
Guard What May Be the Key to Winning Your Appeal: The Record

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Because many cases survive after trial to live another day in court on appeal, trial attorneys fear and respect properly preserving the record for appeal. But appellate litigators pay utmost attention to the record itself—the record *on* appeal. A primary role of an appellate court is to look back at what happened in the trial court, so the record on appeal is one of the key ingredients of your appeal (along with very persuasive arguments, of course).

So, if you are involved in an appeal, take note of recent changes to the Rules of Appellate Procedure that apply to cases appealed on or after January 1, 2021. The Supreme Court made important changes to what is often the core of the record on appeal—the transcript—and changed the time limits for settling a record on appeal by agreement. [Note that, at the time of this writing, these changes do not yet appear in the bound volume of North Carolina Rules of Court 2021.]

Transcripts (Rule 7)

If you plan to include a transcript in the record on appeal, you will need to use one or both of the new forms available on the Supreme Court’s rules webpage.

- A party ordering a transcript *after* notice of appeal has been given or filed must complete the latest version of the Appellate Division Transcript Contract form, which must be served on each party and the transcriptionist:
 - by *appellants*, no later than 14 days after filing or giving notice of appeal, and

- by *appellees*, no later than 28 days after *any* appellant files or gives notice of appeal.
- Any party who has ordered a transcript, whether before or after notice of appeal, must complete the latest version of the Appellate Division Transcript Documentation form and serve it on all other parties in the same time frames described above for serving the transcript contract.
 - If a party intends to designate a transcript ordered *before* notice of appeal as part of the record on appeal, then that party must electronically serve a copy of it on all other parties during the record-settlement process.
- A party who is indigent and entitled to appointed appellate counsel is entitled to have the clerk of superior court order a transcript on that party's behalf. See Rule 7(c).
- The amended rule does not require the new forms to be filed in the trial court.

You'll also need to note changes in delivery and filing requirements for transcripts.

- When a transcript has been ordered *after* notice of appeal under a transcript contract, the transcriptionist must deliver the transcript to the requestor and each party identified in the contract, no later than 90 days after having been served with the transcript contract or the appellate entries.
 - There are different deadlines for transcript delivery in capitally tried cases, certain juvenile cases, and special proceedings on admission or discharge of clients. See Rule 7(e)(1).
- The transcriptionist must certify delivery to the parties and to the clerk of superior court.
- The appellant must electronically file each transcript that the parties have designated as part of the record on appeal, as soon as practicable after the appeal is docketed. An appellant may only avoid filing electronically if granted an exception for good cause.

Record on Appeal (Rules 11 and 12)

If you intend to settle your proposed record on appeal *by agreement*, the parties now have 45 days (70 days in capitally tried cases) to do so, from the time:

- all transcripts ordered under Rule 7 have been delivered, or
- the last notice of appeal is filed or given,
- whichever is later.
- Appellants are now encouraged to file all documents electronically if permitted to do so by the electronic-filing site.

As a side note, a very helpful resource focused on preserving the record *for* appeal (at the trial level) is the North Carolina Bar Association's on-demand CLE Preserving the Record for Appeal Panel, a session from a joint Appellate Practice and Litigation program in 2017, entitled "Harmonizing Trial and Appellate Procedure to Get Your Case Heard on Appeal." The panel discussed motions in limine, timely and effective objections, jury instructions, nonverbal information on the written record, and inviting error. The distinguished panel included Judge G. Bryan Collins, North Carolina Superior Court, Raleigh; Judge Richard D. Dietz, North Carolina Court of Appeals, Raleigh; and Kimmel McDiarmid, Official Court Reporter, State of North Carolina, Resident District 15-B, Pittsboro.

The information contained in this article is of a general nature and is not intended as, nor should it be relied upon for, legal advice. No action should be taken in reliance upon the information contained in this article without obtaining the advice of an attorney.

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