

FREQUENTLY ASKED QUESTIONS

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Court Files and Exhibits

1. The Superior Court clerk failed to send the complete court file. What do I do? Write a letter to the Clerk clearly identifying the document(s) you are missing and ask the Clerk to send the document(s) to you. If you do not receive a response in a reasonable amount of time (a week to ten days), call the Clerk to follow up on the status of your request.

2. I received the complete court file, but I did not get a copy of any exhibits. What do I do? Write a letter to the Clerk clearly identifying the exhibit(s) you are missing and asking the Clerk to send a copy of the exhibit(s) to you. If you do not receive a response in a reasonable amount of time (a week to ten day), call the Clerk to follow up on the status of your request. Cite N.C.G.S. § 7A-452(e) in your letter as support for your request for a copy of the exhibit(s).

3. The client was acquitted of charges or charges were dismissed by the prosecutor or trial court. The clerk only sent court files for cases in which the client was convicted. Do I need to get court files for dismissals and acquittals? Yes. Write a letter clearly identifying the files you are missing and ask the Clerk to send a copy of the files to you. If you do not receive a response in a reasonable amount of time (a week to ten days), call the Clerk to follow up on the status of your request. Include those indictments, dismissals, and acquittals in the record on appeal. Inclusion of those documents creates an accurate record and allows you to cite those docs in the brief. In prejudice arguments, facts, or statement of the case, it is often persuasive to show the prosecutor had to dismiss charges, the trial court dismissed charges, or the client was acquitted of charges.

4. The Clerk says he will not send a copy of the documentary exhibits but I can come look at them. Politely explain that N.C.G.S. § 7A-452(e) requires the Clerk to send a copy of the file and all documentary exhibits upon request.

5. The Clerk says I will have to pay for copies of the court file or exhibits. If your client has been declared indigent, you and the client do not have to pay for copies of the court files or exhibits, pursuant to N.C.G.S. 7A-308(b1).

6. I want the Court of Appeals to review certain trial exhibits. How do I get the exhibits to the Court of Appeals? You may include documentary exhibits in the printed record on appeal, but it is not required. *See* N.C. R. App. P. 9(d). If you don't include exhibits in the printed record on appeal, then you must prepare a Rule 9(d) exhibits volume that you settle along with the printed record. When you file the printed record and the transcripts electronically, you will also file the Rule 9(d) exhibits volume. If you have CDs or DVDs, you will need to mail a copy of them to the Court of Appeals the same day you electronically file the settled record on appeal.

If the exhibit is a tangible object or an exhibit that cannot be duplicated without impairing its legibility or original significance, you must file a motion at the Court of Appeals and present a compelling reason that the exhibits should be sent from the county clerk to the Court of Appeals. *See* N.C. R. App. P. 9(d)(2).

Transcripts and Proposed Records

7. I need an extension from the trial court for a transcript or proposed record on appeal. Do I need to file a formal motion and attach a proposed order?

No. You can send a letter to the appropriate superior court judge asking for the extension and attach a copy of the Appellate Entries (front and back). The Appellate Entries has preprinted orders on the back page for a transcript extension and a proposed record extension. Include a self-addressed stamped envelope that the judge can use to return the extension to you. After receiving the signed order, send it to the Clerk of Superior Court to be filed in the case file and ask that a file stamped copy be returned to you. Keep a copy for yourself in case the clerk loses it or doesn't respond. Include the file stamped copy in your proposed record on appeal.

8. I need an extension from the trial court for a transcript or proposed record on appeal. Which judge do I ask? Pursuant to Rule 36(a) of the N.C. Rules of Appellate Procedure, the judge who entered the judgment (whether resident or visiting), any judge resident in the district, and any visiting judge assigned to that district may grant the requested extension. In most cases, seek extensions from the judge who entered the judgment because that judge will be familiar with the case. If a visiting judge entered the judgment and you want to seek the extension from that judge, you should send the request to the judge's chambers in her home district.

9. I sent a request to a superior court judge asking for an extension for the transcript or proposed record and I have not heard anything for several weeks. Call the judge's home district chambers and speak with the Trial Court Administrator (TCA) who is the person that often screens the judge's mail and presents matters to the judge that need attention. If the TCA cannot locate your letter, ask if you can fax or email your letter and extension order to expedite the process.

10. I sent the extension request on the date the transcript or proposed record was due, and the judge's order allowing my request was signed after the due date. Is the transcript or proposed record out of time? No. The extension order does not have to be signed by the judge prior to the expiration of the time period in order for the extension to be valid.

11. Multiple, subsequent, or "amended" appellate entries were entered. Which appellate entries control the transcript due date? The original or first appellate entries control. Calculate the initial transcript due date from the date the original appellate entries were served on any court reporter in the case. An exception to this rule would be if the clerk served the wrong court reporter with Appellate Entries and the amended Appellate

Entries was served on the correct court reporter. In that instance the amended Appellate Entries would control. *See* N.C. R. App. P. 7.

12. How should I communicate with court reporters? Upon receiving an assignment from the Office of the Appellate Defender, you should send a letter to each court reporter listed on the Appellate Entries introducing yourself, indicating that you have been appointed to represent the client, and telling the court reporter the date that you calculate as the deadline for production of the transcript. Many court reporters work in multiple counties and districts. Clearly identify the case by county, defendant's name, case number, and the date(s) that you believe the court reporter was in court. About 7 to 10 days before the transcript is due, email the court reporter and ask if an extension is required. If there is no response, call the court reporter. If there is still no response, go ahead and obtain the extension so the appeal does not fall out of time.

13. What if the appeal has fallen out of time because the transcript due date or proposed record due date has passed? If the appeal has fallen out of time in the transcript or proposed record stage, retroactive extensions of time must be obtained. First, the initial 30-day extension must be obtained from the trial court and made retroactive to the original due date. Instead of using the preprinted extension order on the back of the Appellate Entries, in this situation you should prepare a proposed order for the trial court judge to sign that clearly indicates the extension is retroactive or nunc pro tunc to the original due date. Next, the remaining period of time must be covered by an extension from the COA. Attach the initial trial court extension order to the COA motion.

14. The transcript was delivered 1 day late. What do I do? The conservative answer is to seek a one day extension from the appropriate court (trial or appellate) for the transcript that is retroactive or nunc pro tunc to the original due date. However, in this situation, some attorneys simply consider the transcript as if it were timely delivered, but then calculate the proposed record due date based on the date the transcript was actually due.

15. My case is in the proposed record stage. I just discovered a possible missing transcript. What do I do? Contact court reporters to determine if notes exist from which a transcript can be produced. If a transcript can be produced, send a letter to the trial court asking for the production and delivery of the missing transcript at State expense. Include a proposed order that includes the date(s) of the hearings that need to be transcribed and a self-addressed stamped envelope for the judge to return the signed order. Serve a copy of the signed transcript order on the court reporter. While waiting for the newly discovered transcript, you will need to obtain extensions for the proposed record (first the trial court, and subsequently the Court of Appeals) citing the need for the newly discovered transcript as the basis for the extension.

16. Do I file the settled record on appeal at the Court of Appeals electronically? Yes. Electronic filing is now available for records on appeal and the Court prefers electronic filing of records as with all pleadings. When you file the record on appeal you will need to "create a new docket" by following the instructions on the website. You DO NOT file the record under a "P" number that might have been assigned to the case when you

sought transcript or proposed record extensions from the Court of Appeals. When you file the printed record on appeal you are also required to file all transcripts and exhibits.

17. I filed the settled record on appeal in the Court of Appeals. I just realized an important document was omitted from the record on appeal. What do I do? File a motion to amend the record.

18. The settled record on appeal has been filed in the Court of Appeals. I need to file a motion or I am ready to file my brief, but no Assistant Attorney General has been assigned to the case yet. Who do I serve? Serve the head of the appellate section at the Attorney General's Office. Currently that is Daniel O'Brien, Special Deputy Attorney General, dobrien@ncdoj.gov.

19. How do I get the transcript to the Court of Appeals? It is your responsibility to electronically file the transcripts at the same time (during the same transaction) that you file the printed record and exhibits.

No Merits / Anders Cases

20. I don't think my case has any non-frivolous issue. What do I do? Read the Anders policies and procedures on the OAD website and submit the case to OAD for Anders review. You should contact OAD and submit your case for review as early in the process as possible. You must submit a memo setting out the basic facts, procedural background, and the issues that you considered, researched, and determined are frivolous. You must submit your printed record on appeal, transcripts, and documentary exhibits. OAD will work as quickly as possible to review the case and provide feedback, but OAD attorneys carry full caseloads and must work your case into their already existing deadlines. If you have an upcoming deadline for filing a brief and OAD has not been able to review your case, you will be responsible for getting an extension for your brief. You should not cite as a reason for the extension that you found no issues and OAD is reviewing the case.

Petitions for Certiorari

21. A petition for certiorari is required due to a possibly defective notice of appeal. Do I file the cert petition before the brief is filed, when the brief is filed, or after the brief is filed? File the cert petition before the brief is filed. As soon as the settled ROA is filed in the COA and you have a COA docket number, go ahead and file the cert petition. If you are unable to file the cert petition before the brief, file the cert petition with the brief.

22. I plan to file a petition for certiorari. Rule 21 requires me to attach certified copies of documents. Do they really have to be certified? In practice, most attorneys in criminal appeals do not attach certified copies of court file documents to the cert petition. The State does not object. The Court has not in recent memory dismissed a cert petition for failing to include certified copies. However, copies of relevant documents still must be attached (indictments, judgments, defective written notice of appeal, appellate entries, appointment of appellate counsel) and the cert petition still must be verified and notarized.

Briefs

23. Where does the standard of review go in the brief? Read N.C. R. App. P. 28(b)(6) for the two options. If you choose option 1, the standard of review must appear immediately after the argument heading. No rule allows the standard of review to appear after an intro paragraph in an argument.

24. Can I include a “summary of argument” section in the brief? No appellate rule permits a “summary of argument” section in the brief. Each issue should already contain a solid intro paragraph summarizing the argument.

Communications and Relationships with Clients

25. Should I send a copy of pleadings to my client? Which ones? You should always send a copy of the record on appeal, appellant’s brief, State’s brief, and appellant’s reply brief to the client as soon as practicable after they are filed. Do not wait until you have received all appellate pleadings before sending them. It is the client’s appeal and the client should receive the documents as they are filed. Include a cover letter to your client explaining what the document is. Most attorneys do not send a copy of extension motions or orders allowing extensions, but they do inform the client that extensions have been received so that the client is aware of the status of the appeal.

26. I have written the client, but the client has not responded. What do I do? Continue writing the client with updates and proceed with the appeal.

27. I found no non-frivolous issues in my case. I have written the client, but the client has not responded. What do I do? Submit the case to OAD for Anders review. Once you hear back from OAD, send the client an update. Proceed with the appeal, including the filing of an Anders Brief, until instructed otherwise by the client.

28. By oral or written communication, the client said he wanted to withdraw the appeal. The client has not returned the signed notice of withdrawal of appeal for filing. What do I do? Contact the client again forwarding another notice of withdrawal of appeal. In the interim, obtain any necessary extensions to prevent the appeal from falling out of time. If an extension is needed from the COA, the motion could assert the reason without revealing confidential information: “An additional 30 days is required to file the brief because Ms. Smith has important decisions to make regarding the direction the direction of this appeal. The additional 30 days is needed to allow time for communication with Ms. Smith regarding how to proceed in this case.” If the client never returns the signed withdrawal of appeal notice, you are required to continue with the appeal, even if you ultimately file an Anders brief.

29. My client demands that I include certain issues in the brief. What should I do? As the appointed appellate attorney, you decide which issues are to be raised

on appeal. However, you should try to maintain your relationship with your client by providing your client with a frank and thorough assessment of the issues your client wants you to raise.

30. My client demands to see a draft of the brief and to provide input before I file the brief. What should I do? Although your client has a right to be informed of the appellate process and to receive copies of pleadings, your client does not have a right to direct the way in which you proceed with the appeal. The client can suggest issues or ideas to you but is not entitled to review the brief before you file it. On the other hand, it is your choice whether to engage with the client over the content of the brief.

31. My client wants a different appellate attorney and wants to know his options. Explain to your client that indigent persons on appeal are entitled to the appointment of appellate counsel pursuant to N.C. Gen. Stat. § 7A-451. However, there is no right to appointed counsel of choice, or to have multiple counsel appointed in succession simply because the client is unhappy with his appointed attorney. If the client does not want you to continue as his attorney, he would need to clearly ask you to seek to withdraw as appellate counsel. Explain that if told to withdraw as counsel, you will file a motion to withdraw as counsel either in the trial court or the appellate court (depending on the current posture of the case). Explain that the client can ask to proceed pro se or to have the Office of the Appellate Defender reappointed. Tell your client that there is no right to proceed pro se on appeal and there is no right to having multiple appointed appellate counsel. Tell your client that the court may deny the motion without explanation and at that point, you would continue as the appointed attorney. The court could grant the motion but deny reappointment of the Office of the Appellate Defender. Although unlikely, that is a possibility, and the client would have to represent himself on appeal. Lastly, the court could grant the motion and reappoint the Office of the Appellate Defender. At that point the Appellate Defender would appoint a different appellate attorney. Advise the client that the entire process will be significantly delayed for you to seek to withdraw. And if a different attorney is ultimately appointed, it will delay the case because the new attorney will have to become familiar with the case.

32. My client said he has fired me and does not want me to work on his case anymore. He wants a different appellate attorney, or he wants to proceed pro se. What should I do? If your client writes and says you are fired, then you are required to file a motion to withdraw as counsel in the trial or appellate court where the case is currently pending. Include a request to have the Office of the Appellate Defender reappointed.

IDS and Appellate Defender Policies

33. I want to visit a client in prison. Do I need prior authorization from the Appellate Defender. No. There is no IDS or Appellate Defender's policy that requires authorization of any sort for you to visit a client in prison. IDS will reimburse for travel expenses and time spent traveling and seeing the client. The only caveat is that IDS and the Appellate Defender review time and expenses for reasonableness and they could possibly deny reimbursement for time and expenses if determined to not be reasonable. Therefore, attorneys often consult with the Appellate Defender to discuss whether a proposed prison trip would be reasonable under the circumstances. It is not required, however.

34. I believe there are good grounds to file an MAR in the Court of Appeals during the direct appeal. What should I do? IDS policy requires that for an appointed appellate attorney to be compensated for work investigating or preparing an MAR while the case is on direct appeal, the attorney must consult with and obtain permission from the Appellate Defender. The easiest way to consult and to document your consultation is to email the Appellate Defender. Set out the basics of the case and why you believe an MAR is necessary in your case.

The Office of the Appellate Defender can provide samples of documents mentioned in these FAQs upon request.