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APPELLATE ADVOCACY

A Handbook on Appellate Practice in Tennessee

Seventh Edition

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INTRODUCTION

The purpose of this handbook is to provide a resource to assist practitioners handling appeals in Tennessee. The goal in all appeals, and indeed, in law in general, is for cases to be decided on their merits. This handbook is intended to aid practitioners in preparing their cases so that the merits are the focus of their appeal.

The Seventh Edition is available free through the website of the Nashville Bar Association, NashvilleBar.org. Therefore, it can be searched online for answers to any appellate questions the reader may have. Anyone who wants to order a hard copy of the book may contact the NBA office directly at 615-242-9272, and one will be provided for a reasonable cost for printing and mailing.

Any changes in the rules affecting appellate practice through the current update, or anticipated through July 1, 2017, have been incorporated. Because the book is published electronically on NashvilleBar.org, it can be more easily updated. It is the editor's intent to update the book online at least annually.

The authors and editors of this Handbook are privileged to have had judges and staff attorneys from the Supreme Court and the Court of Appeals to work with the committee to improve both the quality and accuracy of the information in the book. Several lawyers who practice frequently in the appellate courts have also contributed.

This handbook is only a guide. The appellate courts remain, of course, the final arbiters of the meaning and intent of the rules. If you have questions that are not answered by this handbook, please forward them to the Editor, Donald Capparella, at:

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Lawyers appearing in Tennessee's appellate courts should develop a working knowledge of the Tennessee Rules of Appellate Procedure and the rules of each of the appellate courts. Lawyers will still be expected to make their own independent judgments concerning what the rules require. It is the hope that this handbook will assist the bar in becoming better appellate advocates.

ACKNOWLEDGMENTS

Many persons have contributed to the preparation of the Seventh Edition of the Handbook and the most recent update. However, proper acknowledgment must first be given to the 1990 Appellate Practice Committee as we have stood on their shoulders, and most importantly to Andree Blumstein, Hon. Justice William C. Koch, Jr., Greg Miller, Ellen Pollack, and Mary Schaffner for steering the First Edition to completion.

The persons responsible for the Second Edition included the following members of the appellate practice committee, headed by Donald Capparella, editor of the Handbook, and William T. Owen and Michael W. Catalano, assistant editors, along with Richard Dance, Joe C. Peel, Robert Orr, Jr., and Cecil Crowson. The appellate judiciary and their staffs also deserve special credit for serving as editors at large for the Second Edition, particularly Justice Frank F. Drowota, Justice William C. Koch, Judge W. Frank Crawford, Judge Charles D. Susano, Jr., Judge Hewitt P. Tomlin, Jr., Judge Joseph B. Jones, Judge Joseph M. Tipton, Margaret Faulkner, Marshall Davidson, John Burns, Rebecca Domina and Lee Ramsey. The participation of the Knoxville Bar Assocation was also welcomed, and special thanks to Wanda Sobieski for her comments on the Second Edition. Davis Loftin's assistance in incorporating the final edits should also be mentioned and Gwen Moritz for her work on the cover design and word processing.

The credit for the idea of publishing the Third Edition in electronic form with free access to anyone through NashvilleBar.org must go to Justice William C. Koch. In addition, special thanks must go to the editorial committee, headed by Donald Capparella, editor of the Third Edition of the Handbook, William T. Owen and Michael W. Catalano, assistant editors, for compiling all the new information and putting the Third Edition into its revised format. In addition, the support of C. DeWeese Berry, our liaison to the NBA Board and then NBA President, was invaluable in providing the NBA's resources to publish the book for all lawyers to use. Andy Rowlett, then chair of the appellate practice committee, also deserves credit for helping to see the project to completion. Nikki Gray and her staff at the NBA provided the considerable technical expertise to publish this book on NashvilleBar.org.

The Third Edition was the result of a cast effort by many other lawyers giving their time to the committee under the supervision of the editorial committee. The following people deserve special recognition for the service as editors of individual chapters in this book: Harold T. Pinkley, Donald Capparella, John D. Kitch, Paul W. Ambrosius, Andree S. Blumstein, C. DeWeese Berry, Gail Pigg, Andy Rowlett, Cecil Crowson, William T. Owen, Michael W. Catalano, Judge Joe C. Loser, Kathryn A. Stephenson, and Jeffrey DeVasher. In addition, the state appellate judiciary and their staffs again agreed to serve as editors at large for the Handbook, and special thanks goes particularly to Justice Frank F. Drowota, Justice William C. Koch, Judge Joseph M. Tipton, Cecil Crowson, Patricia Aston, Tony A. Childress, Marshall Davidson, Lee Ramsey, and Cheri Spossey Tollison. Additional credit should go to Donald Capparella, editor of the 2003 update, and to William T. Owen and Kathryn A. Stephenson for their assistance. Thanks also to Paul W. Ambrosius, 2003 Chair of the NBA Appellate Practice Committee.

The 2006 update was the result of another group of lawyers who revised each chapter to meet current law and rule changes. Chapter Editors included Donald Capparella, Kathryn Stephenson, Jon Rose, Paul Ambrosius, William T. Owen, Dean Joe Loser, Michael W. Catalano, and Kristen Amonette. In addition, the Editorial Staff, led by Editor in Chief Donald Capparella, William T. Owen and Michael W. Catalano, reviewed the entire book to assure continued high quality. Thanks to all these dedicated professionals for their hard work. Special thanks to John D. Kitch, the 2006 chair of the Appellate Practice Committee for his leadership and support.

The Fourth Edition was a complete revision of the Handbook. The previous question and answer format was replaced by a more traditional treatise approach. Subject headings replaced the old question and answer format.

Donald Capparella continued as the editor in chief of the Handbook to ensure continuity from the previous editions. Amy J. Farrar and Candi Henry served as assistant editors and wrote several chapters, along with Donald Capparella. Michael

Catalano and William T. Owen retained their previous roles as assistant editors by providing the critical input from the Court and its staff attorneys, to ensure accuracy of information about the court itself, as well as assisting in authorship of the chapters about the appellate court. Tennessee Supreme Court Staff Attorney Lisa Rippy contributed information about the Court's innovative S.C.A.L.E.S. project. Additional chapter contributors included Lea Mullins, who also assisted greatly in providing uniformity in the appearance and format of the chapters and consistency in all the citations. Other chapter authors include Michael Parsons, who drafted the chapter on workers' compensation appeals. I would also like to thank Andree Blumstein for editing one of our chapters, and for all her work on previous editions of this Handbook. Jeff DeVasher deserves special thanks for verifying that our special notations regarding criminal appeals were correct.

I would like to give special thanks to Amy J. Farrar and Candi Henry, the two most recent chairs of the Nashville Bar Association's Appellate Practice Committee, for their leadership and support in completing this project. Special thanks also goes to Scott Pilkinton, who assisted in making sure all recent changes to the rules were included and in updating other authorities.

The Fifth Edition of the Handbook was the result of the work of Candi Henry, Mike Catalano, William T. Owen, & Amy J. Farrar. Special thanks to Candi Henry for reviews and additions to nearly every chapter. Michael Parsons again helped with the workers' compensation chapter. Donald Capparella again served as Editor in Chief.

The Sixth Edition of the Handbook was the result of the hard work of Tracy Alcock, Amy Farrar, Candi Henry, William T. Owen, Mike Parsons, and especially Elizabeth Sitgreaves, who took on the task of comprehensively reviewing the entire Handbook for accuracy and consistency among and between chapters, and of course, Editor Donald Capparella. Special thanks also go to Margaret Dodson, and the members of the Nashville Bar Association's Appellate Practice Committee, who submitted practice tips to improve this Handbook.

The Seventh Edition was the work of Donald Capparella and Candi Henry, with the tremendous assistance of Covington Dismukes and Zachary Parker. Special thanks also to William T. Owen for his excellent editorial contributions, to Michael Parsons, for his help on the Worker's Compensation chapter, and to Amy Farrar for her continuing support of this Handbook.

CHAPTER 1 | APPEAL AS OF RIGHT

A. What is a final order?

In criminal cases, there are many enumerated conditions under which an appeal as of right is available.[1] For civil matters, an appeal as of right lies from all final judgments in the trial court.[2] Regardless of the type of matter, the two conditions attached to an appeal of right are (1) that the order appealed from is final and (2) that the appellant files a timely notice of appeal.[3]

So, the first question you must ask yourself is: Do I have a final judgment or an otherwise appealable order?

The two conditions attached to an appeal of right are (1) that the order appealed from is final and (2) that the appellant files a timely notice of appeal.[4]

There are two ways for an order or judgment to become final. First, a trial court order that decides all the issues among all the parties, leaving nothing to be done in the action except to execute on the judgment, is a "final judgment" and thus appealable.[5] Second, the trial court may certify an order as final in accordance with Tennessee Rule of Civil Procedure 54.02, discussed later in section C.[6]

In criminal cases, as in civil cases, an appeal may be had as of right only from a final order, pursuant to either Tennessee Rule of Appellate Procedure 3(b) or 3(c).[7] Orders of criminal contempt are immediately appealable as of right, although no appeal lies from an acquittal of criminal contempt.[8]

B. What is not a final order?

1. Unresolved claim for attorney's fees

A judgment is not final if there remains an undecided claim for attorney's fees.[9] Divorce and tax cases are common types of cases where attorney's fees may be sought and left unresolved after the substantive issues in the case have been determined.

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[1] Tenn. R. App. P. 3(b)-(c); *see also State v. Lane*, 254 S.W.3d 349, 352-35 (Tenn. 2008).

[2] Tenn. R. App. P. 3(a).

[3] *See* Tenn. R. App. P. 3; *Poff v. Poff*, No. 01-A-01-9301-CV00024, 1993 WL 73897, at *1 (Tenn. Ct. App. Mar. 17, 1993).

[4] *Poff v. Poff*, No. 01-A-01-9301-CV00024, 1993 WL 73897, at *1 (Tenn. Ct. App. Mar. 17, 1993).

[5] *See* Tenn. R. App. P. 3(a); *Ball v. McDowell*, 288 S.W.3d 833, 836-37 (Tenn. 2009); *In re Estate of Ridley*, 270 S.W.3d 37, 40 (Tenn. 2008); *In re Estate of Henderson*, 121 S.W.3d 643, 645 (Tenn. 2003); *Simerly v. City of Elizabethton*, No. E2009-01694-COA-R3-CV, 2011 WL 51737 (Tenn. Ct. App. Jan. 5, 2011); *In re Estate of Schorn*, No. E2010-00935-COA-R3CV, 2011 WL 1201871 (Tenn. Ct. App. Mar. 31, 2011) *perm. app. denied* (Jul. 15, 2011).

[6] *See In re Estate of Henderson*, 121 S.W.3d at 646; *Stidham v. Fickle Heirs*, 643 S.W.2d 324, 325 (Tenn. 1982); *Shofner v. Shofner*, 181 S.W.3d 703, 713 (Tenn. Ct. App. 2004).

[7] *State v. Gallaher*, 730 S.W.2d 622, 623 (Tenn. 1987); *State v. Comer*, 278 S.W.3d 758, 761 (Tenn. Crim. App. 2008); *State v. Maddox*, 603 S.W.2d 740, 741 (Tenn. Crim. App. 1980); *State v. Daniels*, No. E2009-02172-CCA-R3-CD, 2010 WL 5343776 (Tenn. Crim. App. Dec. 23, 2010).

[8] Tenn. R. App. P. 3(b); *Ahern v. Ahern*, 15 S.W.3d 73, 80-82 (Tenn. 2000).

[9] *Spencer v. The Golden Rule, Inc*., No. 03A01-9406-CV-00207, 1994 WL 589564 (Tenn. Ct. App. Oct. 21, 1994).

2. Voluntary dismissals

In *Green v. Moore*, 101 S.W.3d 415 (Tenn. 2003), the Supreme Court held that a voluntary dismissal, without more, does not constitute a final order. In that case, the defendant employer, who had been granted summary judgment on the plaintiff's claims, subsequently took a voluntary dismissal of its counterclaim. Later, the trial court entered an order confirming that all claims had been adjudicated. The Court held that the 30-day time limit for filing a notice of appeal ran from entry of the order, not from the earlier notice of voluntary dismissal. A notice of non-suit does not adjudicate anything; an order is required.

C. Finality based on Tennessee Rule of Civil Procedure 54.02

Under Tennessee Rule of Civil Procedure 54.02, a trial court may direct the entry of a final judgment as to "one or more but fewer than all the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." The order must contain the express determinations and directions provided by the rule. Orders that resolve fewer than all the claims between all the parties, but that contain statements such as "this order constitutes a final judgment" or "this order resolves all pending claims between the parties" have been held not to be final appealable judgments.

The appellate courts can review the propriety of a trial court's decision to certify an order as final under Tennessee Rule of Civil Procedure 54.02.[10] The trial court's authority to direct the entry of a final judgment is not absolute.[11] Tennessee Rule of Civil Procedure 54.02 requires, at a minimum, that the order certified as final actually be "dispositive of an entire claim or party."[12]

This issue is recently becoming more important as appellate courts are taking the time to review whether the trial court properly certified an order as final under Rule 54.02.[13]

A leading case on this subject is currently *Brown v. Roebuck & Assocs., Inc*.[14] The Tennessee Court of Appeals considered whether the trial court erred in granting the Plaintiff's Rule 54.02 motion, certifying a partial summary judgment order against the Defendant as final.[15] The Court cited the well-settled rule that an order may be certified as final under Rule 54.02 if it disposes of at least one claim or party.[16] The Court also noted that the "multiple party prong 'applies only if the [trial court's] judgment disposes of all of the rights or liabilities of one or more of the parties,'" which did not occur in this case.[17] Focusing on the issue of what constitutes a claim under the Rule, the Court definitively stated that the "aggregate of operative facts" test is applicable in Tennessee.[18] The Court concluded that, in this case, all nine of the claims asserted arose from a single aggregate of operative facts and therefore constituted a single claim that should not be separated.[19]

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[10] *Bayberry Assocs. v. Jones*, 783 S.W.2d 553, 557-59 (Tenn. 1990).

[11] *Crane v. Sullivan*, No. 01A01-9207-CH-00287, 1993 WL 15154, at *1-2 (Tenn. Ct. App. Jan. 27, 1993).

[12] *Bayberry Assocs.*, 783 S.W.2d at 558; *See, e.g., Scott v. Yarbro*, No. W2004-00746-COA-R3-CV, 2005 WL 1412128, at *3 (Tenn. Ct. App. June 15, 2005) (holding an order was ineffective as a final judgment where the trial court actually decided nothing more than an element of a cause of action).

[13] *See e.g., Christus Gardens Inc. v. Baker, Donelson, Bearman, et al.*, No. M2007-01104-COA-R3-CV, 2008 WL 3833613, at *3 (Tenn. Ct. App. Aug. 15, 2008) (reiterating that an appellate court's jurisdiction to hear only final judgments is a threshold issue); *Tucker v. Capitol Records, Inc.*, No. M2000-01765-COA-R3-CV, 2001 WL 1013085 (Tenn. Ct. App. Sept. 6, 2001) (holding an improper Rule 54 certification meant there was no final judgment and no jurisdiction in the appellate courts).

[14] *Brown v. Roebuck & Assocs., Inc.*, No. M2008-02619-COA-R3-CV, 2009 WL 4878621 (Tenn. Ct. App. Dec. 16, 2009).

[15] *Id.* at *4.

[16] *Id.* at *5.

[17] *Id.*

[18] *Id. at *6.*

[19] *Id*. at *7.

Tennessee Rule of Civil Procedure 54.02 is not a substitute for an interlocutory appeal and may not be used to appeal such interlocutory decisions as discovery orders or orders denying a motion to dismiss or a motion for summary judgment.

D. Non-final orders that can be appealed as of right

1. Contempt

In a contempt proceeding, a judgment of contempt that reserves ruling on the resulting punishment is not final.[20] Contempt proceedings are, however, collateral to and independent of the cases or proceedings from which they arise. Therefore, a judgment of contempt is a final order and appealable as of right even if the proceeding out of which the contempt arose is not complete.[21] Similarly, contempt proceedings that arise after judgment has been entered, i.e., motions for contempt for failure to comply with a final judgment, do not affect the finality of the judgment.[22]

2. Arbitration

Tennessee Code Annotated § 29-5-319(a) provides that an appeal may be taken from certain orders in arbitration cases that are not final and that would not normally be appealable as of right. The statute "creates a rare exception to the general rule that a party is not entitled to an appeal from an order which is not final."[23]

3. Estate cases

Orders resolving claims against an estate are appealable immediately without waiting for the entire estate to be settled.[24] Disputes over the issuance of letters testamentary are likewise entitled to immediate appeals.[25] An order rejecting all purported wills submitted for probate and finding that the decedent died intestate is a final appealable order.[26]

4. Collateral Order Doctrine

The "collateral order doctrine" is an exception to the finality requirement. For example, there is normally no right to appeal from a denial of a motion for summary judgment. However, when a summary judgment claiming immunity from suit is denied, the Court of Appeals may invoke the "collateral order doctrine" to accept the appeal anyway.[27]

5. Orders Denying Motions for Recusal

Effective July 1, 2012, the Tennessee Supreme Court adopted new procedures to be followed for judge recusal motions.[28] This includes special procedures for interlocutory appeals from the denial of a motion to recuse. Dubbed an "accelerated interlocutory appeal," it is a voluntary appeal as of right.[29] More information can be found in Chapter 11.

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[20] *Hall v. Hall*, 772 S.W.2d 432, 436 (Tenn. Ct. App. 1989); *In re Hedge*, No. M2002-01218-COA-R3-CV, 2003 WL 43353 (Tenn. Ct. App. Jan. 7, 2003).

[21] *Hall v. Hall*, 772 S.W.2d 432, 435-36 (Tenn. Ct. App. 1989); *Poff v. Poff*, No. 01-A-01-9301-CV00024, 1993 WL 73897 at *2 (Tenn. Ct. App. Mar. 17, 1993).

[22] *Poff v. Poff*, No. 01-A-01-9301-CV00024, 1993 WL 73897 at *2 (Tenn. Ct. App. Mar. 17, 1993).

[23] *Samson v. Hartsville Hospital, Inc.*, No. 01-A-01-9609-CH-00430, 1997 WL 107167 at *2 (Tenn. Ct. App. Mar. 12, 1997).

[24] Tenn. Code Ann. § 30-2-315(b); *Cantrell v. Estate of Cantrell*, 19 S.W.3d 842, 844 (Tenn. Ct. App. 1999).

[25] Tenn. Code Ann. § 30-1-107.

[26] *In re Estate of Henderson*, 121 S.W.3d 643 (Tenn. 2003).

[27] *Cantrell v. DeKalb County*, 78 S.W.3d 902, 904 at n.3 (Tenn. Ct. App. 2001); *Fann v. Brailey*, 841 S.W.2d 833, 835 (Tenn. Ct. App. 1992).

[28] *See generally* Tenn. S. Ct. R. 10B.

[29] Tenn. S. Ct. R. 10B.

E. Notice of appeal

1. How to initiate an appeal as of right

Notice of an appeal as of right must be filed with the clerk of the appellate court[30] "within 30 days after the date of entry of the judgment appealed from."[31] The "judgment appealed from" may be the order overruling the motion for new trial, or one of the other orders set forth in Tennessee Rules of Appellate Procedure 50, 52, and 59. Effective July 1, 2016, Tenn. Code Ann. § 36-1-124(d) requires that notices of appeals in termination of parental rights cases be signed by the appellant, not just the attorney.[32]

An order or judgment "is final when it so far disposes of the cause that nothing remains to be done but the issuing of the final process or the taking of other ministerial steps necessary to carry the decree into effect."[33] While the explicit declaration of an order as either "final" or "provisional" may be an indication of the court's intent, it is the substance of an order, not the court's declaration, which provides the nature of the order.[34] An order that determines all outstanding issues leaving nothing left for the court to do beyond ministerial steps is a "final judgment," appealable as of right under Tennessee Rule of Appellate Procedure 3(a).

On occasion, an appeal that should be filed in an intermediate court is filed in the Supreme Court. The Supreme Court may transfer such a case to the appropriate intermediate court pursuant to Tennessee Rule of Appellate Procedure 17.[35]

Tennessee Rule of Appellate Procedure 3(b) sets forth the types of appeal as of right available to criminal defendants. These include an appeal of a conviction after trial, an appeal of a certified question of law, an appeal of a sentence when there was no agreement concerning the sentence, an appeal from a judgment denying or revoking probation, and an appeal from a final judgment in a criminal contempt, habeas corpus, extradition, or post-conviction proceeding, or request for expunction. Consequently, Tenn. R. App. P. 3(b) and (c) have recently been modified to provide that a right of appeal lies from orders addressing those proceedings. Additionally, the Rule now provides for an appeal as of right from matters regarding requests for expunction of criminal records, which could previously only be had by writ of certiorari.[36]

Additionally, Tennessee Rule of Criminal Procedure 36.1, effective July 1, 2013, provides a mechanism for the defendant or the State to seek to correct an illegal sentence.[37] With the adoption of this rule, Tennessee Rule of Appellate Procedure 3 was amended to provide for an appeal as of right from the trial court's ruling on a motion filed under Criminal

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[30] This change to filing with the appellate court clerk rather than the trial court clerk took effect on July 1, 2017, so a safe harbor was added into Tenn. R. App. P. 4: If a party attempts to file a notice of appeal with the trial court clerk within 30 days after the entry of judgment, the party gets an additional 20 days from the 30th day after the judgment to file a notice of appeal with the appellate court clerk.

[31] Tenn. R. App. P. 4(a).

[32] The Court of Appeals has recently determined the signature requirement is jurisdictional, *In re Gabrielle W.*, No. E2016-02064-COA-R3-PT, 2017 WL 2954684, at *4 (Tenn. Ct. App. July 11, 2017), and dismissed ten or so appeals, although not without dissent. Several dozen more pending appeals are subject to dismiss. However, the Supreme Court has used its reach down authority to take up the issue. *In Re Bentley D.*, No. E2016-02299-SC-RDO-PT (Order entered August 24, 2017).

[33] *Thomas v. Hedges*, 183 S.W.2d 14, 16 (Tenn. Ct. App. 1944) (citations omitted). *See also Darty v. Darty*, 232 S.W.2d 59, 62 (Tenn. Ct. App. 1949) (holding "a decree has become final when it has disposed of every issue between the parties"); *Davis v. Davis*, 224 S.W.3d 165, 167-68 (Tenn. Ct. App. 2006) (holding "a final judgment fully and completely defines the parties' rights with regard to the issue, leaving nothing else for the trial court to do.") (citations omitted).

[34] *Ridley v. Ridley*, No. 03A01-9708-GS-00350, 1998 WL 8449, *2 (Tenn. Ct. App. Jan. 13, 1998) (holding "the trial court cannot convert an order that is substantively interlocutory into a final order just by declaring it a 'final order'").

[35] *See Moore v. Chandler*, 675 S.W.2d 153, 154 (Tenn. 1984).

[36] *See* Tenn. R. App. P. 3, adv. comm'n cmt. 2013.

[37] *See* Tenn. R. Crim. P. 36.1, adv. comm'n cmt. 2013.

Procedure Rule 36.1 to correct an illegal sentence.[38]

Criminal defendants may also seek review of bail issues under Tennessee Rule of Appellate Procedure 8, interlocutory appeals under Tennessee Rule of Appellate Procedure 9, and extraordinary appeals under Tennessee Rule of Appellate Procedure 10. When an appeal is not otherwise allowed, a writ of certiorari may be sought to remedy a trial court's acting illegally or without jurisdiction.[39] There is no appeal as of right from a denial of sentence reduction credits.[40]

Tennessee Rule of Appellate Procedure 3(c) sets forth the types of appeal as of right available to the State in criminal cases. These include orders or judgments that have the substantive effect of dismissing an indictment, information, or complaint; a judgment setting aside a verdict and entering a judgment of acquittal; the granting of or refusal to revoke probation; a judgment remanding a child to juvenile court; and an appeal from a final judgment in a habeas corpus, extradition, or post-conviction proceeding. The State may also seek review of bail issues under Tennessee Rule of Appellate Procedure 8, interlocutory appeals under Tennessee Rule of Appellate Procedure 9, and extraordinary appeals under Tennessee Rule of Appellate Procedure 10. The state may seek a writ of certiorari as well.[41]

PRACTICE TIP! When appealing only a sentence, the "judgment appealed from" is the date on which the sentence is imposed.

2. Content of the notice of appeal and determining parties to the appeal

All the parties to an appeal no longer have to be individually named. Tennessee Rule of Appellate Procedure 3(f) was amended in 2004 to provide that an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X."

Under the old rule, parties who were not specifically named in the notice of appeal were not considered parties to the appeal.[42] Even under the rule as amended, the better practice is still to clearly identify all parties to the appeal.

Effective July 1, 2012, Tenn. R. App. P. 5(c) was amended to provide that if more than one party files a notice of appeal in civil cases, the first party to file shall be deemed the appellant, unless otherwise directed by the court. This amendment helps clarify other provisions of the rules, e.g., by making clear who bears the burden with respect to content and preparation of the record,[43] and when briefs are due.[44] The amendment does not apply to cases appealed to the Court of Criminal Appeals.[45]

3. Premature notices of appeal

Tennessee Rule of Appellate Procedure 4(d) provides that, if a notice of appeal is filed prematurely, and the trial court subsequently enters a final appealable order, the notice will be deemed to have been filed after entry of the order. Therefore, in any case where it is not clear whether an order is final, the best course is to go ahead and file a notice of appeal within 30 days of the order that is believed to be final. Although this might result in a premature appeal, it preserves the right to an appeal. Preserving the right to appeal is important since the timely filing of a notice of appeal is jurisdictional, and the appellate court

[38] *See id*.

[39] *See* Tenn. Code Ann. § 27-8-101; *Cox v. State*, 53 S.W.3d 287, 294 (Tenn. Crim. App. 2001), overruled on other grounds by *Moody v. State*, 160 S.W.3d 512, 515-16 (Tenn. 2005).

[40] *Brown v. State*, No. M2003-02058-CCA-R3-CO, 2004 WL 2346159, at *1 (Tenn. Crim. App. Oct. 15, 2004).

[41] *State v. Lane*, 254 S.W.3d 349, 353 (Tenn. 2008); *State v. Leath*, 977 S.W.2d 132, 135 (Tenn. Crim. App. 1998).

[42] *Mairose v. Federal Express Corp*., 86 S.W.3d 502, 508-09 (Tenn. Ct. App. 2001); *Town of Carthage v. Smith County*, No. 01-A-01-9308-CH00391, 1995 WL 92266, at *3-4 (Tenn. Ct. App. Mar. 8, 1995).

[43] *See* Tenn. R. App. P. 24.

[44] *See* Tenn. R. App. P. 29.

[45] Tenn. R. App. P. 5, 2012 adv. comm'n cmt.

cannot extend the 30-day time period for any reason.[46] Filing a premature notice of appeal does not deprive the trial court of jurisdiction to hear additional motions filed pursuant to Tenn. R. App. 4(b)-(c).[47]

If the order appealed from is not final, the appellate court also has the discretion to waive the finality requirement under Tennessee Rule of Appellate Procedure 2, which permits the court to suspend for good cause the requirements of any of the Rules of Appellate Procedure (except for Rules 4, 11, and 12). The court must give a "good reason" for the suspension.[48]

The Court of Appeals may also dismiss a premature appeal without prejudice. In rare cases where the lack of finality is not noticed until after the appeal has been briefed and argued, the court may waive the lack of finality under Tennessee Rule of Appellate Procedure 2.[49]

It should be noted that all three sections of the Court of Appeals screen cases for finality when the record is filed. If no final order has been entered, the Court will either dismiss the appeal or stay the appeal and allow the appellant time (usually sixty days) to obtain a final judgment. Normally, however, the trial court clerk will not send up a record until a final judgment has been entered and the premature notice of appeal has become effective.

Nothing has happened to affect the proceedings at the trial level if an appeal is dismissed because the judgment is not final. The dismissal is not on the merits, so the case has not been dismissed with prejudice. Unless a party obtained a stay while the case was on appeal, the case continues at the trial level until the judgment is final. The Court of Appeals considers the dismissal of an appeal because the judgment is not final as the termination of that appeal. While the appellant may perfect another appeal as of right after obtaining a final order, the Court of Appeals views the second appeal as a new appeal. Thus, when the first appeal is dismissed, the Court of Appeals routinely taxes the costs of the first appeal against the appellant, and collection of costs will not be stayed.

If your appeal is dismissed for lack of finality after your record has been sent to the Court of Appeals, you must file a motion requesting the record in the dismissed case be consolidated with the record in the new appeal. All further pleadings will be under the new appeal number.

The appellant does not have the right to withdraw a notice of appeal without prejudice in order to raise additional issues in the trial court.[50] The only avenue for withdrawing an appeal is set forth in Tennessee Rule of Appellate Procedure 15.

4. Tolling of the time for filing a notice of appeal

The kinds of motions that will toll the time for filing a notice of appeal are set forth in Tennessee Rule of Civil Procedure 4(b). They include a motion for judgment in accordance with a motion for a directed verdict under Tennessee Rule of Civil Procedure 50.02; a motion to amend or make additional findings of fact under Tennessee Rule of Civil Procedure 52.02; a motion for a new trial under Tennessee Rule of Civil Procedure 59.02; and a motion to alter or amend the judgment under Tennessee Rule of Civil Procedure 59.04, which might include a "motion to reconsider" if it is, in substance, a motion to alter or

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[46] *See* Tenn. R. App. P. 2.

[47] Tenn. R. App. P. 4(e).

[48] *Bayberry Assocs. v. Jones*, 783 S.W.2d 553, 559 (Tenn. 1990); *see also Ruff v. Raleigh Assembly of God Church*, 241 S.W.3d 876, n.1 (Tenn. Ct. App. 2003) (the parties had been entangled in litigation for ten years and were entitled to closure); *In re Hedge*, No. M2002-01218-COA-R3-CV, 2003 WL 43353, at *2 (Tenn. Ct. App. Jan. 7, 2003) (finding of contempt had been entered a year earlier and it was highly unfair and prejudicial for that stigma to continue hanging over appellant's head); *but see Scott v. Yarbro*, No. W2004-00746-COA-R3-CV, 2005 WL 1412128, at *3 (Tenn. Ct. App. June 15, 2005) (declining to find good cause).

[49] *See Braden v. Strong*, No. M2004-02369-COA-R3-CV, 2006 WL 369274, at *15-16 (Tenn. Ct. App. Feb. 16, 2006).

[50] *Woods v. State*, No. 01C01-9606-CR-00238, 1997 WL 602865, at *2 (Tenn. Crim. App. Sept. 30, 1997).

amend the judgment.[51] The time for appeal for all parties runs from the entry of the order either denying a motion for a new trial or granting or denying one of the other listed motions.[52]

PRACTICE TIP! Note that a motion for discretionary costs does not toll the time for filing a notice of appeal.[53]

In criminal cases, most post-trial motions that toll the time for filing a notice of appeal are set forth in Tennessee Rule of Appellate Procedure 4(c). These motions include a motion for a judgment of acquittal under Tennessee Rule of Criminal Procedure 29(c); a motion for new trial under Tennessee Rule of Criminal Procedure 33(a); a motion for arrest of judgment under Tennessee Rule of Criminal Procedure 34; and a motion for suspended sentence under Tennessee Rule of Criminal Procedure 32(a). A motion to withdraw a guilty plea also tolls the time.[54] When such motions are filed, the time for appeal for all parties runs from entry of the order denying a new trial or granting or denying any other such motion or petition. A motion to reduce a sentence, however, does not toll the time for filing.[55]

The motions set forth in Tennessee Rule of Appellate Procedure 4(c) will not, however, toll the period for filing an appeal in a post-conviction proceeding.[56]

5. Late notices of appeal

A notice of appeal must be filed within thirty days of entry of a final judgment.[57] In civil cases, filing of a notice of appeal within thirty days of entry of a final judgment is jurisdictional.[58] The comment to Tennessee Rule of Appellate Procedure 4 observes that "in appropriate circumstances" an otherwise untimely appeal may be taken by first securing relief under Tennessee Rule of Civil Procedure 60.02.[59] However, a trial court cannot avoid the Rule 4 time limits by entering a notice of appeal nunc pro tunc.[60]

The Supreme Court may review an appellate court's dismissal of an appeal for failure to file a timely notice of appeal. If the Supreme Court determines the intermediate appellate court erred, it will remand the case to the intermediate appellate court for consideration on the merits.[61]

In criminal cases, however, timely filing is not jurisdictional, and the requirement may be waived "in the interest of justice."[62] This rule applies to appeals as of right brought by either the accused or the State.[63] For purposes of Tennessee Rule of Appellate Procedure 4(a), post-conviction proceedings are criminal in nature, and the notice of appeal may be waived in the interest of justice.[64] The appellate court may waive the notice of appeal requirement sua sponte if it is in the interest of justice.[65]

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[51] *Tenn. Farmers Mut. Ins. Co. v. Farmer*, 970 S.W.2d 453, 454-55 (Tenn. 1998).

[52] As the rule makes clear, an order granting a motion for a new trial is not a final order for purposes of an appeal as of right. *See Evans v. Wilson*, 776 S.W.2d 939, 941 (Tenn. 1989); *Panzer v. King*, 743 S.W.2d 612, 616 (Tenn. 1988), *abrogated on other grounds by Lacy v. Cox*, 152 S.W.3d 480, 485 (Tenn. 2004); *Davis v. Flynn*, No. E1999-00421-COA-R3-CV, 2000 WL 807613, at *1 (Tenn. Ct. App. Jun. 21, 2000).

[53] Tenn. R. App. P. 4, adv. comm'n cmt [1995].

[54] *See State v. Peele*, 58 S.W.3d 701, 706 (Tenn. 2001).

[55] *See State v. Ruiz*, 204 S.W.3d 772, 777 (Tenn. 2006); *State v. Bilbrey*, 816 S.W.2d 71, 75 (Tenn. Crim. App. 1991).

[56] *Boyd v. State*, No. W1999-01981-CCA-R3-PC, 1999 WL 33261797, at *4-5 (Tenn. Crim. App. Dec. 21, 1999).

[57] Tenn. R. App. P. 4.

[58] *G.F. Plunk Const. Co. v. Barrett Properties*, 640 S.W.2d 215, 217-18 (Tenn. 1982).

[59] *See Jefferson v. Pneumo Services Corp*., 699 S.W.2d 181, 184 (Tenn. Ct. App. 1985).

[60] *Dewees v. Sweeney*, 947 S.W.2d 861, 863-64 (Tenn. Ct. App. 1996).

[61] *Rucker v. Metropolitan Gov't*, No. 89-47-I, 1990 WL 32211, at *1 (Tenn. Mar. 26, 1990).

[62] Tenn. R. App. P. 4(a).

[63] *State v. Powell*, 53 S.W.3d 258, 260 (Tenn. Crim. App. 2000).

[64] *State v. Scales*, 767 S.W.2d 157, 158 (Tenn. 1989).

[65] *State v. Dodson*, 780 S.W.2d 778, 780-81 (Tenn. Crim. App. 1989).

If the requirement is waived, the appellate court may limit the scope of appellate review to the issues that have merit.[66]

The decision to waive timely filing of the notice of appeal is discretionary with the Court of Criminal Appeals. Motions for waiver will not be routinely granted. In order to aid the court in making its determination, the party requesting waiver should set forth in its motion (1) the nature of the issues presented for review, (2) the reasons for the delay in seeking relief, and (3) any other factors relevant to the matter.[67] The moving party should also attach "any matter required by a specific provision of these rules…and the papers, if any, on which it is based."[68]

An appellate court may consider a waived issue "when necessary to do substantial justice" if the issue has "affected the substantial rights of a party."[69] This discretionary consideration is known as "plain error" review.[70] For an appellate court to grant relief under plain error review in a criminal case, five criteria must be met: (1) the record must clearly establish what occurred in the trial court; (2) a clear and unequivocal rule of law must have been breached; (3) a substantial right of the accused must have been adversely affected; (4) the accused must not have waived the issue for tactical reasons; and (5) consideration of the error must be "necessary to do substantial justice."[71]

A court will only grant relief if all five of the above criteria are met.[72] When the record is clear that at least one of the factors cannot be established, the Court is not required to consider all five factors.[73] Plain error review places the burden of persuasion on the criminal defendant.[74]

The rules do not specify where a motion to dismiss an untimely appeal should be filed, but, in practice, such motions are filed in the appellate court.

6. No separate notice required for cross-appeals

An appellee does not have to file a cross-appeal or separate notice of appeal in order to preserve the right to raise issues on a direct appeal. Except when the issues on appeal are limited by the Court of Appeals, Tennessee Rule of Appellate Procedure 13(a) permits the appellee to raise issues on appeal in addition to those raised by the appellant.[75] It is the practice of the Appellate Court Clerk's office to designate the party filing the first notice of appeal as the appellant. The typical way an appellee raises issues on appeal is in the appellee's principal brief.

F. Miscellaneous

1. Proceeding as an indigent person

Tennessee Rule of Appellate Procedure 18 directs that if a trial court denies a defendant the right to proceed as an

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[66] *Id*. at 781. *See also State v. Presley*, No. M2007-02487-CCA-R3-CD, 2008 WL 3843849, at *3-4 (Tenn. Crim. App. Aug. 18, 2008) (holding that the Court was without jurisdiction to hear issues raised in a late-filed motion for a new trial, pursuant to Rule 3(e), but waiving untimely notice of appeal in the interest of justice, pursuant to Rule 4(b)).

[67] *See Hill v. State*, No. 01C01-9506-CC-00175, 1996 WL 63950, at *1 (Tenn. Crim. App. Feb. 13, 1996).

[68] Tenn. R. App. P. 22(a).

[69] *State v. Hatcher*, 310 S.W.3d 788, 808 (Tenn. 2010) (citing Tenn. R. App. P. 36(b)).

[70] *Grindstaff v. State*, 297 S.W.3d 208, 219 n.12 (Tenn. 2009).

[71] *State v. Smith*, 24 S.W.3d 274, 282 (Tenn. 2000) (adopting the test set forth in *State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)).

[72] *Id*. at 283.

[73] *Id*.

[74] *United States v. Olano*, 507 U.S. 725, 737 (1993); *State v. Bledsoe*, 226 S.W.3d 349, 355 (Tenn. 2007).

[75] *See State v. Valentine*, 659 S.W.2d 27, 28-29 (Tenn. Crim. App. 1983); *Eller Bros., Inc. v. Home Fed. Sav. & Loan Ass'n of Nashville*, 623 S.W.2d 624, 625 (Tenn. Ct. App. 1981), overruled on other grounds by *Guiliano v. Cleo, Inc*., 995 S.W.2d 88, 100-01 (Tenn. 1999).

indigent person, an appeal of the trial court's denial should be made to the appellate court in the form of a motion. The motion must be filed with the Court within thirty days after service of notice of the action of the trial court. The motion shall be accompanied by copies of the papers filed in the trial court seeking leave to proceed as an indigent person and by a copy of the statement of reasons given by the trial court for its action.[76]

2. Post conviction

Tennessee Code Annotated § 40-30-117(c) and Tennessee Supreme Court Rule 28 section 10(b), rather than Tennessee Rule of Appellate Procedure 3 or 4, govern review of a trial court's decision to deny a motion to reopen a post-conviction petition.[77] In seeking review of the trial court's denial, a petitioner shall file, within ***thirty*** (30) days of the lower court's ruling, an application in the Court of Criminal Appeals seeking permission to appeal.[78] The application shall be accompanied by copies of all the documents filed by both parties in the trial court and the order denying the motion.[79] In order to obtain appellate review of the trial court's order, a petitioner must comply with the statutory requirements contained in § 40-30-117(c).[80] The failure of a petitioner to comply with statutory requirements governing review of denial of a motion to reopen deprives the Court of jurisdiction to entertain such matter.[81]

3. Assumption of jurisdiction by Supreme Court

Under Tennessee Code Annotated § 16-3-201(d), the Supreme Court may assume jurisdiction, upon motion by a party, over undecided cases in which a notice of appeal or application for interlocutory or extraordinary appeal is filed before the intermediate state appellate court.[82] These cases must be of "unusual public importance" needing an expedited decision and are limited to cases regarding state taxes, the right to hold or retain public office, or issues of constitutional law.[83] Under the same statute, the Supreme Court may, on its own motion, assume jurisdiction when there is a compelling public interest over an undecided case in which a notice of appeal is filed in the intermediate state court.[84] Tennessee Rule of Appellate Procedure 17 governs the procedure to be used in transferring a case from the intermediate court to the Supreme Court,[85] as well as transferring a case appealed as of right to the wrong intermediate appellate court. The Supreme Court's jurisdiction is defined in Tennessee Code Annotated § 16-3-201; the jurisdiction of the Court of Appeals is found in § 16-4-108; and the jurisdiction of the Court of Criminal Appeals is found in § 16-5-108.

4. Preserving issues on appeal

A comprehensive discussion of preserving issues for appeal is too complex to be included in this handbook. However, at a minimum, Tennessee Rule of Appellate Procedure 3(e) requires that after a jury trial certain issues be raised before the trial court in a motion for new trial; if this is not done, the issues will be deemed waived.[86]

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[76] Tenn. R. App. P. 18(c).

[77] *McGhee v. State*, No. 02-C-01-9607-CR-00213, 1996 WL 551755 (Tenn. Crim. App. Sept. 30, 1996) (procedure seeking permission to appeal motion to reopen parallels Tennessee Rule of Appellate Procedure 10).

[78] *See* Tenn. Code Ann. § 40-30-117(c).

[79] *Id; see also* Tenn. Sup. Ct. R. 28 § 10(b).

[80] *See Williams v. State*, No. W1999-01731-CCA-R3-PC, 2000 WL 303432, at *1 (Tenn. Crim. App. Mar. 23, 2000); *Drumbarger v. State*, No. M1999-01444-CCA-R3PC, 1999 WL 1103500, at *1 (Tenn. Crim. App. Dec. 7, 1999); *Killebrew v. State*, No. 03C01-9809-CR-00320, 1999 WL 813471, at *1 (Tenn. Crim. App. Oct. 5, 1999).

[81] *Williams v. State*, No. W1999-01731-CCA-R3-PC, 2000 WL 303432, at *1 (Tenn. Crim. App. Mar. 23, 2000).

[82] Tenn. Code Ann. § 16-3-201(d)(1).

[83] Tenn. Code Ann. § 16-3-201(d)(2).

[84] Tenn. Code Ann. § 16-3-201(d)(3).

[85] *See State v. Walker*, 893 S.W.2d 429, 429 (Tenn. 1995).

[86] *See Waters v. Coker*, 229 S.W.3d 682, 689-90 (Tenn. 2007); *Fahey v. Eldridge*, 46 S.W.3d 138, 141-42 (Tenn. 2001); *McCall v. Bennett*, 243 S.W.3d 570, 572 (Tenn. Ct. App. 2007).

PRACTICE TIP! If a criminal defendant seeks to challenge the sufficiency of the evidence in a jury trial, the defendant must assert the issue in his or her motion for new trial in order to raise the argument on appeal. Otherwise, the issue is deemed waived, and the appellate court will only hear the issue if the defendant proves plain error.

CHAPTER 2 | APPEALS BY PERMISSION

A. Tennessee Rule of Appellate Procedure 9 interlocutory appeal

1. Who may file an interlocutory appeal?

Tennessee Rule of Appellate Procedure 9(a) permits a party to appeal an order of a trial court before the trial court has issued a final order resolving all the issues between all the parties. Any non-final order is called an interlocutory order. Appeals under Tennessee Rule of Appellate Procedure 9 are made upon application and in the discretion of both the trial and appellate courts. Rule 9(g) makes clear that permission to appeal may be granted to both the state and the criminal defendant in criminal actions.

a. *Class Certification*

One exception to the need to have permission to appeal at both the trial and appellate level is an appeal of a trial court order that grants or denies class certification under Tennessee Rule of Civil Procedure 23. The appellate court is required to hear this appeal.[87] To appeal such an order, a party must file notice with the clerk of the appellate court within ten (10) days after the entry of the order. Furthermore, the amended statute now states that the trial court's proceedings are automatically stayed pending this appeal of the class certification ruling.[88]

2. Procedure to file an interlocutory appeal

a. In the trial court

Tennessee Rule of Appellate Procedure 9(b) requires that a motion requesting an interlocutory appeal must be filed in the trial court within thirty (30) days of the date of the entry of the order being appealed. If the trial court determines the order, not appealable as of right, is nonetheless appealable, it shall state, in writing, the reasons for its opinion. That statement must specify: (1) the legal criteria making the order appealable[89]; (2) the factors leading the trial court to the opinion those criteria are satisfied; and (3) any other factors leading the trial court to exercise its discretion in favor of permitting an appeal.[90] Once the order granting permission to appeal is entered, the trial court clerk must file the record on appeal within thirty (30) days.[91]

Unless the appellate court or trial court specifically orders, there is no automatic stay granted simply as a result of the grant of an application to appeal under Rule 9.

b. In the appellate courts

Once the trial court grants permission to appeal, Rule 9(c) requires that the application for permission to appeal must be filed with the clerk of the appellate court within ten (10) days after the entry of the trial court's order granting the interlocutory

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[87] Tenn. Code Ann. § 27-1-125.

[88] *Id*.

[89] Subsection 3 below discusses in more detail the factors considered by Tennessee trial and appellate courts when determining whether to grant a Rule 9 appeal.

[90] Tenn. R. App. P. 9(b).

[91] Tenn. R. App. P. 9(e).

appeal, or after the trial court makes the prescribed statement setting forth the necessity of the appeal in Tennessee Rule of Appellate Procedure 9(b), whichever is later.[92]

It should be noted that if the application for permission to appeal is granted by the appellate court, the trial court clerk has only thirty days to file the record on appeal, instead of the usual forty-five days allowed in an appeal as of right.[93]

If the intermediate appellate court *grants* the interlocutory appeal under Rule 9, an appeal of the final decision of the intermediate appellate court to the Tennessee Supreme Court is governed by Tennessee Rule of Appellate Procedure 11, *Appeal by Permission from Appellate Court to Supreme Court*. Accordingly, a party has sixty days from the intermediate court's judgment to file its application to appeal.[94] If, however, the intermediate appellate court *denies* permission to appeal, the party may still file an application to appeal to the Tennessee Supreme Court, but the application must be filed within thirty days, rather than sixty days, of the intermediate appellate court's order. That application shall be titled, "Application for Permission to Appeal from Denial of Rule 9 Application."[95]

If the Tennessee Supreme Court grants the appeal, it may choose to hear the merits itself rather than remanding the appeal to the intermediate appellate court for hearing.[96] It may also grant the appeal and remand the case to the intermediate court for that court's review on the merits.[97]

Although Tennessee Rule of Appellate Procedure 2 grants to the appellate courts the ability to suspend the requirements and/or provisions of any Tennessee Rule of Appellate Procedure, the power to extend the time for filing an application to appeal is specifically excluded in various situations. While the intermediate appellate courts can waive the ten day time limit for filing a Rule 9 application, Rule 2 prohibits any waiver or extension of the time to appeal to the Tennessee Supreme Court from the denial of an interlocutory appeal by the intermediate appellate court.

3. Factors considered by trial and appellate courts when determining whether to grant permission to appeal under Tennessee Rule of Appellate Procedure 9

Rule 9(a) lists several factors the courts will consider when deciding whether to grant an interlocutory appeal. The following considerations, while not controlling nor fully measuring the courts' discretion, "indicate the character of the reasons that will be considered:"[98]

> (1) the need to prevent irreparable injury, giving consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective;
>
> (2) the need to prevent needless, expensive, and protracted litigation, giving consideration to whether the challenged order would be a basis for reversal upon entry of a final judgment, the probability of reversal, and whether an interlocutory appeal will result in a net reduction in duration and expense of the litigation if the challenged order is reversed; and

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[92] Tenn. R. App. P. 9(c).

[93] *Compare* Tenn. R. App. P. 9(e) *with* Tenn. R. App. P. 25.

[94] Tenn. R. App. P. 11(b).

[95] Tenn. R. App. P. 9(c).

[96] *See e.g.*, *State ex rel. Overton v. Taylor*, 786 S.W.2d 942 (Tenn. 1990) (on denial of a Tenn. R. App. P. 9 appeal).

[97] *Womack v. Corr. Corp. of Am.*, No. M2012-00871-SC-R11-CV, 2014 Tenn. LEXIS 659 *(*Tenn. Sept. 22, 2014*)* (granting application for interlocutory appeal and remanding to the Court of Appeals for review on the merits).

[98] Tenn. R. App. P. 9(a).

> (3) the need to develop a uniform body of law, giving consideration to the existence of inconsistent orders of other courts and whether the question presented by the challenged order will not otherwise be reviewable upon entry of final judgment.[99]

Because an interlocutory appeal is an exception to the general rule which requires a final judgment before a party may appeal as of right, permission to appeal is rarely granted by the appellate courts.[100] In fact, during the 2011-2012 fiscal year (the last year for which statistics are available[101]), the Tennessee Court of Appeals disposed of 116 applications for permission to appeal under Rules 9 and 10.[102] Twenty-three percent of applications were granted.[103] For interlocutory appeals to the Tennessee Supreme Court, prospects are much more dim. Out of forty-nine Rule 9 and 10 applications disposed of in the same time period, seven were granted—a success rate of slightly more than fourteen percent.[104]

One example of a successful interlocutory appeal is found in *Rusnak v. Phebus*.[105] In that case, the trial court ruled that because the partition of real property was initiated while one joint tenant (Ms. Oliver) was still living, the partition action should continue after her death.[106] The remaining joint tenant (Ms. Phebus) then properly filed a motion requesting a Rule 9 appeal with the trial court. The trial court found that an interlocutory appeal was appropriate because:

> Ms. Phebus can meet the irreparable harm test set forth in T.R.A.P. 9(a)(1). An interlocutory appeal will also avoid a needless and potentially expensive sale [therefore, the requirements of T.R.A.P. 9(a)(2) are met, and] . . .[p]ursuant to T.R.A.P. 9 (a)(3) Tennessee needs to develop a uniform body of law around the subject of the survivorship of a pending action for partition of a joint tenancy in real property.[107]

The Tennessee Court of Appeals apparently agreed with the lower court because it granted Ms. Phebus permission to appeal under Rule 9. In addition, the Court of Appeals stayed all proceedings in the trial court, including the partition sale pending resolution of the appeal.[108] Since both the trial court and the appellate court granted the Rule 9 appeal, Ms. Phebus met her burden showing irreparable harm if her application was not granted. Though a difficult standard to meet, Ms. Phebus successfully argued that if her interlocutory appeal was not granted, the property would be partitioned, sold, and the proceeds split between her and the deceased joint tenant. She further argued because real property is unique, even if the Tennessee Court of Appeals eventually reversed the trial court in Ms. Phebus's appeal as of right, Ms. Phebus would suffer irreparable harm because the sale of her real property could not be undone.[109] Although Ms. Phebus's interlocutory appeal was successful, it should be remembered that "interlocutory appeals to review pretrial orders or rulings, i.e., those entered before a final judgment, are 'disfavored,' . . . ."[110] and are not routinely granted.

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[99] *Id*.

[100] *State v. Gilley*, 173 S.W.3d 1, 5 (Tenn. 2005).

[101] As of fiscal year, 2012-2013, Tennessee courts no longer track the separate disposition data of Rule 9 and 10 applications. However, the trend in past data and the experience of practitioners supports the position that these appeals are rarely granted.

[102] Annual Report of the Tennessee Judiciary Fiscal Year 2011-2012, available at http://www.tsc.state.tn.us/sites/default/files/docs/annual_report_tn_judiciary_fy_2011-12_2-27-13_0.pdf at p.13.

[103] *Id.*

[104] *Id*. at p. 11.

[104] *Rusnak v. Phebus*, No. M2007-01592-COA-R9-CV, 2008 WL 2229514 (Tenn. Ct. App. May 29, 2008).

[105] *Id.*

[106] *Id*. at *4 (The facts of this case show the joint owners of the property were mother and daughter. The partition action was brought while the mother was still living, not by her but by her conservator. Mother died within one month of the partition action being filed.).

[107] Order Granting Interlocutory Appeal (Jul. 18, 2007).

[108] *Rusnak*, 2008 WL 2229514, at *3.

[109] *Id*. at *4-8 (The Tennessee Court of Appeals also noted that previous Tennessee law did not specifically address the issue before it in *Phebus*. The Court of Appeals reversed the trial court and held a partition abates upon the death of a joint tenant where ownership of the whole vests in the other joint tenant by operation of law. This rule is in line with all other jurisdiction which have addressed the issue.).

[110] *State v. Hawk*, 170 S.W.3d 547, 554 (Tenn. 2005).

4. The application to appeal

a. Contents of the application

An application for a Rule 9 appeal must contain: "(1) a statement of the questions presented for review;[111] (2) a statement of the facts necessary to an understanding of why an appeal by permission lies, with appropriate references to the documents contained in the appendix to the application; and (3) a statement of the reasons supporting an immediate appeal."[112] This statement of reasons will be deemed sufficient if it simply incorporates by reference the trial court's reasons for its opinion that an appeal lies.

In addition, Rule 9(d) requires the application to be accompanied by copies of "(1) the order appealed from, (2) the trial court's statement of reasons [supporting an immediate appeal], and (3) the other parts of the record necessary for determination of the application for permission to appeal."[113] A bond for costs on appeal is not required. Tenn. R. App. 9 has been amended to require that the applicable fees, taxes, and documentation required by Rule 6 be submitted with the application.

The moving party should include copies of any motions or other filings that led to the trial court's order, as well as copies of exhibits or other documents at issue in the trial court's order to provide context to the appellate court. It is probably sufficient to file with the appellate court uncertified copies of the papers in the trial court's file if the papers have all appropriate signatures and file stamps. The very careful practitioner, however, may want to provide certified copies.

b. Number of copies of application filed

The appellant must file a sufficient number of copies of the application so as to be able to provide the clerk and every judge of the appellate court with one copy each. It is wise to ask the appellate clerk before filing the number of copies needed by the Court. The application must be served on all parties as provided for in Tennessee Rule of Appellate Procedure 20.

c. Answer to application to appeal

Within ten (10) days of the filing date of the application, any other party may file an answer in opposition. This answer should be filed in the same number as required for the application, and it should include any additional parts of the record the party wishes to have considered by the appellate court. The answer shall be served on all parties as required by Rule 20, and both the application and answer must be submitted without oral argument unless otherwise ordered.[114]

5. Expansion of issues beyond those granted in a Tennessee Rule of Appellate Procedure 9 appeal

Rule 9 does not specifically prohibit an appellee from raising issues on appeal other than those raised by the appellant in the application for permission to appeal. As a practical matter, however, the only issues that may be raised are those certified in the trial court's order granting permission to seek an interlocutory appeal and in the appellate court's order granting the interlocutory appeal.[115] Thus, an appellee wishing to raise issues other than those certified by the trial court or raised by the

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[111] This rule was amended in 2005 to require the application to include a statement of the questions presented for review.

[112] Tenn. R. App. P. 9(d).

[113] *Id*.

[114] Tenn. R. App. P. 9(d).

[115] *See Tennessee Dep't of Mental Health & Mental Retardation v. Hughes*, 531 S.W.2d 299, 300 (Tenn. 1975) (stating that when dealing with an interlocutory appeal, the court can and will deal only with those matters clearly embraced within the question certified to it); *Heatherly v. Merrimack Mut. Fire Ins. Co*., 43 S.W.3d 911, 914 (Tenn. Ct. App. 2000), *perm. app. denied* (Tenn. 2001) (holding that it is appropriate for the Court of Appeals to address additional issues contained in the brief of the Appellants seeking extraordinary relief under Rule 10 where the Court of Appeals' order did not specifically set forth the issues to be addressed and the Appellees responded to the additional issues in their brief); *Montcastle v. Baird*, 723 S.W.2d 119, 122 (Tenn. Ct. App. 1986) (in which the Court of Appeals refused to hear issues broader than those certified from the trial court and granted by the Court of Appeals in the Rule 9 application).

appellant should obtain permission from the appellate court to do so.

B. Tennessee Rule of Appellate Procedure 10 extraordinary appeal

1. Who may file an extraordinary appeal?

Tennessee Rule of Appellate Procedure 10 allows a party to submit an application to appeal an interlocutory order of a lower court from which an appeal lies to the Tennessee Supreme Court, Court of Appeals, or Court of Criminal Appeals.[116] Unlike an interlocutory appeal, an extraordinary appeal does not require permission of the trial court. Instead, the grant of a Rule 10 appeal is in the sole discretion of the appellate court.

Just as an application for a Rule 9 appeal is available to the state as well as the defendant in a criminal action, both parties may also file an application for an extraordinary appeal. In addition, although it is not typical for an extraordinary appeal to be granted to a party in a workers' compensation case, the Tennessee Supreme Court has noted that there may be unusual issues necessitating Rule 10 appeals in some of those cases.[117]

Furthermore, Tennessee appellate courts *may* transform an improperly filed Rule 3 appeal as of right into a proper Rule 10 appeal.[118] Courts have done so when a party mistakenly filed a Rule 3 appeal when the lower court's order was not a final judgment.[119] This may be attributed to the similarity between the grounds for common law writ of certiorari and extraordinary appeals.[120]

2. Deadlines for filing an extraordinary appeal

While Rule 10 does not contain a time limit for filing the application for permission to appeal, the application should be filed with the clerk of the appellate court as soon as possible after the entry of the order of which appeal is desired. The Tennessee Supreme Court has stated that the absence of a timetable for filing a Rule 10 application was not an error. Most actions which give rise to an extraordinary appeal, however, "are of such a character that the application [should be] filed and pursued immediately, lest the issue be rendered moot . . . ."[121] However, Rule 10 applications may be denied if not pursued within a reasonable time.[122] A reasonable time is determined by the appellate court according to the particular circumstances of the case before it.[123]

3. Factors considered by Tennessee appellate courts when determining whether to grant permission to appeal under

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[116] Tenn. R. App. P. 10.

[117] *Phillips v. A&H Constr. Co. Inc*., 134 S.W.3d 145, 149 (Tenn. 2004).

[118] *State v. Leath*, 977 S.W.2d 132, 135 (Tenn. Crim. App. 1998) ("Our Supreme Court has held that it has the authority to transform an appeal improperly filed under Rule 3 of the Tennessee Rules of Appellate Procedure into a proper appeal under Rule 10 of the Tennessee Rules of Appellate Procedure . . .. Our court has also held that it has the same power over appeals filed in this court.") (quoting *State v. Gallaher*, 730 S.W.2d 622, 623 (Tenn. 1987); *State v. James Doe*, No. 01-C-01-9102-CR-00046, 1992 WL 521516 (Tenn. Crim. App. Jun. 29, 1992)).

[119] *See State v. Gallaher*, 730 S.W.2d 622, 623 (Tenn. 1987) ("The State pursued a T.R.A.P. 3 appeal to the Court of Criminal Appeals from the action of the trial judge . . .. The Court of Criminal Appeals correctly held that the trial judge's order was not a final judgment . . .. The State should have pursued a Rule 10 application. The ruling of the trial judge resulted in the State losing a right that could never be recaptured. [W]e treat the State's appeal as a Rule 10 application."); *Brackins & Trentham, Inc., v. Whittier*, 1988 WL 15712 (Tenn. App. Feb 26, 1988) ("[T]he appeals properly should have been brought as an interlocutory appeal under Rule 9, or as an extraordinary appeal under Rule 10. In the interest of expediting a decision upon this issue and to avoid needless and protracted litigation based solely upon procedural process, this Court suspends the provisions of those Rules and grants this appeal as if it were a Rule 10 application.").

[120] *State v. Willoughby*, 594 S.W.2d 388, 392 (Tenn. 1980).

[121] *State v. Best*, 614 S.W.2d 791, 794 (Tenn. 1981).

[122] *Id.*

[123] *Id.*

Tennessee Rule of Appellate Procedure 10

The rules provide that an extraordinary appeal may be granted in the discretion of the appellate court "(1) if the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review, or (2) if necessary for complete determination of the action on appeal as otherwise provided in these rules."[124] One case has further articulated this standard by saying whenever the following conditions exist, an extraordinary appeal will lie:

a. where the ruling of the court below represents a fundamental illegality;

b. where the ruling constitutes a failure to proceed according to the essential requirements of the law;

c. where the ruling is tantamount to the denial of either party of a day in court;

d. where the action of the trial judge was without legal authority;

e. where the action of the trial judge constituted a plain and palpable abuse of discretion; and

f. where either party has lost a right or interest that may never be recaptured.[125]

Underscoring the intent that Rule 10 appeals be granted rarely is a Tennessee Supreme Court opinion from 2014, in which the Supreme Court held that the Court of Appeals improperly granted an application for extraordinary appeal under Rule 10.[126] The Court of Appeals granted the Rule 10 on the issue of whether the trial court properly denied the defendant's motion for a waiver of the contiguous state requirement in Tenn. Code Ann. § 29-26-115(b) as to an expert witness.[127] The Supreme Court held the grant of the Rule 10 appeal was improper, because "there was no extraordinary departure from the accepted and usual course of judicial proceedings; the trial court adhered to established legal standards."[128] The Court further noted that it was discretionary decision of the trial court on whether to waive the continuous state limitation and in this case, the record established that the trial court considered the proper statute, the relevant facts, and the arguments advanced by the parties.[129]

Appellate courts have granted an extraordinary appeal when a trial court ordered the state to reinstate a prior plea bargain offer after ordering a new trial based on ineffective assistance of counsel;[130] because of the action of a trial judge in striking from the indictment the allegation of a prior DUI conviction, resulting in the state losing a right it could never recapture;[131] and because of the trial court's denial of a defendant's right to a portion or all a transcript.[132]

Examples of grants of extraordinary appeals include the Supreme Court's granting of a Rule 10 application to review the failure of the trial court to dismiss a condemnation complaint that was filed before the city and county obtained the required certificate of public purpose and necessity.[133] The Court of Appeals has granted a father's Rule 10 application to review the trial

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[124] Tenn. R. App. P. 10(a).

[125] *State v. Willoughby*, 594 S.W.2d 388, 392 (Tenn. 1980).

[126] *Gilbert v. Wessels*, No. E2013-00255-SC-R11-CV, 2014 WL 7184306 (Tenn. Dec. 18, 2014).

[127] *Id*.

[128] *Id*. at *3.

[129] *Id*. ("Under our rules, the appellate courts have no authority to unilaterally interrupt a trial court's orderly disposition of a case unless the alleged error rises to the level contemplated by the high standards of Rule 10.").

[130] *State v. Turner*, 713 S.W.2d 327 (Tenn. Crim. App. 1986) *cert. denied*, 479 U.S. 933, 107 S.Ct. 407, 93 L.Ed.2d 360 (1986).

[131] *State v. Gallaher*, 730 S.W.2d 622 (Tenn. 1987).

[132] *State v. Draper*, 800 S.W.2d 489 (Tenn. Crim. App. 1990).

[133] *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam County*, 301 S.W.3d 196 (Tenn. 2009).

court's order denying the father 1) access to his daughter's psychological and psychiatric records during divorce proceedings, 2) permission to depose the daughter, and 3) visitation with his children.[134] The Court of Appeals also granted a Rule 10 application to review a trial court's holding that its prior orders were final while denying a motion for final judgment.[135] The Court of Criminal Appeals granted a Rule 10 application to review the trial court's order affirming the assistant district attorney's denial of the defendant's application for pretrial diversion.[136]

Other examples of extraordinary appeals that have been granted include the following circumstances: the trial court's order that a party's psychological records are discoverable in a domestic dispute despite the psychologist-patient privilege;[137] the trial court's order granting a motion for the psychological evaluation of the parties in a domestic dispute and their daughter without a showing of need;[138] the trial court's failure to enter a judgment consistent with the Tennessee Court of Appeals opinion in the same case;[139] the trial court's ruling that amendments to the Tennessee Uninsured Motor Vehicle statutes could be applied retroactively in a case which arose prior to the enactment of the amendments;[140] and when the trial court erred by refusing to dismiss a case in which the plaintiff did not state a claim for which relief could be granted and the question at issue—when to close legislative meetings—was non-justiciable because the Tennessee Constitution commits that question exclusively to the General Assembly.[141]

Although Rule 9 and Rule 10 appeals are both permissive interlocutory appeals, they differ in that review under Rule 10 is "very narrowly circumscribed to those situations in which the trial court or the immediate appellate court has acted in an arbitrary fashion, or as may be necessary to permit complete appellate review on a later appeal."[142] Furthermore, parties should not perfect simultaneous appeals pursuant to Rule 9 and Rule 10.[143] Although the Tennessee Rules of Appellate Procedure do not require a party to seek a Rule 9 appeal prior to seeking a Rule 10 appeal, in some circumstances, it may make sense to do so. First, if the Rule 9 appeal is granted, then the Rule 10 appeal is not warranted. Second, the scope of review under Rule 10 is narrower than that under Rule 9. Lastly, at least one case suggests that an appellant cannot assert error based on a trial court's decision to deny a Rule 9 appeal when she has not taken the next step and applied for appeal under Rule 10.[144]

If it is necessary to avoid immediate harm, and there is a strong likelihood the trial court will not allow a Rule 9 appeal, the only reasonable option is to file a Rule 10 appeal if you believe you can meet the extraordinarily high standard for such appeals.

4. The application and procedure for an extraordinary appeal

a. Contents of the application

Like a Rule 9 application for an interlocutory appeal, a Rule 10 application must contain "(1) a statement of the questions

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[134] *Shaw v. Shaw*, No. E2010-01070-COA-R10-CV, 2011 WL 255335 (Tenn. Ct. App. Jan 20, 2011).

[135] *In re Conservatorship of Tate*, No. M2009-02174-COA-R10-CV, 2009 WL 4841036 (Tenn. Ct. App. Dec. 15, 2009).

[136] *State v. Hatcher*, No. M2008-020420-CCA-R10-CO, 2010 WL 457491 (Tenn. Crim. App. Feb 10, 2010).

[137] *Culbertson v. Culbertson*, 393 S.W.3d 678 (Tenn. Ct. App. May 23, 2012); *Culbertson v. Culbertson*, No. W2012-01909-COA-R10-CV, 2014 Tenn. App. LEXIS (Tenn. Ct. App. Apr. 30, 2014).

[138] *Kreth v. Kreth*, No. W2001-00983-COA-R3-10-CV, 2002 WL 1050267 (Tenn. Ct. App. May 20, 2002).

[139] *Earls v. Earls*, No. M1999-00035-COA-R3-CV, 2001 WL 504905 (Tenn. Ct. App. May 14, 2001).

[140] *Privtette v. Keyes*, No. M2000-01635-COA-R10-CV, 2001 WL 196970 (Tenn. Ct. App. Feb. 28, 2001).

[141] *Mayhew v. Wilder*, 46 S.W.3d 760 (Tenn. Ct. App. 2001).

[142] Tenn. R. App. P. 10, 2005 adv. comm'n cmt.

[143] *CAM Int'l L.P., v. Turner*, No. 01-A-01-9203CH00116, 1992 WL 74567 (Tenn. Ct. App. April 15, 1992) ("Seeking relief under both rules is unnecessary.").

[144] *Scott v. Pulley*, 705 S.W.2d 666, 672 (Tenn. Ct. App. 1985,) *perm. app. denied*, (Tenn. 1986) ("We are of the opinion that appellant, absent highly unusual circumstances, cannot predicate error upon the trial court's denial of her request for permission to appeal pursuant to Rule 9 without taking the next step and applying for an extraordinary appeal pursuant to Rule 10.").

presented for review; (2) a statement of the facts necessary to an understanding of why an extraordinary appeal lies, with appropriate references to the documents contained in the appendix to the application; and (3) a statement of the reasons supporting an extraordinary appeal."[145] In addition, a Rule 10 application must contain a statement of the relief sought and shall include copies of the order or opinion relevant to the questions presented in the application and any other parts of the record necessary for determination of the application.[146] The appellant must also include the fees and taxes as required by Rule 6. The appellant may also choose to include affidavits or other relevant documents, which should also be contained in the appendix. If the application is made to the Tennessee Supreme Court, the appellant must also include the application filed in the intermediate appellate court and a copy of that court's order.[147]

b. Number of copies of application filed

Just as in a Rule 9 application, the appellant must file a sufficient number of copies of the application so as to provide the clerk and each judge with one copy.[148] Typically, the application shall be filed on all parties as provided for in Rule 20. However, the required number of copies will likely change when the Appellate Court Clerk's office implements electronic filing, which will be sometime in 2017.

c. Procedure for an extraordinary appeal

Once the appellant files an application to appeal under Rule 10 with the appellate court clerk, and serves all other parties pursuant to Rule 20, the clerk shall docket the appeal in accordance with Rule 5(c).[149] If the intermediate appellate court grants the appeal, it should be granted by a majority of the three judge panel and not by a single judge.[150] Once the appeal is granted, the court will specify the issues to be addressed on appeal[151] and will order the appellees to answer within a specified time frame. Otherwise, the Advisory Commission Comments state "an answer need not be filed unless the appellate court so directs . . . ."[152] Therefore, one should not file an answer to a Rule 10 application unless and until the court issues an order requesting an answer. At that point, the court will also advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument, if oral argument is granted. The appellate court may stay the proceedings in the lower court pending the resolution of the extraordinary appeal. This stay is not automatic, but instead is in the discretion of the appellate court.[153]

An intermediate appellate court's decision to grant a Rule 10 appeal is not reviewable by the Tennessee Supreme Court until after the intermediate appellate court decides the appeal on its merits. The intermediate appellate court's opinion and order is a final judgment for the purposes of Rule 11, and thus any party dissatisfied with the decision may apply to the Tennessee Supreme Court for permission to appeal pursuant to Rule 11. If the Tennessee Supreme Court grants permission

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[145] Tenn. R. App. P. 10(c).

[146] *Id*.

[147] *Id*.

[148] Tenn. R. App. P. 10(b).

[149] *Id.*

[150] *Brooks v. Carter*, 993 S.W.2d 603, 609 (Tenn. 1999) ("We believe that applications filed pursuant to Rules 9 and 10 of the Tennessee Rules of Appellate Procedure should be granted by a majority of the members of a three-judge panel. Although the rules do not explicitly specify the requisite number of votes required for such applications to be granted, Rule 22(d) specifies that an appeal may not be 'disposed of' by a single judge."); s*ee also* Tenn. R. App. P. 22, 2005 adv. comm'n cmt. ("It would, therefore, be inappropriate for a single judge to grant a request for permission to appeal . . .").

[151] *Heatherly v. Merrimack Mutual Fire Ins. Co*., 43 S.W.3d 911, 916 (Tenn. Ct. App. 2000).

[152] Tenn. R. App. P. 10, 2005 adv. comm'n cmt.

[153] Tenn. R. App. P. 7, adv. comm'n cmt. ("This rule should be construed in connection with Tennessee Rule of Civil Procedure 62.08, which expressly preserves the power of an appellate court to stay proceedings . . . during the pendency of an appeal."); s*ee also* Tenn. R. App. P 10(a) ("The appellate court may issue whatever order is necessary to implement review under this rule.").

to appeal, it reviews the merits of the intermediate appellate court's decision.[154]

There is no Rule 11 appeal from the denial to hear an extraordinary appeal. If the appellate court denies the Rule 10 appeal, the appellant may not file multiple applications for an extraordinary appeal which involve the same subject matter.[155] The appellant, however, may file an application with the Tennessee Supreme Court within thirty (30) days of the intermediate appellate court's order denying the Rule 10 appeal.[156] This time period is absolute, and under no circumstance will it be extended.[157]

One should note this time period is shorter than the sixty-day time period allowed for Rule 11 appeals.[158] This application must include the application filed in the intermediate appellate court and a copy of that court's order.[159] If the Tennessee Supreme Court grants the application, it will hear the extraordinary appeal only under the criteria of Rule 10.[160]

d. *Jurisdiction for the extraordinary appeal*

It appears that, where a Tenn. R. App. P. 9 appeal lets the trial court retain jurisdiction unless the Court of Appeals rules otherwise, the opposite is true for Rule 10 appeals. In *in Re Conservatorship for Allen*,[161] the Court discussed the jurisdictional issues surrounding Rule 10 appeals:

> We do, however, vacate the order of August 20, 2010, as a matter outside the trial court's jurisdiction. It was entered after this Court obtained jurisdiction of this case by virtue of our order granting permission to appeal. The Rules of Appellate Procedure contemplate two types of appeals to the Court of Appeals, appeals as of right and appeals by permission. A party has the absolute right to appeal a final judgment by filing a timely notice of appeal pursuant to Tenn. R.App. P. 3. In appeals, as of right from a final judgment, the trial court loses jurisdiction of the case upon the filing of the notice of appeal. *Born Again Church v. Myler Church Building Systems*, 266 S.W.3d 421, 425 (Tenn.Ct.App.2007). Appeals by permission of interlocutory orders are governed by Tenn. R.App. P. 9 and 10. See Tenn. R.App. P. 3, Advisory Commission Comments to Subdivisions (a) and (b). In Rule 9 appeals, the norm is for the trial court to retain jurisdiction of the case, except for the issues being appealed. Tenn. R.App. P. 9(f) ("The application for permission to appeal or the grant thereof shall not stay proceedings in the trial court unless the trial court or the appellate court or a judge thereof shall so order."). In Rule 10 appeals, "[t]he appellate court may issue whatever order is necessary to implement review under this rule." Tenn. R.App. P. 10(a). When the order granting permission to appeal is not specific as to the issues to be considered, this court has jurisdiction to consider issues outside those raised in the application for permission to appeal. *Heatherly v. Merrimack Mutual Fire Ins. Co*., 43 S.W.3d 911, 914 (Tenn.Ct.App.2000).[162]

C. Tennessee Rule of Appellate Procedure 11 appeal by permission from appellate court to Tennessee Supreme Court

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[154] *Payne v. Caldwell*, 796 S.W.2d 142 (Tenn. 1990).

[155] *See, e.g., In Re McDonald,* 489 U.S. 180 (U.S. 1989).

[156] Tenn. R. App. P. 10(b).

[157] Tenn. R. App. P. 2.

[158] *See* Tenn. R. App. P. 10, 2012 adv. comm'n cmt.

[159] Tenn. R. App. P. 10(c).

[160] Tenn. R. App. P. 10, 2005 adv. comm'n cmt.

[161] *In re Conservatorship for Allen*, No. E-2010-01625-COA-R10-CV, 2010 WL 5549037 (Tenn. Ct. App. Dec. 29, 2010).

[162] *Id.*

1. Who may file a Rule 11 appeal?

Tennessee Rule of Appellate Procedure 11 allows a party to submit an application and request permission to appeal a *final* decision of the Tennessee Court of Appeals or the Court of Criminal Appeals to the Tennessee Supreme Court.[163] The Tennessee Supreme Court has sole discretion to grant or deny a Rule 11 appeal. As in other permissive appeals, either the state or defendant in a criminal action may seek a Rule 11 appeal. Although the Tennessee Supreme Court hears workers' compensation appeals, those appeals are appeals as of right, and not permissive appeals. Therefore, the provisions of Rule 11 do not govern review of workers' compensation cases.[164]

2. Deadlines for filing a Rule 11 appeal

If no timely petition for rehearing is filed, a party must file the application for permission to appeal with the clerk of the Tennessee Supreme Court within sixty days of the entry of the judgment of the Tennessee Court of Appeals or Court of Criminal Appeals.[165] If a petition for rehearing is filed, the application for permission to appeal must be filed within sixty (60) days after the denial of the petition or entry of the judgment on rehearing.[166] Effective July 1, 2012, Tenn. R. App. P. 11(b) has been amended to clarify the circumstances under which the deadlines for filing a Rule 11 appeal are jurisdictional. In all civil cases, the sixty-day deadline is absolute.[167] However, in criminal cases the deadline is not jurisdictional "[e]xcept for an application seeking to appeal the Court of Criminal Appeals' disposition of an appeal pursuant to Rule 9 or Rule 10."[168] .

3. Factors considered by the Tennessee Supreme Court when deciding whether to grant permission to appeal under Rule 11

The Tennessee Supreme Court will consider, in determining whether to grant permission to appeal, the following factors:

(1) the need to secure uniformity of decision,

(2) the need to secure settlement of important questions of law,

(3) the need to secure settlement of questions of public interest, and

(4) the need for the exercise of the Supreme Court's supervisory authority.[169]

This list is non-exhaustive, but instead simply illustrates typical reasons which are deemed sufficient to secure review by the Tennessee Supreme Court. It is important to realize that even cases falling within these articulated reasons are subject to review only in the sole purview of the Tennessee Supreme Court.[170] Of the 851 Rule 11 applications disposed of by the Tennessee Supreme Court for the fiscal year 2011-2012, only 64 were granted—slightly more than seven percent (7%).[171] Of those only 7 were granted and remanded.[172] A change in the reporting procedure of the clerk's office effective for the 2012-2013

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[163] Tenn. R. App. P. 11(a).

[164] *See* Chapter 10 Workers' compensation Review Panels for more information regarding review of workers' compensation cases.

[165] Tenn. R. App. P. 11(b).

[166] *Id*.

[167] *See* Tenn. R. App. P. 2.

[168] Tenn. R. App. P. 11(b), 2012 adv. comm'n cmt.

[169] Tenn. R. App. P. 11(a).

[170] Tenn. R. App. P. 11, 2005 adv. comm'n cmt.

[171] Annual Report of the Tennessee Judiciary Fiscal Year 2011-2012, available at http://www.tsc.state.tn.us/sites/default/files/docs/annual_report_tn_judiciary_fy_2011-12_2-27-13_0.pdf at p. 11.

[172] *Id*.

fical year means that there is no longer a specific data point reported for denied applications. However, the Supreme Court disposed of 871 "Appeals by Permission" in 2015-2016 but only issued ninety-two opinons altogether. Considering that sixty-six of those opinions likely came from the "Appeals by Right," it becomes clear that the grant of permission to appeal is rare.[173]

If two members of the Supreme Court are satisfied that an application should be granted, an appeal will be allowed.[174] During the 2012-2013 fiscal year, there were 891 Rule 11 applications for review by the Tennessee Supreme Court.[175] As a practical matter, successful Rule 11 applications are quite rare.

To further the purpose of Rule 11, in selecting cases for discretionary review, the Tennessee Supreme Court must "identify those cases of such extraordinary importance as to justify the burdens of time, expense and effort associated with double appeals."[176] Thus, it is best to have one of the following characteristics in your case: (1) a well-reasoned dissent in the Tennessee Court of Appeals opinion, (2) a conflict among the different sections of the Tennessee Court of Appeals on a particular issue, or (3) a case of first impression of substantial importance. One should also be aware that discretionary review by the Tennessee Supreme Court is rarely granted solely for error correction purposes.[177] To illustrate, in *State v. West*, the court stated "the jurisdiction of this Court has become almost completely discretionary. This means that as to non-capital criminal cases, we function primarily as a law-development court, rather than an error-correction court."[178]

4. The application and procedure for a Rule 11 appeal

a. Contents of the application

The application must contain a statement of:

> (1) the date on which the judgment was entered and whether a petition for rehearing was filed, and if so, the date of the denial of the petition or the date of entry of the judgment on rehearing;
>
> (2) the questions presented for review, including a concise statement of the applicable standard of review which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues;[179]
>
> (3) the facts relevant to the questions presented, but facts correctly stated in the opinion of the intermediate appellate court need not be restated in the application; and
>
> (4) the reasons, including appropriate authorities, supporting review by the supreme court.[180]

Additionally, the application must include a copy of the opinion of the appellate court.[181] The argument in an application for

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[173] Annual Report of the Tennessee Judiciary Fiscal Year 2015-2016, available at http://www.tncourts.gov/docs/documents/media/2015-2016-annual-statistical-report.
[174] Tenn. R. App. P. 11(e).
[175] http://www.tsc.state.tn.us/sites/default/files/docs/annual_report_tn_judiciary_fy_2012-13_2-4-14.pdf
[176] Tenn. R. App. P. 11 (Advisory Comm'n Cmt. amended effective 2005).
[177] *Id.*
[178] *State v. West*, 844 S.W.2d 144, 146 (Tenn. 1992).
[179] Tenn. R. App. P. 11 (b)(2).
[180] Tenn. R. App. P. 11 (b).
[181] *Id.*

permission to appeal shall not exceed 50 pages.[182]

Rule 6 has been amended so that taxes and fees are paid at the initiation of a case, rather than the previous procedure of filing a cost bond—so Rule 11(h), which discussed the cost bonds, was deleted.[183]

Rule 11(c) specifies that the color of an application for permission to appeal should be blue "if available."[184] An answer shall have a red cover and the cover of an amicus curiae answer shall be green.[185]

b. Number of copies of application filed

The appellant must file the original plus five copies of the application.[186] The application shall be served on all other parties in the manner provided in Rule 20.[187] The required number of copies will likely change when the Appellate Court Clerk's office implements electronic filing, which will be sometime in 2017.

c. Procedure for a Rule 11 appeal

Within fifteen days after the appellant files the application, any other party may file an answer in opposition, the argument section of which must not exceed 25 pages.[188] The contents of an answer should include reasons why the application should not be granted and any other matters necessary for correction of the application.[189] Additional facts stated in the answer should include appropriate referenees to the record.[190] The appellee, in his answer, may raise issues allegedly decided erroneously by the immediate appellate court.[191] Answers should be served on all parties in the manner provided in Rule 20. No reply to an answer should be filed.[192]

If permission to appeal is granted, the appellant must serve and file a brief within thirty (30) days of the order granting permission to appeal.[193] If a brief was filed with the original application for permission to appeal, the appellant may file a supplemental brief within the same time limitation.[194] The argument in a supplemental brief must not exceed twenty-five pages.[195] Additionally, all briefs must conform to the requirements of Rule 27.

It is an individual practitioner's call as to whether a petitioner should file an opening brief with the Rule 11 application. An appellant who elects not to file a supplemental brief shall so notify the court within the same initial thirty-day period.[196]

The appellee must file any responsive brief within thirty days of the filing of the plaintiff's principal or supplemental brief filed after permission to appeal was granted, or within thirty days of the appellant's filing of a notice that no supplemental brief

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[182] *Id.*
[183] Tenn. R. App. P. 11, Advisory Comm'n Cmt [2017].
[184] Tenn. R. App. P. 11(c).
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] Tenn. R. App. P. 11(d).
[189] *Id.*
[190] *Id.*
[191] Tenn. R. App. P. 11, 1999 adv. comm'n cmt.
[192] Tenn. R. App. P. 11(d).
[193] Tenn. R. App. P. 11(f).
[194] *Id.*
[195] *Id.*
[196] *Id.*

will be filed.[197] Cross appeals are not required, and an appellee can raise any issues seeking relief on appeal by including them in the principal brief.[198] Reply briefs by the appellant are due fourteen (14) days after the filing of the appellee's brief.[199]

[197] *Id*.

[198] *See* Tenn. R. App. P. 13(a); Tenn. R. App. P. 27(b).

[199] *See* Tenn. R. App. P. 11(f); Tenn. R. App. P. 27(c).

CHAPTER 3 | THE RECORD ON APPEAL

A. Introduction

The record on appeal refers to those items transmitted to the appellate court by the trial court clerk. The purpose of the record is to convey to the appellate court a fair, accurate, and complete account of what transpired in the trial court. The record on appeal contains all the information the judges can use to decide your case. Ensuring a complete record on appeal is arguably the most important thing a lawyer can do to present a case at the appellate level. In the absence of an adequate record on appeal, the Court of Appeals will presume the trial court's rulings are supported by sufficient evidence.[200]

Both parties share the burden of ensuring an adequate record on appeal. "An appellant is responsible for preparing the record and providing to the appellate court a 'fair, accurate and complete account' of what transpired at the trial level. The appellee, however, shares the responsibility for ensuring the appellate court has a complete record."[201]

B. Contents of the record

The content of the record on appeal is controlled by Tennessee Rule of Appellate Procedure 24. By default, the record on appeal contains all papers filed in the trial court except: (1) subpoenas or summonses; (2) papers relating to discovery, including depositions, interrogatories and answers thereto, reports of physical or mental examinations, requests to admit, and all notices, motions or orders relating thereto; (3) any list from which jurors are selected; (4) trial briefs; and (5) minutes of opening and closing of court.[202]

The record also contains the original of any exhibits, the transcript or statement of the evidence or proceedings, any requests for instructions submitted to the trial judge for consideration, and any other matter designated by a party and "properly includable."[203]

The Rules were amended in 2012 to provide for an appeal as of right from the trial court's filing of a corrected judgment or order. Therefore, in appeals made pursuant to Tennessee Rule of Criminal Procedure 36, the record on appeal should include the items listed in the content of the rule pertaining to both the original judgment or order and those items pertaining to the corrected judgment or order. Parties remain free to designate that only certain items be included if less than the full record is sufficient to convey an account of the lower court's actions regarding the issues on appeal.[204]

If the record contains any documents filed under seal in the trial court, it is the responsibility of the trial court clerk to place the sealed documents in a separate envelope with a copy of the trial court's sealing order on the cover.[205] The Rules do not permit documents to be filed under seal in the appellate courts based solely on the stipulation of the parties or on a party's designation of the document as confidential pursuant to a protective order.[206] Instead, the trial court must have made an individualized determination that the particular document should be filed under seal.[207]

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[200] *Tip's Package Store, Inc. v. Commercial Ins. Managers, Inc*., 86 S.W.3d 543 (Tenn. Ct. App. 2001).
[201] *Jennings v. Sewell-Allen Piggly Wiggly*, 173 S.W.3d 710, 713 (Tenn. 2005) (citations omitted).
[202] Tenn. R. App. P. 24(a).
[203] *Id.*
[204] Tenn. R. App. P. 24, 2012 Advisory Comm'n Cmt.
[205] Tenn. Ct. App. R. 15(b)(iii).
[206] Tenn. Ct. App. R. 15(b)(ii).
[207] *Id.*

There are some steps you should take at the trial court level to ensure that an adequate record is being established:

(1) Ensure the proceedings are appropriately recorded whenever evidence is taken or the circumstances will otherwise call for a report of the proceedings. Preparing a statement of the evidence in lieu of having a transcript to file is a time-consuming and often contentious endeavor.

(2) With respect to jury instructions, the appellate record should contain "any requests for instructions submitted to the trial judge for consideration, whether expressly acted upon or not."[208] Therefore, you should always make sure the trial court clerk marks your requested jury instructions as "filed" before they are considered by the trial court. Once the instructions are considered and acted upon, you should ask the trial court: (a) to initial or sign and (b) to write either "granted" or "denied" on each instruction if the court has not already done so.

The failure to include a request for a jury instruction in the record transmitted to the appellate court will result in the affirmation of an issue predicated upon the requested instruction.[209] When the jury charge is not in the record, the appellate court will presume the trial judge charged the jury fully and correctly.[210]

(3) For practitioners, it is vital to notice what is *not* automatically included in the record and therefore requires counsel to make a specific request. Exhibits attached to any document other than a pleading[211] do not become part of the record automatically.[212] Thus, if you attach exhibits to a motion, you should make sure that the motion specifically incorporates by reference each exhibit and that the trial court clerk stamps the motion and each exhibit with the "filed" stamp. If an exhibit is used in an evidentiary hearing, make sure it is admitted into evidence and appropriately marked.

Finally, avoid attaching exhibits to any brief or legal memorandum filed in the trial court because Tennessee Rule of Appellate Procedure 24(a) specifically excludes briefs from the appellate record; exhibits should be attached to the motions. The Court of Appeals has reminded attorneys on a regular basis that it cannot consider exhibits that are not properly part of the appellate record.[213] The Courts will also refuse to consider exhibits attached to your appellate brief, which were filed in the trial court, but are not part of the appellate record.[214]

C. Designating the record

The term "abridge the record" may refer to either (1) the designation in the trial court of less than the full technical record or full transcript pursuant to Tennessee Rule of Appellate Procedure 24(a) and (b); or (2) the designation and filing of an abridged transcript in the Court of Appeals pursuant to Tennessee Court of Appeals Rule 4. As a practical matter, the act of identifying specific items to include or exclude from the record is referred to as "designating the record."

Remember, Tennessee Rule of Appellate Procedure 24(g) discourages the parties from including unnecessary matters in the appellate record.[215] The benefits of a streamlined record include lowering the expenditures of the state by reducing the

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[208] Tenn. R. App. P. 24(a).

[209] *State v, Griffith*, 649 S.W.2d 9, 10 (Tenn. Crim. App. 1982).

[210] *Bennett v. Sanders*, 685 S.W.2d 1, 2 (Tenn. Ct. App. 1984).

[211] *See* Tenn. R. Civ. P. 7.01.

[212] *State ex rel. Waterhouse v. Cumberland County Bank*, 1990 WL 24971 (Tenn. March 12, 1990) (designated as not for publication).

[213] *See, e.g., Pendleton v. Mills*, 73 S.W.3d 115, 119 n.7 (Tenn. Ct. App. 2001); *Robinson v. Clement*, 65 S.W.3d 632, 635 n.2 (Tenn. Ct. App. 2001).

[214] *In re Dakota C.R.*, 404 S.W.3d 484, 502 (Tenn. Ct. App. 2012), perm. app. denied (Tenn. Mar. 6, 2013) (stating attaching a document to a party's appellate brief does not make the document part of the appellate record).

[215] *See SecurAmerica Bus. Credit v. Schledwitz*, No. W2009-02571-COA-R3CV, 2011 WL 3808232 (Tenn. Ct. App. Aug. 26, 2011) (citing Tenn. R. App. P. 24(a)) ("The parties provided an appellate record that is both excessive and incomplete. The record is at times superfluous

shipping costs of transcripts, lowering the costs on appeal, and more importantly, a streamlined record enables the Court to review the necessary documents efficiently. This might even result in a quicker decision in your appeal.

D. Duty to designate and orders to abridge

All three appellate courts *require* the parties to designate less than the full record when the full record is unnecessary. Unfortunately, parties frequently leave the preparation of the record to the trial court clerk, overlooking these designation requirements. The rules require the appellant to designate the documents to be included in the record when the full record is not necessary to convey a fair, accurate, and complete account of what transpired in the trial court with respect to the issues on appeal. Similarly, the appellant must prepare and file only those portions of the transcript necessary for the appeal.[216] This requirement is echoed by the Supreme Court Rules, which provide for costs for failure to comply to be assessed against the party whose counsel is in default.[217]

In addition to requiring the designations provided in Tennessee Rule of Appellate Procedure 24(a) and (b), the Court of Appeals may order the filing of an abridged transcript of the evidence pursuant to Tennessee Court of Appeals Rule 4 after the record has been filed in the appellate court if the transcript of evidence, including depositions, exceeds three hundred pages. The abridged transcript should include only that which is sufficient to give a complete account of the issues on appeal.

The appellant designates portions of the transcript to be included in the abridged transcript, and these designations are to be served on the appellee with the appellant's brief (but the designation is not yet filed with the court). The appellee may then designate any additional sections to be added to the abridged transcript, and this is served on the appellant with the appellee's brief. The appellant then files one complete abridged transcript with the court clerk, including any additional parts not previously designated by either party, at the time the reply brief is filed. If there is no reply brief, then the appellant must file the abridged transcript within the time allowed for filing a reply brief. The parties must not alter the original transcript, which remains a part of the record.[218]

"An appellant who fails to include the relevant portions of the testimony in the abridged record takes the risk that [the] court will decline to review the issues raised by the appellant because, in the absence of the necessary portions of the transcript, this court generally must presume that the findings of the trial court were supported by the evidence heard below."[219]

In practice, the Eastern and Western Sections of the Court of Appeals often order the parties to abridge the transcript. The Middle Section rarely invokes abridgement. The Court of Criminal Appeals has no specific rule regarding abridgment of the record other than Tennessee Rule of Appellate Procedure 24. Abridgment of the record in criminal appeals is uncommon, though it may become more so with the advent of appeals as of right pursuant to Tennessee Rule of Criminal Procedure 36.

E. Mechanics of designating the record

When an appellant decides that not all the documents normally included in the record are necessary, or if the appellant wishes to include any items normally excluded from the record, the appellant should file with the trial court clerk a designation of the documents the appellant intends to include in the record on appeal, together with a short, plain declaration of the issues the appellant intends to present. This must be done within fifteen days of filing the notice of appeal, and the appellee must also

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(*e.g.*, it unnecessarily contains: (1) full transcripts of the trial as well as extensive excerpts; (2) motions and responses irrelevant to the issues on appeal; and (3) trial briefs and discovery papers.")).

[216] Tenn. R. App. P. 24(a), (b).

[217] Tenn. S. Ct. R. 3.

[218] Tenn. Ct. App. R. 4(e).

[219] *Nguyen v. Hart*, No. 03A01-9302-CH-00058, 1993 WL 291411, at *4 (Tenn. App. July 29, 1993), perm. app. denied (Tenn. Nov. 29, 1993).

be served. The appellee may respond with its own designation within fifteen days.[220]

Tennessee Rule of Appellate Procedure 24 was amended in 2014 to permit a statement of the evidence to be filed instead of a stenographic report, if the trial court determines, in its discretion, that the cost to obtain the stenographic report in a civil case is beyond the financial means of the appellant or that the cost is more expensive than the matters at issue on appeal justify, and a statement of the evidence is a reasonable alternative to the stenographic report.[221] This provision is limited to civil cases because transcripts in criminal proceedings are governed by statute and case law.[222]

If there is no transcript, then pursuant to Tennessee Rule of Appellate Procedure 24(d), you must file a notice of no transcript within fifteen (15) days from the filing of your notice of appeal. You must file the notice even if no evidence was presented, such as in an appeal from a summary judgment. The notice allows the trial court clerk to prepare and transmit the record without awaiting a transcript or statement of the evidence.

To obtain an extension of time for filing a transcript or statement of the evidence, you must file a motion in the appellate court before the expiration of the original time for filing the transcript.[223] We recommend including an affidavit showing your due diligence along with the motion. If the extension is required because of some limitation of the court reporter, the reporter's affidavit explaining the need for an extension may also be helpful. All three appellate courts have held parties will be given extensions of time to file transcripts when: (1) the delay will not prejudice their adversary and (2) when there has been a good faith effort to comply with the rules.[224]

If the appellant fails to file the transcript or statement of the evidence within the time specified or fails to follow the procedure when no transcript or statement is to be filed, then the appellee may file a motion in the appellate court to dismiss the appeal.[225] In addition, the trial court clerk is required to notify the appellate court of the failure to comply with the rules, and the appellate court may direct the appellant to show cause why the appeal should not be dismissed.[226]

PRACTICE TIP! Under current Tennessee case law, unless a party is in privity of contract with the court reporter (as provided as a matter of course if one splits the court reporting fees), neither party has a right to a copy of the trial transcript nor to demand from the court reporter a copy thereof, nor even to ask a court for an order mandating such.[227] It might be worth sharing the court reporter per diem and thus preserving one's collegial reputation as well as protecting one's client by avoiding a late problem in a possible appeal.

F. Disputes regarding the record

If you object to a statement of the evidence in the trial court filed by your opponent, you may file objections to the statement with the trial court clerk within fifteen days of the filing of notice, and, if necessary, submit your own statement of the evidence.[228]

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[220] Tenn. R. App. P. 24(a).

[221] Tenn. R. App. P. 24(c). The 2014 Advisory Commission Comment states that the trial court should start with the presumption that the cost to obtain the stenographic report is beyond the financial means of an appellant who is appealing as an indigent person as allowed by Tenn. R. App. P. 18.

[222] Tenn. R. App. P. 24, 2014 Adv. Comm'n Cmt.

[223] *State v. Blevin*s, 736 S.W.2d 120, 122 (Tenn. Crim. App. 1987).

[224] *Davis v. Sadler*, 612 S.W.2d 160, 161 (Tenn. 1981); *State v. Blevins*, 736 S.W.2d 120, 122 (Tenn. Crim. App. 1987); *Butler v. Butler*, 680 S.W.2d 467, 468 n.l (Tenn. Ct. App. 1984).

[225]Tenn. R. App. P. 26(b).

[226] Tenn. R. App. P. 25(a).

[227] *Sizemore v. Sizemore*, Nos.E2005-01166-COA-R3-CV, E2006-01456-COA-R3-CV, (Tenn. Ct. App. 2007) (citing *Beef N'Bird of Am., Inc. for Use & Benefit of Galbreath v. Cont'l Cas. Co*., 803 S.W.2d 234, 240 (Tenn. Ct. App. 1990)).

[228] Tenn. R. App. P. 24(c).

The trial court must settle the parties' differences concerning the content of the record. If two statements of the evidence have been filed, the trial court must approve one of the statements, direct that a corrected statement be prepared, or direct that a transcript be filed if one is available. The trial court may not simply approve or disapprove both statements of the evidence.[229]

Only the transcript or statement of the evidence approved by the trial court becomes part of the record on appeal. Any other transcript or statement of the evidence is superfluous. Disapproved statements of the evidence are not part of the record and should not be attached to briefs or other papers filed in the appellate courts.[230]

Where a verbatim transcript is available, the appellee should inform the clerk of the trial court and the trial court may then order the preparation of the verbatim transcript instead of approving the statement of the evidence, as verbatim transcripts are expressly preferred by the court.[231]

The clerk of the trial court must transmit the record to the appellate court within forty-five days after the filing of the transcript, statement of the evidence, or the appellant's notice that no transcript or statement of the evidence will be filed.[232] A 2014 amendment to Rule 25(a) requires the trial court clerk to include a table of contents listing in chronological order all of the papers filed in the trial court with each document's corresponding page number.[233] If the clerk has not complied with the requirements for preparing the record set forth in the rules, either or both parties may move to remand the record to the trial court for proper completion. Parties may also request the briefing schedule begin when the corrected record is filed in the appellate court. A trial court clerk who does not complete and transmit an appellate record in accordance with the appellate rules risks forfeiting costs.[234] Appellate Rule 25(a) provides that the clerk of the appellate court may return the record to the trial court clerk for lack of compliance with the appellate rules governing the preparation, completion, and transmission of the record. If that occurs, the clerk of the trial court is instructed to promptly remedy the lack of compliance and promptly transmit the modified record to the appellate clerk.[235]

Because the rules do not require the trial court clerk to notify the parties before transmitting the appellate record to the appellate court, consider sending the trial court clerk a letter requesting notification when the record is completed and asking for an opportunity to inspect it. If, after inspecting the record prepared by the trial court clerk, you discover that an exhibit or anything else properly includable in the record has been omitted, bring the omission to the clerk's attention. Depending on the custom of the trial court clerk, it may be that the matter can be solved informally. However, Tennessee Rule of Appellate Procedure 24(e) provides a formal mechanism to fix any problems, as the rule permits the trial court or the appellate court, on proper motion, to correct or modify the appellate record.

If, on appeal, it becomes apparent that there is actually a mistake in the trial court's order, a Tenn. R. Civ. P. 60.01 motion provides a mechanism to correct the mistaken order during the course of the appeal.

G. Physical parts of the record

The record on appeal generally consists of two parts. The first part, commonly referred to as the "technical record," contains copies of the papers filed in the trial court. The second part consists of either a verbatim transcript of the evidence or a statement of the evidence. If no evidence was heard, *e.g.* the case was decided on a motion to dismiss or a motion for

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[229] *See Bellamy v. Cracker Barrel Old Country Store, Inc.*, 302 S.W.3d 278, 281 (Tenn. 2009).

[230] *See id.*

[231] *Beef N'Bird of Am., Inc. v. Cont'l Cas. Co.*, 803 S.W.2d 234, 240 (Tenn. Ct. App. 1990).

[232] Tenn. R. App. P. 25(a).

[233] Tenn. R. App. P. 25(a). The 2014 Advisory Commission Comment states the amendment was to provide a uniform method of preparation, which previously had varied among trial court clerks.

[234] Tenn. R. App. P. 40(i).

[235] Tenn. R. App. P. 25(h).

summary judgment, there may be only a technical record. Any exhibits are compiled and bound, if necessary, in a separate volume.[236]

You must insure that the record is in intelligible form when it is transmitted to the appellate court.[237] While it is safe to assume the court has the equipment to view VHS and DVD materials, technology changes rapidly and equipment may be replaced. Therefore, it is advisable to contact the appellate clerk's office to be sure that the Court has the proper equipment to review evidence if equipment is necessary.

Tennessee Supreme Court Rule 26 controls the use of electronic recording equipment to record court proceedings in those trial courts, such as the Sixth Circuit Court of Davidson County, that have been authorized by the Supreme Court to use videotape or CD-ROM equipment to create the court record.[238] In appeals from those authorized courts, the videotape or CD-ROM recording is the official transcript of the proceedings for the purposes of Tennessee Rule of Appellate Procedure 24.[239] Even when videotape or CD-ROM transcripts are authorized, you may want to provide the Court of Appeals with a written transcription in the form of an appendix to an appellate brief.[240] Moreover, you should be prepared for the court to request a written transcription of the proceedings.[241]

H. Post-judgment facts

Tennessee Rule of Appellate Procedure 14 permits the appellate courts to consider "post-judgment facts" if a party presents a properly supported motion. Post-judgment facts include only those facts occurring after the entry of the judgment being appealed; facts concerning preexisting matters that are discovered after judgment are not post-judgment facts. Consideration of post-judgment facts is contemplated only when the facts occur after the judgment appealed from, are unrelated to the merits, and are not genuinely disputed.[242] The rule does not permit a party to re-litigate disputed issues by placing before the appellate court evidence not heard by the trial court. Similarly, post-judgment changes in the circumstances of the parties should not be considered pursuant to the rule.[243]

Post-judgment facts that may be considered could include amended tax returns[244] and facts that render a judgment moot.[245] Additionally, post-judgment facts relating to representation on appeal may be considered by the court.[246] In criminal cases, *Brady* material (exculpatory information) discovered after trial because the material was withheld by the State is properly considered as a post-judgment fact.[247]

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[236] Tenn. R. App. P. 25(b).

[237] *Bush v. Bush*, 684 S.W.2d 89, 94 (Tenn. Ct. App. 1984) ("The record, when transmitted to this Court, must be in intelligible form. If a microscope is required to view details of an exhibit, a microscope must be provided with the record. Likewise, a projector is required for moving pictures or slides, and any other necessary equipment for obtaining intelligence from the record.").

[238]There is no compilation of courts that have been "authorized" to record proceeds pursuant to this rule. The appellate clerk's office informs the editors that, generally, the rule is interpreted that any courtroom with the necessary equipment is authorized to submit recorded proceedings as the record. As a practical matter, this provision of the rules is infrequently used.

[239] Tenn. Sup. Ct. R. 26 § 2.02. The Rule states that the official record of the court proceeding shall consist of two electronic recordings, recorded simultaneously, of the proceedings. One recording is filed and certified by the clerk as part of the appeal, and the second shall be retained by the clerk of the trial court.

[240] Tenn. Sup. Ct. R. 26 § 4.02.

[241] Tenn. Sup. Ct. R. 26 § 4.03.

[242] Tenn. R. App. P. 14, Advisory Comm'n Cmt.

[243] *Nicholson v. Nicholson*, No. M2008-00006-COA-R3-CV, 2009 WL 3518172, at *7 (Tenn. Ct. App. Oct. 29, 2009) (citing *Wade v. Wade*, 897 S.W.2d 702, 722 (Tenn. Ct. App. 1994)).

[244] *Massey v. Casals*, 315 S.W.3d 788 (Tenn. Ct. App. 2009).

[245] *Lovin v. State*, 286 S.W.3d 275, 283 (Tenn. 2009).

[246] *See id.*

[247] *State v. Branam*, 855 S.W.2d 563, 571 (Tenn. 1993).

You may seek Supreme Court review of an intermediate appellate court's disposition of a motion to consider post-judgment facts using Tennessee Rule of Appellate Procedure 10.[248]

[248] *Duncan v. Duncan*, 672 S.W.2d 765 (Tenn. 1984).

CHAPTER 4 | MOTIONS

A. Content of motions

Rule 22 of the Tennessee Rules of Appellate Procedure governs the content of motions filed in the appellate courts. While no special terminology is required, all three appellate courts expect each motion to contain a short, intelligible statement of the grounds of the motion and the relief sought. A motion should refer to the rule, statute, or other legal authority on which the motion is based. Do not assume that the record on appeal is readily available to the judge who will rule on your motion. Do not be afraid to include explanatory material from the record as attachments to your motion where necessary. You must serve opposing counsel with a copy of the motion. In a criminal case, this may mean service on the State Attorney General instead of the local District Attorney General.

1. Captions

According to Rule 30(b) of the Tennessee Rules of Appellate Procedure, "[p]apers other than briefs" must be captioned with (1) the number of the case in the appellate court and the name of that court, (2) the title of the case as it appeared in the trial court, and (3) a brief descriptive title indicating the purpose of the paper."[249]

2. Memoranda and affidavits

Rule 22 of the Tennessee Rules of Appellate Procedure provides that every motion must be accompanied by a memorandum of law. If the motion is based on matters not appearing in the record, an "affidavit or other evidence in support thereof" is required.[250] As to motions for an extension of time, Rule 6(d) of the Rules of the Court of Appeals requires that such a motion "set forth the reason for the extension sought."[251] Presumably, this would require an affidavit.[252] For simple motions, many practitioners are in the habit of failing to file a separate memorandum; it is the better practice to follow the rule. Statements concerning your adversary's lack of opposition to your motion should be contained in your affidavit rather than the motion.

Do not present the clerk with uncollated sets of papers. Staple copies of your supporting affidavits to each copy of the motion. The same rules apply to responses.[253]

3. Proposed orders

a. Supreme Court

The Supreme Court no longer requires the submission of proposed orders.

b. Court of Criminal Appeals

[249] Tenn. R. App. P. 30(b).
[250] Tenn. R. App. P. 22(a).
[251] Tenn. Ct. App. R. 6(d).
[252] The Eastern section of the Court of Appeals specifically requires a motion for an extension of time be accompanied by an affidavit, but does not require a memorandum of law for such motions.
[253] *See* Tenn. R. App. P. 22(a).

In the Court of Criminal Appeals, motions for extension of time must be accompanied by a proposed order. However, the proponent of a motion other than a motion for extension of time is not required to submit a proposed order.[254]

c. Court of Appeals

Each section of the Court of Appeals routinely prepares its own orders on all matters.

4. Copies

According to Rule 22(e) of the Tennessee Rules of Appellate Procedure, a party must file "two copies" of "all papers related to motions." In practice, two copies generally mean the original and one copy.[255] Because Rule 22(e) also cautions that "the court may require additional copies to be furnished," it is good practice to check with the clerk to determine how many copies of a particular motion will be needed.

Generally, applications under Tennessee Rules of Appellate Procedure 9 and 10 and motions for stay under Tennessee Rule of Appellate Procedure 7 in the Court of Appeals should include the original and four copies.[256] Applications to the Court of Criminal Appeals under Tennessee Rules of Appellate Procedure 9 or 10 should include the original and three copies. The Supreme Court requires such applications to include the original and five copies.

Please refer to the chapters directly applicable to Rules 9 and 10 for the requirements for interlocutory appeals and extraordinary appeals.

5. Prescribed Covers.

Motions and any accompanying memorandum of law do not have particular cover requirements. However, practitioners should note that briefs and other applications on appeal do often have specifications as to color of cover.[257]

B. Consideration of motions

1. General information

a. Court of Appeals –Western and Eastern Sections

The Western and Eastern Sections of the Court of Appeals use the rotation system, with one judge serving as motion judge for one month.

b. Court of Appeals – Middle Section

In the Middle Section of the Court of Appeals, judges are assigned to motions according to a mathematical formula

[254] *See* Tenn. Crim. App. R. 7.

[255] *See, e.g.,* Tenn. Ct. App. R. 8(a).

[256] Tenn. R. App. P. 7 does not provide guidance as to the number of copies. Tenn. R. App. P. 9(b) and 10(b) each provide that a sufficient number of copies shall be filed to provide the clerk and each judge of the appellate court with one copy." Generally, this is presumed to refer to a three-judge panel. Tenn. Ct. App. R. 8 provides that "the original of all applications for interlocutory appeals under Tenn. R. App. P. 9, extraordinary appeals under Tenn. R. App. P. 10, or motions for a stay or injunction pending appeals under Tenn. R. App. P. 7 shall be accompanied by one (1) copy." This Rule, however, does not harmonize easily with the guidance in the Rules of Appellate Procedure. Thus, practitioners are advised to confirm the expected number of copies with the clerk.

[257] *See, e.g.,* Tenn. R. App. P. 9(d), 10(f).

related to the last five digits of the appeal number. This formula does not apply when the case is assigned for preparation of an opinion.

c. Supreme Court

Each associate justice of the Supreme Court serves as motion judge for the entire State for a rotating, two-month term. Motions affecting the scheduling of hearings are always referred to the Chief Justice, since the Chief Justice controls the Supreme Court Docket.

d. Court of Criminal Appeals

The four judges in the Eastern, Western, and Middle Section of the State rotate the responsibilities for motions, interlocutory appeals, and extraordinary appeals monthly. Most motions may be handled by one judge. If the nature of the order requires more than one signature, the motion judge will prepare and circulate the proposed order.

2. Directing motions to a particular judge

None of the three appellate courts looks with favor on judge shopping. As a general matter, you should simply file your motion with the clerk.

3. Hearing on motions

The appellate court may act upon a procedural motion at any time, without awaiting a response. Any party adversely affected by such action may by application to the court request reconsideration, vacation, or modification of such action.[258] In addition, all procedural motions must contain a statement concerning the efforts to contact adverse counsel and state whether there is opposition to the motion. Presumably, this requirement alerts the court to those motions that it may not be appropriate to rule on the motion summarily. Motions to dismiss or any motions that address the merits of the case or the jurisdiction of the Court are examples of non-procedural motions.

PRACTICE TIP! It is very important to include a separate memorandum of law and whether you have contacted adverse counsel as to whether they will oppose the motion, as failing to do so could result in the motion being dismissed for failure to comply with the rules of appellate procedure.

4. Time for ruling on motions

The court generally rules on motions shortly after the time for filing a response has expired. On occasion, the court may decide to reserve judgment on a motion until oral argument. If the circumstances require an expedited decision, you should include the grounds for expediting the decision in your motion and make the clerk aware of the situation so that the matter can be brought to the attention of the court. Do not include such motions as part of a principal brief or reply brief.

Motions for extension of time should be filed before the expiration of the initial time allowed.[259] Rule 6(d) also requires that a motion for extension of time "shall be filed or presented to a member [of the Court of Appeals] within the time initially allowed by Tennessee Rule of Appellate Procedure 29(a) for doing the act for which an extension is sought."[260] Rule 8 of the Court of Criminal Appeals contains similar requirements.[261]

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[258] Tenn. R. App. P. 22(b).

[259] Tenn. Ct. App. R. 6(d).

[260] *Id*.

[261] *See* Tenn. R. Crim. App. 8.

5. Opposing a motion

A response in opposition to a motion—other than a procedural motion—must be served and filed within ten days after the motion is filed (not ten days after service).[262] If you wish to oppose a procedural motion, you should do so as soon as you possibly can because the court may act on such a motion, including motions for extensions of time under Tennessee Rule of Appellate Procedure 21(b), "at any time, without waiting for a response." If the court does rule on a procedural motion without waiting for your response, you may, by motion, ask the court to reconsider.[263]

Responses in opposition to motions to dismiss, pursuant to Tennessee Rule of Appellate Procedure 26(b) and Tennessee Rule of Appellate Procedure 29(c), must be filed within fourteen days after the motion to dismiss is filed. Tennessee Rule of Appellate Procedure 7 permits a party to file an answer to a motion for stay "promptly."

6. Dispositive motions

Motions that could resolve an appeal prior to oral argument, such as motions to dismiss an appeal for failure to file a timely notice of appeal, transcript, or brief, should be filed as soon as the grounds for the motion become known. They should be filed and supported in the same way all other motions are filed and supported. Do not include motions as part of principal briefs or reply briefs; file motions separately. All three appellate courts may require responses to the motions and may also set these motions for hearing. The filing of a motion will not alter the briefing schedule unless the court orders otherwise.

7. Unusual or urgent motions

If you must present a motion to the court that requires immediate attention and action, the motion itself should contain a request for an expedited decision and, in addition, you should notify the clerk of the urgency of the motion and request that the clerk bring the matter to the immediate attention of the motion judge.

8. Hearing in chambers

None of the Tennessee appellate courts hears motions in chambers as a general practice.

9. Review of intermediate court's decision on a motion

A single judge's disposition of a motion may be reviewed by the entire court.[264] (Presumably, the "entire court" means the entire section of the court in which the appeal is pending.) By implication, it appears that orders signed by three judge panels are not subject to review per Rule 22(d). Although the rules do not specify how one should ask the entire court to review a single judge's disposition of the motion, a motion for review should suffice. A party dissatisfied with an intermediate appellate court's disposition of a motion may also seek Supreme Court review under Rule 10 of the Tennessee Rules of Appellate Procedure, although the Court rarely grants such applications.

Also, in theory, the entire Court of Appeals or Court of Criminal Appeals could review the disposition of a motion. Tennessee Code Annotated section 16-4-109 provides that the Court of Appeals can sit *en banc*.[265] Similarly, Tennessee Code Annotated section 16-5-107(d) provides that the Court of Criminal Appeals "may sit en banc . . . in the discretion of the presiding judge." Litigants are not entitled to such review, however, and the Court is not obligated to grant such review. Such a review

[262] Tenn. R. App. P. 22(a).
[263] Tenn. R. App. P. 22(b).
[264] Tenn. R. App. P. 22(d).
[265] *See also* Court of Appeals Internal Operating Procedure 6.

likely would be granted only in the most exceptional of circumstances.

C. Dismissal of appeals by motion

1. Voluntary dismissal

Parties must seek voluntary dismissal of their appeal in the appellate court regardless of whether the record has been filed.[266] The preferred method is to file a stipulation of dismissal signed by all parties which can be approved and entered by the clerk of the appellate court.[267] The stipulation should address the allocation of costs and fees. When a stipulation is not agreed upon, the party wishing to dismiss the appeal should file a motion along with the notice of dismissal.[268] Appellees who wish to pursue their own issues notwithstanding the dismissal, can raise the matter in their response to the motion for dismissal.[269] Where dismissal is contingent on a settlement agreement subject to the approval of the trial court, the parties should file a motion in the appellate court asking the court to remand the case to the trial court for the limited purpose of considering the proposed settlement.[270]

a. Supreme Court

If an application for permission to appeal has been granted under Tennessee Rule of Appellate Procedure 11 and all parties thereafter wish to have the appeal dismissed, the appellant must file a motion and proposed order with the clerk of the Supreme Court.[271]

b. Court of Criminal Appeals

Rule 11 of the Rules of the Court of Criminal Appeals additionally requires the defendant to submit with his motion to dismiss a statement, personally signed by the defendant, that shows that he has been advised of his rights regarding the appeal and expressly waives his rights.

2. Settlement agreement

The Court of Appeals does not, as a matter of policy, approve the terms of settlement agreements and will not enter an agreed order containing such terms. If the settlement does not require trial court approval, the appellate court will dismiss the appeal upon proper motion of the parties. If a settlement requires approval of the trial court, Tennessee Rule of Appellate Procedure 15(c) requires the parties to file a motion asking the appellate court to remand the case to the trial court for that limited purpose. Within thirty days of the trial court's order approving the settlement agreement, the parties must file a joint motion to dismiss the appeal, including a copy of the settlement agreement with the trial court's order, and providing for assessment of costs on appeal. If the trial court disapproves the settlement, the appellant must file within thirty days a notice with the appellate court and the case will proceed on appeal.

Agreements for the payment of costs on appeal are an exception, and provisions for the payment of costs should be included in any motion or agreed order of dismissal.

3. Rule 60.02 motions

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[266] Tenn. R. App. P. 15.

[267] See Tenn. R. App. P. 15(a).

[268] Tenn. R. App. P. 15(a).

[269] *Id.*

[270] Tenn. R. App. P. 15(c); *see* Section C (2) Settlement agreement, below.

[271] Tenn. R. App. P. 15(b).

A trial court has no jurisdiction to consider a Tennessee Rule of Civil Procedure 60.02 motion during the pendency of an appeal and a party seeking relief from the judgment must apply to the appellate court for an order of remand.[272] Remand for consideration of a Tennessee Rule of Civil Procedure 60.02 motion will be freely granted by the court unless the motion is frivolous on its face.[273]

If a litigant is concerned that the time for filing a Rule 60.02 motion is about to expire, that party would be well advised to lodge the motion in the trial court at the same time it files its motion for remand in the appellate court. While the Supreme Court in the *Spence* case clearly held that the trial court has no "jurisdiction to consider" a Rule 60.02 motion while the case is pending on appeal, it did not directly address the effect of filing or lodging the motion in the trial court. Since time may be critical under Rule 60.02, the motion should be filed in the trial court out of an abundance of caution.

D. Method of filing

Under Tennessee Rule of Appellate Procedure 20A, motions and other documents set forth in 20A(b)(4) may be filed by fax. Be aware, however, that the sender bears the risk of failure of receipt by the appellate court clerk. Other limitations apply, including a page limit of fifty pages (*including* cover sheet), and a charge of $5.00 plus $1.00 per page, a cost you must pay within ten days of sending the fax. Consult the rule in its entirety before sending your fax.

E. Practice Points

While motion practice on appeal is infrequently required, it can be useful to help streamline issues on appeal. By using motions to handle preliminary matters such as whether items are improperly included in the record (Tenn. R. App. P. 24(e)) or whether the trial court's order contains easily ascertainable typographical errors (Tenn. R. Civ. P. 60.01), practitioners can ensure that the issues on appeal are narrowly tailored.

[272] *Spence v. Allstate Ins. Co.*, 883 S.W.2d. 586, 595-96 (Tenn. 1994).
[273] *See id.*

CHAPTER 5 | BRIEFS

The brief is the most important part of the appellate process. Practitioners should make sure to comply with the necessary rules of appellate procedure, in addition to writing a thoughtful and well-researched brief. The required elements for a brief are outlined in Tenn. R. App. P. 27; they are not listed in full here. Below, your editors have provided commentary with respect to customary brief elements that are either not itemized in the Rule or otherwise present traps for the unwary.

A. Content of briefs

1. Board of Professional Responsibility number

Although you are not required to include your Tennessee Supreme Court Board of Professional Responsibility Number on the cover page of briefs or on the other papers you file on appeal, it is helpful to the courts and to the clerk's office if you do. The clerk's notification system finds your address based upon your registration information.

2. Appeal number

The front covers of briefs and other papers addressed to the appellate courts must contain a caption setting forth, among other things, the number of the case in the appellate court.[274] You should include the entire number assigned to the case in the court where the appeal is pending—not the number assigned in the trial court or the number used in an earlier appeal. You should call the clerk if you are uncertain about the proper case number.

3. Statement of the issues

Practitioners should be certain that their statement of the issues includes every request of the court. Occassionally, drafters will raise an issue in the argument secton of the brief that is not specifically identified in the statement of the issues.[275] Or, lawyers will close their briefs by requesting an award of attorney's fees without specifically designating the request as an issue. Do so at your peril.[276]

4. Statement of the case

The purpose of the "statement of the case" is to provide the court with the information it needs to determine the scope of its review.[277] Accordingly, the statement of the case should advise the court of the procedural posture of the case, including the type of appeal presented.

The statement of the case must include a brief description of the nature of the case, the course of proceedings, and its

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[274] Tenn. R. App. P. 30 (b), (d).

[275] *See, Forbess v. Forbess*, 370 S.W.3d 347, 356 (Tenn.Ct.App.2011) (holding that husband waived an issue by his failure to designate it as an issue in his statement of the issues). *See also Childress v. Union Realty Co.*, 97 S.W.3d 573, 578 (Tenn. Ct. App. 2002); *Oslin v. Oslin*, No. 03A01–9210–CV–00395, 1993 WL 38154, 1993 Tenn.App. LEXIS 135 (Tenn.Ct.App. Feb. 17, 1993) *(no perm. app. filed).*

[276] sts associate

See, e.g., Akard v. Akard, No. E2013-00818-COA-R3CV, 2014 WL 6640294, at *9 (Tenn. Ct. App. Nov. 25, 2014) (*no perm. app. filed)*; *Forbess v. Forbess*, 370 S.W.3d 347, 356 (Tenn.Ct.App.2011)

[277] *See* Tenn. R. App. P. 13 regarding scope of review on appeal.

disposition in the court below.[278] It is not necessary, in relating the course of proceedings, to include procedural history that is not relevant to the issues on appeal. Including every notice or motion that was filed, which have no relevance to the issues on appeal, is unnecessary and does little to assist the appellate court.

5. Statement of the facts

The "statement of the facts" is the narration of the determinative facts established in the record that are relevant to the issues presented for review.[279] It is in this section that you tell your client's view of the facts. This is your opportunity to tell the court the story of the case. Only facts that are in the record may be included. The facts should be selected and arranged to support your legal arguments. You should avoid simply giving a synopsis of each witness's testimony.

Accuracy is a must, and to ensure accuracy in the statement of facts, Tennessee Rules of Appellate Procedure 27(a)(6), 27(g) and Tennessee Court of Appeals Rule 6(a)(4) require that you support your factual statements with references to the exact place in the record where the evidence of each fact may be found. This is also true for factual references in the argument section of the brief.

6. Standard of review

All briefs must contain a "concise statement of the applicable standard of review" as to each issue.[280] This may be in either a separate heading before the argument section or within the argument section itself.

7. Argument

Argument may be preceded by a summary of argument.[281] Arguments in principal briefs are limited to 50 pages, and reply briefs may not exceed 25 pages.[282] This limitation may be waived only by order of the court.[283] It is important to note that the page limits apply to the argument section only.[284]

8. Confidential information

Court of Appeals Rule 15 provides that when a party "deems it unavoidable" to disclose protected information in a brief, that party must file a motion to seal those portions which refer to the protected information.[285] The moving party has the burden of showing protection from disclosure is necessary and the brief cannot be adequately prepared by referring to sealed portions of the record without disclosing protected information.[286] The Court, however, will not permit a brief, motion, or application to be filed under seal absent a showing of extraordinary circumstances.[287]

When a party has filed a motion to seal a document, he or she may lodge the document under conditional seal by placing it in a separate envelope with "Conditionally Under Seal" on the cover.[288] The document will be treated as if sealed until

[278] Tenn. R. App. P. 27(a)(5).
[279] Tenn. R. App. P. 27(a)(6).
[280] Tenn. R. App. P. 27 (a)(7)(B).
[281] Tenn. R. App. P. 27(a)(7).
[282] Tenn. R. App. P. 27(i).
[283] Tenn. R. App. P. 27(a)(7).
[284] Tenn. R. App. P. 27, Advisory Comm'n Cmt.
[285] Tenn. Ct. App. R. 15(d)(ii).
[286] *Id.*
[287] Tenn. Ct. App. R. 15(d)(i).
[288] Tenn. Ct. App. R. 15(e)(i).

the court rules on the motion.[289]

B. Citing to the Record

1. When to cite to the record

Both the statement of facts and the argument must be supported with "appropriate references to the record."[290] While citations to the record are not required in the statement of the case, it may be beneficial to include such citations to aid the court, especially when the record is voluminous. The Court of Appeals requires specific citation to the record to support statements of determinative fact and to support claims of error and prejudice.[291] The Court of Appeals has held that is not under a duty to search a voluminous record to verify unsupported allegations.[292]

The Court of Appeals will not consider arguments based on assertions of fact that are unsupported or that are supported by inaccurate or imprecise citations to the record.[293] Similarly, the Court of Criminal Appeals will treat as waived issues that are not supported by appropriate references to the record, citation to authorities, or argument.[294]

PRACTICE TIP! Avoid making conclusory statement to support an issue in one's brief. Legal authority, argument, and references to the record must support the issue. As noted above, an appellate court will treat these as waived issues, and in the criminal context, will only hear the waived issue if the defendant proves plain error.

2. How to cite to the record

You must make "appropriate references to the record" in your statement of facts and your argument.[295] These references should be to the page of the record involved. Any intelligible abbreviations may be used.[296]

The Supreme Court and the Court of Criminal Appeals have no additional requirements concerning abbreviations. In the Court of Appeals, references to the record may be made by using the abbreviation "R.___" and should include the volume and page number.[297]

The record often consists of two or more volumes, but the pages may not be consecutively numbered from volume to volume. The papers filed in the trial court are usually bound in one volume, beginning with page 1, and the transcript of evidence is usually bound in another, separate volume beginning again with page 1. To avoid confusion, you should refer to each volume by a different abbreviation. Some attorneys use "R.____" or "T.R.____" to refer to the volumes containing the papers filed in the trial court (a.k.a. the technical record) and "Tr." Or "Transc." to refer to the transcript of the evidence.

No matter what abbreviations you use, it is good practice to include at the beginning of each brief, usually in a footnote,

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[289] *Id.*

[290] Tenn. R. App. P. 27(a)(6), (7).

[291] Tenn. Ct. App. R. 6(a).

[292] *Schoen v. C. Bradford & Co*., 642 S.W.2d 420, 427 (Tenn. Ct. App. 1982), *perm. app. denied* (Nov. 22, 1982); *Long v. Long*, 957 S.W.2d 825, 828 (Tenn. Ct. App. 1997); *Freeman v. CSX Transp., Inc*., 359 S.W.3d 171, 176 (Tenn. Ct. App. 2010).

[293] Tenn. Ct. App. R. 6(b). *See also Pearman v. Pearman*, 781 S.W.2d 585, 587-88 (Tenn. Ct. App. 1989); *Lance Productions, Inc. v. Commerce Union Bank*, 764 S.W.2d 207, 211 (Tenn. Ct. App. 1988); *First Am. Bank of Nashville v. Woods*, 734 S.W.2d 622, 626 (Tenn. Ct. App. 1987).

[294] Tenn. Ct. Crim. App. R. 10(b); s*ee also State v. Aucoin*, 756 S.W.2d 705, 716 (Tenn. Crim. App. 1988); *State v. Galloway*, 696 S.W.2d 364, 369 (Tenn. Crim. App. 1985).

[295] Tenn. R. App. P. 27(a)(6), (7).

[296] Tenn. R. App. P. 27(g).

[297] Tenn. Ct. App. R. 3(a).

an explanation of the abbreviations that you will be using.

C. Citations to authorities

1. General citation rules

The citation rules for briefs are contained in Tennessee Rule of Appellate Procedure 27(h). Citation of reported cases must include the title, page of the volume where the case begins, pages upon which the pertinent matter appears, and year of decision.[298] When citing a Tennessee case, one may refer to the official or South Western Reporter or both.[299] Citation of cases from other jurisdictions must be to the National Reporter System or both the official state reports and the National Reporter System.[300] Citations to textbooks must also include the page on which the pertinent matter appears, year of publication and edition, and, if applicable, the section.[301] Citation of Tennessee statutes should be to the Tennessee Code Annotated, Official Edition, and citation of supplements to the Code must so indicate and include the year of publication of the supplement.[302] These rules are similar to the Bluebook rules and should also be followed for motions and other papers.[303] Tennessee Supreme Court Rule 1 requires the Tennessee Rules of Appellate Procedure be cited as "Tenn. R. App. P." or "T.R.A.P."

The case *Bean v. Bean* is an example of a worst case scenario when citations to authority are lacking or woefully inaccurate.[304] In the case, the Court of Appeals dismissed the appeal because the appellant failed to comply with the Tennessee Rules of Appellate Procedure.[305] The Court cited *Crowe v. Birmingham & N.W. Ry. Co.* in which the Tennessee Supreme Court held "it will not find this Court in error for not considering a case on the merits where the plaintiff did not comply with the rules of this Court."[306] The Court of Appeals went on to note that the appellant failed to substantially comply with Tennessee Rule of Appellate Procedure 27 and Court of Appeals Rules 6 and 15.[307] Specifically, the Court found the appellant's argument section of his brief his "most egregious" mistake.[308] Although the appellant set forth seven issues for appeal, his argument section, in its entirety, consisted of four paragraphs.[309] In those four paragraphs, there were no citations to the record, and only one woefully inaccurate citation to a Tennessee case.[310]

As a practical matter, the appellate courts do not strictly adhere to any particular set of citation rules. At a minimum, however, you should use uniform citation forms that reasonably identify the authorities being cited.

2. Unpublished Tennessee opinions

Until relatively recently, all three appellate courts and the Supreme Court required that copies of unpublished Tennessee opinions cited in briefs or other papers be furnished to the court and opposing counsel by attaching it to the document in which it is cited. However, this has changed. The Tennessee Court of Criminal Appeals Rule 19.4 now provides that it is optional to attach copies of unpublished Tennessee Court of Criminal Appeals opinions to a brief filed in the Tennessee Court

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[298] Tenn. R. App. P. 27(h).
[299] *Id.*
[300] *Id.*
[301] *Id.*
[302] *Id.*
[303] *Id.*
[304] *Bean v. Bean*, 40 S.W.3d 52 (Tenn. Ct. App. 2000) *perm. app. denied* (Tenn. Feb. 26, 2001).
[305] *Id.*
[306] *Id.* (citing *Crowe v. Birmingham & N.W. Ry. Co.*, 1 S.W.2d 781 (Tenn. 1928)).
[307] *Bean*, 40 S.W.3d at 53-56.
[308] *Id.* at 55.
[309] *Id.*
[310] *Id.*

of Criminal Appeals.[311] The Tennessee Supreme Court and the Tennessee Court of Appeals no longer require an attached copy of unpublished Tennessee opinions if the opinion is available from an internet-based electronic database.[312] However, the Tennessee Court of Criminal Appeals and the Tennessee Court of Appeals still require the title page of the copies and any citations to the unpublished decision to contain a notation indicating whether an application for permission to appeal has been filed and, if filed, the date and disposition of the application.[313]

An unpublished opinion is considered controlling authority between the parties to the case when relevant under the doctrines of law of the case, res judicata, collateral estoppel, or in a criminal, post-conviction or habeas corpus action involving the same defendant. Unless designated "Not for Citation," "DCRO" or "DNP," unpublished opinions are considered persuasive authority for all other purposes.[314]

a. Appendix

As noted above, Tennessee Court of Appeals Rule 12(b) requires that unpublished opinions are included in an appendix to the brief. The Court of Appeals may require a party to furnish an appendix if the party insists on including the full record when less than the full record is sufficient.[315] Appendices are otherwise optional.[316] They can be very helpful to the appellate court, particularly to the judges of the Court of Appeals since the Court of Appeals does not generally circulate the record with the proposed opinion. Consequently, two of the judges on the panel deciding the appeal will not have the entire record to review. The Court of Criminal Appeals does circulate the entire record with the proposed opinion. Thus, all three judges on the panel will have the entire record available when deciding to concur or dissent.

b. Providing copies of authorities

In addition to the copies of unpublished opinions required by Tennessee Supreme Court Rule 4(H)(1), you must also provide, in an addendum to your brief, copies of pertinent parts of constitutional provisions, statutes, rules, regulations, or other similar matter not already reproduced in the body of the brief.[317]

You should also consider including in an appendix any authorities that are not readily available to the appellate courts, such as excerpts from older treatises.

3. Supplemental Authority

If pertinent and significant authorities come to your attention after your brief has been filed or after oral argument, but prior to the court's decision, you may bring them to the court's attention in a letter addressed to the clerk of the court.[318]

The letter should cite the authority and, without additional argument, refer to the page in the brief or the point in the oral argument on which the authority is relevant. You must send a copy of the letter to all other parties, and furnish sufficient copies to the clerk for distribution to each judge on the panel. The other parties may make a similar limited response.[319]

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[311] Tenn. Ct. Crim. App. R. 19(4).
[312] Tenn. Ct. App. R. 12(a).
[313] Tenn. Ct. Crim. App. R. 19(4); Tenn. Ct. App. R. 12(a).
[314] Tenn. S. Ct. R. 4(G)(1).
[315] Tenn. Ct. App. R. 6(c).
[316] Tenn. R. App. P. 28.
[317] Tenn. R. App. P. 27(e).
[318] Tenn. R. App. P. 27(d).
[319] Tenn. R. App. P. 27(a)(6).

If the supplemental authority is an unpublished opinion, make sure you attach a copy of the opinion to your letter.

D. Legibility of the record, briefs, and other papers filed in the appellate courts

The production and reproduction requirements for briefs and other papers filed in the appellate courts are contained in Tennessee Rule of Appellate Procedure 30(a). All parties are permitted to file typewritten documents, but the type used must not be smaller than "standard elite typewriting," where typewriters are concerned, and times new roman 12-point font, where computer generated fonts are concerned.[320] In either case, the text should not exceed 6.5 by 9.5 inches on 8.5 by 11-inch paper.[321] Only indigent persons proceeding under Tennessee Rule of Appellate Procedure 18 are permitted to use carbon copies.[322]

If you plan to use copies of cases, exhibits, and other materials, you should make sure that the copies are completely legible. Since the record on appeal generally contains copies of papers filed in the trial court, it is also a good idea to make sure that the copies contained in the record are also legible. You may wish to inspect the record before it is filed in the appellate court to make sure the contents are legible.[323]

E. Filing the brief

1. Timely filing

Under Tennessee Rule of Appellate Procedure 29, the appellant's brief is due thirty (30) days after the date on which the record is filed with the clerk. The appellee's brief is due thirty (30) days after the appellant's brief is filed, and reply briefs are due fourteen (14) days after filing of the preceding brief. In appeals involving termination of parental rights proceedings, the time for filing the appellee's brief is shortened to twenty (20) days from the date the appellant's brief is filed.[324]

Briefs will be considered timely if they are received by the clerk within the time fixed for filing, or if they are mailed to the clerk by certified return receipt mail or registered return receipt mail within the time fixed for filing, or if they are placed with a commercial delivery service having computer tracking ability within the time fixed for filing.[325] Briefs placed in the drop boxes located at the three Supreme Court buildings before the boxes are opened at the beginning of each business day will be deemed filed on the last business day preceding the opening of the box. Additional time after service by mail no longer applies to the filing of briefs.

To request an extension for filing a brief, file and serve a written motion for an extension of time in excess of the time allotted under Tennessee Rule of Appellate Procedure 29(a), Tennessee Court of Appeals Rule 6(d), or Tennessee Court of Criminal Appeals Rule 8(a).[326] Note that the motion must be filed before the original deadline for filing the brief has expired.[327] The appellate courts have discretion to grant extensions of time for filing briefs.[328]

Your motion should also be accompanied by an affidavit and memorandum of law stating the reasons for the extension, note whether the motion is opposed, and whether the granting of the extension will affect the date for oral argument.

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[320] Tenn. R. App. P. 30(a).
[321] *Id.*
[322] *Id.*
[323] *See, e.g.* Chapter 3, *The Record on Appeal.*
[324] Tenn. R. App. P. 8A(g).
[325] Tenn. R. App. P. 20(a).
[326] For more information regarding motions for extension of time, *see* Chapter 4, *Motions*.
[327] Tenn. Ct. App. R. 6(d).
[328] Tenn. R. App. P. 21 (b).

While the Supreme Court may grant extensions for the filing of briefs, the Court may not, under Tennessee Rule of Appellate Procedure 11, grant an extension of the 60-day period within which to file an application for permission to appeal.[329] The Supreme Court will usually grant extensions for filing briefs as long as the extension does not delay or interfere with the Court's preparation or schedule for oral argument. Note that extensions of time in an appeal of a termination of parental rights proceeding are disfavored and will be granted only upon a particularized showing of good cause.[330]

If you are unable to file your brief on time and did not secure an extension before the original deadline expired, you should file your motion for an extension of time as soon as possible, and it is best to also proffer your late brief with the motion, along with a motion requesting that the Court accept the late-filed brief.

An appellee may file a motion in the appellate court to dismiss an appeal if the appellant's brief has not been filed on time. An appellant may file a motion to have the case submitted for decision on the record and on the appellant's brief if the appellee's brief has not been filed on time.[331]

Both a motion to dismiss and a motion to submit should be filed as soon as you know that your opposing party has failed to file a brief within the time allowed under Tennessee Rule of Appellate Procedure 29(a) or within the time allowed by any extension.

In the Court of Criminal Appeals, the Court will usually issue a "file brief" order to the party, granting them additional time to file their brief. Failure to comply with such an order can lead to a show cause order or even a finding of contempt against the attorney. A pro se defendant's failure to submit a brief will result in a dismissal of the appeal.

The filing of a motion for an extension of time generally presumes that you are unable to file a timely brief after making a good-faith effort to do so. While you should not assume that every motion for an extension of time will be granted, you should also not assume that a timely filed, properly supported motion will be denied merely because the court has not acted on the motion prior to the expiration of the original time for filing the brief.

2. Correcting errors

The rules do not contain a procedure for correcting typographical or other errors in briefs. The preferable procedure is to file a motion and affidavit requesting permission to file a corrected brief and attach the corrected brief, along with the appropriate number of copies, to the motion.

3. Consolidated briefing

If a party has multiple adversaries, each filing briefs, the party may respond to all the arguments in a single, consolidated brief. Tennessee Rule of Appellate Procedure 29(a) permits a party to file a single responsive brief to multiple adversarial briefs.[332]

The time for filing a consolidated responsive brief does not begin to run until all the adversaries' briefs have been filed.[333] In cases involving more than one appellant, an appellee electing to file a consolidated brief must file its brief within thirty days after the last appellant's brief is filed. In cases involving more than one appellee, an appellant electing to file a consolidated reply brief must file its brief within fourteen days after the last appellee's brief is filed.

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[329] Tenn. R. App. P. 2.

[330] Tenn. R. App. P. 8(A)(i).

[331] Tenn. R. App. P. 29(c).

[332] Tenn. R. App. P. 29, adv. comm'n cmt.

[333] Tenn. R. App. P. 29(a).

4. Raising issues as appellee

Appellees who want to raise their own issues on appeal must include those issues and arguments in the brief filed in response to the appellant's principal brief. The appellee's brief should specify the issues raised as separate issues. This does not apply to Tennessee Rules of Appellate Procedure 9 or 10 appeals, where appellees are not permitted to expand the issues on appeal unless specifically permitted to do so by the court.

5. No cross-appeals

Once a notice of appeal has been filed by either party, any question of law may be brought up for review by any party without filing a separate notice of appeal and the court may consider the case as a whole.[334] Cross-appeals or separate appeals are not required, and any subsequently filed notice of appeal is surplusage.[335] Once a party has filed a notice of appeal, any opposing party seeking relief from the judgment should raise its issues and requests for relief from the judgment in its appellee's brief.[336] Please note that the notice of appeal must specify the parties taking the appeal by naming each one in the caption or body, but terms such as "all plaintiffs" or "the defendants" are sufficient.[337] However, when both parties have filed a notice of appeal, the party filing the first notice filed will generally be treated as the appellant by the clerk unless some other designation is deemed more appropriate.

Tennessee Rule of Appellate Procedure 29(a) specifies the time periods within which an appellee's briefs are to be filed. There is no rule that provides for the situation where one party is an appellee and that party's principal opponent is also an appellee. If a party desires to deviate from the briefing schedule, that party should diligently move the Court pursuant to Tennessee Rule of Appellate Procedure 22 to exercise its rights, as preserved in Tennessee Rule of Appellate Procedure 2, and individualize the Rules to that particular case.

6. Domestic relations cases

If the issues on appeal involve the amount or disposition of marital property, the appellant's brief must contain an orderly tabulation which lists each item of marital property, the value given to the property by each party, the value of the property found by the trial court, and the party to whom the property was awarded.[338] Each entry must contain a citation to the record. Separate tabulations must be made if the issues on appeal involve the parties' separate property or marital debt.[339]

7. Lodging under seal

All documents filed with the clerk are public records unless they are protected from disclosure by a statute, rule, or court order.[340] In the Court of Appeals, briefs, motions, and applications will be filed under seal only upon a showing of extraordinary circumstances.[341] When a party seeks to seal a portion of a brief, he or she must lodge the complete brief which contains the confidential information *and* shall also file a second, public brief, with the matters redacted. Only the original and

[334] Tenn. R. App. P. 13, advisory comm'n cmt.; *State v. Russell*, 800 S.W.2d 169,170-71 (Tenn. 1990).
[335] Tenn. R. App. P. 13(a); *Edwards v. Hunt*, 635 S.W.2d 696, 698 (Tenn. Ct. App. 1982); Henderson v. Mabry, 838 S.W.2d 537, 541 (Tenn. Ct. App. 1992).
[336] Tenn. R. App. P. 27(b).
[337] Tenn. R. App. P. 3(f).
[338] Tenn. Ct. App. R. 7.
[339] *Id.*
[340] Tenn. Sup. Ct. R. 34(b)(vii).
[341] Tenn. Ct. App. R. 15(d)(i).

one copy of the public version need to be filed.[342]

[342] Tenn. Ct. App. R. 15(d)(iii).

CHAPTER 6 | ORAL ARGUMENT[343]

A. Requesting oral argument

Parties are not automatically entitled to oral argument. A case under appeal will be docketed for oral argument only if one party to the appeal requests oral argument on the cover of its brief.[344] Only one party needs to make the request for oral argument, and if the requesting party later withdraws the request, the non-requesting party may then notify the court of its request for oral argument.[345] If no party requests oral argument, the case will ordinarily be forwarded for a ruling upon the briefs and the record.[346] However, the courts retain the right to order oral argument.[347] If you forget to request oral argument on the cover page of your brief, you may remedy this by filing a motion requesting oral argument, preferably prior to the expiration of the time for filing all briefs.[348]

Even if only one party requests oral argument, representatives for the other parties should appear at oral argument. If only one party appears for oral argument, the oral argument will still be heard. If the party requesting oral argument fails to appear, the court is empowered to assess costs and attorney's fees.[349] Generally, a party who does not file a brief is not entitled to present oral argument, although the court may grant exceptions due to unusual circumstances.[350] The Attorney General is permitted to argue even without submitting a brief when the validity of a statute, rule, or regulation is at issue and a state officer or agency is not a party to the proceeding.[351]

There are some exceptions to the right to request oral argument. Oral argument will not be permitted in cases concerning questions certified from a federal court unless ordered by the appellate court on its own motion or upon application by a party.[352] Amicus Curiae may present oral argument only upon motion or upon request from the Court.[353] Further, motions are generally reviewed without oral argument, though a party may request a hearing.[354]

B. Docketing

Cases are assigned a tentative oral argument date shortly after the appellee's brief is filed.[355] In the Middle Section of the Court of Appeals, the parties are notified of the date and are allowed ten days within which to notify the clerk of any conflicts. If the clerk is notified of a conflict within the ten-day period, the case can usually be easily rescheduled by the clerk without the necessity of a court order. After the ten-day period, has expired, oral argument will be rescheduled only upon a showing of extraordinary and unforeseen circumstances. Conflicting trials and other matters which were known to counsel but not brought to the clerk's attention during the ten-day period are neither extraordinary nor unforeseen. Likewise, conflicting trials and other

[343] This chapter generally describes the requirements outlined in Tennessee Rule of Appellate Procedure 35.
[344] Tenn. R. App. P. 35(a).
[345] Id.
[346] Tenn. R. App. P. 35(h).
[347] Id.
[348] See Tenn. R. App. P. 35, Adv. Comm'n Cmt.
[349] Tenn. R. App. P. 35(g).
[350] Tenn. R. App. P. 35(a).
[351] Tenn. R. App. P. 32(c).
[352] Tenn. Sup. Ct. R. 23(7)(B).
[353] Tenn. R. App. P. 31(c).
[354] *See* Tenn. R. App. P. 22(c).
[355] Tenn. R. App. P. 35(b).

matters which were set after counsel was notified of the date of oral argument will not be grounds for rescheduling. Oral argument in termination of parental rights cases is set on an expedited basis and may be continued only by order of the court.

Tennessee Rule 8(b) of the Court of Criminal Appeals states that continuances may be granted for good cause.[356] A motion must be filed, accompanied by an affidavit stating the reason for the extension. The motion must also state whether opposing counsel consents to the extension of time.[357] Motions filed after the last Thursday before a case is set for oral argument will not be continued except under exigent circumstances.[358] Rule 8(e) also provides the mechanism for waiver of oral argument after it has been requested.

Regarding appeals to the Supreme Court, if the Supreme Court has granted permission to appeal, it normally wants to hear oral argument and generally sets the argument date upon completion of briefing.

Note that the location and time at which the courts sit is subject to variation. Be sure to double-check the docket information. It is not unusual for cases scheduled for argument to be removed from the calendar without notice to other parties on the docket. Moreover, it is common for arguments not to consume the full time allotted. You should, therefore, arrive prepared to argue your case at the beginning of the session when your case is scheduled regardless of where your case is on the docket for that session. Otherwise, you risk arriving after your case has been called and heard in your absence.

C. Location

1. Supreme Court

By constitutional mandate, the Supreme Court sits in the three grand divisions of the state.[359] The Court usually hears oral arguments in the following cities during the following months: Knoxville - January, May and September; Nashville - February, June and October; Jackson - April and November. The sessions are usually scheduled for the first week of each month. The morning session usually begins at 9:00 a.m. (local time) and the afternoon session at 1:00 p.m. (local time). The docket provided by the clerk setting the schedule for oral argument will state when court convenes for that day.

As part of the Supreme Court Advancing Legal Education for Students ("SCALES"), the Supreme Court will occasionally sit in other cities, and special audiences of high school students are brought in to listen to oral argument. The students are provided with the briefs beforehand and enjoy the opportunity to have lunch with the Supreme Court afterwards. If a case is selected to be part of SCALES, an attorney will receive an initial phone call from the Appellate Clerk's office, followed by a letter with more information. Attorneys may decline to participate in SCALES. Those who choose to participate should be aware that continuances and extensions will be awarded only in the most exceptional of circumstances because of the intensive planning involved in preparing and administering a SCALES case.

2. Court of Appeals

The Middle Section of the Court of Appeals hears oral arguments in Nashville year-round, usually during the first or second week of the month. The morning session begins at 9:00am and the afternoon session at 1:00pm. The Western Section of the Court of Appeals in Jackson generally hears arguments all year, usually the third week of the month. The Eastern Section meets in Knoxville at 30 to 45 day intervals, depending on its caseload. The Eastern Section also sits at the University of Tennessee College of Law on designated "docket days."

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[356] Tenn. Ct. Crim. App. R. 8(b) (referencing Tenn. R. App. P. 21(b)).

[357] Id.

[358] Tenn. Ct. Crim. App. R. 8(d).

[359] Tenn. Const. art. VI, § 2.

3. Court of Criminal Appeals

The Court of Criminal Appeals generally hears oral arguments each month in each grand division. Sessions in Nashville usually begin on the third Tuesday of the month. Sessions in Knoxville usually begin on the fourth Tuesday of the month. Sessions in Jackson normally begin on the first Tuesday of the month. Pursuant to Court Rule, the morning session is to convene at 9:30am.[360] Afternoon sessions generally begin at 1:30pm.

D. Panel assignments

The Supreme Court does not sit in panels. Therefore, you can assume that all five justices will participate in every case unless one or more have recused themselves because of conflict, illness, or other reason. Customarily, the Chief Justice files an order appointing a special justice when one of the regular justices will not be sitting. If you wish to find out whether a special justice will be sitting on a particular day or even on a particular case, you may ask the clerk whether an order appointing a special justice has been entered.

The Workers' Compensation Panels consist of one Supreme Court Justice and two other panelists. The other intermediate appellate courts sit in three-judge panels, although the method by which those panels are chosen differs greatly between criminal and civil courts. For on brief cases, the twelve judges on the Court of Criminal Appeals are assigned to cases across the state regardless of the residence of the judge. In oral argument cases, however, the judges generally sit by division. The notice sent by the clerk's office to counsel when a case is scheduled for oral argument or submission on briefs contains the names of the three judges who will be hearing and deciding the case.

The Court of Appeals sits in panels of three judges. While the judges generally sit on cases in their own grand division, a panel will normally include one member from a different division. A panel from one division may also occasionally sit in a different division to equalize the caseload. While the printed docket sent to counsel includes the names of all judges sitting on that docket, the clerk will not disclose the composition of a particular panel until the day the panel sits.

Both the Court of Appeals and the Court of Criminal Appeals use special judges designated by the Chief Justice, but these substitutions are not generally known until immediately before argument.

E. Judges' preparations for argument

Tennessee attorneys are fortunate in that they can generally expect to encounter an informed and engaged appellate bench. The method by which each judge prepares for oral argument will, of course, vary. There are, however, some generalizations that may be useful. It is safe to assume that your brief has been read prior to oral argument. Additionally, a law clerk will have prepared a "bench brief" summarizing the case and, often, provided copies of pertinent documents in the record. It is rare that a judge will have had the opportunity to review the entire record prior to oral argument, so attorneys should be prepared to answer questions with accurate references to the record.

F. Length of argument

The courts vary in their approach to enforcing time limits, but it is always advisable to prepare your argument so that you can complete it (and answer questions) within your allotted time. If, for any reason, you anticipate needing more than the time provided by the court, you should, well in advance of your hearing, file a motion seeking additional time.

[360] Tenn. Ct. Crim. App. R. 4.

1. Supreme Court and Workers' Compensation Panel

Each side requesting the same relief is entitled to 30 minutes for argument unless the court otherwise orders. Of course, "a party is not obligated to use all the time allowed, and the court may terminate argument whenever in its judgment further argument is unnecessary." [361] Workers' Compensation Panels generally allow 15 minutes per side.

2. Court of Appeals

The Eastern and Middle Sections of the Court of Appeals customarily limit argument to 15 minutes per side. The Western Section of the Court of Appeals designates the length of time for oral argument after briefing and notifies counsel when the calendar is distributed. Most arguments are limited to 15 minutes per side.

3. Court of Criminal Appeals

The Court of Criminal Appeals limits argument to 20 minutes unless it has granted additional time.[362] Motions filed in the Court of Criminal Appeals seeking additional time for argument are forwarded to the designated judge of the panel that will be hearing the argument. If the court receives your motion well in advance, it usually acts on the motion and notifies counsel of its decision. If the motion is not received until shortly before argument, the decision may not be announced until the time of argument.

G. Multiple lawyers per side

If two or more parties are requesting the same relief, their lawyers should agree in advance on the division of their time and should inform the court of their agreement before they begin their argument, keeping in mind that divided arguments are not favored and that multiple arguments will not automatically result in the expansion of the time allotted for argument.[363] No more than two lawyers representing parties seeking the same relief may argue except by permission of the court.[364] Permission will be granted when there are parties on the same side representing diverse interests.[365]

H. Beginning your argument

You should identify yourself by name and by geographical location of your practice (e.g. "the Nashville bar"). You should also state whether you are appearing on behalf of the appellant or the appellee and give the name of the party you are representing. If counsel from another state is involved in the appeal, whether in filing or in oral argument, he or she must file a motion for leave to appear pro hac vice in accordance with Tennessee Supreme Court Rule 19.[366]

The panel of judges collectively should be referred to as "the court" (e.g., "May it please the court"). Individual judges may be referred to as "Your Honor." Alternatively, you may refer to individual members of the Supreme Court as "Justice" (followed by their surname) and to members of the intermediate appellate courts as "Judge" (followed by their surname). If you decide to refer to a judge or justice by name, make sure you pronounce the name properly. Using a judge's name is appropriate when responding to a question or referring to an opinion prepared by a particular judge, but is best avoided in other situations.

[361] Tenn. R. App. P. 35(c).
[362] Tenn. Ct. Crim. App. R. 14.
[363] Tenn. R. App. P. 35(f).
[364] Id.
[365] Id.
[366] Tenn. Sup. Ct. R. 19.

The appellant is entitled to open and to conclude the argument.[367] You should reserve time for rebuttal by informing the court before you begin your argument that you desire rebuttal time.[368] Rebuttal arguments will not increase the total amount of time you will be permitted to argue. As a general practice, you should reserve no more than five minutes for rebuttal. If, at the conclusion of the appellee's argument, you discover that rebuttal is not required, simply announce to the court that you have no further argument. Do not use your reserved time to reargue your case.

I. Structuring your argument

The amount of time you spend on the facts depends on the nature of the case and your appraisal of the level of the judges' preparation. It is not uncommon for the presiding judge to announce that the panel has read the briefs and that the attorneys may proceed directly to legal argument. If the panel appears to be unfamiliar with the facts, you should provide factual context sufficient to enable the panel to understand what the case is all about.

Do not hesitate to ask whether the court wishes a recitation of the facts when you are unsure about the panel's level of preparation. If the court indicates a recitation of facts would be helpful, assume you need to do more than merely refresh the judges' memories. Keep in mind, however, that your recitation of the facts should be limited to the facts in the record and any post-judgment facts the court has permitted pursuant to Tennessee Rule of Appellate Procedure 14.[369]

You should not read your statement of facts.[370] The appellee should not review the facts if they have been accurately presented by the appellant. The appellee should, however, point out any factual disagreements or misstatements by the appellant and should reinforce the facts that favor the appellee.

J. Demonstrative exhibits

There are no rules governing the use of demonstrative exhibits during oral argument. All three appellate courts, however, permit the use of demonstrative exhibits, especially if they are part of the evidence introduced in the trial court and are part of the record on appeal.

You may also prepare demonstrative exhibits based on evidence already in the appellate record. If you do so, you should (1) notify your adversary of your intention to use a demonstrative exhibit, (2) request your adversary's approval of the accuracy of the exhibit, (3) file your demonstrative exhibit with the clerk of the court, and (4) notify the clerk of the court in advance of the argument and request whatever assistance will be required in presenting the exhibit to the court. The general policy in the Court of Appeals is that an oversized exhibit may be brought from the trial court and presented to the appellate panel during argument. If the court determines that the exhibit shall be made part of the record, it is marked by the clerk after argument.

Computer presentations via Powerpoint or other similar programs are still rare in the Court of Appeals. If you decide that such a presentation is essential for the presentation of your argument, contact the clerk's office well in advance of your argument to make appropriate arrangements. You would be well-advised to bring an assistant to handle the mechanics of the slide show while you focus on your argument.

K. Questions from the bench

Anticipate that you will be asked questions during your argument. Questions are a sign of interest, and they provide

[367] Tenn. R. App. P. 35(d).
[368] *See* Tenn. Ct. Crim. App. R. 14.
[369] *See* Tenn. R. App. P. 13(c).
[370] Tenn. R. App. P. 35(d).

you with an opportunity to clear up issues that are on the court's mind. Do not treat questions as interruptions. Answer them immediately; do not tell the court you will answer the question later.

Questions are rarely intended to trap you. Judges ask questions to clear up issues about the facts and to test the soundness of your legal position. Sometimes judges even ask questions to make a point with their fellow judges. Many times, judges simply want you to confirm their understanding of the record or their point of view. If you do not know the answer to a question asked by a member of the court, be straightforward and say so. Depending on the complexity of the question, you may offer to submit a supplementary brief addressing the issue.

L. Audio recordings of oral arguments

All oral arguments before the Supreme Court, the Court of Appeals, and the Court of Criminal Appeals are digitally recorded. The recordings are readily available for review by the judges and their staff after oral argument. Oral arguments are posted on the website of the Tennessee Court System TnCourts.gov twenty (20) days after oral argument and are available to the public. Audio recordings of the oral argument are available for $20.00 per argument.

You may file a motion with the appellate court requesting that the oral argument not be posted on the internet for good cause shown.[371] Examples of good cause include a showing that the posting of audio recordings would create a safety threat for a party, witness, lawyer, or other individual involved in the litigation, or a showing that private or emberassing information affecting a juvenile was disclosed in oral argument.That motion must be filed no later than ten (10) days after the oral argument is heard.

[371] *See* Tenn. Sup. Ct. R. 30.

CHAPTER 7 | COSTS AND STAY BONDS

The Appellate Court Clerk's office uses an electronic filing system and charges fees at the initiation of an appeal. Under Tennessee Rule of Appellate Procedure 6, all applicable taxes and fees required by the clerk must be filed comtemporaneously with a notice of appeal. A bond that stays enforcement of or execution upon a judgment under Tennessee Rule of Civil Procedure 62 is referred to as a "stay bond" or a "bond for stay."[372] Such bonds are also referred to as "supersedeas bonds" in federal court. A stay bond secures payment of or obedience to a judgment.

A. Costs on appeal is generally required

The costs on appeal required by Tennessee Rule of Appellate Procedure 6 need only be filed in civil cases. No costs are required for criminal appeals. Indigent persons[373] and governmental entities[374] are also exempted from the costs requirement.

Applications for permission to appeal pursuant to Tennessee Rules of Appellate Procedure 9 and 10 require any applicable fees, taxes, or documentation to be filed with them. Tennessee Rule of Appellate Procedure 12 petitions for review of administrative decisions by the Court of Appeals also must be accompanied by the appropriate costs as provided in Tennessee Rule of Appellate Procedure 6. Notwithstanding the provision for joint appeals in Tennessee Rule of Appellate Procedure 16(a), each appellant represented by a different attorney must comply with the requirements of Tennessee Rule of Appellate Procedure 6.

B. Stay bond is not required, but a bond entitles the appellant to a stay

"The right to appeal is not conditioned upon the filing of a bond for stay; but, if the appellant desires the protection of a stay, then the bond for stay must be filed."[375] Once an adequate bond has been filed, the appellant is entitled to a stay of execution upon the entirety of the judgment against it, regardless of which issues the appellant intends to raise on appeal.[376]

C. Form and content of stay bonds

The content requirements for stay bonds are stated in Tennessee Rule of Civil Procedure 62.05. There is no specific formula for the amount of the bond. Generally, it should be conditioned to secure the payment of the judgment in full, interest, damages for delay, and costs on appeal. The Tennessee Code Annotated section 47-14-121 sets the rate of post-judgment interest. The rate at the time of judgment remains in effect for the duration of the interest-bearing bearing. For appeal purposes, a bond including two years of post-judgment interest is generally considered sufficient. Interest is computed from the date of the jury verdict or the equivalent determination by the court in a non-jury case.[377] Rates are published on the Adminsistrative Office of the Court's website.[378]

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[372] Tenn. R. Civ. P. 62.05.
[373] Tenn. R. App. P. 18.
[374] Tenn. R. Civ. P. 62.06.
[375] *Security Bank & Trust Co. of Ponca City, Okl. v. Fabricating, Inc*., 673 S.W.2d 860, 866 (Tenn. 1983).
[376] Order of June 2, 2009, *Servitech Indus. Inc., v. Bailey Tool*, No. M2009-00685-COA-R3-CV (Tenn. Ct. App.).
[377] Tenn. R. App. P. 41.
[378] http://www.tncourts.gov/node/1232344 (last accessed Aug. 3, 2017).

Tenn. R. Civ. P. 62.05(2) provides that if an appeal is from a judgment ordering the sale of real property, the bond for stay shall be conditioned to secure obedience of the judgment and payment for the use, occupancy, detention and damage or waste of the property from the time of appeal until delivery of possession of the property and costs on appeal.

The adequacy of any proposed bond will be up to the trial court. While a bond has most come to be thought of as a formal instrument usually issued by an insurance company, this type of bond is not required, and, indeed, since 2008 these bonds have been increasingly more difficult to secure. Cash deposited with the court can serve as bond, and, often family members will pledge stock or other assets on behalf of an appellant. "Although surety bonds are routinely files as 'appeals bonds,' cash payments made directly to the clerk of the court are also sufficient.[379] Litigants are also allowed to pledge property as bond.

A stay bond may be set in a lesser amount for good cause shown.[380] Factors to consider include indigency, the presence of plentiful assets, and the adequacy of insurance coverage.[381] The trial and appellate courts also have general authority to issue a stay in the absence of a bond in appropriate circumstances.[382]

D. Time to file bond

Plaintiff may give the bond for a stay "at or after" filing the notice of appeal.[383] "The stay is effective when the bond is approved by the court."[384]

E. Recoverable costs on appeal

Recoverable costs include the cost of preparing and transmitting the record, the cost of a transcript of the evidence or proceedings, the cost of producing necessary copies of briefs and the record, the premiums paid for bonds to preserve rights pending appeal, and the fees of the clerk.[385] Costs must be reasonable; costs of copying are taxable "at rates not higher than those generally charged for photocopying in the area where the office of the attorney seeking such costs is located."[386]

Although Tennessee Rule of Appellate Procedure 28 permits a party to prepare an optional appendix to the brief, the cost of preparing the appendix is not included in Tennessee Rule of Appellate Procedure 40(c) and, thus, the cost of its preparation is not recoverable on appeal.[387] The cost of preparing an optional appendix may be considered as part of the damages for a frivolous appeal.

Attorney's fees may be recoverable as costs under certain circumstances. For example, a reasonable attorney's fee is recoverable in the court's discretion if a party does not appear for oral argument.[388]

If you believe that the appellate court has mistakenly taxed costs, the prevailing party should file a motion to re-tax the costs within ten days, setting forth the grounds.[389]

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[379] *Griffin v. Campbell Clinic, P.A.*, 439 S.W.3d 899 (Tenn. 2014) (citing Tenn. R. App. P. 6 adv. comm'n cmt.).
[380] Tenn. R. Civ. P. 62.03; Tenn. R. Civ. P. 62.07.
[381] Tenn. R. Civ. P. 62.05 Advisory Comm'n Cmt. to 1984 Amendment.
[382] Tenn. R. Civ. P. 62.07-.08.
[383] Tenn. R. Civ. P. 62.04.
[384] *Id.*
[385] Tenn. R. App. P. 40(c).
[386] Tenn. R. App. P. 40(e).
[387] Tenn. R. App. P. 40(c); *See also*, Advisory Comm'n Cmt. to Tenn. R. App. P. 28.
[388] Tenn. R. App. P. 35(g).
[389] *See* Tenn. R. App. P. 39(b).

A party that was not assessed costs may file with the appellate court a Party's Statement of Recoverable Costs to effectuate recovery of costs.[390] The statement must be filed no later than fifteen (15) days after the issuance of mandate, and it *may not be filed prior to the issuance of mandate*.[391]

If you disagree as to costs being requested by an opposing party, file an objection to the costs requested by your adversary as allowed by Tennessee Rule of Appellate Procedure 40(d). The objection must be filed within fifteen (15) days after the filing of the party's statement of recoverable costs.[392] The clerk will then issue a report "in which the clerk shall approve and/or disapprove such costs in whole or in part . . . ."[393] Thereafter, a party has ten (10) days to object to the clerk's report.[394]

F. Minimizing court costs on appeal

Court costs have historically been based upon the size of the record, and, therefore, practitioners have had an incentive to follow the rules andinclude in the appellate record only those documents "sufficient to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal."[395] The switch to electronic records may well result in a change in this cost policy. In any case, however, it is not good strategy to file unnecessary papers in the appellate court. And, in the discretion of the Supreme Court, costs accruing for failure of counsel to comply with Tennessee Rule of Appellate Procedure 24(a) may be adjudged against the party whose counsel is in default.[396]

In determining the total fees and costs for which your client may be liable, do not forget the litigation tax imposed on all civil appeals. For an appeal, as of right, the tax is triggered upon the filing of the notice of appeal in the trial court clerk's office. The appellate court clerk's office invoices the appellant's attorney for this tax when the appellate court receives a copy of the notice of appeal from the trial court clerk. The tax is also imposed when appeals are filed pursuant to Rules 9, 10, and 11 of the Tennessee Rules of Appellate Procedure.

G. Examples

Some counties have forms for appeal bonds, so be sure to check for local practice. If your local court does not have a specific form, consider the examples below.

1. For illustration only, the following is a form for the body of such bond including costs on appeal, P being the principal and S being the surety:

[390] Tenn. R. App. P. 40(d).
[391] *Id.*
[392] *Id.*
[393] Tenn. R. App. P. 40(f).
[394] *Id.*
[395] Tenn. R. App. P. 24(a).
[396] Tenn. Sup. R. 3.

DEFENDANTS BOND FOR STAY OF EXECUTION PENDING APPEAL

As indicated and confirmed by the signatures of their authorized agents below, P, as principal, and S, as surety, are held and firmly bound unto plaintiff, his attorneys, successors, executors, administrators, or assigns in the amount of $_____, a reasonable amount based on the total amount of the judgment in this action of $_____.

The street address of the principal is: _____.
The street address of the surety is: _____.

On the___day of_____, 2011, a jury verdict in the amount of $_____was rendered in the above entitled action in favor of plaintiff.

Defendant desires a stay of execution of all further proceedings in the above-styled case with respect to said judgment until the determination of said appeal.

The conditions of this bond are (1) that if Defendant shall well and truly prosecute its appeal, said bond shall be void and of no effect; (2) that if the judgment is affirmed on appeal and if the principal fails to pay and satisfy the judgment in full as required by law (together with any interest, damages for delay, or costs of appeal assessed by a court to Defendant), then the above bond will be rendered in full force and effect and the surety will be obligated to pay the judgment in full as required by law (together with any interest, damages for delay, or costs of appeal assessed by a court to Defendant).

It is certified that the undersigned are authorized to sign this bond.

2. For illustration only, on the following page is a form for the body of such an agreed order:

AGREED ORDER APPROVING DEFENDANT'S BOND AND STAYING EXECUTION ON PLAINTIFF'S JUDGMENT

It appears to the Court that (1) Defendant filed a bond for stay of execution pending appeal and for costs, (2) defendant's bond has sufficient surety, (3) the bond is conditioned to secure the payment of the judgment in full, interest, damages for delay, and costs on appeal, (4) the form of defendant's bond is appropriate, (5) a stay of execution on plaintiff's judgment is appropriate, (6) the bond should be approved, and (7) plaintiff does not object to entry of this order.

Therefore, the Court ORDERS that (1) defendant's bond is approved, and (2) no execution shall issue upon plaintiff's judgment, nor shall proceedings be taken for its enforcement, until this Court modifies this order.

It is so ORDERED.
Enter this the____day of_____, 20_____.

CHAPTER 8 | INNER WORKINGS OF THE APPELLATE COURTS

A. Assignment of cases for the preparation of an opinion

1. Supreme Court

Most cases are assigned to a justice following their submission after oral argument.

2. Court of Appeals

Cases are assigned to a member of the panel approximately two to three weeks prior to oral argument in accordance with instructions of the presiding judge.

3. Court of Criminal Appeals

In the Court of Criminal Appeals, both oral argument and on briefs cases are randomly assigned to judges immediately before oral arguments are heard.

B. On brief cases

If neither party requests oral argument on the cover of the party's brief, the case will be submitted to the court for a decision on the record and briefs. While oral argument allows counsel the opportunity to address any questions the court may have concerning the record or the parties' legal arguments, the court does not consider cases submitted on brief any differently from oral argument cases. In criminal cases, a lawyer will not be found to be ineffective solely because the lawyer submits an accused's case on brief.[397]

Each of the appellate courts use different procedures for the consideration of cases submitted on briefs.

1. Supreme Court

The Supreme Court uses the same procedures to consider cases submitted on briefs that it uses to consider cases that have been argued. The cases are reviewed and discussed in conference by all the justices just as though the case had been argued orally.

2. Court of Appeals

The Court of Appeals places cases submitted on briefs on a separate on brief docket. The clerk generally prepares the on brief docket at the beginning of each month. Each case on the on brief docket is assigned to a rotating panel consisting of one member from each section of the court. The authoring judge for each on brief case is also assigned on a rotating basis.

4. Court of Criminal Appeals

The Court of Criminal Appeals includes cases submitted on briefs on the same docket with the cases to be argued. If

[397] *Hindman v. State*, 672 S.W.2d 223, 224 (Tenn. Crim. App. 1984), *perm. app. denied* (Tenn. 1984).

there are insufficient cases ready to be argued, a docket may include only on-brief cases. On-brief cases may not be discussed in post-hearing conference as cases that have been argued. The judge assigned to prepare the opinion sends the completed opinion along with the record to the other members of the panel.

C. Rehearings

Rehearings are governed by Tennessee Rule of Appellate Procedure 39. All three appellate courts may grant a rehearing, either on the court's own motion or on the petition of a party, if the court's opinion contains a mistake of law or fact that affects the outcome of the case. Rehearings will not be granted merely to reargue matters already fully argued.[398]

A petition for rehearing must be filed within ten days after the court's opinion was filed. The court may extend the time for filing a petition for rehearing, but such extensions are generally granted only in extreme and unavoidable circumstances. [399]

While Tennessee Rule of Appellate Procedure 39(d) empowers the courts to schedule additional arguments, they rarely do so. As a general matter, the courts will act on the basis of the petition for rehearing alone or will act after giving opposing counsel an opportunity to file an answer to the petition.

Motions to reconsider are not contemplated by the Tennessee Rules of Appellate Procedure. The Appellate Courts generally treat such motions as Tennessee Rule of Appellate Procedure 39 petitions to rehear.

When the Court of Appeals or Court of Criminal Appeals has acted on a petition for rehearing, no further petitions for rehearing can be filed in that court.[400] A second petition for rehearing may be filed in the Supreme Court only upon motion and leave of the court.[401] The Supreme Court disfavors petitions to rehear the denial of applications for permission to appeal and such petitions are rarely granted.

D. Standards for publishing decisions

Publication of opinions in the official reporter (Southwestern Reporter) is governed by Tennessee Supreme Court Rule 4.

1. Supreme Court

Unless explicitly designated "Not for Publication", all Supreme Court opinions are published.[402]

2. Supreme Court - Special Workers' Compensation Appeals Panel

Opinions of the Special Workers' Compensation Appeals Panel are not published unless publication is ordered by a majority of the Supreme Court.[403]

3. Court of Appeals and Court of Criminal Appeals

If a Tennessee Rule of Appellate Procedure 11 application is filed and granted, the intermediate appellate court opinion

[398] Tenn. R. App. P. 39(a).
[399] Tenn. R. App. P. 39(b).
[400] Tenn. R. App. P. 39(f).
[401] *Id*.
[402] Tenn. S. Ct. R. 4(A)(2).
[403] Tenn. S. Ct. R. 4(A)(3).

shall not be published unless otherwise directed by the Supreme Court.[404] If a Tennessee Rule of Appellate Procedure 11 application is denied with the designation "Not for Citation," the intermediate appellate court opinion has no precedential value and shall not be published.[405]

If an application for permission to appeal is filed and denied, Tennessee Supreme Court Rule 4(D) provides that the appellate court opinion may be published in the official reporter if it meets one or more of the following standards of publication:

> (i) the opinion establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a set of facts significantly different from those stated in other published opinions;
>
> (ii) the opinion involves a legal issue of continuing public interest;
>
> (iii) the opinion criticizes, with reasons given, an existing rule of law;
>
> (iv) the opinion resolves an apparent conflict of authority, whether the earlier opinion or opinions are reported;
>
> (v) the opinion updates, clarifies or distinguishes a principle of law; or
>
> (vi) the opinion makes a significant contribution to legal literature by reviewing either the development of a common-law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.[406]

If no Tennessee Rule of Appellate Procedure 11 application is filed, or the application is dismissed as untimely, publication of the intermediate court opinion shall proceed in accordance with Court of Appeals Rule 11 and Court of Criminal Appeals Rule 19.[407] Both rules require that the opinion meet one or more of the six standards set forth above and that the opinion be approved for publication by a majority of the entire court.

The parties, their attorneys, other members of the bar, or bar groups may file a motion or write a letter requesting publication of an opinion. The motion should be accompanied by a memorandum stating (1) the reasons for requesting publication and (2) the manner in which the opinion meets the court's publication requirements.[408]

E. Inquiries regarding the status of a case

If an unusual amount of time has passed since a case was orally argued or submitted on briefs, counsel may desire to inquire about the status of the case. The first step is usually to contact the clerk to ensure that no notices from the clerk have been overlooked. The public case history is also available online at TnCourts.gov and counsel can check the status on this website, which will also have PDF versions of many notices and filings available. Counsel may also file a motion to ascertain the status of the case.

If an unusual amount of time has passed since a case was fully briefed and the case has not yet been set for oral argument or submitted on briefs, counsel should contact the clerk to ensure that no notices have been overlooked, check the

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[404] Tenn. S. Ct. R. 4(C).
[405] Tenn. S. Ct. R. 4(E).
[406] *See* Tenn. Ct. App. R. 11; Tenn. Ct. Crim. App. R. 19.
[407] Tenn. S. Ct. R. 4(F).
[408] *See* Tenn. S. Ct. R. 4(E); Tenn. Ct. App. R. 11; Tenn. Ct. App. R. 12; Tenn. Ct. Crim. App. R. 19.

online public history, and then inquire if the case will be set for argument or submitted to the court in due course.

F. Screening of appellate records for jurisdictional or procedural problems

1. Supreme Court

The Supreme Court reviews the records in all Tennessee Rule of Appellate Procedure 11 applications for permission to appeal. It does not screen the record in the direct appeals. The Supreme Court also screens Tennessee Rules of Appellate Procedure 9 and 10 applications for procedural problems.

2. Court of Appeals

The Court of Appeals screens all records to determine: (1) whether the court has subject matter jurisdiction, (2) whether the order being appealed from is final, and (3) whether the notice of appeal was timely filed. When the screening reveals problems, the court will either issue a show cause order or take some other appropriate action, including transferring the appeal to another court or dismissing the appeal.

3. Court of Criminal Appeals

The Court of Criminal Appeals does not routinely screen the record. Customarily, the court expects counsel to call to their attention procedural irregularities requiring correction.

G. Pro se filings by parties represented by counsel

It has long been the rule in Tennessee that an appellant may not be represented by counsel and simultaneously proceed pro se.[409]

[409] *State v. Burkhart*, 541 S.W.2d 365, 371 (Tenn. 1976).

CHAPTER 9 | APPELLATE COURT CLERK'S OFFICE

A. Introduction

The Appellate Court Clerk's Office is responsible for maintaining all case files and tracking the progress of all cases through the appellate courts. Specific duties of the Clerk, appointed by the Supreme Court for a six-year term, include: (1) filing and processing all briefs, motions and other documents for cases on appeal; (2) scheduling all oral arguments; (3) filing all orders and opinions issued by the appellate courts; and (4) notifying all parties to appeals of all filings. The dedicated staff is located at the Supreme Court buildings in Nashville, Knoxville, and Jackson. Any questions concerning the procedures or the status of a particular case before any of the appellate courts should be directed to the Appellate Court Clerk's Office. The office is open at all three locations from 8:00am to 4:30pm (Local Time), Monday through Friday each week except when the buildings are closed for a holiday.

The Supreme Court buildings in Knoxville and Nashville have very limited parking facilities, so plan to park in one of the nearby commercial parking garages. There is adequate parking behind the Supreme Court building in Jackson.

B. Basic information - locations, addresses, telephone/fax numbers, etc.

The Appellate Court Clerk's Office serves the Supreme Court, the Court of Appeals, and the Court of Criminal Appeals. The Appellate Court Clerk's Office is open from 8:00am to 4:30pm (Local Time) Monday through Friday. The office is generally closed on all legal holidays, which are set by statute.[410] However, prudence dictates that you check with the Appellate Court Clerk's Office when you have a filing deadline because the office is sometimes closed on non-statutory days and open on legal holidays. This is especially true around Thanksgiving, Christmas and New Year's Day. For example, Columbus Day is usually observed on the day after Thanksgiving.

The basic contact information for each of the locations of the Clerk's Office is listed below:

1. Nashville

The Middle Division of the Appellate Court Clerk's Office is in Room 100 on the first floor of the Supreme Court Building at 401 7th Ave N (at Charlotte Ave) in Nashville. The telephone number of the Appellate Court Clerk's Office in Nashville is 615-741-2681. Fax number is 615-532-8757.

2. Knoxville

The Eastern Division of the Appellate Court Clerk's Office is at 505 Main St, Ste 200, Knoxville, Tennessee 37901. Mail can be forwarded to PO Box 444, Knoxville, Tennessee 37901. The clerk's phone number is 865-594-6700. Fax number is 865-594-6497. The Appellate Court Clerk's Office is open from 8:00am to 4:30pm (Local Time) Monday through Friday. The office is generally closed on all legal holidays, which are set by statute.[411] However, prudence dictates that you check with the Appellate Court Clerk's Office when you have a filing deadline because the office is sometimes closed on non-statutory days and open on legal holidays. This is especially true around Thanksgiving, Christmas and New Year's Day.

[410] *See* Tenn. Code Ann. §15-1-101 et seq.
[411] *Id.*

3. Jackson

The Western Division of the Appellate Court Clerk's Office is on the first floor of the Supreme Court Building, #6 Hwy 45 Bypass, Jackson, Tennessee 38301. Mail can be forwarded to the Appellate Court Clerk's Office at the following address: PO Box 909, Jackson, Tennessee 38302-0909. The Appellate Court Clerk's Office phone number is 731-423-5840. Fax number is 731-423-6453.

C. Resources

1. Introduction

In keeping with the constitutional mandate in Article I, Section 17 of the Tennessee Constitution that "all courts shall be open", the Appellate Court Clerk's Office has striven to provide better and more efficient access to the appellate courts in Tennessee via the internet. The following services of the Appellate Court Clerk's Office are available at the website for the Tennessee Court System at TnCourts.gov: (a) variety of forms online which can be filled out online but still must be filed in paper form with the appropriate Appellate Court Clerk's Office; (b) all of the oral argument dockets for the appellate courts; and (c) the public case history of all appeals in which the records were filed in the appellate courts after September 1, 2006, excluding parental termination and juvenile appeals.

2. Forms and manuals

The Administrative Office of the Courts maintains forms and manuals online for many purposes. The appellate documents are located at TnCourts.gov/node/170.

a. Beginning the appeal

i. Notice of Appeal (Civil or Criminal)
ii. Uniform Affidavit of Indigency (Civil, Criminal, Ignition Interlock)
iii. Appearance Bond (Criminal)
iv. Docketing Statement (Civil and Criminal)
v. Appellee Address Form

b. Appellate record

i. Exhibit Sign-out Sheet (with Appellate Record Checkout Policy)[412]
iii. Notice of Failure to File Transcript

c. Motions and briefs

i. Motion for Extension
ii. Certificate of Service (and example)
iii. Brief Cover Page
iv. Brief Color Chart
v. Uniform Facsimile Filing Cover Sheet

[412] As this is a frequently-needed form for practitioners, here is the direct link: http://www.tncourts.gov/docs/forms/appellate-court-clerk/acc-exhibit-sign-out-sheet.

d. Manuals and charts

i. Appellate Record Preparation Handbook (Trial Court Clerks)
ii. Appeal Timeline Charts (Attorneys and Pro Se Litigants)
iii. Pro Se Filing Guide ((Pro Se Litigants)

3. Oral argument dockets

The oral argument dockets for the Supreme Court, Court of Appeals, Court of Criminal Appeals and Special Workers' Compensation Panels are all available online. These dockets are normally posted the last week of each month before the arguments for the next month.

4. Public case history

The public case history for all appeals in which the record was filed after September 1, 2006, with the exception of parental termination appeals and juvenile appeals, are available online. The Public Case Histories are searchable by the appeal number or party and provide a complete listing of all public document filings in an appeal with the date of the filing and a brief description of the document filed. To find the database, go to TnCourts.gov/courts/supreme-court/public-case-history.

5. Oral Argument Audio Recordings

Oral arguments are posted on the website of the Tennessee Court System, TnCourts.gov, twenty (20) days after oral argument and are available to the general public. You may file a motion with the appellate court to exclude the oral argument from posting on the internet for good cause shown.[413] Examples of good cause include a showing that the posting of audio recordings would create a safety threat for a party, witness, lawyer, or other individual involved in the litigation, or a showing that private or embarrassing information affecting a juvenile was disclosed in oral argument. That motion must be filed no later than ten (10) days after the oral argument is heard. In addition, audio records are available on CD for $20 per argument.

6. Electronic Version of Technical Record and Transcripts

A party may opt to purchase an electronic version of the technical record and transcripts in the Supreme Court, the Court of Appeals, and the Court of Criminal Appeals. The record is provided in PDF format on either a disc or flash drive depending upon the size of the record. Exhibits are not included in the electronic version.

The cost is: (1) 0 to 50 mb- $50; (2) 50 to 100 mb $75; (3) over 100 mb- $100. To obtain the electronic copy, contact the Clerk's Office in the appropriate division.

D. Filing of motions, briefs, etc.

All motions, briefs and other pleadings may be mailed to the Appellate Court Clerk's Office by certified return receipt mail or registered return receipt mail within the time fixed for filing.[414] In addition, "[filing] will also be timely if placed with a commercial delivery service, having computer tracking capacity, within the time for filing."[415] Drop boxes are located at the three Supreme Court buildings. Papers deposited in the drop box will be file stamped the preceding business day when the papers are removed from the box at 8:00 a.m. each business day.[416] Appellate records should not be returned to the Appellate Court

[413] See Sup. Ct. R. 30.
[414] Tenn. R. App. P. 20(a).
[415] *Id.*
[416] *Id.*

Clerk's Office via the drop box as many times the appellate record can be too voluminous to place in the drop box. If a party files a brief via the drop box after hours, the appellate record may be returned promptly the next business day when the Clerk's Office reopens. Please do not attempt to place appellate records in the drop box.

E. Notification of decision

On the same day judgment is entered in your case, the Appellate Court Clerk will mail to all counsel of record the date of entry of judgment and a copy of the opinion or order.[417] Pro se parties will also be sent a copy of the opinion or order. Opinions are usually posted to the Tennessee Court System website the day they are filed, if not the day after, and are available at TnCourts.gov. Counsel of record or pro se parties may also request opinions to be emailed to them by submitting an email notification form.

F. Timeline for appeals

The following is a timeline for appeals which is a helpful aid the Appellate Court Clerk's Office provides to counsel and litigants:[418]

Person Filing	Item Filed	Time Deadline	Location Filed	Tenn App. P. Rule
Appellant	Notice of Appeal	30 days after entry of final order	Appellate Court Clerk	4(a)
Appellate Court Clerk	Copy of Notice of Appeal in Civil & Criminal cases	Promptly after Notice of Appeal filed	Trial Court Clerk	5
Appellant	Proof of service of Notice of Appeal in Civil & Criminal cases	7 days after Notice of Appeal served	Appellate Court Clerk	5
Appellant	Designation of record if less than full record is needed	15 days after Notice of Appeal filed	Trial court clerk	24(a)
Appellee	Designation of record, if any, in addition to Appellant	15 days after service of Appellant's designation	Trial court clerk	24(b)
Appellant	Filing of certified transcript with proof of service to Appellee	60 days after Notice of Appeal filed	Trial court clerk	24(c)

[417] *See* Tenn. R. App. P. 38.

[418] This is a general timeline for most appeals as of right. However, the timeline may be different for certain specific appeals. For example, the timeline for parental termination appeals is on an expedited basis and is controlled by Tennessee Rule of Appellate Procedure 8A.

Person Filing	Item Filed	Time Deadline	Location Filed	Tenn App. P. Rule
Appellant	Statement of evidence when no transcript of evidence is available	60 days after Notice of Appeal filed	Trial court clerk	24(d)
Appellant	Notice that no transcript of the evidence or statement of the evidence to be filed	15 days after Notice of Appeal filed	Trial court clerk	24(d)
Trial court judge	Approval of the transcript of the evidence or the statement of the evidence	30 days after the 15-day objection period expires	Trial court	24(f)
Trial court clerk	Appellate record	45 days after the transcript of the evidence, statement of the evidence, or Notice of No Transcript filed	Transmit to Appellate court clerk	25(a) 25(b)
Trial court clerk	Extension of time for completion of the record	Within 45-day period - no more than 60 days after filing transcript of the evidence or statement of the evidence	Appellate court clerk	25(d)
Appellate court clerk	Notice of filing of record	Upon receipt and filing of record	Trial court clerk and parties	26(a)
Appellant	Appellant's brief	30 days after the filing of the record	Appellate court clerk	29(a)
Appellee	Appellee's brief	30 days after the filing of Appellant's brief	Appellate court clerk	29(a)
Appellant	Appellant's reply Brief (optional)	14 days after the filing of Appellee's brief	Appellate court clerk	29(a)
Appellate court clerk	Notice of Oral Argument scheduled	Upon setting of the appeal for oral argument	All parties	35(b)

Person Filing	Item Filed	Time Deadline	Location Filed	Tenn App. P. Rule
Appellate court clerk	Opinion of the intermediate appellate court and judgment	Date opinion and judgment filed	All parties	38
Appellant	Application for permission to appeal (Rule 11)	60 days after entry of judgment, of intermediate appellate court	Appellate court clerk	11(b)
Appellate court clerk	Mandate (certified copy of opinion & judgment)	61 days after entry of judgment or immediately after denial of Rule 11 application by Supreme Court	Trial court clerk & all parties	42
Appellee	Response in opposition to Rule 11 application	15 days after filing Rule 11 application to Supreme Court	Appellate court clerk	11(d)
Appellate court clerk	Order granting Rule 11 application	Upon issuance, by Supreme Court	All parties	11(e)
Appellant	Appellant's brief in the Supreme Court or supplemental brief if a brief was filed with application	At time of filing Rule 11 application or 30 days after Supreme Court grants Rule 11 application	Appellate court clerk	11(b) & 11(f)
Appellee	Appellee's brief in the Supreme Court	30 days after Appellant's brief filed (or after supplemental brief or notice that supplemental brief will not be filed)	Appellate court clerk	11(f)
Appellant	Appellant's reply brief in the Supreme Court (optional)	14 days after Appellee's brief filed	Appellate court clerk	11(f)
Appellate court clerk	Notice of Oral Argument scheduled	Upon setting the appeal for oral argument	All parties	35(b)

Person Filing	Item Filed	Time Deadline	Location Filed	Tenn App. P. Rule
Appellate court clerk	Opinion & Judgment of the Supreme Court	Date the opinion & judgment filed	All parties	38
Supreme Court clerk	Mandate (certified copy of opinion & judgment)	11 days after entry of the judgment	Trial court clerk & all parties	42

G. Brief Color Chart

The following is a chart of the color and number of briefs required to be filed in the appellate courts.

COURT OF APPEALS

Appellant's Brief	Appellee's Brief	Reply Brief	Amicus Brief	Motions w/ Affidavit	Petitions to Rehear
Original + 4 copies (Blue cover)	Original + 4 copies (Red cover)	Original + 4 copies (Gray cover)	Original + 4 copies (Green cover)	Original + 1 copy (No cover)	Original + 3 copies (No cover)

COURT OF CRIMINAL APPEALS

Appellant's Brief	Appellee's Brief	Reply Brief	Amicus Brief	Motions w/ Affidavit	Petitions to Rehear
Original + 3 copies (Blue cover)	Original + 3 copies (Red cover)	Original + 3 copies (Gray cover)	Original + 3 copies (Green cover)	Original + 3 copies (No cover)	Original + 3 copies (No cover)

SUPREME COURT

	Application	Response
Rule 11 (Application)	Original + 5 copies (Blue cover)	Original + 5 copies (Red cover)

	Appellant's Brief	Appellee's Brief	Reply Brief	Amicus Brief	Motions w/ Affidavits	Petitions to Rehear
Merits' Briefs	Original + 5 copies (Blue cover)	Original + 5 copies (Red cover)	Original + 5 copies (Gray cover)	Original + 5 copies (Green cover)	Original + 1 copy (No cover)	Original + 5 copies (No cover)

WORKERS' COMPENSATION PANEL (SUPREME COURT)

Appellant's Brief	Appellee's Brief	Reply Brief	Amicus Brief	Motions w/ Affidavits	Petitions to Rehear
Original + 3 copies (Blue cover)	Original + 3 copies (Red cover)	Original + 3 copies (Gray cover)			Review by Entire S Ct Original + 5 copies

CHAPTER 10 | WORKERS' COMPENSATION PANELS

Tennessee Supreme Court Rule 51 refers all workers' compensation appeals to the "Special Workers' Compensation Appeals Panel."[419] These panels are authorized by the Tennessee Code Annotated and consist of three judges, at least one of whom shall be a member of the Supreme Court.[420] The record on appeal and briefs are filed in accordance with the Tennessee Rules of Appellate Procedure.

For injuries occurring prior to July 1, 2014, Tenn. Code. Ann. § 50-6-225(a) requires a "benefit review conference" be completed prior to filing the workers' compensation civil action,[421]. The Supreme Court has held exhaustion of the benefit review process is a jurisdictional prerequisite to filing a workers' compensation action.[422] Thus, while not explicitly required under the Rules of Appellate Procedure, it is wise to include information that establishes administrative exhaustion in the Statement of the Case or Statement of the Facts sections of your brief.

For injuries occurring on or after July 1, 2014, Tenn. Code Ann. § 50-6-237 vests exclusive jurisdiction over workers' compensation claims to the Court of Workers' Compensation Claims. Orders granting or denying interocutory relief ("interlocutory orders") may be appealed to the Workers' Compensation Appeals Board.[423] There is no additional appeal permitted for interlocutory orders.[424] Order granting or denying relief on the merits ("compensation orders") may be appealed to the Appeals Board.[425] Decisions of the Appeals Board may be appealed to the Supreme Court, after being certified as final by the trial court.[426] In the alternative, if neither party files an appeal to the Appeals Board within thirty days, a direct appeal to the Supreme Court may be made.[427] The appeal then proceeds in accordance with the Tennessee Rules of Appellate Procedure.

For all appeals, after briefing has been completed, the Supreme Court may, on its own initiative, enter an order directing that the appeal be heard by the full Court, rather than the appeals panel.[428] If that does not occur, and oral argument has been requested, the appeal is then set for hearing before the next session of the panel in the grand division in which the appeal arises. If oral argument has not been requested, the case is referred to the next session of the panel in the grand division in which it arises.

Each fall, the Supreme Court issues a schedule of sessions of the panel for the next calendar year. Schedules vary from year to year, but generally there are at least four sessions per year in Nashville and at least three per year in Jackson and Knoxville. To expedite an appeal, parties are permitted to request that oral argument be transferred from one grand division to another.[429]

Each side is given fifteen minutes for oral argument before the panel. After oral argument, the panel issues its written findings and conclusions. Any party may then file a motion requesting review of the panel's decision within fifteen days of the

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[419] Tenn. Sup. Ct. R. 51, § 1.
[420] *See* Tenn. Code Ann. § 50-6-225(e).
[421] Tenn. Code Ann. § 50-6-225(a)(1).
[422] *Chapman v. Davita*, 380 S.W.3d 710 (Tenn. 2012).
[423] Tenn. Code Ann. §§ 50-6-239(d)(3) & (4); Tenn. Code Ann. § 50-6-217(d)(1)(A)
[424] Tenn. Code Ann. §50-6-217(d)(1)(A)
[425] Tenn. Code Ann. §50-6-217(d)(1)(B)
[426] Tenn. Code Ann. §50-6-217(c)(7)
[427] *Id.*
[428] Tenn. Sup. Ct. R. 51, § 2.
[429] Tenn. Code Ann. § 50-6-225(f)(2).

date it is mailed.[430] If no motion for review is filed, the panel decision becomes the judgment of the Supreme Court.[431] If a motion for review is filed, judgment is not entered until either the motion is denied, or if the motion is granted, until the Supreme Court enters its final judgment on the case.[432] Motions for review are considered according to the same criteria applicable to motions for permission to appeal made pursuant to Tennessee Rule of Appellate Procedure 11.

If review is granted, the appeal may, at the Court's discretion, be scheduled for oral argument, or may be decided on the briefs.[433] Additional briefing by the parties is not permitted, unless the Court orders the filing of supplemental briefs.[434]

[430] Tenn. Code Ann. § 50-6-225(e)(5)(A)(ii).
[431] Tenn. Code Ann. § 50-6-225(e)(5)(A).
[432] Tenn. Code Ann. § 50-6-225(e)(5)(A)(ii).
[433] Tenn. Code Ann. § 50-6-225(e)(6).
[434] *Id.*

CHAPTER 11 | JUDICIAL RECUSAL

A. Tennessee Supreme Court Rule 10B Judge Recusal Motions and Appeals

In 2012, the Tennessee Supreme Court adopted new procedures to be followed for judge recusal motions set forth in Tennessee Supreme Court Rule 10B, Section 2. On October 16, 2014, the Tennessee Supreme Court entered an order effective upon its entry, which deleted the previous Section 2 in its entirety and replaced it with a revised version.

Rule 10B, Section 2 provides the procedure for an interlocutory appeal from the denial of a motion to recuse by the trial judge. Dubbed an "accelerated interlocutory appeal," it is a voluntary appeal as of right. The Rule also states that the issue may be raised in an appeal as of right pursuant to Tennessee Rule of Appellate Procedure 3 following the entry of the trial court's judgment.[435] Thus, the failure to pursue an accelerated interlocutory appeal does not operate as a waiver of the issue. Nor does it foreclose the possibility of filing an ethics complaint against a judge pursuant to Title 17, Chapter 5, of the Tennessee Code.[436] Additionally, the rule specifically provides that parties represented by counsel may not invoke these procedures on a pro se basis.[437] The rule makes clear that review pursuant to this rule and pursuant to an appeal of right after a final order are the only mechanisms for review of a recusal motion; thus, Tenn. R. App. P 9 and 10 appeals do not apply to judge recusal situations.[438]

The standard of review for the motion for disqualification or recusal is de novo.[439]

B. Stay is not automatic on appeal

The filing of a petition for recusal appeal does not automatically stay the trial court proceeding.[440] The rule states that "either the trial court or the appellate court may grant a stay on motion of a party or on the court's own initiative, pending the appellate court's determination of the appeal."[441]

C. Appeal of trial court ruling denying motion to recuse

If a trial court judge denies a party's motion to recuse, an appeal is taken by filing a petition in the appropriate appellate court (i.e., whichever court would have jurisdiction over an appeal from a final order)[442] within twenty-one (21) days of the trial court's entry of the order.[443] A bond for costs is no longer required in civil cases due to the amendment of Tenn. S. Ct. Rule 9. The remaining reference to the bond in Tenn. S. Ct. R. 10B is likely an oversight.[444] The contents of the petition for recusal appeal set forth in Rule 10B, 2.03, and include a statement of the issues presented for review, a statement of the facts relevant

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[435] Tenn. S. Ct. R. 10B, 2.01.
[436] Tenn. S. Ct. R. 10B, 5.
[437] Tenn. S. Ct. R. 10B, 1.01, 3.01, 4.01.
[438] Tenn. S. Ct. R. 10B, cmt. to Sec. 2.
[439] *See* Tenn. S. Ct. R. 10B, 2.01; *In re Conservatorship of Patton*, M2012-01878-COA10BCV, 2012 WL 4086151, at n.3 (Tenn. Ct. App. Sept. 17, 2012), reh'g denied (Oct. 2, 2012).
[440] Tenn. S. Ct. R. 10B, 2.04.
[441] *Id.*
[442] The rule also provides for recusal motions for circumstances where the judge or other officer is not presiding over a trial court of record, and in those cases an appeal would lie to the otherwise appropriate venue. *See* Tenn. S. Ct. R. 10B, Section 4.
[443] Tenn. S. Ct. R. 10B, 2.01, 2.02.
[444] Tenn. S. Ct. R. 10B, 2.02.

to the issues presented for review, an argument, and a short conclusion. The order or opinion from the trial court must also be appended, as well as any other pertinent documents.[445]

The only order that may be reviewed pursuant to these procedures is the court's order to deny a recusal entered after July 1, 2012. Orders that grant recusal, orders to recuse that were filed before July 1, 2012, or any other order may not be addressed.[446] While the Rule does not require that the attached trial court documents be copies that are stamped "filed," the Court of Appeals has made clear that such is the expectation.[447]

Oral argument is allowed at the discretion of the Court.[448] Therefore, practitioners would be well-advised to request oral argument in the same manner as with other motions or appeals. An answer is not required, and the Courts of Appeal will either act summarily upon the motion or enter an order directing whether or not an answer is to be filed.[449] The Court may also order further briefing, in which case the time period for filing will be set by the Court.[450] Rule 10B further directs that when the Court renders its order or opinion, it "should state with particularity the basis for its ruling on the recusal issue."[451]

A party wishing to appeal from the Court of Appeals or Court of Criminal Appeals' decision on a denial of a motion for recusal may file an accelerated application for permission to appeal, by filing the application within twenty-one (21) days of the intermediate court's order or opinion.[452] The requirements for the accelerated application for permission to appeal and the process that follows the filing of the application mirrors the process in the intermediate appellate court.[453]

D. Motion to Recuse Appellate Court Judge

The process works similarly for motions to recuse intermediate appellate judges.[454] The party files a motion with an accompanying affidavit or declaration along with any other supporting materials. The motion must state all factual and legal grounds supporting recusal, and the affidavit must state that it is not being presented for "any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."[455]

When such a motion is filed, the judge in question is to "act promptly" by written order. If the motion is denied, the judge must state in writing the grounds for the denial.[456] The movant has twenty-one (21) days to file a motion for court review, whereby the other judges in that section of the court would conduct a de novo review of the matter.[457] If the motion for court review is denied, then an accelerated appeal as of right automatically lies to the Tennessee Supreme Court.[458] The appeal is to be titled "recusal appeal from the [Court of Appeals or Court of Criminal Appeals]" and must be filed within twenty-one (21) days of the order denying the motion for court review.[459]

When a party seeks the disqualification, recusal, or determination of constitutional or statutory incompetence of a

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[445] Tenn. S. Ct. R. 10B, 2.03.
[446] *See Duke v. Duke*, 398 S.W.3d 665 (Tenn. Ct. App. 2012).
[447] *Elliott v. Elliott*, No. E2012-02448-COA10BCV, 2012 WL 5990268, at n.1 (Tenn. Ct. App. Nov. 30, 2012).
[448] Tenn. S. Ct. R. 10B, 2.06.
[449] Tenn. S. Ct. R. 10B, 2.05.
[450] *Id.*
[451] Tenn. S. Ct. R. 10B, 2.01.
[452] Tenn. S. Ct. R. 10B, 2.07.
[453] *See* Tenn. S. Ct. R. 10B, 2.07.
[454] *See* Tenn. S. Ct. R. 10B, Section 3.
[455] Tenn. S. Ct. R. 10B, 3.01.
[456] Tenn. S. Ct. R. 10B, 3.02.
[457] *Id.*
[458] *Id.*
[459] *Id.*

Supreme Court justice, the justice is obligated to "act promply" upon the motion and state in writing any grounds upon which the motion is denied.[460] A full court review is available as a matter of right, to be determined by the remaining justices "promptly" using a de novo standard of review.[461]

E. Timeliness and Rehearing

The revised version of Rule 10B preserves the case law holding that recusal motions must be filed promptly.[462] "Although the Rule does not state a specific period of time within which the motion must be filed, a motion under this Rule should be made promptly upon the moving party becoming aware of the alleged ground or grounds for such a motion. The requirement that the motion be timely filed is therefore intended to prevent a party with knowledge of facts supporting a recusal motion from delaying filing the motion to the prejudice of the other parties and the case. Depending on the circumstances, delay in bringing such a motion may constitute a waiver of the right to object to a judge presiding over a matter. Further, the delay in bringing a motion or the timing of its filing may also suggest an improper purpose for the motion."[463]

The newest revision to Rule 10B makes clear that Tennessee Rule of Appellate Procedure 39 does not apply to the appellate court's decision on an accelerated interlocutory appeal stating "a petition for rehearing pursuant to that rule is therefore not permitted in such appeals."[464]

[460] Tenn. S. Ct. R. 10B, 3.03

[461] *Id*.

[462] *See* Tenn. S. Ct. R. 10B, 2.01; *Marcum v. Caruana*, No. M2012-01827-COA10BCV, 2012 WL 3984631, at *6 (Tenn. Ct. App. Sept. 11, 2012).

[463] Tenn. S. Ct. R. 10B, cmt. to Sec. 1.

[464] Tenn. S. Ct. R. 10B, 2.06.

CHAPTER 12 | MISCELLANEOUS

A. Standards of Review

It is a fundamental principle of the appellate process that appellate courts review the record and do not second-guess findings of fact. The rules require that, for each issue, the standard of review be identified.[465] Here are some of the most common standards of review encountered.

1. Material evidence standard

The standard of review by the appellate court of a jury verdict in a civil action is whether there is material evidence to support the verdict.[466] Thus, the appellate court's scope of review is limited to searching "the record to ascertain if material evidence is present to support the verdict. It matters not a whit where the weight or preponderance of the evidence lies . . . ."[467] This standard is also encountered in appeals of administrative decisions.[468]

What is "material evidence"? It "is relevant evidence that a reasonable person would accept as adequate to support a rational conclusion."[469] The Tennessee Supreme Court has stated if "the record contains 'any material evidence to support the verdict, [the jury's findings] must be affirmed; if it were otherwise, the parties would be deprived of their constitutional right to trial by jury.'"[470] To determine whether there is material evidence to support a verdict, the appellate court will (1) take the strongest legitimate view of all the evidence in favor of the verdict; (2) assume the truth of all evidence that supports the verdict; (3) allow all reasonable inferences to sustain the verdict; and (4) discard all countervailing evidence.[471]

2. *De novo* upon the record

The appellate court's review after a bench trial is de novo upon the record, accompanied by a presumption of correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise.[472] A trial court's conclusions of law are subject to a de novo review with no presumption of correctness.[473]

3. Abuse of Discretion

The abuse of discretion standard applies in a variety of circumstances. For example, the abuse of discretion standard applies to decisions to admit evidence.[474] An abuse of discretion occurs when the trial court "applied incorrect legal standards,

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[465] Tenn. R. App. P. 27(a)(7)(B).

[466] Tenn. R. App. P. 13(d).

[467] *Hohenberg Bros. Co. v. Missouri Pac. R.R. Co.*, 586 S.W.2d 117, 119 (Tenn. Ct. App. 1979).

[468] *See Leonard Plating Co. v. Metro. Gov't of Nashville and Davidson County*, 213 S.W.3d 898, 904 (Tenn. Ct. App. 2006), *perm. app. denied* (Dec. 27, 2006) (stating court may review the record solely to determine whether it contains any material evidence to support the decision because a decision without evidentiary support is an arbitrary one).

[469] *Id.*

[470] *Barnes v. Goodyear*, 48 S.W.3d 698, 704 (Tenn. 2000). In the context of review of administrative decisions, the amount of material evidence required "must exceed a scintilla of evidence but may be less than a preponderance of the evidence." *Leonard*, 213 S.W.3d at 904.

[471] *See Barnes*, 48 S.W.3d at 704.

[472] Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001).

[473] *S. Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

[474] *State v. Riels*, 216 S.W.3d 737, 748 (Tenn. 2007).

reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employed reasoning that causes an injustice to the complaining party."[475]

B. Circumstances which require notice of the appeal to the Attorney General

The Tennessee Rules of Appellate Procedure, along with the Tennessee Code and the Tennessee Rules of Civil Procedure, require that the Attorney General receive notice when the validity of a state statute, rule, or regulation is challenged.[476] Notice is served by the party challenging the statute by serving a copy of his brief on the Attorney General.[477] This is true even when the state is not a party to the action.

This requirement serves two purposes. "First, the notice enables the Office of the Attorney General to discharge its responsibility to defend the constitutionality of state statutes. Second, the joinder of the Attorney General assures that the statute will be vigorously defended."[478]

C. Prehearing conferences

The Tennessee Rules of Appellate Procedure permit appellate courts to order a prehearing conference.[479] Nothing in the rules prohibits a party from moving for a prehearing conference, though in practice such conferences are rare. Comments to the rule state that a prehearing conference should not be used in routine cases, in part, because the purpose of a prehearing conference is to allow for simplifying complex appeals in a manner similar to the pretrial conference at the trial level.[480] "In this connection, Tennessee Rule of Civil Procedure 16 should be consulted."[481]

D. Expedited appeal

Comments to Tennessee Rule of Appellate Procedure 4(a) indicate that an expedited schedule of appellate review may be established as permitted by Rule 2,[482] beginning with an immediate filing of the notice of appeal. Tennessee Rule of Appellate Procedure 2, with certain exceptions, allows appellate courts to suspend the rules for good cause, including the expedited decision, upon motion of either party or upon the court's own motion.[483]

One case involving a life or death situation in which appellate review was expedited before the adoption of the Tennessee Rules of Appellate Procedure is *Northern v. State of Tennessee, Dep't of Human Services*, 575 S.W.2d 946 (Tenn. 1978), aff'd 563 S.W.2d 197 (Tenn. Ct. App. 1978).

Tennessee Court of Appeals Rule 13 provides for the acceleration of civil appeals before the Tennessee Court of Appeals upon stipulation of the parties.[484] The stipulation requires parties to waive a written opinion and any appeal to the Tennessee Supreme Court.[485] In exchange, the parties receive priority for oral argument and an oral decision from the bench following oral argument.[486] If oral argument is requested, it will be accelerated and set within sixty (60) days after the case is at

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[475] *State v. Davidson*, 509 S.W.3d 156, 198 (Tenn. 2016) (citing *State v. Davis*, 466 S.W.3d 49, 61 (Tenn. 2015)).

[476] *See* Tenn. Code Ann. § 29-14-107(b); Tenn. R. Civ. P. 24.04; Tenn. R. App. P. 32.

[477] Tenn. R. App. Proc. 32(a).

[478] *See Waters v. Farr*, 291 S.W.3d 873, 918-19 (Tenn. 2009) (Koch, J. concurring) (citing Tenn. Code Ann. § 8-6-109(b)(9); *Cummings v. Beeler*, 223 S.W.2d 913, 916 (Tenn. 1949); *Cummings v. Shipp*, 3 S.W.2d 1062, 1063 (Tenn. 1928)).

[479] Tenn. R. App. P. 33.

[480] Tenn. R. App. P. 33 adv. comm'n cmt.

[481] *Id.*

[482] Tenn. R. App. P. 4(a) adv. comm'n cmt.

[483] Tenn. R. App. P. 2.

[484] Tenn. Ct. App. R. 13.

[485] Tenn. Ct. App. R. 13(6), (8).

[486] *Id.* at (3), (5).

issue or sixty (60) days after the stipulation is filed, whichever is later.[487] The briefing schedule is not accelerated.[488] An example of such an accelerated appeal is *Taylor v. Taylor.*[489]

E. Supreme Court jurisdiction

1. Certification of state law issues from federal court to the Tennessee Supreme Court

Tennessee Supreme Court Rule 23 authorizes the Supreme Court, at its discretion, to answer questions of state law certified by the Supreme Court of the United States, a Court of Appeals of the United States, a District Court of the United States in Tennessee, or a Bankruptcy Court of the United States in Tennessee. This rule may be invoked when the certifying court determines that, in a proceeding before it, there are questions of law of this state which will be determinative of the cause and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of Tennessee.[490]

Rule 23, of course, does not govern procedure for the federal courts. The practice for such a procedure is to file a motion in the federal courts requesting certification under Rule 23 and the reasons for such a request. If the court grants the motion, the certification order must include the following: (a) the style of the case, (b) a statement of facts showing the nature of the case, the circumstances out of which the question of law arises, the question of law to be answered, and any other relevant information, (c) the names of each of the parties, (d) the names, addresses and telephone numbers of counsel for each party, and (e) a designation of one of the parties as the moving party.[491]

Within twenty (20) days of the filing of the certification order with the Supreme Court, the moving party, or petitioner, shall file and serve its brief.[492] The adverse party then has twenty (20) days to file its brief, and the petitioner may file a reply brief within ten (10) days thereafter.[493] Oral arguments are only permitted when ordered by the Supreme Court, on its own motion or upon application of a party.[494] The Supreme Court will then issue a written opinion stating the law governing the question certified to the certifying court, parties, and counsel or, if it declines to answer any question presented, will send an order to the certifying court, parties, and counsel.[495]

2. Motion for Supreme Court to assume jurisdiction

The Supreme Court may assume jurisdiction over a case from the Court of Appeals, upon its own motion or motion of a party.[496] A party may file a motion in the Court of Appeals addressed to the Supreme Court. If the Supreme Court grants the motion, the clerk will be instructed in the Court's order to transfer the case to the Supreme Court. This procedure, however, is only applicable for "cases of unusual public importance in which there is a special need for expedited decision and that involve: (A) State taxes; (B) The right to hold or retain public office; or (C) Issues of constitutional law."[497] Upon its own motion, the Supreme Court may assume jurisdiction when there is a "compelling public interest."[498] In *Bredesen v. Tenn. Judicial Selection Comm'n*, the Supreme Court granted the "reach down motions" and assumed jurisdiction of the appeal, which dealt with issues

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[487] *Id.* at (3).
[488] *Id.* at (2).
[489] *Taylor v. Taylor*, No. M2009-01411-COA-R3-CV, 2010 WL 174775 (Tenn. Ct. App. Jan. 19, 2010).
[490] Tenn. Sup. Ct. R. 23, § 1.
[491] *Id.*, § 3.
[492] *Id.*, § 7(A).
[493] *Id.*
[494] *Id.* at § 7(B).
[495] *Id.*, § 8, 9.
[496] Tenn. Code Ann. § 16-3-201(d).
[497] *Id.*
[498] *Id.*

of constitutional law involved with appointing a new justice to be the fifth member of the Tennessee Supreme Court.[499]

F. Review of bond in criminal case

Tennessee Rule of Appellate Procedure 8 provides that review of the trial court's setting or denial of a bond may be had at any time before an appeal of any conviction by filing a motion for review in the Court of Criminal Appeals or, if an appeal is pending, by filing a motion for review in the appellate court to which the appeal has been taken.[500] The motion must be accompanied by a copy of the motion filed in the trial court, any answer in opposition, and the trial court's written statement of reasons for setting or denial of bond.[501] It must state: (1) the court that entered the order, (2) the date of the order, (3) the crime or crimes charged or of which defendant was convicted, (4) the amount of bail or other conditions of release, (5) the arguments supporting the motion, and (6) the relief sought.[502]

G. Administrative appeals appealed directly to the Court of Appeals

1. UAPA claims

Unless the statute under which the claim is brought specifies otherwise, appeals under the Uniform Administrative Procedures Act ("UAPA") are appealed from the agency decision to the Chancery Court of Davidson County, Tennessee, and such appeals are outside the scope of this handbook.[503]

Part I of Rule 12 of the Tennessee Rule of Appellate Procedure governs the procedure for appeals from agencies directly to the Court of Appeals under UAPA. Under Part I, appeals must be filed within sixty (60) days after entry of the administrative order appealed from.[504] The agency is named as respondent.[505] Instead of a notice of appeal, a petition for review is filed.[506] The petition must specify the party seeking review, designate the order appealed from, and briefly describe the issues which the petitioner intends to raise.[507]

The appeal must be accompanied by any applicable fees, taxes, or documentation required by Tennessee Rule of Appellate Procedure 6.[508] The petitioner must serve a copy of the appeal on the agency, the Attorney General, and on all parties of record to the proceeding before the agency pursuant to Tennessee Rule of Appellate Procedure 5(a).[509] In order for a person other than the petitioner who was a party to the proceeding below to become a party of record to the appeal, such person must file a written notice of appearance within thirty (30) days after the filing of the petition for review.[510] Such notice of appearance shall describe the position of the intervenor, and shall be served on the agency and all parties in the proceeding before the agency.[511]

The record of the proceeding before the agency is filed by the agency within forty-five (45) days after the petition for

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[499] *Bredesen v. Tenn. Judicial Selection Comm'n*, 214 S.W.3d 419 (Tenn. 2007).
[500] Tenn. R. App. P. 8(a); *see also* Tenn. Code Ann. § 40-11-144.
[501] Tenn. R. App. P. 8(a).
[502] *Id.*
[503] Tenn. Code Ann. § 4-5-322(b)(1)(A).
[504] Tenn. R. App. P. 12, pt. I(a).
[505] *Id.*
[506] *Id.*
[507] Tenn. R. App. P. 12, pt. I(b).
[508] Tenn. R. App. P. 12, pt. I(c).
[509] Tenn. R. App. P. 12, pt. I(d).
[510] Tenn. R. App. P. 12, pt. I(e).
[511] *Id.*

review is filed.[512] The rest of the briefing schedule conforms to the time limits and other requirements of Tennessee Rules of Appellate Procedure 27-30, with the time for filing the appellant's brief beginning to run from the day the record is filed.[513] Any party disagreeing in whole or in part with the decision rendered by the agency must file a brief within the time allowed for the petitioner.[514] The agency may file a responsive brief but is not required to do so.[515] The Tennessee Rules of Appellate Procedure control these appeals, but to the extent there is any conflict between the Rules and the UAPA, the provisions of the UAPA control.[516]

2. Administrative claims not under the UAPA

Part II of Tennessee Rule of Appellate Procedure 12 covers those appeals from administrative agencies not covered by the UAPA that are taken directly to the Court of Appeals.[517] Under Part II, appeals must be filed within thirty (30) days after the date of entry of the administrative order appealed from.[518] In those cases, the petition for review must specify the party or parties seeking review and shall designate the respondent and the order to be reviewed.[519] The agency and all other parties of record shall be named as respondents.[520] The petition for review filed with the clerk of the Court of Appeals shall be accompanied by the address of the petitioner or petitioner's counsel, a list of the names and addresses of the parties or counsel upon whom service is required, and any applicable fees, taxes, or documentation required by Tennessee Rule of Appellate Procedure 6.[521] The clerk shall docket the proceeding and send notice of the docketing as provided in Tennessee Rule of Appellate Procedure 5(c).[522]

The petitioner must serve the petition for review on the agency and all other parties of record to the proceeding before the agency.[523] If any respondent other than the agency wants to participate in the case before the Court of Appeals, he must file a written appearance, although no time period is specified for when this notice must be filed.[524]

The entire record before the agency shall be the record on review unless the agency or the parties stipulate to omit portions.[525] The record shall be filed by the agency within forty-five (45) days after the filing of the petition for review.[526] After this, the briefing schedule conforms to the Tennessee Rules of Appellate Procedure.[527]

3. Claims Commission appeals

Claims Commission appeals are directly appealed to the Court of Appeals and are governed by Tennessee Rule of Appellate Procedure 3.[528]

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[512] Tenn. R. App. P. 12, pt. I(f).
[513] Tenn. R. App. P. 12, pt. I(g).
[514] *Id.*
[515] *Id.*
[516] Tenn. R. App. P. 12, pt. I(h) (referencing Tenn. Code Ann. § 4-5-322(f)).
[517] Tenn. R. App. P. 12, pt. II.
[518] Tenn. R. App. P. 12, pt. II(a).
[519] *Id.*
[520] *Id.*
[521] *Id.*
[522] *Id.*
[523] Tenn. R. App. P. 12, pt. II(b).
[524] Tenn. R. App. P. 12, pt. II(c).
[525] Tenn. R. App. P. 12, pt. II(d).
[526] Tenn. R. App. P. 12, pt. II(e).
[527] Tenn. R. App. P. 12, pt. II(h).
[528] Tenn. Code Ann. § 9-8-403(a)(1).

H. Procedure for appeal that has become moot

Cases must be justiciable not only when they are first filed but must also remain justiciable throughout the entire course of litigation, including the appeal.[529] If you believe your appeal (or your opponent's appeal) has become moot, either because of some change of position or recent ruling in another case, you should file a motion bringing the question before the court. The court may take notice of the post-judgment fact in accordance with Tennessee Rule of Appellate Procedure 14.[530] If the case has become moot, the court will remand the case with directions to vacate the judgment.[531]

In direct appeals of criminal cases, if the defendant dies, counsel should file a motion to dismiss the appeal and abate the prosecution upon suggestion of death.[532] Attach a certified copy of the death certificate to the motion. The court will usually require a response from the State to verify the identity of the deceased.

I. Proper procedure to withdraw as counsel

1. Civil appeals

The attorney seeking permission to withdraw should file the motion and state that the motion has been served on his client with notice to the client as to what should be done with respect to the pending appeal. The Court of Appeals may require that a party be notified and have an opportunity to object before counsel will be permitted to withdraw or substitute other counsel. Substitution requires an order of the court. Notice is not sufficient. Further, an order of substitution does not automatically release the attorney as surety.

Counsel appointed pursuant to Supreme Court Rule 13(1)(d) to represent persons in a case in which allegations could result in finding the child dependent or neglected, or in which there is a petition for termination of parental rights, are now subject to Supreme Court Rule 14 if they seek to withdraw after an adverse decision in the intermediate appellate court. The requirements of Rule 14 are described below in connection with criminal appeals.

2. Criminal appeals

In criminal cases, counsel appointed to represent the accused is obligated to perfect the appeal and represent the accused in the appellate court when the appeal is from a judgment which imposes a prison sentence.[533] Appointed counsel will not be permitted to withdraw unless there is a legal ground asserted that justifies withdrawal. Counsel representing the accused in a private capacity may move the trial court to withdraw at the hearing on the motion for a new trial.[534] The trial court may permit counsel to withdraw. If the accused is indigent, however, the trial court should appoint counsel to represent the accused in the appellate court since counsel is the person most familiar with the prosecution against the accused.[535]

In the Court of Criminal Appeals, counsel may be allowed to withdraw as counsel of record only for good cause shown and if the application is made to the court when such counsel is not delinquent in his duties.[536] If privately retained counsel seeks

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[529] *McIntyre v. Traughber*, 884 S.W.2d 134, 137 (Tenn. Ct. App. 1994).

[530] *See* Tenn. R. App. P. 14; *Easley v. Britt*, No. M1998-00971-COA-R3-CV, 2001 WL 1231516, at *1 (Tenn. Ct. App. Oct. 16, 2001).

[531] *See Butler v. White*, No. W2005-01382-COA-R3-CV, 2006 WL 64599, at *3 (Tenn. Ct. App. Jan. 12, 2006) (citing *Ford Consumer Fin. Co. v. Clay*, 984 S.W.2d 615, 617 (Tenn. Ct. App. 1998); *McIntyre*, 884 S.W.2d at 138).

[532] *See Carver v. State*, 398 S.W.2d 719 (Tenn. 1966).

[533] Tenn. Code Ann. § 40-14-203.

[534] Tenn. R. Crim. P. 37(e).

[535] Tenn. R. Crim. P. 37(e)(3), *see also Jones v. State*, 548 S.W.2d 329, 332-334 (Tenn. Ct. Crim. App. 1976) perm. app. denied (Jan. 17, 1977).

[536] Tenn. Ct. Crim. App. R. 12.

to withdraw after the notice of appeal has been filed, the motion to withdraw must be presented to the Court of Criminal Appeals.[537] If counsel is deficient in any duty required to be fulfilled at the time the motion is made, the Court of Criminal Appeals will not, as a general rule, permit counsel to withdraw.[538] Appointed counsel may also withdraw during an appeal if the appeal is deemed wholly frivolous by the court.[539] The procedures for withdrawal under such circumstances are in Rule 22 and are to be strictly applied.[540]

Both appointed counsel (including counsel for parents in dependent/neglect cases and guardians ad litem for children in such cases) and private counsel may withdraw after the appellate court has released its opinion. Appointed counsel must comply with the requirements of Tennessee Supreme Court Rule 14. This rule requires that a post-opinion motion to withdraw and proposed order must be presented to the clerk of the appropriate court of appeals within fourteen (14) days of the date the opinion was filed.[541] The motion must state that the issues presented are available for second-tier review, if sought by the indigent party pro se, and it must be accompanied by a copy of the notice sent to the indigent party.[542] The required contents of the notice to the indigent party are listed in Rule 14. These should be reviewed carefully. Privately retained counsel should also follow this procedure to prevent a misunderstanding between counsel and the defendant regarding subsequent representation, and to ensure that the defendant has an opportunity to seek review by the Tennessee Supreme Court.

J. Frivolous appeals

1. Criteria and factors considered by the court to determine sanctions for a frivolous appeal

There are no hard and fast rules regarding when the Court of Appeals will find an appeal to be frivolous. Tennessee Code Annotated § 27-1-122 provides:

> When it appears to any reviewing court that the appeal from any court of record was frivolous, or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

There is no additional help provided from the above statute. Courts construe this section of the Code strictly in an effort not to discourage legitimate appeals.[543] The Tennessee Supreme Court has described a frivolous appeal as an appeal that is "devoid of merit" and "has no reasonable chance of success."[544] It is one completely "lacking in justiciable issues."[545]

A review of selected cases provides an indication as to some circumstances that could put an appellant in jeopardy of being tagged with a frivolous appeal. One of the most common is the failure to file a transcript of the evidence when factual questions are raised by the appeal.[546] The party raising an issue on appeal is obligated to give the appellate court a record that is sufficient for an appropriate review of the issue raised.[547] An appeal in which the appellate court's ability to address the issues

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[537] *Id.*

[538] *See id.*

[539] Tenn. Ct. Crim. App. R. 22.

[540] *See id.*

[541] Tenn. Sup. Ct. R. 14.

[542] *Id.*

[543] *Davis v. Gulf Ins. Group*, 546 S.W.2d 583, 586 (Tenn. 1977).

[544] *See id.*

[545] *Id.*

[546] *McDonald v. Onoh*, 772 S.W.2d 913, 914 (Tenn. Ct. App. 1989); *Wallace v. Action Mortgage Corp.*, No. CA03A01-9209-CV-0033, 1993 WL 455285 (Tenn. Ct. App. Nov. 9, 1993).

[546] *Williams v. Williams*, 286 S.W.3d 290, 297-98 (Tenn. Ct. App. 2008) (citing Tenn. R. App. P. 24; *McDonald*, 772 S.W.2d at 914).

raised is undermined by the appellant's failure to provide an adequate record may be deemed frivolous because it has no reasonable chance of succeeding.[548]

In *Williams v. Williams*, the Court of Appeals found the appeal to be frivolous when: 1) the appellant questioned the trial court's findings of fact, but did not file the transcript from the trial court, 2) the issues raised by the appellant hinged on the trial court's determinations of credibility, which were unfavorable to the appellant, 3) the issues raised by appellant are reviewed for an abuse of discretion, a notably high standard of review, and 4) an objective review of these factors would cause a reasonable person to conclude the appellant had "no reasonable chance of success."[549]

Other situations giving rise to a frivolous appeal include a failure to file a motion for a new trial in a case tried before a jury[550] and asserting error that was not raised in a motion for a new trial.[551]

Of course, simply filing an appeal and stating no reason or justification for the appeal may result in sanctions,[552] as might failing to make any legal argument showing a reasonable chance of success.

In addition, when the appellant is faced with adverse controlling authority directly on point and can show no authority that would entitle him to relief, the appeal might be frivolous,[553] and may result in sanctions.[554] In one unusual case, the court took judicial notice of the fact that the appellant appealed four civil cases just since the time the court had converted to the use of computerized records.[555] Considering the appellant's previous record before the court, the court found the current case before it to be frivolous.[556]

More recently, in *Barnett v. Tennessee Orthopaedic Alliance*, No. M2011-01978-COA-R3CV, 2012 WL 4166994 (Tenn. Ct. App. Sept. 19, 2012), perm. app. dismissed (Jan. 2, 2013), the plaintiff filed a medical malpractice suit three years after the alleged malpractice occurred. After her counsel withdrew, she continued litigation pro se, received multiple extensions of time to file a certificate of good faith, and eventually located an expert who admittedly lacked the expertise to testify upon the subject. When she did not respond to the defendants' motion for summary judgment, the defendants were granted summary judgment and plaintiff was assessed discretionary costs in the amount of $9,000. She appealed. The Court of Appeals granted the defendants' request to deem the appeal frivolous, finding that the trial court had the patience of Job with the plaintiff and that, enough being enough, the trial court did not err in granting summary judgment and assessing the discretionary costs. Further, the matter was remanded to the trial court for a determination of attorney's fees to be awarded to the defendants.[557]

The above cases are by no means exhaustive of all circumstances in which the Court of Appeals has found, or will find an appeal to be frivolous. They do provide at least a glimpse into some circumstances that have resulted in a ruling that the appellant has crossed the line and deserved sanctions.

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[548] *Young v. Barrow*, 130 S.W.3d 59, 67 (Tenn. Ct. App. 2003).

[549] *Williams v. Williams*, 286 S.W.3d 290, 297-98 (Tenn. Ct. App. 2008).

[550] *Pye v. Opryland USA, Inc.*, No. 01A01-9302-CV-00074, 1993 WL 541115 (Tenn. Ct. App. Dec. 29, 1993); *Leake v. Airport Toyota of Memphis, Inc.*, No. 02A01-9208-CV-0023, 1993 WL 360443 (Tenn. Ct. App. Sept. 14, 1993).

[551] *Pye v. Opryland USA, Inc.*, No. 01A01-9302-CV-00074, 1993 WL 541115 (Tenn. Ct. App. Dec. 29, 1993).

[552] *Cagle v. Cagle*, No.03A01-9209-CV-00344, 1993 WL 1934 (Tenn. Ct. App. Jan. 6, 1993) *perm. app. denied, concurring in results only* (Jul. 26, 1993). (*Cagle* is a memorandum opinion and thus while designated not for citation is used in this Handbook to illustrate the possibility of sanctions in such an instance.

[553] *Sharp v. Allstate Ins. Co.*, No. 02A01-9204-CV-00107, 1992 WL 289660, *3 (Tenn. Ct. App. Oct. 16, 1992).

[554] *Hooker v. Sundquist*, 107 S.W.3d 532, 536 (Tenn. Ct. App. 2002) (citing *Boyd v. Prime Focus, Inc.*, 83 S.W.3d 761, 765)) ("Sanctions are appropriate when an attorney submits a motion or other paper on grounds which he knows or should know are without merit, and a showing of subjective bad faith is not required.").

[555] *Harris v. State*, No. 03A01-9401-CV-00016, 1994 WL 399127, *4 (Tenn. Ct. App. Aug. 3, 1994).

[556] *Id*.

[557] *Barnett v. Tennessee Orthopaedic Alliance*, 2012 WL 4166994, at * 9.

2. Damages recoverable for frivolous appeals

Upon motion, the appellate court can award damages against the appellant for a frivolous appeal.[558] "Damages" includes, but is not limited to costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.[559] Attorney's fees are also among those damages that can be awarded.[560] Although the statute permits the court to award damages "upon its own motion," it is best for the appellee to make a request for damages for a frivolous appeal as part of his brief.[561] Under no circumstances should the motion for a frivolous appeal only be made orally at the oral argument before the appellate court. If the appellate court grants the motion, it is customary for the case to be remanded to the trial court for the determination of damages.[562]

K. Appellate Mediation

Rule 34 of the Tennessee Rules of Appellate Procedure institutes the procedure permitting parties to voluntarily mediate their dispute on appeal, thereby suspending various deadlines.

This Rule is applicable "in all cases appealed to the Court of Appeals," and the Advisory Commission Comment notes that Rule 34 therefore does not apply in workers' compensation cases, which are appealed to the Tennessee Supreme Court.[563] Pursuant to the plain language of the Rule itself, then, it would not apply to any Tennessee case on appeal to the state's highest court, and would only apply to civil appeals.

Parties will receive notification from the Appellate Court Clerk within five (5) days of the filing of the notice of appeal that they may request a joint suspension of "the processing of the appeal" to engage in voluntary mediation.[564] Parties must file a joint stipulation requesting suspension within fifteen (15) days of the date of the notice sent by the Clerk.[565] The Rule contemplates a suspension of "no more than sixty days to enable the parties to mediate their dispute."[566] The Rule specifically excludes: 1) expedited appeals; 2) appeals involving the constitutionality of a statute, rule or ordinance; or 3) appeals involving the imposition of criminal contempt sanctions.[567]

If the parties are successful in mediation, the parties shall file a notice of voluntary dismissal of the appeal within five (5) days of the successful mediation, and such notice "shall provide for the taxation of costs."[568] If the mediation is not successful, the parties have five (5) days to file a notice with the Clerk requesting resumption of the appeal.[569] If the mediation was successful as to some but not all issues, the parties have five (5) days to file a notice to the Clerk identifying the remaining issues and requesting resumption of the appeal.[570]

Importantly, if, after sixty (60) days, no notice of voluntary dismissal has been filed, the case will be returned to the

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[558] Tenn. Code Ann. § 27-1-122.
[559] *Id.*
[560] *See Leake v. Airport Toyota of Memphis Inc.*, No. 02A21-9208-CV-0023, 1993 WL 360443, at *4 (Tenn. Ct. App. Sept. 14, 1993).
[561] *See* Tenn. Code Ann. § 27-1-122.
[562] *See, e.g., Davis v. Gulf Ins. Group*, 546 S.W.2d 583, 586 (Tenn. 1977); *Guess v. Maury*, 726 S.W.2d 906, 923 (Tenn. Ct. App. 1986) *perm. app. denied* (Jan. 1, 1987), *overruled on other grounds by Elliott v. Cobb*, 320 S.W.3d 246 (Tenn. 2010).
[563] Tenn. R. App. P. 34(a), 2009 adv. comm'n cmt.
[564] Tenn. R. App. P. 35(a).
[565] Tenn. R. App. P. 35(b).
[566] *Id.*
[567] *Id.*
[568] Tenn. R. App. P. 35(c).
[569] *Id.*
[570] *Id.*

active docket, with the appellate deadlines reactivated.[571] The parties, with the mediator, can jointly file a notice of an extension for an additional thirty (30) days to complete mediation if necessary.

Rule 34(e) sets out a confidential evaluation process for appellate mediation, which is required to be filed within ten (10) days of the completion of the mediation.

L. Appellate Pro Bono

The Tennessee Bar Association and the Tennessee Alliance for Legal Services launched an Appellate Pro Bono Pilot Program in 2011. The program provides pro bono representation to low-income litigants appearing in Tennessee's appellate courts who otherwise could not afford counsel.

Experienced appellate lawyers volunteer to represent these low-income clients, or to assist a lawyer without much appellate experience who seeks to learn more about this area of the law.

For more information, please contact the TBA or TALS.

[571] *Id.*