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APPELLATE ADVOCACY

A Handbook on Appellate Practice in Tennessee

13th 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 Thirteenth 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 February ???, 2024, have been incorporated. Because the book is published electronically on NashvilleBar.org, it can be more easily updated. The editor intends to update the book online at least annually.

The authors and editors of this Handbook are privileged to have had staff attorneys from the Supreme Court and the Court of Appeals 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.

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Many people have contributed to the preparation of the Twelfth 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 the late 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 Association 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 their 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 particularly to the late 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.

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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 critical input from the Court and its staff attorneys, to ensure the accuracy of information about the court itself, as well as assisting in the authorship of the chapters about the appellate court. Tennessee Supreme Court Staff Attorney Lisa Rippe 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.

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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?

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.⁴ 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.⁵ A final judgment is “one that resolves all the issues in the case [affecting the parties’ substantive rights or obligations in the case], ‘leaving nothing else for the trial court to do.’”⁶ Strict, not substantial, compliance is required with Tennessee Rule of Civil Procedure 58 to become final.⁷

In criminal cases, as in civil cases, an appeal may be had as of right only from a final order, under either Tennessee Rule of Appellate Procedure 3(b) or 3(c).⁸ Orders of criminal contempt are immediately appealable as of right,⁹ although no appeal lies from an acquittal of criminal contempt.¹⁰ The jurisdiction of the Court of Criminal

¹ Tenn. R. App. P. 3(b)-(c); see also *State v. Rowland*, 520 S.W.3d 542, 545-46 (Tenn. 2017); *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), *no appeal taken*.

⁴ See Tenn. R. App. P. 3(a); *State v. Cavin*, 671 S.W.3d 520, 526-28 (Tenn. 2023); *State v. Gevedon*, 671 S.W.3d 537, 541-42 (Tenn. 2023); *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); *Kee v. City of Jackson*, No. W2011-02143-COA-R3CV, 2012 WL 1154513, at *2 (Tenn. Ct. App. Apr. 4, 2012), *no appeal taken*; *In re Estate of Schorn*, 359 S.W.3d 192, 196 (Tenn. Ct. App. 2011), *perm. app. denied* (Jul. 15, 2011); *Simerly v. City of Elizabethton*, No. E2009-01694-COA-R3-CV, 2011 WL 51737, at *7 (Tenn. Ct. App. Jan. 5, 2011), *perm. app. denied* (Tenn. Apr. 13, 2011).

⁵ See *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), *perm. app. denied* (Oct. 24, 2005).

⁶ *Henderson*, 121 S.W.3d at 645 (quoting *State ex rel. McAllister v. Goode*, 968 S.W.2d 834, 840 (Tenn. Ct. App. 1997)); *Ball v. McDowell*, 288 S.W.3d 833, 838 (Tenn. 2009).

⁷ *Wallace v. City of Lewisburg*, No. M2018-01572-COA-R3-CV, 2019 WL 2184981, at *3 (Tenn. Ct. App. May 21, 2019), *no appeal taken* (“Neither Rule 58, the advisory comments to the rule, nor the cases interpreting that rule, allow for substantial compliance to satisfy the strictures of Rule 58. On the contrary, as previously noted, compliance with the strictures of the rule is ‘mandatory.’” (citing *State ex rel. Taylor*, No. W2004-02589-COA-R3-JV, 2006 WL 618291, at *2 (Tenn. Ct. App. Mar. 13, 2006) (itself quoting *Gordon v. Gordon*, No. 03A01-9702-CV-00054, 1997 WL 304114, at *1 (Tenn. Ct. App. June 5, 1997)))).

⁸ *State v. Gallaher*, 730 S.W.2d 622, 623 (Tenn. 1987); *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), *no appeal taken*.

⁹ See Tenn. R. App. P. 3(b); *Ahern v. Ahern*, 15 S.W.3d 73, 80-82 (Tenn. 2000); *Trezevant v. Trezevant*, 568 S.W.3d 595, 624-625 (Tenn. Ct. App. 2018), *perm. app. denied* (Tenn. Sep. 18, 2018); *Burris v. Burris*, 512 S.W.3d 239, 251 (Tenn. Ct. App. 2016).

¹⁰ *Overnite Transp. Co. v. Teamsters Loc. Union No. 480*, 172 S.W.3d 507, 510 (Tenn. 2005).

Appeals attaches upon the filing of the notice of appeal and, therefore, the trial court loses jurisdiction in most instances.¹¹ When a defendant files a Rule 3 notice of appeal, the trial court is thereafter divested of jurisdiction to consider a Rule 9 application.¹² The filing of a notice of appeal does not, however, divest a trial court of jurisdiction to adjudicate a subsequently timely filed motion pursuant to Tenn. R. Crim. P. 35 for reduction of sentence.¹³

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.¹⁴ 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. However, unresolved attorney's fees that are awarded under Tenn. Code Ann. § 20-12-119(c) where a motion to dismiss for failure to state a claim is granted does not prevent an order from being final.¹⁵

2. Voluntary dismissals

In *Green v. Moore*¹⁶, 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 the entry of the order of dismissal, not from the earlier notice of voluntary dismissal. A notice of non-suit does not adjudicate anything; an order is required.

3. Unresolved claim for punitive damages

If a jury awards punitive damages, the trial court must review the award of punitive damages and determine whether it will grant or reduce the award by setting forth specific findings of fact and conclusions of law.¹⁷ Therefore, when a trial court approves a punitive damage award, in whole or in part, a judgment is not final without the trial court performing a full *Hodges* analysis.¹⁸

4. Order modifying conditions of mandatory outpatient treatment

In a criminal case where the defendant has been found not guilty by reason of insanity, either party may appeal a final adjudication ordering the defendant's judicial hospitalization or to participate in outpatient treatment.¹⁹ In *State v. Yancey*²⁰,

¹¹ *State v. Pendergrass*, 937 S.W.2d 834, 837 (Tenn. 1996).

¹² *State v. Yancey*, No. W2022-00131-CCA-R3-CD, 2022 WL 6257321, at *3 (Tenn. Crim. App. Oct. 10, 2022).

¹³ *State v. Patterson*, 564 S.W.3d 423, 429 (Tenn. 2018).

¹⁴ *Spencer v. Golden Rule, Inc.*, No. 03A01-9406-CV-00207, 1994 WL 589564, at *1 (Tenn. Ct. App. Oct. 21, 1994), *no appeal taken*.

¹⁵ *Irvin v. Green Wise Homes, LLC*, No. M2019-02232-COA-R3-CV, 2021 WL 709782, at *3–7 (Tenn. Ct. App. Feb. 24, 2021), *perm. app. denied* (June 9, 2021).

¹⁶ *Green v. Moore*, 101 S.W.3d 415 (Tenn. 2003).

¹⁷ *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992).

¹⁸ *Id.*

¹⁹ Tenn. Code. Ann. § 33-7-303(d).

²⁰ *State v. Yancey*, No. W2022-00131-CCA-R3-CD, 2022 WL 6257321, at *3 (Tenn. Crim. App. Oct. 10, 2022).

however, the Court of Criminal Appeals held that the trial court's order modifying the defendant's mandatory outpatient treatment plan, set pursuant to Tenn. Code Ann. § 33-7-303 following a finding of not guilty by reason of insanity, was not a final judgment and therefore was subject to a discretionary appeal under Rules 9 and 10 rather than an appeal as of right under Rule 3. The Court of Criminal Appeals based this finding on the trial court's indication that it intended to provide further judgment over the defendant's compliance with the treatment plan.

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 54.02.²¹ The trial court's authority to direct the entry of a final judgment is not absolute.²² 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."²³

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 54.02.²⁴ The trial court is not required to include additional explicit language certifying a judgment as final as long as some "unequivocal disposition" of the case is included in the order.²⁵ Unless multiple cases are truly consolidated under one docket number, if the trial court consolidates portions of multiple lawsuits for pragmatic reasons (e.g., discovery), a judgment in one case may be final even if it does not affect the disposition of the other, similar cases.²⁶

A leading case on this subject is *Brown v. Roebuck & Assocs., Inc.*²⁷ 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.²⁸ The Court cited the well-settled rule that an order may be certified as final under Rule 54.02 if it disposes

²¹ *Bayberry Assocs. v. Jones*, 783 S.W.2d 553, 557-59 (Tenn. 1990).

²² *Crane v. Sullivan*, No. 01A01-9207-CH-00287, 1993 WL 15154, at *1-2 (Tenn. Ct. App. Jan. 27, 1993), *no appeal taken*.

²³ *Bayberry*, 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), *no appeal taken* (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).

²⁴ *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), *no appeal taken* (reiterating that an appellate court's jurisdiction to hear only final judgments is a threshold issue); *Tucker v. Capitol Recs., Inc.*, No. M2000-01765-COA-R3-CV, 2001 WL 1013085, at *1 (Tenn. Ct. App. Sept. 6, 2001), *no appeal taken* (holding an improper Rule 54 certification meant there was no final judgment and no jurisdiction in the appellate courts); *see also Kee v. City of Jackson*, No. W2011-02143-COA-R3CV, 2012 WL 1154513, at *1 (Tenn. Ct. App. Apr. 4, 2012), *no appeal taken*; *Simerly v. City of Elizabethton*, No. E2009-01694-COA-R3-CV, 2011 WL 51737, at *7 (Tenn. Ct. App. Jan. 5, 2011), *perm. app. denied* (Tenn. Apr. 13, 2011); *City of Jackson v. Hersh*, No. W2008-02360-COA-R3-CV, 2009 WL 2601380, at *4 (Tenn. Ct. App. Aug. 25, 2009), *no appeal taken*.

²⁵ *Brooks v. Woody*, 577 S.W.3d 529, 533 (Tenn. Ct. App. 2018), *appeal denied* (Mar. 27, 2019) (holding that language stating that the "lawsuit against all defendants is dismissed in its entirety with prejudice" was sufficient to render the order final).

²⁶ *Id.* at 532-33.

²⁷ *Brown v. Roebuck & Assocs., Inc.*, No. M2008-02619-COA-R3-CV, 2009 WL 4878621 (Tenn. Ct. App. Dec. 16, 2009), *no appeal taken*.

²⁸ *Id.* at *4.

of at least one claim or party.²⁹ 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.³⁰ 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.³¹ 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.³²

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.³³ Contempt proceedings are, however, collateral to and independent of the cases or proceedings from which they arise. Therefore, a judgment of contempt with a designation of punishment is a final order and appealable as of right even if the proceeding out of which the contempt arose is not complete.³⁴ 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.³⁵

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.”³⁶

3. Estate cases

Orders resolving claims against an estate are appealable immediately without waiting for the entire estate to be settled.³⁷ Disputes over the issuance of letters testamentary are likewise entitled to immediate appeals.³⁸ An order rejecting all purported wills submitted for probate and finding that the decedent died intestate is a final appealable order.³⁹

4. Collateral Order Doctrine

The “collateral order doctrine” is an exception to the finality requirement. For example, there is normally no right to

²⁹ *Id.* at *5.

³⁰ *Id.*

³¹ *Id.* at *6.

³² *Id.* at *7.

³³ *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, at *2 (Tenn. Ct. App. Jan. 7, 2003), *no appeal taken*.

³⁴ *Hall*, 772 S.W.2d at 435-36; *Poff v. Poff*, No. 01-A-01-9301-CV00024, 1993 WL 73897, at *2 (Tenn. Ct. App. Mar. 17, 1993), *no appeal taken*.

³⁵ *Poff*, 1993 WL 73897, at *2.

³⁶ *Samson v. Hartsville Hosp., Inc.*, No. 01-A-01-9609-CH-00430, 1997 WL 107167, at *2 (Tenn. Ct. App. Mar. 12, 1997), *no appeal taken*.

³⁷ Tenn. Code Ann. § 30-2-315(b); *Cantrell v. Estate of Cantrell*, 19 S.W.3d 842, 844 (Tenn. Ct. App. 1999).

³⁸ Tenn. Code Ann. § 30-1-107.

³⁹ *In re Henderson*, 121 S.W.3d 643, 647 (Tenn. 2003).

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.⁴⁰

5. Orders Denying Motions for Recusal

Effective July 1, 2012, the Tennessee Supreme Court adopted new procedures to be followed for judge recusal motions.⁴¹ 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.⁴² More information can be found in Chapter 12.

6. Motions to Intervene

Effective July 1, 2018, an order granting or denying a motion to intervene under Tennessee Rules of Civil Procedure 24 shall be a final judgment for the purposes of Tennessee Rules of Appellate Procedure 3. For the purposes of Tennessee Rules of Appellate Procedure 4, the term party includes a person filing a motion to intervene under Tennessee Rules of Civil Procedure 24.

7. Class Certification

An order granting or denying class certification under Tennessee Rule of Civil Procedure 23 is automatically appealable as of right.⁴³ To appeal such an order, a party must file a notice with the clerk of the appellate court within ten (10) days of the entry of the order. Furthermore, the amended statute now states that the trial court’s proceedings are automatically stayed pending an appeal of the class certification ruling.⁴⁴

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 court⁴⁵ “within 30 days after the date of entry of the judgment appealed from.”⁴⁶ The “judgment appealed from” may be the order denying the motion for a new trial, or one of the other orders outlined in Tennessee Rules of Appellate Procedure 50, 52, and 59.⁴⁷ Notices of appeals in termination of parental rights cases are no longer required to be signed by the appellant in addition to the attorney.⁴⁸

An order or judgment “is final when it so far disposes of the cause that nothing remains to be done but the issuing of

⁴⁰ *Cantrell v. DeKalb Cnty.*, 78 S.W.3d 902, 904 n.3 (Tenn. Ct. App. 2001) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526–30 (1985); *Fann v. Brailey*, 841 S.W.2d 833, 835 (Tenn. Ct. App. 1992)).

⁴¹ See generally Tenn. Sup. Ct. R. 10B.

⁴² Tenn. Sup. Ct. R. 10B.

⁴³ Tenn. Code Ann. § 27-1-125.

⁴⁴ *Id.*

⁴⁵ This change to filing with the appellate court clerk rather than the trial court clerk took effect on July 1, 2017. However, the safe harbor expired on June 29, 2018, previously allowing a party who attempted to file a notice of appeal with the trial court clerk within 30 days after the entry of judgment an additional 20 days from the 30th day after the entry of judgment to file the notice of appeal with the appellate court clerk.

⁴⁶ Tenn. R. App. P. 4(a).

⁴⁷ “It is well settled that ‘an order granting a new trial is not a final judgment and is not appealable as of right.’” *Cooper v. Tabb*, 347 S.W.3d 207, 218 (Tenn. Ct. App. 2010) (emphasis added) (quoting *Evans v. Wilson*, 776 S.W.2d 939, 941 (Tenn. 1989) (itself citing *Panzer v. King*, 743 S.W.2d 612, 616 (Tenn. 1988))).

⁴⁸ 2018 Tennessee Laws Pub. Ch. 875 (H.B. 1856).

the final process or the taking of other ministerial steps necessary to carry the decree into effect.”⁴⁹ 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.⁵⁰ 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).

If a notice of appeal is filed in the incorrect appellate court, that court may transfer the appeal to the appropriate court under Tennessee Rule of Appellate Procedure 17.⁵¹ Appeals may be transferred among the Court of Appeals, Court of Criminal Appeals, and Supreme Court. If an appeal of a juvenile or general sessions court judgment should have been made to the circuit court but was mistakenly filed in the Court of Appeals, the Court of Appeals may transfer the appeal to the circuit court.

Criminal Court Appeals

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, an appeal of a judgment on a motion to correct clerical mistakes under Tennessee Rule of Criminal Procedure 36, an appeal of a judgment on a motion to correct an illegal sentence under Tennessee Rule of Criminal Procedure 36.1, an appeal from a final judgment in a criminal contempt, habeas corpus, extradition, or post-conviction proceeding, or request for expunction. Therefore, Tennessee Rule of Appellate Procedure 3(b) and (c) were modified to provide that a right of appeal lies from orders addressing those proceedings. The Rule 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.⁵²

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.⁵³ A defendant’s motion to seek relief from the trial court’s denial of pretrial jail credit⁵⁴ or community corrections ‘street time’⁵⁵ must be brought under Tennessee Rule of Criminal Procedure 36, and therefore a denial of such motions may be appealed as of right. There is no appeal as of right from a denial of sentence reduction credits.⁵⁶

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

⁴⁹ *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).

⁵⁰ *Ridley v. Ridley*, No. 03A01-9708-GS-00350, 1998 WL 8449, at *2 (Tenn. Ct. App. Jan. 13, 1998), *no appeal taken* (holding “the trial court cannot convert an order that is substantively interlocutory into a final order just by declaring it a ‘final order’”).

⁵¹ See *Moore v. Chandler*, 675 S.W.2d 153, 154 (Tenn. 1984).

⁵² See Tenn. R. App. P. 3, adv. comm’n cmt. 2013.

⁵³ 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).

⁵⁴ *Anderson v. Washburn*, No. M2018-00661-SC-R11-HC, 2019 WL 3071311 (Tenn. Jun. 27, 2019).

⁵⁵ *State v. Nichols*, No. M2022-00802-CCA-R3-CD, 2023 WL 2861903, at *2 (Tenn. Crim. App. Apr. 10, 2023), *perm. app. denied* (Tenn. Sep. 12, 2023).

⁵⁶ *Brown v. State*, No. M2003-02058-CCA-R3-CO, 2004 WL 2346159, at *1 (Tenn. Crim. App. Oct. 15, 2004), *no appeal taken*.

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.⁵⁷

Juvenile Court Appeals

Appeals from juvenile court orders present unique challenges as the proper avenue for appeal depends on the nature of the juvenile court proceedings, as laid out in Tenn. Code Ann. § 37-1-159. Appeals from final orders of the juvenile court in unruly child or dependency and neglect proceedings are made to the circuit court, for trial de novo. Note the appeal to the circuit court must be perfected within ten days. Final orders in delinquency proceedings are appealed to the criminal court, for trial de novo. All other juvenile court final orders, including termination of parental rights and parentage orders, are appealed to the Court of Appeals under the Tennessee Rules of Appellate Procedure. There is no appeal from a juvenile court's decision to transfer a minor to the criminal court for trial as an adult under Tenn. Code Ann. § 37-1-134.

Determining whether a Juvenile Court order should be appealed to the circuit court or the Court of Appeals can be difficult, especially where multiple petitions have been filed involving dependency and neglect, termination of parental rights, parentage, or custody. Any custody decision arising out of a dependency and neglect proceeding must be appealed to the circuit court.⁵⁸ A subsequent custody modification decision will also arise out of and be part of the dependency and neglect proceeding even if the petition to modify does not reference the dependency and neglect proceeding and is filed years after the final order.⁵⁹

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

The notice of appeal must contain all parties taking the appeal in the caption or body of the notice, but all the parties to an appeal no longer have to be individually named if an attorney represents more than one party. 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.⁶⁰ Even under the rule as amended, the better practice is still to clearly identify all parties to the appeal—especially a list of all parties upon whom service of notice of docketing is required under Rule 5.

Note that under Tennessee Rule of Appellate Procedure 5(a), the Notice of Appeal does not have to be served on all parties *contemporaneously* with filing, though this is obviously still the better practice.⁶¹ Under Rule 5(a), the party filing the Notice of Appeal has seven (7) days after filing within which to serve each party in civil cases.⁶² In criminal cases, the party filing the Notice of Appeal also has seven (7) days within which to serve it, but note that a defendant filing an appeal must serve the Notice of Appeal both on the Attorney General *and* on “the district attorney general of the county in which the judgment was entered.”⁶³ In both civil and criminal cases, Rule 5 requires that “proof of service” must be filed with the appellate court clerk

⁵⁷ *State v. Lane*, 254 S.W.3d 349, 353 (Tenn. 2008); *State v. Leath*, 977 S.W.2d 132, 135 (Tenn. Crim. App. 1998).

⁵⁸ *Dep’t of Child’s Servs. v. Owens*, 129 S.W.3d 50, 55 (Tenn. 2004).

⁵⁹ *In re D.Y.H.*, 226 S.W.3d 327, 331 (Tenn. 2007).

⁶⁰ *Mairose v. Fed. Express Corp.*, 86 S.W.3d 502, 508-09 (Tenn. Ct. App. 2001); *Town of Carthage v. Smith Cnty.*, No. 01-A-01-9308-CH00391, 1995 WL 92266, at *3-4 (Tenn. Ct. App. Mar. 8, 1995), *no appeal taken*.

⁶¹ See Tenn. R. App. P. 5(a).

⁶² *Id.*

⁶³ Tenn. R. App. P. 5(b).

within seven days of service.⁶⁴

Tennessee Rule of Appellate Procedure 5(c) has been amended in 2017 to clarify that the appellate court has the authority to designate the appellate action's title, and the default is to retain the title designated in the trial court title unless the trial court excluded the appellant's name. If the appellant's name was excluded from the title in the trial court, the party's name, identified as appellant, shall be added to the title unless the Court directs otherwise.⁶⁵

Effective July 1, 2012, Tennessee Rule of Appellate Procedure 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 concerning content and preparation of the record,⁶⁶ and when briefs are due.⁶⁷ The amendment does not apply to cases appealed to the Court of Criminal Appeals.⁶⁸

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 cannot extend the 30-day time period for any reason.⁶⁹ Filing a premature notice of appeal does not deprive the trial court of jurisdiction to hear additional motions filed under Tennessee Rule of Appellate Procedure 4(b)-(c).⁷⁰

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, 9(c), 10(b), 11, and 12). The court must give a "good reason" for the suspension.⁷¹ 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 requirement of finality under Tennessee Rule of Appellate Procedure 2.⁷²

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 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.

⁶⁴ Tenn. R. App. P. 5(a)-(b).

⁶⁵ Tenn. R. App. P. 5, 2017 adv. comm'n cmt.

⁶⁶ See Tenn. R. App. P. 24.

⁶⁷ See Tenn. R. App. P. 29.

⁶⁸ Tenn. R. App. P. 5, 2012 adv. comm'n cmt.

⁶⁹ See Tenn. R. App. P. 2.

⁷⁰ Tenn. R. App. P. 4(e).

⁷¹ *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, 877 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), *no appeal taken* (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), *no appeal taken* (declining to find good cause).

⁷² See *Braden v. Strong*, No. M2004-02369-COA-R3-CV, 2006 WL 369274, at *15-16 (Tenn. Ct. App. Feb. 16, 2006), *no appeal taken*.

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 due to the lack of a final judgment 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 the 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.⁷³ The only avenue for withdrawing an appeal is outlined 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 outlined in Tennessee Rule of Appellate Procedure 4(b). They include 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 amend the judgment.⁷⁴ 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.⁷⁵ Filing of serial post-trial motions to extend the time for filing a notice of appeal is not permitted.⁷⁶

While unresolved attorney’s fees typically preclude a judgment from being final,⁷⁷ a motion for attorney’s fees under Tennessee Code Annotated § 20-12-119(c) neither affects the finality of the judgment nor tolls the time for filing a notice of appeal. This narrow statutory exception only applies to a party whose motion to dismiss under Tennessee Rule of Civil

⁷³ *Woods v. State*, No. 01C01-9606-CR-00238, 1997 WL 602865, at *2 (Tenn. Crim. App. Sept. 30, 1997), *perm. app. denied* (Tenn. June 29, 1998).

⁷⁴ *Tenn. Farmers Mut. Ins. Co. v. Farmer*, 970 S.W.2d 453, 454-55 (Tenn. 1998). Despite the ruling in *Farmer*, it is highly advisable **not** to style your motion as a “Motion to Reconsider” or to give it any other similar title. The Court of Appeals has expressly stated: “The Tennessee Rules of Civil Procedure do not authorize ‘motions to reconsider.’” *McCracken v. Brentwood United Methodist Church*, 958 S.W.2d 792, 794 n.3 (Tenn. Ct. App. 1997).

⁷⁵ 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), *on reh’g in part*, No. 6, 1989 WL 135293 (Tenn. Sept. 25, 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), *no appeal taken*.

⁷⁶ *See Grissette v. Grissette*, No. E2020-00923-COA-R3-CV, 2021 WL 867106, at *4 (Tenn. Ct. App. 2021), *perm. app. denied* (Tenn. Oct. 13, 2021) (“Although the filing of a second motion pursuant to Rule 59 is in certain circumstances permissible if the judgment was amended in response to a previous Rule 59 motion, the second motion to alter or amend in this case was not filed in response to changes made to the judgment. Instead, Wife’s second motion to alter or amend raised issues in response to the November 15, 2019 judgment, which could and should have been raised in Wife’s first motion to alter or amend. As such, the filing of Wife’s second motion to alter or amend after the Trial Court had ruled upon the first motions to alter or amend constituted the filing of serial motions to alter or amend, which is not permitted.”); *Gassaway v. Patty*, 604 S.W.2d 60, 61 (Tenn. Ct. App. 1980).

⁷⁷ *See Khan v. Regions Bank*, 572 S.W.3d 189, 194 (Tenn. Ct. App. 2018), *perm. app. denied* (Jan. 18, 2019) (“Our Supreme Court has held that a judgment is not “final” within the meaning of Tenn. R. Civ. P. 54.02 if it is entered while a motion for attorney’s fees is still pending.” (citing *Deas v. Deas*, 774 S.W.2d 167, 169 (Tenn. 1989))).

Procedure 12.02(6) was granted. When a case is dismissed under this Rule—for failure to state a claim upon which relief may be granted—Tennessee Code Annotated § 20-12-119(c)(3) provides, in part, that “an award of costs pursuant to this subsection (c) shall be made only after all appeals of the issue of the granting of the motion to dismiss have been exhausted and if the final outcome is the granting of the motion to dismiss.”

PRACTICE TIP! Note that a motion for discretionary costs does not toll the time for filing a notice of appeal.⁷⁸

In criminal cases, most post-trial motions that toll the time for filing a notice of appeal are outlined 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 a 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.⁷⁹ When such motions are filed, the time for appeal for all parties runs from the 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.⁸⁰

The motions outlined in Tennessee Rule of Appellate Procedure 4(c) will not, however, toll the period for filing an appeal in a post-conviction proceeding.⁸¹

5. Late notices of appeal

A notice of appeal must be filed within thirty days of entry of a final judgment.⁸² In civil cases, filing of a notice of appeal within thirty days of entry of a final judgment is jurisdictional, and the appellate court cannot extend the deadline for any reason.⁸³ 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 60.02.⁸⁴ However, a court cannot avoid the Rule 4 time limits by entering a notice of appeal *nunc pro tunc*.⁸⁵

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.⁸⁶

In criminal cases, however, timely filing is not jurisdictional. This rule applies to appeals as of right brought by either the accused or the State.⁸⁷ 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.⁸⁸ The appellate court may waive the notice

⁷⁸ Tenn. R. App. P. 4, adv. comm’n cmt [1995]; see *Gunn v. Jefferson Cnty. Econ. Dev. Oversight Comm., Inc.*, 578 S.W.3d 462, 464–68 (Tenn. Ct. App. 2019) (holding that a motion for discretionary costs is “ancillary” or “collateral” to the underlying matter and do not affect the finality of the underlying judgment).

⁷⁹ See *State v. Peele*, 58 S.W.3d 701, 706 (Tenn. 2001).

⁸⁰ 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).

⁸¹ *Boyd v. State*, No. W1999-01981-CCA-R3-PC, 1999 WL 33261797, at *4-5 (Tenn. Crim. App. Dec. 21, 1999), *no appeal taken*.

⁸² Tenn. R. App. P. 4.

⁸³ *G.F. Plunk Const. Co. v. Barrett Props.*, 640 S.W.2d 215, 217-18 (Tenn. 1982).

⁸⁴ See *Jefferson v. Pneumo Servs. Corp.*, 699 S.W.2d 181, 184 (Tenn. Ct. App. 1985); *Columbia Advert. Agency v. Isenhour*, No. M2001-01627-COA-R3CV, 2002 WL 1189839, at *2 n.2 (Tenn. Ct. App. June 5, 2002), *no appeal taken*.

⁸⁵ *Deweese v. Sweeney*, 947 S.W.2d 861, 863-64 (Tenn. Ct. App. 1996).

⁸⁶ *Rucker v. Metro. Gov’t*, No. 89-47-I, 1990 WL 32211, at *1 (Tenn. Mar. 26, 1990), *no appeal taken*.

⁸⁷ *State v. Powell*, 53 S.W.3d 258, 260 (Tenn. Crim. App. 2000).

⁸⁸ *State v. Scales*, 767 S.W.2d 157, 158 (Tenn. 1989).

of appeal requirement sua sponte if it is in the interest of justice.⁸⁹ If the requirement is waived, the appellate court may limit the scope of appellate review to the issues that have merit.⁹⁰

The decision to waive timely filing of the notice of appeal is discretionary with the Court of Criminal Appeals. Motions for waiver are not routinely granted. 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.⁹¹ 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.”⁹²

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.”⁹³ This discretionary consideration is known as “plain error” review, which is rarely at issue in criminal cases and even rarer in civil cases.⁹⁴ 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.”⁹⁵

A court will only grant relief if all five of the above criteria are met.⁹⁶ 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.⁹⁷ Plain error review places the burden of persuasion on the defendant.⁹⁸ Plain error doctrine and other preservation requirements still apply even though new rules as they are announced are applied retroactively to cases pending direct review.⁹⁹ Although the Tennessee Supreme Court has not resolved this issue of whether the State may seek plain error relief when it has failed to preserve an issue it subsequently raises on appeal, the Court of Criminal Appeals has repeatedly granted plain error relief to the State.¹⁰⁰

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 is required for cross-appeals

An appellee does not have to file a cross-appeal or separate notice of appeal to preserve the right to raise issues on a

⁸⁹ *State v. Dodson*, 780 S.W.2d 778, 780-81 (Tenn. Crim. App. 1989).

⁹⁰ *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), *no appeal taken* (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)).

⁹¹ See *Hill v. State*, No. 01C01-9506-CC-00175, 1996 WL 63950, at *1 (Tenn. Crim. App. Feb. 13, 1996), *perm. app. denied* (May 28, 1996).

⁹² Tenn. R. App. P. 22(a).

⁹³ *State v. Hatcher*, 310 S.W.3d 788, 808 (Tenn. 2010) (citing Tenn. R. App. P. 36(b)); see *State v. Lowe-Kelley*, 380 S.W.3d 30, 34 (Tenn. 2012).

⁹⁴ *Grindstaff v. State*, 297 S.W.3d 208, 219 n.12 (Tenn. 2009).

⁹⁵ *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)).

⁹⁶ *Id.* at 283.

⁹⁷ *Id.*

⁹⁸ *United States v. Olano*, 507 U.S. 725, 737 (1993); *State v. Bledsoe*, 226 S.W.3d 349, 355 (Tenn. 2007); *State v. Gomez*, 239 S.W.3d 733, 742 (Tenn. 2007).

⁹⁹ *State v. Minor*, 546 S.W.3d 59, 70 (Tenn. 2018).

¹⁰⁰ See, e.g., *State v. Locust*, No. W2022-01026-CCA-R3-CD, 2023 WL 8940830, at *25-26 (Tenn. Crim. App. Dec. 28, 2023).

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.¹⁰¹ 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. Review of Stay Orders Pending Appeal

Any party may file a motion in the appropriate appellate court to obtain review of a trial court's order, issued pursuant to Tennessee Rule of Civil Procedure 62, to stay proceedings to enforce a judgment, provided that the party first files such a motion in the trial court where practicable.¹⁰² It is important to note that appellate review extends to both the grant *or* denial of a stay of execution pending appeal, and a party may move that an order staying execution merely be modified.¹⁰³ The motion for review in the appellate court must be accompanied by: (a) the motion filed in the trial court; (b) any documents filed in opposition to the motion in the trial court; and (c) any written statements that the trial court issued stating the reasons for its order.¹⁰⁴ Additionally, the motion must state:

- (1) the court that entered the order;
- (2) the date of the order;
- (3) the substance of the order, including the amount of any bond or other conditions of stay of execution;
- (4) the facts relied on, including the facts showing relief in the trial court is not practicable if a motion for the relief sought on review has not been presented to the trial court;
- (5) the arguments supporting the motion; and
- (6) the relief sought.¹⁰⁵

If the facts upon which you rely for the relief requested in your motion are "subject to dispute," you must support your motion with affidavits or other sworn statements.¹⁰⁶

You must serve a copy of your motion on the other parties to the appeal.¹⁰⁷ The other parties may file an answer. The appellate court will review the matter without briefs and will decide the matter promptly. Appellate review of such matters is conducted under an abuse of discretion standard.¹⁰⁸ An example of this process in action can be seen in the proceedings of *OldSmith Group, LLC v. Mosby Cool Springs, LLC*, No. M2022-01584-COA-R3-CV, Court of Appeals of Tennessee at Nashville. If the Court of Appeals is the court reviewing the matter, then either party has fifteen (15) days from the date the Court of Appeals issues its order to file a motion for review in the Supreme Court.¹⁰⁹

2. Proceeding as an indigent person

A party who was permitted to proceed as an indigent person in the trial court may proceed as an indigent person on

¹⁰¹ See *State v. Valentine*, 659 S.W.2d 27, 28-29 (Tenn. Crim. App. 1983); *Eller Bros. 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).

¹⁰² Tenn. R. App. P. 7(a).

¹⁰³ Tenn. R. App. P. 7(a).

¹⁰⁴ Tenn. R. App. P. 7(a).

¹⁰⁵ Tenn. R. App. P. 7(a).

¹⁰⁶ Tenn. R. App. P. 7(a).

¹⁰⁷ Tenn. R. App. P. 7(a).

¹⁰⁸ *Open Lake Sporting Club v. Lauderdale Haywood Angling Club*, 511 S.W.3d 494, 505 (Tenn. Ct. App. 2015).

¹⁰⁹ Tenn. R. App. P. 7(a).

appeal without seeking further leave of either court. A party who did not proceed as an indigent person in the trial court may file a motion to proceed as an indigent person on appeal under Tennessee Rule of Appellate Procedure 18 in either the trial court or the appellate court, though it is generally preferable to file the motion in the trial court because it is in a better position to make the necessary factual determinations. The motion must be accompanied by the Uniform Affidavit of Indigency outlined in Supreme Court Rule 13 (Criminal) or 29 (civil). In civil cases, only residents of Tennessee may proceed as indigent persons. Tenn. Code Ann. § 20-12-127.

If a trial court denies a defendant the right to proceed as an 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.¹¹⁰

In civil cases, a party proceeding as an indigent person is relieved from prepaying the costs but remains responsible for any costs or fees taxed against him or her at the conclusion of the appeal.

3. 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 the review of a trial court's decision to deny a motion to reopen a post-conviction petition.¹¹¹ 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.¹¹² 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.¹¹³ To obtain appellate review of the trial court's order, a petitioner must comply with the statutory requirements contained in § 40-30-117(c).¹¹⁴ The failure of a petitioner to comply with statutory requirements governing review of a denial of a motion to reopen deprives the Court of jurisdiction to entertain such a matter.¹¹⁵

4. 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.¹¹⁶ 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.¹¹⁷ 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.¹¹⁸ Tennessee Rule of Appellate Procedure

¹¹⁰ Tenn. R. App. P. 18(c).

¹¹¹ *McGhee v. State*, No. 02-C-01-9607-CR-00213, 1996 WL 551755 (Tenn. Crim. App. Sept. 30, 1996), *perm. app. denied* (Tenn. Mar. 3, 1997) (procedure seeking permission to appeal motion to reopen parallels Tennessee Rule of Appellate Procedure 10).

¹¹² See Tenn. Code Ann. § 40-30-117(c).

¹¹³ *Id.*; see also Tenn. Sup. Ct. R. 28 § 10(b).

¹¹⁴ See *Williams v. State*, No. W1999-01731-CCA-R3-PC, 2000 WL 303432, at *1 (Tenn. Crim. App. Mar. 23, 2000), *perm. app. denied* (Tenn. Oct. 16, 2000); *Drumbarger v. State*, No. M1999-01444-CCA-R3PC, 1999 WL 1103500, at *1 (Tenn. Crim. App. Dec. 7, 1999), *no appeal taken*; *Killebrew v. State*, No. 03C01-9809-CR-00320, 1999 WL 813471, at *1 (Tenn. Crim. App. Oct. 5, 1999), *perm. app. denied* (Tenn. Apr. 24, 2000).

¹¹⁵ *Williams*, 2000 WL 303432, at *1.

¹¹⁶ Tenn. Code Ann. § 16-3-201(d)(1).

¹¹⁷ Tenn. Code Ann. § 16-3-201(d)(2).

¹¹⁸ Tenn. Code Ann. § 16-3-201(d)(3).

17 governs the procedure to be used in transferring a case from the intermediate court to the Supreme Court,¹¹⁹ 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.

5. Waiver and preserving issues on appeal

A comprehensive discussion of preserving issues for appeal is too complex to be included in this handbook, but the following is a primer on some key issues regarding waiver. It is important to recognize that the process of preserving issues for appeal begins even before the initial trial, at the Complaint stage. Before filing your appeal, you must have ensured the following:

- If you are plaintiff-side, you pled specific legal theories in your Complaint;¹²⁰
- If you are defendant-side, you have pled any affirmative defenses in your Answer or other filings during the trial;¹²¹
- Any motions in limine have been “clearly and definitively” disposed of;¹²²
- You have given notice to the State Attorney General of any challenges to the constitutionality or validity of a state statute, administrative regulation, or rule specifying the statute, regulation, or rule being challenged (which must be renewed upon appeal);¹²³
- You have exhausted your peremptory challenges and raised the issue in a motion for new trial, and ensure that the transcript contains all arguments of counsel, the judge's ruling on the challenge, and the portion of the voir dire examination of the prospective juror at issue;¹²⁴
- You have requested the instruction of a lesser included offense in writing;¹²⁵
- You have contemporaneously objected to statements made during an opponent's opening statement and moved for a mistrial to preserve the issue if the judge sustains the objection and gives the jury a limiting instruction;¹²⁶
- You have contemporaneously made specific objections to introductions of evidence in the trial court and filed motions to strike where excluded evidence is introduced, or if previously included evidence becomes excluded;¹²⁷
- You have contemporaneously objected to closing argument;¹²⁸
- You have demanded a mistrial as soon as you were aware of grounds for one;¹²⁹
- You have made any objections to erroneous, omitted, or misstated jury instructions in a motion for new trial or raised them on appeal, and you have not given express approval to any erroneous jury instructions.¹³⁰

On rare occasions, a claim or issue may be tried with the express or implied consent of the parties, and the pleadings

¹¹⁹ See *State v. Walker*, 893 S.W.2d 429, 429 (Tenn. 1995).

¹²⁰ See *Bowman v. Benouffas*, 519 S.W.3d 586, 601 (Tenn. Ct. App. 2016), perm. app. denied (Jan. 19, 2017).

¹²¹ See *Alexander v. Armentrout*, 24 S.W.3d 267, 272 (Tenn. 2000).

¹²² See *State v. Walls*, 537 S.W.3d 892, 899 (Tenn. 2017); *State v. McGhee*, 746 S.W.2d 460, 462–63 (Tenn. 1988).

¹²³ See *Taylor v. Beard*, 104 S.W.3d 507, 511 (Tenn. 2003); *Tennison Bros. v. Thomas*, 556 S.W.3d 697, 731 (Tenn. Ct. App. 2017).

¹²⁴ See *State v. Howell*, 868 S.W.2d 238, 248 (Tenn. 1993); *Underwood v. State*, 604 S.W.2d 875, 878 (Tenn. Crim. App. 1979).

¹²⁵ See Tenn. Code. Ann. § 40-18-110(c).

¹²⁶ See *State v. Mathis*, No. M2009-00123-CCA-R3-CD, 2012 WL 4461767, at *38 (Tenn. Crim. App. Sept. 26, 2012), perm. app. denied (Tenn. Feb. 25, 2013); *Davis v. Hall*, 920 S.W.2d 213, 218 (Tenn. Ct. App. 1995).

¹²⁷ See *In re Estate of Armstrong*, 859 S.W.2d 323, 328 (Tenn. Ct. App. 1993); *State v. Pilkey*, 776 S.W.2d 943, 952 (Tenn. 1989).

¹²⁸ See *State v. Enix*, 653 S.W.3d 692, 700-01 (Tenn. 2022).

¹²⁹ See *Latiff v. Dobbs*, No. E2006-02395-COA-R3-CV, 2008 WL 238444, at *11 (Tenn. Ct. App. Jan. 29, 2008), no appeal taken (citing *Oldham v. Pickett*, No. 01-A-01-9211-CV-00441, 1993 WL 95590 (Tenn. Ct. App. April 2, 1993)).

¹³⁰ See *Stevens v. Jones*, 710 S.W.2d 38, 40 (Tenn. Ct. App. 1984); *Rule v. Empire Gas Corp.*, 563 S.W.2d 551, 553-54 (Tenn. 1978); *Haddock v. Lummus Cotton Gin Co.*, 552 S.W.2d 390, 392 (Tenn. Ct. App. 1976).

may be amended to conform to the proof.¹³¹ As a general rule of thumb, always show that you took whatever actions reasonably available to you to prevent or nullify the harmful effect of an error by the trial court.¹³²

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.¹³³ The appellant must specify in the motion for a new trial each specific issue intended to raise on appeal, including any erroneous pre-trial rulings, failure to grant summary judgment, or motions for a continuance.¹³⁴ In a criminal case, if a motion for new trial is not timely filed, all issues are deemed waived except for sufficiency of evidence and sentencing.¹³⁵ A prevailing party who becomes the appellee in an appeal is not required to file a motion for a new trial or similar motion in the trial court to preserve any issue for appeal.¹³⁶ By contrast, a prevailing party who appeals the judgment is subject to the Rule 3(e) requirements to preserve issues on appeal.¹³⁷ Further, because “[i]t is well-settled that a trial court speaks through its written orders—not through oral statements contained in the transcripts,” it is crucial to either incorporate the transcript of the oral statements of the judge into the order or to write in the details of the order to preserve for appeal.¹³⁸

When you file your Notice of Appeal, you should ensure that you timely file the notice within the 30-day deadline, as the appellate court does not have jurisdiction to extend the deadline, and ensure that you have identified each party and each final order from which you are appealing.¹³⁹ When appealing from an order involving cases that have been consolidated, it is important to utilize all consolidated case numbers to properly appeal each and raise issues from each.¹⁴⁰ You should review the appellate record to ensure it is complete, including attached exhibits to motions, and move to supplement the record if you discover a material item missing from the appellate record, as anything not included in the appellate record waives appellate review.¹⁴¹ While the primary burden is placed on the appellant to ensure the record is complete on appeal, the appellee “shares some of the responsibility to make sure the record is complete,” primarily when the missing portions of the record are essential to the appellate court’s ability to review the issue on appeal, or when summary judgment is granted in favor of the appellee

¹³¹ See *Alumbaugh v. Wackenhut Corp.*, No. M2016-01530-COA-R3-CV, 2018 WL 5733293, at *8 (Tenn. Ct. App. Oct. 31, 2018), *perm. app. denied* (Mar. 28, 2019) (citing *Zack Cheek Builders, Inc. v. McLeod*, 597 S.W.2d 888 (Tenn. 1980)).

¹³² See *Raley v. Brinkman*, 621 S.W.3d 208, 248 (Tenn. Ct. App. 2020); *Loeffler v. Kjellgren*, 884 S.W.2d 463, 472 (Tenn. Ct. App. 1994).

¹³³ 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); see also Tenn. R. Civ. P. 7.02 (requiring all motions, including motions for new trial, to state the underlying grounds for the motion with particularity, meaning general motions for new trial or for a directed verdict are insufficient to preserve issues on appeal).

¹³⁴ See *Fahey*, 46 S.W.3d at 141-144 for guidance on specificity.

¹³⁵ See *State v. Bough*, 152 S.W.3d 453, 460 (Tenn. 2004).

¹³⁶ *Advisory comm’n cmt* to Tenn. R. App. P. 3: “The third sentence of Rule 3(e) does not bar an appellee who failed to move for a new trial from raising issues on appeal under Rule 13(a). That has been the practice since adoption of the Appellate Rules, and it is the conclusion reached by Prof. John Sobieski—Reporter at the time—in 46 Tenn. L. Rev. at 732-4 (1979)”; see also John L. Sobieski, Jr., *An Update of the New Tennessee Rules of Appellate Procedure*, 46 Tenn. L. Rev. 727, 732-34 (1979) (“Under no circumstances, therefore, should an appellee be required to move for a new trial in order to obtain appellate review and relief.”).

¹³⁷ *Nepp v. Hart*, M2005-2024-COA-R3-CV, 2006 WL 2582503, at *6 (Tenn. Ct. App. Sept. 7, 2006), *no appeal taken* (holding that when the plaintiffs prevailed at trial but sought to appeal the judgment, they waived issues on appeal by failing to file a motion for new trial).

¹³⁸ *In re Conservatorship of Hudson*, 578 S.W.3d 896, 917 (Tenn. Ct. App. 2018) (citing *Williams v. City of Burns*, 465 S.W.3d 96, 119 (Tenn. 2015)).

¹³⁹ See *Town of Carthage v. Smith Cnty.*, No. 01-A-01-9308-CH00391, 1995 WL 92266, at *4 (Tenn. Ct. App. Mar. 8, 1995), *no appeal taken*.

¹⁴⁰ See *Rainbow Ridge Resort, LLC v. Branch Banking & Tr. Co.*, 525 S.W.3d 252, 259 (Tenn. Ct. App. 2016) (appeal from one case does not constitute an appeal of the other consolidated cases). *But see* Order, *Adamson v. Grove*, No. M2020-01651-SC-R11-CV (Tenn. Apr. 14, 2022), vacating *Adamson v. Grove*, No. M2020-01651-COA-R3-CV, 2021 WL 5919118 (Tenn. Ct. App. Dec. 15, 2021).

¹⁴¹ See *UT Med. Grp., Inc. v. Vogt*, 235 S.W.3d 110, 122 (Tenn. 2007) (citing *Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992)).

below.¹⁴²

Under Tennessee Rule of Appellate Procedure 27, a brief should “be oriented toward a statement of the issues presented in a case and the arguments in support thereof.”¹⁴³ Rule 27(a) requires that the appellant provide: (1) a table of contents, (2) a table of authorities, (3) a jurisdictional statement in cases appeal from a trial court directly to the Supreme Court, (4) a statement of the issues presented for review,¹⁴⁴ (5) a statement of the case, (6) a statement of the facts, (7) an argument setting forth the contentions related to the issues presented,¹⁴⁵ citations to authority¹⁴⁶ and the record, and a standard of review for each, and (8) a conclusion specifying the precise relief sought. Failure to comply with Rule 27 can lead to waiver of issues on appeal.¹⁴⁷ Additionally, under Tennessee Rule of Appellate Procedure 35, if you are seeking oral argument, you must raise this issue on the cover page of your brief.

Of these requirements, the Supreme Court has stated that “a properly framed issue may be the most important part of an appellate brief.”¹⁴⁸ Tennessee Rule of Appellate Procedure 13 states that those issues not raised for review will generally not be considered, and Tennessee courts have interpreted this to mean that issues not properly raised in the statement of the issues are waived.¹⁴⁹ The level of specificity required is not entirely clear, but the Tennessee Supreme Court has stated that appellants should frame issues “as specifically as the nature of the error will permit to avoid any potential risk of waiver.”¹⁵⁰ This requirement is upheld even in cases with *pro se* plaintiffs.¹⁵¹

In addition to properly raising issues in your “statement of the issues presented for review,”¹⁵² you should also make sure to provide substantive discussions of each issue in the argument section of your brief. This is because the Court of Appeals will deem waived any issue that is raised in the statement of the issues section but not included, or only marginally included, in the body of the brief.¹⁵³

¹⁴² *Svacha v. Waldens Creek Saddle Club*, 60 S.W.3d 851, 855 (Tenn. Ct. App. 2001) (vacating a grant of summary judgment in favor of appellee when the transcript was not in the record on appeal, noting that both parties shared the responsibility under Tenn. R. App. P. 24(a)); see also *Range v. Baese*, No. M2006-00120-COA-R3-CV, 2008 WL 186645, at *3 (Tenn. Ct. App. Jan. 22, 2008), *no appeal taken* (citing *Jennings v. Sewell-Allen Piggly Wiggly*, 173 S.W.3d 710, 713 (Tenn. 2005) (“Particularly when summary judgment is granted in its favor, an appellee has some responsibility for the adequacy of the record.”)).

¹⁴³ Tenn. R. App. P. 27, advisory comm’n cmt.

¹⁴⁴ See *Cartwright v. Jackson Cap. Partners, Ltd. P’ship*, 478 S.W.3d 596, 613–14 (Tenn. Ct. App. 2015)

¹⁴⁵ *Anders v. Anders*, No. W2018-02172-COA-R3-CV, 2021 WL 5447051, at *1 n.4 (Tenn. Ct. App. Nov. 22, 2021), *perm. app. denied* (Tenn. Mar. 24, 2022) (of ten issues on appeal, appellant only made an argument relevant to one, so the rest were waived).

¹⁴⁶ *Harris v. McMichael*, No. E2020-00817-COA-R3-CV, 2021 WL 5274050, at *6 (Tenn. Ct. App. Nov. 12, 2021), *no appeal taken* (appellant cited no legal authority for three issues raised on appeal, leading these issues to be waived).

¹⁴⁷ See, e.g., *Murray v. Miracle*, 457 S.W.3d 399, 404 (Tenn. Ct. App. 2014) (waiver because appellant failed to comply with Rule 27 in any meaningful way).

¹⁴⁸ *Hodge v. Craig*, 382 S.W.3d 325, 334–35 (Tenn. 2012).

¹⁴⁹ See *Burris v. Burris*, 512 S.W.3d 239, 254 (Tenn. Ct. App. 2016) (holding that violation of Rule 52.01’s requirement that trial court make findings of fact and conclusions of law was waived where only denial of a motion to alter was appealed); *Champion v. CLC of Dyersburg, LLC*, 359 S.W.3d 161, 163 (Tenn. Ct. App. 2011) (holding that claim for medical expenses was waived where not raised in appeal of separate summary judgment findings).

¹⁵⁰ *Hodge v. Craig*, 382 S.W.3d 325, 334–35 (Tenn. 2012); see *Soto v. Presidential Props., LLC*, No. E2020-00375-COA-R3-CV, 2021 WL 1626275, at *11 n.9 (Tenn. Ct. App. 2021), *no appeal taken* (stating that appellants could have been entitled to attorney’s fees for defending a frivolous appeal, but failed to raise the issue in their appeal and thus waived the argument).

¹⁵¹ See *Murray v. Miracle*, 457 S.W.3d 399, 404 (Tenn. Ct. App. 2014).

¹⁵² Tenn. R. App. P. 27(a)(4).

¹⁵³ *Adkins v. Adkins*, No. M2022-00986-COA-R3-CV, 2023 WL 5439785, at *7 (Tenn. Ct. App. Aug. 24, 2023) (“For an issue to be properly presented, it must be both designated as an issue and argued in more than a skeletal fashion within the body of the party’s brief. Wife’s

While Tennessee Rule of Appellate Procedure 11 does not specifically address issues of waiver concerning the questions presented for review in the application for permission to appeal, the Tennessee Supreme Court has also stated that failure to raise an issue in a Rule 11 application with sufficient specificity waives the issue.¹⁵⁴ The court justifies its stance based on commentary by the Advisory Commission on the Rules of Practice and Procedure that discusses the content of appellate briefs and not Rule 11 applications. Despite the lack of a clear line of case law to support the Tennessee Supreme Court's current stance on waiver in the context of Rule 11 applications, it has now clearly held that a Rule 11 application must state all issues on appeal with sufficient specificity to avoid waiving them. Accordingly, when drafting a Rule 11 application, the appellant should ensure that they have included and detailed all issues that they ask the court to address.

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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 at 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.

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 specific issue or issues the court is certifying and the reasons for its opinion. That statement must specify: (1) the legal criteria making the order appealable¹⁵⁵; (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.¹⁵⁶ In 2021, the Tennessee Rule of Appellate Procedure 9(b) was amended to require the trial court to state in writing the specific issue or issues the court is certifying for appeal. Once the order granting permission to appeal is entered, the trial court clerk must file the record on appeal within thirty (30) days.¹⁵⁷

argument that the trial court erred in its partial recusal order is designated as an issue and mentioned in the conclusion to her appellate brief, but is not argued in any fashion in the argument section of her appellate brief. It is waived.") (citations and footnote omitted).

¹⁵⁴ *TWB Architects, Inc. v. Braxton, LLC*, 578 S.W.3d 879, 887 (Tenn. 2019) (finding that appellant waived affirmative defenses of waiver, merger, and willful exaggeration of lien when it failed to include these defenses in its Tenn. R. App. P. 11 application).

¹⁵⁵ 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.

¹⁵⁶ Tenn. R. App. P. 9(b).

¹⁵⁷ Tenn. R. App. P. 9(e).

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 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.¹⁵⁸

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 (45) days allowed in an appeal as of right.¹⁵⁹

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. Accordingly, a party has sixty (60) days from the intermediate court's judgment to file its application to appeal.¹⁶⁰ 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."¹⁶¹

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 a hearing.¹⁶² It may also grant the appeal and remand the case to the intermediate court for that court's review on the merits.¹⁶³

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."¹⁶⁴

¹⁵⁸ Tenn. R. App. P. 9(c).

¹⁵⁹ Compare Tenn. R. App. P. 9(e), with Tenn. R. App. P. 25.

¹⁶⁰ Tenn. R. App. P. 11(b).

¹⁶¹ Tenn. R. App. P. 9(c).

¹⁶² 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).

¹⁶³ *Womack v. Corr. Corp. of Am.*, 448 S.W.3d 362, 376 (Tenn. 2014) (granting application for interlocutory appeal and remanding to the Court of Appeals for review on the merits).

¹⁶⁴ Tenn. R. App. P. 9(a).

(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

(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.¹⁶⁵

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.¹⁶⁶ In fact, during the 2011-2012 fiscal year (the last year for which statistics are available¹⁶⁷), the Tennessee Court of Appeals disposed of 116 applications for permission to appeal under Rules 9 and 10.¹⁶⁸ Twenty-three percent of applications were granted.¹⁶⁹ For interlocutory appeals to the Tennessee Supreme Court, prospects are much dimmer. 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.¹⁷⁰

One example of a successful interlocutory appeal is found in *Rusnak v. Phebus*.¹⁷¹ 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.¹⁷² 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.¹⁷³

The Tennessee Court of Appeals agreed with the lower court because it permitted Ms. Phebus to appeal under Rule

¹⁶⁵ *Id.*

¹⁶⁶ *State v. Gilley*, 173 S.W.3d 1, 5 (Tenn. 2005).

¹⁶⁷ 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.

¹⁶⁸ 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.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 11.

¹⁷¹ *Rusnak v. Phebus*, No. M2007-01592-COA-R9-CV, 2008 WL 2229514 (Tenn. Ct. App. May 29, 2008), *no appeal taken*.

¹⁷² *Id.*; see also *Williams v. City Of Milan*, No. W2010-00450-COA-R9-CV, 2011 WL 538868, at *1 (Tenn. Ct. App. Feb. 16, 2011), *no appeal taken* (granting Rule 9 interlocutory appeal and reversing trial court's denial of motion to transfer). But see *Welty v. Welty*, No. W2009-00921-COA-R3-CV, 2010 WL 1781613, at *1 (Tenn. Ct. App. May 5, 2010), *no appeal taken* (dismissing appeal of a denial of a motion to transfer for lack of a final judgment, but appeal was filed under Tenn. R. App. P. 3, not R. 9).

¹⁷³ *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.).

¹⁷⁴ Order Granting Interlocutory Appeal (July 18, 2007).

9. In addition, the Court of Appeals stayed all proceedings in the trial court, including the partition sale pending resolution of the appeal.¹⁷⁴ Since both the trial court and the appellate court granted the Rule 9 appeal, Ms. Phebus met her burden by 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.¹⁷⁵ 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,' . . ."¹⁷⁶ and are not routinely granted.

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;¹⁷⁷ (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."¹⁷⁸ 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 an application for an interlocutory appeal to be accompanied by an appendix containing 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."¹⁷⁹ 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. The

¹⁷⁴ *Rusnak*, 2008 WL 2229514, at *3.

¹⁷⁵ *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 jurisdictions that have addressed the issue.).

¹⁷⁶ *State v. Hawk*, 170 S.W.3d 547, 554 (Tenn. 2005).

¹⁷⁷ This rule was amended in 2005 to require the application to include a statement of the questions presented for review.

¹⁷⁸ Tenn. R. App. P. 9(d).

¹⁷⁹ *Id.*

rules regarding the required number of copies do not apply to any e-filed document.

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 an appendix containing 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.¹⁸⁰

An answer in opposition to an application for permission to appeal can be e-filed.¹⁸¹ Rule 30(e) provides that answers to Rule 11 applications shall not exceed 5,000 words.¹⁸²

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.¹⁸³ Thus, an appellee wishing to raise issues other than those certified by the trial court or raised by the 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.¹⁸⁴ Unlike an interlocutory appeal, an extraordinary appeal does not require permission from the trial court. Instead, the grant of a Rule 10 appeal is at the sole discretion of the appellate court.

Just as an application for a Rule 9 appeal is available to the State as well as to 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.¹⁸⁵

Furthermore, Tennessee appellate courts *may* transform an improperly filed Rule 3 appeal as of right into a proper

¹⁸⁰ *Id.*

¹⁸¹ Tenn. Sup. Ct. R. 46.

¹⁸² Tenn. R. App. P. 30(e).

¹⁸³ 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).

¹⁸⁴ Tenn. R. App. P. 10.

¹⁸⁵ *Phillips v. A&H Constr. Co.*, 134 S.W.3d 145, 149 (Tenn. 2004).

Rule 10 appeal.¹⁸⁶ Courts have done so when a party mistakenly filed a Rule 3 appeal when the lower court's order was not a final judgment.¹⁸⁷ This may be attributed to the similarity between the grounds for common law writ of certiorari and extraordinary appeals.¹⁸⁸

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 that 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"¹⁸⁹ However, Rule 10 applications may be denied if not pursued within a reasonable time.¹⁹⁰ A reasonable time is determined by the appellate court according to the particular circumstances of the case before it.¹⁹¹

3. Factors considered by Tennessee appellate courts when determining whether to grant permission to appeal under 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."¹⁹² 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;

¹⁸⁶ *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.") (citation omitted).

¹⁸⁷ 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*, No. C.A.136, 1988 WL 15712, at *2 n.2 (Tenn. App. Feb. 26, 1988), *no appeal taken* ("[T]he appeal 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.").

¹⁸⁸ *State v. Willoughby*, 594 S.W.2d 388, 392 (Tenn. 1980).

¹⁸⁹ *State v. Best*, 614 S.W.2d 791, 794 (Tenn. 1981).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Tenn. R. App. P. 10(a).

and

- f. where either party has lost a right or interest that may never be recaptured.¹⁹³

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 10.¹⁹⁴ 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.¹⁹⁵ 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."¹⁹⁶ The Court further noted that it was a 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.¹⁹⁷

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,¹⁹⁸ 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,¹⁹⁹ and because of the trial court's denial of a defendant's right to a portion or all a transcript.²⁰⁰

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.²⁰¹ The Court of Appeals has granted a father's Rule 10 application to review the trial 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.²⁰² 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.²⁰³ 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.²⁰⁴

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;²⁰⁵ 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;²⁰⁶ the trial court's failure to enter a judgment consistent with the Tennessee Court of Appeals opinion

¹⁹³ *Willoughby*, 594 S.W.2d at 392 (citing *State v. Johnson*, 569 S.W.2d 808, 815 (Tenn. 1978)).

¹⁹⁴ *Gilbert v. Wessels*, 458 S.W.3d 895, 896, 899 (Tenn 2014).

¹⁹⁵ *Id.* at 896.

¹⁹⁶ *Id.* at 899.

¹⁹⁷ *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.").

¹⁹⁸ *State v. Turner*, 713 S.W.2d 327 (Tenn. Crim. App. 1986) *cert. denied*, 479 U.S. 933 (1986).

¹⁹⁹ *State v. Gallaher*, 730 S.W.2d 622 (Tenn. 1987).

²⁰⁰ *State v. Draper*, 800 S.W.2d 489 (Tenn. Crim. App. 1990).

²⁰¹ *Norma Faye Pyles Lynch Fam. Purpose LLC v. Putnam Cnty.*, 301 S.W.3d 196 (Tenn. 2009).

²⁰² *Shaw v. Shaw*, No. E2010-01070-COA-R10-CV, 2011 WL 255335 (Tenn. Ct. App. Jan. 20, 2011), *no appeal taken*.

²⁰³ *In re Conservatorship of Tate*, No. M2009-02174-COA-R10-CV, 2009 WL 4841036 (Tenn. Ct. App. Dec. 15, 2009), *no appeal taken*.

²⁰⁴ *State v. Hatcher*, No. M2008-020420-CCA-R10-CO, 2010 WL 457491 (Tenn. Crim. App. Feb. 10, 2010), *no appeal taken*.

²⁰⁵ *Culbertson v. Culbertson*, 393 S.W.3d 678 (Tenn. Ct. App. 2012); *Culbertson v. Culbertson*, 455 S.W.3d 107, 123-25 (Tenn. Ct. App. 2014), *perm. app. denied* (Tenn. Oct. 17, 2014).

²⁰⁶ *Kreth v. Kreth*, No. W2001-00983-COA-R3-10-CV, 2002 WL 1050267 (Tenn. Ct. App. May 20, 2002), *no appeal taken*.

in the same case;²⁰⁷ 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;²⁰⁸ 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.²⁰⁹

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.”²¹⁰ Furthermore, parties should not perfect simultaneous appeals under Rule 9 and Rule 10.²¹¹ Although the Tennessee Rules of Appellate Procedure do not require a party to seek a Rule 9 appeal before 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 an appeal under Rule 10.²¹²

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 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.”²¹³ In addition, a Rule 10 application must contain a statement of the relief sought and shall include an appendix containing 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.²¹⁴ 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.²¹⁵

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

²⁰⁷ *Earls v. Earls*, No. M1999-00035-COA-R3-CV, 2001 WL 504905 (Tenn. Ct. App. May 14, 2001), *no appeal taken*.

²⁰⁸ *Privette v. Keyes*, No. M2000-01635-COA-R10-CV, 2001 WL 196970 (Tenn. Ct. App. Feb. 28, 2001), *no appeal taken*.

²⁰⁹ *Mayhew v. Wilder*, 46 S.W.3d 760 (Tenn. Ct. App. 2001).

²¹⁰ Tenn. R. App. P. 10, 2005 adv. comm'n cmt.

²¹¹ *CAM Int'l L.P., v. Turner*, No. 01-A-01-9203CH00116, 1992 WL 74567, at *2 (Tenn. Ct. App. Apr. 15, 1992), *no appeal taken* (“Seeking relief under both rules is unnecessary since the scope of relief under either procedure is the same.”).

²¹² *Scott v. Pulley*, 705 S.W.2d 666, 672 (Tenn. Ct. App. 1985), *perm. app. denied* (Tenn. Jan. 21, 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.”).

²¹³ Tenn. R. App. P. 10(c).

²¹⁴ *Id.*

²¹⁵ *Id.*

the clerk and each judge with one copy.²¹⁶ Typically, the application shall be filed on all parties as provided for in Rule 20. With the adoption of Tennessee Supreme Court Rule 46, the rules regarding the required number of copies do not apply to any e-filed document.

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 under Rule 20, the clerk shall docket the appeal in accordance with Rule 5(c).²¹⁷ The other parties should not file an answer unless directed by the appellate court.²¹⁸ The application will be reviewed by a panel, and the appellate court will either summarily deny the application or order the other parties to file an answer within a fixed time. After receiving the answer, the appellate court will either grant or deny the application. If the appellate court grants the application the court will order the filing of a record and set a briefing schedule. The court may also specify the issues to be addressed on appeal.²¹⁹ The appeal will then generally proceed as any other appeal under the Rules of Appellate Procedure. On rare occasions, the appellate court may dispense with the filing of a record and briefs and decide the merits based on the application and answer alone. 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 at the discretion of the appellate court.²²⁰

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 under Rule 11. If the Tennessee Supreme Court grants permission to appeal, it reviews the merits of the intermediate appellate court's decision.²²¹

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 that involve the same subject matter.²²² 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.²²³ This time period is absolute, and under no circumstance will it be extended.²²⁴

One should note this time period is shorter than the sixty-day time period allowed for Rule 11 appeals.²²⁵ This application must include the application filed in the intermediate appellate court and a copy of that court's order.²²⁶ If the Tennessee Supreme Court grants the application, it will hear the extraordinary appeal only under the criteria of Rule 10.²²⁷

²¹⁶ Tenn. R. App. P. 10(b).

²¹⁷ *Id.*

²¹⁸ Tenn. R. App. P. 10, 2005 adv. comm'n cmt.

²¹⁹ *Heatherly v. Merrimack Mut. Fire Ins. Co.*, 43 S.W.3d 911, 916 (Tenn. Ct. App. 2000).

²²⁰ 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."); see also Tenn. R. App. P. 10(a) ("The appellate court may issue whatever order is necessary to implement review under this rule.").

²²¹ *Payne v. Caldwell*, 796 S.W.2d 142 (Tenn. 1990).

²²² See, e.g., *In Re McDonald*, 489 U.S. 180 (U.S. 1989).

²²³ Tenn. R. App. P. 10(b).

²²⁴ Tenn. R. App. P. 2.

²²⁵ See Tenn. R. App. P. 10, 2012 adv. comm'n cmt.

²²⁶ Tenn. R. App. P. 10(c).

²²⁷ Tenn. R. App. P. 10, 2005 adv. comm'n cmt.

d. Jurisdiction for the extraordinary appeal

It appears that, where a Tennessee Rule of Appellate Procedure 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*,²²⁸ 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).²²⁹

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

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.²³⁰ 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.²³¹

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.²³² If a petition for rehearing is filed, the application for permission to appeal must be filed within sixty (60) days after

²²⁸ *In re Conservatorship for Allen*, No. E2010-01625-COA-R10-CV, 2010 WL 5549037, at *6 (Tenn. Ct. App. Dec. 29, 2010), *no appeal taken*.

²²⁹ *Id.*

²³⁰ Tenn. R. App. P. 11(a).

²³¹ See Chapter 10 Workers' compensation Review Panels for more information regarding review of workers' compensation cases.

²³² Tenn. R. App. P. 11(b).

the denial of the petition or entry of the judgment on rehearing.²³³ Effective July 1, 2012, Tennessee Rule of Appellate Procedure 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.²³⁴ 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.”²³⁵

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.²³⁶

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.²³⁷ 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%).²³⁸ Of those only 7 were granted and remanded.²³⁹ A change in the reporting procedure of the clerk’s office effective for the 2012-2013 fiscal 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 opinions 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.²⁴⁰

If two members of the Supreme Court are satisfied that an application should be granted, an appeal will be allowed.²⁴¹

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.”²⁴² 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

²³³ *Id.*

²³⁴ See Tenn. R. App. P. 2.

²³⁵ Tenn. R. App. P. 11(b), 2012 adv. comm’n cmt.

²³⁶ Tenn. R. App. P. 11(a).

²³⁷ Tenn. R. App. P. 11, 2005 adv. comm’n cmt.

²³⁸ 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.

²³⁹ *Id.*

²⁴⁰ Annual Report of the Tennessee Judiciary Fiscal Year 2015-2016, available at <http://www.tncourts.gov/docs/documents/media/2015-2016-annual-statistical-report>.

²⁴¹ Tenn. R. App. P. 11(e).

²⁴² Tenn. R. App. P. 11 (Advisory Comm’n Cmt. amended effective 2005).

by the Tennessee Supreme Court is rarely granted solely for error correction purposes.²⁴³ 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.”²⁴⁴

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;²⁴⁵
- (3) the facts relevant to the questions presented, with appropriate references to the record, 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.²⁴⁶

Additionally, the application must include a copy of the opinion of the appellate court.²⁴⁷ The argument in an application for permission to appeal shall not exceed 15,000 words.²⁴⁸

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.²⁴⁹

Rule 11(c) specifies that the color of an application for permission to appeal should be blue “if available.”²⁵⁰ An answer shall have a red cover and the cover of an amicus curiae answer shall be green.²⁵¹

b. Number of copies of application filed

The appellant must file the original plus five copies of the application.²⁵² The application shall be served on all other parties in the manner provided in Rule 20.²⁵³ With the adoption of Tennessee Supreme Court Rule 46, the rules regarding the required number of copies do not apply to any document that is e-filed.

²⁴³ *Id.*

²⁴⁴ *State v. West*, 844 S.W.2d 144, 146 (Tenn. 1992).

²⁴⁵ Tenn. R. App. P. 11 (b)(2).

²⁴⁶ Tenn. R. App. P. 11 (b).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ Tenn. R. App. P. 11, 2017 advisory comm’n cmt.

²⁵⁰ Tenn. R. App. P. 11(c).

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

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 15,000 words.²⁵⁴ 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.²⁵⁵ Additional facts stated in the answer should include appropriate references to the record.²⁵⁶ The appellee, in his answer, may raise issues allegedly decided erroneously by the immediate appellate court.²⁵⁷ Answers should be served on all parties in the manner provided in Rule 20. No reply to an answer may be filed.²⁵⁸

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.²⁵⁹ 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.²⁶⁰ The argument in a supplemental brief must not exceed 5,000 words.²⁶¹ 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.²⁶²

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 will be filed.²⁶³ Cross appeals are not required, and an appellee can raise any issues seeking relief on appeal by including them in the principal brief.²⁶⁴ Reply briefs by the appellant are due fourteen (14) days after the filing of the appellee's brief.²⁶⁵

²⁵⁴ Tenn. R. App. P. 11(d), 30(e).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ Tenn. R. App. P. 11, 1999 adv. comm'n cmt.

²⁵⁸ Tenn. R. App. P. 11(d).

²⁵⁹ Tenn. R. App. P. 11(f).

²⁶⁰ *Id.*

²⁶¹ Tenn. R. App. P. 30(e).

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ See Tenn. R. App. P. 13(a); Tenn. R. App. P. 27(b).

²⁶⁵ 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.²⁶⁶

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."²⁶⁷

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.²⁶⁸

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."²⁶⁹

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 under 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.²⁷⁰

In the Court of Appeals, 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.²⁷¹ The Rules do not permit documents to be filed under seal in the Court of Appeals based solely on the stipulation of the parties or on a party's designation of the document as confidential under a protective order.²⁷² Instead, the trial court must have made an individualized determination that the particular document should be filed under seal.²⁷³ The Court of Appeals reviews

²⁶⁶ *Tip's Package Store, Inc. v. Com. Ins. Managers*, 86 S.W.3d 543 (Tenn. Ct. App. 2001).

²⁶⁷ *Jennings v. Sewell-Allen Piggly Wiggly*, 173 S.W.3d 710, 713 (Tenn. 2005) (citations omitted).

²⁶⁸ Tenn. R. App. P. 24(a).

²⁶⁹ *Id.*

²⁷⁰ Tenn. R. App. P. 24, 2012 advisory comm'n cmt.

²⁷¹ Tenn. Ct. App. R. 15(b)(iii).

²⁷² Tenn. Ct. App. R. 15(b)(ii).

²⁷³ *Id.*

every document filed under seal and may remand the record to the trial court if the trial court has not made the required individualized determination or if the trial court's sealing order does not contain findings and conclusions necessary to support the decision to seal the document.

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

(1) Hire a court reporter. 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.²⁷⁴

(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."²⁷⁵ 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.²⁷⁶ When the jury charge is not in the record, the appellate court will presume the trial judge charged the jury fully and correctly.²⁷⁷

(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 pleading²⁷⁸ do not become part of the record automatically.²⁷⁹ 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.²⁸⁰ 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.²⁸¹

²⁷⁴ Tenn. R. App. P. 24(c) requires a Statement of the Evidence to be approved by both parties and the trial judge; however, the Court of Appeals held in *Marra v. Bank of New York* that a Statement of the Evidence is "deemed to have been approved" if thirty days have passed after the filing of the Statement of the Evidence without objection from opposing counsel or the trial court. 310 S.W.3d 329, 330 (Tenn. Ct. App. 2009), *pet. for reh'g denied* Aug. 26, 2009, *perm. app. denied* Feb. 22, 2010. Even a statement of the evidence that is "deemed approved" because of a lack of action by the trial court can still be rejected by the appellate court if the Court of Appeals finds it clearly does not accurately represent the record of the trial court. *Reed's Track Hoe & Dozier Serv. v. Dwyer*, No. W2012-00435-COA-R3CV, 2012 WL 6094127, at *4 (Tenn. Ct. App. Dec. 7, 2012), *no appeal taken*.

²⁷⁵ Tenn. R. App. P. 24(a).

²⁷⁶ *State v. Griffith*, 649 S.W.2d 9, 10 (Tenn. Crim. App. 1982).

²⁷⁷ *Bennett v. Sanders*, 685 S.W.2d 1, 2 (Tenn. Ct. App. 1984).

²⁷⁸ See Tenn. R. Civ. P. 7.01.

²⁷⁹ *State ex rel. Waterhouse v. Cumberland Cnty. Bank*, 1990 WL 24971 (Tenn. Mar. 12, 1990), *no appeal taken* (designated as not for publication).

²⁸⁰ 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).

²⁸¹ *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).

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 under Tennessee Rule of Appellate Procedure 24(a) and (b); or (2) the designation and filing of an abridged transcript in the Court of Appeals under 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.²⁸² The benefits of a streamlined record include lowering the expenditures of the state by reducing the 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 concerning the issues on appeal. Similarly, the appellant must prepare and file only those portions of the transcript necessary for the appeal.²⁸³ 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.²⁸⁴

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 under 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.²⁸⁵

“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,

²⁸² See *SecurAmerica Bus. Credit v. Schledwitz*, No. W2009-02571-COA-R3CV, 2011 WL 3808232, at *13 n.18 (Tenn. Ct. App. Aug. 26, 2011), *no appeal taken* (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 (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.”)).

²⁸³ Tenn. R. App. P. 24(a)-(b).

²⁸⁴ Tenn. Sup. Ct. R. 3.

²⁸⁵ Tenn. Ct. App. R. 4(e).

this court generally must presume that the findings of the trial court were supported by the evidence heard below.”²⁸⁶

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 be served. The appellee may respond with its own designation within fifteen days.²⁸⁷

The appellant must file a transcript of the evidence with the trial court clerk within sixty days after the notice of appeal is filed.²⁸⁸ If a transcript of the evidence is not available, the appellant should prepare and file with the trial court clerk a narrative statement of the evidence together with a short, plain declaration of the issues the appellant intends to present.²⁸⁹ The appellant may also file a statement of the evidence in lieu of a transcript if the trial court determines, at its discretion, that the costs to obtain a transcript is beyond the financial means of the appellant or that the costs are more expensive than the matters at issue on appeal justify, and a statement of the evidence is a reasonable alternative to a transcript. This provision is limited to civil cases because transcripts in criminal proceedings are governed by statute and case law.²⁹⁰

If no transcript or statement of the evidence is to be filed, then under Tennessee Rule of Appellate Procedure 24(d), you must file a notice of no transcript with the trial court clerk 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.²⁹¹ 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.²⁹²

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.²⁹³ 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.²⁹⁴

²⁸⁶ *Nguyen v. Hart*, No. 03A01-9302-CH-00058, 1993 WL 291411, at *4 (Tenn. Ct. App. July 29, 1993), *perm. app. denied* (Tenn. Nov. 29, 1993).

²⁸⁷ Tenn. R. App. P. 24(a).

²⁸⁸ Tenn. R. App. P. 24(b).

²⁸⁹ Tenn. R. App. P. 24(c).

²⁹⁰ Tenn. R. App. P., 2014 adv. comm’n cmt.

²⁹¹ *State v. Blevins*, 736 S.W.2d 120, 122 (Tenn. Crim. App. 1987).

²⁹² *Davis v. Sadler*, 612 S.W.2d 160, 161 (Tenn. 1981); *Blevins*, 736 S.W.2d at 122; *Butler v. Butler*, 680 S.W.2d 467, 468 n.1 (Tenn. Ct. App. 1984).

²⁹³ Tenn. R. App. P. 26(b).

²⁹⁴ Tenn. R. App. P. 25(a).

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.²⁹⁵ 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 the notice, and, if necessary, submit your own statement of the evidence.²⁹⁶

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.²⁹⁷ The trial court will normally approve either the statement of the evidence filed by the appellant or an alternate version submitted by the appellee. If neither party has submitted a statement of the evidence that, in the trial court's opinion, conveys a fair, accurate, and complete account of what transpired in the trial court, the trial court may give the parties an opportunity to correct the accuracy of their statements or the trial court may prepare its own statement of the evidence. *Lacy v. HCA Tristar Hendersonville Hosp.*, No. M2015-02217-COA-R3-CV, 2016 WL 4497953, at *3 (Tenn. Ct. App. Aug. 25, 2016). Except in cases where no evidence was presented, the trial court should not decline to approve any statement of the evidence and thereby leave the appellant with an inadequate record to pursue the appeal.

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.²⁹⁸

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.²⁹⁹

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.³⁰⁰ 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.³⁰¹ If the clerk has not complied with the requirements for preparing the record outlined 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

²⁹⁵ *Sizemore v. Sizemore*, Nos.E2005-01166-COA-R3-CV, E2006-01456-COA-R3-CV, 2007 WL 2198358, at *8 (Tenn. Ct. App. 2007), *no appeal taken* (citing *Beef N'Bird of Am., Inc. ex rel. Galbreath v. Cont'l Cas. Co.*, 803 S.W.2d 234, 240 (Tenn. Ct. App. 1990)).

²⁹⁶ Tenn. R. App. P. 24(c).

²⁹⁷ See *Bellamy v. Cracker Barrel Old Country Store, Inc.*, 302 S.W.3d 278, 281 (Tenn. 2009).

²⁹⁸ See *id.*

²⁹⁹ *Beef N'Bird of Am., Inc. ex rel. Galbreath v. Cont'l Cas. Co.*, 803 S.W.2d 234, 240 (Tenn. Ct. App. 1990).

³⁰⁰ Tenn. R. App. P. 25(a).

³⁰¹ 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.

rules risks forfeiting costs.³⁰² 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.³⁰³

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. Absent extraordinary circumstances, the trial court's determination of the accuracy of the record is conclusive.³⁰⁴

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 summary judgment, there may be only a technical record. Any exhibits are compiled and bound, if necessary, in a separate volume.³⁰⁵

You must ensure that the record is in intelligible form when it is transmitted to the appellate court.³⁰⁶ 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.³⁰⁷ 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 24.³⁰⁸ Even when videotape or CD-ROM transcripts are authorized, you may want to provide the Court of Appeals with a written

³⁰² Tenn. R. App. P. 40(i).

³⁰³ Tenn. R. App. P. 25(h).

³⁰⁴ Tenn. R. App. P. 24(e). *See also State v. Bristol*, 654 S.W.3d 917, 930 (Tenn. 2022).

³⁰⁵ Tenn. R. App. P. 25(b).

³⁰⁶ *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.").

³⁰⁷ 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.

³⁰⁸ 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.

transcription in the form of an appendix to an appellate brief.³⁰⁹ Moreover, you should be prepared for the court to request a written transcription of the proceedings.³¹⁰

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. Under Tennessee Rule of Appellate Procedure 14, a motion may also be brought to disregard post-judgment facts and strike portions of a brief that references facts not in the record.³¹¹ 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.³¹² 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 under the rule.³¹³

Post-judgment facts that may be considered could include amended tax returns³¹⁴ and facts that render a judgment moot.³¹⁵ Additionally, post-judgment facts relating to representation on appeal may be considered by the court.³¹⁶ 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.³¹⁷

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 10.³¹⁸

³⁰⁹ Tenn. Sup. Ct. R. 26 § 4.02.

³¹⁰ Tenn. Sup. Ct. R. 26 § 4.03.

³¹¹ *Blue v. Church of God Sanctified, Inc.*, No. M2021-00244-COA-R3-CV, 2022 WL 2302263, at *9 (Tenn. Ct. App. June 27, 2022), *no appeal taken* (granting appellees’ motion to disregard post-judgment facts and strike portions of appellants’ brief when appellant “sought to have this Court consider post-judgment facts without filing a motion to do so pursuant to Tennessee Rule of Appellate Procedure 14”).

³¹² Tenn. R. App. P. 14, advisory comm’n cmt.

³¹³ *Nicholson v. Nicholson*, No. M2008-00006-COA-R3-CV, 2009 WL 3518172, at *7 (Tenn. Ct. App. Oct. 29, 2009), *no appeal taken* (citing *Wade v. Wade*, 897 S.W.2d 702, 722 (Tenn. Ct. App. 1994)).

³¹⁴ *Massey v. Casals*, 315 S.W.3d 788 (Tenn. Ct. App. 2009).

³¹⁵ *Lovin v. State*, 286 S.W.3d 275, 283 (Tenn. 2009).

³¹⁶ *See id.*

³¹⁷ *State v. Branam*, 855 S.W.2d 563, 571 (Tenn. 1993).

³¹⁸ *Duncan v. Duncan*, 672 S.W.2d 765 (Tenn. 1984).

CHAPTER 4 | ELECTRONIC FILING

A. Registered users

The Supreme Court adopted electronic filing (“e-filing”) in the appellate courts in 2018. The revised Tennessee Supreme Court Rule 46, adopted effective July 1, 2022, continues to authorize parties to e-file documents voluntarily and governs specified procedures associated with those filings. E-filing is available to both attorneys licensed in Tennessee³¹⁹ and self-represented parties.

Except as otherwise provided under the rule, a registered user may choose to e-file any document that would otherwise be filed in paper form under the Tennessee Rules of Appellate Procedure, the Rules of the Court of Appeals, or the Rules of the Court of Criminal Appeals. The appellate court may choose to send any other documents to registered users via the court’s e-filing system as well, such as orders, opinions, and judgments. The appellate court may waive any portion of Tennessee Supreme Court Rule 46 on a motion for good cause or sua sponte.

Both attorneys and pro se parties must become registered users to utilize the e-filing system. To become a registered user, an attorney or pro se party must first register with the clerk. Registration provides a secure log-in name and password specific to the registered user, and the log-in name used to e-file any document should match the name and signature on the document. A registered user’s log-in name and password serves as the user’s signature for all purposes and must be reflected at the end of the document with an electronic signature, name of the user, business address, telephone number, email address, and BPR number, as applicable.

By registering, a user consents to receive electronic service (“e-service”) of all documents and notices issued by the appellate court or the clerk, and the appellate court clerk will provide registered users with an online user guide to e-filing. Registered users have a duty to keep their contact information accurate and up-to-date—especially the email address because any e-service on a registered user’s registered email address constitutes valid service on the registered user, regardless of whether the email address is outdated.

The e-filing provider, ImageSoft, will provide webinars on the Appellate Court Clerk’s Office website to train users to use the new e-filing system.

B. Filing and service procedures

Electronically submitted documents are considered to be filed with the court when the electronic transmission is complete. The e-filing system will send a transaction receipt to the registered user stating the date and time of the submission, which serves as proof of filing. Without confirmation of receipt, whether through the transaction receipt or otherwise, no presumption exists that the court received and filed the document. The registered user has the duty to verify that the court received and filed the e-filed document.

The appellate court clerk may reject any document that fails to comply with the filing or payment requirements. If this happens, the clerk must promptly send a notice of rejection, explaining the reasoning for rejection. The clerk has the discretion to allow the filing party up to three (3) days to correct the rejected filing. The date of filing of any timely corrected e-filed document will relate back to the date of the initial deficient filing. The clerk has no requirement to notify the registered user of acceptance of a document for filing.

³¹⁹ Including those who are admitted or seek to be admitted pro hac vice under Tenn. Sup. Ct. R. 19.

The appellate court clerk must add an “electronically filed” stamp on any e-filed documents with the date and time of filing and the name of the clerk, and this stamp has the same force and effect as any manually affixed “filed” stamp for paper documents filed with the clerk.

A day lasts until 11:59 p.m. in the clerk’s local time in the grand division in which the appeal sits, and any e-filing received by the appellate court before this time qualifies as having been filed on that date—so long as the clerk accepts the filing upon review.

C. Format

Follow the terms-of-use agreement of the e-filing system, the requirements below, and the applicable rules of the appellate court—except for the rules about the number of copies, the color of the cover page, and the types of paper. The formatting requirements in Tennessee Supreme Court Rule 46 prevail in the event of any conflict between rules.

Maximum word counts, excluding the title/cover page, table of contents, table of authorities, and certificate of compliance:

- Principal brief: 15,000 words
- Reply briefs: 5,000 words
- Amicus briefs: 7,500 words

Formatting:

- Line spacing: 1.5 inches
- Margins: 1 inch
- Font: any within the Century Family³²⁰
- Font size: 14-point
- Footnotes: same font and font size as body of document
- Text alignment: full justification
- Pagination: beginning with page 1, which is the cover page for briefs
- Navigation: the use of internal hyperlinks, internal bookmarks, and external links to legal authorities is encouraged
 - Hyperlinks cannot replace proper citation format
 - Hyperlinks or linked websites are not part of the record
- All original³²¹ e-filed documents: word processing file must be converted to Portable Document Format (PDF) directly
 - Cannot scan an original paper document into PDF
 - May scan attachments and appendices containing photocopies of documents into PDF
 - Any e-filed PDF documents must be text searchable, if possible
- Certificate of Compliance: must accompany any e-filed brief, and include a statement of the number of words in the brief and a certification that the brief complies with the formatting requirements listed above

D. Fees

Any statutory fees or taxes required to be paid at the time of filing must be paid with an approved form of electronic payment at the time of the e-filing. E-filing fees are recoverable costs under Tennessee Rule of Appellate Procedure 40(c).³²²

³²⁰ Note that the formerly predominant Times New Roman font is not in the Century Family. Although any font in the Century Family is acceptable, the editors of this handbook recommend Century Schoolbook.

³²¹ E.g., applications, briefs, motions, memoranda of law

³²² See Chapter 7 for a breakdown of costs on appeal.

E. Signatures

A registered user submitting a document requiring multiple signatures of attorneys has two options. First, the user may electronically sign the other attorneys' names, which certifies that each of the other attorneys have given their express permission to the form and substance of the document as well as to e-file under their names. Second, the user has the option to submit a separate scanned document as a PDF containing all signatures.

Any e-filed document requiring a signature under penalty of perjury or the signature of a notary public must attach a printed signed copy of the full document and the signatures scanned as a PDF.

Any e-filing made properly under Rule 46 fully binds the signatory as if it were a paper document physically signed and filed, including as an attestation to the truthfulness of any e-filed affidavit, declaration, or certification.

F. E-Service

The e-filing system will email both a notice of filing and any e-filed document to all registered users participating in a given case, which qualifies as service on the registered users.

Whether initiated by a registered user or by the court, e-service constitutes sufficient service of the e-filed document on the registered users as required under Tennessee Rule of Appellate Procedure 20. E-service satisfies the notice and mailing requirements of Rules 5(c), 23, and 38. However, any attorneys or *pro se* parties who are not registered users or otherwise did not receive this e-service must be served through conventional means under Rule 20. Note that Tennessee Supreme Court Rule 46 defines a "Registered user" as: "any person listed in section 2.01 of this Rule *who has properly registered with the clerk to e-file documents in the appellate courts.*"³²³ Thus, if the person whom you wish to serve has not *registered* with the e-filing system, then you must serve him or her via traditional means, even if that person is an attorney. This distinction is important because the Appellate Courts' e-filing system will let you add persons "Ad Hoc" to be electronically served with the filed document, but under Supreme Court Rule 46 this does not technically constitute service.

Upon the motion of the filing party, the court has the discretion to direct the filing of a document nunc pro tunc to the date of the original attempt of e-filing if the document had failed to be e-filed due to one of four reasons: "(1) a technical error in the transmission of the document to the clerk, which error was unknown to the sending party, (2) a failure to process the electronic document when received by the clerk, (3) rejection of the transmitted document by the court or clerk, or (4) other technical problems experienced by either the e-filer or the clerk." In this event, the court must extend the date for filing any applicable response or performing any other right, duty, or other act due to the delayed e-filing.

If the e-filing system becomes temporarily unavailable due to technical reasons for a significant portion of a day, the clerk has the discretion to issue a written declaration that e-filing is unavailable for that day and that all filings due on that day will be timely if filed the following day. If the clerk issues such a declaration, the parties are not required to file a motion seeking permission of the court to file a document nunc pro tunc.

³²³ Tenn. Sup. Ct. R. 46 § 1.01(l) (emphasis added).

CHAPTER 5 | 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(d) 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.”³²⁴

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.³²⁵ 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.³²⁶

3. Proposed orders

a. Supreme Court

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

b. Court of Criminal Appeals

In the Court of Criminal Appeals, proposed orders are not required.³²⁷

c. Court of Appeals

³²⁴ Tenn. R. App. P. 30(d).

³²⁵ Tenn. R. App. P. 22(a).

³²⁶ *Id.*

³²⁷ See Tenn. Ct. Crim. App. R. 7.

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.³²⁸ 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.³²⁹ 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.³³⁰

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 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.

³²⁸ See, e.g., Tenn. Ct. App. R. 8(a).

³²⁹ 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.

³³⁰ See, e.g., Tenn. R. App. P. 9(d), 10(f).

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.³³¹ 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.³³² 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.”³³³ Rule 8 of the Court of Criminal Appeals contains similar requirements.³³⁴

³³¹ Tenn. R. App. P. 22(b).

³³² Tenn. Ct. App. R. 6(d).

³³³ *Id.*

³³⁴ 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).³³⁵ 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.³³⁶

Responses in opposition to motions to dismiss, under 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 before 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. 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.³³⁷ (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*.³³⁸ 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

³³⁵ Tenn. R. App. P. 22(a).

³³⁶ Tenn. R. App. P. 22(b).

³³⁷ Tenn. R. App. P. 22(d).

³³⁸ 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.³³⁹ The preferred method is to file a stipulation of dismissal signed by all parties with the appellate court.³⁴⁰ 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.³⁴¹ Appellees who wish to pursue their own issues notwithstanding the dismissal can raise the matter in their response to the motion for dismissal.³⁴² 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.³⁴³

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.³⁴⁴

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 an 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.

³³⁹ Tenn. R. App. P. 15.

³⁴⁰ See Tenn. R. App. P. 15(a).

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ Tenn. R. App. P. 15(c); see Section C (2) Settlement agreement, below.

³⁴⁴ Tenn. R. App. P. 15(b).

3. Rule 60.02 motions

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.³⁴⁵ 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.³⁴⁶

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 outlined 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. You should be aware that there are certain motions that require prompt filing, such as a Motion to Strike a brief, and should ensure that you research any potential motion immediately.³⁴⁷

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.

³⁴⁵ *Spence v. Allstate Ins. Co.*, 883 S.W.2d 586, 595-96 (Tenn. 1994).

³⁴⁶ *See id.*

³⁴⁷ *See Julie C. W. v. Frank Mitchell W.*, No. M2019-01243-COA-R3-CV, 2021 WL 745288, at *16 (Tenn. Ct. App. Feb. 26, 2021), *perm. app. denied* (Tenn. Dec. 9, 2021) (“Nevertheless, instead of filing a motion to strike Wife’s disrespectful brief soon after it was filed, Husband only moved to strike Wife’s brief in his own brief. We decline, at this late stage of the case, to strike Wife’s brief.”).

CHAPTER 6 | 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 Tennessee Rule of Appellate Procedure 27; they are not listed in full here.³⁴⁸ 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. Cover Page

Tennessee Rule of Appellate Procedure 30(b) has very specific rules regarding what information must appear on the cover page of a brief.³⁴⁹ 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.³⁵⁰ 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.

When setting forth the caption of the case, you should refer to the parties as they were referred to in the trial court, except that you should also indicate whether they are “Appellant” or “Appellee” on appeal.³⁵¹ This is most commonly done by using a “/” to designate the dual identity of a party: e.g., “Plaintiff/Appellant” or “Defendant/Appellee.”

Rule 30(b) also requires you to state “the nature of the proceeding in the appellate court and the name of the court, agency, or board below.”³⁵² This is most commonly done by stating the rule under which the appeal is proceeding and the court from which the appeal has been generated: e.g., “Rule 3 Appeal from the Final Judgment of the Chancery Court for Davidson County” or “Rule 9 Interlocutory Appeal by Permission from the Order of the Circuit Court for Knox County.”

Finally, Rule 30(b) requires you to put the title of your document on the cover page (e.g., “Brief of Appellant”), as well as the name and address of the attorney (or pro se party) filing the document.³⁵³ 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. Statement of the issues

Practitioners should be certain that their statement of the issues includes every request of the court. Occasionally,

³⁴⁸ The appellate courts are increasingly noting when briefs are out of compliance with Rule 27, and we caution you to follow the rule closely. See *Heflin v. Iberiabank Corp.*, 571 S.W.3d 727, 734 (Tenn. Ct. App. 2018), *appeal denied* (June 8, 2018) (admonishing an attorney for failing to comply with Rule 27 and holding that such lack of compliance resulted in waiver of several issues).

³⁴⁹ See Tenn. R. App. P. 30(b).

³⁵⁰ Tenn. R. App. P. 30 (b), (d).

³⁵¹ See Tenn. R. App. P. 30(b).

³⁵² Tenn. R. App. P. 30(b).

³⁵³ Tenn. R. App. P. 30(b).

drafters will raise an issue in the argument section of the brief that is not specifically identified in the statement of the issues.³⁵⁴ Often, lawyers will close their briefs by requesting an award of attorney's fees without specifically designating the request in the statement of the issues, but the Court of Appeals has held that failure to do so waives the request for fees on appeal.³⁵⁵

3. 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.³⁵⁶ 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 disposition in the court below.³⁵⁷ 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.

4. 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.³⁵⁸ 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.

5. Standard of review

All briefs must contain a "concise statement of the applicable standard of review" as to each issue.³⁵⁹ This may be in either a separate heading before the argument section or within the argument section itself.

6. Argument

The argument may be preceded by a summary of the argument, which should serve only to clarify a complex argument.³⁶⁰ The argument section is the place to make your argument. If you make argument in another portion of the brief,

³⁵⁴ 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 *Oslin v. Oslin*, No. 03A01-9210-CV-00395, 1993 WL 38154 (Tenn. Ct. App. Feb. 17, 1993) (memorandum opinion), *no appeal taken*.

³⁵⁵ *Brunetz v. Brunetz*, 573 S.W.3d 173, 185-86 (Tenn. Ct. App. 2018), *appeal denied* (Jan. 18, 2019); see *Akard v. Akard*, No. E2013-00818-COA-R3CV, 2014 WL 6640294, at *9 (Tenn. Ct. App. Nov. 25, 2014), *no appeal taken*; *Forbess*, 370 S.W.3d 347.

³⁵⁶ See Tenn. R. App. P. 13 regarding scope of review on appeal.

³⁵⁷ Tenn. R. App. P. 27(a)(5).

³⁵⁸ Tenn. R. App. P. 27(a)(6).

³⁵⁹ Tenn. R. App. P. 27(a)(7)(B).

³⁶⁰ Tenn. R. App. P. 27(a)(7); see also *Best Practices in Appellate Courts Focus of TBA Discussion*, Tennessee Bar Ass'n (Oct. 1, 2020), <https://www.tncourts.gov/news/2020/10/01/best-practices-appellate-courts-focus-tba-discussion> ("Justice Kirby said that she is always

you run the risk that the Court will not consider it.³⁶¹ Principal briefs are limited to 15,000 words, and reply briefs may not exceed 5,000 words.³⁶² More than simply the argument section is included in this calculation.³⁶³ This limitation may be waived only by order of the court.³⁶⁴ It is important to note that certain sections of the brief are excluded from these word limitations.³⁶⁵ In a reply brief, an appellant may respond to a new issue raised by an appellee.³⁶⁶ Similarly, if an appellee raises a request for relief in its principal brief, then the appellee is also entitled to file a reply brief responding to the appellant's arguments on the issue.³⁶⁷

7. 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.³⁶⁸ 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.³⁶⁹ The Court, however, will not permit a brief, motion, or application to be filed under seal absent a showing of extraordinary circumstances.³⁷⁰ 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.³⁷¹ The document will be treated as if sealed until the court rules on the motion.³⁷²

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.”³⁷³ 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.³⁷⁴ The Court of Appeals has held that is not under a duty to

happy to see a summary section in a brief because the process of writing a summary forces attorneys to really think through what is most essential about their argument.”).

³⁶¹ See *Boren v. Hill Boren PC*, No. W2021-00478-COA-R3-CV, 2023 WL 3375623, at *3 n.6 (Tenn. Ct. App. May 11, 2023), *no appeal taken* (“Although the version of the appellate rules in effect at the time of the filing of the Principal Brief allowed a party to include up to fifty pages in the argument portion of the principal brief, we will not consider substantive argument to the extent that it is interspersed outside of the denominated argument section given the referenced fifty-page limitation.”).

³⁶² Tenn. R. App. P. 27(i).

³⁶³ See Tenn. R. App. P. 30(e).

³⁶⁴ Tenn. R. App. P. 27(a)(7).

³⁶⁵ Tenn. R. App. P. 30(e); See also Tenn. Sup. Ct. R. 46, § 3.02(a)(1). Please note that Tenn. R. App. P. 30(e) explicitly provides that the Attorney Signature Block and Certificate of Service need not be counted in the word total, while Tenn. Sup. Ct. R. 46, § 3.02(a)(1) does not expressly except these two sections from the word count. Because Tenn. Sup. Ct. R. 46 trumps other procedural rules “concerning the format of documents that are e-filed,” Tenn. Sup. Ct. R. 46, § 3.02(a), the better practice is to include the Attorney Signature Block and Certificate of Service in the word count for e-filed documents.

³⁶⁶ *Khan v. Regions Bank*, 584 S.W.3d 418, 427 (Tenn. Ct. App. 2019) (citing *Goetz v. Autin*, No. W2015-00063-COA-R3-CV, 2016 WL 537818, at *11 n.8 (Tenn. Ct. App., Filed Feb. 10, 2016), *perm. app. denied* (Tenn. 2016)).

³⁶⁷ See Tenn. R. App. P. 27(c).

³⁶⁸ Tenn. Ct. App. R. 15(d)(ii).

³⁶⁹ *Id.*

³⁷⁰ Tenn. Ct. App. R. 15(d)(i).

³⁷¹ Tenn. Ct. App. R. 15(e)(i).

³⁷² *Id.*

³⁷³ Tenn. R. App. P. 27(a)(6), (7).

³⁷⁴ Tenn. Ct. App. R. 6(a).

search a voluminous record to verify unsupported allegations.³⁷⁵

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.³⁷⁶ Both the Court of Appeals and 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.³⁷⁷

PRACTICE TIP! Avoid making conclusory statements 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.³⁷⁸ These references should be to the page of the record involved. Any intelligible abbreviations may be used.³⁷⁹

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.³⁸⁰

The record often consists of two or more volumes, but the pages may or may not be consecutively numbered from volume to volume. The papers filed in the trial court are sometimes bound in one or more consecutively-paginated volumes, beginning with page 1, and the transcript of evidence is sometimes bound in separate, consecutively-paginated volumes, 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. You should also put the volume number of the portion of the record to which you are citing, as it is required by Tenn. Ct. App. R. 3(a)³⁸¹: e.g., "Vol. 1 T.R. at 1." No matter what abbreviations you use, it is good practice to include at the beginning of each brief, usually in a footnote, 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

³⁷⁵ *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); *see also Duke v. Duke*, 563 S.W.3d 885, 894–95 (Tenn. Ct. App. 2018), *appeal denied* (Oct. 10, 2018) ("[W]e caution appellate attorneys that any [true] misrepresentations [of the record], when apparent from our thorough review of the record, weigh against the attorney's credibility with this Court.").

³⁷⁶ Tenn. Ct. App. R. 6(b); *see also Pearman v. Pearman*, 781 S.W.2d 585, 587–88 (Tenn. Ct. App. 1989); *Lance Prods., Inc. v. Com. 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).

³⁷⁷ *Duracap Asphalt Paving Co. v. City of Oak Ridge*, 574 S.W.3d 859, 871 (Tenn. Ct. App. 2018) (holding that the appellant's "failure to provide appropriate citations regarding this matter results in a waiver of the issue"); Tenn. Ct. Crim. App. R. 10(b); *see 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).

³⁷⁸ Tenn. R. App. P. 27(a)(6), (7).

³⁷⁹ Tenn. R. App. P. 27(g).

³⁸⁰ Tenn. Ct. App. R. 3(a).

³⁸¹ Tenn. Ct. App. R. 3(a).

must include the title, page of the volume where the case begins, pages upon which the pertinent matter appears, and year of decision.³⁸² When citing a Tennessee case, one may refer to the official or South Western Reporter or both.³⁸³ Citation of cases from other jurisdictions must be to the National Reporter System or both the official state reports and the National Reporter System.³⁸⁴ Citations to textbooks must also include the page on which the pertinent matter appears, year of publication and edition, and, if applicable, the section.³⁸⁵ 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.³⁸⁶ These rules are similar to the Bluebook rules and should also be followed for motions and other papers.³⁸⁷ Tennessee Supreme Court Rule 1 requires the Tennessee Rules of Appellate Procedure to 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.³⁸⁸ In the case, the Court of Appeals dismissed the appeal because the appellant failed to comply with the Tennessee Rules of Appellate Procedure.³⁸⁹ 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.”³⁹⁰ 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 15.³⁹¹ Specifically, the Court found the appellant’s argument section of his brief his “most egregious” mistake.³⁹² Although the appellant set forth seven issues for appeal, his argument section, in its entirety, consisted of four paragraphs.³⁹³ In those four paragraphs, there were no citations to the record and only one woefully inaccurate citation to a Tennessee case.³⁹⁴

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 of Criminal Appeals.³⁹⁵ 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.³⁹⁶ 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

³⁸² Tenn. R. App. P. 27(h).

³⁸³ *Id.*

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ *Bean v. Bean*, 40 S.W.3d 52 (Tenn. Ct. App. 2000), *perm. app. denied* (Tenn. Feb. 26, 2001).

³⁸⁹ *Id.*

³⁹⁰ *Id.* (citing *Crowe v. Birmingham & N.W. Ry. Co.*, 1 S.W.2d 781 (Tenn. 1928)).

³⁹¹ *Bean*, 40 S.W.3d at 53-56.

³⁹² *Id.* at 55.

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ Tenn. Ct. Crim. App. R. 19(4).

³⁹⁶ Tenn. Ct. App. R. 12(a).

filed and, if filed, the date and disposition of the application.³⁹⁷

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.³⁹⁸

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.³⁹⁹ Appendices are otherwise optional.⁴⁰⁰ 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.⁴⁰¹

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 before the court’s decision, you may bring them to the court’s attention in a letter addressed to the clerk of the court.⁴⁰²

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.⁴⁰³

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

³⁹⁷ Tenn. Ct. Crim. App. R. 19(4); Tenn. Ct. App. R. 12(a).

³⁹⁸ Tenn. Sup. Ct. R. 4(G)(1).

³⁹⁹ Tenn. Ct. App. R. 6(c).

⁴⁰⁰ Tenn. R. App. P. 28.

⁴⁰¹ Tenn. R. App. P. 27(e).

⁴⁰² Tenn. R. App. P. 27(d).

⁴⁰³ Tenn. R. App. P. 27(a)(6).

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.⁴⁰⁴ In either case, the text should not exceed 6.5 by 9.5 inches on 8.5 by 11-inch paper.⁴⁰⁵ Only indigent persons proceeding under Tennessee Rule of Appellate Procedure 18 are permitted to use carbon copies.⁴⁰⁶

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.⁴⁰⁷

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 the 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.⁴⁰⁸ By way of example, if the record is filed on April 30, 2021, then the appellant’s brief would be due thirty (30) days later on June 1, 2021, because Sunday (May 30th) would not count, and neither would Monday (May 31st, Memorial Day holiday).

Under the Tennessee Rules of Appellate Procedure, there is no due date for an amicus reply brief. Instead, the filer must move the court for permission to reply.

Briefs will be considered timely if they are received by the clerk within the time fixed for filing (see rules on e-filing for information if not filing physical copies of briefs), 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 for delivery with computer tracking, either through a commercial delivery service or the United States Postal Service, within the time fixed for filing.⁴⁰⁹ 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).⁴¹⁰ Note that the motion must be filed before the original deadline for filing the brief has expired.⁴¹¹ The appellate courts have discretion to grant extensions of time for filing briefs.⁴¹²

⁴⁰⁴ Tenn. R. App. P. 30(a).

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ See, e.g., Chapter 3, *The Record on Appeal*.

⁴⁰⁸ Tenn. R. App. P. 8A(g).

⁴⁰⁹ Tenn. R. App. P. 20(a).

⁴¹⁰ For more information regarding motions for extension of time, see Chapter 4, *Motions*.

⁴¹¹ Tenn. Ct. App. R. 6(d).

⁴¹² Tenn. R. App. P. 21 (b).

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.

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.⁴¹³ 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.⁴¹⁴

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.⁴¹⁵

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.⁴¹⁶

⁴¹³ Tenn. R. App. P. 2.

⁴¹⁴ Tenn. R. App. P. 8(A)(i).

⁴¹⁵ Tenn. R. App. P. 29(c).

⁴¹⁶ Tenn. R. App. P. 29, adv. comm'n cmt.

The time for filing a consolidated responsive brief does not begin to run until all the adversaries' briefs have been filed.⁴¹⁷ 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.

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.

The appellant may file a brief in reply to the brief of the appellee under Tennessee Rule of Appellate Procedure 27(c). If the appellee also is requesting relief from the judgment, the appellee may file a brief in reply to the response of the appellant to the issues presented by the appellee's request for relief.

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.⁴¹⁸ Cross-appeals or separate appeals are not required, and any subsequently filed notice of appeal is surplusage.⁴¹⁹ 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.⁴²⁰ 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.⁴²¹ 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 under 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 that 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.⁴²² 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.⁴²³

⁴¹⁷ Tenn. R. App. P. 29(a).

⁴¹⁸ Tenn. R. App. P. 13, advisory comm'n cmt.; *State v. Russell*, 800 S.W.2d 169, 170-71 (Tenn. 1990).

⁴¹⁹ 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).

⁴²⁰ Tenn. R. App. P. 27(b).

⁴²¹ Tenn. R. App. P. 3(f).

⁴²² Tenn. Ct. App. R. 7.

⁴²³ *Id.*

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.⁴²⁴ In the Court of Appeals, briefs, motions, and applications will be filed under seal only upon a showing of extraordinary circumstances.⁴²⁵ When a party seeks to seal a portion of a brief, he or she must lodge the complete brief that contains the confidential information *and* shall also file a second, public brief, with the matters redacted. Only the original and one copy of the public version need to be filed.⁴²⁶

⁴²⁴ Tenn. Sup. Ct. R. 34.

⁴²⁵ Tenn. Ct. App. R. 15(d)(i).

⁴²⁶ Tenn. Ct. App. R. 15(d)(iii).

CHAPTER 7 | ORAL ARGUMENT⁴²⁷

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.⁴²⁸ Only one party needs to request 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.⁴²⁹ If no party requests oral argument, the case will ordinarily be forwarded for a ruling upon the briefs and the record.⁴³⁰ However, the courts retain the right to order oral argument.⁴³¹ 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.⁴³²

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.⁴³³ 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.⁴³⁴ 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.⁴³⁵

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.⁴³⁶ Amicus Curiae may present oral argument only upon motion or upon request from the Court.⁴³⁷ Further, motions are generally reviewed without oral argument, though a party may request a hearing.⁴³⁸ However, the court rarely, if ever, grants such requests for a hearing.

B. Docketing

Cases are assigned a tentative oral argument date shortly after the appellee's brief is filed.⁴³⁹ 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, the oral argument will be rescheduled only upon a showing of

⁴²⁷ This chapter generally describes the requirements outlined in Tennessee Rule of Appellate Procedure 35.

⁴²⁸ Tenn. R. App. P. 35(a).

⁴²⁹ *Id.*

⁴³⁰ Tenn. R. App. P. 35(h).

⁴³¹ *Id.*

⁴³² See Tenn. R. App. P. 35, adv. comm'n cmt.

⁴³³ Tenn. R. App. P. 35(g).

⁴³⁴ Tenn. R. App. P. 35(a).

⁴³⁵ Tenn. R. App. P. 32(c).

⁴³⁶ Tenn. Sup. Ct. R. 23(7)(B).

⁴³⁷ Tenn. R. App. P. 31(c).

⁴³⁸ See Tenn. R. App. P. 22(c).

⁴³⁹ Tenn. R. App. P. 35(b).

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 matters which were set after counsel was notified of the date of oral argument will not be grounds for rescheduling. While oral argument in termination of parental rights cases was previously set on an expedited basis and continued only by order of the court, termination of parental rights cases no longer receive this special treatment and are set like all other cases.

Tennessee Rule 8(b) of the Court of Criminal Appeals states that continuances may be granted for good cause.⁴⁴⁰ 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.⁴⁴¹ Motions filed after the last Thursday before a case is set for oral argument will not be continued except under exigent circumstances.⁴⁴² 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 are 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.⁴⁴³ 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 am (local time) and the afternoon session at 1:00 pm (local time). The docket provided by the clerk setting the schedule for oral argument will state when the 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 arguments. The students are provided with the briefs beforehand and enjoy the opportunity to have lunch with the Supreme Court afterward. 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.

⁴⁴⁰ Tenn. Ct. Crim. App. R. 8(b) (referencing Tenn. R. App. P. 21(b)).

⁴⁴¹ *Id.*

⁴⁴² Tenn. Ct. Crim. App. R. 8(d).

⁴⁴³ Tenn. Const. art. VI, § 2.

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 9:00 am and the afternoon session at 1:00 pm. 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.”

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. Under Court Rule, the morning session is to convene at 9:30 am.⁴⁴⁴ Afternoon sessions generally begin at 1:30 pm.

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

⁴⁴⁴ Tenn. Ct. Crim. App. R. 4.

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.

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."⁴⁴⁵ Workers' Compensation Panels generally allow 15 minutes per side.

2. Court of Appeals

Pursuant to Tennessee Court of Appeals Rule 16, adopted in 2023, oral argument is limited to 15 minutes per side, unless the Court orders otherwise pursuant to a motion filed by a party or the Court's own motion.⁴⁴⁶

3. Court of Criminal Appeals

The Court of Criminal Appeals limits argument to 20 minutes unless it has granted additional time.⁴⁴⁷ 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.⁴⁴⁸ No more than two lawyers representing parties seeking the same relief may argue except by permission of the court.⁴⁴⁹ Permission will be granted when there are parties on the same side representing diverse interests.⁴⁵⁰

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

⁴⁴⁵ Tenn. R. App. P. 35(c).

⁴⁴⁶ Tenn. Ct. App. R. 16.

⁴⁴⁷ Tenn. Ct. Crim. App. R. 14.

⁴⁴⁸ Tenn. R. App. P. 35(f).

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.*

motion for leave to appear pro hac vice in accordance with Tennessee Supreme Court Rule 19.⁴⁵¹

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.

The appellant is entitled to open and to conclude the argument.⁴⁵² You should reserve time for rebuttal by informing the court before you begin your argument that you desire rebuttal time.⁴⁵³ 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 14.⁴⁵⁴

You should not read your statement of facts.⁴⁵⁵ 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

⁴⁵¹ Tenn. Sup. Ct. R. 19.

⁴⁵² Tenn. R. App. P. 35(d).

⁴⁵³ See Tenn. Ct. Crim. App. R. 14.

⁴⁵⁴ See Tenn. R. App. P. 13(c).

⁴⁵⁵ Tenn. R. App. P. 35(d).

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 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. If asked a yes or no question, answer yes or no, then explain your answer if needed.

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 and livestreamed on YouTube. At the conclusion of the arguments, the livestream is ended. The recordings are readily available for review by the judges and their staff after oral argument, but are not immediately viewable by the public once the livestream is over. Videos of oral arguments are posted on the website of the Tennessee Court System TnCourts.gov 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.⁴⁵⁶ 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. The Court can also choose to edit the video recording to protect sensitive information. That motion must be filed no later than ten (10) days after the oral argument is heard.

⁴⁵⁶ See Tenn. Sup. Ct. R. 30.

CHAPTER 8 | COSTS ON APPEAL AND STAY BONDS

A. Costs on appeal are 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 persons⁴⁵⁷ and governmental entities⁴⁵⁸ are also exempted from the cost requirement.

In civil cases, the Appellate Court Clerk's office charges fees at the initiation of an appeal. Unless an appellant is exempted by statute or has been permitted to proceed as an indigent person on appeal under Tennessee Rule of Appellate Procedure 18, all applicable taxes and fees required by the clerk must be filed contemporaneously with the notice of appeal or other initiating document. Other initiating documents include applications for permission to appeal pursuant to Tennessee Rules of Appellate Procedure 9 and 10, Tennessee Rule of Appellate Procedure 12 petitions for review of administrative decisions by the Court of Appeals, and Tennessee Rules of Appellate Procedure 11 Applications for Permission to Appeal to the Supreme Court. Indigent persons are not required to pay the costs in advance but may be taxed with the costs at the conclusion of the appeal. Upon the filing of a notice of appeal or other initiating document, the appellant must either (1) pay the required taxes and fees; (2) establish that the appellant is exempt; or (3) apply for, or establish proof of, indigency under Tennessee Rule of Appellate Procedure 18. 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.

In addition to the fees charged at the initiation of the appeal, the clerk may charge additional fees for certain other filings during the appeal. Any additional notice has no cost.

On June 25, 2018, the Supreme Court of Tennessee issued an order implementing a new fee structure, effective July 9, 2018, for costs and fees assessed in the appellate courts to reflect the courts' transition to electronic filing. Also effective July 9, 2018, appellate litigants must pay these fees when initiating a case in the appellate courts rather than waiting until the appellate process is complete. The new fee schedule may be found on the following page, copied from the Appellate Court clerk's webpage:

⁴⁵⁷ Tenn. R. App. P. 18.

⁴⁵⁸ Tenn. R. Civ. P. 62.06.

Document Filed/Service Provided	Costs & Fees for Filing/Service
1. Appeal/other review pursuant to one of the following rules or statutes:	
a. Tennessee Rules of Appellate Procedure	
Tenn. R. App. P. 3 – Appeal as of right	\$550.00
Tenn. R. App. P. 4(a) – Waiver of timely filing NOA	\$150.00
Tenn. R. App. P. 7 – Stay or injunction pending appeal	\$200.00
Tenn. R. App. P. 8 – Release in criminal cases	\$200.00
Tenn. R. App. P. 9 – Interlocutory appeal by permission	\$350.00
Tenn. R. App. P. 10 – Extraordinary appeal by permission	\$350.00
Tenn. R. App. P. 11 – Appeal by permission to Supreme Court	\$350.00
Tenn. R. App. P. 12 – Direct review of administrative proceedings by the Court of Appeals	\$550.00
Tenn. R. App. P. 18 – Appeals by indigent persons	\$100.00
b. Supreme Court Rules	
Tenn. Sup. Ct. R. 10B – Disqualification or recusal of a judge	\$250.00
Tenn. Sup. Ct. R. 11 §III(c) – Cases under advisement	\$100.00
Tenn. Sup. Ct. R. 23 – Certification of questions of state law from federal court	\$550.00
Tenn. Sup. Ct. R. 28 §10 – Appeals post-conviction	\$200.00
Tenn. Sup. Ct. R. 48 – Assuming jurisdiction over undecided cases	\$150.00
c. Tenn. Code Ann. § 39-13-206 – automatic transfer	\$550.00
2. Administrative proceeding in the Supreme Court	\$100.00
3. Other pleading initiating proceedings in the Appellate Courts	\$150.00
4. Board of Judicial Conduct Formal Charges	\$300.00
5. Additional filings/actions in the Appellate Courts:	
a. Motion to file late notice of appeal	\$150.00
b. Motion for full court review	\$150.00
c. Motion to participate as Amicus Curiae	\$150.00
d. Motion under Tenn. R. App. P. 7 – Stay or injunction pending appeal	\$200.00
e. Motion under Tenn. R. App. P. 8 – Release in criminal cases	\$200.00
f. Motion to withdraw archived record	\$75.00
g. Petition to rehear	\$50.00
h. Show cause order	\$10.00
6. Other services:	
a. Affixing seal	\$2.00
b. Certification of document with seal	\$5.00
c. Copies of all documents	\$0.50/page
d. Issuing capias, subpoena, or other process	\$12.00
e. Issuing fi. fa. or other writ	\$12.00
f. Issuing certificate of good standing	\$50.00

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

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.”⁴⁵⁹ Such bonds are also referred to as “supersedeas bonds” in federal court. A stay bond secures payment of or obedience to a judgment.

“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.”⁴⁶⁰ 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.⁴⁶¹

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, but Tennessee courts have stated that the bond can take the form of cash paid into the court.⁴⁶² 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 period. 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.⁴⁶³ Rates are published on the Administrative Office of the Court’s website.⁴⁶⁴

Tennessee Rule of Civil Procedure 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 filed as ‘appeals bonds,’ cash payments made directly to the clerk of the court are also sufficient.⁴⁶⁵ Litigants are also allowed to pledge property as bond.

A stay bond may be set in a lesser amount for good cause shown.⁴⁶⁶ Factors to consider include indigency, the presence of plentiful assets, and the adequacy of insurance coverage.⁴⁶⁷ The trial and appellate courts also have general authority to issue a stay in the absence of a bond in appropriate circumstances.⁴⁶⁸

For more information on the process for appealing a stay bond, or any other type of order governing a stay pending appeal, please see Chapter 1, Section F-1 of this Handbook.

⁴⁵⁹ Tenn. R. Civ. P. 62.05.

⁴⁶⁰ *Sec. Bank & Trust Co. of Ponca City v. Fabricating, Inc.*, 673 S.W.2d 860, 866 (Tenn. 1983).

⁴⁶¹ Order of June 2, 2009, *Servitech Indus. Inc., v. Bailey Tool*, No. M2009-00685-COA-R3-CV, 2010 WL 2073854 (Tenn. Ct. App. 2010), *no appeal taken*.

⁴⁶² *Griffin v. Campbell Clinic, P.A.*, 439 S.W.3d 899 (Tenn. 2014).

⁴⁶³ Tenn. R. App. P. 41.

⁴⁶⁴ <http://www.tncourts.gov/node/1232344> (last accessed June 14, 2018).

⁴⁶⁵ *Griffin v. Campbell Clinic, P.A.*, 439 S.W.3d 899, 905 (Tenn. 2014) (citing Tenn. R. App. P. 6 adv. comm’n cmt.).

⁴⁶⁶ Tenn. R. Civ. P. 62.03; Tenn. R. Civ. P. 62.07.

⁴⁶⁷ Tenn. R. Civ. P. 62.05 advisory comm’n cmt. to 1984 Amendment.

⁴⁶⁸ Tenn. R. Civ. P. 62.07-.08.

D. Time to file bond

Plaintiff may give the bond for a stay “at or after” filing the notice of appeal.⁴⁶⁹ “The stay is effective when the bond is approved by the trial court.”⁴⁷⁰

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.⁴⁷¹ 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.”⁴⁷²

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.⁴⁷³ 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.⁴⁷⁴

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.⁴⁷⁵

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.⁴⁷⁶ 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.⁴⁷⁷

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.⁴⁷⁸ The clerk will then issue a report “in which the clerk shall approve and/or disapprove such costs in whole or in part”⁴⁷⁹ Thereafter, a party has ten (10) days to object to the clerk’s report.⁴⁸⁰

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 and include in the appellate record only those documents “sufficient to convey a fair, accurate and complete

⁴⁶⁹ Tenn. R. Civ. P. 62.04.

⁴⁷⁰ *Id.*

⁴⁷¹ Tenn. R. App. P. 40(c).

⁴⁷² Tenn. R. App. P. 40(e).

⁴⁷³ Tenn. R. App. P. 40(c); *see also*, advisory comm’n cmt. to Tenn. R. App. P. 28.

⁴⁷⁴ Tenn. R. App. P. 35(g).

⁴⁷⁵ *See* Tenn. R. App. P. 39(b).

⁴⁷⁶ Tenn. R. App. P. 40(d).

⁴⁷⁷ *Id.*

⁴⁷⁸ *Id.*

⁴⁷⁹ Tenn. R. App. P. 40(f).

⁴⁸⁰ *Id.*

account of what transpired with respect to those issues that are the bases of appeal.”⁴⁸¹ The switch to electronic records, at least during this transitional period, has changed the court costs, as shown in the table in Chapter 7, subsection A. 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.⁴⁸²

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

For illustration only, the following is a form for the body of such bond, P being the principal and S being the surety:

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.

⁴⁸¹ Tenn. R. App. P. 24(a).

⁴⁸² Tenn. Sup. Ct. R. 3.

For illustration only, below 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 9 | 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.⁴⁸³

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.

⁴⁸³ *Hindman v. State*, 672 S.W.2d 223, 224 (Tenn. Crim. App. 1984), *perm. app. denied* (Tenn. 1984).

3. 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 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.⁴⁸⁴

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.⁴⁸⁵

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.⁴⁸⁶ A second petition for rehearing may be filed in the Supreme Court only upon motion and leave of the court.⁴⁸⁷ 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.⁴⁸⁸

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.⁴⁸⁹

⁴⁸⁴ Tenn. R. App. P. 39(a).

⁴⁸⁵ Tenn. R. App. P. 39(b).

⁴⁸⁶ Tenn. R. App. P. 39(f).

⁴⁸⁷ *Id.*

⁴⁸⁸ Tenn. Sup. Ct. R. 4(A)(2).

⁴⁸⁹ Tenn. Sup. Ct. R. 4(A)(3).

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 shall not be published unless otherwise directed by the Supreme Court.⁴⁹⁰ 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.⁴⁹¹

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.⁴⁹²

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 19.⁴⁹³ 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.⁴⁹⁴

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

⁴⁹⁰ Tenn. Sup. Ct. R. 4(C).

⁴⁹¹ Tenn. Sup. Ct. R. 4(E).

⁴⁹² See Tenn. Ct. App. R. 11; Tenn. Ct. Crim. App. R. 19.

⁴⁹³ Tenn. Sup. Ct. R. 4(F).

⁴⁹⁴ See Tenn. Sup. Ct. R. 4(E); Tenn. Ct. App. R. 11; Tenn. Ct. App. R. 12; Tenn. Ct. Crim. App. R. 19.

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 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*.⁴⁹⁵

⁴⁹⁵ *State v. Burkhart*, 541 S.W.2d 365, 371 (Tenn. 1976).

CHAPTER 10 | 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.⁴⁹⁶ 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.⁴⁹⁷ 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.

⁴⁹⁶ See Tenn. Code Ann. §15-1-101 et seq.

⁴⁹⁷ *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)⁴⁹⁸
- 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

⁴⁹⁸ 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>. (last accessed June 14, 2018).

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.⁴⁹⁹ 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.

For physical filing, 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.⁵⁰⁰ In addition, "[filing] will also be timely if placed placed for delivery with computer tracking, either through a commercial delivery service or the United States Postal Service, within the time fixed for filing. ." ⁵⁰¹ Drop boxes are located at the three Supreme Court buildings. Papers deposited in

⁴⁹⁹ See Tenn. Sup. Ct. R. 30.

⁵⁰⁰ Tenn. R. App. P. 20(a).

⁵⁰¹ *Id.*

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.⁵⁰² Appellate records should not be returned to the Appellate Court 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.

Reference Chapter 4 for guidelines on e-filing.

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.⁵⁰³ *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:⁵⁰⁴

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)

⁵⁰² *Id.*

⁵⁰³ See Tenn. R. App. P. 38.

⁵⁰⁴ 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	Filing of certified transcript with proof of service to Appellee	60 days after Notice of Appeal filed	Trial court clerk	24(c)
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)

Person Filing	Item Filed	Time Deadline	Location Filed	Tenn. App. P. Rule
Appellate court clerk	Notice of Oral Argument scheduled	Upon setting of the appeal for oral argument	All parties	35(b)
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)

Person Filing	Item Filed	Time Deadline	Location Filed	Tenn. App. P. Rule
Appellate court clerk	Notice of Oral Argument scheduled	Upon setting the appeal for oral argument	All parties	35(b)
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 if following physical filing requirements.

COURT OF APPEALS					
<u>Appellant's Brief</u>	<u>Appellee's Brief</u>	<u>Reply Brief</u>	<u>Amicus Brief</u>	<u>Motions w/ Affidavit</u>	<u>Petitions to Rehear</u>
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					
<u>Appellant's Brief</u>	<u>Appellee's Brief</u>	<u>Reply Brief</u>	<u>Amicus Brief</u>	<u>Motions w/ Affidavit</u>	<u>Petitions to Rehear</u>
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					
<u>Application</u>	<u>Response</u>				
<i>Rule 11 (Application)</i>	Original + 5 copies (Blue cover)	Original + 5 copies (Red cover)			
<u>Appellant's Brief</u>	<u>Appellee's Brief</u>	<u>Reply Brief</u>	<u>Amicus Brief</u>	<u>Motions w/ Affidavits</u>	<u>Petitions to Rehear</u>
<i>Merits' Briefs</i>	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)					
<u>Appellant's Brief</u>	<u>Appellee's Brief</u>	<u>Reply Brief</u>	<u>Amicus Brief</u>	<u>Motions w/ Affidavits</u>	<u>Petitions to Rehear</u>
Original + 3 copies (Blue cover)	Original + 3 copies (Red cover)	Original + 3 copies (Gray cover)			Review by Entire S Ct Original + 5 copies

CHAPTER 11 | WORKERS' COMPENSATION PANELS

Tennessee Supreme Court Rule 51 refers all workers' compensation appeals to the "Special Workers' Compensation Appeals Panel."⁵⁰⁵ 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.⁵⁰⁶ 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, Tennessee Code Annotated section 50-6-225(a) requires a "benefit review conference" be completed prior to filing the workers' compensation civil action,⁵⁰⁷ The Supreme Court has held exhaustion of the benefit review process is a jurisdictional prerequisite to filing a workers' compensation action.⁵⁰⁸ 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, Tennessee Code Annotated section 50-6-237 vests exclusive jurisdiction over workers' compensation claims to the Court of Workers' Compensation Claims. Orders granting or denying interlocutory relief ("interlocutory orders") may be appealed to the Workers' Compensation Appeals Board.⁵⁰⁹ There is no additional appeal permitted for interlocutory orders.⁵¹⁰ Orders granting or denying relief on the merits ("compensation orders") may be appealed to the Appeals Board.⁵¹¹ Decisions of the Appeals Board may be appealed to the Supreme Court, after being certified as final by the trial court.⁵¹² 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.⁵¹³ 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.⁵¹⁴ 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.⁵¹⁵

⁵⁰⁵ Tenn. Sup. Ct. R. 51, § 1.

⁵⁰⁶ See Tenn. Code Ann. § 50-6-225(a)(3).

⁵⁰⁷ Tenn. Code Ann. § 50-6-225(a)(1).

⁵⁰⁸ *Chapman v. Davita*, 380 S.W.3d 710, 714 (Tenn. 2012).

⁵⁰⁹ Tenn. Code Ann. § 50-6-239(d)(3) & (4); Tenn. Code Ann. § 50-6-217(a)(1)(A).

⁵¹⁰ Tenn. Code Ann. § 50-6-217(a)(1)(A).

⁵¹¹ Tenn. Code Ann. § 50-6-217(a)(1)(B).

⁵¹² Tenn. Code Ann. § 50-6-217(c)(7).

⁵¹³ Tenn. Code Ann. § 50-6-225(a)(1) ; see also *Pope v. Nebco of Cleveland, Inc.*, 585 S.W.3d 874, 882-85 (Tenn. 2018).

⁵¹⁴ Tenn. Sup. Ct. R. 51, § 2.

⁵¹⁵ Tenn. Code Ann. § 50-6-225(b)(2).

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 after it is mailed.⁵¹⁶ If no motion for review is filed, the panel decision becomes the judgment of the Supreme Court.⁵¹⁷ 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.⁵¹⁸ 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.

⁵¹⁶ Tenn. Code Ann. § 50-6-225(a)(5)(A)(ii), (a)(5)(B).

⁵¹⁷ Tenn. Code Ann. § 50-6-225(a)(5)(A).

⁵¹⁸ Tenn. Code Ann. § 50-6-225(a)(5)(A)(ii)(a)-(b).

CHAPTER 12 | 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.⁵¹⁹ 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.⁵²⁰ Additionally, the rule specifically provides that parties represented by counsel may not invoke these procedures on a *pro se* basis.⁵²¹ 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, Tennessee Rules of Appellate Procedure 9 and 10 appeals do not apply to judge recusal situations.⁵²²

The standard of review for the motion for disqualification or recusal is *de novo*.⁵²³

B. Stay is not automatic on appeal

The filing of a petition for recusal appeal does not automatically stay the trial court proceeding.⁵²⁴ 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.”⁵²⁵

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)⁵²⁶ within twenty-one (21) days of the trial court’s entry of the order.⁵²⁷ A bond for costs is no longer required in civil cases due to the amendment of Tennessee Supreme Court Rule 9. The remaining reference to the bond in Tennessee Supreme Court Rule 10B is likely an oversight.⁵²⁸ The contents

⁵¹⁹ Tenn. Sup. Ct. R. 10B, 2.01.

⁵²⁰ Tenn. Sup. Ct. R. 10B, 5.

⁵²¹ Tenn. Sup. Ct. R. 10B, 1.01, 3.01, 4.01.

⁵²² Tenn. Sup. Ct. R. 10B, cmt. to Sec. 2.

⁵²³ See Tenn. Sup. Ct. R. 10B, 2.01; *In re Conservatorship of Patton*, M2012-01878-COA10BCV, 2012 WL 4086151, at *1 n.3 (Tenn. Ct. App. Sept. 17, 2012), *reh’g denied* (Oct. 2, 2012).

⁵²⁴ Tenn. Sup. Ct. R. 10B, 2.04.

⁵²⁵ *Id.*

⁵²⁶ 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. Sup. Ct. R. 10B, Section 4.

⁵²⁷ Tenn. Sup. Ct. R. 10B, 2.01, 2.02.

⁵²⁸ Tenn. Sup. Ct. R. 10B, 2.02.

of the petition for recusal appeal set forth in Rule 10B, 2.03, include a statement of the issues presented for review, a statement of the facts relevant 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.⁵²⁹

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.⁵³⁰ 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.⁵³¹

Oral argument is allowed at the discretion of the Court.⁵³² 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.⁵³³ The Court may also order further briefing, in which case the time period for filing will be set by the Court.⁵³⁴ 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."⁵³⁵

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.⁵³⁶ 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.⁵³⁷

D. Motion to Recuse Appellate Court Judge

The process works similarly for motions to recuse intermediate appellate judges.⁵³⁸ 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."⁵³⁹

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.⁵⁴⁰ 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.⁵⁴¹ If the motion for court review is denied, then an accelerated appeal as of right automatically lies to the Tennessee Supreme Court.⁵⁴² 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.⁵⁴³

⁵²⁹ Tenn. Sup. Ct. R. 10B, 2.03.

⁵³⁰ See *Duke v. Duke*, 398 S.W.3d 665 (Tenn. Ct. App. 2012).

⁵³¹ *Elliott v. Elliott*, No. E2012-02448-COA10BCV, 2012 WL 5990268, at *3 n.1 (Tenn. Ct. App. Nov. 30, 2012), *no appeal taken*.

⁵³² Tenn. Sup. Ct. R. 10B, 2.06.

⁵³³ Tenn. Sup. Ct. R. 10B, 2.05.

⁵³⁴ *Id.*

⁵³⁵ Tenn. Sup. Ct. R. 10B, 2.01.

⁵³⁶ Tenn. Sup. Ct. R. 10B, 2.07.

⁵³⁷ See Tenn. Sup. Ct. R. 10B, 2.07.

⁵³⁸ See Tenn. Sup. Ct. R. 10B, Section 3.

⁵³⁹ Tenn. Sup. Ct. R. 10B, 3.01.

⁵⁴⁰ Tenn. Sup. Ct. R. 10B, 3.02.

⁵⁴¹ *Id.*

⁵⁴² *Id.*

⁵⁴³ *Id.*

When a party seeks the disqualification, recusal, or determination of constitutional or statutory incompetence of a Supreme Court justice, the justice is obligated to “act promptly” upon the motion and state in writing any grounds upon which the motion is denied.⁵⁴⁴ 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.⁵⁴⁵

E. Timeliness and Rehearing

The revised version of Rule 10B preserves the case law holding that recusal motions must be filed promptly.⁵⁴⁶ “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.”⁵⁴⁷

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.”⁵⁴⁸

F. New Judge on Remand

In the event that a case is remanded, litigants are often curious about whether they can seek a new judge to hear the case on remand. This is especially true for an appellant who has successfully had a trial court judge overturned on appeal. Appellate courts do have the power to “order reassignment of a case to a different judge on remand in the exercise of the court’s inherent power to administer the system of appeals and remand.”⁵⁴⁹ The Court of Appeals recently revisited the standard for determining whether or not it will order the case to be reassigned on remand:

Some factors to be considered by an appellate court in deciding whether to exercise its supervisory authority to reassign a case are: (1) whether on remand the trial judge can be expected to follow the dictates of the appellate court; (2) whether reassignment is advisable to maintain the appearance of justice; [(3)] whether reassignment risks undue waste and duplication.⁵⁵⁰

Note that “[r]ulings of a trial judge, even if erroneous, numerous and continuous, do not, without more justify disqualification.”⁵⁵¹ Appellate courts are most likely to reassign a case if the case has been appealed on multiple occasions, the previous instructions

⁵⁴⁴ Tenn. Sup. Ct. R. 10B, 3.03.

⁵⁴⁵ *Id.*

⁵⁴⁶ See Tenn. Sup. Ct. R. 10B, 2.01; *Marcum v. Caruana*, No. M2012-01827-COA-10B-CV, 2012 WL 3984631, at *6 (Tenn. Ct. App. Sept. 11, 2012), *no appeal taken*.

⁵⁴⁷ Tenn. Sup. Ct. R. 10B, cmt. to Sec. 1.

⁵⁴⁸ Tenn. Sup. Ct. R. 10B, 2.06.

⁵⁴⁹ *Culbertson v. Culbertson*, 455 S.W.3d 107, 157 (Tenn. Ct. App. 2014) (quoting *Rudd v. Rudd*, No. W2011-01007-COA-R3-CV, 2011 WL 6777030, at *7 (Tenn. Ct. App. Dec. 22, 2011)).

⁵⁵⁰ *Biggs v. Town of Nolensville*, No. M2021-00397-COA-R3-CV, 2022 WL 41117, at *6 (Tenn. Ct. App. Jan. 5, 2022), *no appeal taken* (quoting *Rudd v. Rudd*, No. W2011-01007-COA-R3-CV, 2011 WL 6777030, at *7 (Tenn. Ct. App. Dec. 22, 2011)).

⁵⁵¹ *Alley v. State*, 882 S.W.2d 810, 821 (Tenn. Crim. App. 1994).

to the trial court were clear, and the trial court has “had difficulty putting his [or her] previous views and findings aside and complying with the mandate on remand.”⁵⁵²

⁵⁵² See, e.g., *Rudd v. Rudd*, No. W2011-01007-COA-R3-CV, 2011 WL 6777030, at *7 (Tenn. Ct. App. Dec. 22, 2011), no appeal taken.

CHAPTER 13 | 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.⁵⁵³ 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.⁵⁵⁴ 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" ⁵⁵⁵ This standard is also encountered in appeals of administrative decisions.⁵⁵⁶

What is "material evidence"? It "is relevant evidence that a reasonable person would accept as adequate to support a rational conclusion."⁵⁵⁷ 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.'"⁵⁵⁸ 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.⁵⁵⁹

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.⁵⁶⁰ A trial court's conclusions of law are subject to a de novo review with no presumption of correctness.⁵⁶¹

3. Abuse of Discretion

The abuse of discretion standard applies in a variety of circumstances. For example, the abuse of discretion standard

⁵⁵³ Tenn. R. App. P. 27(a)(7)(B).

⁵⁵⁴ Tenn. R. App. P. 13(d).

⁵⁵⁵ *Hohenberg Bros. Co. v. Missouri Pac. R.R. Co.*, 586 S.W.2d 117, 119 (Tenn. Ct. App. 1979).

⁵⁵⁶ See *Leonard Plating Co. v. Metro. Gov't of Nashville & Davidson Cnty.*, 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).

⁵⁵⁷ *Id.*

⁵⁵⁸ *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.

⁵⁵⁹ See *Barnes*, 48 S.W.3d at 704.

⁵⁶⁰ Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001).

⁵⁶¹ *S. Constructors, Inc. v. Loudon Cnty. Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

applies to decisions to admit evidence.⁵⁶² An abuse of discretion occurs when the trial court “applied incorrect legal standards, 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.”⁵⁶³

Appellate courts review criminal sentencing decisions for abuse of discretion with a presumption of reasonableness.⁵⁶⁴

4. The Topsy Coachman Doctrine

An appellate court can also affirm a trial court’s decision if it reaches the correct result for the wrong reason.⁵⁶⁵ This is referred to as the “Topsy Coachman Doctrine.”⁵⁶⁶ This term stems from an 1879 Georgia Supreme Court case, which itself quoted a 1774 Oliver Goldsmith poem, *Retaliation: A Poem*:

The pupil of impulse, it forc'd him along,
His conduct still right, with his argument wrong;
Still aiming at honor, yet fearing to roam,
The coachman was tipsy, the chariot drove home.⁵⁶⁷

The doctrine has been recognized in Tennessee since at least 1902, when the Tennessee Supreme Court stated that it will affirm a trial court’s correct holding even when it’s based upon an erroneous theory of the law.⁵⁶⁸

5. Appellate Court’s Ability to Raise Issues Sua Sponte

An appellate court’s authority generally will extend only to those issues presented for review.⁵⁶⁹ An appellate court must consider subject-matter jurisdiction, however, regardless of whether that issue was presented by the parties or addressed below, and “may in its discretion consider other issues in order, among other reasons: (1) to prevent needless litigation, (2) to prevent injury to the interests of the public, and (3) to prevent prejudice to the judicial process.”⁵⁷⁰ When an appellate court considers an issue that has not been properly presented, it must give the parties fair notice and an opportunity to be heard on the dispositive issues.⁵⁷¹ This seems to mostly happen in criminal cases.

⁵⁶² *State v. Riels*, 216 S.W.3d 737, 748 (Tenn. 2007).

⁵⁶³ *State v. Tolle*, 591 S.W.3d 539, 545 (Tenn. 2019) (citing *State v. Davis*, 466 S.W.3d 49, 61 (Tenn. 2015)).

⁵⁶⁴ *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012) (adopting an abuse of discretion standard of review, granting a presumption of reasonableness to within-range sentencing decisions that reflect a proper application of the purposes and principles of the Sentencing Act); *State v. Caudle*, 388 S.W.3d 273, 278 (Tenn. 2012) (extending the same standard to review of alternative sentencing determinations); *State v. Pollard*, 432 S.W.3d 851, 860 (Tenn. 2013) (extending the same standard to review of consecutive sentencing determinations); *State v. King*, 432 S.W.3d 316, 324 (Tenn. 2014) (extending the same standard to review of judicial diversion decisions); *State v. Dagnan*, 641 S.W.3d 751, 759 (extending the same standard to review of probation revocations).

⁵⁶⁵ *Biles v. Roby*, No. W2016-02139-COA-R3-CV, 2017 WL 3447910, at *6 n.3 (Tenn. Ct. App. Aug. 11, 2017), *perm. app. denied* (Tenn. Jan. 22, 2018).

⁵⁶⁶ *Id.*

⁵⁶⁷ *Lee v. Porter*, 63 Ga. 345, 346 (1879).

⁵⁶⁸ *Sheafer v. Mitchell*, 109 Tenn. 181, 71 S.W. 86, 87 (1902).

⁵⁶⁹ Tenn. R. App. P. 13(b).

⁵⁷⁰ *Id.* See also *State v. Bristol*, 654 S.W.3d 917, 926 (Tenn. 2022).

⁵⁷¹ *Bristol*, 654 S.W.3d at 927.

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.⁵⁷² Notice is served by the party challenging the statute by serving a copy of his brief on the Attorney General.⁵⁷³ 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.”⁵⁷⁴

C. Prehearing conferences

The Tennessee Rules of Appellate Procedure permit appellate courts to order a prehearing conference.⁵⁷⁵ 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.⁵⁷⁶ “In this connection, Tennessee Rule of Civil Procedure 16 should be consulted.”⁵⁷⁷

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 2,⁵⁷⁸ 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.⁵⁷⁹

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.⁵⁸⁰ The stipulation requires parties to waive a written opinion and any appeal to the Tennessee Supreme Court.⁵⁸¹ In exchange, the parties receive priority for oral argument and an oral decision from the bench following oral argument.⁵⁸² If oral argument is requested, it will be accelerated and set within sixty (60) days after the case is at

⁵⁷² See Tenn. Code Ann. § 29-14-107(b); Tenn. R. Civ. P. 24.04; Tenn. R. App. P. 32.

⁵⁷³ Tenn. R. App. P. 32(a).

⁵⁷⁴ 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)).

⁵⁷⁵ Tenn. R. App. P. 33.

⁵⁷⁶ Tenn. R. App. P. 33 adv. comm’n cmt.

⁵⁷⁷ *Id.*

⁵⁷⁸ Tenn. R. App. P. 4(a) adv. comm’n cmt.

⁵⁷⁹ Tenn. R. App. P. 2.

⁵⁸⁰ Tenn. Ct. App. R. 13.

⁵⁸¹ Tenn. Ct. App. R. 13(6), (8).

⁵⁸² *Id.* at (3), (5).

issue or sixty (60) days after the stipulation is filed, whichever is later.⁵⁸³ The briefing schedule is not accelerated.⁵⁸⁴ An example of such an accelerated appeal is *Taylor v. Taylor*.⁵⁸⁵

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.⁵⁸⁶

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.⁵⁸⁷

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.⁵⁸⁸ 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.⁵⁸⁹ Oral arguments are only permitted when ordered by the Supreme Court, on its own motion or upon application of a party.⁵⁹⁰ 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.⁵⁹¹

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.⁵⁹² 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."⁵⁹³ Upon its own motion, the

⁵⁸³ *Id.* at (3).

⁵⁸⁴ *Id.* at (2).

⁵⁸⁵ *Taylor v. Taylor*, No. M2009-01411-COA-R3-CV, 2010 WL 174775 (Tenn. Ct. App. Jan. 19, 2010), *no appeal taken*.

⁵⁸⁶ Tenn. Sup. Ct. R. 23, § 1.

⁵⁸⁷ *Id.* at § 3.

⁵⁸⁸ *Id.* at § 7(A).

⁵⁸⁹ *Id.*

⁵⁹⁰ *Id.* at § 7(B).

⁵⁹¹ *Id.* at § 8, 9.

⁵⁹² Tenn. Code Ann. § 16-3-201(d).

⁵⁹³ *Id.*

Supreme Court may assume jurisdiction when there is a “compelling public interest.”⁵⁹⁴ 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 of constitutional law involved with appointing a new justice to be the fifth member of the Tennessee Supreme Court.⁵⁹⁵

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.⁵⁹⁶ 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.⁵⁹⁷ 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.⁵⁹⁸

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.⁵⁹⁹

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.⁶⁰⁰ The agency is named as respondent.⁶⁰¹ Instead of a notice of appeal, a petition for review is filed.⁶⁰² The petition must specify the party seeking review, designate the order appealed from, and briefly describe the issues which the petitioner intends to raise.⁶⁰³

The appeal must be accompanied by any applicable fees, taxes, or documentation required by Tennessee Rule of Appellate Procedure 6.⁶⁰⁴ 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).⁶⁰⁵ 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.⁶⁰⁶ Such notice shall describe the position of the intervenor, and shall be served on the agency and all parties in the proceeding before the agency.⁶⁰⁷

⁵⁹⁴ *Id.*

⁵⁹⁵ *Bredesen v. Tenn. Jud. Selection Comm’n*, 214 S.W.3d 419 (Tenn. 2007).

⁵⁹⁶ Tenn. R. App. P. 8(a); see also Tenn. Code Ann. § 40-11-144.

⁵⁹⁷ Tenn. R. App. P. 8(a).

⁵⁹⁸ *Id.*

⁵⁹⁹ Tenn. Code Ann. § 4-5-322(b)(1)(A).

⁶⁰⁰ Tenn. R. App. P. 12, pt. I(a).

⁶⁰¹ *Id.*

⁶⁰² *Id.*

⁶⁰³ Tenn. R. App. P. 12, pt. I(b).

⁶⁰⁴ Tenn. R. App. P. 12, pt. I(c).

⁶⁰⁵ Tenn. R. App. P. 12, pt. I(d).

⁶⁰⁶ Tenn. R. App. P. 12, pt. I(e).

⁶⁰⁷ *Id.*

The record of the proceeding before the agency is filed by the agency within forty-five (45) days after the petition for review is filed.⁶⁰⁸ 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.⁶⁰⁹ 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.⁶¹⁰ The agency may file a responsive brief but is not required to do so.⁶¹¹ The Tennessee Rules of Appellate Procedure control these appeals, but to the extent there is any conflict between the Rules and the UAPA, the UAPA controls.⁶¹²

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.⁶¹³ Under Part II, appeals must be filed within thirty (30) days after the date of entry of the administrative order appealed from.⁶¹⁴ 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.⁶¹⁵ The agency and all other parties of record shall be named as respondents.⁶¹⁶ 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 6.⁶¹⁷ The clerk shall docket the proceeding and send notice of the docketing as provided in Tennessee Rule of Appellate Procedure 5(c).⁶¹⁸

The petitioner must serve the petition for review on the agency and all other parties of record to the proceeding before the agency.⁶¹⁹ 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.⁶²⁰

The entire record before the agency shall be the record on review unless the agency or the parties stipulate to omit portions.⁶²¹ The record shall be filed by the agency within forty-five (45) days after the filing of the petition for review.⁶²² After this, the briefing schedule conforms to the Tennessee Rules of Appellate Procedure.⁶²³

3. Claims Commission appeals

Claims Commission appeals are directly appealed to the Court of Appeals and are governed by Tennessee Rule of

⁶⁰⁸ Tenn. R. App. P. 12, pt. I(f).

⁶⁰⁹ Tenn. R. App. P. 12, pt. I(g).

⁶¹⁰ *Id.*

⁶¹¹ *Id.*

⁶¹² Tenn. R. App. P. 12, pt. I(h) (referencing Tenn. Code Ann. § 4-5-322(f)).

⁶¹³ Tenn. R. App. P. 12, pt. II.

⁶¹⁴ Tenn. R. App. P. 12, pt. II(a).

⁶¹⁵ *Id.*

⁶¹⁶ *Id.*

⁶¹⁷ *Id.*

⁶¹⁸ *Id.*

⁶¹⁹ Tenn. R. App. P. 12, pt. II(b).

⁶²⁰ Tenn. R. App. P. 12, pt. II(c).

⁶²¹ Tenn. R. App. P. 12, pt. II(d).

⁶²² Tenn. R. App. P. 12, pt. II(e).

⁶²³ Tenn. R. App. P. 12, pt. II(h).

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.⁶²⁵ 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 14.⁶²⁶ If the case has become moot, the court will remand the case with directions to vacate the judgment.⁶²⁷

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.

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.

If a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client, and the lawyer and client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter.⁶²⁸

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.⁶²⁹ 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.⁶³⁰ 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.⁶³¹

⁶²⁴ Tenn. Code Ann. § 9-8-403(a)(1).

⁶²⁵ *McIntyre v. Traughber*, 884 S.W.2d 134, 137 (Tenn. Ct. App. 1994).

⁶²⁶ 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), *no appeal taken*.

⁶²⁷ See *Butler v. White*, No. W2005-01382-COA-R3-CV, 2006 WL 64599, at *3 (Tenn. Ct. App. Jan. 12, 2006), *no appeal taken* (citing *Ford Consumer Fin. Co. v. Clay*, 984 S.W.2d 615, 617 (Tenn. Ct. App. 1998); *McIntyre*, 884 S.W.2d at 138).

⁶²⁸ Tenn. Sup. Ct. R. 8, RPC 1.3, Comment 4.

⁶²⁹ Tenn. Code Ann. § 40-14-203.

⁶³⁰ Tenn. R. Crim. P. 37(e)(1).

⁶³¹ Tenn. R. Crim. P. 37(e)(3); see also *Jones v. State*, 548 S.W.2d 329, 332-34 (Tenn. Ct. Crim. App. 1976), *perm. app. denied* (Jan. 17, 1977).

In the Court of Criminal Appeals, counsel may be allowed to withdraw only for good cause shown and if the application is made to the court when such counsel is not delinquent in his duties.⁶³² If privately retained counsel seeks to withdraw after the notice of appeal has been filed, the motion to withdraw must be presented to the Court of Criminal Appeals.⁶³³ 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.⁶³⁴ Appointed counsel may also withdraw during an appeal if the appeal is deemed wholly frivolous by the court.⁶³⁵ The procedures for withdrawal under such circumstances are in Rule 22 and are to be strictly applied.⁶³⁶

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.⁶³⁷ 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.⁶³⁸ 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.⁶³⁹ The Tennessee Supreme Court has described a frivolous appeal as an appeal that is “devoid of merit” and “has no reasonable chance of success.”⁶⁴⁰ It is one completely “lacking in justiciable issues.”⁶⁴¹

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

⁶³² Tenn. Ct. Crim. App. R. 12.

⁶³³ *Id.*

⁶³⁴ *See id.*

⁶³⁵ Tenn. Ct. Crim. App. R. 22.

⁶³⁶ *See id.*

⁶³⁷ Tenn. Sup. Ct. R. 14.

⁶³⁸ *Id.*

⁶³⁹ *Davis v. Gulf Ins. Grp.*, 546 S.W.2d 583, 586 (Tenn. 1977).

⁶⁴⁰ *See id.*

⁶⁴¹ *Id.*

questions are raised by the appeal.⁶⁴² 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.⁶⁴³ An appeal in which the appellate court's ability to address the issues 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.⁶⁴⁴

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."⁶⁴⁵

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 jury⁶⁴⁶ and asserting error that was not raised in a motion for a new trial.⁶⁴⁷

Of course, simply filing an appeal and stating no reason or justification for the appeal may result in sanctions,⁶⁴⁸ 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,⁶⁴⁹ and may result in sanctions.⁶⁵⁰ 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.⁶⁵¹ Considering the appellant's previous record before the court, the court found the current case before it to be frivolous.⁶⁵²

More recently, in *Barnett v. Tennessee Orthopaedic Alliance*, 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.

⁶⁴² *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), *no appeal taken*.

⁶⁴⁶ *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).

⁶⁴⁴ *Young v. Barrow*, 130 S.W.3d 59, 67 (Tenn. Ct. App. 2003).

⁶⁴⁵ *Williams*, 286 S.W.3d at 297-98.

⁶⁴⁶ *Pye v. Opryland USA, Inc.*, No. 01A01-9302-CV-00074, 1993 WL 541115 (Tenn. Ct. App. Dec. 29, 1993), *no appeal taken*; *Leake v. Airport Toyota of Memphis, Inc.*, No. 02A01-9208-CV-0023, 1993 WL 360443 (Tenn. Ct. App. Sept. 14, 1993), *no appeal taken*.

⁶⁴⁷ *Pye*, 1993 WL 541115, at *2.

⁶⁴⁸ *Cagle v. Cagle*, No.03A01-9209-CV-00344, 1993 WL 1934 (Tenn. Ct. App. Jan. 6, 1993), *perm. app. denied, concurring in results only* (July 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.)

⁶⁴⁹ *Sharp v. Allstate Ins. Co.*, No. 02A01-9204-CV-00107, 1992 WL 289660, at *3 (Tenn. Ct. App. Oct. 16, 1992), *no appeal taken*.

⁶⁵⁰ *Hooker v. Sundquist*, 107 S.W.3d 532, 536 (Tenn. Ct. App. 2002) (quoting *Boyd v. Prime Focus, Inc.*, 83 S.W.3d 761, 765 (Tenn. Ct. App. 2001)) ("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.").

⁶⁵¹ *Harris v. State*, No. 03A01-9401-CV-00016, 1994 WL 399127, at *4 (Tenn. Ct. App. Aug. 3, 1994), *no appeal taken*.

⁶⁵² *Id.*

Further, the matter was remanded to the trial court for a determination of attorney's fees to be awarded to the defendants.⁶⁵³

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.

2. Damages recoverable for frivolous appeals

Upon motion, the appellate court can award damages against the appellant for a frivolous appeal.⁶⁵⁴ "Damages" includes, but is not limited to costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.⁶⁵⁵ Attorney's fees are also among those damages that can be awarded.⁶⁵⁶ 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.⁶⁵⁷ 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.⁶⁵⁸

3. Tennessee Court of Appeals Rule 17

In 2023, the Court of Appeals adopted new Court of Appeals Rule 17.⁶⁵⁹ The new Rule 17 essentially takes the standards, procedures, and sanctions of Tennessee Rule of Civil Procedure 11 (a.k.a. "Rule 11"), which is applicable to trial courts, and makes them applicable to the Court of Appeals.⁶⁶⁰ Henceforth, whenever presenting "a notice of appeal, application for permission to appeal, application for extraordinary appeal, petition for recusal appeal, brief, motion, or other paper" to the Court of Appeals, the attorney (or unrepresented party) doing so "is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," that

- (1) 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;
- (2) the issues, claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support;
- (4) the denial of factual contentions is warranted on the evidence; and
- (5) the filing is neither repetitive, frivolous nor vexatious and does not constitute an abuse of the judicial process.⁶⁶¹

The Rule also provides that attorneys, law firms, or parties that violate the rule, "or are responsible for the violation," may be

⁶⁵³ *Barnett v. Tennessee Orthopaedic Alliance*, 391 S.W.3d 74, 85 (Tenn. Ct. App. 2012).

⁶⁵⁴ Tenn. Code Ann. § 27-1-122.

⁶⁵⁵ *Id.*

⁶⁵⁶ See *Leake v. Airport Toyota of Memphis, Inc.*, No. 02A01-9208-CV-0023, 1993 WL 360443, at *4 (Tenn. Ct. App. Sept. 14, 1993), *no appeal taken*.

⁶⁵⁷ See Tenn. Code Ann. § 27-1-122.

⁶⁵⁸ See, e.g., *Davis*, 546 S.W.2d at 586; *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).

⁶⁵⁹ *In Re: Adoption of the New Court of Appeals Rule Regarding Representations to the Court and Sanctions*, No. ADM2023-00919 (Tenn. Ct. App. June 21, 2023).

⁶⁶⁰ Compare Tenn. R. Civ. P. 11 with Tenn. Ct. App. R. 17.

⁶⁶¹ Tenn. Ct. App. R. 17.01.

sanctioned.⁶⁶²

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.⁶⁶³ 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.⁶⁶⁴ Parties must file a joint stipulation requesting suspension within fifteen (15) days of the date of the notice sent by the Clerk.⁶⁶⁵ The Rule contemplates a suspension of “no more than sixty days to enable the parties to mediate their dispute.”⁶⁶⁶ 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.⁶⁶⁷

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.”⁶⁶⁸ If the mediation is not successful, the parties have five (5) days to file a notice with the Clerk requesting resumption of the appeal.⁶⁶⁹ 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.⁶⁷⁰

Importantly, if, after sixty (60) days, no notice of voluntary dismissal has been filed, the case will be returned to the active docket, with the appellate deadlines reactivated.⁶⁷¹ 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.

⁶⁶² Tenn. Ct. App. R. 17.02.

⁶⁶³ Tenn. R. App. P. 34(a), 2009 adv. comm’n cmt.

⁶⁶⁴ Tenn. R. App. P. 35(a).

⁶⁶⁵ Tenn. R. App. P. 35(b).

⁶⁶⁶ *Id.*

⁶⁶⁷ *Id.*

⁶⁶⁸ Tenn. R. App. P. 35(c).

⁶⁶⁹ *Id.*

⁶⁷⁰ *Id.*

⁶⁷¹ *Id.*

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.