding against him. On the rare occasions that prohibition has been used in our practice, in recent times at least, it seems clear that this traditional form has not been observed. See, e.g., *State of N. C. ex rel. Payne v. Ramsey*, 262 N.C. 757 (1964). The main feature of the traditional form is the opportunity it provides for the affected judicial officer to participate directly. This feature may be important when the conduct drawn in question is alleged to contain elements of abuse of power, or to reflect a recurring pattern in similar cases. On most occasions, however, this will not be the case, and the judicial officer will simply leave the matter to be contested between the true parties in interest.

Subdivisions (b) and (c) set out the essentials of the writ practice, and conform generally to the traditional patterns of motion practice with or without direct participation of the judicial officer as technical respondent.

RULE 23

SUPERSEDEAS

(a) **Pending Review of Trial Tribunal Judgments and Orders.**

(1) **Application—When appropriate.** Application may be made to the appropriate appellate court for a writ of supersedeas to stay the execution or enforcement of any judgment, order, or other determination of a trial tribunal which is not automatically stayed by the taking of appeal when an appeal has been taken or a petition for mandamus, prohibition, or certiorari has been filed to obtain review of the judgment, order, or other determination; and (i) a stay order or entry has been sought by the applicant by deposit of security or by motion in the trial tribunal and such order or entry has been denied or vacated by the trial tribunal, or (ii) extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial tribunal for a stay order.

(2) **Same—How and to Which Appellate Court Made.** Application for the writ is by petition which shall in all cases, except those initially docketed in the Supreme Court, be first made to the Court of Appeals. Except where an appeal from a superior court is initially docketed in the Supreme Court no petition will be entertained by the Supreme Court unless application has been first made to the Court of Appeals and by that court denied.

(b) **Pending Review by Supreme Court of Court of Appeals Decisions.** Application may be made in the first instance to the Supreme Court for a writ of supersedeas to stay the execution or enforcement of a judgment, order or other determination mandated by the Court of Appeals when an appeal of right has been taken, or a petition for discretionary review or for review by certiorari, mandamus, or prohibition has been filed to obtain review of the decision of the Court of Appeals. No prior motion for a stay order need be made to the Court of Appeals.

(c) **Petition: Filing and Service; Content.**

The petition shall be filed with the clerk of the court to which application is being made, and shall be accompanied by proof of service upon all other parties. The petition shall be

verified by counsel or the petitioner. Upon receipt of the required docket fee, the clerk will docket the petition.

For stays of the judgments of trial tribunals, the petition shall contain a statement that stay has been sought in the court to which issuance of the writ is sought and by that court denied or vacated, or of facts showing that it was impracticable there to seek a stay. For stays of any judgment, the petition shall contain: (1) a statement of any facts necessary to an understanding of the basis upon which the writ is sought; and (2) a statement of reasons why the writ should issue in justice to the applicant. The petition may be accompanied by affidavits and by any certified portions of the record pertinent to its consideration. It may be included in a petition for discretionary review by the Supreme Court under G.S. § 7A-31, or in a petition to either appellate court for certiorari, mandamus or prohibition.

(d) **Response; Determination by Court.** Within 10 days after service upon him of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response, and any supporting papers. No briefs or oral arguments will be received or allowed unless ordered by the court upon its own initiative.

(e) **Temporary Stay.** Upon the filing of a petition for supersedeas, the applicant may apply, either within the petition or by separate paper, for an order temporarily staying enforcement or execution of the judgment, order, or other determination pending decision by the court upon the petition for supersedeas. If application is made by separate paper, it shall be filed and served in the manner provided for the petition for supersedeas in Rule 23(c). The court for good cause shown in such a petition for temporary stay may issue such an order ex parte.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 34(2).

Commentary.

General. This rule builds upon the bare reference to supersedeas writ practice found in former Sup. Ct. R. 34(2). It provides in these Rules the sole grounds and procedures by which an appellate court may

stay enforcement or execution of the judgment of a trial tribunal pending the appellate court's review of that judgment by appeal or on application for certiorari, mandamus, or prohibition. Supersedeas by appellate court writ is a different procedure than that provided in App. R. 8 for stay by trial court order. The two rules are interrelated by appropriate cross-references.

Subdivision (a) deals only with supersedeas to stay enforcement of trial tribunal judgments. Supersedeas to stay Court of Appeals judgments is dealt with in following subdivision (b). This subdivision (a) lays down two conditions to seeking stay of enforcement of trial tribunal judgments: 1) the case must either be on appeal or the petitioner must be seeking review by one of the extraordinary writs. The procedure is thus ancillary and may not be undertaken except in conjunction with appellate review of the judgment in question; 2) there must have been a prior unsuccessful attempt to obtain or to hold an effective stay of the judgment in the trial tribunal. The procedures by which this may be attempted at that level are spelled out in App. R. 8. This latter condition may be avoided only upon an alternative one—that under the circumstances, seeking to obtain stay at the trial court level would simply be impracticable.

Subsection (2) directs the petition in all cases except death and life imprisonment cases to the Court of Appeals. Thus, a party may not appeal to the Court of Appeals and seek initially to obtain stay by supersedeas from the Supreme Court. Upon denial of the petition by the Court of Appeals, the petitioner could then turn to the Supreme Court with a petition for supersedeas to that court (rather than seeking review of that denial by appeal or discretionary review in the Supreme Court).

Subdivision (b) deals with the much more rare practice for seeking supersedeas from the Supreme Court in respect of Court of Appeals' determinations. Here again, as in petitions for supersedeas directed to trial tribunal judgments, it is required that the petition be in conjunction with an attempt to obtain review of the judgment in question by the Supreme Court. But, unlike supersedeas running to trial tribunals, there is no requirement here that stay must first have been sought in the Court of Appeals.

Subdivision (c) expands upon the procedure provided in former Sup. Ct. R. 34(2). See Committee Form 9, "Petition for Writ of Supersedeas."

Subdivision (d) expands upon the procedure provided in former Sup. Ct. R. 34(2)(3).

Subdivision (e) had no counterpart in former rules. It provides for relief comparable to that of the t.r.o. in injunction practice, for stay pending the court's determination of the base petition. By the last sentence, this may in extreme cases be issued ex parte.

RULE 24

FORM OF PAPERS: COPIES

A party need file with the appellate court but a single copy of any paper required to be filed in connection with applications for extraordinary writs. The court may direct that additional copies be filed. The clerk will not reproduce copies.

Drafting Committee Note

Sources and parallels in former rules and statutes: None.

Commentary.

General. This applies to the practice to obtain any of the writs authorized by App. Rules 21, 22, or 23.

ARTICLE VI. GENERAL PROVISIONS

RULE 25

DISMISSAL FOR FAILURE TO COMPLY WITH RULES

If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the docketing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been docketed in an appellate court motions to dismiss are made to that court. Motions to dismiss shall be supported by affidavits or certified copies of docket entries which show the failure to take timely action or otherwise to perfect the appeal, and shall be allowed unless compliance or a waiver thereof is shown on the record, or unless the appellee shall consent to action out of time, or unless the court for good cause shall permit the action to be taken out of time.

Motions made under this rule to courts of the trial divisions may be heard and determined by any judge of the particular court specified in Rule 36 of these rules; motions made under this rule to a commission may be heard and determined by the

chairman of the commission; or, if to a commissioner, then by that commissioner. The procedure in all motions made under this rule to trial tribunals shall be that provided for motion practice by the N. C. Rules of Civil Procedure; in all motions made under this rule to courts of the appellate division, shall be that provided by Rule 37 of these rules.

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. §§ 1-282, 287.1; Ct. App. Rules 5, 17, 18, 50.

Commentary. This rule states a blanket authority in the appropriate courts to dismiss cases on appeal for failure to take any timely action in the appellate process, from serving proposed case on appeal to filing the record on appeal. The consequence of failing thereafter to file briefs within permitted times is dealt with separately by App. Rules 13(c) (appeals from trial tribunals), 14(d)(2) (appeals of right from Court of Appeals and 15(g)(4) (discretionary appeals from Court of Appeals). Former practice with respect to the proper court to entertain motions to dismiss is varied slightly in this rule. Under former Sup. Ct. R. 17 a motion to dismiss for failure to make timely filing of a record on appeal was made to the appellate court in conjunction with a motion to docket the appeal. This Rule 25 simply directs the motion for any failure to take timely action to the court wherein the case is then docketed. In the instance of a record not yet filed in the appellate court with time therefor elapsed, this now means the trial tribunal. The rule also makes plain that which is merely implied in former statutes and rules: that upon motion to dismiss the court may for good cause excuse an untimely action or nonaction and permit delayed action rather than dismissing. This replaces the more complicated procedure for "redocketing" or "reinstatement" upon such a showing which was provided by former Sup. Ct. RR. 17, 18. The provisions of App. R. 27(c) for extensions of time or for the taking of action after time expired are related in an obvious way to these provisions for dismissal upon initiative of the opposing party.

RULE 26

FILING AND SERVICE

(a) **Filing.** Papers required or permitted by these rules to be filed in the trial or appellate divisions shall be filed with the clerk of the appropriate court. Filing may be accomplished by mail addressed to the clerk but is not timely unless the papers are received by the clerk within the time fixed for filing.

(b) **Service of All Papers Required.** Copies of all papers filed by any party and not required by these rules to be served by

the clerk shall, at or before the time of filing, be served on all other parties to the appeal.

(c) **Manner of Service.** Service may be made in the manner provided for service and return of process in Rule 4 of the N. C. Rules of Civil Procedure, and may be so made upon a party or upon his attorney of record. Service may also be made upon a party or his attorney of record by delivering a copy to either or by mailing it to either at his last known address, or if no address is known, by filing it in the office of the clerk with whom the original paper is filed. Delivery of a copy within this Rule means handing it to the attorney or to the party, or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of the paper enclosed in a postpaid, properly addressed wrapper in a Post Office or official depository under the exclusive care and custody of the United States Post Office Department.

(d) **Proof of Service.** Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the papers filed.

(e) **Joint Appellants and Appellees.** Any paper required by these rules to be served on a party is properly served upon all parties joined on the appeal by service upon any one of them.

(f) **Numerous Parties to Appeal Proceeding Separately.** When there are unusually large numbers of appellees or appellants proceeding separately, the trial tribunal upon motion of any party or on its own initiative, may order that any papers required by these rules to be served by a party on all other parties need be served only upon parties designated in the order, and that the filing of such a paper and service thereof upon the parties designated constitutes due notice of it to all other parties. A copy of every such order shall be served upon all parties to the action in such manner and form as the court directs.

Drafting Committee Note

Sources and parallels in former rules and statutes: None.

Commentary.

General. This rule deals comprehensively with the procedures for filing and serving papers in any context where these are required by

these rules. The attempt in general is to conform to parallel requirements in the N. C. Rules of Civil Procedure governing filing and service of papers in the trial courts.

Subdivision (a). The key point here is the provision that although filing may be accomplished by mailing as well as by hand delivery to the appropriate clerk's office, its timeliness is measured in either case by the time of receipt in the clerk's office.

Subdivisions (b)(c)(d). Paralleling the provisions of N.C.R.Civ.P. 5, these subdivisions provide practical, expeditious modes of accomplishing and proving required service of papers. Of particular importance is the provision in subdivision (b) making service by mail complete upon due deposit in the mails, a provision which expedites the requirement in subdivision (b) that papers be served "at or before" filing. Of importance here is the provision of App. R. 27(b) which gives any person so served by mail an additional 3 days to take required action following service.

Subdivisions (e)(f). These subdivisions are other instances of the attempt to accommodate the rules to the case involving multiple parties, and are designed to expedite conformance with the party-service requirements in the situations described. Cf. N.C.R.Civ.P. 5(c). The specification "proceeding separately" accommodates to the alternative possibility that "numerous" parties may have voluntarily joined under App. R. 5, in which case by force of App. R. 26(e) service upon one automatically is service upon all.

RULE 27

COMPUTATION AND EXTENSION OF TIME

(a) **Computation of Time.** In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. A half holiday shall be considered as other days and not a holiday.

(b) **Additional Time After Service by Mail.** Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

(c) **Extensions of Time; By Which Court Granted.** Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules or by order of court for doing any act required or allowed under these rules; or may permit an act to be done after the expiration of such time. Courts may not extend the time for taking an appeal prescribed by these rules or by law.

A motion to extend the time for filing the record on appeal to a time greater than 150 days from the taking of appeal may only be made to the appellate court to which appeal has been taken. All other motions for extensions of time are made to the trial tribunal from whose judgment, order, or other determination the appeal has been taken during the time prior to docketing of the appeal in the appellate division. After the appeal is docketed in the appellate division such motions are made to the appellate court where docketed. Motions made under this Rule 27 to a court of the trial divisions may be heard and determined by any of those judges of the particular court specified in Rule 36 of these rules. Such motions made to a commission may be heard and determined by the chairman of the commission; or, if to a commissioner, then by that commissioner.

Motions for extensions of time made to a trial tribunal may be made orally or in writing and without notice to other parties and may be determined at any time or place within the state. Such motions may be determined ex parte, but the moving party shall promptly serve on all other parties to the appeal a copy of any order extending time.

Drafting Committee Note

Sources and parallels in former rules and statutes: Subd. (a) and (b): None. Subd. (c): G.S. § 1-282, Ct. App. Rules 5, 17, 18, 50.

Commentary.

Subdivisions (a) and (b). These subdivisions parallel for appellate procedure the provisions of N.C.R.Civ.P. 6(a) and (e) for trial court procedures.

Subdivision (c). As in the corollary provisions of App. R. 25 governing the procedure for dismissals for untimely action or for nonaction, this subdivision lays down a blanket authority in the appropriate courts to extend any of the critical time intervals provided in these rules, with the important exception of the times for taking appeal. The general rule stated is that such motions are made to that court wherein the action is currently docketed. An important exception to this is the provision that the outer time limit of 150 days from taking appeal to file the record on

appeal provided by App. Rule 13(a) may only be extended by the appellate court to which appeal has been taken. This parallels the provision formerly in Ct. App. R. 5 that the 90-day outer limit for "docketing" a record on appeal might be extended by the appellate court.

The final paragraph of this subdivision is new and authorizes extensions of time by the trial tribunals to be made ex parte, and without prior notice, but with the requirement of post-order notice to all parties of any extension granted. While this is a liberalization of former practice, it is thought justified, in view of the matter involved, to expedite action. App. R. 36, cross-referred as the source for identifying trial division judges empowered to grant extensions of time, also liberalizes the practice by opening this to a wider range of such judges than was formerly provided by now repealed G.S. § 1-282, which limited this to "the trial judge." Again, the idea is that given the matter involved, expedition of action is the most important consideration.

RULE 28

BRIEFS: FUNCTION AND CONTENT

(a) **Function.** The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned. Similarly, questions properly presented for review in the Court of Appeals but not then presented and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court are deemed abandoned.

(b) **Content of Appellant's Brief.** An appellant's brief in any appeal shall contain, under appropriate headings, and in the following order:

(1) A statement of the questions presented for review.

(2) A concise statement of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court. It should additionally contain a short, non-argumentative summary of the essential facts underlying the matter in controversy where this will be helpful to an understanding of the questions presented for review.

(3) An argument. This shall contain the contentions of the appellant with respect to each question presented together with citations of the authorities, statutes, and those portions of the record on appeal upon which he relies. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error and exceptions pertinent to the question, identified by their numbers and by the pages of the printed record on appeal at which they appear. Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

(4) A short conclusion stating the precise relief sought.

(c) **Content of Appellee's Brief; Presentation of Additional Questions.** An appellee's brief in any appeal shall contain an argument and a conclusion in the form provided in Rule 28(b)(3) and (4) for an appellant's brief. It need contain no statement of the questions presented nor of the case, unless the appellee disagrees with the appellant's statements and desires to make a restatement of either, or unless the appellee desires to present questions in addition to those stated by the appellant. Without having taken appeal, an appellee may present for review, by stating them in his brief, any questions raised by cross-assignments of error under Rule 10(d). Without having taken appeal or made cross-assignments of error, an appellee may present the question, by statement and argument in his brief, whether a new trial should be granted to the appellee rather than a judgment n.o.v. awarded to the appellant when the latter relief is sought on appeal by the appellant. Within 20 days after service upon him of an appellee's brief presenting such questions, an appellant may file and serve upon all parties a reply brief limited to those additional questions presented in the appellee's brief.

(d) **Incorporation of Court of Appeals Argument into Supreme Court Brief by Reference.** All or any portions of the argument section of a brief filed in the Court of Appeals may be incorporated by reference into the argument section of a new brief required to be filed in the Supreme Court by Rules 14(d)(1) or 15(g)(2).

(e) **References in Briefs to the Record.** References in the briefs to exceptions and assignments of error shall be by their numbers and to the pages of the printed record on appeal at which

they appear. Every reference to an assignment of error should include a reference to the particular exception(s) pertinent to the point for which the reference is made. Reference to parts of the printed record on appeal shall be to the pages where the parts appear. Where reference to the printed record on appeal is made in support of a contention that there was insufficient evidence to support a verdict, finding, or order, the reference may be to those pages within which all the evidence is set out.

(f) **Joinder of Multiple Parties in Briefs.** Any number of appellants or appellees in a single cause or in causes consolidated for appeal may join in a single brief although they are not formally joined on the appeal. Any party to any appeal may adopt by reference portions of the briefs of others.

(g) **Additional Authorities.** Additional authorities discovered by a party after filing his brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties prior to the oral argument. Authorities not cited in the briefs nor in such a memorandum may not be cited and discussed in oral argument.

(h) **Reply Briefs.** Except for a reply brief filed under subdivision (c) of this Rule 28, or unless the court upon its own initiative orders a reply brief to be filed and served, none will be received or considered by the court.

(i) **Amicus Curiae Briefs.** A person may file an amicus curiae brief only by leave of the appellate court wherein the appeal is docketed or in response to a request made by that court on its own initiative. A person may apply for leave to file such a brief by motion filed with the clerk of the appellate court and served upon all parties within 5 days after the appeal is docketed in the appellate court. The brief shall be conditionally filed with the motion for leave. The motion shall identify the interest of the applicant and state the reasons why an amicus curiae brief is desirable. Unless otherwise ordered by the court, the application for leave will be determined solely upon the motion, and without responses thereto or oral argument. The clerk of the appellate court will forthwith notify the applicant and all parties of the court's action upon the application. In all cases where amicus curiae briefs are permitted by a court, the clerk of the court at the direction of the court will notify all parties of the times within which they may file reply briefs. Such reply briefs will be limited to points or authorities pre-

sented in the amicus curiae brief which are not presented in the main briefs of the parties. A motion of an amicus curiae to participate in oral argument will be allowed only for extraordinary reasons.

Drafting Committee Note

Sources and parallels in current statutes and rules: Sup. Ct. Rules 27, 27½, 28, 29.

Commentary.

General. This Rule defines the function and prescribes the form and content of *all* briefs, whether on appeals from the trial tribunals, or from the Court of Appeals to the Supreme Court. It does not deal with filing and service requirements. These appear in App. RR. 13 (appeals from trial tribunals), 14(d) (appeals of right from Court of Appeals) and 15(g) (discretionary review of Court of Appeals).

Subdivision (a). This statement of function builds upon well-established practice developed over the years. Its basic point is that the questions formally presented to the court in the briefs define the actual scope of review which has been earlier narrowed by the choice of exceptions to be brought forward in assignments of error. This serves to focus attention on the true function of assignments of error—that they serve primarily merely to alert the appellee to those portions of the record which will be relevant to consideration of the appellant's contentions on appeal. Since some of these may be abandoned, it is the questions presented in the briefs rather than the assignments of error which provide the court's direct source for consideration of error. In this light, the provisions of App. R. 10 which strip the assignment of error to a non-argumentative statement of the substance of the error suggested, with a mere reference to those exceptions set out in the body of the record upon which it is based, is justified. See Commentary to App. R. 10(c).

Subdivision (b) builds upon the more sparsely stated content requirements of former Sup. Ct. RR. 27, 27½, and 28. Subsection (2) attempts to formulate a clear standard of expectation as to the form and content of that element described as the "statement of the case." This element of the brief (confusedly denominated in many as the "statement of case on appeal") has been a frequent source of unhelpful prolixity and occasional abuse, as contested fact has been stated as established fact or in argumentative form. Against this tendency, the rule emphasizes a desire for conciseness, an outline of the essential nature of the case with its bare procedural history, and a nonargumentative statement of just so much undisputed factual background and context as will aid the court in its study of the briefs and records in light of the questions presented.

Subdivision (c). The most important provision in this subdivision is that which authorizes the formal presentation by appellees of questions for consideration by the court on a conditional basis. The conditional aspect is that in response to the appellant's brief the court will find error as assigned by the appellant. Two types of conditional questions are posited. The first must rest upon formal cross-assignment of error by the

appellee, and this, per App. R. 10(d), may be based upon any error which is asserted by the appellee to have deprived him of an alternative basis for supporting his judgment. The other is already provided by N.C.R.Civ.P. 50(d) in its authorization for appellee presentation of the question (without any cross-assignment of error) whether a new trial should be awarded him as a matter of grace rather than giving judgment n.o.v. for the appellant where the court determines that the appellee's verdict is not supportable on the evidence. This provision is also important in its relationship to App. Rule 16 wherein the scope of Supreme Court review of Court of Appeals decisions is defined in terms of the questions properly raised by appellees as well as appellants in the Court of Appeals. The Commentary to that rule should be read in conjunction with this.

Subdivision (d). This is an important adjunct to the requirement in Rules 14(d)(1) and 15(g)(2) that *new* briefs be filed for Supreme Court review of Court of Appeals determinations. The compelling reason for that requirement is to force a reconsideration and possibly a restatement of the questions to be presented on this second review. See Commentary to App. R. 16. Even when a party desires to present exactly the same set of questions presented to the Court of Appeals, their restatement in the new brief will not be unduly burdensome. But restating the entire argument advanced in support of the party's position on these questions could well be. Hence this provision allows all or portions of the *argument* section in a Court of Appeals brief to be incorporated by reference in a new Supreme Court brief. This brief must nevertheless contain a reformulation or restatement of the other required elements: questions presented; statement of case (which has changed by whatever action the Court of Appeals has taken); and relief sought (which will have changed most obviously if the parties are now reversed as appellant and appellee).

Subdivision (e) carries forward traditional practice for making references in the brief to particular items or portions of the record on appeal. The specification that reference is to be made to pages of the "printed" record refers to the "work copies" as prepared by the clerk pursuant to App. RR. 12(c), 13(b), 14(d)(1), 15(g)(3). These of course will bear different pagination than does the formal record on appeal filed by the appellant, and may indeed contain fewer items by stipulation of the parties under App. R. 12(c). This of course means that final references must await preparation by the clerk of these "printed" or "work" copies, but the time intervals between filing of the formal record and the deadline for filing briefs is adequate. App. R. 13(a).

Subdivision (f). If parties have formally joined on the appeal under App. R. 5, they will of course file joint briefs. This subdivision permits joinder on brief by parties not formally joined for all purposes on an appeal.

Subdivision (g) carries forward in slightly restated form a comparable provision in former Sup. Ct. R. 27.

Subdivision (h) had no counterpart in former rules, but expresses generally understood practice. The cross-reference is to that subdivision

of this Rule which gives a right to an appellant to file a reply brief in any situation where an appellee has exercised the right to present "cross-questions," the reply brief being limited to these.

Subdivision (i) had no counterpart in former rules.

RULE 29

TERMS AND SITTINGS OF COURTS; CALENDAR FOR HEARINGS

(a) **Terms and Sittings.**

(1) **Supreme Court.** There shall be two terms of the Supreme Court each year—a Spring Term commencing on the first Tuesday in February and a Fall Term commencing on the first Tuesday in September. During the terms appeals will be calendared for hearing as provided in subdivision (b) of this rule, and will be heard in accordance with a schedule promulgated by the Chief Justice.

(2) **Court of Appeals.** Appeals will be heard in accordance with a schedule promulgated by the Chief Judge. Panels of the Court will sit as scheduled by the Chief Judge. For the transaction of other business, the Court of Appeals shall be in continuous session.

(b) **Calendaring of Cases for Hearing.**

Each appellate court will calendar the hearing of all appeals docketed in the court. In general, appeals will be calendared for hearing in the order in which they are docketed, but the court may vary the order for any cause deemed appropriate. On motion of any party, with notice to all other parties, the court may determine without hearing to give an appeal peremptory setting or otherwise to vary the normal calendar order. Except as advanced for peremptory setting on motion of a party or of the court's own initiative, no appeal will be calendared for hearing at a time less than 30 days after the filing of the appellant's brief. The clerk of the appellate court will give reasonable notice to all counsel of record of the setting of an appeal for hearing by mailing a copy of the calendar. When a reply brief is allowed by rule or ordered by the Court, the appeal will be calendared or re-calendared for hearing at a time not less than 10 days after the time for filing the reply brief.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. RR. 1, 4, 5, 6, 7, 8, 9, 45; Ct. App. R. 1.

Commentary.

Subdivision (a) carries forward, with a minor modification to be noted, the provisions of former rules of both appellate courts regarding their respective terms and sittings.

Subsection (1) retains the Supreme Court's traditional Spring and Fall Terms of Court, from former Sup. Ct. R. 1. It abandons the stated hours for sitting during these terms which were provided in superseded Sup. Ct. R. 45. The last sentence substitutes for this a scheduling procedure which does not specify particular hours of sitting.

Subsection (2) retains, from superseded Ct. App. R. 1, that Court's maintenance of a continuous term, with sittings of the panels for hearings being controlled by administrative action of the Chief Judge in accordance with published schedules.

Subdivision (b) consummates abandonment of the "district call" mode of calendaring cases for hearing in both appellate courts. As indicated, cases are now calendared without regard to their districts of origin, and generally instead on the basis of their order of docketing. The provision in the fourth sentence for a minimum of 30 days between filing of appellant's brief and the hearing of argument gives a leeway of at least 10 days between the filing of appellee's brief and the oral argument in appeals from the trial tribunals, App. R. 13(a); and a minimum of 15 days between the filing of appellee's brief and the time of oral argument in appeals from the Court of Appeals, App. RR. 14(d)(1), and 15(g)(2).

RULE 30

ORAL ARGUMENT

(a) **Order and Content of Argument.** The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Oral arguments should complement the written briefs, and counsel will therefore not be permitted to read at length from briefs, records, and authorities.

(b) **Time Allowed for Argument.**

(1) **In General.** Ordinarily a total of thirty minutes will be allowed all appellants and a total of thirty minutes will be allowed all appellees for oral argument. Upon written or oral application of any party, the court for good cause shown may extend the times limited for argument. Among other causes, the existence of adverse interests between multiple appellants or between multiple appellees may be suggested as good cause for

such an extension. The court of its own initiative may direct argument on specific points outside the times limited. Counsel is not obliged to use all the time allowed, and the court may terminate argument whenever it considers further argument unnecessary.

(2) **Numerous Counsel.** Any number of counsel representing individual appellants or appellees proceeding separately or jointly may be heard in argument within the times herein limited or allowed by order of court. When more than one counsel is heard, duplication or supplementation of argument on the same points shall be avoided unless specifically directed by the court.

(c) **Non-Appearance of Parties.** If counsel for any party fails to appear to present oral argument, the court will hear argument from opposing counsel. If counsel for no party appears, the court will decide the case on the written briefs unless it orders otherwise.

(d) **Submission on Written Briefs.** By agreement of the parties, a case may be submitted for decision on the written briefs; but the court may nevertheless order oral argument prior to deciding the case.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. RR. 10, 15, 30.

Commentary.

Subdivision (a). The first sentence carries forward traditional practice as provided in former Sup. Ct. R. 30(1). The second sentence carries forward traditional practice as provided in former Sup. Ct. R. 30(2), in its requirement that appellant include a statement of the case in his opening argument. However, as appears in subdivision (b), this rule does not give him automatically an additional 10 minutes (over appellee's time) to devote to this. The last sentence of this subdivision (a) is new and its purpose is to encourage proper utilization of the oral argument as a complementary, not merely repetitive, device to the argument in written brief.

Subdivision (b) builds upon the less detailed provisions of former Sup. Ct. R. 30(2), (3), and (4) which controlled the allocation of times for arguments. As indicated in the Commentary to subdivision (a) the basic times allocated by the rule are varied to cut back the appellant's time to parity of 30 minutes with that given appellee. If appellant considers that his duty to state the case justifies an extension in the particular case, he may request it. The specific identification of adverse interests between co-parties as a possible basis for extending the basic time of 30 minutes given to all of them simply recognizes that this is probably the most frequent basis upon which extensions may justly be sought. The penultimate sentence is drawn from former Sup. Ct. R. 30(4). The last sentence is new as a direct

statement but has certainly been implicit in the practice under former rules.

Subsection (2) restates without substantive change the provisions of former Sup. Ct. R. 30(5).

Subdivision (c) supplants former Sup. Ct. R. 15 in dealing with the problem of non-appearance at oral argument. The former rule dealt more broadly with failures to "prosecute" in general, presumably including non-appearance at the hearing set for oral argument.

Subdivision (d) carries forward in restated form but without substantive change the provisions of former Sup. Ct. R. 10.

RULE 31

PETITION FOR REHEARING

(a) **Time for Filing: Content.** A petition for rehearing may be filed in a civil action within 20 days after the mandate of the court has been issued. The petition shall state with particularity the points of fact or law which, in the opinion of the petitioner, the court has overlooked or misapprehended, and shall contain such argument in support of the petition as the petitioner desires to present. It shall be accompanied by a certificate of at least two attorneys who, for periods of at least five years respectively, shall have been members of the bar of this State and who have no interest in the subject of the action and have not been of counsel for any party to the action, that they have carefully examined the appeal and the authorities cited in the decision, and that they consider the decision in error on points specifically and concisely identified. Oral argument in support of the petition will not be permitted.

(b) **How Addressed; Filed.** A petition to the Supreme Court shall be addressed to the court. Two copies thereof shall be filed with the clerk.

A petition to the Court of Appeals shall be addressed to the court. Two copies thereof shall be filed with the clerk.

(c) **How Determined.** Within 30 days after the petition is filed, the court will either grant or deny the petition. Determination to grant or deny will be made solely upon the written petition; no written response will be received from the opposing party; and no oral argument by any party will be heard. Determination by the court is final. The rehearing may be granted as to all or

less than all points suggested in the petition. When the petition is denied the clerk shall forthwith notify all parties.

(d) **Procedure When Granted.** Upon grant of the petition the clerk shall forthwith notify the parties that the petition has been granted, and if the court has ordered oral argument, shall give notice of the time set therefor, which time shall be not less than 30 days from the date of such notice. The case will be reconsidered solely upon the record on appeal, the petition to rehear, and new briefs of both parties, and the oral argument if one has been ordered by the court. The briefs shall be addressed solely to the points specified in the order granting the petition to rehear. The petitioner's brief shall be filed within 10 days after the clerk has given notice of the grant of the petition; and the opposing party's brief, within 20 days after petitioner's brief is served upon him. Filing and service of the new briefs shall be in accordance with the requirements of Rule 13.

(e) **Stay of Execution.** When a petition for rehearing is filed, the petitioner may obtain a stay of execution in the trial court to which the mandate of the appellate court has been issued. The procedure is as provided for stays pending appeal by Rule 8 of these rules.

(f) **Waiver by Appeal from Court of Appeals.** The timely filing of a notice of appeal from, or of a petition for discretionary review of, a determination of the Court of Appeals constitutes a waiver of any right thereafter to petition the Court of Appeals for rehearing as to such determination or, if a petition for rehearing has earlier been filed, an abandonment of such petition.

(g) **No Petition in Criminal Cases.** The courts will not entertain petitions for rehearing in criminal actions.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 44.

Commentary.

General. Traditional practice in this relatively seldom invoked procedure has been fairly complex and burdensome, featuring the requirement that a petition to be considered at all must be supported by the certificates of two disinterested attorneys that each considers the court's decision in error, and the direction of the petition to specific (non-dissenting) members of the court rather than to the court itself, with these members then acting for the court in respect of the grant or denial of the petition. The first of these features is retained in this new rule; the latter is completely changed.

Subdivision (a) shortens the time for filing a petition from 40 days under former Sup. Ct. R. 44(1) to 20 days. It carries forward, in restated form but unchanged in substance, the provisions as to content and the attorney certificate requirement of former Sup. Ct. R. 44(2).

Subdivision (b) involves a complete change from the former practice by which the petition was addressed to specific members of the court who then determined for the court, and without further recourse to the court, whether the rehearing should be allowed. Under this subdivision (b) the petition is directed to the appropriate court. The manner in which the court will then determine whether to grant the rehearing is not spelled out and is left to administrative determination of the particular court.

Subdivision (c) accommodates to the new provision for court determination of the petition rather than specific member determination which is embodied in subdivision (b). The time for determination by the court after filing of the petition is the same 30 days provided in former Sup. Ct. R. 44(4) for determination by the court members to whom the petition was directed after it was delivered to them. The second sentence restates more explicitly the provisions in former Sup. Ct. R. 44(1),(5) for determination to grant or deny the petition solely on the basis of the petition, without oral argument or response from the other party. The provisions for allowance as to less than all points prayed is carried forward in restated form from former Sup. Ct. R. 44.

Subdivision (d) carries forward, in restated form but unchanged in substance, the provisions of former Sup. Ct. R. 44(5) as to the matter to be considered by the court if rehearing is allowed, including the provision that oral argument will only be permitted by order of court. The provision for setting a time for oral argument if one is ordered is new. The times provided in the new rule for filing new briefs when rehearing is allowed is unchanged as to the petitioner (10 days from notice of grant) but changed as to the opposing party (from 20 days after grant of petition to 20 days after service upon him of petitioner's brief) from the provisions of former Sup. Ct. R. 44(5).

Subdivision (e) substantially changes the procedure for obtaining stay of execution of the trial court judgment upon filing of a petition for rehearing from that provided in former Sup. Ct. R. 44(7). Under the new rule, this is done at the trial court level pursuant to the provisions of App. R. 8, rather than by the Court members who under former Sup. Ct. R. 44 considered the petition.

Subdivision (f) is new, having no counterpart in former rules. It operates reciprocally with provisions of App. R. 14(a) and App. R. 15(b), which provide that the filing of a timely petition for rehearing tolls the running of the time to give notice of appeal or to petition for discretionary review from a Court of Appeals determination. The time for petitioning for rehearing is 20 days from issuance of mandate; that for giving notice of appeal or petitioning for discretionary review is 15 days from the same date. This means that if a party is to keep alive options for both rehearing and appellate review of Court of Appeals determinations, he must within the 15 days allowed to appeal or petition for discretionary review file a petition for rehearing. He loses any opportunity for possible rehearing if

within the time given for appeal or discretionary review petition he takes either of the latter actions. His option to petition for rehearing, however, will continue to exist for 5 days after expiration of the time within which he might have appealed or petitioned for discretionary review if he failed or chose not to do either during that time.

RULE 32

MANDATES OF THE COURTS

(a) **In General.** Unless a court of the appellate division directs that a formal mandate shall issue, the mandate of the court consists of certified copies of its judgment and of its opinion and any direction of its clerk as to costs. The mandate is issued by its transmittal from the clerk of the issuing court to the clerk or comparable officer of the tribunal from which appeal was taken to the issuing court.

(b) **Time of Issuance.** Unless a court orders otherwise, its clerk shall issue the mandate of the court twenty days after the written opinion of the court has been filed with the clerk.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 38.

Commentary:

Subdivision (a) builds upon former Sup. Ct. R. 38, but with some alteration of the terminology traditionally employed to describe the formal action by which an appellate court's determination of an appeal is made operative. This action is most accurately described as being the issuance of the court's *mandate* to the court from which appeal was taken. The former rule, above cited, spoke of transmitting "certificates of the decisions" of the court or, alternatively, of ordering "an opinion certified down," and in general usage the court's action has come to be referred to as "certifying decisions" or "opinions." But the court itself has employed the more accurate and comprehensive terminology when called upon to analyze and interpret the significance of the action in a particular situation. See, e.g. the opinion in *D & W, Inc. v. City of Charlotte,* 268 N.C. 720 (1966). This rule employs the terminology here suggested as the more accurate. The mandate *includes,* but is not solely a certified copy of the court's opinion or judgment. And in some cases, it may take the form of a direct order to the trial tribunal, as in *D & W v. City of Charlotte, supra;* or *Collins v. Simms,* 257 N.C. 1 (1962) (exact text of judgment mandated).

Subdivision (b). The time of issuance of a mandate has importance under these rules as the reference point for taking appeal of right from the Court of Appeals to the Supreme Court (App. R. 14(a)); for petitioning the Supreme Court to certify a Court of Appeals decision for discre-

tionary review (App. R. 15(b)); and for petitioning either appellate court for rehearing (App. R. 31(a)). Accordingly it is important for counsel to be alerted to the ordinary course indicated in subdivision (b) by which issuance occurs 20 days after filing of the court's opinion with its clerk.

RULE 33

ATTORNEYS

(a) **Appearances.** An attorney will not be recognized as appearing in any case unless he is entered as counsel of record therein. The signature of an attorney on a record on appeal, motion, brief, or other document permitted by these rules to be filed in a court of the appellate division constitutes entry of the attorney as counsel of record for the parties designated and a certification that he represents such parties. The signature of a member or associate in a firm's name constitutes entry of the firm as counsel of record for the parties designated. Counsel of record may not withdraw from a case except by leave of court. Only those counsel of record who have personally signed the brief prior to oral argument may be heard in oral argument.

(b) **Agreements.** Only those agreements of counsel which appear in the record on appeal or which are filed in the court where an appeal is docketed will be recognized by that court.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. RR. 32, 33.

Commentary.

Subdivision (a) restates, in an attempt at clarification, the provisions of former Sup. Ct. R. 33.

Subdivision (b) restates, with only minor variation and no change of substance, the provisions of former Sup. Ct. R. 32.

RULE 34

FRIVOLOUS APPEALS; COSTS

If a court of the appellate division determines that an appeal has been taken frivolously and for purposes of delay, it may be dismissed at the cost of the appellant upon motion of the appellee or upon the court's own initiative.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 17(1).

Commentary.

This rule carries forward, in restated form but without change of substance, the provisions of former Sup. Ct. R. 17(1).

RULE 35

COSTS

(a) **To Whom Allowed.** Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered by the court; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed in part, reversed in part, or modified in any way, costs shall be allowed as directed by the court.

(b) **Direction as to Costs in Mandate.** The clerk shall include in the mandate of the court an itemized statement of costs taxed in the appellate court and designate the party against whom taxed.

(c) **Costs of Appeal Taxable in Trial Tribunals.** Any costs of an appeal which are assessable in the trial tribunal shall upon receipt of the mandate be taxed as directed therein, and may be collected by execution of the trial tribunal.

(d) **Execution to Collect Costs in Appellate Courts.** Costs taxed in the courts of the appellate division may be made the subject of execution issuing from the court where taxed. Such execution may be directed by the clerk of the court to the proper officers of any county of the State; may be issued at any time after the mandate of the court has been issued; and may be made returnable on any day named. Any officer to whom such execution is directed is amenable to the penalties prescribed by law for failure to make due and proper return.

Drafting Committee Note

Sources and parallels in former rules and statutes: Subd. (a)-(c): None. Subd. (d): Sup. Ct. R. 43(2).

Commentary.

General. Former rules did not speak directly to standards or procedures by which the appellate courts should tax costs of appeal which by law were properly assessable by these courts. By statute, G.S. § 7A-11 (Supreme Court) and 7A-20(b) (Court of Appeals) both appellate courts have the authority to fix by rule the fees to be assessed against litigants for costs incurred in those courts. This is done by separate special rule outside the scope of these Rules.

Subdivision (a) lays down the basic standard by which, following traditional practice, those costs properly assessable by the appellate court are taxed to the losing party.

Subdivision (b) repeats a provision also included in App. R. 32(a) "Mandates of the Courts."

Subdivision (c) takes into account the fact that some costs of appeal are assessable in the trial court, and can only be assessed after the final determination on appeal of the losing party who is to bear them. See G.S. § 6-33, 7A-304(b), 7A-305(d)(5).

Subdivision (d) builds on former Sup. Ct. R. 43(2) in providing for direct execution to collect costs taxed by the appellate courts.

RULE 36

TRIAL JUDGES AUTHORIZED TO ENTER ORDERS UNDER THESE RULES

(a) **When Particular Judge Not Specified by Rule.** When by these rules a trial court or a judge thereof is permitted or required to enter an order or to take some other judicial action with respect to a pending appeal and the rule does not specify the particular judge with authority to do so, the following judges of the respective courts have such authority with respect to causes docketed in their respective divisions:

(1) Superior court: the judge who entered the judgment, order, or other determination from which appeal was taken, and any regular or special judge resident in the district or assigned to hold courts in the district wherein the cause is docketed;

(2) District court: the judge who entered the judgment, order, or other determination from which appeal was taken; the chief district judge of the district wherein the cause is docketed;

and any judge designated by such chief district judge to enter interlocutory orders under G.S. § 7A-192.

(b) **Upon Death, Incapacity, or Absence of Particular Judge Authorized.** When by these rules the authority to enter an order or to take other judicial action is limited to a particular judge and that judge is unavailable for the purpose by reason of death, mental or physical incapacity, or absence from the state, the Chief Justice will upon motion of any party designate another judge to act in the matter. Such designation will be by order entered ex parte, copies of which will be mailed forthwith by the Clerk of the Supreme Court to the judge designated and to all parties.

Drafting Committee Note

Sources and parallels in former rules and statutes: None.

Commentary.

Subdivision (a). The only judicial action which under these Rules must be taken by a "particular" judge is that of settling the record on appeal. Per G.S. § 1-283 and App. R. 11(c), only the judge from whose judgment appeal is taken may settle the record. All other judicial actions permitted to be taken by trial judges under these rules, including dismissals for failure to perfect appeals under App. R. 25, and extensions of time to take action under App. R. 27(c), come under the provisions of this subdivision. This involves a change from former practice which permitted only the "trial judge" to extend the time within which "case on appeal" (now "proposed record on appeal") might be served.

Subdivision (b) is complementary to newly re-written G.S. § 1-283 which provides for the continued authority of the only judge authorized to settle a record on appeal despite the expiration of his term after appeal has been taken from his judgment.

RULE 37

MOTIONS IN APPELLATE COURTS

(a) **Time; Content of Motions; Response.** An application to a court of the appellate division for an order or for other relief available under these rules may be made by filing a motion for such order or other relief with the clerk of the court, with service on all other parties. Unless another time is expressly provided by these rules, the motion may be filed and served at any time before the case is called for oral argument. The motion shall contain or be accompanied by any matter required by a

specific provision of these rules governing such a motion and shall state with particularity the grounds on which it is based and the order or relief sought. If a motion is supported by affidavits, briefs, or other papers, these shall be served and filed with the motion. Within 10 days after a motion is served upon him or until the appeal is called for oral argument, whichever period is shorter, a party may file and serve copies of a response in opposition to the motion, which may be supported by affidavits, briefs, or other papers in the same manner as motions. The court may shorten or extend the time for responding to any motion.

(b) **Determination.** Notwithstanding the provisions of Rule 37(a), a motion may be acted upon at any time, despite the absence of notice to all parties, and without awaiting a response thereto. A party who has not received actual notice of such a motion or who has not filed a response at the time such action is taken, and who is adversely affected by the action may request reconsideration, vacation or modification thereof. Motions will be determined without argument, unless the court orders otherwise.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 36.

Commentary.

General. Motion practice in the appellate division is fairly limited. It extends to such matters as obtaining dismissals under App. R. 25; extensions of time under App. R. 27(c); peremptory settings for oral argument under App. R. 29(b); modification in the times allocated for oral argument under App. R. 30(b); additions or amendments to the record on appeal under App. R. 9(b)(6); and substitution of parties under App. R. 38. This Rule 37 builds upon and expands the rudimentary directions for motion practice found in former Sup. Ct. R. 36.

Subdivision (a) carries forward from former Sup. Ct. R. 36 the point that motions may be made down to the very time of oral argument, unless a specific time limit applies to the particular motion. This necessitates the provision in the penultimate sentence of this subdivision which accommodates to the possibility that a motion may be filed within 10 days of argument so that the normal response time of 10 days cannot be given.

Subdivision (b) contains an accommodation to the occasional emergency situation requiring ex parte relief, or possibly to a situation created by extremely late filing of motion so that it is impracticable to await reponse if effective relief is to be given. The protection given the adverse party in such a situation by the penultimate sentence is like that available to parties subjected ex parte to t.r.o.'s who may move to dissolve. Given the modest forms of relief which may be obtained by motion practice in the appellate

division, all interests are thought adequately protected by this provision. The last sentence, providing that determination is ordinarily without oral argument, is new.

RULE 38

SUBSTITUTION OF PARTIES

(a) **Death of a Party.** No action abates by reason of the death of a party while an appeal may be taken or is pending, if the cause of action survives. If a party acting in an individual capacity dies after appeal is taken from any tribunal, the personal representative of the deceased party in a personal action, or the successor in interest of the deceased party in a real action may be substituted as a party on motion filed by the representative or the successor in interest or by any other party with the clerk of the court in which the action is then docketed. A motion to substitute made by a party shall be served upon the personal representative or successor in interest in addition to all other parties. If such a deceased party in a personal action has no personal representative, any party may in writing notify the court of the death, and the court in which the action is then docketed shall direct the proceedings to be had in order to substitute a personal representative.

If a party against whom an appeal may be taken dies after entry of a judgment or order but before appeal is taken, any party entitled to appeal therefrom may proceed as appellant as if death had not occurred; and after appeal is taken, substitution may then be effected in accordance with this subdivision. If a party entitled to appeal dies before filing a notice of appeal, appeal may be taken by his personal representative, or, if he has no personal representative, by his attorney of record within the time and in the manner prescribed in these rules; and after appeal is taken, substitution may then be effected in accordance with this rule.

(b) **Substitution for Other Causes.** If substitution of a party to an appeal is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a).

(c) **Public Officers; Death or Separation from Office.** When a person is a party to an appeal in an official or representative

capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Prior to the qualification of a successor, the attorney of record for the former party may take any action required by these rules to be taken. An order of substitution may be made, but neither failure to enter such an order nor any misnomer in the name of a substituted party shall affect the substitution unless it be shown that the same affected the substantial rights of a party.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 37.

Commentary.

General. This rule deals with the situation created by the loss of legal capacity of a party by death or other occurrence at those stages of litigation after an appealable order or judgment has been entered for or against the erstwhile party. Former Sup. Ct. R. 37 dealt in limited fashion with the situation under the title "Abatement and Revivor." This treated only the death possibility. This new rule attempts to deal more clearly with the total situation.

Subdivision (a) deals only with the situation created by *death* of a party acting in an *individual* (as opposed to official) capacity. Substitution for such a party for other reasons than death is treated in subd. (b). The problem of substitution for parties acting in *official* capacities is treated in subd. (c). After stating the basic non-abatement principle in its lead sentence, subdivision (a) then deals successively with the different situations created by death of parties in two distinct time intervals. The first is treated in the first paragraph and is that interval between the taking of appeal and its final disposition. The distinction made as to the proper persons to be substituted depending upon whether the action is "real" or "personal" is dictated by such cases as *Paschal v. Autry*, 256 N.C. 166 (1962), which hold in a variety of contexts that in real actions the cause passes to successors in interest, not personal representatives, so that judgments only against the latter would not bind the former. The substitution procedure described applies whether the deceased party was appellant or appellee. The last sentence of the first paragraph accommodates to the possibility that in a personal action, where the personal representative is the proper substitute party, none has been appointed. Here the opposing party, whether appellee or appellant, may invoke court intervention to provide a proper substitute. This provision is particularly necessary for appellants whose appeals simply cannot proceed until proper substitution for their deceased adversary is made.

The second paragraph deals with another possible time interval, and one which poses quite different problems. This is the time period after appealable judgment is entered but before appeal has been taken. Here it is necessary to differentiate between the deaths of potential appellants and of potential appellees. The first sentence deals with the death in this inter-

val of a potential appellee. Here the aggrieved party may simply proceed to take appeal within the time limited, without first obtaining substitution. Under our procedure this problem could be posed (except in the most exceptional circumstance) only where the appellant had not taken appeal by oral notice, i.e. when he must both file and serve notice of appeal upon all other parties. This rule does not speak directly to the problem of affecting service in this situation upon the now deceased adverse party. A proper solution would seem to be to serve the party's attorney of record under App. R. 26(c), or if the action is a real action wherein successors in interest are readily ascertainable, upon them as the prospective substitute parties. After appeal has been taken, substitution as described for the post-appeal interval must then be made. The other possibility, of death of the potential appellant during this interval, is handled by authorizing his attorney of record to take appeal, with substitution to follow. (The alternative of appeal by personal representative is unlikely to be available in view of the 10-day limit on taking appeal, but could of course be realized.)

Subdivision (b) simply borrows the procedures of subdivision (a) for substitution necessitated by any other cause than death of a party acting in an individual capacity.

Subdivision (c) is new, with no counterpart in former rules.

RULE 39

DUTIES OF CLERKS; WHEN OFFICES OPEN

(a) **General Provisions.** The clerks of the courts of the appellate division shall take the oaths and give the bonds required by law. The courts shall be deemed always open for the purpose of filing any proper paper and of making motions and issuing orders. The offices of the clerks with the clerks or deputies in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but the respective courts may provide by order that the offices of their clerks shall be open for specified hours on Saturdays or on particular legal holidays or shall be closed on particular business days.

(b) **Clerk's Docket Book, Judgment Docket and Minute Book.** There shall be maintained in the offices of the clerks of each of the courts of the appellate division (i) a docket book, (ii) a judgment docket, and (iii) a minute book.

(i) In the docket book the clerk shall enter all appeals, motions, petitions, and orders docketed or entered in the court.

(ii) In the judgment docket the clerk shall enter a brief memorandum of every final judgment or order of the court,

show the party against whom costs are adjudicated, and identify each case by its title and its number in the docket book. The judgment docket shall be indexed and cross-indexed in alphabetical order to the names of all parties.

(iii) In the minute book the clerk shall enter a brief summary of the proceedings of the court in each appeal disposed of and a brief summary of all sittings and ceremonies of the court.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 39.

Commentary.

This rule is devoted to a description of those internal administrative and clerical operations of the clerk's offices in the appellate division which it is considered should be known to counsel in their conduct of appellate practice.

RULE 40

CONSOLIDATION OF ACTIONS ON APPEAL

Two or more actions which involve common questions of law may be consolidated for hearing upon motion of a party to any of the actions made to the appellate court wherein all are docketed, or upon the initiative of that court. Actions so consolidated will be calendared and heard as a single case. Upon consolidation, the parties may set the course of argument, within the times permitted by App. R. 30(b), by written agreement filed with the court prior to oral argument. This agreement shall control unless modified by the court.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 14.

Commentary. This carries forward in restated form the provisions of former Sup. Ct. R. 14. That rule made no specific mention of the possibility that consolidation might be on either party or court initiative, but this was certainly implied. This new rule makes more specific the general provision in the former rule regarding the role of parties and court respectively in setting the "course of argument." The provisions of App. R. 30(b) are obviously available to parties in consolidated appeals to move for enlargement of the basic times therein allocated as totals for each "side."

RULE 41

TITLE

The title of these rules is "North Carolina Rules of Appellate Procedure." They may be so cited either in general references or in reference to particular rules. In reference to particular rules the abbreviated form of citation, "App. R. ____," is also appropriate.

APPENDIX OF TABLES AND FORMS

TABLE I

SUGGESTED ORDER OF ARRANGEMENT OF RECORD ON APPEAL IN CIVIL JURY CASE (per Rule 9(b) (4))

Note

Only those items below listed which are required by Rule 9(b) (1) in the particular case should be included. See Rule 9(b) (5) for sanctions against including unnecessary items. The case number is desired in item 1. to expedite identification.

1. Title of action (all parties named) and case number
2. Index, per Rule 9(b) (1) (i)
3. Statement of organization of trial tribunal, per Rule 9(b) (1) (ii)
4. Statement of record items showing jurisdiction, per Rule 9(b) (1) (iii)
5. Complaint
6. Pre-answer motions of defendant, with rulings thereon
7. Answer
8. Motion for summary judgment, with rulings thereon
9. Pre-trial order
10. Plaintiff's evidence, with any evidentiary rulings assigned as error
11. Motion for directed verdict, with ruling thereon
12. Defendant's evidence, with any evidentiary rulings assigned as error
13. Plaintiff's rebuttal evidence, with any evidentiary rulings assigned as error
14. Issues tendered by parties
15. Issues submitted by court
16. Court's instructions to jury, per Rule 9(b) (1) (vi)
17. Verdict
18. Motions after verdict, with rulings thereon
19. Judgment

20. Appeal entries, per Rule 9(b)(1)(ix)
21. Assignments of error, with pertinent exceptions, per Rule 10
22. Entries showing settlement of record on appeal
23. Clerk's certification of record on appeal
24. Names, office addresses, and telephone numbers of counsel for all parties to appeal

TABLE II

SUGGESTED ORDER OF ARRANGEMENT OF RECORD ON APPEAL IN APPEAL FROM SUPERIOR COURT REVIEW OF ADMINISTRATIVE AGENCY

Note

Only those items below listed which are required by Rule 9(b)(2) in the particular case should be listed. See Rule 9(b)(5) for sanctions against including unnecessary items. The case number is desired in item 1. to expedite identification.

1. Title of action (all parties named) and case number
2. Index, per Rule 9(b)(2)(i)
3. Statement of organization of superior court, per Rule 9(b)(2)(ii)
4. Statement of record items showing jurisdiction of the board or agency, per Rule 9(b)(2)(iii)
5. Copy of petition or other initiating pleading
6. Copy of answer or other responsive pleading
7. Copies of all items from administrative proceeding filed for review in superior court, including evidence
8. Evidence taken in superior court, in order received
9. Copies of findings of fact, conclusions of law, and judgment of superior court
10. Appeal entries, per Rule 9(b)(2)(viii)
11. Assignments of error, with pertinent exceptions, per Rule 9(b)(2)(ix)

12. Entries showing settlement of record on appeal
13. Clerk's certification of record on appeal
14. Names, office addresses, and telephone numbers of counsel for all parties to appeal

TABLE III

SUGGESTED ORDER OF ARRANGEMENT OF RECORD ON APPEAL IN CRIMINAL CASE (per Rule 9(b)(4))

Note

Only those items below listed which are required by Rule 9(b)(3) in the particular case should be included. See Rule 9(b)(5) for sanctions against including unnecessary items. This listing is based on successive trials in both the District Court and the Superior Court, but is of course adaptable to trial only in the Superior Court by exclusion of the items indicated by an *. The case number is desired in item 1. to expedite identification.

1. Title of action (all parties named) and case number
2. Index, per Rule 9(b)(3)(i)
3. Statement of organization of trial tribunal, per Rule 9(b)(3)(ii)
4. Warrant
5. Judgment in district court*
6. Entries showing appeal to superior court*
7. Bill of indictment (if not tried on original warrant)
8. Arraignment and plea in superior court
9. State's evidence, with any evidentiary rulings assigned as error
10. Motions at close of state's evidence, with rulings thereon
11. Defendant's evidence, with any evidentiary rulings assigned as error
12. Motions at close of defendant's evidence, with rulings thereon

13. State's rebuttal evidence, with any evidentiary rulings assigned as error
14. Motions at close of all evidence, with rulings thereon
15. Court's instructions to jury, per Rules 9(b)(3)(vi), 10(b)(2)
16. Verdict
17. Motions after verdict, with rulings thereon
18. Judgment and order of commitment
19. Appeal entries
20. Assignments of error, with pertinent exceptions, per Rule 10
21. Entries showing settlement of record on appeal
22. Clerk's certification of record on appeal
23. Names, office addresses and telephone numbers of counsel for all parties to appeal

TABLE IV

TIMETABLE FOR APPEALS FROM SUPERIOR AND DISTRICT COURTS UNDER ARTICLE II

Note

All of the critical time intervals here outlined except that for taking appeal may be extended by order of the court. The time for filing record on appeal may be extended past 150 days from the date of taking appeal only by order of the appropriate appellate court. All other times may be extended by the court wherein the appeal is docketed at the time. App. R. 27(c). This timetable does not cover appeals under Articles III (within appellate division) and IV (direct review of administrative agencies).

Action	*Time (Days)*	*From Date of*	*Rule Reference*
Taking Appeal (civil)	10	entry of judgment (unless tolled)	3(c)

Action	*Time (Days)*	*From Date of*	*Rule Reference*
Taking Appeal (criminal)	10	Last day of session (unless tolled)	4(a) (2)
Filing and serving proposed record on appeal	30	Taking appeal	11(b)
Filing and serving objections or proposed alternative record	15	Service of proposed record	11(c)
Requesting judicial settlement of record	10	Last day within which last appellee served could file objections, etc.	11(c)
Settlement of record by judge	15	Receipt by judge of request for settlement	11(c)
Certification of record by clerk	10	Record on appeal settled	11(e)
Filing record on appeal in appellate court	10	Certification by clerk *(but not more than 150 days from taking appeal)*	12(a)
Filing appellant's brief	20	Docketing appeal	12(b), 13(a)
Filing appellee's brief	20	Service of appellant's brief	13(a)
Oral argument	30 (usual minimum)	Filing appellant's brief	29

FORM 1

NOTICE OF APPEAL TO THE COURT OF APPEALS FROM A JUDGMENT OR ORDER OF A SUPERIOR COURT OR A DISTRICT COURT

Note

Appropriate in all appeals of right from district or superior courts, except appeals from criminal judgments imposing sentences of death or of imprisonment for life. G.S. § 7A-27.

NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE

..... COUNTY — ..... COURT DIVISION

A. B., PLAINTIFF

V.

C. D., DEFENDANT

_____ (trial court case number)

NOTICE OF APPEAL

(or)

THE STATE OF NORTH CAROLINA

V.

C. D., DEFENDANT

Defendant C.D. gives notice of appeal to the Court of Appeals of North Carolina (from the final judgment) (from the order) (describing it).

(S) .....

....., 19.....

.....
(address)

Attorney for C.D., Defendant

FORM 2

NOTICE OF APPEAL TO THE SUPREME COURT FROM A JUDGMENT OF THE SUPERIOR COURT WHICH INCLUDES A SENTENCE OF DEATH OR IMPRISONMENT FOR LIFE

(Caption as in Form 1)

THE STATE OF NORTH CAROLINA

V.

A. B., DEFENDANT

_____
(trial court case number)

NOTICE OF APPEAL

Defendant A.B. gives notice of appeal to the Supreme Court of North Carolina from the judgment (describing it).

(S) _____

_____, 19____.

_____
(address)

Attorney for A.B., Defendant

FORM 3

NOTICE OF APPEAL TO THE SUPREME COURT FROM A JUDGMENT OF THE COURT OF APPEALS

Note

Appropriate in all appeals taken as of right from the Court of Appeals to the Supreme Court under G.S. § 7A-30. To take account of the possibility that the Supreme Court may determine that the appeal does not lie of right, an alternative petition for discretionary review by certification may be included at the option of the party appealing. It may also be filed separately. See Form 4.

GENERAL COURT OF JUSTICE
STATE OF NORTH CAROLINA
IN THE COURT OF APPEALS

A. B., PLAINTIFF

V.

C. D., DEFENDANT

(Court of Appeals case number)

NOTICE OF APPEAL

(or)

THE STATE OF NORTH CAROLINA

V.

C. D., DEFENDANT

C.D., defendant, hereby appeals to the Supreme Court of North Carolina from the judgment of the Court of Appeals (describing it) which judgment (directly involves (a) substantial question(s) arising under Article ....., Section ..... of the Constitution of the (United States) (State of North Carolina), in that it violates rights secured thereunder to the appellant by (here set out with particularity the way in which it is contended the constitutional rights have been violated)); or (was rendered with a dissent by Judge .....); or (was entered upon review of a decision of the North Carolina Utilities Commission in a general rate-making case).

(S) .....

....., 19.....

.....
(address)

Attorney for C.D., Defendant

FORM 4

PETITION TO SUPREME COURT FOR DISCRETIONARY REVIEW OF COURT OF APPEALS JUDGMENT UNDER G.S. § 7A-31

Note

For filing either alone or as a separate paper in conjunction with a notice of appeal to the Supreme Court when the appellant considers that

such appeal lies of right under G.S. § 7A-30, but desires to have the Court consider discretionary review should it determine that appeal does not lie of right in the particular case. The petition for discretionary review may also be included as an alternative within the Notice of Appeal. App. R. 14(a).

(Caption as in Form 3)

A. B., PLAINTIFF

V.

C. D., DEFENDANT

(or)

THE STATE OF NORTH CAROLINA

V.

C. D., DEFENDANT

(Court of Appeals case number)

PETITION FOR DISCRETIONARY REVIEW UNDER G.S. § 7A-31

C.D., defendant, hereby petitions the Supreme Court of North Carolina that the Court certify for discretionary review the judgment of the Court of Appeals [describing it] on the basis that [here set out the facts relied upon as constituting the grounds for discretionary review provided in G.S. § 7A-31].

(S) .....

....., 19....

.....
(address)

Attorney for C.D., Defendant

FORM 5

APPEAL ENTRIES

Note

Appropriate as a ready means of providing in composite form for the record on appeal: 1) the entry required by App. Rule 9(b) showing appeal duly taken by oral notice under App. Rule 3(a)(1) or 4 (a) (1); 2)

judicial approval of the undertaking on appeal required by App. Rules 6 or 7; and 3) the entry required by App. Rule 9(b) showing any judicial extension of time for serving proposed record on appeal under App. Rule 27(c). These entries of record may also be made separately. Where appeal is taken by filing and serving written notice, a copy of the notice with filing date and proof of service is appropriate as the record entry required. Per Tables I, II, and III in the Appendix of Tables and Forms, such "appeal entries" are appropriately included in the record on appeal following the judgment from which appeal is taken. The judge's signature, while not technically required, is traditional, and serves as authentication of the substance of the entries.

Defendant gave due notice of appeal to the Court of Appeals. Appeal bond in the sum of $ ..... adjudged to be sufficient. Defendant is allowed ..... days in which to serve proposed record on appeal, and plaintiff is allowed ..... days thereafter within which to serve objections or a proposed alternative record on appeal.

This ..... day of ....., 19.....

(S) .....
Judge Presiding

FORM 6

EXCEPTIONS SET OUT IN RECORD ON APPEAL

A. Examples related to evidentiary rulings

1. Evidence admitted

Q. Did you hear D. call a name?

A. Yes.

Q. Whose name did he call?

Objection.

Objection overruled.

Exception No. 7.

A. The name of E. F.

2. Evidence excluded

Q. Did you hear D call a name?

A. Yes.

Q. Whose name did he call?

Objection.

Objection sustained.

(Witness would have testified: "The name of E. F.")

Exception No. 8.

B. To ruling on motion for directed verdict

At the close of all the evidence the defendant renewed his motion for directed verdict on the stated grounds that the plaintiff's evidence established as a matter of law his contributory negligence.

Motion denied.

Exception No. 9.

C. To refusal of court to submit issue tendered by defendant

Issues tendered by the defendant:

• • •

2. If so, did the plaintiff by his own negligence contribute to his injuries, as alleged in the answer?

. . .

The court refused to submit issue No. 2.

Exception No. 10.

D. **Examples related to judge's instructions to jury**

1. **Instruction erroneously given**

[Enclose in brackets portion of instructions to which exception is directed, followed by entry:]

Exception No. 11.

2. **Law not explained, as required by N.C.R.Civ.P. 51**

[Entry to be made at end of instructions given by court:]

The court failed to instruct the jury on the doctrine of last clear chance.

Exception No. 12.

3. **Law not applied to evidence, as required by N.C.R.Civ.P. 51**

[Entry to be made at end of instructions given by court.]

The court failed in instructing the jury to apply the doctrine of last clear chance to plaintiff's evidence, Record pp. 80-90.

Exception No. 13.

FORM 7

ASSIGNMENTS OF ERROR

A. **Examples related to pre-trial rulings in civil action**

Defendant assigns as error:

1. The court's denial of defendant's motion under N.C.R.Civ. P. 12(b)(2) to dismiss for lack of jurisdiction over the person of the defendant, on the grounds [that the uncontested affidavits in support of the motion show that no

grounds for jurisdiction existed] [or other appropriately stated grounds].

Exception No. 1, R p. 4.

2. The court's denial of defendant's motion under N.C.R.Civ. P. 12(b)(6) to dismiss for failure of the complaint to state a claim upon which relief can be granted, on the grounds that the complaint affirmatively shows that the plaintiff's own negligence contributed to any injuries sustained.

Exception No. 2, R p. 7.

3. The court's denial of defendant's motion requiring the plaintiff to submit to physical examination under N.C.R. Civ.P. 35, on the grounds that on the record before the court, good cause for the examination was shown.

Exception No. 3, R p. 10.

4. The court's denial of defendant's motion for summary judgment; on the grounds that there was no genuine issue of fact that the statute of limitations had run and defendant was therefore entitled to judgment as a matter of law.

Exception No. 4, R p. 15.

B. **Examples related to civil jury trial rulings**

Defendant assigns as error the following:

1. The court's admission of the testimony of the witness E. F. R pp. 29, 30; on the grounds that the testimony was hearsay.

Exception No. 7, R p. 29.

Exception No. 8, R p. 30.

2. The court's denial of the defendant's motion for directed verdict at the conclusion of all the evidence; on the grounds that plaintiff's evidence as a matter of law established his contributory negligence.

Exception No. 8, R p. 45.

3. The court's instructions to the jury, R pp. 50-51, explaining the doctrine of last clear chance; on the grounds that the doctrine was not correctly explained.

Exception No. 10, R p. 51.

4. The court's instructions to the jury, R pp. 53-54, applying the doctrine of sudden emergency to the evidence; on the grounds that the evidence referred to by the court did not support application of the doctrine.

   Exception No. 11, R p. 54.

5. The court's denial of defendant's motion for a new trial for newly discovered evidence; on the grounds that on the uncontested affidavits in support of the motion the court abused its discretion in denying the motion.

   Exception No. 9, R p. 80.

C. **Examples related to civil non-jury trial**

Defendant assigns as error:

1. The court's refusal to enter judgment of dismissal on the merits against plaintiff upon defendant's motion for dismissal made at the conclusion of plaintiff's evidence; on the grounds that plaintiff's evidence established as a matter of law that plaintiff's own negligence contributed to the injury.

   Exception No. 1, R p. 20.

2. The court's Finding of Fact No. 10; on the grounds that there was insufficient evidence to support it.

   Exception No. 2, R p. 25.

3. The court's Conclusion of Law No. 3; on the grounds that there are no findings of fact which support the conclusion that defendant had the last clear chance to avoid the collision alleged.

   Exception No. 3, R p. 27.

FORM 8

PETITION FOR WRIT OF CERTIORARI UNDER RULE 21

GENERAL COURT OF JUSTICE
STATE OF NORTH CAROLINA
IN THE COURT OF APPEALS

A. B., PLAINTIFF
V.
C. D., DEFENDANT

(trial tribunal case number)
PETITION FOR WRIT OF CERTIORARI

To the Honorable Court of Appeals of North Carolina:

A.B., plaintiff, respectfully petitions this Court to issue its writ of certiorari pursuant to Rule 21 of the N. C. Rules of Appellate Procedure to review the [judgment] [order] [decree] of the Honorable E. F., Judge of the Superior [District] Court, dated _____, 19__ [dismissing plaintiff's action] or [entered on a jury verdict for defendant] or [denying plaintiff's motion for physical examination of defendant] etc.; and in support of this petition shows the following:

Facts

[Here set out factual background necessary for understanding basis of petition: e.g., failure to perfect appeal by reason of circumstances constituting excusable neglect; nonappealability of right of an interlocutory order, etc.] [If circumstances are that transcript could not be procured from reporter, statement should include estimate of date of availability, and supporting affidavit from the Court Reporter.]

Reasons Why Writ Should Issue

[Here set out factual and legal argument to justify issuance of writ: e.g., reasons why interlocutory order makes it impractical for petitioner to proceed further in trial court; meritorious basis of petitioner's proposed assignments of error; etc.]

Attachments

Attached to this petition for consideration by the Court are certified copies of the [judgment] [order] [decree] sought

to be reviewed, and [here list any other certified items from the trial court record and any affidavits attached as pertinent to consideration of the petition.]

Wherefore, petitioner respectfully prays that this Court issue its writ of certiorari to the Superior Court of _____ County to permit review of the [judgment] [order] [decree] above specified, upon errors to be assigned by petitioner in a record on appeal constituted in accordance with the rules of this Court; and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted, _____, 19____.

_____
Attorney for Petitioner

(Verification by petitioner or counsel)

FORM 9

PETITION FOR WRIT OF SUPERSEDEAS UNDER RULE 23

GENERAL COURT OF JUSTICE
STATE OF NORTH CAROLINA
IN THE COURT OF APPEALS

A. B., PLAINTIFF
V.
C. D., DEFENDANT

_____
(trial court case number)

PETITION FOR WRIT OF SUPERSEDEAS

To the Honorable Court of Appeals of North Carolina:

C.D., defendant in the above-titled action, respectfully petitions this Court to issue its writ of supersedeas to stay [execution] [enforcement] of the [judgment] [order] [decree] of the Honorable E. F., Judge of the Superior [District] Court, dated _____, 19____, pending review by this Court of said [judgment] [order] [decree] which [awarded damages in the sum of _____] [enjoined defendant from proceeding with construction of a dwelling described in the decree] etc.; and in support of this petition shows the following:

Facts

[Here set out factual background necessary for understanding basis of petition and justifying its filing under Rule 23: e.g. trial judge has vacated the entry upon finding security deposited under G.S. § ..... inadequate; or that trial judge has refused to stay execution upon motion therefor by petitioner; or that circumstances make it impracticable to apply first to trial judge for stay, etc.; and showing that review of the trial court judgment is being sought by appeal or extraordinary writ.]

Reasons Why Writ Should Issue

[Here set out factual and legal argument for justice of issuing writ: e.g., that security deemed inadequate by trial judge is adequate under the circumstances; that irreparable harm will result to petitioner if he is required to obey decree pending its review; that petitioner has meritorious basis for seeking review, etc.]

Attachments

Attached to this petition for consideration by the court are certified copies of the [judgment] [order] [decree] sought to be stayed and [here list any other certified items from the trial court record and any affidavits deemed necessary to consideration of the petition].

Wherefore, petitioner respectfully prays that this Court issue its writ of supersedeas to the Superior [District] Court of ..... County staying [execution] [enforcement] of its [judgment] [order] [decree] above specified, pending issuance of the mandate of this Court following its review and determination of the [appeal now pending] [review by extraordinary writ] in the cause; and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted, ..., 19.....

.....
Attorney for Petitioner

(Verification by petitioner or counsel)

Note

Rule 23(e) provides that in conjunction with such a petition for supersedeas, either as a part of it, or separately, the petitioner may petition for a temporary stay of execution or enforcement pending the court's ruling on the petition for supersedeas. The following form is illustrative of such a petition for temporary stay order either included in the main petition as part of it or filed separately.

Petition for Temporary Stay

Petitioner applies to the Court for an order temporarily staying [execution] [enforcement] of the [judgment] [order] [decree] which is the subject of [this] [the accompanying] petition for writ of supersedeas, such order to be in effect until determination by this Court whether it shall issue its writ. In support of this application the petitioner shows that [here set out legal and factual argument for justice of such a temporary stay order: e.g., irreparable harm practically threatened if petitioner must obey decree of trial court during interval before decision by Court whether to issue writ of supersedeas].