

STATE OF WEST VIRGINIA

At the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 24th day of November, 2015, the following order was made and entered **in vacation**:

RE: APPROVAL OF AMENDMENTS TO RULES 3, 4, 10, AND 11 AND APPENDIX A OF THE RULES OF APPELLATE PROCEDURE

By prior order entered July 13, 2015, the Court proposed amendments to Rules 3(d)(1), 3(d)(2), 10(c)(10), 11, and Appendix A of the Rules of Appellate Procedure and requested public comment on the proposals. The public comment period closed on September 11, 2015. The Court received a number of insightful comments, and expresses appreciation for those members of the bar who provided comment.

Upon review of the comments received and consideration thereof, the Court is of the opinion to and does hereby APPROVE the following amendments to the Rules of Appellate Procedure, **effective January 1, 2016**. Additions are indicated by underlining, and deletions are indicated by strikethrough. The Clerk's Notes are provided to alert the reader to the general nature of the changes.

RULES OF APPELLATE PROCEDURE

Rule 3. Attorneys

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(d)(1) *Withdrawal of counsel*. In order to withdraw as counsel in an action pending in this Court in which counsel has previously appeared, counsel must provide the Court with documentation that counsel has fully complied with the requirements of Trial Court Rule 4.03. Counsel is not relieved of the obligation to comply with all applicable deadlines and obligations in the case until such time as the Court enters an order permitting counsel to withdraw.

(2) When counsel is directed by a client to file an appeal in a criminal case, habeas corpus case, or an abuse and neglect case, counsel will not be permitted to withdraw solely on the basis that counsel lacks a good faith belief that an appeal is reasonable and warranted under the circumstances. Good faith may at times be defined by the legal obligation of counsel to file a brief referring to any point in the record that might arguably support the appeal in instances where a client insists on appeal after being advised that the appeal is wholly frivolous. Rule 10(c)(10) sets forth the requirements that must be observed when counsel in a criminal, habeas corpus, or abuse and neglect case lacks a good faith belief that an appeal is reasonable and warranted.

CLERK'S NOTES ON RULE 3

Rule 3(d)(2) is intended to complement Rule 10(c)(10) by requiring counsel to continue representation even where counsel does not have a good faith belief that an appeal is reasonable and warranted under the circumstances. The procedure set forth in *Anders v. California*, 386 U.S. 738 (1967) is a constitutional minimum for court-appointed counsel in indigent criminal cases. The Supreme Court held in *Smith v. Robbins*, 528 U.S. 259, 276 (2000), "the *Anders* procedure is merely

one method of satisfying the requirements of the Constitution for indigent criminal appeals. States may—and, we are confident, will—craft procedures that, in terms of policy, are superior to, or at least as good as, that in *Anders*.” Numerous states have developed their own guidelines. The amendment to Rule 3(d)(2) is modeled after the policy established in Massachusetts, which provides that court-appointed counsel should not be permitted to withdraw solely on the ground that an appeal is frivolous or otherwise lacks merit. *See Commonwealth v. Moffett*, 383 Mass. 201, 418 N.E.2d 585 (1981). The rationale behind Rule 3(d)(2) is that the appearance of counsel is not an implicit representation to the Court that counsel believes in the legal substantiality of the contentions raised; instead, it acknowledges that counsel serves an important function in ensuring that a client’s arguments are fully advanced on appeal. The language of the rule relating to good faith derives in part from *State v. McGill*, 230 W.Va. 85, n. 7, 736 S.E.2d 85, n. 7 (2012). Counsel in such circumstances has an ethical obligation to provide the Court with relevant information from the record and relevant legal authorities. In extraordinary circumstances, if counsel is ethically compelled to disassociate from the contentions presented in the brief, counsel must preface the brief with a statement that the brief is filed pursuant to Rule 10(c)(10)(b) of the Rules of Appellate Procedure.

Rule 4. Unrepresented parties

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(b) *Pro se appearance by a represented party*. A party to an action before this Court who is represented by counsel, ~~and where counsel has made a filing or an appearance before this Court,~~ may not file any pro se documents in that action with the Court or make an oral argument in that action before the Court, unless specifically permitted to do so by order.

CLERK’S NOTES ON RULE 4

The amendment to Rule 4(b) is intended to prohibit pro se filings whenever a party is represented by counsel in an action regardless of whether counsel has made a filing or an appearance before this Court in that action. If the client wishes to file a pro se document while represented by counsel, such document will only be accepted if specifically permitted by order. One such exception to Rule 4(b) is set forth in Rule 10(c)(10)(b), which provides that in extraordinary circumstances, if counsel is ethically compelled to disassociate from assignments of error raised on appeal, counsel must file a motion requesting leave for the client to file a pro se supplemental brief raising those assignments of error that the client wishes to raise, but that counsel does not have a good faith belief are reasonable and warranted. The rule applies to a specific action, so it would not prohibit an inmate who is represented by counsel in an underlying criminal matter from filing a pro se petition for writ of habeas corpus regarding conditions of confinement.

Rule 10. Briefs

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(c)(10) The following requirements must be observed when counsel in a criminal, habeas corpus, or abuse and neglect case is directed by a client to file an appeal where counsel lacks a good faith belief that an appeal is reasonable and warranted under the circumstances:

(a) Counsel must engage in a candid discussion with the client regarding the merits of the appeal. If, after consultation with the client, the client insists on proceeding with the appeal, counsel must file a notice of appeal and perfect the appeal on the petitioner’s behalf. The petitioner’s brief should raise any arguable points of error advanced by the

client. Counsel need not espouse unsupportable contentions insisted on by the client, but should present a brief containing appropriate citations to the appendix and any case law that supports the assignments of error.

(b) In extraordinary circumstances, if counsel is ethically compelled to disassociate from the contentions presented in the brief, counsel must preface the brief with a statement that the brief is filed pursuant to Rule 10(c)(10)(b). Counsel should not inject disclaimers or argue against the client’s interests. If counsel is ethically compelled to disassociate from any assignments of error that the client wishes to raise on appeal, counsel must file a motion requesting leave for the client to file a pro se supplemental brief raising those assignments of error that the client wishes to raise but that counsel does not have a good faith belief are reasonable and warranted.

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(g) *Reply brief.* The petitioner may file a reply brief, which must comply with such parts of this rule applicable to the respondent, but need not contain a summary of argument, if appropriately divided by topical headings. If a timely-filed respondent’s brief asserts cross-assignments of error, the applicable page limitation for a reply brief set forth in Rule 38 is extended to forty pages, and the time for filing a reply brief is automatically extended, without need for further order, until thirty days after the date the respondent’s brief containing cross-assignments of error was filed. Unless otherwise provided by order, in cases where more than one respondent’s brief is filed, the petitioner is limited to filing only a single reply brief that consolidates the reply to each of the responses. In cases where more than one response brief is filed, the page limitation for the reply brief under Rule 38 is automatically extended to thirty pages, without need for further order.

CLERK’S NOTES ON RULE 10

The addition of Rule 10(c)(10) is intended to provide counsel in criminal, habeas corpus, and abuse and neglect cases with guidance on the procedure to follow in light of syllabus point 3 of *State v. McGill*, 230 W.Va. 85, 736 S.E.2d 85 (2012) (“Pursuant to the principles contained in Rule 3.1 of the West Virginia Rules of Professional Conduct, an appellate remedy should not be pursued unless counsel believes in good faith that error has been committed and there is a reasonable basis for the extension, modification, or reversal of existing law.”) The Rule encourages counsel to first engage in a candid discussion with the client regarding the merits of the appeal. Counsel has a duty to encourage the client to file an appeal that is reasonable and warranted under the circumstances.

Should the client, after a candid discussion with counsel, insist on proceeding with the appeal despite counsel’s contentions, counsel must file a notice of appeal and must perfect the appeal on the petitioner’s behalf. Counsel should raise any arguable points of error advanced by the client. Rule 10(c)(10)(a) provides that counsel is not required to espouse unsupportable contentions insisted on by the client. Counsel must present such arguments succinctly referring to the portions of the record that support the assertions and citing to relevant case law. By insisting on a full presentation of the facts and procedure, this Rule provides protection to a client because it ensures that the client’s arguments are fully advanced by counsel.

Rule 10(c)(10)(b) addresses situations in which counsel is ethically compelled to disassociate from the contentions raised on appeal. If counsel is ethically compelled to disassociate from the contentions raised in the brief, counsel may preface the brief with a statement that the brief is being filed pursuant to this Rule. If counsel is ethically compelled to disassociate from any assignments of error that the client wishes to raise on appeal and counsel does not have a good faith belief that those

assignments of error are reasonable and warranted, counsel must file a motion requesting leave of Court to permit the client to file a pro se supplemental brief. This Rule ensures that counsel fully advances the client's arguments on appeal, but provides counsel with a means of disassociating from the contentions presented in the brief when the client insists on raising assignments of error that counsel does not have a good faith belief are reasonable and warranted.

In cases where a pro se supplemental brief is permitted by the Court, an amended scheduling order will set forth all relevant deadlines deemed necessary including the deadline for filing the pro se supplemental brief, the deadline for filing a response, and the deadline for filing a reply brief. The amended scheduling order will also set forth whether a pro se petitioner will be permitted to file a reply brief.

A brief filed pursuant to Rule 10(c)(10)(b) will be reviewed in the same course as all other appeals filed before the Court. Once the deadline for filing the reply brief has passed, the case will be considered mature for consideration and will be proceed pursuant to Rule 5(h) in a criminal case or habeas corpus case. The case will proceed pursuant to Rule 11(k) in an abuse and neglect case. It is important to note that counsel has a continuing obligation to serve as counsel of record in the case until the mandate has issued.

The amendment to Rule 10(g) applies to all cases and provides that the petitioner is prohibited from filing more than one reply brief unless permitted by order. This changes the Court's current practice of allowing the petitioner to reply to multiple response briefs or summary responses that have been filed. In the event of multiple responses to the petitioner's brief, the petitioner is permitted to file only one brief that consolidates the reply to each of the responses and the page limitation is automatically extended to thirty pages.

Rule 11. Abuse & neglect appeals

(a) *Applicability.* This Rule governs all appeals from a circuit court final judgment in abuse and neglect cases under West Virginia Code § ~~49-6-1~~, 49-4-601, et seq.

(b) *Docketing the appeal.* Within thirty days of entry of the judgment being appealed, the petitioner shall file the notice of appeal and the attachments required in the notice of appeal form contained in Appendix A of these Rules. The notice of appeal shall be filed in the Office of the Clerk of the Supreme Court. The petitioner must file an original and the number of copies required by Rule 38. In addition to serving the notice of appeal in accordance with Rule 37, the party appealing shall serve a copy of the notice of appeal, including attachments, on all parties to the action in circuit court, on the clerk of the circuit court from which the appeal is taken—which shall be made a part of the record in the circuit court—and on each court reporter from whom a transcript is requested. ~~The Court prefers abuse and neglect appeals to proceed initially under subsection (i) of this Rule, therefore, transcript requests may not be approved, or may be deferred.~~ To the extent that a transcript of a particular proceeding is necessary for the Court to review a disputed evidentiary or testimonial issue, the petitioner must so indicate in the notice of appeal. Upon motion filed in accordance with Rule 39(b), the Court may extend the time period for filing a notice of appeal for good cause shown.

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(g) *Perfecting the appeal—method.* An appeal is perfected by the timely and proper filing in the Office of the Clerk of the Supreme Court of an original and the number of copies required by Rule 38 of: (1) the petitioner's brief prepared in accordance with Rule 10 and (2) the

appendix record prepared in accordance with Rule 7, unless the Court has specifically provided that an appendix record is not required. ~~In order to provide the most expeditious and inexpensive procedure for appeal in abuse and neglect cases, the petitioner is encouraged to perfect an appeal without presentation of a transcript of the testimony in whole or in part, provided that the petitioner complies with subsection (i) of this Rule.~~ Failure by the petitioner to perfect an appeal will result in the case being dismissed from the docket of the Court.

* * * *

~~(i) *Statement in lieu of transcript.* In order to provide an inexpensive and expeditious method of appeal, the petitioner is encouraged to perfect an appeal under this Rule without the transcript of testimony taken in the lower court. In lieu of filing all or part of the transcript of testimony, the petitioner shall set out in the petitioner's brief a statement of all facts pertinent to the assignments of error. The petitioner's brief shall include a certificate by the petitioner's counsel that the facts alleged are faithfully represented and that they are accurately presented to the best of counsel's ability. The use of this abbreviated procedure places the highest possible fiduciary duty upon a lawyer with regard to the Court and intentional misrepresentation of any sort is grounds for disciplinary action.~~

~~(j) *Briefs.* (i) *Special requirements for briefs.* In addition to the items required by Rule 10, the briefs filed by the parties (including the guardian ad litem) must contain a section immediately following the concise summary of argument required by Rule 10(c)(5), setting forth the current status of the minor children and any plans for permanent placement, and the current status of the parental rights of all the children's parents. Within one week of any oral argument scheduled by the Court, or within such other time as may be specified by order, the parties shall provide a written statement of any change in the circumstances that were set forth in the briefs.~~

(j) *Update regarding the current status of the child.* The parties shall provide a written statement of any change in the circumstances that were set forth in the briefs within one week of any oral argument scheduled by the Court or within such other time as may be specified by order.

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CLERK'S NOTES ON RULE 11

Subsection (a) has been updated to reflect that during the 2015 Regular Session, the West Virginia Legislature repealed West Virginia Code §§ 49-1-1 through 49-11-10 and recodified these statutes, with some revisions, into West Virginia Code §§ 49-1-101 through 49-7-304.

Because transcripts are essential to review abuse and neglect appeals, the statement in lieu of transcript requirement in Rule 11(i) was deleted. The required update on the status of children has been moved to its own subsection (j) in order to highlight this important requirement.

Appendix A — Notice of Appeal

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Certification:

I hereby certify that I have performed a review of the case that is reasonable under the circumstances and ~~I have a good faith belief that an appeal is warranted~~ that the contents of the Notice of Appeal are accurate and complete.

CLERK'S NOTES ON APPENDIX A

The changes to the certification required in the Notice of Appeal were updated in light of the changes to Rule 3 and Rule 10 which clarify the application of good faith belief in the merits of the appeal.

A True Copy

Attest: //s// Rory L. Perry II
Clerk of Court

