

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ORDER AMENDING RULE 42 OF §
THE RULES OF THE SUPREME §
COURT OF DELAWARE §

Before **STRINE**, Chief Justice, **HOLLAND**, **VALIHURA**, **VAUGHN**, and **SEITZ**, Justices, constituting the Court *en banc*.

ORDER

This 30th day of April 2015, it appears to the Court that it is desirable to amend Supreme Court Rule 42. The amendments set forth below are effective May 15, 2015.

(1) Current Supreme Court Rule 42 is stricken in its entirety and the following new Rule 42 is adopted:

RULE 42. INTERLOCUTORY APPEALS

(a) *Exercise of Jurisdiction.* The Court's jurisdiction to hear and determine appeals in civil cases from interlocutory orders of a trial court, including a trial court acting as an intermediate appellate court in the review of a ruling, decision or order of a court or an administrative agency, shall be exercised in accordance with this rule as to certification and acceptance of interlocutory appeals. All time periods under this rule should be calculated under Supreme Court Rule 11.

(b) *Criteria to Be Applied in Determining Certification and Acceptance of Interlocutory Appeals.*

(i) No interlocutory appeal will be certified by the trial court or accepted by this Court unless the order of the trial court decides a substantial issue of material importance that merits appellate review before a final judgment.

(ii) Interlocutory appeals should be exceptional, not routine, because they disrupt the normal procession of litigation, cause delay, and can threaten to exhaust scarce party and judicial resources. Therefore, parties should only

ask for the right to seek interlocutory review if they believe in good faith that there are substantial benefits that will outweigh the certain costs that accompany an interlocutory appeal.

(iii) Any application for interlocutory review shall contain a statement that the applicant and the applicant's counsel have determined in good faith that the application meets the criteria set forth in this paragraph. Consistent with the principles set forth in subparagraph (ii) of this paragraph, in deciding whether to certify an interlocutory appeal, the trial court should consider whether:

(A) The interlocutory order involves a question of law resolved for the first time in this State;

(B) The decisions of the trial courts are conflicting upon the question of law;

(C) The question of law relates to the constitutionality, construction, or application of a statute of this State, which has not been, but should be, settled by this Court in advance of an appeal from a final order;

(D) The interlocutory order has sustained the controverted jurisdiction of the trial court;

(E) The interlocutory order has reversed or set aside a prior decision of the trial court, a jury, or an administrative agency from which an appeal was taken to the trial court which had decided a significant issue and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice;

(F) The interlocutory order has vacated or opened a judgment of the trial court;

(G) Review of the interlocutory order may terminate the litigation; or

(H) Review of the interlocutory order may serve considerations of justice.

After considering these factors and its own assessment of the most efficient and just schedule to resolve the case, the trial court should identify whether and why the likely benefits of interlocutory review outweigh the probable costs, such that interlocutory review is in the interests of justice. If the balance is uncertain, the trial court should refuse to certify the interlocutory appeal.

(c) Procedure for Certification of Interlocutory Appeals in the Trial Court. An application for certification of an interlocutory appeal shall be made in the first instance to the trial court in accordance with the following procedures:

(i) Application. Such application shall be served and filed within 10 days of the entry of the order from which the appeal is sought or such longer time as the trial court, in its discretion, may order for good cause shown.

(ii) Response. An opposing party shall have 10 days (or such shorter time as the trial court shall in its discretion order, upon notice for good cause shown or upon the trial court's order sua sponte) after such service within which to serve and file a written response or, if the trial court so directs, present an oral response in lieu of a written response.

(iii) Action by Trial Court. Within 10 days after filing of the response or, if there is none, within 20 days after filing the application, the trial court shall enter an order certifying or refusing to certify the interlocutory appeal.

(iv) Form of Order. Such order shall be substantially in the form set forth in Official Form L, setting forth the basis for the certification and indicating which of the criteria set forth in paragraph (b) of this rule is applicable.

(v) Service on Trial Court. A copy of the application and response referred to in subparagraphs (i) and (ii) of this paragraph shall, concurrently with service and filing, be delivered by the party serving and filing it to the judge of the trial court whose order is sought to be reviewed.

(d) *Procedure for Acceptance of Interlocutory Appeals in the Supreme Court.* No interlocutory order shall be reviewed by this Court unless the appeal therefrom has been accepted by this Court in accordance with the following procedure:

(i) Time to File. The notice of appeal may be filed at any time after the filing of the application for certification in the trial court, except that it shall be the obligation of appellant to serve and file in this Court a notice of appeal of an interlocutory order within 30 days after the entry of the order from which the appeal is sought to be taken;

(ii) Form of Filing. The notice of appeal and any cross-appeal shall comply with this rule, Rules 6 and 7 of this Court and with such version of Official Form M as shall be applicable to the situation;

(iii) Supplemental Notice. If the notice of appeal is filed before action has been taken by the trial court on the application for certification, appellant shall file a supplementary notice of appeal within 10 days after the expiration of the time periods set forth in paragraph (c) of this rule.

(iv) Contents of Notice. The notice of appeal and the supplementary notice of appeal, if any, shall include a true and correct copy of such of the following papers as shall have been filed below except that the supplementary notice of appeal shall not contain any papers previously attached to the notice of appeal:

(A) Application. The application for certification and attachments thereto; the Court discourages unnecessary attachments to the application for certification;

(B) Order on Review. The interlocutory order from which the appeal is sought to be taken together with any opinion of the trial court with respect thereto;

(C) Response. The written response, if any, to the application for certification, or the transcript, if and when available, of an oral response in lieu of a written response;

(D) Action by Trial Court. The order, if any, of the trial court certifying or refusing to certify the interlocutory appeal and any opinion with respect thereto; and

(E) No Action by Trial Court. If no order has been entered by the trial court on the application for certification within 30 days of the entry of the interlocutory order, a separate certificate of appellant's counsel so stating shall be attached.

(v) Action by This Court. Unless otherwise ordered, this Court shall thereupon and without further argument determine in its discretion whether to accept or refuse the interlocutory appeal. In exercising that discretion, this Court may consider all relevant factors, including the decision of the trial court whether to certify the interlocutory appeal and the factors set forth in paragraph (b) of this rule.

(vi) Proceedings After Acceptance. From the date of the acceptance of the interlocutory appeal, further proceedings shall be governed by these Rules, except:

(A) Trial Record Not Transmitted. The record shall not, in the first instance, be transmitted to the Clerk of this Court. Instead, the respective appendices of the parties, or a joint appendix if one is agreed upon, shall contain such record materials as each party believes relevant to the determination of the issue on appeal. The Court may, at its option, thereafter direct the clerk of the trial court to transmit all of the record, or such portions as the Court deems relevant to consideration of the interlocutory appeal.

(B) Brief Schedule. The time schedule for the filing of the briefs and appendices, under Rule 15, shall commence upon the third day following the acceptance of the interlocutory appeal, if no transcript is ordered. In the event a transcript is designated to be prepared under Rule 9(e), the brief schedule shall commence upon this Court's receipt of the court reporter's final transcript log entry.

(C) Preparation of transcript. The time schedule for the preparation and filing of the transcript, if designated under Rule 9(e), shall commence upon the third day following the acceptance of the interlocutory appeal.

(vii) Proceedings After Refusal. If the appeal is refused, a certified copy of the order shall be sent to the trial court and a copy thereof to each counsel.

(e) *Continuation of Other Proceedings in the Trial Court.* The pendency of proceedings under this rule shall not operate as an automatic stay. Applications for stays shall be processed in the same manner as stays pending appeal under Rule 32.

(f) *Failure to Seek or Obtain Review of Interlocutory Order.* The failure to seek review of or the refusal of the Court to accept an appeal from an interlocutory order under this rule shall not bar a party from seeking review of such interlocutory order on appeal from the final order, judgment or decree.

(2) The Comment to current Supreme Court Rule 42 also is stricken in its entirety, and the following new comment is adopted:

In reviewing existing Supreme Court Rule 42, regarding Interlocutory Appeals, the Committee found that the rule itself provided some, but ultimately insufficient, guidance as to when the Court would be more or less inclined to hear an interlocutory appeal. In the experience of members, there were instances where seemingly identical circumstances yielded different results. Therefore, it was felt that a revised rule, which more precisely identified instances where the Court would be inclined to consider an interlocutory appeal would be helpful to practitioners, litigants, trial courts, and, ultimately, the Court itself. It is intended that a revised rule will limit interlocutory appeal requests to those instances which will truly benefit the judicial process and enable the parties and lower courts to focus on the factors and considerations which the Court feels are most important in considering whether to take an interlocutory appeal.

Accordingly, the revised Rule now more specifically sets forth those instances in which the Court may be inclined to consider an interlocutory appeal, although the revised rule does still leave discretion to the Court for other cases, not covered by specific language, where review of an interlocutory order “may serve considerations of justice.” The revised Rule

also makes clear that interlocutory appeals are considered “exceptional” and “not routine.” Thus, even if an interlocutory appeal satisfies one or more of the possible criteria set forth in the Rule, the Court may still refuse the appeal. The Committee believes that the addition of this language will reinforce what has always been the case with interlocutory appeals – they are rarely granted and generally not favored.

Even with the changes made, the Committee and the Court believe that the grant of interlocutory appeals will be the exception, rather than the rule, and that even if a particular case meets one of the criteria identified, it does not necessarily mean that an interlocutory appeal will be granted. The Committee and the Court will review the operation of the rule amendments after one year to determine whether further amendment is necessary to discourage meritless applications to the trial court and this Court.

(3) Official Form L is stricken in its entirety and replaced with:

**IN THE....[1]....COURT OF THE
STATE OF DELAWARE
IN AND FOR....[2]....COUNTY**

....[3].....,	:	Civil Action No.[5]....
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
....[4].....,	:	
	:	
Defendant.	:	

**ORDER GRANTING LEAVE TO APPEAL
FROM INTERLOCUTORY ORDER**

This day of,, the[6]..... having made application under Rule 42 of the Supreme Court for an order certifying an appeal from the interlocutory order of this Court, dated[7].....; and the Court having found that such order decides a substantial issue of material importance that merits appellate review before a final judgment and that the following

criteria of Supreme Court Rule 42(b)(iii) apply[8].....;
IT IS ORDERED that the Court's order of[9]..... is hereby certified to
the Supreme Court of the State of Delaware for disposition in accordance
with Rule 42 of that Court.

Dated:
Judge

Insertions to Official Form L:

- [1] Lower court.
- [2] County in which lower court sits.
- [3] Plaintiff's name.
- [4] Defendant's name.
- [5] Lower court civil action number.
- [6] "Plaintiff" or "Defendant."
- [7] Date of interlocutory order.
- [8] Applicable criteria of Rule 42(b)(iii).
- [9] Date of interlocutory order.

(4) The Clerk of this Court is directed to transmit a certified copy of the
Order to the clerk for each trial court in each county.

BY THE COURT:

/s/ Leo E. Strine, Jr.
Chief Justice