

RECIPE FOR FRESH AND CRISPY
ASSIGNMENTS OF ERROR EVERY SINGLE TIME
“THEY WILL DO YOU PROUD”

Staples Hughes

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No client’s chance for relief need be defaulted because error was not properly assigned. It’s not difficult to draft assignments that will pass even the most hostile review. This outline is designed to give you an approach to assigning error that is easy to understand and apply. It is not a catalog of examples of assignments for various kinds of claims. There’s no need for a catalog. Download a record from a lawyer whose work you respect and look at the assignments if you want examples, but measure them against the approach suggested here.

PART I: WHAT RULE 10 SAYS AND MEANS

I. FIRST, READ RULE 10 OF THE RULES OF APPELLATE PROCEDURE (“ASSIGNING ERROR ON APPEAL”). READ IT. CLOSELY AND CAREFULLY. THE WHOLE THING. RECENT EXPERIENCE SUGGESTS THAT THIS IS NOT AN EMPTY EXERCISE.

- A. The fundamental stricture in Rule 10(a) is this: if it isn’t claimed in the assignments of error in the record on appeal, you can’t argue it in the brief. Period.¹
- B. The rest of Rule 10(a) lists some issues that arguably you can assign as error notwithstanding trial preservation. Nice to have them rattling around in the back of your mind, although the precise meaning of some of the language is unclear.²
- C. Rule 10(b) is about what must be done at trial to preserve error. Tuck away for a moment what to do if trial counsel does not preserve the issue of the sufficiency of the evidence to get to the jury.

¹ The appellate court might permit you to add an assignment via a motion to amend the record on appeal (see Rule 9(b)(5)), but it might not, and you do not want to gamble your client’s welfare on that discretion.

² “Rule 10 (a) Function in limiting scope of review. Except as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly making them the basis of assignments of error, 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.”

II. RULE 10(c) (“ASSIGNMENTS OF ERROR”) IS THE HEART OF THE MATTER. HERE IS THE TEXT OF RULE 10(C)(1), WITH MY EMPHASES:

(1) Form; Record references. A listing of the assignments of error upon which an appeal is predicated shall be stated at the conclusion of the record on appeal, **in short form without argument**, and shall be separately numbered. Each assignment of error shall, so far as practicable, **be confined to a single issue of law**; and shall **state plainly, concisely** and without argumentation **the legal basis upon which error is assigned**. An assignment of error is **sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references**. Questions made as to **several issues or findings relating to one ground of recovery or defense may be combined in one assignment of error, if separate record or transcript references are made**.

- A. So an assignment of error must be **short** [carrying on for lines and lines will impress your parents or children (maybe), but is no guarantee that you will get it right].
- B. It must be made without **argument** [a relevant point when the opponent says you didn't carry on enough about what you claim went wrong].
- C. It must be confined to a **single issue of law**.
- D. It must state the **legal basis** for the claim of error [what law was violated].
- E. It must permit the reviewing court (i.e. a person, whether judge or clerk) to **easily find what you are talking about by use of reference to the record on appeal or the transcript**. This is but a specific instance of the general principle that the easier you make it for the judge or clerk to figure things out, the better off you are (e.g., if a time stamp on a document is important, make sure it's legible).
- F. You can combine into a single assignment **multiple instances of the same legal issue** (“ground of recovery or defense”) if you **point out each instance** in the assignment.

III. RULE 10(c)(2) IS ABOUT ASSIGNING ERROR TO JURY INSTRUCTIONS. HERE IS THE TEXT, WITH MY EMPHASES:

(2) Jury instructions. Where a question concerns instructions given to the jury, the party shall **identify the specific portion of the jury charge in question by setting it within brackets or by any other clear means of reference in the record on appeal**. A question of the failure to give particular instructions to the jury, or to make a particular finding of fact or conclusion of law which finding or conclusion was not specifically requested of the trial judge, shall **identify the omitted instruction, finding or conclusion by setting out its substance in the record on appeal immediately following the instructions given, or findings or conclusions made**.

- A. So, you have to put the jury charge **in the record on appeal** if you want to complain about it.
- B. You have to **mark or identify the bad parts in the record on appeal itself**. Perhaps you can get away just by identifying transcript page and line, and record page and line in the assignment of error, but why not follow the rule? Make transcript and record page and line references in the assignment of error, to be sure, but the rule says “brackets,” so do it. No reason not to. But be careful. If you fail to bracket everything bad, the opponent will have an opening to point out that you didn’t. And make your page and line references consistent with the brackets.
- C. If you are complaining that the judge didn’t give an instruction, **or make a finding or conclusion** (sneaky how that gets in this part of the rule), you have to **put what the judge should have** instructed, found, or concluded (but instead omitted) in the record on appeal after the instruction, or findings, or conclusions. Specifically, after the jury instructions that the judge did give, or after the judge’s order making findings and conclusions, put in the text of what they didn’t give. This might have been something that was requested and rejected by the trial judge, or it might have been something you are saying the judge had to instruct because required by statute or case law, or it might be something you are claiming as plain error. If the judge made oral finding and conclusions that appear only in transcript, and you are asserting the judge left something out, put what the judge

did give in the record, even if you have no beef with it, simply so you can comply with the rule on the omitted matters. Makes it easy for the judges and clerks to compare the two.

IV. IGNORE RULE 10(c)(3). IT APPLIES TO CIVIL CASES, INCLUDING CHAPTER 7B APPEALS. IT IS PERMISSIVE AND CAN ONLY GET YOU IN TROUBLE.

- A. The rule permits combinations of sufficiency issues in civil cases. Why take the chance of impermissibly combining distinct legal issues in one assignment?
- B. Might be useful authority if the opponent in a civil appeal claims improper conflation of assignments into one.
- C. Otherwise ignore it. It can only get you in trouble.

V. ASSIGNING PLAIN ERROR UNDER RULE 10(c)(4). THE TEXT:

(4) Assigning plain error. **In criminal cases**, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error. [again, my emphasis added]

- A. Only criminal cases. No plain error in civil cases, including 7B cases.
- B. Case law is clear. If you don't assign it as plain error in an assignment of error, you can't claim it as plain error in the brief. You will be defaulted and the argument will be down the tubes. Lawyers get clients relief with plain error arguments in criminal appeals, so don't minimize the consequences of losing plain error review.
- C. When there is a question of whether something is plain error, or is preserved as a matter of law, make the two claims in separate assignments. Why take the chance? You can combine the

assignments into one argument in the brief, but split them in the record.

VI. UNDER RULE 10(D), IN A CIVIL APPEAL, THE APPELLEE CAN CROSS APPEAL ON ISSUES THAT WOULD HAVE PROVIDED AN ALTERNATIVE BASIS FOR WINNING AT TRIAL.

- A. The appellee doesn't have to give notice of appeal to cross-assign error.
- B. The issues do have to be preserved at trial.
- C. You must include in the record on appeal the material necessary to understand the issue.
- D. You must make the issues the subject of assignments of error, which must conform to Rule 10.

PART II: HOW TO DO IT.

I. ASK YOURSELF AND ANSWER THESE QUESTIONS WHEN YOU ARE FORMULATING AN ASSIGNMENT OF ERROR:

- A. **What happened that was illegal or unfair? What was the act?**
- B. **Why was it illegal or unfair?**
- C. **What doctrine, statute, rule, or constitutional provision did it violate?**
- D. Example: The defendant is on the stand in a murder trial and is asked on direct whether or not he feared for his life when he shot the soon to be dead person. The prosecutor's objection is sustained. Defense counsel makes an offer of proof on voir dire after cross is completed ("I thought I saw a gun in his hand as he came around the car. I thought he was going to kill me. I was terrified. He had a horrible look on his face. I thought it was him or me, so I shot him (witness breaks down sobbing).")

What happened was that the court sustained the prosecutor's objection to the testimony that the defendant feared for his life.

It was illegal because the evidence was relevant to the claim of self-defense and therefore necessarily admissible.

It violated Evidence Rule 402 and the common law of North Carolina.

The resulting assignment of error:

1. The court's exclusion of the defendant's testimony that he feared for his life at the time he fired the fatal shot, on the ground that the evidence was relevant to and admissible on the question of the whether the defendant acted in self-defense, in violation of North Carolina common law and Evidence Rule 402. T p 23, line 13.

II. **IF YOU APPROACH ASSIGNMENTS OF ERROR THIS WAY, IT'S HARD TO GO WRONG AS LONG AS YOU SPOT THE ISSUE AND ALL THE LEGAL BASES FOR CLAIMING ERROR. DON'T TRY TO HEDGE YOUR BETS BY BEING VAGUE. IN THE CURRENT ENVIRONMENT, IT WON'T FLY.**

III. **CONSTITUTIONALIZE CLAIMS TO GET A BETTER PREJUDICE STANDARD.**

To wit:

2. The court's exclusion of the defendant's testimony that he feared for his life at the time he fired the fatal shot, on the ground that the court's ruling violated the defendant's right to make a defense to a criminal charge, contrary to the Fifth, Sixth, and Fourteenth Amendments, and Article I, sections 19 and 23 of the Constitution of North Carolina. T p. 23, line 13.

- A. If you don't have an assertion of the constitutional right at trial, you may be defaulted, but don't worry about that when formulating the assignment of error. You may figure out a way around that default later.
- B. Notice that this is a separate assignment of error from the non-constitutionalized assignment. You can combine them in the same argument in the brief, but they are sufficiently doctrinally distinct that you should make separate assignments.
- C. In general, make one assignment of error for each ground for claiming error when there are multiple grounds to attack something bad (e.g. the expert's opinion was outside the discipline for which he was qualified; the expert's opinion was based on unreliable information; the expert's opinion invaded the jury's function – three assignments of error, not one).

IV. **THINK ABOUT ASSIGNING INEFFECTIVE ASSISTANCE OF COUNSEL TO ADDRESS OBVIOUS TRIAL DEFAULTS AND AVOID PLAIN ERROR REVIEW**

This is an extraordinarily complex topic. Read Janet Moore's piece on litigating ineffective assistance claims on direct appeal in the April 1, 2004 issue of TRIAL BRIEFS, the Academy's magazine. Before you assign and argue IAC claims, talk the issue through with someone whose judgment you respect. But, for instance, if trial counsel did not move to dismiss at the close of all the evidence in a criminal case where there is a real sufficiency issue, assign the failure to move to dismiss as ineffective assistance of counsel under the Sixth Amendment (or under the right to counsel section of Chapter 7B in an analogous situation in a Chapter 7B appeal). Deficient performance is obvious and the prejudice is the default of a winning claim.

V. **WHEN IN DOUBT, MAKE MULTIPLE, DISTINCT ASSIGNMENTS OF ERROR.**

- A. Make a separate assignment of error for each finding of fact you claim is unsupported by the evidence, e.g.:

54. The court's finding that the defendant never told the arresting officer that he wanted to talk to a lawyer before the officer drove him to the scene of the shooting, on the ground that the finding was not supported by the evidence, in violation of the Fourth Amendment and North Carolina common law. 1/9/05 MT p 278, lines 12-20.

- B. Make a separate assignment of error for each conclusion of law you claim is unsupported by the findings of fact, e.g.:

55. The court's conclusion of law that the defendant was not in custody at the time the officers drove him to the scene of the shooting, on the ground that the conclusion was not supported by the evidence or the findings of fact. 1/9/05 MT p. 291, lines 22-23.

- C. And, as emphasized above, make a separate assignment for each distinct legal theory for error when there are multiple potential claims of error in one ruling or action.

- D. **BUT**, where there are multiple instances of the same potentially erroneous ruling or act in violation of the same law, you can combine these into one assignment per Rule 10(c)(1), thus:

34. The court erred by permitting the prosecutor to repeatedly cross-examine the defense expert witness in detail concerning his compensation for services rendered to fifteen other indigent criminal defendants over a period of five years, on the ground that the information elicited from the witness was irrelevant and grossly prejudicial and inflammatory in violation of Evidence Rules 402 and 403. T pp 2345, line 5; 2346, lines 5, 8, 12; 2356, lines etc etc etc.

35. [same thing constitutionalized]