

STATE OF WEST VIRGINIA

At the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 13th day of July, 2015, the following order was made and entered in vacation:

**RE: REQUEST FOR PUBLIC COMMENT ON PROPOSED REVISIONS
TO RULES 3, 4, 5, 10, AND 11 OF THE RULES OF APPELLATE
PROCEDURE**

On a previous day came the Court, on its own motion, and proceeded to consider proposed revisions to the Rules of Appellate Procedure. The proposed amendments to Rules 3(d)(1) and (2), 5(b), 10(c)(10), and 11(b) provide guidance to counsel in criminal appeals, habeas corpus appeals, or abuse and neglect appeals when counsel lacks a good faith belief that an appeal is warranted, and the client demands that an appeal be advanced. The proposed amendment to Rule 4(b) provides that a party who is represented by counsel may not file pro se documents with the Court or make an oral argument before the Court, unless specifically permitted to do so by order regardless of whether counsel previously has made a filing or an appearance before the Court. The proposed amendment to Rule 10(g) provides that the petitioner is prohibited from filing more than one reply brief unless permitted by order. The proposed amendment to Rule 11(i) provides that the Court will no longer accept a statement in lieu of a transcript in abuse and neglect appeals, because transcripts are essential for the consideration of abuse and neglect appeals.

Upon review and consideration thereof, the Court is of the opinion to and does hereby approve a sixty-day period of public comment on the proposed revisions. **All comments must be filed in writing with the Clerk of the Court no later than September 11, 2015.** The Court specifically requests that interested entities, such as West Virginia Public Defender Services, the West Virginia Prosecuting Attorney's Institute, the appellate division of the West Virginia Attorney General's Office, and the Office of Disciplinary Counsel, submit a single set of comments on behalf of the entity where feasible.

The proposed revisions are set forth in this order. Proposed additions are indicated by underlining, and proposed 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.

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 proposed 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.

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 with the Court or make an oral argument before the Court, unless specifically permitted to do so by order.

CLERK'S NOTES ON RULE 4

The proposed amendment to Rule 4(b) is intended to prohibit pro se filings whenever a party is represented by counsel regardless of whether counsel has made a filing or an appearance before this Court. 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.

Rule 5. Appeals from circuit court

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(b) *Docketing the appeal.* Within thirty days of entry of the judgment being appealed, the party appealing shall file the notice of appeal and the attachments required in the notice of appeal form contained in Appendix A of the Rules. Counsel must complete the certification in Appendix A even if counsel does not have a good faith belief that an appeal is reasonable and warranted under the circumstances. The notice of appeal shall be filed in the Office of the Clerk of the Supreme Court. The petitioner must file 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 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. 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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CLERK'S NOTES ON RULE 5

Rule 5 has been amended to provide that counsel must complete the certification in the notice of appeal even if counsel does not have a good faith belief that an appeal is reasonable and warranted under the circumstances. The proposed amendment ensures that attorneys comply with their obligations under Rule 3.1 of the Rules of Professional Conduct, which provides: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established." The amendment also takes into account the direction provided in Comment [3] to Rule 3.1 of the Rules of Professional Conduct relating to the constitutional entitlement "to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule." The requirement that counsel complete the certification acknowledges that good faith may at times be defined by the legal obligation of counsel to file an appeal that raises any arguable points of error that are advanced by the client.

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 certain 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, and attach the pro se supplemental brief to counsel's motion.

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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. The petitioner is prohibited from filing more than one reply brief unless permitted by 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 certain 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. The pro se supplemental brief must be attached to counsel's motion. This Rule ensures that the counsel fully advances the client's arguments on appeal, but provides counsel with a means of dissociating 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.

The proposed 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.

Rule 11. Abuse & neglect appeals

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(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. Counsel must complete the certification in

Appendix A even if counsel does not have a good faith belief that an appeal is reasonable and warranted under the circumstances. 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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~~(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.* 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.

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CLERK'S NOTES ON RULE 11

Rule 11 has been amended to provide an alternate certification in cases where counsel does not have a good faith belief that an appeal is reasonable and warranted under the circumstances. The alternate certification provides protection for court-appointed counsel concerned with complying with Rule 3.1 of the Rules of Professional Conduct and fulfilling counsel's duties to advocate on behalf of an indigent client. Rule 3.1 of the Rules of Professional Conduct provides that an appellate remedy should only be pursued if counsel believes in good faith that error has been committed and

there is a reasonable basis for an extension, modification, or reversal of existing law. The alternate certification for court-appointed counsel acknowledges that good faith may at times be defined by the legal obligation of court-appointed counsel to file an appeal that raises any arguable points of error that are advanced by the client. Because transcripts are essential to review of abuse and neglect appeals, 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.

A True Copy

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

