

MEMO TO THE CRIMINAL APPELLATE ROSTER

FROM: STAPLES HUGHES, APPELLATE DEFENDER

**RE: 2 JULY 2009 AMENDMENTS TO THE RULES OF APPELLATE
PROCEDURE, APPLICABLE TO APPEALS TAKEN ON OR
AFTER 1 OCTOBER 2009.**

DATE: SEPTEMBER 25, 2009

The new rules are effective very soon and this memorandum contains my observations/opinions about certain aspects of what I think are the most important changes. Hopefully, this will be a tool for incorporating the amendments into your appellate practice. I suggest you download and print on a color printer the red-lined version of the new rules from the Courts' website, and read it as you work through this memo.

For those changes that apply only to abuse, neglect, dependency, and TPR appeals ("AND/TPR" appeals), I defer to Wendy Sotolongo and Annick Lenoir-Peek of the IDS Parent Representation Office.

Reasonable minds can and do disagree. If you have different, contrary, or supplemental thoughts about the new rules, please post them to the appeals listservs. In particular, please let me know if I miss a significant change altogether.

Rule 3(b)(1) – In delinquency cases, you have to protect the identity of persons under eighteen at the time of the proceedings in the trial division pursuant to Rule 3.1(b). You do not have to redact the record on appeal, but you must preface any unredacted filing (and the first filing in the appellate court in the case), including the record, with the notice required by Rule 9(a) ("FILED PURSUANT TO RULE [X]; SUBJECT TO PUBLIC INSPECTION ONLY BY ORDER OF A COURT OF THE APPELLATE DIVISION.") Unredacted records in delinquency cases are not placed on the electronic filing site.

Delinquency cases are in no other way governed by Rule 3.1, which otherwise applies only to expedited AND/TPR appeals.

PLEASE READ RULE 3.1(b) CAREFULLY BEFORE YOU FILE A RECORD OR BRIEF IN A DELINQUENCY APPEAL. SCATTERED THROUGHOUT THE AMENDED RULES ARE REMINDERS THAT YOU HAVE TO PROTECT THE IDENTITY OF JUVENILES IN CERTAIN CASES.

Rule 4(e) – In criminal appeals, you must protect the identity of a juvenile victim of a sexual offense pursuant to Rule 3.1(b).

A Brief Pause For A General Observation: Rule 3.1(b) is there to keep counsel in certain cases involving minors from having to spend hours redacting the record on appeal, and to keep certain minors' names off the internet via the electronic filing site (and the IDS brief bank). The Rule 9(a) notice requirement is there to alert the folks in the appellate clerks' offices that they cannot pass the unredacted record or the transcript across the counter to a member of the public without a court order, and cannot put the unredacted record on the electronic filing site.

Rule 3.1(b) does not apply to a criminal appeal in which a minor happens to be mentioned or is a witness or even a victim unless the minor is the victim of a sexual assault per Rule 4(e). The rule does apply to all minors in a delinquency appeal. It does apply to all minors in AND/TPR appeals.

Rule 7(b)(1) – Note that the reporter now electronically delivers the transcript to you. If you still are using a dialup email connection, now is the time to switch to broadband.

Rule 7(b)(2) – **THIS ONE IS A BIG CHANGE.** When you file the settled record in the appellate court, you must “notify” the court reporter that it has been filed. I suggest that you email the court reporter at the email address he or she used to deliver the transcript. Request acknowledgment from the reporter that he or she has received the notification. Then print copies of your notification and the reporter's acknowledgment. After the reporter gets notification, he or she files the transcript electronically with the Court using the docket number the Court has assigned.

THERE IS A GAP IN THE RULE. We do not know the docket number until we get the “Notice to Appellate Counsel” from the Court. The Court does not assign a docket number until the clerks' office enters the case into their database and sends out the Notice. The reporter cannot file the transcript with the Court until he or she knows the docket number.

Contact the reporter again after you get the “Notice to Appellate Counsel,” and give the reporter the docket number. I actually think it would be best to scan the “Notice” and attach it to the email so there will be no mistakes about the docket number. While the Rules do not require us to do this, I believe it is the best practice. The Court does not capture court reporter information in

their system, at least currently. For the meantime, contact the reporter twice, please – once when you file the record and again when you get the Notice.

Rule 9(a) – This is where the requirement of notice that your case is a matter to which Rule 3.1(b)(1) applies is set out, i.e., “FILED PURSUANT TO RULE [X]; SUBJECT TO PUBLIC INSPECTION ONLY BY ORDER OF A COURT OF THE APPELLATE DIVISION.”

Rule 9(a)(3)(f) – Note the explicit requirement for setting out omitted jury instructions after the charge given.

Rule 9(b)(4) – Now you have to include your Bar number and email address along with other contact information at the end of the record. Note the conventions specified in this section for citation to pages of records, supplements to records, and transcripts.

Rule 9(b)(5) – A party can supplement the record if the settled record is an insufficient basis on which to respond to an issue raised by an opposing party. The rule does not say what you do when someone tries to get material before the court that could not have been in the original record. Presumably a motion to strike would be the procedural vehicle.

Rule 9(c) – You can include “statements and events at evidentiary and non-evidentiary hearings” in the record. If you do this, be scrupulously accurate so you prevail in a contested settlement hearing. Note the reiteration of the redaction requirements with regard to juveniles.

Rule 9(c)(3)(b) –The rule continues to say that we “shall cause the settled ... transcript to be filed[.]” However, that is the reporter’s duty now. Only insofar as we notify the reporter that the record has been filed (and notify them a second time of the docket number) do we “cause the settled transcript to be filed[.]”

Rule 10 – SAY GOODBYE TO ASSIGNMENTS OF ERROR – SAY HELLO TO PROPOSED ISSUES ON APPEAL.

Rule 10(b) reads as follows in its entirety:

“Appellant’s Proposed Issues on Appeal. Proposed issues that the appellant intends to present on appeal shall be stated without argument at the conclusion of the record on appeal in a numbered list. Proposed issues on appeal are to facilitate the preparation of the record on appeal and shall not limit the scope of the issues presented on appeal in an appellant’s brief.”

Make a good faith effort to identify issues and to let opposing counsel know roughly where the issue arises in the record. For instance:

15. The court erred in its jury instructions by failing to include self-defense in the final mandate on the charge of first degree murder. T p 524.

Look at the examples in Appendix C, Table 4 of the amended Rules. The examples do not use transcript references, but doing so forecloses an attempt by opposing counsel to supplement the record with extra-record material. Put them on notice what the issue is. If you genuinely did not see the issue at record time, there is absolutely no prohibition on briefing it. No need to amend the record to add an assignment of error.

The good thing about assignments of error was that they forced us to focus our thinking about the case before briefing. Do not throw the baby out with the bathwater. The proposed issues are the point at which we still should begin thinking about framing issues and developing a theory of the appeal. If you fall in the trap of just assigning sufficiency and nothing else because it is easier and it puts off the hard work, there will be two consequences: (1) your client’s chances for relief will suffer; and (2) eventually, if it is a pattern, you may get removed from the roster.

Rule 12(c) – Again, the rule says the appellant “shall cause the transcript to be filed electronically pursuant to Rule 7.” This can only mean notifying the court reporter as discussed above.

Rule 26(g)(3) – Include your Bar number and email address on every document you file in the appellate court.

Rule 28(b)(2) – What we used to call “Questions Presented” we now call “Issues Presented.” See also, Appendix E of the amended Rules.

Rule 28(b)(6) – No requirement to list anything under the argument headings, e.g., no reference to the proposed issues or record pages.

Rule 33.1 – Be aware of the full requirements for establishing secure leave periods, including the requirement in subsection (d) that “[a] separate designation shall be filed as to any cases on appeal subsequently filed and docketed.” Also note that if the case moves to the Supreme Court from the Court of Appeals, where you filed the original designation, you have to file a new designation in the Supreme Court.