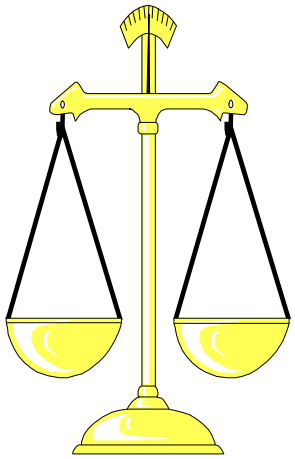
DELAWARE APPELLATE HANDBOOK



SECOND EDITION

Appellate Handbook Committee
of the Delaware Supreme Court Rules Advisory Committee

September 1996

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

CHAPTER 1. INTRODUCTION

Jesse A. Finkelstein[1]

This Second Edition of the Delaware Appellate Handbook builds upon a solid foundation created by the authors of the First Edition over a decade ago. At the direction of Chief Justice Daniel L. Herrmann the First Edition was published in 1984. Chief Justice E. Norman Veasey, then-Chair of the Supreme Court Rules Committee, appointed an eminent panel of members of the Bar to undertake the project. Bruce M. Stargatt chaired the Handbook Committee, and Justice Andrew D. Christie acted as judicial co-chair.

The First Edition was a great success, and was supplemented in 1990. The many capable authors and reviewers who had participated in the creation of the First Edition, along with many new members of the Bar, produced a supplement bringing up to date the text of the First Edition.

In 1993, the Justices of the Supreme Court requested that the Supreme Court Rules Committee undertake a comprehensive revision of the Supreme Court Rules. With Justice Randy Holland serving as Committee liaison, the Committee worked extensively with Margaret Naylor and Gail Lafferty, Staff Attorneys for the Supreme Court, and Stephen Taylor, Court Administrator, to draft proposed revisions.

The revisions adopted by the Supreme Court in 1995 were extensive. Accordingly, Chief Justice Veasey and Justice Holland requested that the Committee produce a Second Edition of the Delaware Appellate Handbook.

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[1]Jesse A. Finkelstein, a member of the firm of Richards, Layton & Finger, served as Chairman of the Supreme Court Rules Committee from 1990 to 1996.

Like my predecessor, I was pleased to find that the original authors, and several new authors, were strongly supportive of the project. The Second Edition of the Delaware Appellate Handbook, like the first, benefits from the work of some of the best lawyers and judges in the state. I also wish to note the extensive coordination effort that John Dorsey undertook in assisting the Committee in compiling the Second Edition.

Since the production of the First Edition, there has been a dramatic shift from the printed word to electronic media. As a sign of this change, the primary method of distributing the Second Edition will be by computer disk. In order to reduce substantially the significant cost of the First Edition, the Supreme Court has arranged to make available disks containing the Second Edition.

In distributing the Second Edition in electronic form, we hope that it will be duplicated freely in whole or part as needed by practitioners. Additionally, it is hoped that firms with local area networks will make the Second Edition available to their network participants for reference.

For some of us, scrolling through a text on a computer screen can never replace leafing through actual printed pages. We recommend that you print out the entire Second Edition. When copied on both sides of a page, the handbook fits into a three- to four-inch ring binder.

Those who contributed to the preparation of the Second Edition had the honor of participating in what the Introduction to the First Edition referred to as "an important and enduring contribution to the practice of law in Delaware." To the many who assisted in this project, I offer my sincere appreciation.

CHAPTER 2. GUIDE TO THE USE OF THE DELAWARE APPELLATE HANDBOOK

TABLE OF CONTENTS

CHAPTER 2. GUIDE TO THE USE OF THE DELAWARE APPELLATE HANDBOOK

John T. Dorsey[1]

2.01 SCOPE OF APPELLATE HANDBOOK. The Second Edition of the Delaware Appellate Handbook, like the First Edition, was prepared to assist Delaware attorneys in appellate practice before the Delaware Supreme Court, Court of Chancery, Superior Court and Family Court. The Handbook can not, of course, provide a comprehensive analysis of every statute or rule governing appellate practice in Delaware. Moreover, while the authors of the various chapters have expended a great deal of time and effort in preparing the Handbook, there is no guarantee that it is error free. Rather, the Handbook should be viewed as a supplemental text to be used along side the applicable rules of court and the Delaware Code, and should not replace careful study of both reported and unreported decisions relevant to appellate practice.

The views expressed on Delaware appellate practice contained in this Handbook are those of the individual chapter authors. The fact that a Supreme Court Justice was on the committee charged with revising the Handbook, or that other members of the judiciary have reviewed the Handbook, should not be viewed as an official adoption of the authors views by the Delaware judiciary. The Handbook is not intended to create an approved system of appellate practice, or stop further development or study of appellate practice in Delaware. Rather, it is intended to be a useful guide-line for attorneys practicing at both the trial and appellate levels.

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[1]John T. Dorsey is an associate in the firm of Richards, Layton & Finger, Wilmington, Delaware. He expresses his appreciation to William D. Johnston and Thomas J. Reed who prepared the previous edition of this Chapter, and which forms the basis for much of the current Chapter.

2.02 CHAPTERS EXPLAINING THE APPELLATE PROCESS. Chapters 3, 4, 6, 13, and 17 together provide a procedural framework for appeals to the Delaware Supreme Court, as well as federal review of certain decisions of that Court. Chapters 3 and 4 primarily address initiation of civil appeals to the Delaware Supreme Court, but also contain valuable information pertinent to criminal appeals. Chapter 6 sets forth the legal standards for the scope of review of trial court and administrative agency factual findings and conclusions of law, and the standards for review of jury trial verdicts and underlying facts. Chapter 13 covers basic materials on initiating, prosecuting and defending criminal appeals. Finally, Chapter 17, details the available means for federal review of state appellate decisions, including appeals to the United States Supreme Court, as well as extraordinary writ practice in federal courts.

It should be noted that Chapter 17 of the first edition of the Handbook, which covered internal processing of cases on appeal before the Delaware Supreme Court, has been eliminated from this edition of the Handbook. The Committee believed that with the publication of the Delaware Supreme Court Internal Operating Procedures, this section of the Handbook was no longer needed. Attorneys interested in the Delaware Supreme Court's processing of cases should refer to the Operating Procedures.

2.03 SUPREME COURT APPELLATE PRACTICE CHAPTERS. Chapters 5, 7, 9, 11, 12, 14, 15 and 16 cover the mechanics of practice before the Supreme Court on appeals and original writs. Chapter 5 explains and analyzes the procedure for taking interlocutory appeals to the Supreme Court. Chapter 7 addresses expedited procedures such as a motion to affirm, currently a significant part of Delaware Supreme Court appellate practice, particularly in the criminal area. Chapter 9 explains other motions typically made in the Supreme Court. Chapter 11 discusses the penalties and possible sanctions for failure to comply with the Delaware Supreme Court Rules and

the Delaware Lawyer's Code of Professional Responsibility. Chapter 12 addresses the Supreme Court's decision and mandate, with particular emphasis on motions for reargument and motions for rehearing en banc. Chapter 14 discusses the original jurisdiction of the Supreme Court, including advisory opinions and the granting of extraordinary writs. Chapter 15 sets out and explains court costs and court administration.

Chapter 16 is devoted to sample forms for use in practice before the Delaware Supreme Court. Please note that Chapters 20 (Worker's Compensation Reviews), 22 (Family Court Appeals), 23 (Justice of the Peace Court Appeals) and 24 (Judicial Review of Zoning and Subdivision Control Decisions) include sample forms specially suited to the subject matter of the respective chapters. Chapter 16 reproduces both the Official Forms of the Supreme Court and forms suggested by the Committee for use in situations not covered by the Official Forms. The Official Forms are reproduced for the purpose of completeness. Keep in mind that the forms are not in the type font required by the Supreme Court. Therefore, care should be used when reproducing these forms for use in that Court.

2.04 CHAPTERS ON THE ART OF APPELLATE ADVOCACY. Chapters 8 and 10 are devoted to the art of appellate advocacy. Chapter 8 presents a comprehensive and detailed explanation of the form and style of briefs and suggests ways of improving the quality of advocacy in appellate brief writing. Chapter 10 offers the reader the norms for oral argument as well as valuable guidelines for effective oral advocacy before the Supreme Court and other courts.

2.05 APPEALS TO THE COURT OF CHANCERY. Recognizing that the right of appeal to the Court of Chancery from administrative agencies has been restricted by the adoption of the Delaware Administrative Procedures Act of 1976 (the "APA"), Chapter 18 addresses statutory appeals to the Court of Chancery from the Secretary of State, the Public Employment Relations

Board, the State Securities Commissioner and the Board of Pension Trustees. This chapter also reviews the mechanism for enforcement or vacation of arbitration awards.

2.06 APPEALS TO THE SUPERIOR COURT. Chapters 19 through 24 deal with appeals to the Superior Court in civil, criminal and "traffic" cases. Chapter 19 addresses appeals to the Superior Court from the Court of Common Pleas, appeals taken under the APA, and special statutory appeals to the Superior Court from decisions of state agencies.

Since the number of appeals to the Superior Court is so large, and the type so diverse, the remaining statutory appeal and review of actions in Superior Court are addressed in individual chapters in order to present greater depth of coverage. Thus, Chapter 20 is a discussion of Superior and Supreme Court review of awards by the Industrial Accident Board in Worker's Compensation cases. Chapter 21 elucidates the intricacies of appellate review of Unemployment Compensation cases in those courts. Chapter 22 covers appeals from the Family Court to the Superior and/or Supreme Courts in domestic relations and juvenile matters. Review of the decisions of Family Court Masters is also analyzed in this chapter. Chapter 23 details review of Justice of the Peace Court decisions in debt and trespass actions, in landlord-tenant actions, in traffic cases and in criminal appeals. Finally, Chapter 24 discusses the manner in which zoning decisions made by the Board of Adjustment may be reviewed in the Superior Court.

2.07 MISCELLANEOUS NOTES ON CONTENT AND FORMULATION OF THE HANDBOOK. Unreported decisions of Delaware courts are cited throughout the Handbook. The Committee decided not to append copies of these decisions to the Handbook, based upon considerations of added cost and bulk as well as the general availability of the decisions in all County Law Libraries and many law offices. Additionally, the reader undoubtedly will notice occasional treatment of the same or similar subjects in different chapters or contexts. This repetition is

intentional and is meant to accurately reflect the special view of, or emphasis placed upon the particular subject matter by the respective authors.

2.08 SUPPLEMENTAL MATERIALS. It is anticipated that the Handbook will be periodically reviewed, updated and supplemented to maintain its usefulness. In the interim, the reader should make certain that he or she updates any court rule, statutory, legislative, case law or practice reference in order to ensure containing validity. If the reader does note any error or omission in, or recent development pertinent to, the Handbook, he or she is requested to notify the Delaware Supreme Court Rules Advisory Committee.

2.09 REPRODUCTION OF THE HANDBOOK. The Second Edition of the Appellate Handbook has been made available on computer disk. Practitioners should feel free to create as many additional copies of the Handbook as needed, either in computer disk or hard copy format. In addition, the Handbook can be imported on to computer network systems for easy access by all members of a given firm or office.

CHAPTER 3. JURISDICTION OF THE SUPREME COURT, SCOPE, CONSTRUCTION AND APPLICATION OF THE SUPREME COURT RULES

TABLE OF CONTENTS

CHAPTER 3. JURISDICTION OF THE SUPREME COURT, SCOPE, CONSTRUCTION AND APPLICATION OF THE SUPREME COURT RULES

F. Alton Tybout[1]

3.01 COMPOSITION OF THE SUPREME COURT. There are five Justices of the Delaware Supreme Court, including the Chief Justice. Del. Const. art. IV, § 2. A quorum of the Supreme Court sitting en banc is five Justices, and a quorum of the Court sitting as a panel consists of three Justices. Supr. Ct. R. 4(b). If the three Justice panel is unable to reach a unanimous decision on the matter before them, or in the event that there is a reasonable likelihood that a prior decision of the Court may be modified or overruled, a rehearing is scheduled before the entire Court. Supr. Ct. R. 4(d). The entire Court is required to sit in any criminal case in which the accused has been sentenced to death or in other civil or criminal cases as the Court, by rule, or the General Assembly, may determine. Del. Const. art. IV, § 12; Supr. Ct. R. 4. Except as noted in death penalty cases and when two or more qualified and available members of the court vote for a hearing en banc ab initio, Supr. Ct. R. 4(g), there are no rules or statutes which require the Court to sit en banc. If there is an insufficient number of justices available to form a three justice panel, the Chief Justice or the next senior justice may designate a former justice of the Supreme Court or a judge of the Court of Chancery or the Superior Court to complete a quorum. Del. Const. art. IV, § 12; Supr. Ct. R. 2, 4(a). The assignment of judges to sit on the Supreme Court, when necessary, is fixed by "seniority" determined pursuant to Supr. Ct. R. 2(b). Retired Justices who assent may be appointed to sit temporarily pursuant to Del. Const. art. IV, § 38.

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[1]F. Alton Tybout is a partner in the firm of Tybout, Redfearn & Pell, Wilmington, Delaware.

3.02 APPELLATE JURISDICTION OF THE SUPREME COURT

a. Civil Appeals. Appellate jurisdiction is determined by Del. Const. art. IV, § 11. The Court has jurisdiction to receive appeals from the Superior Court and from the Court of Chancery in interlocutory or final judgments and other proceedings. Del. Const. art. IV, §§ 11(1)(a), 11(4). Any order, ruling, decision, or judgment of the Family Court in any civil proceeding, including a delinquency proceeding, also is appealable to the Supreme Court as a matter of right. 10 Del. C. § 1051(a). Article IV, § 11(1)(a) of the Delaware Constitution has been construed to give the Court jurisdiction over appeals only if there is a continuing justiciable controversy, and not if the issues are moot or an advisory opinion is sought. See, e.g., Family Court v. Alexander, Del. Supr., 522 A.2d 1265 (1987) (holding that the Superior Court's discharge in a habeas corpus proceeding of a person held in contempt in a Family Court proceeding is not appealable by the State on behalf of the Family Court).

b. Criminal Appeals. The Court has jurisdiction to receive appeals in criminal cases from the Superior Court on application of the accused in cases in which the sentence is death, imprisonment exceeding one month, or a fine exceeding $100, and in such other cases "as shall be provided by law." Del. Const. art. IV, § 11(b) See also Sack v. State, Del. Supr., No. 46, 1986, Horsey, J. (Mar. 31, 1986) (ORDER) (Supreme Court lacked jurisdiction over appeal in which the sentence was probation). For a discussion of criminal appeals, see Chapter 13, § 13.03(a)(2).

c. Election Offenses. The Court's appellate jurisdiction over prosecution for election offenses is governed by Del. Const. art. V, § 8.

d. Commencement of Appeals. The commencement of all appeals from final orders or judgments is controlled by Supr. Ct. R. 7. Interlocutory appeals to the Supreme Court are controlled by Supr. Ct. R. 42. Appeals in criminal cases by the State are controlled by Supr. Ct.

R. 27. The Court does not receive appeals from interlocutory orders in criminal cases. Steigler v. Superior Court, Del. Supr., 252 A.2d 300, 302-03 (1969), cert. denied, 396 U.S. 880 (1969). Under limited circumstances, a defendant in a criminal proceeding may seek relief by a writ of prohibition from the Court before a final order or judgment when the trial court's jurisdiction is challenged in a criminal proceeding. However, the writ is an extraordinary remedy which the Court is reluctant to grant unless the lack of jurisdiction in the trial court is manifest. In Re Hovey, Del. Supr., 545 A.2d 626, 628 (1988). But see Chapter 5.04 regarding the Court's acceptance of certified questions of law. Cross-appeals are controlled by Supr. Ct. R. 7.

3.03 EXTRAORDINARY WRIT JURISDICTION OF THE SUPREME COURT.

a. Writs. Under Del. Const. art. IV, § 11(6), the Court has original jurisdiction to issue writs of prohibition, quo warranto, certiorari and mandamus to any other court in the State.

b. Temporary Writs or Orders. When the Court is not in session, any Justice has the right to issue temporary writs or orders in causes pending on appeal in order to protect the rights of the parties. Del. Const. art. IV, § 11(7).

c. Procedure. The procedure for securing extraordinary writs is outlined in Supr. Ct. R. 43. For a more complete discussion, see Chapter 14.

3.04 SUPREME COURT AUTHORITY TO MAKE RULES. The authority of the Court to make rules is established by 10 Del. C. § 161.

3.05 HISTORY OF THE SUPREME COURT RULES. A general revision of the Supreme Court Rules was adopted by the Court on January 4, 1978. Any decision on Supreme Court Rules prior to that time should be considered in light of these changes. In addition, the Court has an on-going practice of amending the Rules as the need appears. Consequently, an updated set of Rules

should always be maintained. In case of doubt concerning the amendment of any rule, the attorney should check with the Clerk of the Court.

3.06 SCOPE AND APPLICATION OF THE COURT RULES. The Supreme Court's Rules govern all of its proceedings. Supr. Ct. R. 101(a). To the extent the Rules conflict with any statute, the Rules supersede the statute pursuant to the terms of 10 Del. C. § 161(b). Supr. Ct. R. 101(b) requires that all other courts adopt Rules consistent with these Supreme Court Rules.

3.07 CONSTRUCTION OF THE SUPREME COURT RULES. Supr. Ct. R. 102(a) provides that the Rules shall be construed so as to do substantial justice and provide for the speedy and efficient determination of proceedings. 10 Del. C. § 161(a) provides that the Court may adopt general rules, or, where it deems it "best for the advancement of justice," may make special orders, which , among other objectives, "provide for the conduct of the business of the Court" and "regulate the practice and procedure governing causes and proceedings in the Court." The Court has also held that it has inherent power to make rules governing the conduct of the Bar. In Re Member of Bar, Del. Supr., 257 A.2d 382 (1969), appeal dismissed sub nom. In re Reed, 396 U.S. 274 (1970).

CHAPTER 4. INITIATING THE APPEAL IN CIVIL ACTIONS

TABLE OF CONTENTS

CHAPTER 4. INITIATING THE APPEAL IN CIVIL ACTIONS

F. Alton Tybout[1]

4.01 INTRODUCTION. This chapter concerns the steps necessary for the initiating of an appeal to the Supreme Court from lower court final judgments and orders in civil actions. It does not concern special proceedings before the Court. For special proceedings, see Chapter 14. Appeals from interlocutory orders in civil cases or final judgments in criminal cases are treated in Chapters 5 and 13, respectively. This work does not consider appeals in election offenses as controlled by Del. Const. art. V, § 8.

4.02 DECISIONS OF THE SUPERIOR COURT WHICH MAY BE APPEALED IN CIVIL CASES.

a. Constitutional Provision. In civil cases, the Supreme Court may receive appeals from the Superior Court in "interlocutory or final judgments and other proceedings...." Del. Const. art. IV, § 11(1)(a). The sweeping language of this provision should be read in the context of the following sections which discuss matters of civil appeal in more detail.

b. Interlocutory Appeals. Any order by the Superior Court which does not resolve all issues in the litigation is an interlocutory appeal. This is true even when the Superior Court acting as an appellate court, resolves all of the issues before it on that appeal. Werb v. D'Alessandro, Del. Supr., 606 A.2d 117 (1992); Stroud v. Milliken Enters., Inc., Del. Supr., 552 A.2d 476 (1989); DiSabatino Brothers v. Wortman, Del. Supr., 543 A.2d 102 (1982). Interlocutory appeals to the Supreme Court are controlled by Supr. Ct. R. 42. See Chapter 5.

4.03 DECISIONS OF THE COURT OF CHANCERY WHICH MAY BE APPEALED. The Supreme Court has jurisdiction to "receive appeals from the Court of Chancery

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and to determine finally all matters of appeal in the interlocutory or final decrees and other proceedings in Chancery." Del. Const. art. IV, § 11(4). As with appeals from the Superior Court, the breadth of this provision should be read in the context of the following sections which discuss matters of civil appeal, and of Chapter 5 addressing interlocutory appeals, in more detail.

4.04 DECISIONS OF THE FAMILY COURT WHICH MAY BE APPEALED. Del. Const. art. IV, § 11 does not provide explicitly for direct appeals from the Family Court to the Supreme Court. But see Del. Const. art. IV, § 11(8) (authorizing the Supreme Court to exercise such other jurisdiction as the General Assembly may from time to time confer upon it). However, under 13 Del.C. §§ 515(a)(3), 917, 1110 and 1522(a)(3), the Supreme Court has jurisdiction to hear certain direct appeals from the Family Court. The Supreme Court's jurisdiction over direct appeals stems from the fact that the Family Court was given jurisdiction in various cases where jurisdiction previously had been vested in the Court of Chancery or the Superior Court. Effective July 13, 1987, 10 Del.C. § 1051(a) authorizes the Supreme Court to receive appeals from any civil proceedings in the Family Court, including any delinquency proceeding. This right of appeal is limited to "any order, ruling, decision or judgment of the Court". This right of review does not apply to a Commissioner's or Master's findings unless some affirmative action is taken by a judge of the Family Court showing that the judge has actually reviewed and considered the findings and has determined that the findings should be approved or disapproved. The routine rubber-stamping of a Commissioner's or Master's findings without more is inadequate to provide a basis under the statute for appeal. Redden v. McGill, Del. Supr., 549 A.2d 695, 697 (1988). For further discussion of this subject, see Chapter 23.

In the event that an appeal is erroneously filed in the Supreme Court when the Court lacks subject matter jurisdiction, the appellant can elect to transfer the case to the appropriate court under 10 Del.C. §1902. For a detailed discussion of Family Court appeals, see Chapter 23.

4.05 DECISIONS OF ADMINISTRATIVE COMMISSIONS AND BOARDS WHICH MAY BE APPEALED. There are no decisions of administrative commissions or boards which may be appealed directly to the Supreme Court. For administrative appeals, see Chapters 19 (Chancery) and 20 (Superior).

4.06 TAKING THE APPEAL.

a. Parties to the Appeal. All parties to the litigation who may be directly affected by a ruling on an appeal should be made parties to the appeal. The failure to do so may not be fatal to the appeal; however, such failure places on the appellant the burden of showing an absence of prejudice to the party below omitted from the appeal. State Personnel Comm'n. v. Howard, Del. Supr., 420 A.2d 135 (1980). Prudence suggests that, in case of doubt, or as a matter of routine, all non-appealing parties should be designated appellees. If a party in the proceeding below is not joined in the appeal, the party should not be named in the caption; however, the party or the party's attorney should be designated as a party receiving notice of the appeal. See Haley v. Town of Dewey Beach, Del. Supr., 672 A.2d 55, 58 (1996) (holding that every party to the lower court proceedings must be served with the notice of appeal so that any party who is not named in the appeal has the opportunity to "seek leave of [the] court to intervene and protect their interest in the judgment" from which the appeal is taken). Forms A and B appended to the rules, and set forth as Forms 16:01 and 16:02 respectively in the supplement to Chapter 16, show the proper forms for a Notice of Appeal and Cross-Appeal. In contrast to earlier practice, the Notice of Appeal must now specify the parties taking the appeal, the parties against whom the appeal is taken and the parties against whom the appeal is not taken. The order from which the appeal is taken must be attached to the notice of appeal.

b. Appeals by Multiple Parties. When two parties appeal the same judgment or order, Supr. Ct. R. 7(e) provides that they may join in a single appeal or they may file

separate appeals. If they file a joint appeal, they should be designated in their respective capacities in the court below and as appellants.

The Rules do not contemplate a joint appeal where two litigants wish to appeal, each from a different order or judgment. The writers believe that under such circumstances, the parties should file separate appeals. In each case, the appealing party should designate itself both in its capacity below and as appellant. The appellant should similarly designate other parties to the appeal in their capacity below and as appellees. The Court may consolidate the appeals for decision on motion, or on its initiative, if consolidation appears appropriate.

c. Cross-Appeal. Each aggrieved party is entitled to appeal from that portion of the judgment which adversely affects that party. If each party files an appeal, under Del. Supr. Ct. R. 15 the party first filing is deemed the appellant and the later filer is deemed the cross-appellant for purposes of briefing. The filing of an appeal by one party gives adverse parties at least fifteen additional days within which to perfect a cross-appeal. See Section 4.07(b) below.

It is not necessary for the winning party to cross-appeal in order to raise, as a ground for affirmance, a proposition of fact or law that was raised to, but rejected by, the court below. Filing a notice of cross-appeal is required only if the party seeks review of the judgment itself, as distinguished from the reasoning or grounds upon which the judgment is based.

d. Death of a Party Before Appeal.***

(1) In civil cases, if a party dies before a notice of appeal is filed, the notice may be filed by the personal representative of the party. If the party has no personal representative, the notice may be filed by the attorney of record for the deceased party in the trial court within the time for the filing of appeal. Supr. Ct. R. 7(f)(i). Substitution of parties may be accomplished thereafter.

(2) Rule 7(f) does not discuss the case in which an appellee dies before an appeal is taken. The writers anticipate that the Court would approve designating the decedent as appellee if the appellant acts with reasonable promptness to insure that a representative is appointed and that persons having a substantial interest in the outcome of the appeal are informed of the appeal.

(3) When an appellant dies after the notice of appeal is filed, substitution of parties is effected pursuant to the rules. Supr. Ct. R. 7(f)(ii).

4.07 TIME FOR FILING THE NOTICE OF APPEAL.

a. Basic Time Allowed. A notice of appeal must be filed in the office of the Clerk of the Supreme Court as follows: (a) within 30 days after entry upon the docket of a judgment, order or decree from which the appeal is taken in a civil case except as to appeals controlled by 10 Del.C. § 146 (appeals of infants and mentally incompetent persons); (b) within 30 days after a sentence is imposed in a direct appeal of a criminal conviction; and (c) within 30 days after entry upon the docket of a judgment or order in any proceeding for post-conviction relief. Supr. Ct. R. 6, as amended, effective October 1, 1984 and January 1, 1995. If a motion for a new trial remains undecided after a sentence is imposed, a direct appeal of the criminal conviction must be filed within 30 days after the sentence, despite the unresolved motion for a new trial. Eller v. State, Del. Supr., 531 A.2d 948, 950 (1987). Katcher v. Martin, Del. Supr., 597 A.2d 352 (1991).

b. Cross-Appeal. In civil cases, any party may file a cross-appeal within 15 days of the filing of the first timely notice of appeal or within 30 days of the date of the final judgment or order, whichever is later. 10 Del.C. § 149; Supr. Ct. R. 6.

c. Multiple Claims or Parties. When there are multiple claims against one party or claims against multiple parties, and one such claim is totally resolved by an order of the Court, the time for appeal from that order generally does not begin to run until all of the claims in the

litigation are resolved. However, Family, Superior, and Court of Chancery Chancery Court Rules 54(b) provide that there may be an entry of a final judgment upon one or more but fewer than all of the claims only when there is "an express determination that there is no just reason for a delay" in the entry of such an order and "an express direction for the entry of the judgment." If such an express determination is not stated in the order, the time for appeal does not begin to run and the right to appeal does not arise until all of the issues in the litigation are finally resolved. Thus, in Shellburne, Inc. v. Roberts, Del. Supr., 238 A.2d 331, 335 (1968), the Supreme Court found in a multiple party suit that the resolution, by summary judgment, of non-liability of two of the parties was interlocutory and not appealable absent such express determination and direction by the trial court. The Court held that the ultimate appeal, therefore, was not subject to dismissal on the ground of untimeliness when that appeal was taken at the end of the litigation well after the time allowed for appeal (had the time been calculated from the time of the otherwise final determination of the non-liability of the parties).

d. Enlargement of Time for Appeal. The time for appeal or cross-appeal may not be enlarged. Supr. Ct. R. 11(b). While there are no grounds for extending the time for the taking of an appeal, the Court has held that under certain limited circumstances, an appeal may be filed after the 30 day period if the failure to file the appeal in a timely manner was caused by "Court-related personnel". Bey v. State, Del. Supr., 402 A.2d 362 (1979). The Court in Bey did not articulate what the action of the "Court-related personnel" was. However, the Court stated that the appellant "was prevented from properly perfecting his appeal by both the action and inaction of State agencies." Id. at 363. The jurisdictional defect created by the untimely filing of the notice of appeal cannot be excused "in the absence of unusual circumstances which are not attributable to the appellant or the appellant's attorney." Riggs v. Riggs, Del. Supr., 539 A.2d 163, 164 (1988). For purposes of this text, readers should consider that the time for the taking of appeal is without exception.

Readers are referred to Section 4.08(e) for a discussion of filing fees and the limited exceptions thereto.

e. Effect of Motions in the Lower Courts Following a Final Judgment or Order. When a motion is filed pursuant to Super. Ct. Civ. R. 59 or Ch. Ct. R. 59, the time period to run until there is a final judgment or order on the motion. Katcher v. Martin, Del. Supr., 597 A.2d 352 (1991). The time fixed by those rules for the filing of those motions must be strictly met. Even if the lower court improperly grants an extension of time for filing of a motion under its rules and no objection is made to the extension, the extension will have no effect and the time for the filing of the appeal will run from the initial date of the final order or judgment. Fisher v. Biggs, Del. Supr., 284 A.2d 117 (1971). It should be clearly noted that motions under Super. Ct. Civ. R. 60(b) or Ch. Ct. R. 60(b) do not affect the finality of a judgment or suspend its operation; therefore, the time for taking an appeal from the judgment or order is not extended. An appeal may be taken from the action of the Court on the Rule 60(b) motion. Such an appeal, however, brings before the Supreme Court only the subject matter of the 60(b) motion. Swann v. Carey, Del. Supr., 272 A.2d 711 (1970).

f. Infants and Mentally Incompetent Persons. 10 Del.C. § 146 provides that the time for taking an appeal on behalf of an infant or mentally incompetent person who was a party to an action and not represented in the action in the lower court by a guardian ad litem, a general guardian or trustee, begins to run "at the ceasing of such disability and not at the time of signing the judgment or decree." The commentary to Supr. Ct. R. 6, as amended effective October 1, 1984 and January 1, 1995, recognizes that Rule 6 is subject to 10 Del. C. § 146 as providing an exception to the typical 30-day period within which to take an appeal.

g. Death of a Party. The death of a party does not affect the time for the taking of an appeal. Procedure is governed by Supr. Ct. R. 7(f). See Section 4.06d.

h. Dissolution of a Corporation. If a corporation is dissolved between the time of the final judgment or order and the time for appeal, the dissolved corporation remains subject to the general time requirements of the rules. 8 Del.C. § 282 provides the appropriate procedure when dissolution is suggested on the record.

i. Date is Calculated From the Entry on the Docket. The date of the order or judgment appealed from is the date it is entered on the docket of the Clerk of the Court, which is not necessarily the date that appears on the written order or judgment or, in the case of a bench ruling, the date the judgment is announced in open court. In Security Storage Co. v. Weiss, Del. Supr., 280 A.2d 534 (1971), a judge of the Superior Court wrote an opinion containing the final order on an appeal. The opinion was dated November 20, 1970. The opinion was received by the Prothonotary's office on November 23, 1970 and entered in its docket on that date. Even though the order bore the date of November 20, the Court held that the appeal period did not begin to run until November 23. See Salomon, Inc. v. Steuart Petroleum Co., Del. Supr., 567 A.2d 402 (1989) for the consistency between Supreme Court Rules 6 and 10, Del.C. § 148.

j. The Court Below Must Have Intended the Entry of the Order of Judgment to be Its Final Act in the Litigation. An appeal period will not begin to run until all actions by the lower court necessary to complete the litigation at that stage have been completed. In J.I. Kislak Mortgage Corp. v. William Matthews Builder, Inc., Del. Supr., 303 A.2d 648 (1973), the Superior Court granted summary judgment to the plaintiff and concluded with the statement "it is so ordered." However, one task remained, the calculation of the amount of the judgment to be entered. This was subsequently done and a further order signed by the Court was filed with the Prothonotary. The Supreme Court held that the appeal period began to run from the date of the entry of the amount of the judgment rather than the date of the summary judgment decision. The Court held that when

a court's action indicates it anticipates doing something further in the litigation, the appeal time will not begin to run until that further step is taken.

k. Bankruptcy. If a party files for bankruptcy during the time for appeal, the rights of the parties are determined by the federal bankruptcy laws. An automatic stay against further action is in effect, and the parties must apply to the Bankruptcy Court for relief. See 11 U.S.C. § 362(a) (1984).

l. Interlocutory Appeals. The time within which to file interlocutory appeals is 30 days after the date of the entry of the interlocutory judgment or order which is the subject of the appeal. Supr. Ct. R. 42(d). Procedures for taking such an appeal are discussed in Chapter 5.

4.08 SERVICE AND FILING OF THE NOTICE OF APPEAL.

a. Service on Other Parties. A notice of appeal must be served in duplicate on the attorney of record for each party to the litigation below, or if there is no such attorney of record, on each party to the litigation below, including those, if any, not designated as appellees. Supr. Ct. R. 7(a). This may be accomplished by serving the attorney for the party in the court below unless there has been a substitution of attorneys filed in the court below, in which case service should be made on the new attorney. Service shall be made as provided in Supr. Ct. R. 10. See Official Forms A and B (included herein as sample forms 16:01 and 16:02, respectively).

b. Filing. After service on all other parties, and the court reporter if required, an original and one copy of a notice of appeal (an original and three copies of a notice of interlocutory appeal) must be filed either with the Clerk of the Court in Dover, or with any Deputy Clerk in any county. The proof of service should be on, or accompany, the original of the notice of appeal filed with the Clerk.

c. Filing by Mail. A party may file a notice of appeal by mailing it to the Clerk of the Court in Dover or any Deputy Clerk in any county. However, Supr. Ct. R. 10(a) provides that no documents are considered filed until received by the Clerk. Prudence suggests filing by hand whenever possible.

d. Computation of Time. The filing of the notice of appeal pursuant to Rule 6 is subject to the terms of Rule 11 concerning the computation of time. While the time for the filing of the notice of appeal may not be enlarged, it is not required that the parties served by mail receive the notice within the time for appeal (although service must be made within the additional 3-day period), provided that the notice is properly mailed before it is filed with the Court. See Supr. Ct. R. 11(c).

e. Filing Fees. A non-refundable filing fee of $250.00 must ordinarily accompany the filing of the notice of appeal, a notice of cross-appeal, or any other proceeding. Supr. Ct. R. 20(a). There are, however, several limited exceptions. The filing fee is not required in appeals by indigents. An indigent person may appeal in a civil case without prepayment if the indigent person files an affidavit that the indigent person is unable to pay the fee and requests that the fee be waived. The affidavit must state the nature of the action or defense and the affiant's belief that the affiant is entitled to redress. Supr. Ct. R. 20(h). If the Court does not grant the appellant's request to proceed in forma pauperis, the appellant must file the $250 docketing fee promptly or else the case may be dismissed for failure to prosecute. See generally Chapter 15.03. The filing fee is likewise not applicable to appeals in workmen's compensation cases, see generally Chapter 21, Worker's Compensation Reviews, and to unemployment compensation cases, see generally Chapter 22, Review of Unemployment Insurance Decisions.

When the 30 day period is about to expire and funds for the filing fee are not immediately available, the Clerk is empowered to docket the notice of appeal without the filing fee

subject to its prompt payment (72 hours). The rules do not explicitly allow this and therefore practitioners are cautioned against reliance upon this procedure.

4.09 CONTENTS OF THE NOTICE OF APPEAL.

a. Notice of Appeal from Final Judgments or Orders in Civil Actions.

The form of the notice of appeal or cross-appeal from a final order or judgment is controlled by Supr. Ct. R. 7(c) and official Forms A and B. Rule 7(c) requires that the notice of appeal or cross-appeal contain:

1. The name of the court from which the appeal is taken, the name of the judge entering the judgment and the case number in that court.

2. The name of the party or parties taking the appeal or cross-appeal, the party or parties against whom the appeal is taken and the name and address of each party's attorney of record below.

3. A designation of the judgment or order, or the part of such judgment or order, for which review is sought and the date of such judgment or order.

4. The name and address of the attorney for each other party to the proceeding below against whom the appeal is not taken.

5. If there is no attorney for a party, the name and last known address of such party.

6. A designation of the transcript as required by Supr. Ct. R. 9(e).

7. A copy of the order of judgment to be reviewed and any separate written rationale which may explain the court's reasoning must be attached to the notice of appeal or the notice of cross-appeal if the documents are different from those attached to the notice of appeal. If there are no such documents a statement to that effect should be made in the notice. Forms A and B have not been amended to reflect this 1994 addition to Rule 7(c). Compliance with Rule 7(c)(9) may be accomplished by inserting one of the following statements in Form A after the reference to the court from which the appeal is taken and before the required statement of the name and address of the attorney below:

(1) "A copy of the order of judgment is attached.";

(2) "A copy of the order of judgment along with rationale of the court as stated in opinion (or letter opinion, etc.) is attached.";

(3) "A copy of the order of judgment is attached. No separate rationale was prepared."; or

(4) "No order of judgment or rationale for the order was prepared."

In Form B the appropriate statement may be inserted before a statement of the parties against whom the cross-appeal is taken. If the documents attached to the notice of appeal also apply to the cross-appeal, the cross-appellant should state: "The document(s) attached to the notice of appeal are the basis for this cross-appeal."

For interlocutory appeals, see Chapter 5.

b. Form of the Notice of Appeal from a Final Judgment or Order.

"Notice of appeal" is Official Form A included herein as sample form 16:01. Supr. Ct. R. 7(c) requires that the notice of appeal comply substantially with the Official Form. Rule 7(c)(8) requires that the caption on the appeal shall contain only the names of the party or parties below taking the appeal and the names of the parties against whom the appeal is taken. The fact that a party below may not be named in the appeal does not affect the requirement of Rule 7(a) that service be made on the attorney for each party in the proceedings below or on the pro se party. There are some aspects of Form A and Form B for cross-appeals (sample form 16:02 herein), which are confusing. Forms A and B are set forth as Forms 16:01 and 16:02 respectively in the supplement to Chapter 16. See also Section 4.06(a), Basic Time Allowed.

Both Forms indicate that the notice should set forth "with particularity the portion appealed from, if applicable." The Forms then refer only to an "order" of the court below, although the Rules consistently refer to appeals from a "judgment or order." Usually, the appeal is from a final judgment or order. A designation of a specific part of that order or judgment as a basis for appeal may be beneficial, as where an order or judgment adjudicates liability and damages, and the appeal is from the damages portion only. If in doubt, consideration should be given to designating the entire judgment or order from which the appeal is taken. Designation of the judgment or order without limitation brings before the Court on appeal or cross-appeal all of the proceedings which preceded

and led to the judgment or order designated. Under such circumstances, the Court may consider all issues which were fairly presented to the lower court. Supr. Ct. R. 8. As a general rule, the Supreme Court will not review contentions which have not been raised or fairly presented to the trial court for decision. Culver v. Bennett, Del. Supr., 588 A.2d 1094, 1096 (1991). The same rule applies in criminal proceedings. Gordon v. State, Del. Supr., 604 A.2d 1367 (1992). The Court will from time to time exercise its discretion to consider appeals on the basis of insufficient evidence in criminal cases, even where the matter has not properly been raised below. The question is one of the discretion of the Court. Gaines v. State, Del. Supr., 571 A.2d 765 (1990).

Form A requires that the appellant designate the "portions of the record and transcript in accordance with Rules 7(c)(6) and 9(e)(ii)." Form B requires the cross-appellant to designate "portions of the record and transcript per Rule 9(e)(ii)." However, neither Rule 7(c)(6) nor Rule 9(e)(ii) refers to the "record" as opposed to the transcript. Since Rule 9(b) provides specifically for the transmission of the record to the Clerk of the Court, reference to the "record" on the notice of appeal or cross-appeal seems superfluous.

c. Designation of the Transcript Other Than in the Notice of Appeal.

Official Form A also permits transcript designation by attachment to the notice of appeal of an "Exhibit A," designating the portions of the transcript to be transcribed. "Exhibit A" should conform substantially to Official Form C (Form 16:03 set forth in Chapter 16). See also Section 4.07(a), Basic Time Allowed.

The third option in Form A, and apparently the sole alternative in Form B, is a statement in lieu of a transcript which should be prepared in the manner of Official Form D (sample form 16:04 herein). This form may be used when no transcript is required as provided in Supr. Ct. R. 9(b)(ii). Supr. Ct. R. 9(e)(ii) and Official Form D require a statement of the reason no transcript is required.

Neither Official Form A nor Form B refers to situations in which there is no transcript as anticipated in Supr. Ct. R. 9(g). When such a situation occurs, the notice of appeal should contain a statement that the party is seeking a certified statement from the trial court. Application to the trial court for the certification should be made at the time of or before filing the notice of appeal. There may also be a stipulation of facts.

The failure to secure a transcript of the proceeding will cause the Court to reject an appellant's arguments alleging errors in that proceeding. Slater v. State, Del. Supr., 606 A.2d 1334 (1992). Loss of all or part of the stenographic record before transcription is not anticipated by the Rules. Moore v. Moore, Del. Supr., 144 A.2d 765 (1958).

d. Designation of the Record Served on the Court Reporter. When a transcript is to be prepared, notice of the designation of the record to be transcribed must be served on the court reporter. If the designation of the record is in the notice of appeal, one copy of the notice of appeal must be served promptly on the appropriate court reporter no later than seven days after the notice of appeal is filed, the appellant must file a certificate with the Supreme Court Clerk reflecting that service was accomplished on the court reporter and that the cost of the transcript has been, or will be promptly paid. No separate certificate of service is required, however, if the proof of service is attached to the notice of appeal reflects service on the court reporter. Since Supr. Ct. R. 10(a) requires that all papers filed with the clerk must be served on all other parties, the designation of the transcript must be served on them even if the designation is not in the notice of appeal. The most expeditious means of accomplishing the required notice to the court reporter usually is to serve him or her with the original notice of appeal with a designation of the transcript.

e. Designation of the Transcript by Appellees. Supr. Ct. R. 9(e)(iii) requires any appellee within seven days after receipt of a notice of appeal with a designation of the transcript, or within 15 days after the appeal is docketed if there is no designation, to file with the

clerk of the trial court and with the Clerk of the Supreme Court a designation of the transcript required by the appellee. Such designation must be served on the other parties first and on the court reporter forthwith and proof of service must be made. See Official Forms C and D (sample forms 16:03 and 16:04, respectively).

f. Criminal Class A Felony. Special rules pertain to the transcription of the record in appeals from conviction of a criminal Class A felony. See Rule 9(e)(i).

g. How Service on the Court Reporter is Completed. Supr. Ct. R. 9(e)(ii) requires service of the designation on the "appropriate court reporter." In many lengthy cases, a number of court reporters serve in the course of the trial. The Court of Chancery and the Superior Court each have offices for their respective court reporters. It is sufficient service if service is made on some responsible person at the office of the court reporters for the appropriate court. Securing a transcript in appeal from the Family Court is discussed in Chapter 23.

h. Duty of the Court Reporter. When the designations of the record are received by a court reporter, the court reporter is required to prepare the transcript no later than 40 days after the last received designation. Supr. Ct. R. 9(e)(iv). When the record cannot be completed within that time, it is the duty of the court reporter to apply for an extension of time to complete the transcript and to notify the parties of that application.

i. Cost of the Transcript. The cost per page of a transcript of court proceedings is fixed by the trial court. The original transcript prepared by the court reporter is filed with the clerk of the court below. The transcription cost includes preparation of the original and one copy. There is no reason to order only an original without a copy since the charge is the same for an original and a copy. Parties not ordering the transcript are not required to purchase a copy of the transcript. As a matter of practice, the court reporters preparing the transcript on the order of one

party routinely inquire of the other parties whether a copy of the transcript is requested. The party who does not order the transcript, but requests a copy, is responsible for the cost of that copy alone.

j. Disclosure of Corporate Affiliations and Financial Interest. A disclosure of corporate affiliations and financial interest must be filed by each party within ten days of the docketing of the appeal. Supr. Ct. R. 7(g). It can be filed at the time the appeal is docketed. The contents of the disclosure is governed by Form P. When expedited proceedings are sought, the disclosure must be filed concurrently by the party filing the motion to expedite and, when such a motion is filed, the other parties must file the disclosure within two days of service of the motion to expedite. Somewhat different rules apply when any government entity is a party. Supr. Ct. R. 7(g); Form P.

4.10 CONTENTS OF THE RECORD ON APPEAL FROM A FINAL JUDGMENT OR ORDER. Pursuant to Supr. Ct. R. 9(b), the record on appeal contains all of the original papers, photographs and documentary exhibits in the court below, along with the prepared transcript. Other exhibits are transmitted to the Court only on the order of a member of the Court.

The Clerk in the trial court transmits the original papers, exhibits and transcripts of testimony and attaches to it a certificate identifying the record. The record is prepared in chronological order and contains a certified copy of the docket entries as the top paper. Any documents which were sealed in the lower court remain sealed in the record forwarded to the Supreme Court except by order of the Supreme Court for good cause shown. Supr. Ct. R. 9(bb).

Pursuant to Supr. Ct. R. 9(c), the parties may stipulate that some parts of the record not be transmitted to the Supreme Court. As a practical matter, this is seldom done except in cases having voluminous records. The stipulation must be filed in the trial court and must state distinctly which parts of the record are to be included and which parts are to be omitted, and it must designate the docket entry number for each part. The trial court or the Supreme Court may nevertheless

require that parts of the record omitted by stipulation be transmitted. While the caption of this subsection of the Rule refers to "papers," the body of the Rule refers to "parts of the record." The parties, therefore, presumably could stipulate that certain exhibits be omitted from the record.

4.11 AGREED REPORT OF PROCEEDINGS. Supr. Ct. R. 9(g) permits the parties, in cases in which relevant matter or testimony has not been stenographically recorded, to certify factual material which may be necessary to the disposition of the issues. When such certification is filed with the clerk of the trial court, it becomes part of the record in the case. Such material is limited to the rulings of the court on matters of law and only such statements of facts as may be necessary to review those rulings.

The parties may enter into a stipulation as to the substance of testimony or other proceedings as may be essential to a decision of the issues to be presented on the appeal whether or not a stenographic record has been made. The stipulation must be approved by the trial judge and certified to the Supreme Court in place of a transcript. In such case, the requirements concerning the designation of the record to be made pursuant to Supr. Ct. R. 9(e) are not necessary in the notice of appeal.

4.12 FILING AND SERVICE OF THE RECORD. It is the duty of the clerk of the trial court to forward the record to the Clerk of the Supreme Court. Supr. Ct. R. 9(b). This must be done within 20 days after the receipt of the notice of appeal unless there is a designation of a transcript of proceedings to be prepared. In such case, the clerk is required to transmit the record to the Clerk of the Supreme Court within ten days after receipt of the transcript.

On an interlocutory appeal pursuant to Supr. Ct. R. 42, transmission of the record is controlled by Supr. Ct. R. 42(d)(vi)(A).

4.13 CUSTODY OF THE RECORDS IN THE SUPREME COURT. Supr. Ct. R. 91(a)(iii) provides that the Clerk has custody of the records and papers in the Supreme Court. The

Clerk may not permit any original record to be taken from the Clerk's custody except by direction of the Court.

4.14 CORRECTING OR SUPPLEMENTING THE RECORD AFTER IT IS FILED WITH THE SUPREME COURT. There is no rule permitting the correcting or supplementing of a record after it is filed with the Supreme Court. However, on motion or sua sponte, the Court may allow correction or supplementation, or it may remand the cause to the trial court for such. The Court has held that, where part of a record is lost, the Court has the power to take such actions as it considers appropriate to secure the end of justice. The absence of the complete file does not prevent the Court from hearing the appeal unless the Court concludes that it is unable to resolve the issues properly without the missing part of the record. See, e.g., Moore v. Moore, Del. Supr., 144 A.2d 765 (1958). The Court will not consider outside evidence to contradict facts in the record. Nelte v. State, Del. Supr., 198 A.2d 921, 922 (1964). The Court also will not hold hearings to determine the accuracy of trial transcripts. Waller v. State, Del. Supr. 395 A.2d 365, 367 (1978).

4.15 APPEARANCE OF COUNSEL. Except in the case of a party appearing pro se, an attorney who is an active member of the Delaware Bar and maintains an office in Delaware for the practice of law, must sign any paper filed with the Court. Supr. Ct. R. 12(a) and Supr. Ct. R. 12(d). Having done so, the attorney or another lawyer in the attorney's firm must then attend all court proceedings in the case. When an attorney is designated on the notice of appeal as the attorney below for the appellee, that attorney is deemed to be the attorney for the appellee unless another attorney files a notice of appearance as provided by Official Form E (sample form 16:05). Supr. Ct. R. 12(a). The admission of attorneys pro hac vice is in the discretion of the Court. No attorney may be admitted pro hac vice unless the attorney associates with an attorney who is an active member of the Bar of the Supreme Court of Delaware and maintains an office in the State. Supr. Ct. R. 71.

4.16 SERVICE AND FILING OF PAPERS. Two copies of every paper to be filed with the Clerk must be served upon the attorney for each party to the appeal. Supr. Ct. R. 10(b). Service on a party not represented by an attorney must be made by personal delivery or by first class mail or as otherwise ordered by the Court. If the party is not represented by an attorney and the address of the party is unknown, service may be completed by depositing with the Clerk two copies of the paper, together with an accompanying affidavit or certificate of the member of the Bar required to make such service, stating that the address of the party is unknown and cannot be ascertained with reasonable diligence. Supr. Ct. R. 10(b).

When service is personal, the party making service may obtain on the document filed with the Clerk acknowledgment of service by the persons served. Supr. Ct. R. 10(c). In the absence of such acknowledgment, the party making service must file a certificate of service in the form of a statement of the date and manner of service and name(s) of the persons served. This certificate must be signed by the person making the service. The Clerk is permitted in the Clerk's discretion to receive filings without an acknowledgment or proof of service if the Clerk has satisfactory assurance that such proof will be filed promptly thereafter. Supr. Ct. R. 10(c).

All papers of any kind filed with the Clerk or a Deputy Clerk in any county must be filed during regular business hours by depositing the number of copies designated in Supr. Ct. R. 10(d)(i)-(iv). Filing with the Clerk in any county is considered filing with the Court on the date filed. Filing of papers may be made by mail to the Office of the Clerk of the Court in Dover or to Wilmington or Georgetown chambers; however, such filing is not considered to be complete until the papers have been received in the Office of the Clerk or in Wilmington or Georgetown chambers. Supr. Ct. R. 10(a).

A party filing a brief or other document may at the party's option deliver or mail one copy to each Justice at the Justice's office and inform the Clerk that the party has done so. In that

case, the number of copies delivered or filed with the Clerk may be reduced by the total number of copies delivered to the Justices. Supr. Ct. R. 10(e). The provisions of Rule 10(a) apply to mailing to the individual Justices as they do to the Clerk of the Court.

4.17 COMPUTATION OF TIME AND ENLARGEMENT OF TIME. Supr. Ct. R. 11 concerns the manner in which time is computed in all cases in which the Supreme Court Rules fix the time for the taking of any action. In computing a deadline, the date of the entry of an order or judgment is not included. Thus, if an order is entered on May 1, the 30th day thereafter, for the purpose of filing the notice of appeal, is May 31. However, if the last day within which an act must be done under the Rules falls on a Saturday, Sunday, or legal holiday, or any day in which the Office of the Clerk is closed, the time period extends to the end of the next day on which the Office of the Clerk is open. If the time period designated in the Rules is less than seven days, Saturdays, Sundays and legal holidays are not included in the calculation of the time period.

The time for taking an appeal or cross-appeal may not be enlarged. Supr. Ct. R. 6. Any motion for an extension or enlargement of any other time period may be made to and granted by the Motion Justice, Supr. Ct. R. 3(c), or, in limited instances, by the Clerk of the Supreme Court.[2] A motion or stipulation for such time enlargement should be prepared and presented to the Motion Justice or the Clerk, respectively, within the time permitted for the act to occur as provided by the Rules. The motion or stipulation should be prepared as reflected in sample form 16:06, with copies served on all other parties. A party or the party's attorney may sign a stipulation. It is the burden of the moving party to make appropriate arrangements for a hearing on a motion by arrangement through the Office of the Clerk of the Court.

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[2]Pursuant to internal operating procedures of the Supreme Court, the Clerk is authorized to sign and process a "So Ordered" on stipulations extensions of time (not to exceed three extensions or a total of 75 days) for the filing of a brief. Supr. Ct. Internal Operating Procedure XV(6)(a).

Whenever a party has the right or is required to do some act or take some proceeding within a prescribed period after being served and service is by mail 3 days shall be added to the prescribed period. Supr. Ct. R. 11(a). It should be noted, however, that Supr. Ct. R. 10(a) provides that filing with the Clerk of the Court in Dover by mail is not deemed completed until the paper has been received in the Office of the Clerk of the Court. Consequently, if a notice of appeal is mailed, it must be received by the Clerk of the Court within 30 days of the order appealed from. Supr. Ct. R. 11(c) does not enlarge the 30 days allowed. The same is true with the time fixed for the filing of briefs. If the filing of a notice of appeal or any other document required to be filed with the Clerk of the Court is completed in a timely fashion, with a certificate of mailing to any other party, the other party has three additional days in which to meet any time deadline which may be fixed by the Rules of the Court. There is no additional time allowed as a result of the mailing of orders or directions from the Court. Supr. Ct. R. 11(c).

4.18 SUPERSEDEAS BONDS AND SECURITY IN CIVIL CASES.

a. What a Supersedeas is. A supersedeas is historically a writ issued by a higher court staying proceedings in a lower court. As a practical matter, the word is now usually used in connection with a stay of the lower court proceedings and the giving of security to protect the appellee.

b. Constitutional Provision. Del. Const. art. IV, § 24 provides that a person, other than an executor or administrator who files an appeal to the Supreme Court, in order to secure a stay of proceedings in the court below, must give "sufficient security to be approved by the court below or by a judge of the Supreme Court." The security must be sufficient to "pay the condemnation money and all costs, or otherwise abide the decree in appeal or the judgment in error" if the appellant is unsuccessful. Sannini v. Casscells, Del. Supr., 401 A.2d 927, 929-30 (1979); State ex rel. Caulk v. Nichols, Del. Supr., 281 A.2d 24 (1971) appeal dismissed, 408 U.S. 901 (1972).

Security is not required as a condition of appeal. It is required as a condition of staying proceedings and, most importantly, execution proceedings.

c. Supreme Court Rule. Supr. Ct. R. 32(a) provides that the stay or injunction pending appeal is granted or denied in the first instance by the trial court whose decision is reviewable by the Supreme Court. The trial court or the Supreme Court may impose additional terms or conditions in addition to the required security, as it sees fit.

d. Superior Court and the Court of Chancery. With regard to the Superior Court and the Court of Chancery, stays and supersedeas bonds are addressed in Super. Ct. Civ. R. and Ch. Ct. R. 62(d). In each case, the Rule simply refers to Del. Const. art. IV, § 24 and the Supreme Court Rules.

e. Family Court. Family Ct. R. 300(e) broadly addresses stays of proceedings. For a more specific discussion, see Chapter 23.

f. Stay or Injunction Pending Appeal Granted by Trial Court. Stays or injunctions are discretionary in civil cases. See Hughes v. Trans World Airlines, Inc., Del. Supr., 185 A.2d 886 (1962); Blaustein v. Standard Oil Co., Del. Super., 45 A.2d 533 (1945). They are broadly governed by Supr. Ct. R. 32(a), which states that the trial court's decision is reviewable, but the lower court "may impose such terms and conditions, in addition to the requirement of indemnity, as may appear appropriate in the circumstances." Court of Chancery Rule 62(c) reiterates that standard in an appeal from a judgment granting, dissolving or denying an injunction. The Court of Chancery may "suspend, modify, restore or grant an injunction" during the pendency of the appeal "upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party."

g. Determination of the Amount of Bond on Appeal. A supersedeas bond for a money judgment must be in an amount at least equal to the judgment below. Del. Const. art. IV, § 24; Blackwell v. Sidwell, Del. Supr., 126 A.2d 237 (1956). The bond must more than meet the

minimum amount of complainant's reasonably possible recovery. It must be of a substantial amount. McDaniel v. Franklin Railway Supply Co., Del. Ch., 177 A.544 (1935). The amount of the appeal bond is a res out of which damages may be obtained, but is not a liquidated amount of damages. Ellis D. Taylor, Inc. v. Craft Builders, Inc., Del. Ch., 260 A.2d 180 (1969).

h. Security Other Than Bond. Supr. Ct. R. 32(c) and Official Form J (sample form 16:10) require a surety bond for supersedeas. However, Del. Const. art. IV, § 24 requires only "sufficient security." Thus, an injunction or stay which is not intended to have supersedeas effect, the nature of the security depends upon the nature of the judgment below. It does not have to include "condemnation" money if the decree appealed is not money damages. See Ownbey v. Morgans Executors, Del. Supr., 105 A. 838 (1919), aff'd, 256 U.S. 94 (1921). In its discretion, the Supreme Court will not disturb an order of a lower court requiring the paying of the total amount of the judgment with interest into the court. Owens Corning Fiberglas Corp. v. Carter, Del. Supr., 630 A.2d 647 (1993).

i. Recovery of Bond Expense as Cost on Appeal. In appropriate circumstances, the premium for an injunction bond may be awarded as costs on appeal. See Claus v. Babiarz, Del. Ch., 190 A.2d 19 (1963).

j. Statute of Limitations for Action on Bond. An action on an appeal bond reflects a liability on a written instrument. It is governed by the three year statute contained in 10 Del.C., § 8106 unless the bond is given under seal (as indicated for supersedeas on Official Form J, sample form 16:10), in which case a 20-year common law limitation period controls. See Di Biase v. A & D, Inc., Del. Super., 351 A.2d 865 (1976); and Monroe Park v. Metropolitan Life Insurance Co., Del. Supr., 457 A.2d 734 (1983), regarding the validity and effect of a seal.

k. Recovery Against Surety. Damages, costs and interest are recoverable. Del. Const. art. IV, §24.

Ch. Ct. R. 65.1 and Super. Ct. Civ. R. 65.1 indicate that the giving of security submits each surety to the jurisdiction of the court and irrevocably appoints the Register in Chancery or the Prothonotary as agent for notice and service. A surety's liability may be enforced on motion, without independent action. The agent will send copies of the notice to the sureties. See Official Form J (sample form 16:10).

Any party attempting to recover on a bond must prove damages. Ellis D. Taylor, Inc. v. Craft Builders, Inc., Del. Ch., 260 A.2d 180 (1969). Generally, counsel fees are not recoverable on a bond. See Walsh v. Hotel Corp. of America, Del. Supr., 231 A.2d 458 (1967); Claus v. Babiarz, Del. Ch., 190 A.2d 19 (1963).

l. Termination of the Stay and Exoneration of the Surety. If the judgment stayed is satisfied, together with costs, interest and damages for delay, or if the judgment is affirmed or modified and so satisfied, or if it is reversed or the appeal dismissed, the bond becomes void. See Official Form J (sample form 16:10).

CHAPTER 5. CERTIFICATION OF QUESTIONS OF LAW AND INTERLOCUTORY APPEALS

TABLE OF CONTENTS

CHAPTER 5. CERTIFICATION OF QUESTIONS OF LAW AND INTERLOCUTORY APPEALS

Irving Morris
Seth D. Rigrodsky
James A. McShane[1]

5.01 INTRODUCTION. This Chapter discusses the Delaware Supreme Court's ("the Supreme Court") ability to accept and decide certified questions of law and interlocutory appeals.

5.02 JURISDICTION. Article IV, §11 of the Delaware Constitution grants the Supreme Court the jurisdiction to accept certified questions of law and interlocutory appeals. The Supreme Court, however, will not invoke its jurisdiction to determine a certified question of law or an interlocutory appeal unless the parties satisfy applicable Supreme Court rules.

5.03 CERTIFICATION OF QUESTIONS OF LAW. The Delaware Constitution grants the Supreme Court jurisdiction "[t]o hear and determine questions of law certified to it by other Delaware courts, the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court, or the highest appellate court of any other state, where it appears to the Supreme Court that there are important and urgent reasons for an immediate determination of such questions by it." Del. Const. art. IV, § 11(9).

Supreme Court Rule 41 ("Rule 41") governs the requirements and the procedures for certification.[2] Rule 41(a)(i), (ii) provide that the certifying court:

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[2] See Supr. Ct. R. 41(c) for Supreme Court certification procedures. See Court of Chancery Rule 72(b) and Superior Court Civil Rule 75 governing the procedures for certifying legal questions to the Supreme Court from those courts.

> may, on motion or sua sponte, certify to this Court for decision a question or questions of law arising in any case before it prior to the entry of final judgment if there is an important and urgent reason for an immediate determination of such question or questions by [the Supreme] Court and the certifying court has not decided the question or questions in the case.[3]

(footnote added).

The certifying court and the Supreme Court both have the discretion to decide whether certification is appropriate. See Rales v. Blasband, Del. Supr., 626 A.2d 1364, 1366 (1993) (accepting certification from the District Court of Delaware); Draper v. Paul N. Gardner Defined Plan Trust, Del. Supr., 625 A.2d 859, 868 n.12 (1993) (California State Court, in applying Delaware law, could certify questions to Delaware Supreme Court). Rule 41(b) provides a nonexhaustive list of reasons why the Supreme Court will typically grant certification:

> (i) Original Question of Law. The question of law is of first instance in this State;
>
> (ii) Conflicting Decisions. The decisions of the trial courts are conflicting upon the question of law;[4]
>
> (iii) Unsettled Question. 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 the Court.

Supr. Ct. R. 41(b).

The Supreme Court will not consider an application for certification, however, which fails to comply with Supreme Court Rule 41.

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[3]In Rales v. Blasband, Del. Supr., 634 A.2d 927, 931 (1993), the Supreme Court held it could not, in addressing a question certified to it by the Third Circuit Court of Appeals, reconsider the Third Circuit's conclusions on matters of substantive Delaware corporation law, as these rulings had become the law of the case.

[4]The term "decisions" as used in Rule 41 refers to reported and unreported court decisions. See In re Amendment of Supreme Court Rules 41(b); 42(c); and 42(d) (Jan. 31, 1989) (ORDER).

The certificate must state "with particularity the important and urgent" reasons for certification. Supr. Ct. R. 41(b). All facts material to the certified issue must be undisputed.[5] See, e.g., Hughes v. State, Del. Supr., 653 A.2d 241, 242 (1994) ("[a]s required for certification proceedings, the facts underlying the certified questions are undisputed"); Loden v. Getty Oil Co., Del. Supr., 359 A.2d 161, 164 (1976) (refusing as "not in proper posture" a certified question containing "a basic disputed fact").

The Supreme Court will answer only those questions which are presented by the facts before the certifying court and which arise in the case, Randolph v. Wilmington Hous. Auth., Del. Supr., 139 A.2d 476, 484 (1958), and it will not accept a certification of questions that require it to consider a voluminous record because resolution of such a case is more appropriately handled by the certifying court. Id. at 489-90.

Recent examples where the Supreme Court granted certification include: Hughes v. State, Del. Supr., 653 A.2d 241, 242 (1994) (answering two of five questions certified by the Family Court regarding the constitutionality and application of a statutory amendment which significantly altered the Family Court's jurisdiction and would have required the transfer of at least forty-five pending cases); Rales v. Blasband, Del. Supr., 634 A.2d 927 (1993) (question as to standards for demand excused in shareholders' derivative suits); State v. Cohen, Del. Supr., 604 A.2d 846, 849 (1992) (answering certified questions to resolve "important issues regarding the construction and constitutionality" of Delaware's revised death penalty statute).

Orders entered pursuant to Rule 41 are not subject to reargument. Supr. Ct. R. 18.

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[5]Having accepted certification, the Supreme Court will not consider factual assertions not included in the certificate. Shaw v. Agri-Mark, Inc., Del. Supr., 663 A.2d 464, 465 n.2 (1995); Farahpour v. DCX, Inc., Del. Supr., 635 A.2d 894, 897 (1994).

5.04 INTERLOCUTORY APPEALS. The Delaware Constitution provides the Supreme Court "shall have jurisdiction" over interlocutory appeals from the Court of Chancery, and, in civil cases, the Superior Court. Del. Const. art. IV, §11(1)(a), (4). Although vested with the jurisdiction to consider interlocutory appeals, the Supreme Court, exercising its own discretion, will only consider an interlocutory appeal which complies with Supreme Court Rule 42 ("Rule 42"). See Supr. Ct. R. 42(d). The Supreme Court Rules Advisory Committee's commentary on Rule 42 states the Rule was designed to advance the "salutary purpose" of terminating litigation and conserving the trial court's resources while simultaneously minimizing the unnecessary delay and danger of abuse associated with such appeals. See Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins., Del. Supr., 616 A.2d 1192, 1193 n.1 (1992) (accepting an interlocutory appeal to promote judicial economy but cautioning against the practice of a series of applications for interlocutory appeals when such a practice could delay or interrupt significantly the orderly progress of cases).

a. Procedure. A party seeking an interlocutory appeal must apply to the trial court for certification in accordance with the procedures in Rule 42(c). After the trial court decides whether or not to certify the interlocutory appeal, the party seeking the interlocutory appeal must follow the procedures in Rule 42(d).[6] Werb v. D'Alessandro, Del. Supr., 606 A.2d 117, 199 (1992) (dismissing for failure to comply with Rule 42 an appeal from a Superior Court order granting a motion to vacate a default judgment entered by the Justice of the Peace Court). The appellant must

[6]The Supreme Court, unless it orders otherwise, will determine without further argument whether to accept or refuse the interlocutory appeal. Supr. Ct. R. 42(d)(v). Once the Supreme Court accepts the interlocutory appeal, the proceedings are governed by the Supreme Court's rules applicable to other appeals (including Rule 14 concerning briefs), except that the record is not, in the first instance, transmitted to the Supreme Court, and the time schedule for the filing of briefs and appendices pursuant to Supreme Court Rule 15 commences upon the third day following acceptance of the interlocutory appeal, if no transcript has been ordered. If transcript has been ordered, it is the Court's practice to start the briefing schedule on the third day following receipt of the transcript. See Supr. Ct. R. 42(d)(vi).

serve and file in the Supreme Court a notice of appeal of an interlocutory order within 30 days after the trial court enters the order "from which the appeal is sought to be taken."[7] Supr. Ct. R. 42(d)(i). If the appellant files the notice of appeal before the trial court has acted on the application for certification, the appellant also must file a supplementary notice of appeal within 10 days after the time described in Rule 42(c). See Supr. Ct. R. 42(d)(iii), Official Form M.

Recent amendments have significantly changed certain aspects of procedure under Rule 42. In 1989, the Supreme Court revised Rule 42 ("the 1989 Amendment") by granting trial courts, in Rule 42(c)(ii), the discretion to shorten the time to file a response to an application for certification of an interlocutory appeal and to direct an oral response to an application under appropriate circumstances. See In re Amendment of Supreme Court Rules 41(b); 42(c); and 42(d) (Jan. 31, 1989) (ORDER). The revision to Rule 42(c) reflects the Supreme Court's recognition that expedited proceedings require an abbreviated schedule, which was not available under the previous form of the rule or Supreme Court Rule 25(d).

To facilitate the lower courts' expedited handling of applications for certification, the 1989 Amendment also added a new subsection 42(c)(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.

The 1989 Amendment also revised portions of Rule 42(d) to reflect, in Rule 42(d)(iv)(C), the revision to Rule 42(c)(ii) which permits the trial court to request an oral response to an application for certification. The 1989 Amendment added Rule 42(d)(v), which codified the Supreme Court's discretion to consider all relevant factors, including the trial court's decision whether

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[7]Supreme Court Rule 10(d)(ii) requires the filing of four copies of the notice of interlocutory appeal. Supreme Court Official Form M is the form of the Notice of Appeal From Interlocutory Order.

to certify the interlocutory appeal, in making its own determination whether to accept or refuse the appeal.

In 1994, the Supreme Court again amended Rule 42 ("the 1994 Amendment"). The 1994 Amendment provided in Rule 42(c)(i) that the Court, upon motion or sua sponte, could in its discretion enlarge the usual 10-day period for service and filing of the application to the trial court for certification. The modification to Rule 42(c)(i) codified prior Supreme Court decisions effectively extending the 10 day limit. See, e.g., Interstate Bakeries Corp. v. Salomon Bros., Inc., Del. Supr., No. 13, 1990, Holland, J. (Jan. 12, 1990) (ORDER); see also Stepak v. Tracinda Corp., Del. Supr., No. 406, 1989, Christie, J. (Nov. 9, 1989) (ORDER) (holding a motion for reargument tolled the period for applying for certification but refusing, on other grounds, to accept the interlocutory appeal).

b. Standards for Accepting Interlocutory Appeals. In accordance with Rule 42(b), the Supreme Court will not accept an interlocutory appeal unless the order of the trial court: (1) determines a substantial issue; and (2) establishes a legal right; and (3) meets one or more of the following criteria:

(i) Same as Certified Question. Any of the criteria applicable to proceedings for certification of questions of law set forth in Rule 41; or

(ii) Controverted Jurisdiction. The interlocutory order has sustained the controverted jurisdiction of the trial court; or

(iii) Substantial Issue. An order of the trial court has reversed or set aside a prior decision of the court, a jury, or an administrative agency from which an appeal was taken to the trial court which had determined a substantial issue and established a legal right, and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice; or

(iv) Prior Judgment Opened. The interlocutory order has vacated or opened a judgment of the trial court; or

(v) Case Dispositive Issue. A review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice.

c. Motions to Dismiss. The Supreme Court ordinarily does not accept interlocutory appeals of decisions denying motions to dismiss for failure to state a claim. Cf. Wilmington Medical Ctr., Inc. v. Coleman, Del. Supr., 298 A.2d 320, 322 (1972). The Supreme Court, however, has accepted appeals from: (1) the denial of a motion to dismiss on statute of limitations grounds, Laventhol, Krekstein, Horwath & Horwath v. Tuckman, Del. Supr., 372 A.2d 168, 169 (1976); (2) the denial of a motion to dismiss for lack of personal jurisdiction, Phillips v. Liberty Mut. Ins. Co., Del. Supr., 232 A.2d 101,102-03 (1967); and (3) from the denial of a motion to dismiss for forum non conveniens. States Marine Lines v. Domingo, Del. Supr., 269 A.2d 223, 225 (1970).

d. Motions for Summary Judgment. The Court occasionally has accepted appeals from a denial of a motion for summary judgment, (see, e.g., Hessler, Inc. v. Farrell, Del. Supr., 226 A.2d 708, 710 (1967), but interlocutory appeals ordinarily are not accepted in such cases. See, e.g., Sports Complex, Inc. v. Golt, Del. Supr., No. 145, 1994, Moore, J. (May 27, 1994) (ORDER); Certain Underwriters at Lloyd's London v. Hoechst Celanese Corp., Del. Supr., No. 129, 1994, Moore, J. (Apr. 22, 1994) (ORDER); New Castle Cty. v. Chavin, Del. Supr., No. 366, 1993, Horsey, J. (Oct. 27, 1993) (ORDER).

The Supreme Court occasionally accepts interlocutory appeals from decisions granting partial summary judgment. See, e.g., Magness v. Harmony Mill Ltd. Partnership, Del. Supr., No. 180, 1990, Walsh, J. (June 6, 1990) (ORDER); Continental Airlines Corp. v. American Gen. Corp., Del. Supr., No. 220, 1988, Christie, J. (July 22, 1988) (ORDER). However, it also has refused to consider such appeals. See, e.g., Langley v. Elsmere Assocs., Del. Supr., No. 58, 1995, Holland, J. (Mar. 8, 1995) (ORDER); Quality Elec. Co. v. Fireman's Fund Ins. Co., Del. Supr., No. 419, 1993,

Veasey, C.J. (Jan. 19, 1994) (ORDER) (refusing an appeal from a Superior Court order granting summary judgment in favor of one defendant); Spadaro v. Owens-Illinois, Inc., Del. Supr., No. 210, 1992, Moore, J. (Oct. 8, 1992) (ORDER) (dismissing an interlocutory appeal, previously accepted by the Court, from a Superior Court order granting summary judgment to certain asbestos litigation defendants on the ground that a release executed by plaintiffs in an earlier action barred plaintiffs' claim as to these defendants).

e. Discovery-Related Rulings. The Supreme Court generally will not accept interlocutory appeals from discovery-related rulings. See, e.g., McCann v. Emgee, Inc., Del. Supr., No. 402, 1993, Veasey, C. J. (Dec. 22, 1993) (ORDER) (refusing appeal from a Superior Court order requiring appellants to respond to discovery requests served upon them by an intervenor); Hoechst Celanese Corp. v. National Union Fire Ins. Co., Del. Supr., No. 385, 1993, Horsey, J. (Nov. 16, 1993) (ORDER) (refusing appeal from an order denying the plaintiffs' motion for an order protecting assertedly privileged documents from discovery); E.I. duPont de Nemours & Co. v. Admiral Ins. Co., Del. Supr., No. 48, 1993, Horsey, J. (Feb. 8, 1993) (ORDER).

The Supreme Court's strong disinclination to accept interlocutory appeals from discovery matters was made especially clear from its en banc ruling in In re Rinehardt, Del. Supr., 575 A.2d 1079 (1990). In Rinehardt, a State Farm Fire and Casualty Co. employee appealed from what the employee claimed was a final contempt judgment issued against the employee by the Superior Court for the employee's refusal, contrary to a discovery order of the Superior Court, to answer certain questions at the employee's deposition. The Supreme Court observed that State Farm had not filed an interlocutory appeal from the discovery order, and expressed its disapproval of the employee's appeal, which the Court regarded as a "stratagem . . . intended to avoid the possibility that we would refuse to hear an interlocutory appeal from the discovery order." Id. at 1080 (footnote omitted). In vacating the contempt order and dismissing the appeal without reaching the issue of the

propriety of the discovery order, the Court reaffirmed "discovery orders rarely satisfy the criteria of Rule 42(b) for the acceptance of such appeals." Id. at 1080 n.1.

The Court noted an exception to its general refusal to accept interlocutory appeals of discovery-related rulings in PepsiCo, Inc. v. Pepsi-Cola Bottling Co. of Asbury Park, Del. Supr., 261 A.2d 520, 521-522 (1969). In PepsiCo, the Court dismissed an appeal from an order requiring discovery responses, rejecting the appellant's "undue burden and expense" argument, but noted that a discovery order involving privilege, self-incrimination, privacy, trade secrets, or "ruinous" burden might determine substantive rights and issues so as to be appealable. Id. at 521.

f. Acceptance of Appeals from Family Court. The Supreme Court will accept certain interlocutory appeals from Family Court decisions where such appeals were previously available in the Superior Court. 13 Del. C. § 1522(a)(3). The Supreme Court, however, does not hesitate to refuse or dismiss appeals from the Family Court not meeting the requirements of Rule 42. See, e.g., Street v. Street, Del. Supr., No. 140, 1995, Hartnett, J. (July 13, 1995) (ORDER) (refusing to accept an appeal of an interlocutory Family Court order granting the petitioner's former wife an interest in certain real estate formerly titled in the petitioner's name, and ordering the petitioner to pay a sum to his former wife); Davis v. Division of Child Support Enforcement, Del. Supr., No. 108, 1995, Hartnett, J. (May 24, 1995) (ORDER) (dismissing interlocutory appeal from Family Court order issuing a capias for appellant's arrest for failure to appear at a child support hearing).

g. Acceptance of a Portion of an Order. The Supreme Court can review an interlocutory order of the trial court and accept only that portion which it deems satisfies the requirements of Rule 42. Gibson v. Keith, Del. Supr., No. 93, 1984, Christie, J. (May 9, 1984) (ORDER).

h. Appeals from Administrative Agencies. The 1983 amendments to Rule 42(a) and Rule 42(b)(iii) provide that interlocutory appeals may be taken from decisions made

by the Superior Court or Court of Chancery acting in their capacity as intermediate appellate courts charged with reviewing decisions or orders of a court or an administrative agency.

Prior to the 1983 Amendment, there was no provision for interlocutory appeals from rulings of administrative agencies. See, e.g., Taylor v. Collins & Ryan, Inc., Del. Supr., 440 A.2d 990 (1981); Schagrin Gas Co. v. Evans, Del. Supr., 418 A.2d 997, 998 (1980). However, in DiSabatino Bros., Inc. v. Wortman, Del. Supr., 453 A.2d 102, 104 (1982), the Supreme Court applied Rule 42 to interlocutory appeals from administrative agencies and announced that it would amend Rule 42 to make it clear both that the Rule applies to a trial court acting in an appellate capacity and that eligibility for interlocutory review is not foreclosed because the trial court remands, provided the administrative agency's decision has determined a substantial issue and established a legal right. The Supreme Court suggested in a footnote in DiSabatino that the interlocutory appeal procedure was not applicable to remands for "purely ministerial" functions presumably indicating such remands were final orders appealable to the Supreme Court as a matter of right. Id. at 104 n.3 (quoting McClelland v. General Motors Corp., Del. Supr., 214 A.2d 847, 848 (1965)).

This dichotomy may present a dilemma to the practitioner. If there exists any doubt as to the proper characterization of the administrative entity's function on remand, a notice of appeal should be filed. Consideration also should be given as to whether the Rule 42 procedure should be pursued at the same time, with the thought that at some stage of the appellate proceedings the Supreme Court will indicate which procedure is applicable.

Importantly, a Superior Court decision remanding a matter to the Industrial Accident Board is an interlocutory rather than a final order. Accordingly, the requirements of Rule 42 control the appeal. See Kleimann v. Dutch Pantry Restaurant, Del. Supr., No. 171, 1993, Horsey, J. (July 19, 1993) (ORDER); Wilson Beverage v. McCracken, Del. Supr., No. 523, 1992, Walsh, J. (May 3, 1993) (ORDER); DiSabatino Bros., Inc. v. Wortman, 453 A.2d at 103-04.

i. In Forma Pauperis. Trial court rulings on applications of persons to proceed in forma pauperis are interlocutory. See, e.g., Abdul-Akbar v. Washington-Hall, Del. Supr., 649 A.2d 808, 809 (1994); Grubb v. Santoro, Del. Supr., No. 373, 1993, Horsey, J. (Nov. 17, 1993).

j. Stay Rulings. The Supreme Court occasionally accepts interlocutory appeals from trial court decisions staying or declining to stay actions. See, e.g., ANR Pipeline Co. v. Shell Oil Co., Del. Supr., 525 A.2d 991, 992 (1987) (interlocutory appeal from the Court of Chancery's ruling granting a stay); Williams Natural Gas Co. v. BHP Petroleum Co., Inc., Del. Supr., No. 429, 1989, Christie, C.J. (Nov. 8, 1989) (ORDER) (accepting an interlocutory appeal from the Court of Chancery's ruling granting a stay); but see Allen v. Jim Walker Corp., Del. Supr., No. 53, 1990, Christie, C.J. (Apr. 2, 1990) (ORDER) (refusing to accept an interlocutory appeal from the Court of Chancery's denial of a motion for a stay).

k. Disqualification of Counsel. A ruling on a motion for disqualification is generally deemed interlocutory and therefore not subject to review without compliance with Rule 42. See Los v. Los, Del. Supr., 595 A.2d 381, 383 n.2 (1991) (a Family Court ruling denying a motion for recusal, although interlocutory, became final when the Family Court dismissed the movant's petition for review of a child support order because the movant refused to participate in a hearing after denial of his motion); see also Berlin v. Emerald Partners, Del. Supr., No. 136, 1988, Moore, J. (Apr. 14, 1988) (ORDER) (accepting an interlocutory appeal from a ruling of the Court of Chancery denying disqualification of the corporate plaintiff's attorney).

l. Granting a New Trial. In Celotex Corp. v. Bradley, Del. Supr., No. 279, 1990, Horsey, J. (Sept. 4, 1990) (ORDER), the Supreme Court refused to accept the defendant's application for an interlocutory appeal of an order of the Superior Court granting plaintiffs a partial new trial limited to damages. The Superior Court had found that the jury verdicts in favor of plaintiffs were so grossly out of proportion to the injuries they suffered as to shock the conscience

and sense of justice of the court. The Superior Court therefore granted the partial new trial as to damages only, finding that the jury's findings on all of the other issues were supported by the evidence. The Supreme Court refused to accept the interlocutory appeal because it did not meet the threshold requirements of Rule 42 and would not terminate the litigation or be in the interest of justice. See also Miller v. Suburban Propane Gas Corp., Del. Supr., 565 A.2d 913, 914 (1989) (dismissing, for failure to comply with Rule 42, plaintiffs' motion for review of a Superior Court order granting defendants' motion for a new trial on the issue of punitive damages); Sanford School, Inc. v. Alexander, Del. Supr., No. 197, 1984, Christie, J. (Nov. 16, 1984) (ORDER) (dismissing cross-appeals from a Superior Court ruling which refused to set aside a jury verdict for the plaintiff, but did set aside the jury's award of damages, and ordered a new trial as to damages; the Supreme Court ruled that the order was interlocutory as to both sets of parties, so that the appeals would be inappropriate even if attempts had been made to bring the appeals within the requirements of Rule 42).

m. Criminal Proceedings. Rule 42 specifically governs civil actions; the Supreme Court is without jurisdiction to accept an appeal from an interlocutory order in a criminal case. See Del. Const. art. IV, § 11(1)(b); Rash v. State, Del. Supr., 318 A.2d 603, 604 (1974).

In In the Matter of Frank Acierno, Del. Supr., No. 210, 1990, Walsh, J. (July 19, 1990) (ORDER), the Attorney General issued a subpoena to a witness in connection with an investigation into possible violations of state election laws. The witness appealed from the Superior Court's denial of a motion to quash the subpoena. The Supreme Court found that the proceeding was civil in nature since the sanction for failing to comply with the subpoena would be civil contempt. Since the Superior Court had not yet issued a sanction for contempt, resolution of the failure to comply was not final and therefore the Supreme Court dismissed the appeal as being interlocutory

and premature. See also In re Henkel, Del. Supr., No. 40, 1984, Horsey, J. (Feb. 27, 1984) (ORDER).

n. Miscellaneous. Several other "miscellaneous" matters are also noteworthy as they pertain to interlocutory appeals:

(1) The taking of an interlocutory appeal does not automatically stay the proceedings in the trial court. Instead, a party seeking a stay must apply for such relief. Supr. Ct. R. 42(e).

(2) Neither a party's failure to seek review of an interlocutory order nor the Supreme Court's refusal to accept an appeal therefrom bars the party from seeking review of the interlocutory order on appeal from the final order, judgment, or decree. Supr. Ct. R. 42(f).

(3) An "anticipated adverse ruling" is not sufficient grounds for taking an interlocutory appeal; rather, an interlocutory appeal is appropriate from rulings actually made and orders actually entered. See Lummus Co. v. Air Prods. and Chems., Del. Supr., 243 A.2d 718, 719 (1968).

(4) The failure to take an interlocutory appeal does not act as a waiver of objection to the trial court's ruling and an appeal may subsequently be taken from the final order or judgment. Coaxial Communications v. CNA Fin. Corp., Del. Supr., 367 A.2d 994, 997 (1976); 10 Del.C. § 144.

(5) Finally, orders entered by the Supreme Court under Rule 42 are not subject to reargument. Supr. Ct. R. 18.

CHAPTER 6. STANDARD AND SCOPE OF REVIEW OF TRIAL COURT DECISION/TRIAL AND APPELLATE COURT FUNCTIONS COMPARED

TABLE OF CONTENTS

CHAPTER 6. STANDARD AND SCOPE OF REVIEW OF TRIAL COURT DECISION/TRIAL AND APPELLATE COURT FUNCTIONS COMPARED

Richard R. Cooch[1]
Donald J. Wolfe, Jr.[2]

6.01 INTRODUCTION. This chapter addresses the standard and scope of review that the Supreme Court will apply to a trial court decision and, more specifically, the extent to which the Court is willing to reexamine and reanalyze the contentions resolved by the trial court's decision. The "standard" of review refers to the legal standard as may be appropriate (i.e., "clearly erroneous"; "abuse of discretion"), whereas the "scope" of review refers to the parameter of the review. In practice, however, the terms generally are viewed as synonymous.

The selected standard and scope of review is frequently of critical significance to the outcome of an appeal, for it may well determine the result. The practitioner is therefore well-advised to bear the applicable principles in mind even at the trial level in order to develop strategies to ensure that the record will be sent up in the most advantageous possible posture should an appeal be required and, on appeal, to frame the issues so as to obtain from the client's standpoint the most favorable scope of review.

This chapter will deal generally with the standard and scope of review in civil appeals. The standard and scope of review applicable to more specialized areas is covered in other chapters as follows:

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[1]The Honorable Richard R. Cooch is a Judge of the Delaware Superior Court. He was originally assisted in his preparation of this chapter by Andrew P. Taylor and Francis J. Jones, Jr. Mr. Taylor is a director in Cooch & Taylor. Mr. Jones is a partner in the firm of Morris, James, Hitchens & Williams.

[2]Donald J. Wolfe, Jr., a partner at Potter Anderson & Corroon, updated Judge Cooch's original chapter. He was assisted in that task by Michael S. McGinniss, a Potter Anderson & Corroon associate.

1. Standard and scope of review of interlocutory appeals -- Chapter 5.

2. Standard and scope of review in criminal cases -- Chapter 13.

3. Standard and scope of review of appeals to the Court of Chancery -- Chapter 19.

4. Standard and scope of review of appeals to the Superior Court from administrative commissions, boards and other courts -- Chapter 20.

5. Standard and scope of review in worker's compensation decisions -- Chapter 21.

6. Standard and scope of review in unemployment compensation decisions -- Chapter 22.

7. Standard and scope of review from Family Court decisions -- Chapter 23.

8. Standard and scope of review from Justice of the Peace Court decisions -- Chapter 24.

The requirement of Supreme Court Rule 14(b)(vi) that a statement of the standard and scope of review precede each argument section of a brief is discussed in Chapter 8 ("Briefs").

6.02 REVIEW OF FACTUAL DETERMINATIONS. The standard and scope of review of a factual determination turns on (1) whether the trier of fact was the trial court or a jury; (2) whether the evidence relied upon to make the determination was "live" or documentary; and (3) whether the factual finding was based upon inferences and deductions from other facts.

When the factual determinations are made by a jury, the inquiry on review is limited by Article IV, Section 11(1)(a) of the Delaware Constitution, which provides that "the findings of the jury, if supported by evidence, shall be conclusive." See also Storey v. Camper, Del. Supr., 401 A.2d 458 (1979) (trial court decision granting new trial after jury verdict reversed when trial court did not give detailed reasons for its ruling); Sussex Poultry Co. v. American Ins. Co., Del. Supr., 301 A.2d 281 (1973) (jury finding that windstorm did not proximately cause damage to building supported by evidence when expert witness testified building collapsed from weight of snow on roof); Malcolm v.

Little, Del. Supr., 295 A.2d 711 (1972) (jury award for compensatory damages resulting from unlawful eviction upheld when evidence showed tenant was locked out of apartment and refused access despite the fact that items exempt from distress remained in apartment); Haveg Corp. v. Guyer, Del. Supr., 226 A.2d 231 (1967) (jury finding that defendant breached contract with plaintiff upheld when plaintiff testified defendant agreed and promised plaintiff exclusive requirements contract). Although the Constitution does not expressly define "supported by evidence," the factual findings of the jury will not be disturbed if there is any competent evidence upon which the verdict could reasonably be based. Turner v. Vineyard, Del. Supr., 80 A.2d 177, 179 (1951).

Where the Court is the trier of fact, the standard and scope of review in the Supreme Court is generally more broad. The principles that are applicable in this circumstance were enumerated in the case of Levitt v. Bouvier, Del. Supr., 287 A.2d 671 (1972), in which the Supreme Court held that factual findings by a trial judge that are sufficiently supported by the record and are the product of an orderly and logical deductive process must be accepted even though the reviewing Court might have reached opposite conclusions. Id. at 673. The Levitt Court stated that the reviewing court will make contradictory findings of fact only when the findings below are clearly wrong and the doing of justice so requires. See also Lank v. Steiner, Del. Supr., 224 A.2d 242, 245 (1966); Adams v. Jankouskas, Del. Supr., 452 A.2d 148, 151 (1982) (trial court's findings will be given "great deference" where there is conflicting testimony and trial court heard all the witnesses); Smith v. Van Gorkom, Del. Supr., 488 A.2d 858, 871 (1985) (reviewing court made its own findingwhere trial court's finding was "contrary to the record and not the product of a logical and deductive reasoning process").[3]

[3]This rule recalls the "clearly erroneous" standard in Rule 52 of the Federal Rules of Civil Procedure. The federal standard has been interpreted to mean that findings of fact shall not be set aside unless the reviewing court, on the basis of all record evidence, is left with a definitive and firm conviction that a mistake has been committed. Guzman v. Pichirilo, 369 U.S. 698 (1962); C.I.R. v.

While the relatively deferential Levitt rule has also been invoked with respect to judicial findings of fact based solely on inferences drawn from undisputed facts and as to factual findings drawn entirely from documentary evidence, see, e.g., Dutra de Amorim v. Norment, Del. Supr., 460 A.2d 511, 515-16 (1983); Fiduciary Trust Co. v. Fiduciary Trust Co., Del. Supr., 445 A.2d 927, 930 (1982), a number of cases nevertheless suggest that the Supreme Court will undertake a more active review in these circumstances. See, e.g., International Boiler Works Co. v. General Waterworks Corp., Del. Supr., 372 A.2d 176, 177 (1977); duPont v. duPont, Del. Supr., 216 A.2d 674, 680 (1966); Application of Delaware Racing Ass'n, Del. Supr., 213 A.2d 203, 207 (1965); Hob Tea Room Inc. v. Miller, Del. Supr., 89 A.2d 851 (1952); New York Trust Co. v. Riley, Del. Supr., 16 A.2d 772 (1940); Lank v. Steiner, Del. Supr., 224 A.2d 242, 248 (1966) (Herrmann, J., dissenting). Cf. Blish v. Thompson Automatic Arms Corp., Del. Supr., 64 A.2d 581, 604 (1948); Levin v. Smith, Del. Supr., 513 A.2d 1292, 1301 (1986)(trial court's findings of fact, inferences and deductions held "clearly wrong"); Mills Acquisition Co. v. Macmillan, Inc., Del. Supr., 559 A.2d 1261 (1989) (the Court will review entire documentary record and reach its own conclusions with respect to the facts). See also Ivanhoe Partners v. Newmont Mining Corp., Del. Supr., 535 A.2d 1334 (1987) (on an appeal from an entirely paper record, the standard and scope of review requires Supreme Court to review entire record and draw its own conclusions with respect to the facts if the findings below are clearly wrong and justice requires the Court to do so); Cummings v. Pinder, Del. Supr., 574 A.2d 843 (1990).

While Levitt v. Bouvier itself involved an appeal from the Superior Court, its holding has also been applied to appeals to the Supreme Court from decisions from the Court of Chancery, Apartment Communities Corp. v. State, Del. Supr., 422 A.2d 342 (1980); Kahn v. Lynch

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Duberstein, 363 U.S. 278 (1960). See also Frank G.W. v. Carol M.N., Del. Supr., 457 A.2d 715, 719 (1983).

Communication Systems, Inc., Del. Supr., 638 A.2d 1110 (1994) (factual findings of the Court of Chancery will not be set aside unless they are clearly erroneous or not the product of a logical and orderly deductive process); Bartley v. Davis, Del. Supr., 519 A.2d 662 (1986) (appellate review of findings of Chancellor after trial is limited to search for substantial evidence supporting them, but to extent Chancellor's ruling implicated issues of law, reviewing Court was free to examine such rulings de novo), to appeals from the Family Court, Wife (J.F.V.) v. Husband (O.W.V., Jr.), Del. Supr., 402 A.2d 1202 (1979), Eberly v. Eberly, Del. Supr., 489 A.2d 433 (1985), to appeals to the Superior Court from the Court of Common Pleas, State v. Cagle, Del. Supr., 332 A.2d 140 (1974), and to the Superior Court's review of fact findings by administrative agencies, Baker v. Connell, Del. Supr., 488 A.2d 1303 (1985) (reversing the grant of a variance by the Board of Adjustment of the City of Rehoboth Beach). For a further discussion of administrative appeals, see Section 20.09, Administrative Agencies from Which an Appeal May Be Taken Under the Administrative Procedures Act, Section 20.14, Review of Case Decisions Under the Administrative Procedures Act, and Section 20.15, Administrative Agencies, Boards and Commissions From Which Appeals May Be Taken By Special Statutes Other Than the Administrative Procedures Act. In addition, the Levitt formulation has been applied to review of court-approved settlements. See Polk v. Good, Del. Supr., 507 A.2d 531 (1986) (standard of review is whether under all the facts and circumstances the Chancellor abused his discretion). See also In re Resorts Int'l Shareholders Litig. Appeals, Del. Supr., 570 A.2d 259 (1990) (Supreme Court's review of an appeal from a class or derivative settlement is predicated on the trial court's considerable discretion).

6.03 REVIEW OF LEGAL DETERMINATIONS. The Supreme Court will review de novo questions of law decided by the Court below. Fiduciary Trust Co. v. Fiduciary Trust Co., Del. Supr., 445 A.2d 927, 936 (1982); Wife (J.F.V) v. Husband (O.W.V., Jr.), Del. Supr., 402 A.2d 1202, 1204 (1979); duPont v. duPont, Del. Supr., 216 A.2d 674, 680 (1966); Nardo v. Nardo, Del.

Supr., 209 A.2d 905, 917 (1965). See Section 6.05 for the effect of error. It is relatively rare, however, that an appeal from a nonjury decision after trial, either in the Court of Chancery or the Superior Court, will involve a pure question of law. More often, mixed questions of law and fact will be presented. International Boiler Works Co. v. General Waterworks Corp., Del. Supr., 372 A.2d 176, 177 (1977) (citing, inter alia, Levitt v. Bouvier). See Black v. Gray, Del. Supr., 540 A.2d 431 (1988) (Family Court decision terminating parental rights must be supported by clear and convincing evidence consistent with the applicable legal criteria; when proof fails or trial court conclusions are not the product of an orderly and logical deductive process, Supreme Court must reverse); Bartley v. Davis, Del. Supr., 519 A.2d 662 (1986). As noted above, the Supreme Court will apply the Levitt standard to its review of the factual findings, and will overturn those findings only if "clearly wrong." Section 6.02, supra. See Cede & Co. v. Technicolor, Inc., Del. Supr., 634 A.2d 345, 360 (1993) ("Assuming a correct formulation of the rule's elements, the trial court's findings upon application of the duty of loyalty or duty of care, being "fact dominated," are, on appeal, entitled to substantial deference unless clearly erroneous or not the product of a logical and deductive reasoning process"); Frantz Mfg. Co. v. EAC Indus., Del. Supr., 501 A.2d 401, 407 (1985) (applying Levitt standard to Court of Chancery's decision on mixed questions of law involving the validity and fairness of corporation's bylaw amendments). See also Judge v. Rago, Del. Supr., 570 A.2d 253 (1990) (Supreme Court review is "plenary" in appeal presenting issues of both contract interpretation and the common law of real property; insofar as the trial court relied upon parol evidence, its factual findings are entitled to greater deference). See generally Anderson v. Bessemer City, 470 U.S. 564 (1985) (a fact finder's choice between two reasonable interpretations of the evidence cannot be "clearly erroneous"). Accordingly, the appellant seeking reversal of a nonjury determination should fashion appellant's arguments, if possible, to avoid the need to overturn the clearly factual aspects of such decisions in order to secure reversal.

Even appeals from jury trials frequently raise mixed questions of law and fact, placing squarely at issue the proper scope of review in a particular case. The appellant in such circumstances typically will characterize the question presented as a legal one, warranting a virtually unlimited scope of review. Conversely, the appellee routinely will emphasize the factual aspects of the issue, urging a narrower and more deferential review.

6.04 ABUSE OF DISCRETION. Many decisions by a trial court do not involve discrete findings of facts and applications of pure law. Rather, such decisions may turn on the balancing of many conflicting factors, both legal and factual, and the formulation of a judgment based upon what is characterized as an exercise of discretion. Examples include the grant or denial of interim injunctive relief or the appropriate amount of an award of child support. The standard of review upon appeal from such decisions is described as "abuse of discretion" and, in effect, holds that the reviewing court will not substitute its own notions of what is right for those of the trial judge, if the trial judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness. The clearest statement of this standard by the Supreme Court was made in Pitts v. White, Del. Supr., 109 A.2d 786, 788 (1954):

> The essence of judicial discretion is the exercise of judgment directed by conscience and reason, as opposed to capricious or arbitrary action; and where a court has not exceeded the bounds of reason in view of the circumstances, and has not so ignored recognized rules of law or practice, so as to produce injustice, its legal discretion has not been abused; for the question is not whether the reviewing court agrees with the court below, but rather whether it believes that the judicial mind in view of the relevant rules of law and upon due consideration of the facts of the case could reasonably have reached the conclusion of which complaint is made. [citations omitted]

See Chavin v. Cope, Del. Supr., 243 A.2d 694 (1968). See also Wahle v. Medical Center of Delaware, Inc., Del. Supr., 559 A.2d 1228 (1989) (upholding trial court's dismissal of action for failure of plaintiff to identify expert witness, and citing Pitts v. White, Del. Supr., 109 A.2d 786 (1954)).

6.05 TYPE AND EFFECT OF ERROR BELOW.

a. General Rule: Appellate Review is Limited to Errors Asserted in the Trial Court. Delaware subscribes to the general rule that "issues not raised in the trial court shall not be heard on appeal." Wilmington Trust Co. v. Conner, Del. Supr., 415 A.2d 773, 781 (1980); Wilmington Memorial Co. v. Silverbrook Cemetery Co., Del. Supr., 297 A.2d 378 (1972); Equitable Trust Co. v. Gallagher, Del. Supr., 77 A.2d 548 (1950). This rule is embodied in Supreme Court Rule 8, which provides:

> Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.

Rule 8 applies to evidentiary, procedural, and substantive claims, in both civil and criminal appeals. Thus, a First Amendment question, not presented below, was not considered on appeal in Peterson v. Hall, Del. Supr., 421 A.2d 1350 (1980); a choice of law question, not presented below, was not considered on appeal in Cline v. Prowler Industries of Maryland, Inc., Del. Supr., 418 A.2d 968 (1980); an objection to evidence was not permitted to be raised for the first time on appeal in Rochester v. Katalan, Del. Supr., 320 A.2d 704 (1974); and lack of objection to a prosecutor's summation, not raised below, was not considered on appeal in Young v. State, Del. Supr., 431 A.2d 1252 (1981).

Rule 103 of the Delaware Rules of Evidence ("D.R.E."), provides the ground rules for raising evidentiary issues on appeal:

> (a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> > (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

> (2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.
>
> (b) Record of Offer and Ruling. The Court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made and the ruling thereon. It may direct the making of an offer in question and answer form.
>
> (c) [omitted]
>
> (d) Plain Error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Thus, D.R.E. 103, like its counterpart, Federal Rule of Evidence 103, places the initiative for raising and preserving the right to raise error in the admission or exclusion of evidence upon the party, and not upon the court, with one narrow exception (for "plain error"). One authority discussing the federal rule has summarized the distinctions among types of error as follows:

> Although plain error is the only class of error explicitly mentioned in Rule 103, the Rule deals with three categories of error well-recognized in statutory law and judiciary opinion. 'Harmless error' is error raised at trial but found not to affect substantial rights. `Prejudicial' or `reversible' error is error raised at trial which is found to affect substantial rights. `Plain error' is error not raised at trial, but nevertheless considered by a reviewing court, which is found to affect substantial rights. The distinction between harmless and reversible error thus turns on whether substantial rights are affected, and the distinction between harmless and plain error on whether the particular error in the case at hand excuses the party's failure to bring it properly to the trial court's attention.

1 Weinstein's Evidence § 103[01], at 103-8 (1995) (hereinafter "Weinstein").[4]

In criminal cases, the phrase "when the interests of justice so require," Supr. Ct. R. 8, constitutes a "plain error" standard. See Chapter 13.

[4]Federal cases and authorities regarding error may of course be helpful by analogy but are not controlling.

> [T]he error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process. Furthermore, the doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character; and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice.

Wainwright v. State, Del. Supr., 504 A.2d 1096, 1100 (1986) (citations omitted). See Dawson v. State, Del. Supr., 637 A.2d 57, 62-63 (1994); Bowe v. State, Del. Supr., 514 A.2d 408, 410-11 (1986).

The purpose of D.R.E. 103 is to expedite finality and promote economy in litigation by forcing parties to object below or risk being foreclosed from raising the error on appeal. See I Weinstein § 103[02], at 103-15. Compare Super. Ct. Civ. R. 43(c) and Ch. Ct. R. 43(c) (each establishing the procedure required for creating a record of excluded evidence) with D.R.E. 103 (apparently creating an unconditional right to make an offer of proof). Since the Rules of Evidence supersede any conflicting court rule, In re Adoption of the Delaware Uniform Rules of Evidence (Feb. 1, 1980) (ORDER), an attorney now has both the right and obligation to make an offer of proof.

It has been said that "plain error" is a concept that appellate courts find easier to apply than to define. 3A Wright, Federal Practice and Procedure: Criminal § 856 (1969). As noted previously, the phrase "when the interests of justice so require" contained in Supreme Court Rule 8 is in effect a plain error rule, particularly in criminal cases, and can only be defined on a case-by-case basis. See, e.g., Culver v. Bennett, Del. Supr., 588 A.2d 1094, 1099 (1991) (plain and reversible error to use the term "substantial factor" in the instructions and interrogatories to the jury on the issue of proximate cause, and failure to object at trial did not constitute a waiver of the right to raise the issue on appeal).

D.R.E. 103(a) provides that an error properly brought to the trial court's attention may be the basis for a reversal on appeal only if the error affected "a substantial right of a party." See

State Highway Dept. v. Buzzuto, Del. Supr., 264 A.2d 347 (1970) (pre-Rule); Malone Freight Lines, Inc. v. Johnson Motor Lines, Inc., Del. Supr., 148 A.2d 770 (1959).

In most instances, reliance by an appellant upon the "plain error" rule to obtain a reversal on appeal should be viewed as a tactic of last resort. Moreover, because consideration of error not raised below is looked upon with disfavor by the Supreme Court, the attorney should always endeavor to make a record on all potential claims of error in the trial court.

Error is harmless when it is trivial, formal or merely academic, not prejudicial to the substantial rights of the party assigning it, and when it no way affects the final outcome of the case. See, e.g., State Personnel Comm'n v. Howard, Del. Supr., 420 A.2d 135 (1980) (incomplete notice of appeal held not substantially prejudicial); Seeney v. State, Del. Supr., 211 A.2d 908 (1965) (trial judge's comments held not prejudicial); Mann v. Oppenheimer & Co., Del. Supr., 517 A.2d 1056 (1986) (refusal of trial court to permit discovery required reversal). Error is prejudicial, and constitutes a ground for reversal, only when it affects the final result of the case and adversely affects a substantial right of the party assigning it, a fact that must be clear on the record. The burden, generally, is on the party assigning error to demonstrate both the existence of error and its prejudicial result. See generally 5 Am.Jur.2d, Appeal and Error §§ 776-792; 1 Weinstein § 103[02], at 103-07.

Courts in a number of reported Delaware civil cases have not specifically referred to the "harmless error" rule but, in finding reversible error, have concluded inferentially that an error standing alone was harmless. See, e.g., State Highway Dep't v. Buzzuto, Del. Supr., 264 A.2d at 351 (one of several errors asserted held nonprejudicial). Errors which in themselves are deemed harmless, however, may cumulatively constitute reversible error. Robelen Piano Co. v. DiFonzo, Del. Supr., 169 A.2d 240, 248 (1961).

Finally, with regard to harmless error in the context of a motion for a new trial, see Superior Court Civil Rule 51 and Court of Chancery Rule 61.

b. Some Particular Circumstances Affecting Scope of Review or Right of Review. Some particular circumstances affecting the scope and right of review are briefly examined below.

1. Acquiescence. The right of appeal may not be lost by acquiescence in, or recognition of, the validity of the decision below from which the appeal is taken or by otherwise taking a position which is inconsistent with the right of appeal. 5 Am.Jur.2d, Appeal and Error, § 618.

2. Acceptance of Benefits. Acceptance of benefits, or the taking of money under a judgment, may preclude the right to appeal if there are elements of an estoppel (e.g., prejudice) present. Hayward v. Green, Del. Supr., 88 A.2d 806 (1952).

3. Invited Error. An attorney can also waive the attorney's client's right to raise an error on appeal by deliberately eliciting or relying on inadmissible evidence, even when the error involves a defendant's constitutional rights. See generally 1 Weinstein § 103[02], at 103-20-21. The "invited error" doctrine prevents a party to a legal action from profiting when a party causes or invites the error. But see Wainwright v. State, Del. Supr., 504 A.2d 1096, 1101 (1986) ("Where there is plain error, the fact that the error may have been 'invited' by the actions of defense counsel does not render it less significant or result in a forfeiture of appellate review.").

4. Estoppel and Waiver. Depending on the circumstances, waiver and estoppel principles generally bar a party from complaining of error not raised and preserved in the trial court, or presented by a proper record. City of Wilmington v. Spencer, Del. Supr., 391 A.2d 199 (1978); Wilkins v. Birnbaum, Del. Supr., 278 A.2d 829 (1971). Based on the same principles, right to appeal or cross-appeal may be lost by consenting to the judgment, complying therewith or accepting its benefits. 5 Am.Jur.2d, Appeal and Error, § 718. But see discussion of the "plain error" rule, above, at Section 6.05.

5. Mootness. The function of appellate courts is only to decide actual controversies injuriously affecting the rights of some party to the litigation. Generally, an appellate court will not consider an appeal when the issue is found to be abstract, theoretical, or moot. Ackerman v. Stemerman, Del. Supr., 201 A.2d 173 (1964); 5 Am.Jur.2d, Appeal and Error §§ 640-645.

6.06 STANDARD AND SCOPE OF REVIEW OF ORDERS ON MOTIONS.

a. Introduction. The form of the order from which an appeal is taken, however, does not determine whether the decision is a final decision appealable as a matter of right or whether the appeal may be taken only under Supreme Court Rule 42 as an interlocutory appeal. In re Campher, Del. Supr., 498 A.2d 1090, 1092 (1985) (treating as a final order a denial of a motion

for summary judgment in an uncontested proceeding to quiet title). Whether a ruling upon a motion or other order is appealable depends upon the substance of what the ruling or order accomplishes. If it is determinative of the litigation, as the granting of a motion to dismiss, or summary judgment or judgment on the pleadings, an appeal lies as a matter of right. Otherwise, under current Supreme Court practice, an appeal will lie only if the ruling is certified in accordance with the procedures and standards enunciated in Supreme Court Rule 42. The discussion below is limited to the scope of review applied to specified rulings or orders where the appeal has been perfected either as a matter of right or by certification. See Chapter 5 regarding interlocutory appeals.

b. Motion for Judgment on the Pleadings. Assuming that the order is appealable, the sole issue on appeal from the entry of judgment on the pleadings is necessarily a question of law since, for purposes of such a motion, the moving party admits the allegations of the opposing party's pleadings. Accordingly, the standard and scope of review is the broad de novo review accorded legal issues. Fagnani v. Integrity Fin. Corp., Del. Super., 167 A.2d 67 (1960). See Section 6.03.

c. Motions for Summary Judgment. The standard and scope of appellate review with respect to a motion for summary judgment depends upon the approach that the trial court has adopted in resolving the motion. Thus, in Vanaman v. Milford Memorial Hosp., Del. Supr., 272 A.2d 718, 720 (1970), the Supreme Court stated:

> It is elementary, of course, that a summary judgment may be granted only if, on undisputed facts, the moving party establishes that he is entitled to that judgment as a matter of law. Any application for such a judgment must be denied if there is any reasonable hypothesis by which the opposing party may recover, or if there is a dispute as to a material fact or the inferences to be drawn therefrom.

As in all summary judgment cases, the facts shall be stated in the light most favorable to the party against whom summary judgment is requested. Hazewski v. Jackson, Del. Super., 266 A.2d 885, 886 (1970).

When considering an appeal from a decision disposing of a motion for summary judgment, it is important first to determine whether the trial court's decision is a final judgment (appealable as of right) or an interlocutory order (potentially appealable under Rule 42). Occasionally, the trial court's denial of summary judgment may constitute a final, and therefore appealable, decision. "[N]otwithstanding the form of the Order appealed, the Court's decision [denial of Motion for Summary Judgment] constituted a final judgment in substance, if not in form, and represented a final decision on the merits.... Since the Order appealed is not an interlocutory order, the provisions of Rule 42(d) do not apply." In re Campher, Del. Supr., 498 A.2d 1090, 1092 (1985) (denial of summary judgment motion treated as a final order in uncontested proceedings to quiet title). See also Gannett Co. v. Re, Del. Supr., 496 A.2d 553 (1985), in which the court applied the abuse of discretion standard in reviewing the disposition of a new trial motion. The court further distinguished between the "great weight of the evidence" standard, which is applicable when the trial court considers motions to set aside a jury verdict, and the "shocking to the court's conscience and sense of justice" standard, which is applicable when the trial court considers motions dealing with the size of a jury verdict.

A litigant has no absolute right to the entry of summary judgment. An application for summary judgment is always addressed to the discretion of the trial judge. Brunswick Corp. v. Bowl-Mor Co., Del. Supr., 297 A.2d 67, 69 (1972); Sterling Drug, Inc. v. City Bank Farmers Trust Co., Del. Supr., 154 A.2d 156, 159 (1959). As such, in the unusual case when a denial of summary judgment is certified for interlocutory appeal, the appropriate standard of review is whether there was an abuse of discretion in the denial of the motion for summary judgment. In the case where the

decision on the motion for summary judgment turns on a question of law, the applicable standard of review is whether the trial court committed reversible error as to that question of law.

The scope of review on appeal of a decision on summary judgment is de novo consideration, pursuant to which the Supreme Court may review the entire record, including the pleadings and any issues such pleadings may raise, affidavits and other evidence in the record, as well as the trial court's order and opinion. Pike Creek Chiropractic Ctr. v. Robinson, Del. Supr., 637 A.2d 418 (1994). From this review the Court is free to draw its own conclusions with respect to the facts if the findings below are clearly wrong and if justice so requires, particularly where the findings arise from deductions, processes of reasoning or logical inferences. Dutra de Amorim v. Norment, Del. Supr., 460 A.2d 511 (1983); Fiduciary Trust Co. v. Fiduciary Trust Co., Del. Supr., 445 A.2d 927 (1982). Nonetheless, the Supreme Court will view the acts in a light most favorable to the nonmoving party. Alexander Indus., Inc. v. Hill, Del. Supr., 211 A.2d 917 (1965). The appellate court then determines whether there is an issue of fact for trial which, if resolved in favor of the nonmoving party, would entitle the nonmoving party to judgment. Id. Stated another way, the Court determines whether under all the circumstances the moving party is entitled to summary judgment. Brunswick Corp. v. Bowl-Mor Co., 297 A.2d at 69. See also Delmarva Power & Light Co. v. City of Seaford, Del. Supr., 575 A.2d 1089 (1990); Gilbert v. El Paso Co., Del. Supr., 575 A.2d 1131 (1990).

d. Motions to Dismiss. It is important to note that an order dismissing fewer than all defendants or fewer than all claims is not a final appealable judgment unless the trial court expressly enters the dismissal as a final judgment under Superior, Chancery or Family Court Rule 54, in which case an appeal lies as of right. Otherwise, the procedure set forth in Supreme Court Rule 42 must be employed to obtain review.

The standard and scope of review of an order granting or denying a motion to dismiss depends upon whether the order turned upon the facts, the law or both. Once this is determined, the scope of review explained above in Section 6.02, Review of Factual Determinations, and Section 6.03, Review of Legal Determinations, applies. In general, the standard and scope of review will be limited to the pleading in issue -- namely, the complaint -- for the pertinent facts. The Court will then determine the applicable law and apply the law to the facts. However, the Court will not review such issues as the standards of proof, a claim of privilege or other defenses. Spence v. Funk, Del. Supr., 396 A.2d 967 (1978). In determining the facts, the Supreme Court will accept all well-pleaded allegations as true. The test for sufficiency of the complaint "is a broad one, that is, whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint." Spence, 396 A.2d at 968.

e. Procedural Motions. The grant or denial of most procedural motions is within the sound discretion of a trial judge. Therefore, the applicable standard of review is abuse of discretion.

Rulings on most procedural motions, such as a motion for a more definite statement (Rule 12(e)), a motion to strike (Rule 12(f)), or a motion to amend pleadings (Rule 15(a)) are interlocutory orders which are generally not appealable unless they settle substantial legal issues, determine rights of the parties, and are certified for appeal under Supreme Court Rule 42. See generally Chapter 5. For example, in Walsh v. Hotel Corp. of America, Del. Supr., 231 A.2d 458, 460 (1967), a case predating Supreme Court Rule 42, the Court held that an order refusing leave to amend the complaint was an appealable interlocutory order because it adversely determined the substantial right to bring an alternate theory of recovery into the case and to conduct discovery on it. The Court limited its scope of review to the facts, determining that the evidence presented by the plaintiff was sufficient to justify further investigation of the facts that led to the amendment of the

complaint. On this basis, the trial court was held to have abused its discretion in refusing to allow the amendment to the complaint.

The mere fact that an interlocutory procedural motion is not immediately appealable does not mean that it will never be reviewed. Such an interlocutory order will be reviewable on appeal of the final judgment where it is part of or incidental to that judgment. Robinson v. Meding, Del. Supr., 163 A.2d 272, 274-75 (1960) (order denying motion to strike).

f. Discovery Motions. Discovery rulings are interlocutory and discretionary. Therefore, in order to be appealable, the trial court's determination must first satisfy the requirements of an appealable interlocutory order. Even before Rule 42 was adopted, the Supreme Court expressed its view that, generally speaking, appeals solely from rulings on discovery fall within the general proscription against appellate review of interlocutory orders. Lummus Co. v. Air Prods. & Chems., Inc., Del. Supr., 243 A.2d 718, 719 (1968). For a further discussion on appealing discovery orders, see Chapter 5, Section 5.04. See also Huang v. Rochen, Del. Supr., No. 407, 1988, Walsh, J. (Oct. 27, 1988) (ORDER) (a substantial issue or legal right is needed for the Court to hear an interlocutory appeal involving a discovery matter).

g. Evidentiary Motions. The standard and scope of review of evidentiary motions has been explained and examined in detail in Section 6.04, above.

h. Post-Trial Motions.

(1) Judgment Notwithstanding the Verdict. On appeals from the grant or denial of a judgment notwithstanding the verdict, the Court will examine the record to determine whether a reasonable person could find as the jury did. If the Court decides that issue in the affirmative, the jury's decision will survive. Eustice v. Rupert, Del. Supr., 460 A.2d 507 (1983). Furthermore, when the issues of liability are close and are raised as a matter of law, the court "will

not from [its] appellate perch disagree generally with the decision of the Trial Judge that such issues should have been submitted to the jury." Hochberg v. Keiser, Del. Supr., 447 A.2d 425, 426 (1982).

(1)a. Directed Verdict. "On appeal from the Superior Court's denial of a motion for a directed verdict, the standard of review is whether the evidence and all reasonable inferences that can be drawn therefrom, taken in the light most favorable to the nonmoving party, raise an issue of material fact for consideration by the jury." Russell v. Kanaga, Del. Supr., 571 A.2d 724, 731 (1990).

(2) New Trial. The standard of review of the trial court's grant or denial of a motion for a new trial is the restrictive abuse of discretion standard. Nonetheless, the appellate court will also review the record to determine whether the matters raised as the grounds for a new trial significantly prejudiced the case so as to have denied one party a fair trial. As part of the review, the Court may review questions of law to determine whether an error of law significantly prejudiced the case. If prejudicial errors are found, the Court may find that the trial court abused its discretion in denying the motion for a new trial. See Eustice v. Rupert, Del. Supr., 460 A.2d 507, 510-511 (1983) (and cases cited therein). See also Strauss v. Biggs, Del. Supr., 525 A.2d 992 (1987). Also, "[W]hen a motion for a new trial, based 'solely on weight of the evidence grounds is denied in a jury case, this Court on appeal is bound by the jury verdict if it is supported by evidence.'" James v. Glazer, Del. Supr., 570 A.2d 1150, 1156 (1990) (quoting Stoney v. Camper, Del. Supr., 401 A.2d 458, 465 (1979) (emphasis in original) (finding "evidence in the record" to support the jury's verdict).

(3) Remittitur or Additur. A trial court's actions on motions for remittitur or additur are also reviewed only for abuse of discretion. Yankanwich v. Wharton, Del. Supr., 460 A.2d 1326, 1332 (1983). See also Gannett Co. v. Re, Del. Supr., 496 A.2d 553, 558 (1985), in which the court applied the abuse of discretion standard to affirm the trial court's review

of the size of the jury award, a decision properly set aside only if it is "so grossly out of proportion as to shock the [trial] court's conscience and sense of justice." In Moffitt v. Carroll, Del. Supr., 640 A.2d 169 (1994), however, the Supreme Court observed that a trial court's reduction of its own damage award does not constitute "remittitur," a procedural device generally used in connection with jury verdicts. Id. at 176. Thus, the Court reviews such modifications of damage awards in a nonjury trial first "to determine whether the corrections are supported by the record," and then considers "whether the trial judge's modified conclusion, which followed from an accurate understanding of the correct factual predicate, was the result of an orderly and logical deductive process." Id. at 177 (citing Levitt v. Bouvier, Del. Supr., 287 A.2d 671, 673 (1972)).

(4) Alter or Amend Judgment (Rule 59(e)) or Reargument (Rule 59(d)). The disposition of motions to alter or amend a judgment (Rule 59(e)) or motions for reargument (Rule 59(d)) are within the sound discretion of the trial judge. Accordingly, if the order is appealable at all, it is reviewed only for abuse of discretion. 4 Am.Jur.2d, Appeal and Error, §§ 125, 126.

(5) Relief from Judgment (Rule 60(b)). A ruling on a Rule 60(b) motion for relief from a judgment or order also will be set aside on appeal only for abuse of discretion. Wife B. v. Husband B., Del. Supr., 395 A.2d 358 (1978). Furthermore, such an appeal properly raises only the correctness of the Rule 60(b) order; it does not permit the appellant to attack the underlying judgment for an error which could have been complained of on appeal from the underlying judgment. Swann v. Carey, Del. Supr., 272 A.2d 711 (1970).

(6) Conclusion. It is important to bear in mind the stringent standard and scope of review on appeal from post-trial motions with the standard and scope of review applicable to a direct appeal from the underlying judgment in considering whether to file post-trial

motions or to take a direct appeal and whether to appeal from the disposition of the post-trial motions or from the underlying judgment.

6.07 REVIEW OF DETERMINATIONS MADE BY BOARDS ESTABLISHED BY THE SUPREME COURT. Pursuant to its responsibility to license and discipline attorneys, the Supreme Court has established the Board of Bar Examiners and the Board on Professional Responsibility and the Board on the Unauthorized Practice of Law. Supr. Ct. R. 51, 63 and 86. Each of these Boards acts in a quasi-judicial capacity, making findings of facts, conclusions of law, and recommendations to the Court with respect to admissions to the Bar and discipline of members.

Supreme Court Rule 52(f) controls the standard and scope of review of petitions challenging the admissions decisions of the Board of Bar Examiners. The Court will accept petitions for review of decisions of the Board of Bar Examiners only where an applicant's "substantial" rights are affected by a challenged decision. Supr. Ct. R. 52(f); In re Petition of Rubenstein, Del. Supr., 637 A.2d 1131 (1994). Appeals of decisions of the Board of Bar Examiners are based on the record and are "not by means of a hearing de novo." Supr. Ct. R. 52(f). In reviewing the findings of facts of the Board of Bar Examiners, the Court has stated that the deferential rule announced in Levitt v. Bouvier, Del. Supr., 287 A.2d 671 (1972) is applicable. See Supr. Ct. R. 52(f), 64; In re Petition of Nenno, Del. Supr., 472 A.2d 815 (1983); In re Green, Del. Supr., 464 A.2d 881, 887 (1983). But see Kosseff v. Board of Bar Examiners, Del. Supr., 475 A.2d 349 (1984) (substantial evidence standard). As to conclusions of law, the standard of review for decisions concerning admission to the bar has been described as "abuse of discretion." In re Petition of Nenno, Del. Supr., 472 A.2d 815 (1983); In re Huntley, Del. Supr., 424 A.2d 8, 12 (1980).

The Supreme Court's scope of review of the Board on Professional Responsibility's findings of fact is limited to a determination of whether the record before the Board contains substantial evidence to support those findings. In re Kennedy, Del. Supr., 472 A.2d 1317, 1326

(1984); In re Lewis, Del. Supr., 528 A.2d 1192, 1193 (1987); In re Berl, Del. Supr., 540 A.2d 410, 413 (1988); In re Christie, Del. Supr., 574 A.2d 845, 852 (1990). See also In re Berl, Del. Supr., 560 A.2d 1009 (1989) (review function of Supreme Court precludes it from assuming role of fact finder). The Court's review of the Board's conclusions of law is de novo. In re Berl, 540 A.2d at 413. See also In re Christie, 574 A.2d 845 at 852; In re Carmine, Del. Supr., 559 A.2d 248 (1989). A complainant has no right of appeal from a dismissal of a complaint where the Assistant Disciplinary Counsel finds the allegations, taken as true, do not constitute misconduct. In re Connolly, Del. Supr., 510 A.2d 484 (1986).

6.08 EXTENT OF JURISDICTION OF TRIAL COURT AFTER APPEAL IS TAKEN. Except when interlocutory (Supr. Ct. R. 42), a duly perfected appeal generally divests a trial court of jurisdiction of the cause and transfers such jurisdiction to the appellate court, where jurisdiction remains until the trial court may regain jurisdiction after disposition of the appeal. Moore v. Moore, Del. Supr., 144 A.2d 765 (1958); King v. Lank, Del. Super., 61 A.2d 402 (1948); 4 Am.Jur.2d, Appeal and Error, § 352.

The taking of an appeal does not necessarily preclude the trial court from retention of jurisdiction as to collateral or independent matters. Examples would be motions to stay; transcript ordering. Park Oil, Inc. v. Getty Refining and Marketing Co., Del. Supr., 407 A.2d 537 (1979) (jurisdiction retained to enter sanctions and to strike pleadings); Biggs Boiler Works Co. v. Smith, Del. Supr., 82 A.2d 919 (1951) (jurisdiction did not retain power to amend judgment); 4 Am.Jur.2d, Appeal and Error, § 355.

Covered in Chapter 4 is the subject of applications for stay or supersedeas to a trial court coincident with the taking of an appeal by a party.

CHAPTER 7. EXPEDITED PROCEDURE

TABLE OF CONTENTS

CHAPTER 7. EXPEDITED PROCEDURE

William Prickett
James L. Holzman
John E. Tracey

7.01 INTRODUCTION. Supreme Court Rule 25 ("Supr. Ct. R. 25") provides the Court with two mechanisms for expeditiously disposing of non-meritorious appeals. Pursuant to Supr. Ct. R. 25(a), the appellee may file a motion to affirm the lower court's decision. Supreme Court Rule 25(b) authorizes the Court sua sponte to affirm the lower court ruling or decision. Further provisions of Supr. Ct. R. 25 permit the Court, upon the stipulation of the parties or its own initiative, to entertain appeals with limited or no briefing (Supr. Ct. R. 25(c)), or to order expedited scheduling for any and all matters, including briefing (Supr. Ct. R. 25(d)).

The purpose and use of these expedited procedures was discussed in Rossitto v. State, Del. Supr., 298 A.2d 775 (1972) (analyzing prior Supr. Ct. R. 8(2)). The Court found that the "validity, operation, and usefulness" of this Rule is

> based upon the assumption that the appellant will state fully in [its] opening brief the grounds of [its] appeal and the arguments and authorities in support thereof; that [it] will "put [its] best foot forward" in [its] opening brief. At that stage, the Court is entitled to screen the appeal against the minimal tests set forth in the Rule. At that stage, there is no need for a brief from the appellee.

Id. at 778.

This Rule serves two purposes: (1) it allows the appellee an opportunity to extricate itself from a frivolous appeal without the significant expense of further defending the appeal, and (2) it helps speed the litigation towards a conclusion and provides the Court with a mechanism to clear its docket summarily of meritless appeals. Id. Indeed, this Rule "has proved to be a useful tool for promoting economy in litigation and for accelerating the appellate process." Id.

7.02 MOTION TO AFFIRM. The appellee is required to wait until the appellant has filed its opening brief on appeal before it can file its motion to affirm. From the date of service of the appellant's opening brief, the appellee has ten days within which to file a motion to affirm. Supr. Ct. R. 25(a); Walls v. Cooper, Del. Supr., No. 209, 1991, Christie, J. (Nov. 8, 1991) (ORDER). The motion to affirm is filed in lieu of the appellee's answering brief and automatically suspends the briefing schedule so long as the motion is pending. Supreme Court Rule 25(a).[1]

a. Grounds for Motion to Affirm. Rule 25(a) provides three grounds upon which a motion to affirm may be granted. The motion will be granted only if:

(i) The issue on appeal is clearly controlled by settled Delaware law. Wongus v. State, Del. Supr., No. 124, 1995, Berger, J. (May 23, 1995) (ORDER); Johnson v. Butler, Del. Supr., No. 423, 1994, Walsh, J. (Jan. 30, 1995) (ORDER);

(ii) The issue on appeal is factual and clearly there is sufficient evidence to support the jury verdict or findings of fact below. Smith v. Unemployment Ins. Appeal Bd., Del. Supr., No. 189, 1984, Hartnett, J. (Sept. 22, 1994) (ORDER); Phoenix Steel Corp. v. Brinzo, Del. Supr., 405 A.2d 678 (1979); or

(iii) The issue on appeal is one of judicial discretion and clearly there was no abuse of discretion. Kempel v. Alexander, Del. Supr., No. 32, 1994, Moore, J. (June 1, 1994) (ORDER); Weldin v. Independent Petroleum Distributors, Del. Supr., 408 A.2d 945 (1979); Dumire v. State, Del. Supr., 278 A.2d 836 (1971); Supr. Ct. R. 25(a).

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[1]Only a Supr. Ct. R. 25 motion to affirm will suspend compliance with an established briefing schedule. With all other motions, the briefing and filings schedules already in place continue to bind the parties. See Supreme Court Rule 30(e). See also, Chapter 9.

b. Requirements and Limitations of the Rule. The motion to affirm is filed in lieu of the appellee's answering brief. The Rule limits the contents of the motion. The motion may contain only "the ground or grounds on which it is based together with citation of authorities and record references to evidence relied upon." Supr. Ct. R. 25(a); Walls v. Cooper, supra. The motion cannot contain argument. Id. Moreover, unless requested by the Court, no briefing, oral argument, or response to the motion is permitted. Supr. Ct. R. 25(a). Indeed, the Court will strike any papers filed in response to a motion to affirm as non-conforming papers pursuant to Supr. Ct. R. 34. See, e.g., Dorn v. State, Del. Supr., No. 386, 1995, Veasey, C.J. (Jan. 29, 1996) (ORDER); Younger v. State, Del. Supr., No. 397, 1994, Holland, J. (Nov. 28, 1994) (ORDER); Mazzatenta v. State, Del. Supr., No. 336, 1990, Horsey, J. (Apr. 23, 1991) (ORDER). However, an appellant may petition the Court for the right to respond to a motion to affirm. See, e.g., Rineer v. Seal, Del. Supr., No. 289, 1993, Horsey, J. (Dec. 7, 1993) (ORDER) (appellant permitted to file a response to a motion to affirm to address alleged factual inaccuracies in appellee's motion).

Pursuant to Supr. Ct. R. 30, a motion to affirm may not exceed four pages in length.[2] A proposed form of order may not be attached to the motion to affirm. Supr. Ct. R. 25(a) Additionally, a motion to affirm should generally follow the example set out in Supreme Court Official Form G.

c. Judicial Action on a Motion to Affirm. A motion to affirm will be granted following the unanimous decision of a three- Justice panel that the appeal is without merit. If it is granted, an opinion or order will be entered and a mandate will be issued thereon. Supr. Ct.

[2]Neither Supr. Ct. R. 25 nor Supr. Ct. R. 30 prohibits a movant from petitioning the Court for permission to exceed the page limitations of Supr. Ct. R. 30. However, because Supr. Ct. R. 25 is designed to expedite the appeal process by eliminating argument, briefing, and response, such a request would be contrary to the purpose of the Rule. Moreover, the Supreme Court looks with disfavor on motions to exceed page limitations. See Supr. Ct. R. 14(b); Williamson v. State, Del. Supr., No. 341, 1994, Veasey, C.J. (Feb. 17, 1995) (ORDER).

R. 25(a). If the motion is denied, however, briefing on the merits of the appeal will proceed. The appellee must file its answering brief within twenty days of the date of the Order denying the motion. Supr. Ct. R. 25(a).

The Supreme Court has established a strict standard for summary affirmance under the Rule:

> A motion for affirmance under the Rule is granted only when there is a unanimous decision that the appeal is "unquestionably without merit" and that the motion should be granted; in the absence of such unanimity, a motion under the Rule is uniformly denied as a matter of course.

Rossitto v. State, Del. Supr., 298 A.2d 775, 778 (1972). But when "the law is clear, the sufficiency of the evidence clear and the exercise of discretion clearly proper, [the Court] should not hesitate to grant a motion under Rule 25." Jerry L. C. v. Lucille H. C., Del. Supr., 448 A.2d 223, 225 (1982).

7.03 AFFIRMANCE SUA SPONTE. Rule 25 authorizes the Supreme Court to dispose of an appeal summarily on its own motion. After the filing of the appellant's opening brief, the Court may enter sua sponte an order or opinion affirming the judgment or order of the trial court. The Court may act on the same grounds applicable to a motion to affirm:

(i) The issue on appeal is clearly controlled by settled Delaware law;

(ii) the issue on appeal is factual and clearly there is sufficient evidence to support the jury verdict or findings of fact below; or

(iii) the issue on appeal is one of judicial discretion and clearly there was no abuse of discretion.

An affirmance sua sponte may be entered only if a three-Justice panel reaches a unanimous decision. Although Rule 25 does not so specify, upon an affirmance sua sponte, a mandate will issue pursuant to Supr. Ct. R. 19.

7.04 ORAL ARGUMENTS WITHOUT BRIEFS. Supr. Ct. R. 25(c) permits oral argument with limited or no briefing. This may occur either through the Court's acceptance of the parties' stipulation or if the Court so orders sua sponte. The oral argument may take place without briefing, or with limited briefing and/or the record from the court below. Should the parties wish to proceed via stipulation, the stipulation must be filed with the Court no later than the time when the opening brief is otherwise due to be served and filed.

7.05 EXPEDITED SCHEDULING. Supr. Ct. R. 25(d) outlines the procedure for expedited scheduling. Upon either a motion for good cause shown or if the Court so orders sua sponte, the Court may order expedited scheduling of any or all procedures, including shortening the time for filing of briefs and other papers in an appeal or other proceeding. Through this provision, expedited scheduling may take place in regular appeals as well as in expedited appeals. Supr. Ct. R. 25(d).

7.06 INTERNAL PROCESSING OF EXPEDITED MATTERS. Supr. Ct. R. 25 motions are brought before the Court in the same manner as all motions.[3] The motion is first presented to the motion justice. If the motion will not determine or terminate the appeal, the motion justice may, acting alone, rule on the motion. Supr. Ct. R. 3(b). Thus, the motion justice alone is empowered to order expedited scheduling or to deny a motion to affirm. However, if it appears to the motion justice that the motion to affirm might be meritorious, the motion justice will refer the motion to affirm to a three-justice panel. As noted above, the panel must unanimously approve the motion before the motion to affirm can be granted. Supr. Ct. R. 25(a).

7.07 PRACTICE GUIDES. The Court's task in weighing a motion to affirm is straightforward. It must determine, on the face of the appellant's opening brief, whether the appeal

[3]See Chapter 9 and the Internal Operating Procedures for the Delaware Supreme Court discussing, respectively, motions and internal processing of cases on appeal.

is without merit. Weldin v. Independent Petroleum Distributors, Del. Supr., 408 A.2d 945, 946 (1979). The arguments raised in the appellant's opening brief will dictate the subjects addressed in the motion to affirm. An aggressive practitioner may wish to base its motion to affirm on all three grounds provided for in Supr. Ct. R. 25(a). However, such a broad motion may not be possible because of the four page limitation Supr. Ct. R. 30(a). An effort to meet the page limitation of Supr. Ct. R. 30 may dilute the substance of the motion and thus jeopardize the integrity of the motion. Neither of these alternatives furthers the position of the appellee or is necessary under the Rule. Consequently, the movant must balance the length and quality of record citations and legal authorities against the three alternative basis for affirmance contained in the Rule.

The Court may grant a motion to affirm on any one of the three alternate grounds. The appellee should evaluate the appellant's opening brief carefully and ascertain which alternative ground offers the most compelling basis for rejecting the appeal. The motion to affirm should carefully point out the compelling reasons for affirmance.

The motion to affirm provides an effective tool for both the appellee and the Court in the case of a meritless appeal. The motion to affirm facilitates efficient docket management by making expedient processing of appeals possible. From the appellee's point of view, the motion to affirm is a cost effective way of extracting itself from the expensive process of participating in a meritless appeal to its conclusion. As a result, in the appropriate circumstances, a motion to affirm should be utilized.

These motions are filed most often in postconviction criminal cases. Indeed, the appellant in such a case should anticipate a motion to affirm from the State. A review of the LEXIS or WESTLAW data bases for Delaware reveals a host of successful motions to affirm on the part of the State in postconviction criminal appeals. Although the motion to affirm is an effective mechanism for dealing with frivolous appeals, the parties should be dissuaded from filing such a motion simply

to extend the appeal time. Such action violates the intent of Supr. Ct. R. 25. Thus, a motion to affirm should only be filed where the appellee has a good faith belief that the appellant's appeal should be summarily dismissed.

CHAPTER 8. BRIEFS

TABLE OF CONTENTS

CHAPTER 8. BRIEFS

David A. Drexler[1]

8.01 INTRODUCTION. This chapter discusses the rules governing appellate briefs and appendices and points out some suggestions for effective brief writing. The rules for appellate briefs and appendices are set forth primarily in Supreme Court Rules 13, 14 and 15.

8.02 BRIEFS ALLOWED. In each appeal, the only briefs authorized are an opening brief of appellant, an answering brief of appellee and a reply brief of appellant. Supr. Ct. R. 15(a). In cases of cross-appeals, the first to file the notice of appeal is considered the appellant. Supr. Ct. R. 15(a)(iv). However, in practice, the rule is not inflexible. In cases where the circumstances suggest that one party is the principal appellant, as, for example, where a defendant wishes to appeal from a judgment, while the plaintiff wishes to appeal only with respect to the calculation of costs or interest, the parties may agree that the defendant may be the appellant regardless of who filed the first notice. In these circumstances, the Court will generally accommodate the parties. In cross-appeal situations, where the appellant's reply brief contains matter related to the cross-appeal, the appellee/cross-appellant may file a reply brief directed thereto but limited to a total of twenty pages, exclusive of appendix. Supr. Ct. R. 15 (a)(v).

A prevailing party is not required to cross-appeal in order to raise an issue which was decided adversely to that party in the Court below, unless the ruling denied some relief, not subsumed by the favorable judgment, to which the party believes itself additionally entitled. For instance, the appellee, without filing a separate cross-appeal, may argue for affirmance of the lower court's ruling based on altnernative grounds that were raised to, but rejected by, the court below.

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[1]David A. Drexler, Esquire is of counsel to the firm of Morris, Nichols, Arsht & Tunnell. He was assisted in his preparation of the original chapter by Superior Court Judge William T. Quillen and Thomas C. Grimm, Esquire, a partner at Morris, Nichols. Alissa B. Anderson, a summer associate at Morris, Nichols, contributed significantly to this revision.

Under Supr. Ct. R. 28, upon leave of Court, a non-party may file a brief as an amicus curiae. See § 8.08 infra.

No other brief or writing containing argument is permitted without prior leave of Court. Supr. Ct. R. 15(a)(vi). However, a party may advise the Court of additional authority decided after completion of briefing The letter, however, may not contain any argument. Supr. Ct. R. 15(a)(iv).

8.03 TIME FOR SERVICE AND FILING OF BRIEFS AND APPENDICES. Unless otherwise ordered, appellant's opening brief and appendix must be served and filed not later than 30 days after the filing of the record with the Court, except in cases where no transcript or no further transcript has been ordered or designated as part of the record, in which case appellant's opening brief and appendix must be served and filed not later than 45 days after the filing of the notice of appeal. Supr. Ct. R. 15(a)(i). Appellee's answering brief and appendix must be served and filed not later than 30 days after service of appellant's opening brief. Supr. Ct. R. 15(a)(ii). Appellant's reply brief and appendix, if any, must be served and filed not later than 15 days after service of appellee's answering brief, except that when there is a cross-appeal and the reply brief contains material in response thereto, the reply brief and appendix, if any, must be served and filed not later than 30 days after service of appellee's answering brief and appendix. Supr. Ct. R. 15(a)(iii). Appellee/cross-appellant's reply brief and appendix, if any, must be served and filed not later than 10 days after service of appellant's reply brief. Supr. Ct. R. 15(a)(v).

Nothing in Rule 15 prevents a party from filing its brief and appendix before the brief is due, and thus advancing the date for the filing of any responsive brief.

Extensions of these time periods are not granted unless the Court so orders upon a motion showing good cause for enlargement of time. Supr. Ct. R. 15(b). Any such motion must conform substantially with Official Form F (sample form 16:061) of the Rules. Id. The motion must

be filed before the brief is due. The Court has been liberal in granting initial requests for extensions of time, particularly if the motion indicates that opposing counsel does not oppose the motion. In addition to these directives, the Delaware Supreme Court Internal Operating Procedure allows the Clerk to approve timely consented-to motion for an extension of time for filing a brief not to exceed three exensions or 75 days. Del. Supr. Ct. Internal Operating Procedure XV(6)(a).

8.04 NUMBER AND FORM OF BRIEFS AND APPENDICES.

The original and seven copies of each brief and appendix are to be filed with the Court, except in death penalty cases wherein the original and eleven copies of each brief and appendix are required. Supr. Ct. R. 10(d)(iv).

The rules of form are the same for all briefs and appendices. They may be printed or typed, and may be reproduced by any duplicating or copying process which produces a clear black image on opaque, unglazed white paper. Carbon copies are not permitted without permission of the Court. Printed matter must be at least 11 point type on opaque, unglazed paper. Supr. Ct. R. 13(a)(i). All typed matter must be of a size type permitting not more than 11 characters per linear inch. Id. Hence, proportional spacing may not be used. Provided that they are legible, briefs and appendices may be printed or typed either on one side or both sides of the page. Supr. Ct. R. 13(c). Particularly for appendices, counsel should consider using two-sided copy to reduce both cost and bulk. The Court encourages the use of recycled paper. Such use must be indicated on the last page of the paper being filed. Supr. Ct. R. 13(c).

Briefs and appendices must be firmly and separately bound at the left margin. Those which are not professionally printed must be bound in a transparent plastic cover. The Clerk will not accept a brief and appendix that are bound together. Page size for printed briefs and appendices must be approximately 7 by 9 1/2 inches. Page size of briefs and appendices produced by any other process must not exceed 8-1/2 by 11 inches. Rule 13(a)(ii). Briefs and appendices must have double

spacing of at least 1/4 inch between each line of text, Supr. Ct. R. 13(a)(ii), except block quotations and footnotes which should be single spaced. Supr. Ct. R. 14(d). All margins, top, bottom and sides, must be at least one inch. Supr. Ct. R. 13(a)(ii).

Pages of the appendix must be numbered separately at the bottom. Each page number must be preceded in appellant's appendix by a capital A, in appellee's appendix by a capital B, and in cross-appellants appendix by a capital C, etc. Supr. Ct. R. 13(a)(iii).

8.05 STYLE OF BRIEFS.

a. Front Cover. The front cover of each brief must state the name of the Court, the caption of the case, the case number, the name of the trial court, the name of the party for whom the brief is filed, the name of counsel by whom the brief is filed and the date of filing. Supr. Ct. R. 14(a). Supreme Court Rule 12(a) also requires that all papers filed with the Court include the attorney's address, telephone number and Supreme Court identification number. Except where the litigant is *in forma pauperis*, the covers of appellate briefs are to be color coded. Rule 14 requires the cover of appellant's brief to be blue, appellee's red, those of amici curiae and intervenors green, reply briefs gray and appendices white. When a transparent cover is used, the underlying sheet must conform to the color requirements. Rule 14(a). The Court does not require a heavier type of paper stock for covers, although the general and probably better practice is to use kraft-style paper or clear plastic stiffeners.

b. Sections. Appellant's opening brief and appellee's answering brief must contain the following sections in the listed order. These sections are to be listed under distinctive titles, each commencing on a new page. (Supr. Ct. R. 14(b)):

(1) Table of Contents. A table of contents and the page number of each section required, including all headings designated in the body of the brief. Supr. Ct. R. 14(b)(i).

(2) Table of Citations. A table of citations to cases, statutes, rules, textbooks and other authorities, alphabetically arranged. It is acceptable to first list in alphabetical order all cases cited and then to list separately and alphabetically all other authorities cited. Supr. Ct. R. 14(b)(ii).

(3) Nature of Proceedings. A statement of the nature of the proceeding and the judgment or order sought to be reviewed. Supr. Ct. R. 14(b) (iii).

(4) Summary of Argument. A summary of argument, stating in separately numbered paragraphs the legal propositions upon which each side relies. In addition, appellee's summary shall admit or deny appellant's statement, paragraph by paragraph. Supr. Ct. R. 14(b)(iv).

(5) Statement of Facts. A statement of facts presenting the background of the questions involved, all facts necessary for determination of the points in controversy, and the judgment or order sought to be reviewed. Appellee's counterstatement of facts need not repeat facts set forth by appellant. Each fact upon which a party relies should include a reference to the record or to the appendix if included therein. Supr. Ct. R. 14(b)(v).

(6) Argument. An argument divided under appropriate headings, setting forth separate issues for review. Each argument shall commence on a new page. Each division must be further divided into two parts, the first stating the standard and scope of review applicable to the particular issue, and the second stating the merits of the argument. Supr. Ct. R. 14(b)(vi).

(7) Trial Court's Judgment and Rationale. A copy of the order or judgment being appealed, including the separate written or transcribed

rationale of the trial court, must be included at the end of the opening brief, and not in the appendix, as earlier versions of Rule 14 required.

The reply brief is not to be repetitive of the opening brief; it should respond to the matters raised in the answering brief. In addition to the argument, the reply brief need contain only a table of contents and table of authorities.

c. Citations. The style of citations of all reported State opinions, in Delaware and other jurisdictions, must designate the court, the National Reporter [West] System citation and the date (in that order) as set forth in these examples:

Melson v. Allman, Del. Supr., 244 A.2d 85 (1968).

State v. Pennsylvania Railroad Co., Del. Super., 244 A.2d 80 (1968).

Prince v. Bensinger, Del. Ch., 244 A.2d 89 (1968).

References to Delaware's previous State Reporter System or to previous or current State Reporter Systems in other jurisdictions are to be omitted, except where the only citation is in such State Reports. In all other circumstances, citations are acceptable if in accordance with the "Uniform System of Citation", published by the Harvard Law Review Association. Supr. Ct. R. 14(g).

Under Supr. Ct. R. 17(a), unpublished orders of the Supreme Court may now be cited as precedent, as well as unpublished orders and opinions of the lower courts. A copy of any unreported, or not yet reported, opinion or order cited should be appended to the brief, and in the text there must be set forth sufficient facts to demonstrate the pertinency of the orders or opinions to the matter before the Court. Supr. Ct. R. 14(b)(vi)(4). This is especially significant where orders are cited, since they often are understandable only in context. As an alternative to appending copies to the brief, it is acceptable to include copies of unpublished opinions or orders in a bound compendium of unpublished opinions and orders that is separate from the brief and appendix.

Reference should be made to Supr. Ct. R. 93(c), as well as to Supr. Ct. R. 14(g), regarding the style of citation for unreported opinions or orders. The following are examples of acceptable style:

> Schreiber v. Carney, Del. Ch., C.A. No. 6202, Hartnett, V.C. (Dec. 3, 1982).
>
> Ilona H.B. v. Edmund O.B., Del. Supr., No. 22, 1981, Herrmann, C.J. (Nov. 12, 1981) (ORDER).
>
> Hashorua Twer v. Hashorua, Del. Super., C.A. No. 78A-OC-6, Bifferato, J. (Oct. 21, 1980).
>
> G. v. G., Del. Fam., File No. C589, Poppiti, J. (May 27, 1980).

8.06 LENGTH OF BRIEFS. The rules limit the length of briefs. Except upon leave of Court, appellant's opening brief and appellee's answering brief are not to exceed 35 pages. Any reply brief of an appellant or appellee/cross-appellant is not to exceed 20 pages. When there is a cross-appeal, appellant's reply brief which is also the answering brief on the cross-appeal is permitted up to 35 pages. Supr. Ct. R. 14(d). An appellee/cross-appellant should recognize that its brief, denominated an answering brief, is thus limited to 35 pages, absent a motion under Supreme Court Rule 14(d) for a page extension, even though it serves the dual purpose of answering brief on the appeal and opening brief on the cross-appeal. In calculating the number of pages, all required sections of the brief are included except the table of contents and table of citations. The appendix accompanying any brief is also excluded from the calculation. Id. Rule 14(d) proscribes use of footnotes for arguments or for the purpose of circumventing page limitations. The Court disfavors motions to exceed the page limitation, which are granted only for good cause shown. Supr. Ct. R.14(d).

A motion to exceed the stated limitation should be filed before the brief is due and should approximate within a range of 10 the number of pages requested. A motion requesting an

open ended page limitation is likely to be denied. A party filing such a motion should indicate therein whether the motion is unopposed.

8.07 STYLE OF APPENDICES. The requirements for the appendix are set forth in Supr. Ct. R. 14(e). All appendices must be separately bound, with a white cover sheet.

Each appendix must contain a paginated table of contents and a cover page stating the name of the Court, the caption of the case, the case number, the name of the trial court, the name of the party for whom the appendix is filed, the name of counsel by whom the appendix is filed and the date of filing. Supreme Court Rule 12(a) also requires that all papers filed with the Court include the attorney's address, telephone number and Supreme Court identification number. Each appendix must have a table of contents. Appellant's appendix must contain (a) the relevant docket entries in the trial court, arranged chronologically in a single column; and (b) the relevant portions of the charge. Each appendix should also contain those relevant portions of the record, arranged chronologically by time of filing in the Court below, that the submitting side wishes the Justices to read. However, appellee should avoid duplicating in its appendix that which has been set forth in appellant's appendix. Witness testimony in an appendix must cross reference to the pages of the transcript, and omissions in such testimony must be indicated by asterisks or other appropriate means. Counsel for the parties may agree to submit a joint appendix, separately bound and so labeled. Supr. Ct. R. 14(f).

Whenever any document, paper or testimony in a foreign language is included in the appendix or referred to from the record in brief or argument, an English translation thereof must be included in the appendix or the record, as the case may be.

8.08 AMICUS CURIAE PRACTICE. A brief of an amicus curiae may be filed only upon request of the Court or upon leave of Court granted on motion or stipulation. The motion for leave must identify the interest of the movant and state the reasons why a brief of an amicus curiae is desirable. The brief must be filed within the time set by the Court. The form and style of a brief

of an amicus curiae must be in accordance with other briefs, as set forth in sections 8.04 and 8.05, supra. Supr. Ct. R. 28.

8.09 ADVOCACY: THE ROLE OF THE BRIEF. A U.S. Supreme Court Justice, in discussing the appellate process some years ago, ascribed to oral argument the purpose of persuading the Court that it ought to rule in favor of one's client. The brief, the Justice noted, should give assurance to the Court that by so doing it will not be setting 500 years of Anglo-Saxon jurisprudence on its ear.

Since this observation was made, the role of oral argument in the appellate process has diminished. The press of burgeoning calendars has driven many courts, including the Delaware Supreme Court, to curtail rigorously the availability of oral argument to litigants. Under its current practice, the Court declines to hear argument in about two-thirds of its cases, and even where argument is allowed, the assignment of twenty minutes to each side is generally adhered to. Supr. Ct. R.16(f).

As a consequence, while the role of the brief as a vehicle for presenting the Court with a discourse on the applicable principles of law remains, its function as a tool of persuasion has significantly increased. A lawyer preparing an appeal should approach the brief on the assumption that it may be called upon to carry the entire weight of the appellate effort. One should not reserve points for oral argument, because there well may be no oral argument.

It is not the intention of this Handbook to provide a cookbook-style primer on appellate brief writing. For that kind of guidance, the reader is referred to F. Weiner, Briefing and Arguing Federal Appeals (2d ed. 1967). Although, as its title suggests, the author focuses primarily on appellate procedures in United States courts, the sections dealing with the mechanics of brief writing (marshaling the record; assembling the cases, etc.) have general applicability and have not been surpassed for their thoroughness and wisdom. Nor is it the intention here to provide a text on

effective expositive writing. For that, the reader is directed to the late Professor William Strunk, Jr.'s invaluable guidebook, The Elements of Style (W. Strunk and E.B. White, The Elements of Style (3d ed. 1979)). The purpose rather is to provide some practical guidelines for the preparation of effective briefs within the framework of the rules of the Delaware Supreme Court. What is said may also be of some assistance in preparing appellate briefs for the Court of Chancery, the Superior Court, and the Family Court in matters within their appellate jurisdictions, although the briefing rules of those courts are not tailored to their appellate jurisdictions.

8.10 ADVOCACY: THE EFFECTIVE BRIEF-WRITER. The fundamental characteristics of an effective brief-writer are integrity and mastery of the facts and law applicable to the case.

By integrity is meant more than merely refraining from deliberate misstatements of fact or law. Integrity is an affirmative conscientious effort to insure, among other things: that every assertion of a fact is supported by the record; that all relevant facts are disclosed even if some of them are unfavorable to the advocate's position; that every case cited to support a proposition stands for that proposition; that authorities are not quoted out of context; and that adverse authority is faced up to and dealt with.

A lack of integrity is, ethical considerations wholly aside, counterproductive to the advocate's cause. A brief will assuredly be rigorously scrutinized for error by opposing counsel, and misstatements triumphantly exposed. Even if overlooked by the opponent, the discovery of errors by the justices or their law clerks will inevitably breed distrust of the entire brief.

Integrity is, in essence, a by-product of the brief-writer's mastery of the case, so that the importance of being on top of all facets of the case cannot be overemphasized. Appellate counsel who was also counsel in the court below will have one leg up on this mastery, but even here a thorough review of the record and rethinking of the case is required prior to appellate briefing, and

by the attorney for the appellee as well as the appellant. Many appeals are lost because counsel failed to adapt arguments to the change of forum from trial level to appellate level. There is no assurance that the contentions that carried the day in the trial court will prevail on appeal. Of course, where a brief-writer's first participation in a case comes on the appeal, the absolute prerequisite is a thorough familiarization with both the record and the applicable law. Only then can the author proceed to marshal the resources necessary for the brief-writing task.

8.11 ADVOCACY: GENERAL RULES OF BRIEF WRITING. The objective of a brief is to prevail. This means persuading the panel that the brief-writer's position on the appeal is the more meritorious. There are many ways to skin this particular cat, and a device or approach that is successful in one context may well fall flat in another. The ingenuity and skillfulness which comes largely from experience will often dictate the approach to be taken. The younger attorney who lacks this experience does the client a disservice by failing to seek counsel from a knowledgeable practitioner before embarking upon the actual writing. At the minimum, thorough preparation and considerable forethought are required. They may in part compensate for the lack of experience.

Although the overall strategy must be shaped to the particular case, there are some considerations applicable to all briefs.

1. To prevail, one must persuade the Court affirmatively that one's side should win. It may not be enough merely to show that the Court below made an arguable erroneous ruling. The brief-writer, as attorney for either the appellant or appellee, should build the case from the ground up in order to demonstrate the justice of the client's cause.

2. The decision as to whether to undertake a multifaceted challenge or to concentrate on a single issue is often a difficult one for an appellant, requiring careful evaluation. It is ill-advised merely to repeat sequentially the arguments made below. The writer should organize the brief so as to present the strongest points first and then reevaluate the product and decide once

again whether the weaker arguments ought to be discarded as detracting from the overall strength of the brief.

3. A cross-appeal is not required for an appellee to raise as a basis for affirmance a proposition of fact or law as to which the appellee did not prevail in the trial court. Caution should be used in making such an argument because it may divert the Court's attention from the strengths of the appellee's position.

With respect to the writing itself there are some rules applicable to every brief:

1. Conciseness. Apart even from the page limitations fixed by the Court, an effective brief is tightly organized, does not waste words and is not repetitive.

2. Precision. English is an expressive language, and if one approaches its use with thoughtfulness, one can usually find a word or phrase to convey the exact thought one wishes to convey. Avoid vagueness and generalities whenever possible. Roget's Thesaurus, the dictionary and other word and phrase finders are invaluable tools to the brief-writer.

3. Objectivity. The lawyer's function is to make an effective presentation of the client's position. This requires recognition of and dealing with the weaknesses as well as the strengths of the case. A blind belief in one's own rectitude or the rectitude of the cause inhibits such recognition.

4. Detachment. Personal attacks upon opposing counsel or the court below should be avoided, no matter how great the provocation to client or lawyer. Ad hominem challenges to the good faith or integrity of opposing counsel will inevitably fall on deaf ears because the Court generally has neither the time nor the inclination to plumb motivations. Hence, while it may be appropriate to describe an argument as specious if that's what it is, it is ill-advised to suggest that its proponent is a fool or a scoundrel, even where grounds for the view exist.

5. Editing. To accomplish the foregoing goals, an author must diligently edit and reedit a brief. A brief is a written document, and a written document will not be effective if it is created using only a dictating machine or a word processor run amok. Dictated briefs invite defeat.

8.12 THE STATEMENT OF THE NATURE OF THE PROCEEDING AND THE JUDGMENT OR ORDER SOUGHT TO BE REVIEWED. The purpose of this required section is merely to establish the setting for the substantive sections. In essence, only two questions should be dealt with. What is the decision being appealed from? What were the proceedings below which led to that decision? The space used here is charged against the party's overall page limitation, so brevity is especially important. If the appeal is from a judgment after trial, there is no need to present a lengthy chronology of pretrial activities, unless some pre-trial ruling or event bears upon the issue of the appeal. Similarly, if the appeal deals with a non-trial adjudication, such as upon a motion to dismiss, summary judgment or motion to suppress, the proceedings leading to the ruling in question should normally suffice. If an appeal is interlocutory, a brief recapitulation of the Supr. Ct. R. 42 certifications should be included.

In similar fashion, the decision being appealed from should be sketched in broad strokes only. Is it a judgment or order upon a written opinion? Is it a judgment entered during or after trial? If so, at what stage of the trial was it rendered? This section is not the place to argue the validity or invalidity of the ruling appealed from. All that is asked for is a statement of what was done by the Court below.

8.13 THE SUMMARY OF THE ARGUMENT. The requirement of Supr. Ct. R. 14(b)(iv) that the opening and answering brief set forth a summary of the argument in the form of statements of the legal propositions relied upon is a modification of a former rule which mandated a statement by each side of the questions presented by the appeal. However denominated or formulated, the summary of argument section is of singular importance, especially for the appellant,

since it provides an opportunity to define the legal issues with which the Court will deal in the appeal. Using sports vernacular, it is the appellant's opportunity to gain the home field advantage.

It is probably a better practice to defer the final drafting of the summary of argument section until after the brief has been otherwise completed because only at that point will the writer be in a position to distill the arguments effectively. However, it is advisable to begin the brief writing chore by laying out a rough outline of the summary. Such rough outline should be the work product of the initial analysis of the decision below which underlies the entire appellate effort: What are the issues to be raised on the appeal? What does the writer want to say about those issues? What are the facts of record which pertain to such issues? And, finally, what method of presenting such issues holds out the greatest likelihood for success?

Putting the answers to these questions into the form of a tentative summary of argument provides the necessary matrix upon which the entire brief should be built. Embarking upon the brief writing process without such a matrix is like embarking upon a sea voyage without charting a course to the destination. One cannot know what to stress in the Statement of Facts without knowing where one wants to arrive.

As noted below in Section 8.16, there are several acceptable methods by which to organize one's legal arguments, and one should not treat the tentative summary of argument as inviolate. If, as the writer proceeds, a different order of emphasis suggests itself, the tentative summary should be modified accordingly. Then, when the brief is otherwise complete, the Summary of Argument should be completed. In final form, it should set forth the principal legal propositions relied upon in separate enumerated paragraphs, each of which is developed in a subsection of the argument.

Drafting the Summary of Argument section presents some special problems to the appellee. The Rule requires that the appellee admit or deny with specificity each paragraph of the

appellant's summary, as well as set forth affirmatively the separate legal propositions upon which the appellee is relying. If the appellant's brief was written properly, the appellee will usually be loath to admit unqualifiedly the correctness of the appellant's formulations, even where the only disagreement is in the phraseology. Hence, the appellee should probably deny each paragraph of the appellant's summary and follow that denial with a more appropriate counterstatement of the point. Then, to the extent these counterstatements have not set out all of the appellee's propositions, additional statements should be set out in separate paragraphs.

The appellant's summary will generally presage the order of the argument. However, the appellee may wish to discuss the points raised by the appellant in a different order. In such cases, it is advisable, though not required, that the appellee's Summary of Argument cite to the subsection or pages of the answering brief where the particular legal point is discussed.

8.14 THE STATEMENT OF FACTS. If there is one section of the appellate brief to be singled out as requiring the most care and thought in preparation, it is the Statement of Facts. The Court's objective in every appeal is to reach a just result, based upon the particular circumstances of the case before it. It is the Statement of Facts which shapes the Court's perception of those circumstances, and the ultimate outcome on the legal arguments may follow as a matter of course from that perception. Hence, the recitation of the facts should be crafted to spell out in exposition the fundamental justice of the pleader's cause. If the Court then accepts the writer's presentation of the facts as plausible, a giant stride toward winning the appeal has been made.

This is not to say that the rightness of the cause is to be openly argued in the Statement of Facts. It should not be, except under rare circumstances. Yet, at the same time, a Statement of Facts that is skillfully constructed can by its emphasis on the appropriate occurrences and its use of expressive language constitute the most powerful, albeit indirect, argument in support of a cause that can be offered. By way of example, John Hersey's Hiroshima (1946) and Rachel

Carson's Silent Spring (1962) are two of the most powerful polemics ever written. Yet neither book presents an "argument" as such to support the respective author's viewpoint on nuclear warfare or misuse of pesticides. They only detail facts, which facts of themselves lead the reader to comprehension and acceptance of the author's points. Obviously, few brief-writers can hope to emulate such distinguished writers; however, their methodology does provide an achievable guideline for what can be accomplished by the Statement of Facts.

The Statement of Facts must be fairly and accurately drawn from the record below. The need for record support for each assertion of fact cannot be overemphasized. If a factual presentation departs from the record, the Court is likely to be offended, and the transgressor's entire position is jeopardized. Inferences are acceptable so long as they are identified as such and the facts from which the inference is urged identified by record reference. There is one limited exception to the absolute requirement of record citation: Del. R. Evid. ("D.R.E.") 201(f) permits judicial notice of facts to be taken at any stage of a proceeding, including the appellate stage. However, the type of fact of which judicial notice can be taken is extremely circumscribed by D.R.E. 201(b). So the basic rule remains: if there is no record support for an assertion of fact, the assertion should be omitted.

The Statement of Facts should be written in a fashion that will commend it to the Court for adoption as its statement of the case. To achieve this, some guidelines are helpful:

(a) Unfavorable as well as favorable facts must be dealt with. This is of particular concern to the appellant, since the appellee will be confronted by the facts unfavorable to the appellee in the opening brief. However, the appellant should operate under the certainty that the appellee will bring facts unfavorable to the appellant to the Court's attention in the answering brief. Ignoring such matters in the opening brief may well deprive the appellant of placing these negative facts into what the appellant believes to be the proper context.

(b) Let the facts speak for themselves. On the printed page understatement is usually more persuasive than overstatement. The hyperbole which evokes favorable emotional response when presented orally often appears hollow and even foolish on the printed page. Avoid intensifiers such as "very", "extremely", "obviously" and their ilk. Do not characterize witnesses or testimony with adjectives. If one wishes to urge the validity of certain testimony, one should point out the factors that make it particularly credible, such as the disinterest of the witness or the witness' peculiarly good vantage point. Conversely, if one is urging rejection of testimony, one should not merely label the witness a liar or untrustworthy. One should place the testimony into context of the other facts and let the Court draw its own conclusion.

(c) If one can truthfully characterize certain facts as undisputed or unrefuted, one should. It is helpful to the Court in analyzing what is really at issue. However, be sure the characterization is correct. It is counterproductive to invite one's opponent to dispute what is supposedly undisputed or to refute what is claimed to be irrefutable.

(d) Even aside from considerations of space, it is more effective as a general matter to paraphrase testimony and place it in context than to quote extracts at length. However, if a snippet of testimony will advance the narrative, its use is certainly acceptable, and on occasion, it can be very persuasive, especially where it constitutes a telling admission or concession by the adversary.

(e) Generally speaking, the underlying facts should be presented in chronological fashion, starting at the beginning. This is the easiest for the Court to follow. The chronology is, of course, the sequence of substantive events in the dispute. It is not a litany of the order in which the evidence was presented, or a witness-by-witness summary of the testimony.

(f) Footnotes should be used sparingly. They are most effective if utilized primarily to eliminate non-issues, such as inconsequential conflicts in testimony. For example, if the

witness being relied upon said a certain event occurred on Monday, while another witness ascribed it to Tuesday, but the day does not really matter to the writer, a footnote alluding to the apparent conflict might suffice. But if the material relegated to the footnote has some importance to the case, it should be worked into the body of the text. Indeed, Rule 14(d) mandates that this be done. Footnotes are distracting and should be kept as short as possible. A lengthy footnote on a peripheral issue, stretching over the bottom half of two or three pages is generally unacceptable. If the author has committed such a footnote to paper, a review of the bidding is recommended.

(g) In the narrative, reliance should be placed most heavily on the most credible evidence. For example, although it is permissible for an appellee seeking to uphold a jury verdict to assume the acceptance by the jury of the client's self-serving testimony, it may be far more persuasive in laying the groundwork for affirmance to place greater emphasis upon such independent, corroborating evidence as may exist in the record.

(h) Although under Supr. Ct. R. 14(b)(v), the appellee is not required to restate facts recited by the appellant, it is a foolhardy appellee who leaves the facts to the other side. If the appellant has done a proper job, the appellee will find the opening brief's Statement of Facts wholly unacceptable. Even where the appellant's presentation appears benign, a restatement is usually mandated, if for no other reason than to discourage use of the opponent's brief as the Court's only guide to the facts. Only in the unusual case where a narrow legal issue is presented on an essentially undisputed factual framework should the appellee be content with the appellant's Statement of Facts.

The appellee's Statement of Facts should set out the same type of chronological narrative as that of the appellant and should deal with the unfavorable as well as the favorable. To the extent that refuting or explaining the appellant's version cannot be readily worked into the narrative, utilize short footnotes, or, if greater length is required, separate subheadings to handle disagreements with the appellant's points.

8.15 THE ARGUMENT -- STATEMENT OF THE STANDARD AND SCOPE OF REVIEW. Supr. Ct. R. 14(b)(vi) requires that each section of the argument be divided into two sub-sections, the first of which shall set forth the standard and scope of review applicable to that section. The standard and scope of review which the Court applies to a question may preordain the outcome of the appeal, so that a more than perfunctory approach to this sub-section is required.

Chapter 6 sets forth a detailed analysis of the standards of review utilized by the Supreme Court under different circumstances. In essence, there are only three categories of questions which arise on appeal: (a) questions on matters of law; (b) questions on findings of fact, which can be further sub-divided into findings of a jury or findings by the trial court; and, (c) questions on the exercise of discretion by the Court below. For each of these categories, the proper standard and scope of review has been established in many Supreme Court decisions. Where the category of a particular issue is well-defined, the standard and scope of review can be readily set out, although its emphasis and wording can be shaped to some extent to meet the differing concerns of appellant or appellee. The following formulations are useful in such clear-cut situations:

A. Issue of Law (Appellant and Appellee).

> "The standard and scope of review is whether the court below erred in formulating or applying legal precepts."

See Arnold v. Society for Sav. Bancorp, Inc., Del. Supr., 650 A.2d 1270, 1276 (1994); Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P., Del. Supr., 624 A.2d 1199, 1204 (1993). See also Rohner v. Niemann, Del. Supr., 380 A.2d 549, 552 (1977).

B. I. Issue of Fact (Jury).

(i) Appellant.

> "The question involved concerns the jury's findings of fact. Under Art. IV, § 11(a) of the Delaware Constitution, this Court will affirm those findings only 'if supported by evidence.' The Court, therefore, must examine the record to determine whether evidence was adduced at trial which substantiates the jury's findings."

See Sussex County, Del. v. Morris, Del. Supr., 610 A.2d 1354, 1360 (1992); Storey v. Camper, Del. Supr., 401 A.2d 458, 465 (1979).

(ii) Appellee.

> "The question involved concerns findings of fact by a jury. Pursuant to Art. IV, § 11 of the Delaware Constitution, this Court is bound by jury verdicts that are supported by evidence. Therefore, this Court may not weigh the evidence presented to the jury, rather, it must affirm findings that are supported by any evidence of record."

See Sussex County, Del. v. Morris, Del. Supr., 610 A.2d 1354, 1360 (1992); Storey v. Camper, Del. Supr., 401 A.2d 458, 465 (1979).

II. Issue of Fact (Non-Jury).

(i) Appellant.

> "The question involved concerns findings of fact by the court below sitting without a jury. This Court has articulated its review of such findings as follows:
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> > In a nonjury case . . ., an appeal from [a] decision is upon both the law and the facts. In such an appeal this Court has the authority to review the entire record and to make its own findings of fact in a proper case. . . . [W]e have the duty to review the sufficiency of the evidence and to test the propriety of the findings below.
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> Levitt v. Bouvier, Del. Supr., 287 A.2d 671, 673 (1972)(citations omitted). Therefore, this Court will reverse if the trial judge's findings are not supported by the record or are clearly erroneous."

See id.; Arnold v. Society for Sav. Bancorp, Inc., Del. Supr., 650 A.2d 1270, 1276 (1994).

(ii) Appellee.

> "The standard of review is whether the findings of fact are sufficiently supported by the record and are the product of an orderly and logical deductive process. Only when the finding below is clearly wrong and the doing of justice requires its overturn is the Court free to make contradictory findings of fact."

See Arnold v. Society for Sav. Bancorp, Inc., Del. Supr., 650 A.2d 1270, 1276 (1994); Levitt v. Bouvier, Del. Supr., 287 A.2d 671, 673 (1972).

C. Issue of Discretion.

(i) Appellant.

> "The standard and scope of review is whether the court below exercised its discretion in an arbitrary or capricious manner."

See Levine v. Smith, Del. Supr., 591 A.2d 194, 203 (1991); Chavin v. Cope, Del. Supr., 243 A.2d 694, 695 (1968).

(ii) Appellee.

> "The issue here concerns a determination committed to the trial judge's sound discretion:
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> > When an act of judicial discretion is under review the reviewing court may not substitute its own notions of what is right for those of the trial judge, if his judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness.
>
> Chavin v. Cope, Del. Supr., 243 A.2d 694, 695 (1968). Accordingly, the trial judge's decision must stand unless appellant demonstrates that it was arbitrary or capricious."

See id.; Levine v. Smith, Del. Supr., 591 A.2d 194, 203 (1991). See also CM &M Group, Inc. v. Carroll, Del. Supr., 453 A.2d 788, 795 (1982); Storey v. Camper, Del. Supr., 401 A.2d 458, 467 n. 10 (1979).

The problems that arise in formulating the standard and scope of review sub-section of an argument arise when there is uncertainty as to what the issue being argued really is. Some issues are difficult to categorize because the rulings of the trial court involve mixed questions of fact and law, or because in exercising its discretion the Court below arguably misapplied the applicable rules of law. In such cases, it is desirable to argue for the standard and scope of review which is most advantageous to the writer. The appellant should argue, if the appellant legitimately can, that a particular issue involves only a question of law because that scope of review is broadest, being essentially de novo. On the other hand, the appellee should argue in these mixed situations that only factual or discretionary issues are present because the scope of review is narrower.

If there is no prior authority by which one can fairly conclude that the Court itself has categorized the nature of the issue presented, the brief-writer should define the issue from the point

of view of the client and urge that the applicable standard of review is the one which is most favorable to the cause. In such arguably ambiguous situations, one should include in the Standard and Scope of Review section of the argument, not only a formulation of the applicable standard, but also a brief explanation of why the proffered formulation is the correct one. If the adversary disagrees, the Court itself will decide what standard of review to apply.

One final point concerning the scope of review should be noted. An appellee may believe that an appellant is raising an issue which was not raised in the court below. Supreme Court Rule 8 clearly states that the Supreme Court should not consider such an issue, barring some compelling interests of justice. The following formulation may be appropriate in such cases:

> "This argument involves a question that was not presented in the Court below. The standard of review is that the court will not consider it absent a showing of plain error."

See Supr. Ct. R. 8; Sullivan v. State, Del. Supr., 636 A.2d 931, 937 (1994); Stoltz Management Co. v. Consumer Affairs Bd., 616 A.2d 1205, 1212 (1992); Culver v. Bennett, Del. Supr., 588 A.2d 1094, 1096 (1991); Karn v. Doyle, Del. Supr., 406 A.2d 36 (1979).

8.16 THE ARGUMENT -- SUBSTANTIVE SECTIONS -- ORGANIZATION AND HEADINGS. The writing of the substantive argument sections of the brief is a two-step procedure.

First, the overall argument must be organized to make the most effective presentation. Generally speaking, the appellant will achieve this result by putting the best arguments first, followed by the second strongest, down to the weakest. However, such practice is not etched in stone. Occasionally, the underlying factual context may make a chronological format appropriate, with the issues discussed in the order in which they arose. For example, in a contract dispute, it is advisable to discuss the issues concerning the creation of the contract before arguing the issues arising out of its performance. In other appeals, there are plainly principal and subsidiary issues, and the structure

of the argument should reflect this. Plainly, an appellant ought to address the entitlement to recover before turning to the disagreement with the amount of such judgment.

The order of presentation should have a cohesive logic and not merely be a haphazard aggregation of separate arguments put together in the order the writer thought of them. As noted earlier, the decision on organization will probably follow logically from the analysis underlying the Summary of the Argument section. However, if in the drafting of the argument the initial analysis of the issues becomes unworkable, it is advisable to review the statement of issues, and modify it as necessary.

The appellee's problem of overall organization is more complex. An appellee must deal of course with the appellant's contentions. However, at the same time, it is important to demonstrate affirmatively why the decision below should be sustained. Where the parties agree on what the issues are, there is little difficulty in the appellee's following the appellant's format and meeting the appellant's presentation point by point. However, more often than not, the appellee's best arguments for upholding the court below go beyond the mere refutation of the appellant's arguments. In such circumstances, the appellee's argument should be organized much as if it were that of the appellant and then, to the extent the arguments have not refuted the appellant's arguments or authorities within the basic structure or in brief footnotes, it should deal with them in separate argument subsections.

The second stage of the writing of the argument section is the organization and drafting of each argument subsection. In all but the shortest of arguments, it is helpful to divide the discussion into several subsections. Each issue raised by the appeal should be written as a discrete and self-contained argumentative essay on the points involved in that issue. Each argument subsection should open with a statement of the conclusion being urged followed by the analysis of fact and law to lead the Court to that conclusion. In each analysis, it is advisable to commence as

broadly as necessary to familiarize the Court with the general substantive law involved before focusing in depth on the particular facet of that law raised by the appeal.

Each section of the argument and each subsection within a section should be captioned in a manner which advances the position of the writer. Thus, each argument heading and subheading should summarize in a positive manner the contention established by the argument. It is a waste of an opportunity merely to use titles such as "The Misapplication of the Parol Evidence Rule" or "The First Argument." Rather, each heading should be a free-standing statement of position which neither leads into nor depends upon the text itself for completion of the thoughts expressed. The headings and subheadings should be drafted in such a manner that, when assembled in the table of contents, they provide in themselves an understandable outline of the substance of the entire argument.

8.17 THE ARGUMENT -- THE USE OF CASE LAW PRECEDENTS. The building blocks of an effective argument are the authorities which are marshalled to support it. In most instances, case law is the most persuasive authority for at least two reasons. First, consistency of approach is the primary goal to which judges aspire, and precedents provide a basis upon which to build such consistency. Secondly, awareness that other courts have considered and opined on issues similar to those now before the Court relieves it of the uncomfortable task of reinventing the wheel on those issues where it lacks familiarity. However, it is unlikely that any single or controlling precedent will be on all fours on the key issues of the appeal. (If such precedent existed there probably should not even be an appeal.) Hence, the persuasiveness of a legal argument can turn on the thoroughness with which the writer chooses and utilizes the less-than-four-square precedents which are available. Some guidelines to effective use of precedents are as follows:

(a) Although the Court must consider each appeal in the light of its own precedents and the applicable precedents of the U.S. Supreme Court, the Court will be receptive to well-reasoned analyses of precedents of lower Delaware courts, Federal courts, and the courts of

other states. Hence, research should not be limited to Delaware and U.S. Supreme Court cases only. Moreover, in the absence of Delaware authority to the contrary, it is not particularly effective to give back-of-the-hand treatment to adverse decisions of other Courts by merely asserting that they do not represent the law of Delaware. It is much better to explain why the Court should not adopt the rule involved as the law in this State.

(b) Since the most likely use of precedent is by analogy, the brief-writer must provide an explanation for the cases to demonstrate that they deal with issues analogous to those of the present appeal. While it is acceptable to support the statement of essentially undisputed or only peripherally relevant points with a bare citation or two, it is mandatory to place the principal cases upon which the writer relies in the proper context. To accomplish this, the writer clearly should present a short description of those factual aspects which make the holding of the case applicable to the writer's argument, followed by a statement of the holding and an explanation of why it supports the writer's contentions.

(c) Quotations from prior opinions are effective only if utilized sparingly. Lengthy quotations are ill-advised under virtually all circumstances. An argument which consists primarily of a string of quotations with connecting sentences lacks persuasiveness. Moreover, quotations not placed in a proper factual framework raise suspicions that they are proffered out of context. Judges are persuaded by the substantive reasoning of other judges, as explained by the brief, more than by their language, however colorful.

(d) String citations are usually not worth the space they take up. The citation of a case is an invitation to the Court to read it, and listing 10 or 15 cases to support a proposition is something of an imposition. While there are exceptions, as, for example, where one is urging the adoption in Delaware of some principle broadly accepted in other jurisdictions and wishes to demonstrate such acceptance, it is preferable to select two or three of the best cases and

deal with them in adequate detail. Selectivity means reviewing all of the available cases and using a leading case or two establishing the point, if they can be identified, along with the most recent full discussion of the issue. One should avoid citing cases which have negative implications, such as unhelpful language on another issue, to the citer's case.

(e) Adverse authority of the Delaware or U.S. Supreme Courts of which the writer is aware cannot be ignored without violating the Rules of Professional Conduct, Rule 3.3(a)(3). Such authority must be brought to the attention of the Court and discussed even if it has not been mentioned by one's adversary. Though the ethical imperative may be lacking, it is bad practice to ignore adverse authority from other jurisdictions. Even if the adversary has not found the damaging case, the Court itself may, and the writer will have been denied the opportunity to rebut it.

(f) Shepardize. There are few more embarrassing situations than to be confronted after the brief has been filed with the fact that the authorities relied upon do not represent the latest judicial thought on the issue, or that an apparently favorable case has been reversed.

8.18 THE ARGUMENT -- SOME SPECIAL SUGGESTIONS.

a. Public Policy. In a sense, each opinion by the Supreme Court is a statement of public policy. Therefore, every brief is an argument in favor of a particular public policy. Nonetheless, arguments which expressly invoke "public policy" in favor of a particular position must be carefully drawn to be persuasive.

Especially to be avoided are wholly unsupported assertions of what the writer believes to be sound public policy and made-up lists of the "horribles" which the writer envisions will follow if the client's position is rejected. Rather policy arguments should be buttressed, if not by case law, by reference to supportive law journal articles, where available, or to expert non-lawyer opinion in the particular field. Similarly, the negative implications of an adverse ruling should be supported by

reference to the opinions of some expert who has considered the topic. Any published authority may be cited even though not otherwise in the record. A cited source to which opposing counsel or the Court does not have ready access should be reproduced either in the Appendix or as an addendum. Needless to say, judgment in the selection of such material is required, with due regard given to the stature of the publication and the reputation of the author. If adequate authority for an assertion of policy cannot be uncovered through diligent research, the naked appeal to public policy should probably be discarded.

b. Emotionalism. Blatant appeals to the heartstrings are never appropriate in a brief, and even "subtle" intrusions of emotionalism should be avoided. An underlying premise of our judicial system is that justice is based upon a set of principles which are applied even-handedly to all parties before the Court. Hence, constant reminders that the client is a poor orphan or that the injuries are particularly grievous may offend the sensibilities of the Court. If one has drafted the Statement of Facts properly, sympathy for the client's plight has been subliminally implanted. It is wholly unnecessary to attempt to hammer the point home by including essentially gratuitous direct reminders of it in the argument.

c. Supr. Ct. R. 14(c)(i) forbids an appellant from reserving for the reply brief facts and arguments which should be included in a full and fair opening brief. Even aside from the requirements of the Rule, it is usually advisable for the appellant to anticipate an adversary's arguments and deal with them preemptively. There is a considerable advantage which accrues to an appellant in having the first word on an issue, and it should not be lightly abandoned. See Section 8.19. Moreover, Supr. Ct. R. 25(a) permits an appellee to move to affirm after the opening brief has been filed and, under that Rule, no response by appellant to such motion is allowed without leave of Court. See Chapter 7, Section 7.02. Hence, it is at least conceivable that failure to raise an issue in the opening brief will be dispositive of the entire appeal. Prudence, therefore, dictates that the

appellant, while preparing a brief, anticipate such a motion by keeping in mind the Rule 25(a) criteria. See Chapter 7, Section 7.02(a).

d. Footnotes and typographical emphasis, like quotations, are effective only if used sparingly. As with the Statement of Facts, the best use of footnotes is for handling of secondary or peripheral points, rather than for advancing the main points of the argument. An appellee can utilize footnotes to rebut minor points made by the appellant that cannot be comfortably dealt with in the body of the answering brief. Excessive use of underlining or italicization destroys its impact, and impact is, after all, the only reason that the emphasis was undertaken in the first place. Emphasis by use of all capital letters may be offensive to the Court and should be avoided.

8.19 THE REPLY BRIEF -- SOME SPECIAL SUGGESTIONS. Although submission of a reply brief is permissive (Supr. Ct. R. 15(a)(iii)), in most cases it is advisable for the appellant to do so. There are, however, important guidelines which should be followed almost without exception.

(a) A reply brief should be short. One should virtually never apply for leave to exceed the 20-page maximum fixed by Supr. Ct. R. 14(d), and every effort should be made to utilize even fewer pages than the maximum.

(b) Supr. Ct. R. 14(c)(i) proscribes introduction of matters which should have fairly been in the opening brief or repetition of materials which were in the opening brief. Even when an arguably new contention can be defended as not in violation of the Rule's prohibition, the use of new material in a reply brief should be carefully considered. It is highly unlikely that an argument first introduced in a reply brief will be weighty enough to carry the day. If it appears to the appellee that it might be, the Court may well grant a motion for leave to file a rebuttal brief, and, thus, give the appellee the last word on the new issue. The apparent "sandbagging" of an opponent in a rebuttal document is a practice which the Court will not view with favor.

(c) It is helpful to the Court to summarize in the reply brief those issues which the answering brief has disclosed are not in dispute. The Court then can narrow its focus to those issues which are in dispute.

(d) Although the purpose of the reply brief is rebuttal, the appellant need not comment upon every point made by the appellee. Rather the focus should be only upon the major contentions and most telling points. Few cases are won because the prevailing party has demonstrated it was right on every point in dispute. A reply brief which attempts to deal with every point, large and small, of dispute will probably be unduly long and may obscure the merits of the argument on those issues which really count.

(e) Supr. Ct. R. 14(c) requires, in the context of a cross appeal, that the appellant must in the reply brief admit or deny with specificity the appellee's summary of argument. Supr. Ct. R. 14(c)(ii). The appellant's reply brief may also contain, with respect to the cross appeal, a statement of the nature of the proceeding and the judgment or order sought to be reviewed, as well as a statement of facts. Id.

8.20 THE APPENDIX -- SOME SPECIAL SUGGESTIONS. The formal requirements for the appendix are discussed at Section 8.07 above. Some practical guidelines for its preparation are as follows:

(a) A joint appendix is usually more helpful to the Court than separate appendices, and should be utilized if the parties can resolve controversies over the selection of materials for inclusion and allocation of the expenses of preparation. Unlike the Federal Rules of Appellate Procedure, under which a joint appendix is required with its expenses borne initially by the appellant and ultimately taxed against the losing party, the Delaware Supreme Court neither requires a joint appendix nor does it allocate the expense of preparation. Moreover, as a matter of general practice, the expenses incurred in assembling and reproducing the appendix are not taxable as costs.

Hence, a joint appendix must be a matter of agreement between counsel, and despite the difficulties in negotiating such an agreement, the effort should be undertaken.

(b) Although the Court will examine the original record if necessary, and although Supr. Ct. R. 14(e) expressly permits record material not in the appendix to be used in briefs and oral argument, it is advisable to include in the appendix everything the writer wishes the Court to examine. However, in most cases, it is a waste of paper to reproduce the entire record below. The Court uses the appendix as a reference source only, and testimony, exhibits, or docket documents not bearing on the issues of the appeal will probably go unexamined even if set out in the appendix.

(c) It is appropriate and indeed desirable to omit portions of documents and testimony so as to include only the relevant portions. However, the fact of omissions must be clearly noted, preferably both by page headings which describe the material as "Extract from . . . ." and by asterisks, lines or other similar indications at the points where such omissions occur.

8.21 AMICUS CURIAE BRIEF -- SOME SPECIAL SUGGESTIONS. Although virtually everything said previously about brief writing in general is equally applicable to amicus curiae briefs, several principles are of additional importance. Theoretically, at least, an amicus curiae brief, as its name implies, is filed by a disinterested non-party, and its purpose is to aid the court in deciding important matters of policy. If the parties have done their jobs, the facts and proceedings below, arguable trial court errors, and the application of the relevant case or statutory law to the specific facts before the court have all been clearly and concisely set forth for use by the Court. Therefore, the primary function of an amicus curiae brief is to analyze only those important matters of public policy omitted from the briefs of the parties.

Despite their theoretical purpose, very few amicus curiae briefs are filed by truly disinterested individuals or organizations. Usually, such a brief is submitted on behalf of persons or organizations who have a particular interest in the principle involved, or feel they may be affected by

the decision of the appellate court. However, the Court has disqualified from appearing as an amicus curiae a party or its attorneys who took an adversarial role in the proceedings leading to the appeal. Coastal Barge Corp. v. Coastal Zone Ind. Control Bd., Del. Supr., No. 241, 1984, Horsey, J. (Nov. 14, 1984) (ORDER). An amicus curiae assists the court by pointing out potential ramifications of an appellate decision that may not be raised by counsel for the parties because not immediately applicable to their clients. If the purpose of the amicus curiae brief is to protect individuals or groups not adequately represented by the named parties, the Court should be informed of that fact. The Court is entitled to know when a brief has been submitted on behalf of someone who has a personal stake, albeit indirect, in the outcome of the litigation.

Rarely will the amicus curiae attorney need to supplement the statement of facts of the parties. The issues covered should be as narrowly stated as possible. The social policy ramifications of the case should be stressed and never should it be necessary to repeat arguments found in another brief.

8.22 BIBLIOGRAPHY. The following materials are a good cross-section of the literature available on how to write a good brief:

G. Peck, Writing Persuasive Briefs (1984).

M. Pittoni, Brief Writing and Argumentation (3d ed. 1967).

R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice, ch. 13 (7h ed. 1993).

H. Weihofen, Legal Writing Style (2d. ed. 1980).

F. Weiner, Briefing and Arguing Federal Appeals §§ 20-90, at 37-274 (2d ed. 1967).

Reference works on writing style include:

G. Rossman, Advocacy and the King's English (1960).

Miller, On Legal Style, 43 Ky. L.J. 235 (1955) (including Appendix B (a bibliography on English and jurisprudence reference works)).

W. Strunk, Jr., & E.B. White, The Elements of Style (3d ed. 1979).

Articles giving insights into appellate brief writing appear in the Winter 1978, Spring 1983, Winter 1984 and Winter 1994 issues of Litigation, the periodical of the Litigation Section of the American Bar Association. Kaufman, Appellate Advocacy in the Federal Courts, 79 F.R.D. 165 (1978), is also recommended.

CHAPTER 9. MOTIONS

TABLE OF CONTENTS

CHAPTER 9. MOTIONS

William Prickett, Jr.[1]

9.01 INTRODUCTION. Supr.Ct.R. 30 governs the procedure for motion practice in the Delaware Supreme Court. The procedure is designed to provide a summary method of making, handling and disposing of motions with minimal interference with the business of the Court.

Rule 30 represents a substantial change from its predecessor, former Rule 19. It is designed to abbreviate motion practice, expedite proceedings, eliminate oral argument and require brief memoranda. Rule 30 applies to all motions brought before the Court, including motions to dismiss an appeal and Rule 25 motions to affirm. Rule 30, Committee Commentary.

9.02 FORM, FILING AND SERVICE OF MOTION PAPERS. Motion form under Rule 13(b), requires that all motions be on 8 1/2 x 11 inch paper and otherwise conform with the requirements for briefs as provided for in Rule 13(a)(ii). Printed motions shall be 7 x 9 1/2 inches. The motion must reflect the caption of the case (including the name of the court, the parties, the file number, the date of filing and a brief descriptive title indicating the purpose of the motion). A motion shall be filed without a backer. Rule 13(b). Both sides of the page can be used. Rule 13(c). Top, bottom and side margins shall not be less than one inch. Supr. Ct. R. 13(b). Supreme Court Rule 10(a) also requires that all papers filed with the Court include the attorney's address, telephone number and Supreme Court identification number.

Rule 10(d) fixes the number of copies that must be filed with the Clerk of the Supreme Court. The Rule provides for different numbers of copies that must be filed depending on the type of motion:

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[1]William Prickett, Jr., Esquire, is a partner at the firm of Prickett, Jones, Elliott, Kristol & Schnee.

(1) Two copies of the following motions, and responses thereto: (i) Rule 11 or 15(b) motions for extension of time; (ii) Rule 14(d) or 30(a) motions for enlargement of page limitations; and (iii) Rule 12(c) motions for withdrawal of counsel.

(2) Six copies of a motion for rehearing en Banc under Rule 4(f), and any response thereto.

(3) Four copies of all other motions and responses thereto.

9.03 CONTENTS OF THE MOTION. Rule 30(a) provides:

> Rule 30. Motions
>
> (a) Form; Contents. An application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall state the order and relief sought, shall state with particularity the grounds on which it is based, shall cite relevant authorities in support thereof and shall be accompanied by a proposed order. The statement of the grounds for the order or relief and the citation to the authorities in support of the motion shall not be greater than 4 pages in length including the caption of the case and signature of counsel.

The second and third sentences of the Rule embody two apparent ambiguities as to the content and length of the motion. The second sentence of the Rule requires that the motion state (i) "the order and relief sought", (ii) the "grounds" and (iii) "authorities." The third sentence, when setting out the four page limitation, refers only to the "statement of grounds," "the citation to the authorities" and "the caption of the case and signature of counsel," thereby leaving out "the order and relief sought." It seems prudent, however, to assume that the four page limitation includes a recitation of "the order and relief sought." The phrase "shall be accompanied by a proposed order" clearly suggests that the order itself falls outside the four page limitation.

9.04 RESPONSE TO THE MOTION. If a response to a motion is not precluded by the Rules, the party opposing the motion has the right to file within ten days after the service of

the motion an answer thereto citing with particularity the grounds on which the motion is opposed and the relevant authorities. There is no requirement that the opponent file a proposed counter order. Within seven days after the service of an answer to the motion, the moving party may, but is not obliged to, file a reply to the answer. Rule 30(b). If an answer to a motion is required but not filed within the time frame set forth in Rule 30, the non-responding party is deemed to have consented to the relief sought by the movant. Rule 30(c).

Note that Rule 30 authorizes any party opposing the motion to respond. For example, where an attorney files a motion to withdraw as counsel appointed under Rule 26 in an indigent criminal appeal, the indigent party may, if opposed to the motion, file a response.[2] However, in that case, the time limits of Rule 26(c)(iii) allow the response to be filed within 30 days of receipt of the motion.

The Court, in its discretion, may act upon motions under Rules 14, 15 or 34 without awaiting an answer or reply, notwithstanding Rule 30(b). Supr.Ct.R. 30(f).

Rule 30(b) makes clear that the answer or reply to an answer may not exceed four pages in length including the caption of the case and signature of counsel.

9.05 ORAL ARGUMENT AND DETERMINATION OF MOTIONS. Motions are decided without oral argument unless permitted by the Court. Rules 16(a), 30 (c). The parties may submit a stipulation or join in requesting a brief oral argument before the Motion Justice. However, one party's request for oral argument will likely be treated as a motion itself and therefore be subject to the respondent's right to oppose, by answer, argument on the motion. The Court may, sua sponte, order oral argument.

[2]Rule 26(c) specifically permits a response by the defendant to such a motion.

The Rule is silent as to who will hear and determine motions. The Court, however, has established a procedure whereby one Justice is designated the Motion Justice to whom all motions are initially referred. Rule 3(c). Rule 3 was amended, effective January 1, 1995, detailing the duties of the Motion Justice. The Motion Justice serves according to a monthly rotation schedule. The Justice holding that position has the power to grant or deny all routine motions.[3] Rule 3[4]. While motions typically are referred to the Motion Justice, motions should nevertheless be addressed to the Court.

Rule 4(h) was added by amendment to the Rules, effective January 1, 1995, to specify that motions requiring action by a panel, other than those governed by a specific rule or previously submitted to another panel of the Court, are to be considered and determined by Justices consisting of the current month's Motion Justice as well as the last and next months' Motion Justices. Denial of a motion for rehearing en Banc is not subject to a motion for reargument. Rules 4, 18.

When a routine motion is to be brought before the Court, counsel should be alert to the possibility of expediting resolution of the motion by obtaining advance approval of all parties. This would enable the Court to act immediately on the motion without waiting for the response time to elapse. The foregoing is especially appropriate for motions to extend the time to file a brief or to enlarge the page limitation for a brief.[5]

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[3]Rule 3 provides that a decision or order of the Court that does not "determine or terminate" an appeal may be made by one justice. Rule 3(a), (b). Thus, non-dispositive motions are routine.

[4]See Delaware Supreme Court Internal Operating Procedures as contained in the Delaware Rules Annotated.

[5]For these types of motions, even where all parties consent, good cause for the granting of the motion must appear on the face of the motion. Supr. Ct. R. 14(d); Supr. Ct. R. 15(b).

9.06 MOTIONS DO NOT DELAY THE PROGRESS OF THE APPEAL. A motion does not stay or alter the time of an appeal. Specifically, unless the Court otherwise orders, the filing of a motion does not stay, alter or extend the schedule set out in Rule 15 for the filing of briefs. Rule 30(e). The amendment to Rule 30(e), effective January 1, 1995, added the word "stay", and in so doing, bolstered the premise that a motion will not serve to delay the timing set for an appeal. Rule 25(a) constitutes an exception to the foregoing general Rule (see Chapter 7, Expedited Procedure--which suspends briefing schedules during the pendency of a motion to affirm).

When filing a motion to dismiss an appeal, the appellee must anticipate that the time needed to dispose of the motion to dismiss does not toll the Rule 15 briefing schedule on the appeal. Rule 30(e). The appellee may brief the issues raised by the motion as part of its brief on the merits. Alternatively, the appellee may move for an extension of time within which to file its answering brief pursuant to Rule 15(b).

9.07 MOTION FOR REARGUMENT. A motion for reargument under Rule 18 must be filed with the Clerk of the Supreme Court within fifteen days after the filing of the Court's opinion or order, unless the time is enlarged or shortened by the Court. The motion must state the grounds therefor and be supported by a certificate of counsel that it is presented in good faith and not for delay. To eliminate any misunderstanding as to the format of a motion for reargument, the Rule was amended, effective January 1, 1995, to require that the motion conform to the page and form requirements of Rules 30 and 13. No answer to the motion is permitted and the motion is not subject to oral argument unless argument is requested by the Court. Carolina Casualty Insurance Co. v. Mergenthaler, Del. Supr., 372 A.2d 174, 175 (1977); Ingersoll v. Rollins Broadcasting of Delaware, Inc., Del. Supr., 269 A.2d 217, 220-21 (1970).

Rule 18 provides that, (i) Orders entered by the Supreme Court under Rule 41 or 42, (ii) Orders entered by a single justice which are directed to matters of form and do not address the

underlying merits of the appeal, and (iii) Orders denying motions for reargument or rehearing en Banc, are not subject to reargument.

9.08 MOTION FOR REHEARING EN BANC. Motions for rehearing by the Court en Banc are governed by Rule 4(f). A motion for rehearing en Banc must be filed with the Clerk within fifteen days after the filing of the Court's opinion or order entered pursuant to Rule 17, unless the unanimous panel of the Court provided for the mandate in the case to issue forthwith. The time within which to move for rehearing en Banc may be enlarged by motion directed to the Court.[6] The motion for rehearing en Banc must succinctly state the grounds therefor and be supported by a certificate of counsel that it is presented in good faith and not for delay. A motion for rehearing en Banc must also include a copy of the opinion as to which rehearing is sought. Rule 4(f). As provided for in the amendment to Rule 4, effective January 1, 1995, the motion must comply with the page and form requirements of Rules 30 and 13. Motions for rehearing en Banc are not subject to oral argument. Answers or responses to the motion are not permitted unless requested by the Court. Cf. Carolina Casualty Insurance Co. v. Mergenthaler, Del. Supr., 372 A.2d 174, 175 (1977) (Plaintiffs, in an action to recover under an insurance policy, had their reply to defendant's motion for reargument stricken for not obtaining permission from the Court to file such reply); Ingersoll v. Rollins Broadcasting of Delaware, Inc., Del. Supr., 269 A.2d 217, 220-21 (1970).

Rule 4(f) provides three separate grounds upon which a motion for rehearing en Banc may be based: (i) the proceeding involves a question of exceptional importance; (ii) consideration by the Court en Banc is necessary to secure or maintain uniformity in Supreme Court decisions; or

[6]A motion for enlargement of the time within which to move for rehearing en Banc, although not specifically within the ambit of Rules 11 and 15, would likely be governed by the requirement in those Rules that good cause for the enlargement be shown, even if all parties consent to the motion.

(iii) the case may be "controlled by a prior decision of the Court which should be overruled or otherwise modified" (by the decision on which reargument is sought).

A motion for rehearing before the Court en Banc will be granted only upon the affirmative vote of two or more of the qualified and available members of the Court.

9.09 MOTION TO DISMISS AN APPEAL.

a. Voluntary Dismissal. Pursuant to Rule 29(a), an appellant may dismiss an appeal voluntarily at any time prior to the filing of the appellee's brief by serving a "notice of dismissal" upon the other parties to the appeal, filing the notice with the Clerk, and paying the costs. See sample forms 16:31 and 16:32, herein, for the motion, order and affidavit supporting voluntary dismissal by the defendant-below/appellant in a criminal action. After the filing of the appellee's brief, a voluntary dismissal requires stipulation of all parties to the proceeding and the approval of the Court . Rule 29(a). See sample form 16:33 herein.

b. Involuntary Dismissal.

(1) On Motion or Sua Sponte. Rule 29(b) allows the Court to order an appeal dismissed, sua sponte, or upon a motion to dismiss by any party.

(a) Involuntary Dismissal Upon Notice of the Court or Motion of Party. In the event that the Court determines that dismissal of an appeal appears appropriate, sua sponte, the following procedure is provided for: (i) the Clerk shall forward to the appellant a notice directing that the appellant show cause why the complaint, petition or appeal should not be dismissed for the reasons stated in the notice within 10 days after receipt of said notice, and (ii) after consideration of such response, the Court shall enter an order dismissing the complaint, petition or appeal or maintaining jurisdiction of the case. However, if a response is not filed within the time allowed, the dismissal shall be deemed to be consented to pursuant to Rule 3(b)(2). Upon entry of

any order of dismissal, the Court shall specify the terms thereof including a provision for payment of costs.

(b) Involuntary Dismissal Without Prior Notice. The Court may order a complaint, petition or appeal, including any petition seeking to invoke the original jurisdiction of the Court over extraordinary writs, dismissed, sua sponte, without notice, notwithstanding the provisions of Rule 29(b), when such complaint, petition or appeal from any ruling or order, interlocutory or final, fails on its face, to invoke Supreme Court's jurisdiction and where the Court concludes, in the exercise of its discretion, that the giving of notice would serve no meaningful purpose and that any response would be of no avail. Supr.Ct.R. 29(c).

(2) Time for Filing. Rule 30(d) provides that a motion to dismiss an appeal for failure to file a timely notice of appeal must be served and filed within ten days of the filing of the notice of appeal.

A motion to dismiss an appeal on any other ground shall be filed within ten days after the filing of the appellant's brief or within ten days after the act or omission claimed to be the basis for the dismissal. Rule 30(d). This second provision of Rule 30(d) ties in with Rule 25(a), governing procedure for the motion to affirm. However, Rule 30(d) is somewhat broader in that it further allows a motion to dismiss an appeal to be filed within ten days after the act or omission claimed as grounds for the dismissal whereas a motion pursuant to Rule 25(a) motion must be filed within ten days of the receipt of the appellant's opening brief.

(3) Grounds for Motions to Dismiss. A motion to dismiss may be based on any of a number of substantive or procedural grounds. A motion to dismiss may be brought for lack of subject matter jurisdiction, untimely filing of an appeal, appeal of an unappealable interlocutory order, failure diligently to prosecute the appeal, failure to comply with any rule, statute or order of the Court, or for any other reason deemed by the Court to be appropriate. Rule 29(b).

See e.g., Baylis v. Wilmington Medical Center, Inc., Del. Supr., 477 A.2d 1051, 1059 (1984) (cross appeal dismissed as appeal from unappealable interlocutory order). A motion to dismiss an appeal may also be based on the appellant's failure to timely serve and file a notice of appeal. Rule 30(d). See, e.g., Katcher v. Martin, Del. Supr., 597 A.2d 352 (1991); Fisher v. Biggs, Del. Supr., 284 A.2d 117 (1971); Johnson v. State, Del. Supr., 227 A.2d 209 (1967); see also Ademski v. Ruth, Del. Supr., 229 A.2d 837 (1967). An appeal that is moot may always be dismissed by the Court. Stotland v. GAF Corp., Del. Supr., 469 A.2d 421 (1983).

In Stroud v. Milliken Enterprises, Inc., Del. Supr., 552 A.2d 476 (1989), the Court dismissed the appeal for failure to comply with the procedural requirements of Rule 42(c) and (d). Since it appeared that the parties were seeking a final judicial determination of the sufficiency of a proposed statutory notice prior to its sending, the case was held not to be ripe for judicial intervention. Moreover, the Court noted that the parties did not have the power to render an interlocutory order final by agreement.

> Parties may not convert an otherwise interlocutory order into a final order by consensual conduct or by representations of intention to take remedial action so as to render an otherwise less-than-final order final for purposes of appeal.

552 A.2d 482 (citations omitted).

(4) Failure to Respond to Motion to Dismiss. As with all motions governed by Rule 30, the party opposing a motion to dismiss has the right to file within 10 days after the service of the motion an answer thereto, citing with particularity the grounds on which the motion is opposed and the relevant authority, although, as noted in section 9.04, supra, the opponent is not required to file an answer. If no answer is timely filed, the non-moving party is deemed to have consented to the relief sought by the movant. See Supr. Ct. R. 3(b)(2) and Supr. Ct. R. 30(c). In such circumstances the motion to dismiss will be granted. Morning v. Hamilton, Del. Supr., No. 188, Walsh, J. (Nov.

9, 1990) (ORDER); Johnson v. Johnson, Del. Supr., No. 176, 1990, Horsey, J. (Oct. 24, 1990) (ORDER); Bodkins v. State, Del. Supr., No. 162, 1990, Christie, C.J. (June 6, 1990) (ORDER); Martin v. State, Del. Supr., No. 278, 1985, Moore, J. (Dec. 3, 1985) (ORDER); Iverson v. Sullivan, Del. Supr., No. 302, 1984, McNeilly, J. (Nov. 27, 1984) (ORDER). See also Section 11.02(f).

9.10 MOTION FOR LEAVE TO FILE BRIEF AS AN AMICUS CURIAE. Rule 28 provides that a brief of an amicus curiae may be filed only by leave of Court based on a motion or a stipulation or at the request of the Court itself. See generally, Giammalvo v. Sunshine Mining Co., Del. Supr., 644 A.2d 407 (1994) (explaining role of amicus curiae and suggested showing to be included in a motion to file). The motion must state the interest of the applicant and state the reasons why a brief of an amicus curiae is desirable. The time for filing the amicus curiae brief is set by the Court. See Rule 15(a). The careful practitioner, on behalf of an amicus, should follow the schedule of the party on whose behalf the amicus brief is filed.

A motion of an amicus curiae to participate in oral argument is only granted for extraordinary reasons. Supr. Ct. R. 28. The burden of showing an extraordinary reason lies on the amicus.

9.11 MOTIONS FOR EXTENSION AND ENLARGEMENT OF TIME AND PAGE LIMITATIONS. Under Rule 11(b), all motions for extension of time and page limitation, except where specifically set out in the Rules, are subject to the approval of the Court. Reference the Supreme Court Internal Operating Procedures XV(6) which authorize the Clerk of the Court to approve certain limited extensions and enlargements. Therefore, the appellate practitioner must be aware of the specific requirements for each such motion provided for in the rules. Because of the unique nature of several of the motions, the timing and content required by the rules may differ dramatically.

a. Motion for Extension of Time to Order or Designate the Transcript. Under Rule 9, the appellant is required to include in the notice of appeal, or in an attached exhibit, either a statement designating such parts of the proceedings as are deemed necessary to be transcribed for inclusion in the record, or a statement that no transcript need be ordered, with reasons given. Rule 9(e)(ii). The underlying purpose of the Rule is to give the Court a fair and accurate account of the context in which the claim of error occurred. Slater v. State, Del. Supr., 606 A.2d 1334, 1336 (1992). If the notice of appeal contains a designation, the attorney for appellant must serve a copy of the notice of appeal upon the appropriate court reporter and must, no later than seven days after the filing of the notice of appeal, file with the Clerk of the Court a certificate setting forth that such service has been accomplished and that the cost of the transcript has been, or will be promptly, paid.

The time periods set forth in Rule 9 for the designation, ordering of, and payment for, the transcript are mandatory and will only be extended by order of the Court for good cause shown. Rule 9(f). The specific inclusion of the "good cause" language suggests that, as with Rules 14 and 15, even if the parties consent to the extension of time, the motion must show on its face good cause for the extension.

A motion to extend the time within which to designate the record should be filed within the time set by Rule 9. Failure to comply with the provisions of Rule 9, including the timely filing of designations or directions as set forth therein, or the filing of a motion in lieu thereof, allows any other party to move to dismiss the appeal. The Court may dismiss the appeal sua sponte. Rule 9(f). Such failure also may be the basis for disciplinary action against the attorney.

b. Motion for Extension of Brief Schedules. Rule 15 sets forth the specific schedule required for briefs in the Supreme Court. Rule 15 does not identify the times within which a motion for extension of the briefing schedule must be filed. The rule was amended, effective January 1, 1995, to require that such a motion be served and filed before the date on which the brief

is due. Parties should attempt to file the motion as far in advance of the date the brief is due as possible, thereby allowing themselves sufficient time to meet the schedule if the motion is denied. Rule 15(b) specifically mandates that the motion for enlargement of the briefing schedule contain (i) a statement demonstrating the good cause for the request, (ii) each prior request for an extension, and (iii) opposing counsel's position with respect to the request. The motion should follow the Official Form F of the Rules. Rule 15(b).

In accordance with the Supreme Court Internal Operating Procedures on Motion Practice, the Clerk of the Court is authorized to approve any timely, consented-to motion for an extension of time (not to exceed three extensions or a total of 75 days). See sample form 16:09 herein. The Rule 15(b) good cause requirement applies.

c. Motion for Extension of the Length of Briefs. Rule 14(d) fixes the length of all briefs to be filed in the Supreme Court. Briefs exceeding those page limitations can only be filed by leave of the Court.[7]

The Supreme Court looks with disfavor upon motions to exceed page limitations as set forth in Rule 14 and requires that good cause be shown before a motion for enlargement will be granted. Rule 14(d). Appellate practitioners are therefore advised against abusing the motion by petitioning for enlargement as a matter of course.

d. Motion for Enlargement of Argument Time. Rule 16(f) allows each side of an appeal or original proceeding before a panel twenty minutes for argument. Thirty minutes per side is allowed for arguments en Banc. A party or parties to the argument may move for additional time. Such application must be presented to the Court no later than thirty days after the filing of the appellee's brief. Rule 16(f).

[7]Submission of a brief exceeding the page limitation set forth in Rule 14 may result in the brief being stricken from the record. Rule 34.

e. Miscellaneous Motions to Extend. Rule 18, governing reargument, and Rule 4(f), governing rehearing before the Court en Banc, provides that the times within which motions thereunder may be brought can be enlarged by order of the Court. Any motion to enlarge under Rules 18 or 4(f) must be filed prior to the expiration of the time period prescribed by the Rules for the bringing of the original motion. If an extension is not granted within that time period, a Rule 18 or 4(f) motion must be filed.

While Rule 11(b) generally permits enlargement of time schedules, note that the time for taking an appeal or cross appeal is specifically excluded from Rule 11(b). Those time periods cannot be enlarged.

CHAPTER 10. ORAL ARGUMENT

TABLE OF CONTENTS

CHAPTER 10. ORAL ARGUMENT

Nancy Jane Mullen[1]

10.01 INTRODUCTION. This chapter of the Handbook discusses the rules for appellate oral argument on the merits, and also deals with making an effective oral argument. The rules relating to oral argument on the merits are set forth under Supr. Ct. R. 16. Oral argument in connection with motions is discussed in Chapter 9.

10.02 WHEN ORAL ARGUMENT IS HELD. Supr. Ct. R. 16(a) provides that oral argument shall be held only in those appeals and original proceedings designated by the Court. Otherwise, cases shall be deemed submitted for decision upon the briefs. The Court will generally order oral argument in cases presenting questions of first impression in Delaware, or otherwise involving important matters of law or procedure. The Court generally will not order oral argument in cases presenting questions of fact, or involving matters of settled law. The Court's practice is not to schedule oral argument in pro se appeals.

Supr. Ct. R. 16(c) provides that a case shall be deemed to be at issue and ready for argument at the call of the Court upon the filing of the appellee's brief. The Clerk of the Court will thereafter notify counsel for the parties and amici, if any, in writing, of whether oral argument has been ordered by the Court and, if so, the date, place and time for argument. If oral argument has not been ordered by the Court, the Clerk will designate for counsel the members of the panel of the Court to which the case has been submitted for decision on the briefs. Upon receipt of such notice, counsel for any party, by motion, may request that oral argument be permitted. A motion to permit oral argument should be made promptly, and should state with particularity why oral argument is desirable. Such a motion will generally be granted for good cause shown. Copies should be sent to

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all parties and counsel of record who are entitled to file answers in opposition to the motion for oral argument.

10.03 DATE, TIME AND PLACE FOR ORAL ARGUMENT. Oral arguments are heard by the Court in each month, Supr. Ct. R. 16(b). Oral arguments are scheduled on an hourly basis commencing at 9:30 a.m. in the morning session, and at 2:00 p.m. in the afternoon session, unless otherwise directed by the Court. Counsel should arrange to be present at least 30 minutes prior to the scheduled time of oral argument. Any tardiness of counsel in appearing for oral argument can result in the imposition of sanctions by the Court.

A request to change the date or time of oral argument may be made by motion or by letter to the Clerk. Any such request should be made promptly upon receipt of the notice that oral argument has been scheduled, and, in any case, reasonably in advance of the date fixed for argument. Oral argument is held in the Supreme Court Building located on The Green in Dover, unless otherwise specified by the Court.

10.04 WHO MAY PRESENT ORAL ARGUMENT. Counsel of record for a party, or counsel's partner or associate, may present oral argument. Not more than two counsel shall be heard for each party. Supr. Ct. R. 16(e).

Amici curiae may not present oral argument, except upon motion to the Court. Such motion will only be granted for extraordinary reasons. Supr. Ct. R. 28.

If counsel for a party entitled to present oral argument does not appear, the argument will be rescheduled. The failure of counsel to appear for oral argument can result in both the assessment by the Court against the delinquent attorney of the costs incurred by opposing counsel in connection with opposing counsel's appearance for argument, and the imposition by the Court of other appropriate sanctions.

10.05 TIME ALLOWED FOR ORAL ARGUMENT. Each side is allowed 20 minutes for oral argument before a panel of the Court or 30 minutes for oral argument before the Court en banc. Supr. Ct. R. 16(f). An application for additional time for oral argument must be presented to a Justice of the Court not later than 30 days after the filing of the appellee's brief, and will be granted only for good cause shown. If there is more than one party to a side, counsel for that side must share the time allowed and may apportion it between them at their discretion, provided that a fair opening of the case is made by the party having the opening argument. Supr. Ct. R. 16(f).

Cross-appeals are argued as one case, and no additional time is allowed for argument, absent a timely request for additional time approved by a Justice of the Court.

The Court may limit or terminate an oral argument when, in its opinion, the issues have been fully presented. Supr. Ct. R. 16(f).

10.06 ORDER AND CONDUCT OF ARGUMENT. Although Supr. Ct. R. 16(d) provides that the appellant shall be entitled to open oral argument and, if counsel reserves time, to also conclude the argument, proper courtroom etiquette suggests that, prior to commencing argument, counsel for the appellant should "request" permission to reserve time for rebuttal. Invariably, the request will be granted and the time thereby reserved.

As noted previously, cross-appeals are to be argued as one case, and the party filing the first notice of appeal shall be entitled to open and conclude the argument. Each side must argue the issues presented in both the initial appeal and the cross-appeal in the time allotted to it. Supr. Ct. R. 16(d). Upon request, the cross-appellant may conclude the argument with a reply as to the cross-appeal only.

In the conduct of oral argument, counsel will be expected not to read at length from the briefs or opinions. Supr. Ct. R. 16(f). The Rule contains no other specific provisions relating to the conduct of argument. However, recitation of facts not necessary to the argument, or a mere

repetition of arguments made in the briefs, is discouraged. In addition, it is not necessary at oral argument to discuss every argument advanced in the briefs. Counsel should limit oral argument to those matters in the briefs where argument can provide something new or clarify a point raised.

According to informal Court practice, the use of exhibits (whether or not part of the record below) is not allowed at oral argument without special permission of the Court. A request to utilize such materials should be made promptly by letter to the Court. If permission is granted, arrangements can be made through the Office of the Clerk of the Supreme Court.

10.07 WAIVER OF ORAL ARGUMENT. While Supr. Ct. R. 16(a), as recently amended, does not expressly provide for a waiver of oral argument by stipulation of the parties, such a stipulation is likely to be honored by the Court.

10.08 THE IMPORTANCE OF ORAL ARGUMENT. All lawyers should be aware of the importance of oral argument, but most are not. Although oral argument is not ordered in every case, where argument has been scheduled, it may be counsel's best opportunity to impress upon the Court the merit of the arguments raised and the importance of the interests of counsel's client. As the late Mr. Justice Harlan noted, "...your oral argument on appeal is perhaps the most effective weapon you have got if you will give it the time and attention it deserves." Harlan, What Part Does Oral Argument Play in the Conduct of an Appeal, 41 Cornell L.Q. 6 (1955).

Most appellate court judges find good oral argument to be very helpful to them in understanding a case. Mr. Justice Brennan observed: "[O]ral argument is the absolutely indispensable ingredient of appellate advocacy.... [O]ften my whole notion of what a case is about crystallizes at oral argument." W. Brennan, Harvard Law School Occasional Pamphlet No. 9, pp. 22-23 (1967). An effective oral argument clearly can influence the disposition of a case. The late Mr. Justice Jackson thus noted:

> I think the Justices would answer unanimously that now, as traditionally, they rely heavily on oral presentations. Most of them form at least a tentative conclusion from it in a large percentage of the cases.
>
> The Bar must make its preparation for oral argument on the principle that it always is of the highest, and often of controlling, importance.

Jackson, Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations, 37 ABA J. 801 (1951). The above observations should be kept in mind in preparing for and presenting oral argument.

10.09 PREPARATION FOR ORAL ARGUMENT. The key to presentation of an effective oral argument is the preparation put into it. Preparation for oral argument requires that counsel know the record thoroughly, be familiar with the Court's rules, have fully reviewed all of the briefs, be knowledgeable about the most current authorities and have rehearsed the presentation carefully.

a. Know the Record. Since the Court will have fully reviewed the briefs and appendices prior to argument, and occasionally the full record as well, counsel must have a thorough knowledge of the record to argue the case persuasively. A misstatement of fact can confuse or mislead the Court.

In a direct appeal from the judgment or order of a trial court, a thorough knowledge of the record includes knowing the details of all pertinent pre-trial proceedings and rulings by the trial court, knowing the relevant facts and how they were adduced at trial, knowing the objections or exceptions made by trial counsel and the rulings of the trial court thereon which are pertinent to the appeal, and knowing the details of any relevant post-judgment proceedings and rulings by the trial court.

In an appeal from a lower appellate court order, a thorough knowledge of the record includes knowing the original trial court record, the arguments advanced in the lower appellate court and the rulings of the court thereon.

A thorough knowledge of the record also includes the ability to locate a matter promptly in the appendix to the brief when required by the Court.

b. Know the Court Rules. It is essential that counsel have a thorough knowledge of the Court's rules and practices. Both the rules and the practices of the Court are subject to modification at any time, and one must keep abreast of any changes. The Clerk of the Court, the Supreme Court Administrator, and the Staff Attorneys are always responsive to any questions.

c. Study the Briefs. Shortly before oral argument, counsel should study all the briefs filed in the case, reviewing again the principal authorities relied upon. Counsel for the appellee should review especially the appellant's reply brief, and appellee's counsel should be prepared to respond to the arguments presented in that brief. Finally, all counsel should organize carefully the briefs of both sides in order to refer to them when necessary.

d. Check the Current Authorities. Prior to oral argument, counsel should check for opinions which have been issued since the last brief was filed in the case. This includes "Shepardizing" the cases cited, checking the advance sheets, and reviewing periodicals such as U.S. Law Week. It is also useful to obtain copies of unreported orders of the Delaware Supreme Court relating to any issues presented in the case. Unreported orders of the Court do have formal precedential value, and they may provide helpful insight into the thinking of members of the Court.

e. Know the Court. Counsel's objective at oral argument is to persuade the Court that the case should be decided in counsel's client's favor. Toward that end, it is important to know as much as possible about the members of the Court, including their judicial philosophy, what kinds of arguments they find persuasive, what kinds of arguments they reject, and how they have

ruled on similar or related issues in prior cases. The arguments should then be delivered in a manner to which the members of the Court will be receptive.

f. Rehearse. After structuring the oral argument, counsel should rehearse the argument at least twice. This will best ensure adequate time both to address all of the points counsel wishes to discuss, and to respond to the Court's questions. Rehearsal also will best ensure that the argument is cohesive and flows well. Counsel should not memorize the argument, since memorization can interfere with one's ability during argument to be responsive to the questions of the Court.

g. Create a Favorable Impression. The appearance counsel presents to the Court is an important factor in the Court's receptivity to the argument. One should be professional in dress, and conduct oneself professionally in manner of speech and demeanor. Counsel should demonstrate respect for the Court and the proceedings both in the preparation for oral argument and in the presentation of it.

h. Deal with the Statement of Facts. In the presentation of oral argument, counsel should restrict discussion of the facts to those necessary to provide the factual context for the legal arguments. A lengthy recitation of the facts is of little assistance to the Court, which is already familiar with the briefs and appendices, and it can cost precious time in arguing the issues of law. The discussion of the facts should, therefore, be as brief and concise as one can make it.

If different sets of facts relate to different legal arguments raised, counsel should summarize those facts in conjunction with the argument of each issue. Otherwise, the Court may be confused as to the factual basis for each issue.

The advocate, of course, should summarize the pertinent facts in the light most favorable to the advocate’s client. It is equally important, however, to be candid regarding the facts.

Misstating or ignoring relevant facts during argument will seriously damage counsel's credibility with the Court, both in the case before it and in future cases.

10.10 THE FINER POINTS OF ORAL ARGUMENT.

a. Use of Notes. In presenting an oral argument, it is essential to have an outline of the argument, including a summary of each issue, related authorities and references to the record. It is also useful to include in the notes any phrases or quotations which counsel wants to emphasize to the Court. It is likewise helpful to note the amount of time to use in arguing each issue. Finally, the briefs and a copy of the record should also be close at hand.

The availability of notes for argument will facilitate a prompt response to any question from the Court regarding the portions of the record or the authorities upon which counsel is relying. It is also a safeguard against any mental lapses which one might experience at the time of argument. An appellate advocate will be under pressure in arguing the case, and should not rely solely on the appellate advocate’s memory in the presentation of argument.

The value of notes notwithstanding, counsel should not write out the entire argument and read it to the Court, or attempt to commit it to memory. Oral argument involves much give-and-take between counsel and the Court, and it is necessary to be flexible in one's presentation and in responses to questioning.

b. Organization of Argument. An oral argument should include a statement of the nature of the case, essential facts, the specific issues raised and the applicable legal principles. The order of presentation of those matters can be varied, but it should begin with a summary of what the case is about. Ordinarily, the organization of the argument should be as follows:

(1) a brief introduction and statement of how the case came before the Court;

(2) a statement of the issues on review;

(3) a short statement of the essential facts and their relationship to the issues presented;

(4) a brief description of the order in which counsel intends to argue each issue;

(5) the legal argument of each issue; and

(6) the conclusion, including a statement of the action sought from the Court.

c. Presentation of Argument. The most important rule to remember in presenting an oral argument, is that it is an oral argument. The appellate advocate must prepare and present the argument with a view towards making it as simple and straightforward as possible.

Counsel's attitude towards the Court at oral argument should be respectful and professional, but not subservient. Counsel should begin oral argument by saying, "May it please the Court...," or "If the Court pleases...." It is also appropriate to say "Good morning" or "Good afternoon" to the Court in a courteous manner. If counsel is appearing before the Court for the first time, counsel should provide an introduction and state the firm or agency with which counsel is associated. During argument, the members of the Court should be individually addressed as "Your Honor," or as "Justice _____." The collective members should be referred to as "the Court."

One's attitude towards other counsel should also be respectful. Other counsel should be addressed or referred to as "counsel for _____," or as simply "Mr. or Ms. _____."

In commencing oral argument, counsel should have an opening sentence or paragraph prepared which will describe the nature of the case for the Court, and also stimulate its interest.

As previously indicated, the discussion of the facts of the case should be limited to those facts essential to an understanding of the issues presented.

The statement of the issues in the case should be clear and concise, and should ordinarily precede discussion of the relevant facts, so the Court will first know the law it is being asked to apply to the facts. After presenting the facts, counsel should discuss the issues in concrete terms and in the specific context of the case. Focus should be placed on the principal propositions of the authorities upon which counsel relies, and not the details of the underlying facts or reasoning. Where a reasoning process is required for an understanding of an issue, counsel should keep the analysis simple.

In most cases, the appellate advocate will not be able to argue all of the issues presented. Because of the time constraints of oral argument, it is virtually impossible to argue more than two or three issues effectively. As a general rule, counsel should select the two or three strongest issues for oral presentation, and rely on the briefs for the remainder. If counsel does not plan to argue all the issues raised in the briefs, counsel should advise the Court at the outset that, while counsel is prepared to argue all of the issues presented, counsel intends to focus oral argument on certain issues. Of course, counsel must actually be ready to answer questions regarding all the issues raised in the case, since the Court is not restricted in its questioning to only those issues counsel has elected to argue, and it may demonstrate interest in other issues.

Counsel arguing a case on behalf of the appellee should generally focus oral argument both on the issues addressed by counsel for the appellant in the opening argument and on any other issues in which the Court has exhibited an interest through questioning during opening argument. Like counsel for the appellant, appellee's counsel should tailor oral argument to the interests disclosed by the Court during opening argument.

In presenting oral argument, counsel should remember that counsel is an advocate for the client, and counsel’s purpose is to persuade the Court that counsel’s client's contentions should prevail. Oral presentation should be enthusiastic and sincere, and should reflect an abiding conviction

in the justness of the client's cause. Counsel must demonstrate counsel's interest in the case, and stimulate the Court's interest. The choice of words, manner of speech and method of delivery are important tools in persuading the Court of the merit of one's arguments. Counsel should avoid long quotations, unnecessary citation of authorities, discussion of excessive factual detail, and repetition of points already made, all of which can divert the Court's attention from the arguments. Counsel should also avoid the use of any distracting mannerisms, gestures or theatrics. An appellate court is not a jury, and emotional or dramatic presentations to the Court are not appropriate or effective.

In the course of argument, counsel should develop a "feel" for the Court and what it is interested in, and be responsive thereto. Maintaining flexibility is an absolutely critical aspect of oral argument. Only rarely will an oral argument proceed in the manner in which counsel has outlined it. One must be able to respond to the Court's questions, and still make the points which are important. In order to do so, counsel should keep answers to questions as brief as possible, and try to weave counsel's responses into the substance of the argument. One should also plan to allow some time for anticipated questioning. Counsel should not be overly concerned, however, if counsel is unable to discuss every point counsel wished to address.

During argument, counsel should not ask the Court if it has any questions. If the Court has questions, it will certainly ask them.

In concluding oral argument, counsel should briefly reiterate the principal points of counsel's arguments and the action counsel seeks from the Court. Counsel should then courteously close the argument. Counsel may do so by simply indicating that, if the Court has no further questions, the argument is concluded.

When opposing counsel is presenting opposing counsel's argument, one should maintain an attentive but respectful demeanor. Counsel should, of course, never interrupt opposing counsel in oposing counsel's argument. Counsel also should not indicate by any gesture or movement

that counsel disagrees with a statement or point opposing counsel has made. Counsel for the appellee will have an opportunity to respond to statements made by counsel for the appellant. Counsel for the appellant will have an opportunity in rebuttal, or concluding argument, to respond to statements made by counsel for the appellee.

d. Handling Questions from the Bench. Responding to questions from the Court is a difficult but stimulating aspect of oral argument. It is an unusual case where the Court has no questions to ask of counsel at oral argument. It is therefore essential that counsel prepare for and welcome questioning from the Bench.

The most important means of ensuring that one will be able to respond effectively to questions from the Court is to know the record and authorities thoroughly. Counsel should study the record and authorities for anticipated questions the Court probably will, or even might, ask, and counsel should formulate clear and concise responses thereto. As previously noted, the anticipated questions and answers should be included in notes for oral argument for quick and easy reference and, in rehearsing the argument, counsel should practice responding to questioning by the Court.

At oral argument, one should respond courteously and promptly to any questions from the Court. Counsel should never delay answering a question by, for example, saying that counsel will address that point later in the argument. Counsel also should never refuse, directly or indirectly, to answer a question. If a question is totally unexpected and counsel is unable at that time to respond to it, counsel should tell the Court just that, and offer to submit a supplemental memorandum on the point. Assuming the question is not one counsel clearly should have anticipated, inability to answer a question will not be frowned upon by the Court, and candor will be appreciated. However, evading, fabricating a response to, or simply ignoring a question, will be viewed with disfavor by the Court and can affect one's credibility.

When the Court addresses a question to counsel, one should listen to the question completely and reflect upon it before giving a response. If counsel does not listen to the entire question, counsel can easily mistake what the Court is asking. He should also be responsive to the question the Court has asked. If counsel does not understand a question, counsel should tell the Court that in a respectful manner, and the Court will repeat or rephrase its inquiry.

During the give-and-take of judicial questioning at oral argument, counsel should never interrupt the Court when it is asking a question or following up on a response given to a question. An appellate advocate should never argue with the Court. A lively exchange of views is desirable and encouraged by the Court at argument, but counsel should not be perceived as argumentative.

At oral argument, it is important not to allow vigorous questioning from the Bench to force critical concessions in one's case. In light of the importance of oral argument in shaping the Court's view of a case, a material concession made at argument can be potentially dispositive of the case and should be avoided. It is also essential to be candid with the Court, however, and a clearly unsupportable position should not be stubbornly maintained. In addition, counsel should recognize that the questions of the Court are not necessarily reflective of its position on the issue being argued, but may simply be an effort by the Court to probe the parameters of the argument and the consequences which may flow therefrom.

CHAPTER 11. CONSEQUENCES OF FAILURE TO COMPLY WITH THE RULES

TABLE OF CONTENTS

CHAPTER 11. CONSEQUENCES OF FAILURE TO COMPLY WITH THE RULES

Rodman Ward, Jr.[1]

11.01 INTRODUCTION. This chapter focuses on some of the consequences which may result from counsel's failure to comply with the rules governing practice before the Supreme Court. The initial discussion concerns several specific areas in which non-compliance problems most commonly arise. Thereafter, the general provisions concerning sanctions for non-compliance are considered. Lastly, some common sense practice guides are provided to assist the practitioner.

11.02 COMMON PROBLEM AREAS. In the case of many of the Supreme Court Rules, the consequences of non-compliance will flow from the nature of provisions of the specific rule itself. General provisions dealing with the consequences of failure to comply with the Court's rules and procedures are discussed in Section 11.03. The following subsections focus on the consequences of non-compliance with regard to several specific rules which are the subject of some of the more common problems in appellate practice.

a. Perfecting the Appeal. Supr. Ct. R. 6, as amended, effective January 1, 1995, provides that a notice of appeal must be filed as follows: (a)(i) within 30 days after entry upon the docket of a judgment, order or decree from which the appeal is taken in a civil case except as to appeals controlled by 10 Del. C., § 146; (a)(ii) within 30 days after a sentence is imposed in a direct appeal of a criminal conviction; and (a)(iii) within 30 days after entry upon the docket of a judgment or order in any proceeding for post-conviction relief. Cross-appeals must be filed either within the original 30-day period or within 15 days after the filing of the first notice of appeal, whichever is later. Supr. Ct. R. 6(b). These time periods are jurisdictional, see 10 Del. C., §§ 143

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(interlocutory appeals), 145 (appeals from Court of Chancery), 147 (Superior Court criminal appeals), 148 (Superior Court civil appeals), and 149 (cross-appeals), and can neither be waived nor enlarged by counsel or the Court. Dixon v. Delaware Olds, Inc., Del. Supr., 396 A.2d 963, 966 (1978); Supr. Ct. R. 11(b). Thus, failure to comply with the Rule 6 time periods will result in dismissal of the appeal for lack of jurisdiction,[2] see, e.g., Dixon v. Delaware Olds, Inc., supra; Pinkert v. Wion, Del. Supr., 431 A.2d 1269 (1981); Scott v. Draper, Del. Supr., 371 A.2d 1073 (1977); Fisher v. Biggs, Del. Supr., 284 A.2d 117 (1971); Preform Bldg. Components, Inc. v. Edwards, Del. Supr., 280 A.2d 697 (1971), even where the jurisdictional defect is never raised by the appellee and is only discovered by the Court after briefing and argument on the merits have been completed. See Barnes v. State, Del. Supr., No. 336, 1981, McNeilly, J. (July 28, 1982 and Jan. 7, 1983). Other cases illustrate the strict construction given Rule 6 time periods by the Court. See, e.g., Spry v. Gill, Del. Supr., No. 404, 1993, Moore, J. (Feb. 17, 1994) (ORDER) (rejecting untimely appeal received on 33rd day of appeal period where appellant mistakenly first submitted appeal to Superior Court);

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[2]The only limited exception to this rule, and one counsel cannot rely upon to excuse neglect or inadvertency in failing to file a timely appeal, is the following: where an appellant has done all required in seeking appellate review but is prevented from properly perfecting the appeal due to a default by court-related personnel, the appeal will not be dismissed. See Bey v. State, Del. Supr., 402 A.2d 362 (1979); Casey v. Southern Corp., Del. Supr., 29 A.2d 174 (1942). For additional cases concerning the limited exception to Rule 6 time periods (delay or error attributable to Court personnel that causes an untimely appeal), see Riggs v. Riggs, Del. Supr., 539 A.2d 163, 164 (1988) (untimely appeal permitted where appellant incorrectly filed appeal in Family Court and Family Court proceeded as if appeal properly filed); Davis v. State, Del. Supr., No. 392, 1985, Walsh, J. (Dec. 18, 1985) (ORDER) (Court enlarged the time for filing appeal where the actions of Court personnel "may have contributed" to the untimely filing and an appeal-related document that was timely filed with the Court provided notice under the circumstances that an appeal was intended). Moreover, a notice of appeal filed after expiration of the appeal period is presumed to be untimely, and an appellant who relies on the Bey exception has the burden of showing that appellant's actions constituted compliance with Supr. Ct. R. 6. Collier v. State, Del. Supr., No. 284, 1982, Moore, J. (Dec. 20, 1982). See also Carr v. State, Del. Supr., 554 A.2d 778, 780, cert. denied, 493 U.S. 829 (1989) (Court noted that there is a "strong presumption" that papers are docketed when received by Court personnel and an appellant does not meet burden merely by alleging clerical error without producing supporting evidence of such error).

Jackson v. State, Del. Supr., No. 107, 1990, Moore, J. (Apr. 18, 1990) (ORDER) (rejecting untimely appeal where appellant claimed he mistakenly first filed appeal in federal court); Jensen v. State, Del. Supr., No. 29, 1990, Christie, C.J. (Mar. 6, 1990) (rejecting untimely appeal where appellant claimed his counsel failed to notify him of the lower court decision from which appeal was taken); Doran v. Anacay, Del. Supr., No. 302, 1989, Walsh, J. (Aug. 30, 1989) (ORDER) (rejecting untimely appeal where failure to file timely notice resulted from appellant's misinterpretation of Supreme Court Rules). Similarly, in In re Sheeran, Del. Supr., No. 211, 1985, Horsey, J. (Oct. 9, 1985) (ORDER), the Court denied a motion to docket an appeal as timely filed, despite acknowledgment by the appellee of timely service of the Notice of Appeal, as well as attestation by appellant's messenger as to timely delivery to the Court of the Notice of Appeal. The Court noted that its records did not reflect the filing or docketing of a Notice of Appeal, that appellant's attorney had failed to timely verify the filing of the appeal and that the check allegedly submitted to the Court for the filing fee (drawn for an insufficient amount) had not been returned to the payor as canceled.

The Court has similarly declined to adopt a "mailbox" filing rule for prisoner appeals. In Turner v. State, Del. Supr., No. 51, 1985, Horsey, J. (Mar. 18, 1985) (ORDER), the Court received a Notice of Appeal from a lower court order entered on January 8, 1985. The appellant, a prisoner, claimed to have mailed the Notice of Appeal on February 5, 1985, the date on which the Notice of Appeal was signed, witnessed and notarized. Appellant argued that mailing the Notice of Appeal within 30 days from the entry of judgment should satisfy Rule 6, particularly since "the mailing procedures of the correctional center are not within his control." Id., Order at 2. This argument was rejected by the Court, which concluded that "[t]he time for taking an appeal is jurisdictional and may be enlarged only for the default of court-related personnel." Id. Accord Carr v. State, Del. Supr., 554 A.2d 778, cert. denied, 493 U.S. 829 (1989); O'Mayes v. State, Del. Supr., No. 135, 1995, Hartnett, J. (May 3, 1995) (ORDER); Spry v. Gill, supra; Brooks v. State, Del. Supr., No. 536,

1992, Veasey, C.J. (Jan. 6, 1993) (ORDER); Floyd v. State, Del. Supr., No. 18, 1992, Holland, J. (Feb. 12, 1992) (ORDER); Harris v. Casson, Del. Supr., No. 146, 1990, Walsh, J. (May 29, 1990) (ORDER). Compare Houston v. Lack, 487 U.S. 266 (1988) (reaching opposite result pursuant to Federal Rules of Appellate Procedure for appeals of federal prisoners).

Although the ultimate consequences of an untimely appeal which is too late may be far more drastic, the filing of a premature appeal, i.e., before entry of the requisite lower court judgment or order, will also result in dismissal of the appeal. See Melvin v. Short, Del. Supr., No. 289, 1981, Horsey, J. (Jan. 8, 1982) (Supreme Court lacked jurisdiction where appeal from trial court opinion, filed prior to entry of trial court order implementing decision, was premature). For additional cases in which the Court dismissed premature appeals, see Nicholson v. State, Del. Supr., No. 169, 1990, Holland, J. (July 16, 1990) (ORDER); Los v. Los, Del. Supr., No. 444, 1989, Moore, J. (Nov. 21, 1989) (ORDER) (appeal premature because motion to alter Family Court judgment suspends finality of judgment below); Greene v. State, Del. Supr., No. 199, 1988, Horsey, J. (Aug. 2, 1988) (ORDER) (appeal of criminal conviction taken before sentencing was premature and subsequent sentencing by lower court did not cure defect).

Also involved in perfecting an appeal is Supr. Ct. R. 7(c), which sets forth the required contents of a proper notice of appeal and cross-appeal. **See sample form 16:01 [Supr. Ct. R. Form A and Form B].** While the failure to file a technically complete notice of appeal will not necessarily cause the appeal to be dismissed unless such failure is substantially prejudicial to an interested party, the burden of establishing the absence of such substantial prejudice lies with the appellant. State Personnel Comm'n v. Howard, Del. Supr., 420 A.2d 135 (1980). However, an appellant's failure to provide a proper address in the notice of appeal, or otherwise provide the Clerk of the Court with some means of communicating with appellant, may result in dismissal of the appeal,

at least where other failures to comply with the Court's procedures are also involved. See Larkin v. ICI Americas, Inc., Del. Supr., No. 254, 1983, Horsey, J. (Nov. 8, 1983).

Supreme Court Rule 7(c) was amended, effective January 1, 1995, in several ways. First, Supr. Ct. R. 7(c)(8) was added to provide that the caption of the appeal shall only contain the names of the parties below taking the appeal and the names of the parties against whom the appeal is taken. Supr. Ct. R. 7(c)(8). Also added is Supr. Ct. R. 7(c)(9), which instructs that a copy of the order of judgment sought to be reviewed must be attached to the notice of appeal and to the notice of cross-appeal if different from the notice of appeal, and, if not available, a statement noting the un-availability must be included. Supr. Ct. R. 7(c)(9). Numerous cases have been dismissed for the appellant's failure to comply with Supr. Ct. R. 7(c)(9). See, e.g., Glenn v. State, Del. Supr., No. 205, 1995, Veasey, C.J. (June 28, 1995) (ORDER); Machin v. State, Del. Supr., No. 22, 1995, Holland, J. (Mar. 6, 1995) (ORDER); Smith v. Board of Parole, Del. Supr., No. 16, 1995, Veasey, C.J. (Feb. 28, 1995) (ORDER). The recent amendment to Supr. Ct. R. 7(c) also provides that the notice of appeal or cross-appeal shall name the judge entering the judgment from which the appeal is taken and the case number therein, shall provide the name and address of each party's attorney of record below, except as otherwise indicated, and shall designate the name and address of the attorney of record below for each party to the proceeding below against whom the appeal is not taken. Supr. Ct. R. 7(c)(1), (2) and (4).

Another aspect of the appeal procedure is Rule 20, which sets forth the fees required by the Court. Rule 20(a) states that a docketing fee is required to be paid before a case will be filed. Failure to comply with this provision can result in dismissal. Lyles v. Shaw, Del. Supr., No. 59, 1993, Holland, J. (Apr. 13, 1993) (ORDER); Martin v. Koreman, Del. Supr., No. 388, 1992, Horsey, J. (Sept. 16, 1992) (ORDER); Martin v. Widener Univ. Sch. of Law, Del. Supr., No. 282, 1992,

Horsey, J. (Aug. 7, 1992) (ORDER); Read v. Penn Cent., Del. Supr., No. 46, 1985, Horsey, J. (Mar. 14, 1986).

For a more detailed discussion of perfecting an appeal or cross-appeal, see Chapter 4, Sections 4.06 through 4.08.

b. Designation of the Record on Appeal. Supr. Ct. R. 9(e)(ii) and (iii) establish the times for parties to designate portions of the trial record to be transcribed for inclusion in the record on appeal. The appellant's designation, if any, must be included in or attached to the notice of appeal, and the designation of the appellee (or other party to the appeal) must be filed within seven days after a notice of appeal containing appellant's designation or within 15 days after a notice of appeal containing no designation. Under Supr. Ct. R. 9(f), the time for making these designations may be extended only for good cause. Failure to make proper designations is not a proper basis for extending the time for filing briefs. Moreover, Supr. Ct. R. 9(f) provides that if a party or counsel fails to comply with Supr. Ct. R. 9, including the time limit provisions, the Court in its discretion may dismiss the appeal, take disciplinary action against the attorney, or provide other appropriate relief. See Read v. News-Journal Co., Del. Supr., Nos. 121 & 170, 1983, Moore, J. (May 4, 1983). In Cusick v. Neilson, Del. Supr., No. 76, 1988, Moore, J. (Oct. 17, 1988) (ORDER), appellant failed to designate the transcript and failed to serve the court reporter, after having been advised of these requirements by the Clerk of the Court. The Court dismissed the appeal because appellant "repeatedly failed and refused to comply with the Rules of this Court despite numerous opportunities to do so." Id., Order at 4; see also Slater v. State, Del. Supr., 606 A.2d 1334, 1336-37 (1992) (appeal of previously denied motion to dismiss not reviewed because of appellant's failure to provide the Court with transcript of pretrial hearing for motion to dismiss); Torres v. State, Del. Supr., No. 256, 1990, Horsey, J. (Nov. 21, 1991) (ORDER) (even though trial court failed to record sidebar conference, greater burden to record conference was on appellant; thus motion for reargument denied because

of appellant's failure to provide such transcript to the Court on appeal); Hamilton v. State, Del. Supr., No. 466, 1988, Christie, C.J. (Apr. 12, 1989) (ORDER) (appeal dismissed because appellant failed both to serve notice of appeal on the court reporter and arrange payment for transcript); Grunden v. Grunden, Del. Supr., No. 392, 1989, Moore, J. (Nov. 13, 1989) (ORDER); Bordley v. State, Del. Supr., No. 328, 1989, Holland, J. (Nov. 3, 1989) (ORDER).

Failure to arrange for payment of the cost of the transcript can also result in dismissal. Bordley v. State, supra; Hamilton v. State, supra. In this regard, permission to proceed in forma pauperis may not excuse an appellant from paying for the cost of the transcript. Saunders v. Tucker, Del. Supr., No. 266, 1988, Walsh, J. (Nov. 3, 1988) (ORDER) (Court permission to proceed in forma pauperis was limited to non-payment of filing fees and did not excuse obligation to pay for transcript in a civil appeal). **See also Section 15.03, Fees in the Supreme Court.**

For a further discussion of the contents of the notice of appeal, see Chapter 4, Section 4.09.

c. Briefing. Supr. Ct. R. 15(a), as amended, effective January 1, 1995, establishes the normal briefing schedule on appeal: (a)(i) 45 days from the notice of appeal without a Supr. Ct. R. 9(e) designation, or 30 days after filing of the record where such designation has been made, for appellant's opening brief; (a)(ii) 30 days after service of the opening brief for appellee's answering brief; (a)(iii) 15 days after service of the answering brief for appellant's reply brief (30 days if the reply brief includes answering matter related to any cross-appeal); and (a)(iv) in cross-appeals, ten days after service of appellant's reply brief for appellee-cross-appellant's reply brief. Enlargement of the briefing schedule, even if consented to by all parties, will be authorized by the Court, or in limited instances by the Clerk of the Court, only upon a showing of good cause after the motion for enlargement has been served and filed in accordance with Supr. Ct. R. 15(b). **See Chapter 8, Section 8.03; sample form 16:06 [Supr. Ct. R. Form F]**. Failure to file an opening brief in a timely

manner may lead to dismissal of the appeal. See, e.g., Larkin v. ICI Americas, Inc., supra; Bailey v. Sears, Roebuck & Co., Del. Supr., No. 107, 1983, McNeilly, J. (Oct. 11, 1983); Metric Wall Systems, Inc. v. L & W Supply Corp., Del. Supr., No. 148, 1980, Duffy, J. (Oct. 6, 1980) (ORDER). See also Webb v. Mitchem, Del. Supr., No. 62, 1992, Holland, J. (Aug. 5, 1992) (ORDER); Monroe v. Levine, Del. Supr., No. 281, 1991, Horsey, J. (Nov. 21, 1991) (ORDER); Pritchett v. State, Del. Supr., No. 458, 1989, Walsh, J. (May 3, 1990) (ORDER); Lundy-Bey v. State, Del. Supr., No. 477, 1989, Christie, C.J. (Mar. 14, 1990) (ORDER); Hobbs v. State, Del. Supr., No. 342, 1988, Walsh, J. (Nov. 23, 1988) (ORDER) (appeal dismissed despite appellant's claim that appellant failed to file appellant's opening brief on time because the Department of Corrections failed to provide appellant with the necessary supplies, materials and equipment); Supr. Ct. R. 29(b) (failure to diligently prosecute appeal or comply with Court rules may result in dismissal); Major v. Redman, Del. Supr., No. 257, 1982, Moore, J. (June 20, 1983) (ORDER).

The appealing party is generally afforded the opportunity to select and frame the issues it wants to have considered on appeal. Turnbull v. Fink, Del. Supr., 644 A.2d 1322, 1324 (1994). However, in so doing, an appellant must set forth fully each claim of error in the body of appellant's opening brief or the claim is waived. Id.; Murphy v. State, Del. Supr., 632 A.2d 1150, 1152 (1993). See Supr. Ct. R. 14. The appellant must raise the issues; appellant may not rely upon an amicus curiae to do so. Turnbull v. Fink, supra. A claim of error may not be raised in a footnote in the opening brief, Murphy v. State, 632 A.2d at 1152 n.2; Supr. Ct. R. 14(d), nor may one be raised solely in the headings or table of contents. Jackson v. State, Del. Supr., 643 A.2d 1360, 1367 n.5 (1994), cert. denied, 115 S. Ct. 956 (1995).

For a further discussion of brief requirements, see Chapter 8.

d. Interlocutory Appeals. Because of the detailed criteria and procedures involved, interlocutory appeals deserve special mention. The prerequisites for certifying interlocutory appeals are set forth in Supr. Ct. R. 42(b), and the procedures for certifying such appeals are contained in Supr. Ct. R. 42(c) and (d). **The substance of these Rules is discussed in detail in Chapter 5.** Only the failure to comply with these provisions is considered here. The most recent amendments to Supreme Court Rules 41 and 42 became effective January 1, 1995. **See Section 5.04, Interlocutory Appeals, for an extended discussion of these rules.**

The most common situation in which such appeals have been dismissed is where the interlocutory order fails to satisfy the two threshold criteria of Supr. Ct. R. 42(b), i.e., determines a substantial issue and establishes a legal right. See, e.g., Bounds v. Hursey Porter & Assocs., Del. Supr., No. 15, 1995, Walsh, J. (Jan. 30, 1995) (ORDER); Certain Underwriters at Lloyd's v. Burlington N. R.R. Co., Del. Supr., No. 367, 1994, Veasey, C.J. (Nov. 10, 1994) (ORDER); Thornton v. State, Del. Supr., No. 262, 1982, McNeilly, J. (Oct. 22, 1982); Weinberger v. UOP, Inc., Del. Supr., No. 120, 1979, Quillen, J. (Aug. 28, 1979); Castaldo v. Pittsburgh-Des Moines Steel Co., Del. Supr., 301 A.2d 87 (1973); Wilmington Medical Ctr., Inc. v. Coleman, Del. Supr., 298 A.2d 320 (1972); Lummus Co. v. Air Prods. & Chems., Inc., Del. Supr., 243 A.2d 718 (1968). For additional cases that resulted in dismissal for failure to satisfy the two threshold criteria of Supr. Ct. R. 42(b), see Delaware Tire Ctr., Inc. v. State, Del. Supr., Nos. 97 & 120, 1986, Moore, J. (May 7, 1986) (ORDER); Fuqua Indus. v. Lewis, Del. Supr., No. 397, 1985, Moore, J. (Jan. 24, 1986) (ORDER); Artesian Water Co. v. Haynie, Del. Supr., No. 66, 1985, Horsey, J. (Mar. 4, 1985) (ORDER); City of Wilmington v. New Castle County, Del. Supr., No. 30, 1985, Christie, J. (Feb. 13, 1985) (ORDER).

Even if the threshold criteria are met, the failure to also establish one of the Supr. Ct. R. 42(b)(i)-(v) criteria will also result in dismissal. See, e.g., Jenkins v. Lindale, Del. Supr., No. 169, 1982, Horsey, J. (July 16, 1982) (ORDER); Weinberger v. UOP, Inc., supra; Delaware Alcoholic Beverage Control Comm'n v. Retail Liquor Dealers Ass'n, Del. Supr., No. 143, 1980, Duffy, J. (Aug. 5, 1980) (ORDER). Moreover, if the detailed procedures set forth in Supr. Ct. R. 42(c) and (d) for certifying interlocutory appeals are not followed, dismissal will also result, even when the non-compliance is discovered by the Court after briefing has been completed and oral argument on the merits has been heard. See, e.g., Julian v. State, Del. Supr., 440 A.2d 990 (1982); Baylis v. Wilmington Medical Ctr., Inc., Del. Supr., No. 92, 1981, Duffy, J. (July 27, 1981) (ORDER); Chicago Ins. Co. v. Ins. Co. of N. Am., Del. Supr., No. 322, 1980, Quillen, J. (Feb. 9, 1981) (ORDER); Marvel v. Department of Natural Resources & Envtl. Control, Del. Supr., No. 337, 1978, Horsey, J. (June 20, 1979) (ORDER).

For additional cases in which appeals were dismissed for failure to satisfy Supr. Ct. R. 42 procedures or standards, see Eljer Indus. v. Household Int'l, Inc., Del. Supr., No. 123, 1995, Hartnett, J. (Apr. 28, 1995) (ORDER); Abdul-Akbar v. Washington-Hall, Del. Supr., 649 A.2d 808 (1994); Lynch v. Nanticoke Homes, Del. Supr., No. 302, 1994, Walsh, J. (Nov. 7, 1994) (ORDER); Werb v. D'Alessandro, Del. Supr., 606 A.2d 117 (1992); State v. Jorden, Del. Supr., No. 422, 1991, Horsey, J. (Dec. 2, 1991) (ORDER); Brokenbrough v. Sherlock, Del. Supr., No. 195, 1991, Walsh, J. (July 5, 1991) (ORDER); Memmolo v. Memmolo, Del. Supr., 576 A.2d 181 (1990); Dawson v. Dawson, Del. Supr., No. 177, 1990, Holland, J. (June 26, 1990) (ORDER); Stroud v. Milliken Enters., Del. Supr., 552 A.2d 476 (1989).

e. Non-Conforming Papers. Perhaps the most common failure to comply with the Court's rules involves the proper form of briefs, appendices and motions, including proper citation form. See Supr. Ct. R. 13 and 14 (briefs, appendices, motions and other papers), 14(g)

(citations for reported cases) and 30(a) (motions); cf. Supr. Ct. R. 93(c)(iv) (citations for unreported opinions and orders); **see also Official Forms A through N (contained in Chapter 16)**. Supr. Ct. R. 34 provides that any brief, appendix, motion or other paper or document which does not conform to the rules or is not within the bounds of professional propriety may be stricken. See Owens Corning Fiberglas Corp. v. Carter, Del. Supr., No. 313, 1993, Moore, J. (Aug. 27, 1993) (ORDER); In re Baby Boy H., Del. Supr., No. 291, 1993, Moore, J. (Aug. 9, 1993) (ORDER); Anderson v. State, Del. Supr., No. 26, 1993, Horsey, J. (July 30, 1993) (ORDER); In re Johnson, Del. Supr., No. 450, 1992, Walsh, J. (Oct. 19, 1992) (ORDER); Swayne v. State, Del. Supr., No. 457, 1991, Moore, J. (Jan. 10, 1992) (ORDER); Cobb v. State, Del. Supr., No. 251, 1990, Christie, C.J. (Oct. 15, 1991) (ORDER); Field v. State, Del. Supr., No. 332, 1982, Moore, J. (Apr. 7, 1983) (ORDER); Jones v. State, Del. Supr., No. 266, 1979, Quillen, J. (Feb. 26, 1981) (ORDER).

The practitioner should be particularly aware of Supr. Ct. R. 14(d), which provides that motions to exceed the brief page limitations (35 pages for opening and answering briefs; 20 pages for reply briefs) will be viewed "with disfavor" and will be granted only for good cause. See Moore v. State, Del. Supr., No. 273, 1983, McNeilly, J. (Mar. 7, 1984).

f. Supreme Court Rule 30(c). Supreme Court Rule 30(c) provides, in part: "If an answer to a motion is required and is not filed within the time allowed by these Rules, a non-responding party shall be deemed to have consented to the relief sought by movant." For cases applying this rule, see, e.g., CPM Energy Sys. Corp. v. First Fed. Sav. Bank, Del. Supr., No. 188, 1993, Horsey, J. (June 18, 1993) (ORDER); Hamilton v. State, Del. Supr., No. 225, 1992, Veasey, C.J. (July 8, 1992) (ORDER); O'Neal v. State, Del. Supr., No. 186, 1992, Walsh, J. (June 1, 1992) (ORDER); Robinson v. Guessford, Del. Supr., No. 385, 1990, Horsey, J. (Jan. 31, 1991) (ORDER); Bodkins v. State, Del. Supr., No. 162, 1990, Christie, C.J. (June 6, 1990) (ORDER); Sherman v. State, Del. Supr., No. 116, 1990, Moore, J. (Apr. 26, 1990) (ORDER).

11.03 SANCTIONS.

a. Sanctions Under the Court Rules. Supreme Court Rules 29(b), 20(f) and 33 set forth generally the consequences which may result from failure to comply with the Court's Rules. Rule 29(b) provides for involuntary dismissal for: lack of subject matter jurisdiction, untimely filing of an appeal; appealing an unappealable interlocutory order; failing to diligently prosecute an appeal; failing to comply with any rule, statute or Court order; or any other reason deemed appropriate by the Court. Rule 20(f) provides that in the case of frivolous appeals the Court may enter an order assessing costs in addition to those normally allowed under Supr. Ct. R. 20(d), as justice may require, including the costs of preparation and transmission of the record, cost of the transcript, and the reasonable expenses of any appellee. See Read v. News-Journal Co., supra. For an additional case in which fines were imposed under Supr. Ct. R. 20(f), see Leighton v. Beatrice Cos., Del. Supr., No. 231, 1987, Christie, C.J. (Oct. 16, 1987) (ORDER).

Supr. Ct. R. 20(f) and 29(b) apply only to appellants and cross-appellants. Supreme Court Rule 33, however, provides for appropriate sanctions against any party or counsel who fails to comply with any rule or order of the Court. Such sanctions may include an award of reasonable attorneys' fees, the determination of the appeal against the offending party, and disciplinary action, including fines, against the offending attorney. Supr. Ct. R. 33(a). See, e.g., In re Myers, Del. Supr., No. 138, 1983, Herrmann, C.J. (Apr. 20, 1983) (ORDER) ($100 fine for willful and persistent failures to file timely briefs); Field v. State, supra ($100 fine for filing brief with inaccurate and false citations to record and serious and unfounded accusations against opposing counsel); In re Reardon, Del. Supr., No. 360, 1982, Moore, J. (Nov. 19, 1982) (ORDER) ($350 fine for failure to file timely briefs; because of counsel's past neglect of cases before the Court, referral made to Board on Professional Responsibility to investigate counsel's competence to continue as member of Bar).

The practitioner should be especially aware of Supr. Ct. R. 33(b), which provides for disciplinary measures against attorneys whose performance before the Court is found to be deficient. Performance deficiency means attorney conduct which is unacceptable and appears to be the result of inattention, neglect, lack of diligence or other conduct not appropriate for an officer of the Court. Supr. Ct. R. 33(b) explicitly states that discipline for performance deficiency may be imposed for: (1) persistent failure to abide by or comply with the Court's rules, orders or other directives or (2) submission of briefs, oral argument or other communications to the Court or its staff that are lacking in candor or grossly below customary professional standards. Disciplinary action for performance deficiency may include imposition of costs, expenses and reasonable attorneys' fees, fines, temporary disqualification from practice before the Court (up to 90 days), private or public reprimands, or other appropriate sanctions.

b. The Role of Ethics. On October 1, 1985, the Delaware Lawyers' Rules of Professional Conduct ("R. Prof. Cond.") superseded the Delaware Lawyers' Code of Professional Responsibility. All attorneys who appear before the Court, including those admitted pro hac vice, are subject to the Rules of Professional Conduct, Supr. Ct. R. 12(b) and 61, and, as such, "are expected to present all matters and papers to the Court with the highest professional competence and integrity." Supr. Ct. R. 102(b). While most of the provisions of the Rules of Professional Conduct which concern the litigation process are cast in terms of conduct at trial, several provisions which apply (at least by analogy) to appellate proceedings deserve particular note in the context of Supreme Court practice.

One of the most important provisions is that which requires candor of counsel in fairly representing the status of the law involved in the issues on appeal. The Rules of Professional Conduct require that a lawyer, in representing a matter to a tribunal, must disclose legal authority in the controlling jurisdiction directly adverse to the lawyer's client's position which is not disclosed by

opposing counsel. R. Prof. Cond. 3.3(a)(3). This duty to disclose continues to the conclusion of the proceeding. R. Prof. Cond. 3.3(b).

In the event that a decision which should be brought to the attention of the Court becomes available or is brought to the attention of a party during the pendency of appellate proceedings, counsel may write to the Clerk of the Court advising of the existence of the decision and enclosing the appropriate number of copies of the decision, without further argument. Supr. Ct. R. 15(a)(vi). The parties may request an opportunity to supplement the record with brief statements of the parties' positions concerning the new decision.

In briefing or oral argument before the Court, the Rules of Professional Conduct require that a lawyer shall not: state or allude to matters counsel has no reasonable basis to believe are relevant or are not supported by admissible evidence; assert counsel's personal knowledge of the facts; assert counsel's personal opinion as to the justness of a cause; knowingly disobey an obligation under the rules of the Court; or engage in undignified or discourteous conduct. R. Prof. Cond. 3.4(e), 3.4(c) and 3.5(c). See In re Ramunno, Del. Supr., 625 A.2d 248 (1993) (reversing sanction of private admonition and imposing public reprimand for attorney's misconduct violating R. Prof. Cond. 3.5(c)); In re Hurley, Misc. No. 265, Horsey, J. (Oct. 9, 1990) (ORDER) (attorney held in contempt; motion for reargument stricken as disrespectful and unprofessional); Levin v. Smith, Del. Supr., Nos. 287/288, 1984, Horsey, J. (July 25, 1985) (ORDER) (striking motion for reargument that is disrespectful and not within bounds of professional propriety); Solis v. Tea, Del. Supr., No. 386, 1981, Horsey, J. (Nov. 28, 1983) (ORDER) (matter struck as discourteous).

The general requirement of competence also applies to Supreme Court practice. "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." R. Prof. Cond. 1.1. Thus, a lawyer should not pursue an appeal negligently or without adequate preparation.

The practitioner should also be aware of Rule 5 of the Rules of Professional Conduct, which deals with law firms and associations. A partner in a law firm must make a reasonable effort to ensure that other lawyers in the firm, including partners, conform to the ethical rules. This duty also applies to a lawyer having supervisory authority over another lawyer. A lawyer is responsible for another lawyer's violation of the Rules of Professional Conduct if the lawyer orders or ratifies the conduct, or if the lawyer is a partner or has supervisory authority and knows of the other lawyer's conduct but fails to take remedial action at a time when the consequences can be avoided or mitigated. Del. R. Prof. Cond. 5.1. See In re Lassen, Del. Supr., 672 A.2d 988 (1996).

A lawyer acting under the supervision of another lawyer is nonetheless bound by the Rules of Professional Conduct despite instructions or orders from the supervising lawyer. However, a subordinate lawyer does not violate the Rules of Professional Conduct if the subordinate lawyer's action is "in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." R. Prof. Cond. 5.2(b).

Different lawyers in the same firm may not take inconsistent positions in the same court on behalf of the same client at the same time. In Red Dog v. State, Del. Supr., 625 A.2d 245 (1993) (per curiam), the Supreme Court reviewed actions taken by different attorneys within the Public Defender's office during the representation of a condemned prisoner awaiting execution. Though the Court did not impose sanctions on counsel, the Court did find that counsel exercised poor judgment in taking inconsistent positions regarding the prisoner's competency on the eve of the prisoner's execution.

An example of the serious difficulty a lawyer can encounter when it is perceived that the lawyer has acted unethically occurred in Eberly v. Eberly, Del. Supr., 489 A.2d 433 (1985). In Eberly, the Court referred the appellee's attorney to the Board on Professional Responsibility (the "Board") on two separate grounds because of the attorney's conduct in the trial court. First, the

attorney had filed contempt motions "for no other apparent purpose than to unduly coerce and harass" the opposing party. Id. at 447. As a result, the Court referred the lawyer's conduct to the Board for further investigation. Id. Second, the lawyer advised the client to file an affidavit that patently contradicted the client's prior sworn statement. The Court stated that "It appears that this . . . false averment [was] interposed for delay." Id. The Court held that such conduct was:

> inconsistent with the lawyer's oath [to act] . . . "with all good fidelity as well to the Court as to the client; [and] . . . use no falsehood nor delay any person's cause through lucre or malice." Moreover, such behavior contravenes the duties of a lawyer under DR 7-102 of the Delaware Lawyers' Code of Professional Responsibility.

Id. at 448 (quoting Del. Supr. Ct. R. 54).[3] This was an independent ground for referring the lawyer's conduct to the Board. Id. at 449.

Additionally, because of the attorney's conduct, the Court reversed a trial court award of attorney's fees to the appellee and held the appellee's counsel personally liable for the appellant's attorney's fees. Not only was the matter referred to the Board, but the attorney was ordered to repay attorney's fees previously awarded. Id.

Eberly provides a dramatic message to all practitioners that conduct in breach of the lawyer's ethical obligations will not be treated lightly.

In another more recent case, an attorney was suspended from the practice of law for two years for, among other things, failing to post a bond in an appeal from the Family Court to the Superior Court and failing to file an answering brief on a motion to dismiss that appeal. In re Carmine, Del. Supr., 559 A.2d 248 (1989).

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[3]Although this issue was decided under the now-superseded Disciplinary Rules, the former DR 7-102 in this context has clear counterparts in the new Delaware Lawyers' Rules of Professional Conduct (see Rules 1.2, 3.1, 3.2 and 3.3). Therefore, the result reached in Eberly likely would obtain under the new Rules.

Furthermore, the Supreme Court found it unacceptable for an attorney to both work as a trial advocate and testify as a witness in a contested will proceeding because an attorney acting in such dual capacities could prejudice an opposing party. In re Estate of Waters, Del. Supr., 647 A.2d 1091 (1994). Explaining the rationale for prohibiting the attorney-witness situation, the Court quoted the commentary of the Delaware and Model Rules of Professional Conduct Rule 3.7: "A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof." Id. at 1097. The Court concluded that the attorney's conduct undermined the integrity of the adversarial process and thus submitted the opinion to the Office of Disciplinary Counsel. Id. at 1098.

Finally, the practitioner should note the Supreme Court's recent outrage at the professional misconduct involved in Paramount Communications, Inc. v. QVC Network, Inc., Del. Supr., 637 A.2d 34 (1994). In an addendum to the Supreme Court's opinion, the Chief Justice expressed the court's concern for the lack of civility and professionalism demonstrated by a Texas attorney conducting a deposition during the Paramount litigation: "One particular instance of misconduct during a deposition in this case demonstrates such an astonishing lack of professionalism and civility that it is worthy of special note here as a lesson for the future -- a lesson of conduct not to be tolerated or repeated." Id. at 52. After quoting portions of the abusive and profane language used by the attorney during the deposition, the Supreme Court advised that if a Delaware attorney had engaged in such conduct, "that lawyer would have been subject to censure or more serious sanctions." Id. at 55.

The Court not only criticized the action of the Texas attorney defending the deposition but also another attorney present on behalf of the defendants who did nothing to stop the misconduct

of the Texas attorney. The Court explained that a Delaware attorney or an attorney admitted pro hac vice would be expected to take action necessary to end such misconduct. Id. at 56.

c. Admissions Pro Hac Vice. The Supreme Court may, in its discretion, admit attorneys who are not members of the Delaware Bar pro hac vice, upon written motion made by a member of the Delaware Bar who maintains an office in the state. Supr. Ct. R. 71(a). A member of the Delaware Bar, however, must sign or receive service of all pleadings and other papers filed in any action. Supr. Ct. R. 71(c). Unless excused by the Court, the Delaware attorney must also accompany the attorney admitted pro hac vice to any court proceedings or conferences with the Clerk of the Court or other Court officers. Supr. Ct. R. 71(c).

Supreme Court Rule 71(b) instructs that the out-of-state attorney shall attach to the motion for admission pro hac vice a statement certifying the following: (i) the attorney is a member in good standing of the Bar of another state; (ii) the attorney shall be bound by the Delaware Lawyers' Rules of Professional Conduct; (iii) the attorney shall be bound by all Rules of the Court; (iv) the attorney has consented to service of process upon the Clerk of the Supreme Court of Delaware as agent upon whom service of process may be made for all matters, including disciplinary actions, arising out of the practice of law in Delaware; (v) the number of Delaware actions in which the out-of-state attorney has appeared in the last 12 months; (vi) the payment of the fee for admission pro hac vice has been appropriately made; (vii) whether the attorney has been disbarred, suspended, or is the object of any disciplinary proceedings in any jurisdiction; and (viii) the identification of all states and jurisdictions where the attorney has at any time been admitted. Supr. Ct. R. 71(b). **See also form 16.15.**

The attorney admitted pro hac vice must conform to the Rules of Professional Conduct. Since these rules differ from the previous rules of conduct for Delaware and from what may be the current rules of professional conduct in the out-of-state attorney's home jurisdiction, the

cautious practitioner who presents a motion for an out-of-state attorney to appear pro hac vice should supply the out-of-state attorney with a copy of the Delaware Lawyers' Rules of Professional Conduct.

11.04 PRACTICE GUIDES. As shown above, serious consequences can follow counsel's failure to comply with the Supreme Court Rules, including dismissal of what might otherwise be a meritorious appeal with no practical opportunity for further review. Egregious or repeated failures may also result in disciplinary action or monetary sanctions. Even the less serious offenses, such as failures to follow proper briefing or citation forms which may be cured by refiling the necessary papers in proper form, can produce adverse consequences which the practitioner may not fully appreciate. This is because all violations of or failures to comply with the rules, when brought to the Court's attention, cast an unfavorable light on the offending counsel. Most such lapses reveal unfamiliarity with the rules or inattention to detail, which may color the Court's opinion of counsel or the merits of the positions counsel is advancing to the Court. After all, if counsel has been lax in following the Court's procedures, questions may arise as to the reliability and thoroughness of the legal work product presented to the Court. Moreover, repeated failures by counsel to comply with the rules, even when any single failure would not be significant in and of itself, may be construed as a lack of proper respect for and deference to the Court.

Most of these problems can be avoided if the practitioner who brings an appeal becomes thoroughly familiar with all the Court's rules before filing the appeal and then follows the rather straightforward procedures set forth therein. In addition to being thoroughly prepared as to the case on appeal and the Court's procedures, counsel should always maintain a properly respectful demeanor in dealing with the Court and its personnel. These steps will minimize counsel's problems in presenting causes to the Court in the best possible light.

CHAPTER 12. DECISION AND MANDATE

TABLE OF CONTENTS

CHAPTER 12. DECISION AND MANDATE

The Honorable Randy J. Holland

12.01 INTRODUCTION. This chapter of the handbook is primarily concerned with the rule-based authority for the decision-making process of the Delaware Supreme Court. The procedural implications of each type of decision are discussed. This chapter also compares and contrasts the interaction between a motion for reargument and a motion for rehearing en Banc. It concludes with a discussion of the Court's mandate. Unless otherwise noted, all references to court rules are to the Rules of the Delaware Supreme Court.

For a detailed discussion of internal processing of cases on appeal and practice before the Court, see the Internal Operating Procedures of the Delaware Supreme Court, which are published in the Delaware Rules Annotated by the Michie Publishing Company and are cited in this chapter as "Supr. Ct. Op. Proc."

12.02 BASIS FOR DECISION. The Court occasionally will conclude that the proper disposition of a case requires the study of an issue not raised by the parties. See Cede & Co. v. Technicolor, Inc., Del. Supr., 634 A.2d 345, 365 (1993). In fact, the parties might be requested to present additional briefing on an issue raised by the Court. See, e.g., In re Waters, Del. Supr., 647 A.2d 1091 (1994) (attorney disqualification). The Court has disposed of cases on grounds, particularly jurisdictional grounds, not raised by the parties. See, e.g., In re Rinehardt, Del. Supr., 575 A.2d 1079 (1990); Stroud v. Milliken Enterprises, Inc., Del. Supr., 552 A.2d 476 (1989); Dixon v. Delaware Olds, Inc., Del. Supr., 396 A.2d 963 (1978). The Court often performs independent research. If the lower court has made a correct decision for the "wrong" reason, the Supreme Court might affirm that decision or judgment on independent and alternative grounds.

a. Generally. The Delaware Supreme Court will ordinarily decide a case on the basis of issues set forth by the parties in their briefs and fairly raised in the lower court. See

Supr. Ct. R. 8; Murphy v. State, Del. Supr., 632 A.2d 1150, 1152-53 (1993). See also Tricoche v. State, Del. Supr., 525 A.2d 151, 154 (1987) (holding that failure of appellant to include in the record adequate transcripts of the relevant proceedings below precluded appellate review of claim); Tate v. Miles, Del. Supr., 503 A.2d 187, 192 (1986). Compare Turnbull v. Fink, Del. Supr., 644 A.2d 1322, 1324 (1994) (issues cannot be raised by an amicus curiae). However, the doctrine of plain error allows the Court to consider issues not presented at trial. In re Waters, Del. Supr., 647 A.2d 1091, 1095 (1994); Sandt v. Delaware Solid Waste Auth., Del. Supr., 640 A.2d 1030, 1034 (1994); Wainwright v. State, Del. Supr., 504 A.2d 1096, 1100, cert. denied, 479 U.S. 869 (1986). See Chapter 6, Section 6.05. The Court also will consider issues that arise between trial and appeal, due to intervening decisions of the Delaware Supreme Court, the Supreme Court of the United States, or new legislation. See Dawson v. State, Del. Supr., 637 A.2d 57 (1994); State v. Cohen, Del. Supr., 604 A.2d 846 (1992); Weber v. State, Del. Supr., 457 A.2d 674, 687 (1983).

b. Panels. Rule 4(c) provides (with certain exceptions) that all cases shall be assigned for disposition by the Chief Justice to panels of three Justices and shall be heard as they come to issue, unless otherwise ordered by the Court. The case is "at issue" when the appellee's answering brief is filed (not the appellant's reply brief).

c. Form of Opinion. Rule 17(a) provides that all decisions finally determining or terminating a case shall be made by written opinion, or by written order, as determined by the Court.

Rule 17 permits orders of the Delaware Supreme Court to be cited as precedent. See New Castle County v. Goodman, Del. Supr., 461 A.2d 1012, 1013 (1983) (citing rule change). The party relying on an order must comply with the dictates of Rule 14(b)(vi)(4) by attaching a copy of the order to the brief and identifying it with a sufficient statement of facts to demonstrate the

pertinency of the case to the matter before the Court. The form of citation for an order is provided in Rule 93(c)(iv).

The ability to cite a Supreme Court order as precedent is extremely important because it is estimated that two-thirds of all criminal appeals and more than one-half of all civil appeals are decided by order. Supreme Court orders are also important if the trial court opinion has been published. If the Supreme Court deals with a reported opinion of the lower court simply by an order on appeal, that order would be a part of the full citation of the subsequent history of the lower court opinion. However, it is the Court's policy to avoid either the citation of or reliance upon an order in a reported opinion of the Court. But see Ewing v. Beck, Del. Supr., 520 A.2d 653, 661 (1987); Downs v. State, Del. Supr., 570 A.2d 1142, 1145 (1990). Orders have been cited in opinions that have been reported to reconcile apparent inconsistencies. Wiland v. Wiland, Del. Supr., 549 A.2d 306, 307 (1988).

d. Publication. Rule 93(b)(i) provides that each opinion of the Supreme Court (whether signed or per curiam) shall be reported for official publication in full text. All final orders of the Supreme Court are reported for official publication only in the tables which appear from time to time in the official reporter system. However, the text of orders of the Delaware Supreme Court are available through WESTLAW, LEXIS and OIGILAW.

12.03. REARGUMENT --- RULE 18 .

a. Distinction. A motion for rehearing before the Court en Banc is to be distinguished from a motion for reargument before a panel of three Justices. The former is a request for de novo consideration by the entire Court. The latter is a request for reconsideration by the same panel which already had made a ruling.

b. Time for Filing Motion. A motion for reargument, pursuant to Rule 18, must be filed with the Clerk within fifteen days after the filing of the Court's opinion or order unless the time is enlarged or shortened by the Court. Pennell v. State, Del. Supr., 604 A.2d 1368, 1378 (1992) (seven days). However, the application for an enlargement of time must be made before the original fifteen day period expires.

c. Content. The motion shall succinctly state the grounds for reargument and shall be supported by a certificate of counsel that it is presented in good faith and not for delay. The motion is not properly perfected without the certificate of counsel. The statement of the grounds for the motion and the citation to authorities in support of the motion cannot be greater than four (4) pages in length. Supr. Ct. R. 30(a).

d. No Answer or Reply. No answer to the motion shall be permitted unless requested by the Court. Carolina Casualty Ins. Co. v. Mergenthaler, Del. Supr., 372 A.2d 174, 175 (1977); Ingersoll v. Rollins Broadcasting of Delaware, Inc., 269 A.2d 217, 220-221 (1970). See Lynch v. Vickers Energy Corp., Del. Supr., 383 A.2d 278, 282 (1977).

e. No Oral Argument. The motion shall not be subject to oral argument.

f. Internal Process of Motion.

(1) Circulation of Motion for Reargument. If a motion for reargument before the panel is filed simultaneously with a motion for a rehearing en Banc, the motion for reargument is completely processed first. Supr. Ct. Op. Proc. XIII, § 5(a). The Justice who

wrote the panel opinion or order takes the lead on the motion for reargument. However, the motion is circulated to the entire panel. The lead Justice (named author of the opinion or order) circulates a memorandum setting forth the lead justice's position to the other two panel members only. Id. XIII § 5(c). Occasionally, the opposing party is asked to submit a written response to the motion. Id. XIII § 2. If an answer is requested, counsel is advised of the request and the time period for its filing. Id. XIII § 3. Two members of a panel must vote in favor of reargument for it to be granted. Id. XIII § 6. Motions which convey pique at the result, rather than addressing intellectual criticism, will be ineffective. In fact, such motions have been ordered stricken pursuant to Rule 102(b) as discourteous and unprofessional. See, e.g., Levin v. Smith, Del. Supr., Nos. 287/288, 1984, Horsey, J. (July 25, 1985)(ORDER) (striking motion for reargument that is disrespectful and not within bounds of professional propriety); Solis v. Tea, Del. Supr., No. 386, 1981, Horsey, J. (Nov. 28, 1983)(ORDER) (striking matter as discourteous); Del. R. Prof. Cond. 3.4(e) and 3.5(c).

Due to the intense analysis which appeals receive, motions for reargument are seldom granted and when granted rarely lead to a different result. See Levin v. Smith, Del. Supr., 513 A.2d 1292 (1986). Two notable exceptions are Riggs v. Riggs, Del. Supr., 539 A.2d 163 (1988) and State v. Lillard, Del. Supr., 531 A.2d 613 (1987). Rulings which deny a motion for reargument often provide further explanation for the basis for the decision. See, e.g., Stearn v. Koch, Del. Supr., 628 A.2d 44 (1993); Russell v. Kanaga, Del. Supr., 571 A.2d 724 (1990); Gow v. Director of Revenue, Del. Supr., 556 A.2d 190 (1989); Bradley v. State, Del. Supr., 559 A.2d 1234 (1989); Weber v. State, Del. Supr., 547 A.2d 948 (1988), aff'd, Del. Supr., 655 A.2d 1219 (1995); Empire of America Relocation Serv., Inc. v. Commercial Credit Co., Del. Supr., 551 A.2d 433 (1988); Michael v. State, Del. Supr., 529 A.2d 752 (1987); DeShields v. State, 534 A.2d 630 (1987), cert. denied, 486 U.S. 1017 (1988); LaNuova D & B, S.p.A. v. Bowe Co., Inc., Del. Supr., 513 A.2d 764 (1986); Levin v. Smith, Del. Supr., 513 A.2d 1292 (1986); In re Frabizzio, Del. Supr., 498 A.2d 1076 (1985).

(2) Circulation of Motion for Rehearing en Banc. If a motion for reargument is granted, a simultaneous motion for rehearing en Banc is implicitly denied. Supr. Ct. Op. Proc. XIV, § 1(a). However, if the motion for reargument is denied and a simultaneous motion for rehearing en Banc has been filed, the latter motion is put into circulation. Id. XIV § 1(b). A memorandum is then circulated to the other qualified members of the Court by the author of the opinion or order, stating that the panel has denied the motion for reargument, and attaching a copy of the motion for rehearing en Banc with the panel's recommended disposition of the motion for rehearing en Banc. Id. XIV § 1(c). The affirmative vote of two qualified and available Justices is needed for a rehearing en Banc. Id. XIV § 1(d). See Supr. Ct. R. 4(f).

(3) Renewal of Motions. After a motion for reargument is granted, reargument is held, and a subsequent ruling of the panel is issued, another motion for reargument can be made. In addition, another motion for a rehearing en Banc can be made or a motion for are hearing en Banc may be made for the first time as to the matters heard on reargument.

g. Scope of Motion. The Court will not consider in a motion for reargument issues that were not raised, briefed, or argued during the appeal. McKinney v. State, Del. Supr., 466 A.2d 356, 362 (1983); Davis v. State, Del. Supr., 400 A.2d 292, 299 (1979).

h. Orders Not Subject to Reargument. The following types of orders are not subject to reargument: (1) orders entered under Supreme Court Rules 41 and 42; (2) orders entered by a single Justice which are directed to matters of form and do not address the underlying merits of the appeal; and (3) orders denying motions for reargument or rehearing en Banc. Supr. Ct. R. 18.

For a further discussion of motions for reargument, see Chapter 9, Section 9.07.

12.04. MOTION FOR REHEARING EN BANC -- RULE 4 .

a. Time for Filing Motion. A motion for rehearing before the Court en Banc must be filed with the Clerk within fifteen days after the filing of the Court's opinion or order entered pursuant to Rule 17, unless the time is enlarged or shortened by the Court. Supr. Ct. R. 4(f). This fifteen day period is the same time period during which a motion for reargument may be filed. Often, the two motions are filed simultaneously (sometimes in the same document). If a request for an enlargement of time is to be timely, it must be made before the expiration of the original fifteen days.

b. Content. The motion shall succinctly state the grounds therefor and shall be supported by a certificate of counsel that it is presented in good faith and not for delay. Supr. Ct. R. 4(f). A motion for rehearing under Rule 4(f) before the Court en Banc may be based upon any of the following grounds:

(i) The proceeding involves a question of exceptional importance;

(ii) Consideration by the Court en Banc is necessary to secure or maintain uniformity in Supreme Court decisions;

(iii) The case may be controlled by a prior decision of the Court which should be reconsidered or which may be overruled or modified.

The motion shall include a copy of the opinion or order as to which rehearing is sought.

c. No Answer or Reply. An answer or response shall not be permitted unless requested by the Court.

d. No Oral Argument. The motion shall not be subject to oral argument.

e. Internal Processing of the Motion.

(i) Panel Members. If the motion for rehearing before the Court en Banc is filed simultaneously with a motion for reargument, the latter is considered first, but only

by the three panel Justices. Supr. Ct. Op. Proc. XIII, § 5(a). A decision to grant reargument before the panel implicitly denies the motion for rehearing en Banc, and the latter motion goes no further. Supr. Ct. Op. Proc. XIV, § 1(a). If the motion for reargument is denied, the other qualified Justices are informed that the panel has denied reargument and are asked to consider the motion for rehearing by the Court en Banc. Id. XIV § 1(b). If only a motion for rehearing en Banc is filed, the lead is taken by the Justice who authored the opinion or order, who circulates the motion and a memorandum, with the justice's views, to the other qualified Justices, in the same manner that a motion for reargument is processed. Id. XIV § 1(e).

(ii) Qualified Justices. Supreme Court Rule 4(a) reads:

> Composition of Court. The Court en Banc consists of all qualified and available members of the Court. In any case in which the accused shall have been sentenced to death or in any other case where a Rule of this Court provides for a hearing en Banc or a rehearing en Banc under paragraph (d) or (f) hereof, the Court shall sit en Banc. If fewer than all the Justices are qualified and available to constitute a quorum, there shall be an assignment of retired Justices or active State Judges, pursuant to Article IV, §§ 12 and 38 of the Constitution and Rule 2, sufficient to constitute a quorum.

Only those Justices who are qualified and available to hear a case will vote on the motion for rehearing en Banc. Supr. Ct. Op. Proc. XIV, § 2. Except in capital cases, if only *three* Justices are qualified and available, other State Judges or former Justices are not called to complete the Court en Banc in disposition of the motion. Therefore, if only three Justices are available and qualified, the original panel is, in effect, the Court en Banc for purposes of the motion. If only one Justice is disqualified, only the four qualified and available Justices will constitute the Court en Banc and consider the Motion for Rehearing.

f. Decision on Motion. A motion for rehearing before the Court en Banc is granted upon the affirmative vote of two or more of the qualified and available members of the Court. Supr. Ct. R. 4(f). Denial of a motion for rehearing en Banc is not subject to a motion for

reargument. Supr. Ct. R. 18. The Court, sua sponte, may order rehearing en Banc. This usually occurs when one Justice on a panel is inclined to dissent. However, it may occur when the Court finds it necessary to reconcile an inconsistency in prior dispositions, see, e.g., Wiland v. Wiland, Del. Supr., 549 A.2d 306 (1988), or advisable to overrule a prior precedent, see, e.g., White v. State, Del. Supr., 576 A.2d 1322 (1990); Duvall v. Charles Connell Roofing, Del. Supr., 564 A.2d 1132 (1989); Brooks v. Johnson, Del. Supr., 560 A.2d 1001 (1989); Lynam v. Gallagher, Del. Supr., 526 A.2d 878 (1987).

g. Scope of Rehearing. Rehearing by the Court en Banc shall be as to *all* issues on appeal unless the Court otherwise orders. See Schmeusser v. Schmeusser, Del. Supr., 559 A.2d 1294 (1989); In re Karen A.B., Del. Supr., 513 A.2d 770 (1986); but see Probst v. State, Del. Supr., 547 A.2d 114, 122 (1988) (limited rehearing en Banc).

For a further discussion of motion for rehearing en Banc see Section 9.08, Motion for Rehearing en Banc.

h. Denial of Rehearing. When a motion for a rehearing en Banc is denied, the Court often provides a substantive analysis which reinforces the panel's original disposition. Russell v. Kanaga, Del. Supr., 571 A.2d 724 (1990); DiStefano v. Watson, Del. Supr., 566 A.2d 1 (1989); Hammond v. State, Del. Supr., 569 A.2d 81 (1989); Anadarko Petroleum Corp. v. Panhandle Eastern Corp., Del. Supr., 545 A.2d 1171 (1988); Krewson v. State, Del. Supr., 552 A.2d 840 (1988).

12.05 MANDATE -- RULE 19.

a. Issuance of Mandate. Unless otherwise ordered by the Court, or unless a motion for reargument or a motion for rehearing en Banc is filed, a mandate shall issue as a matter of course upon the expiration of the period allowed for filing such motions. Supr. Ct. R. 19(a). The Court rules permit a mandate to issue "forthwith," following the announcement of a unanimous panel

decision in an expedited proceeding. Paramount Communications, Inc. v. QVC Network, Inc., Del. Supr., 637 A.2d 34 (1993). See, e.g., Paramount Communications, Inc. v. Time, Inc., Del. Supr., 571 A.2d 1140 (1989); Mills Acquisition Co. v. MacMillan, Inc., Del. Supr., 559 A.2d 1261, 1265 n.2 (1988). See also Chapter 7, Section 7.02, Motion to Affirm. If a motion for reargument or a motion for rehearing en Banc is filed, the mandate shall issue upon the Court's disposition of the motions. If the mandate is issued, the Court is deprived of jurisdiction. Atlas Sanitation Co. v. State, Del. Supr., 595 A.2d 380 (1991). The issuance of the mandate forthwith thus precludes an opportunity to petition for reargument or rehearing en Banc. See Supr. Ct. R. 4(f), 18.

b. Directive. After reciting the proceedings in the trial court and in the Supreme Court, the mandate shall direct the affirmance, reversal, or modification of the judgment or order in the trial court, and shall direct such court to take proceedings in conformity with the Supreme Court opinion or order. Supr. Ct. R. 19(a).

c. Special Form. In any case in which a special form of mandate may be required, the Court, upon application of counsel filed prior to the time fixed for the issuance of the mandate, or upon its own motion, may permit counsel to be heard upon the form thereof. Supr. Ct. R. 19(b). On occasion, the Delaware Supreme Court issues a special form of mandate. See, e.g., Levin v. Smith, Del. Supr., 513 A.2d 1292, 1302 (1986) (case "remanded . . . with instructions to fashion an appropriate remedy and enter such order as shall be required to reflect that the plaintiffs . . . possess jointly as tenants in common to each other a fifty percent undivided interest with John Lewis Smith, Jr. in all the remaining unsold Indian Beach lands which were conveyed by deed in 1946 to John Lewis Smith, Jr. Defendant Smith shall also be required to account to plaintiffs for their share of the proceeds of all real estate transfers involving the Indian Beach lands made by defendant Smith from 1946 to date").

d. Remand for Determination Below. If the Supreme Court decision includes a remand for a determination by the trial court, that court shall make such determination and file the same as specified by the Delaware Supreme Court within sixty days. See, e.g., Watson v. State, Del. Supr., 564 A.2d 1107 (1989); Supr. Ct. R. 19(c). Supr. Ct. Rule 19(c), which addresses remands, is generally in accordance with ABA Standard 3.36(c), except that it does not address the question of whether a retrial of the case should be reassigned to another trial judge. Nevertheless, the Delaware Supreme Court has specifically ordered reassignment to another trial judge on occasion. See, e.g., Joseph B.P. v. Kathleen M.P., Del. Supr., 469 A.2d 800 (1983). The Delaware Supreme Court has on rare occasions held its determination of an appeal in abeyance by retaining jurisdiction while simultaneously remanding a case to the trial court for further determination. See, e.g., In re Kelly Stevens, Del. Supr., 652 A.2d 18 (1995); Watson v. State, Del. Supr., 564 A.2d 1107 (1989) (waiver of counsel on appeal); Hughes v. State, Del. Supr., No. 260, 1982, Herrmann, C.J. (Oct. 31, 1983)(ORDER) (interview jurors). Such remands are necessary because the trial court is divested of jurisdiction in a case while the matter is on appeal to the Supreme Court. Riggs v. Riggs, Del. Supr., 539 A.2d 163, 164 (1988).

e. Special Timing. The Supreme Court loses jurisdiction of a cause when an unconditional mandate issues. Atlas Sanitation Co. v. State, Del. Supr., 595 A.2d 380, 381 (1991). This procedural consequence has substantive ramifications. The issuance of a mandate has been withheld, upon application of a party, to await the outcome of other proceedings. In Martin v. State, Del. Supr., 433 A.2d 1025 (1981), cert. denied, 454 U.S. 1151 (1982), the Court ordered a stay of remand, upon application of the State, and withheld the mandate to await the outcome of a petition for certiorari to the United States Supreme Court. The State did not request that a mandate be withheld in another case decided at or about the same time. Therefore, after the writ of certiorari was granted and the first case remanded for consideration therewith, the Delaware Supreme Court

concluded that it had lost jurisdiction over the second case in which the mandate had issued, there being no motion to stay the issuance. Bailey v. State, Del. Supr., Nos. 201, 204, 1981, Herrmann, C.J. (Apr. 2, 1982)(ORDER).

Conversely, the Court has expedited the issuance of a mandate in a habeas corpus proceeding when the petitioner was being held without bail. Dickerson v. State, Del. Supr., 267 A.2d 881 (1970).

f. Mandate Rule/Law of the Case. The Supreme Court's opinion becomes part of the mandate. Insurance Corp. of America v. Barker, Del. Supr., 628 A.2d 38, 40 (1993). Pursuant to principles governing the law of the case, as well as the mandate rule, the trial court may only make an order or direction in further progress of the case which is consistent with the decision on appeal unless it regards a question not settled by the Supreme Court. Id.

g. Rule of Vacatur. When a case has become moot during the appellate process, the Supreme Court may, upon application of a party, vacate the judgment below and remand with directions to dismiss, when required in the interest of justice. Stearn v. Koch, Del. Supr., 628 A.2d 44, 47 (1993).

12.06 PRACTICE GUIDE.

a. Decision/Oral Argument. Generally, the decisional conference is held immediately after oral argument. Supr. Ct. Op. Proc. IX § 1. Questions by the Justices during the argument do not necessarily indicate how they are going to vote when they go into the conference. However, the Justices do not confer with one another before oral argument. Supr. Ct. Op. Proc. IV § 2. Therefore, if questions from one of the Justices seem to be leaning in the advocate's direction, the advocate should try to advance that proposition or at least consider whether it has some merit.

If the panel cannot agree after oral argument is concluded, but the advocate has persuaded one Justice to support the advocate's side of the case by dissenting, that is enough to cause

the case to be automatically heard en Banc. Supr. Ct. R. 4(d). It is quite possible that the advocate's position will receive additional support when there are five members on the panel, some of whom may even be judges designated from the Court of Chancery or the Superior Court. Del. Const. art. IV, § 12. Oral argument has turned many cases around completely.

For a detailed discussion of oral argument, see Chapter 10.

b. Motion for Reargument. A motion for reargument is not a brief on the merits. The fundamental differences between them call for different approaches in drafting. A brief is intended to persuade the appellate court that the trial court was in error. It is an argument for or against reversal of a lower court opinion or ruling and suggests the course of action to be taken by the Supreme Court. By contrast, a motion for reargument is intended to persuade the Supreme Court that it should change its own decision. Thus, the motion should be objective and address the issues on an intellectual level. Motions that are disrespectful and unprofessional in content may be stricken pursuant to Rule 102(b). Levin v. Smith, Del. Supr., Nos. 287/288, 1984, Horsey, J. (July 25, 1985) (ORDER).

Persuading the appellate court that its decision is wrong may be difficult. It may be more persuasive to suggest to the Court that its original opinion or order might be subject to misinterpretation or applied so broadly that it will create an inappropriate and unforeseen result. A motion which takes this approach, even if denied, may result in a further explanation of the Court's rationale for its original decision and holding. See, e.g., Simmons v. Delaware State Hosp., Del. Supr., 660 A.2d 384 (1995); Russell v. Kanaga, Del. Supr., 571 A.2d 724 (1990); Gow v. Director of Revenue, Del. Supr., 556 A.2d 190 (1989); Bradley v. State, Del. Supr., 559 A.2d 1234 (1989); Weber v. State, Del. Supr., 547 A.2d 948 (1988), aff'd, Del. Supr., 655 A.2d 1219 (1995); Empire of America Relocation Serv., Inc. v. Commercial Credit Co., Del. Supr., 551 A.2d 433 (1988); Michael v. State, Del. Supr., 529 A.2d 752 (1987); DeShields v. State, Del. Supr., 534 A.2d 630

(1987), cert. denied, 486 U.S. 1017 (1988); LaNuova D & B, S.p.A. v. Bowe Co., Inc., Del. Supr., 513 A.2d 764 (1986); Levin v. Smith, Del. Supr., 513 A.2d 1292 (1986); In re Frabizzio, Del. Supr., 498 A.2d 1076 (1985).

A motion for reargument need not be limited to an effort to change the decision on the merits. A party who is satisfied with the result but who hopes to have the opinion modified in some way may use the motion for reargument to do this. However, the motion subjects the prevailing party to the possibility of a complete change in position by the Court. Ableman v. Katz, Del. Supr., 481 A.2d 1114 (1984).

c. Rehearing en Banc. It is important to remember that the fifteen daytime periods for filing a motion for reargument and a motion for a rehearing en Banc run simultaneously. The practice which is usually followed is to file motions for reargument and motion for rehearing simultaneously. Quite often, both motions are filed in one pleading. Since the doctrine of stare decisis is important to the common law, when moving the Court to sit en Banc, the motion should squarely address the importance of the case at bar and the need for a change in the law, uniformity in decision, and/or the implication of the case at bar with respect to subsequent decisions. See Beattie v. Beattie, Del. Supr., 630 A.2d 1096 (1993).

The Court will not be inclined to sit en Banc except in matters it deems to be of exceptional importance. When moving for rehearing en Banc a party must not forget that a panel has already ruled against the party and perhaps also denied reargument. The thrust of the motion for rehearing must focus on the special precedential value of the case at bar. A motion which takes this approach may result in a further explanation of the Court's rationale for its original decision and holding. Russell v. Kanaga, Del. Supr., 571 A.2d 724 (1990); DiStefano v. Watson, Del. Supr., 566 A.2d 1 (1989); Hammond v. State, Del. Supr., 569 A.2d 81 (1989); Anadarko Petroleum Corp. v. Panhandle Eastern Corp., Del. Supr., 545 A.2d 1171 (1988); Krewson v. State, Del. Supr., 552 A.2d

840 (1988). Occasionally, a rehearing en Banc has resulted in the unanimous reversal of an earlier panel. In re Kelly Stevens, Del. Supr., 652 A.2d 18 (1995); Schmeusser v. Schmeusser, Del. Supr., 559 A.2d 1294 (1989); In re Karen A.B., Del. Supr., 513 A.2d 770 (1986). In at least one case, reargument after hearing en Banc resulted in the unanimous reversal of an earlier en Banc decision in the same case. Haas v. United Technologies Corp., Del. Supr., 450 A.2d 1173 (1982), appeal dismissed, 459 U.S. 1192 (1983) (affirming jury verdict and judgment adverse to plaintiffs and thereby superseding previous en Banc opinion).

d. Mandate. Counsel should always be cognizant of the date on which a mandate will issue automatically. There may be good reason to delay or expedite the issuance of the mandate. Only a timely motion will insure that the timing of the issuance of the mandate and the form of the mandate are consistent with the best interests of the client.

CHAPTER 13. CRIMINAL APPEALS

TABLE OF CONTENTS

CHAPTER 13. CRIMINAL APPEALS

Loren C. Meyers

13.01 INTRODUCTION. This chapter is devoted to matters which are unique to criminal appeals. The omission of principles stated elsewhere in this Handbook should not be viewed as an indication that the principles apply with less force in criminal appeals, but rather as the author's effort to avoid duplicating information.

13.02 WHO CAN APPEAL. Defendants obviously can appeal, but apart from the jurisdictional requirements set out in the Delaware Constitution of 1897, the defendant must have standing. E.g., State v. J.K., Del. Supr., 383 A.2d 283 (1977). The Public Defender does not have independent standing. Smith v. State, Del. Supr., No. 154, 1986 (Christie, C.J.) (Jan. 8, 1987). The state courts recognize the principle of next friend status, but the applicant must show that the real party in interest is incompetent, inaccessible to counsel, or otherwise unable to act on his own. Red Dog v. State, Del. Supr., 620 A.2d 848 (1993); Pennell v. State, Del. Supr., No. 119, 1992, Horsey, J. (Mar. 13, 1992); Yount v. Young, Del. Supr., No. 27, 1988, Holland, J. (Jan. 29, 1988). See generally Demosthenes v. Baal, 495 U.S. 731 (1990); Whitmore v. Arkansas, 495 U.S. 149 (1990).

a. Appeals by the Defendant. The first jurisdictional requirement is that the appeal be taken from a final judgment. Del. Const. art. IV, §11(1)(b). Because the Supreme Court has only the jurisdiction conferred upon it by the constitution, it lacks jurisdiction to entertain interlocutory appeals in criminal cases. E.g., Rash v. State, Del. Supr., 318 A.2d 603 (1974); Steigler v. Superior Court, Del. Supr., 252 A.2d 300 (1969); Murray v. State, Del. Supr., 83 A.2d 694 (1951). The basic constitutional policy in Delaware is "against piece-meal appeals in criminal cases and the delays necessarily resulting therefrom." Hodsdon v. Superior Court, Del. Supr., 239 A.2d 222, 224 (1968). As a result, a variety of pre-trial issues are not appealable until the defendant is sentenced, such as bail, suppression motions, speedy trial, and double jeopardy. Though federal

practice may allow such appeals, for example in the double jeopardy context (Abney v. United States, 431 U.S. 651 (1977)), the federal constitution does not require states to provide interlocutory appeals. People ex rel. Mosley v. Carey, Ill. Supr., 387 N.E.2d 325 (1979); State v. Fisher, Kan. Supr., 579 P.2d 167 (1978).

The judgment is final only when sentence is imposed. E.g., Petition of Hovey, Del. Supr., 545 A.2d 626, 627 (1988); Eller v. State, Del. Supr., 531 A.2d 948, 950 (1987); Johnson v. State, Del. Supr., 227 A.2d 209 (1967); Supr. Ct. R. 6. A notice of appeal filed before the sentence is premature and is not "revived" if the defendant is sentenced before the appeal is dismissed. Harding v. State, Del. Supr., No. 404, 1988, Walsh, J. (Nov. 14, 1988). See also Weston v. State, Del. Supr., 554 A.2d 1119 (1989). Not all sentences, however, are final judgments. An example is the conditional discharge available to first offenders convicted of certain drug offenses. Rash, 318 A.2d at 604-05. See also Van Heckle v. State, Del. Supr., No. 258, 1990, Horsey, J. (Aug. 31, 1990) (revocation of driver's license under 21 Del. C. § 4177H is not a sentence).

The final judgment requirement also comes into play in other contexts. For example, prosecutors may seek to enforce an Attorney General's subpoena (29 Del. C. §§ 2504, 2508) or an investigative demand under the state racketeering statute. If the person named in the subpoena moves to quash, the Superior Court decision denying the motion is interlocutory and is appealable only under Supreme Court Rule 42. The decision holding the individual in civil contempt for failing to comply with the subpoena is appealable as a regular civil matter. In re Acierno, Del. Supr., No. 210, 1990, Walsh, J. (July 19, 1990). In another situation, an individual may move for return of property seized under a search warrant. Super. Ct. Crim. R. 41(e). An appeal from rulings on that is subject to dismissal as being an interlocutory appeal in criminal cases. Smith v. State, Del. Supr., No. 322, 1990, Moore, J. (Oct. 23, 1990) (State's motion to dismiss unopposed). See generally United States

v. Ryan, 402 U.S. 530 (1971); DiBella v. United States, 369 U.S. 121 (1962); In re Search Warrant (Sealed), 810 F.2d 67 (3d Cir. 1987).

Two apparent exceptions exist to the final judgment rule. The first arises in the double jeopardy context: though an appeal will not lie from the Superior Court's denial of a motion to dismiss, the decision can be reviewed by means of a petition for a writ of prohibition. Petition of Hovey, Del. Supr., 545 A.2d 626, 628 (1988). The Court created another exception to the final judgment rule when it adopted the collateral order doctrine. Gannett Co., Inc. v. State, Del. Supr., 565 A.2d 895 (1989) (interim order of the Superior Court in a criminal proceeding constituted a final judgment for purposes of appeal when the order was of a civil nature and on an important issue completely separate from the merits of the action).

In post-conviction cases, the judgment is final when the Superior Court decides the case. Any other interim order, such as orders denying a request for appointment of counsel or for transcript, is interlocutory and is not appealable. Mazzatenta v. State, Del. Supr., No. 32, 1991, Horsey, J. (Feb. 1, 1991); Ketchum v. State, Del. Supr., No. 417, 1990, Christie, C.J. (Jan. 28, 1991). See Jenkins v. United States, D.C. App., 548 A.2d 102 (1988). In addition, an order under Superior Court Criminal Rule 61(c), directing the return of a post-conviction motion to the defendant because the motion does not comply with Criminal Rule 61(b), is interlocutory. Hall v. State, Del. Supr., No. 113, 1993, Holland, J. (Apr. 13, 1993); Bass v. State, Del. Supr., 15, 1993, Horsey, J. (Feb. 9, 1993).

The state constitution also sets a minimum sentence which must be imposed before an appeal can be taken. The Court has no jurisdiction unless the sentence is one of death, a term of imprisonment in excess of one month, or a fine in excess of $100. E.g., Marker v. State, Del. Supr., 450 A.2d 397 (1982). For purposes of this requirement, a sentence of 30 days is deemed to be one month. Marker, 450 A.2d at 399 n.2. The constitutional requirement is that the sentence exceed the minimum. Marker, 450 A.2d at 398-99. As a result, sentences of exactly 30 days or $100 do not

satisfy the jurisdictional requirements; a prison term imposed on one count and a fine imposed on another count can not be aggregated to reach the jurisdictional minimum. Id. A fine, for purposes of the constitution, does not include court costs, restitution, or Victim Compensation Fund assessment. See Brookens v. State, Del. Supr., 466 A.2d 1218 (1983).

A probationary sentence that suspends imposition of sentence is a final judgment. Compare Rash, 318 A.2d at 604-05 (statute prohibits entry of judgment until violation of conditional discharge). Probation, however, is defined as sentencing without imprisonment. 11 Del. C. § 4302(14). Because there is no imprisonment of a person for whom imposition of sentence was suspended during probation, a sentence of simple probation does not meet the jurisdictional requirement. Jewell v. State, Del. Supr., No. 136, 1986, Walsh, J. (June 5, 1986); Sack v. State, Del. Supr., No. 46, 1986, Horsey, J. (Mar. 31, 1986). See Marker, 450 A.2d at 399 (definition of "imprisonment"). Instead, jurisdiction is determined as of the time probation is revoked and a sentence imposed under 11 Del. C. §§ 4204(j) and 4334(c). Cf. Rash, 318 A.2d at 605 (right to appeal deferred until probation revoked and sentence imposed). The use of the SENTAC guidelines (11 Del. C. § 4204(c)), with various levels of probation, has not changed this rule. See Donato v. State, Del. Supr., No. 282, 1990, Moore, J. (Sept. 25, 1990).

b. Appeals by the Prosecution. The prosecution has the right to initiate appeals as of right under 10 Del. C. § 9902. See 10 Del. C. §1053 (prosecution appeals from Family Court). The State has, under the statute, an absolute right to appeal an order vacating a conviction if the order is based on a ruling that the statute forming the basis of the indictment is unconstitutional. Post-verdict appeals are also permitted where the trial court vacates the verdict after determining that it lacked subject matter jurisdiction or jurisdiction over the person. The prosecution is also allowed to appeal as of right any order which constitutes a dismissal of an indictment or information. State v. Pusey, Del. Supr., 600 A.2d 32 (1991); 10 Del. C. § 9902(a). A typical example is dismissal

because of alleged delay in prosecution (Super. Ct. Crim. R. 48). State v. McElroy, Del. Supr., 561 A.2d 154 (1989). Other examples include instances where the trial judge has refused to sentence the defendant on a given charge because of perceived double jeopardy problems. State v. Skyers, Del. Supr., 560 A.2d 1052 (1989); State v. Cook, Del. Supr., 600 A.2d 352 (1991); State v. Cooper, Del. Supr., 575 A.2d 1074 (1990).

Under section 9902(b), the prosecution can appeal a decision suppressing or excluding evidence. However, the State can appeal under section 9902(b) only if it certifies that the evidence is essential. The trial court must then enter an order dismissing the case, and the appeal is taken from the dismissal. This procedure is necessary to satisfy the constitutional requirement that appeals in criminal cases be taken from final judgments. See State v. Clark, Del. Supr., 282 A.2d 603 (1971) (declaring unconstitutional former statute which allowed interlocutory appeals by State). See also Skyers, 560 A.2d at 1053 (judgment is final when trial court rules that one conviction will not be subject to a sentence); State v. Lilly, Del. Supr., No. 264, 1978, Quillen, J. (Mar. 14, 1979) (order requiring prosecution to disclose name of confidential informant is not final order subject to appeal). Though the usual situation involves the suppression of evidence seized as the result of an arrest or search or the suppression of a confession, the statute covers any order excluding or suppressing evidence. As a result, the pre-trial exclusion of bad acts evidence the prosecution intended to introduce in a drug trafficking trial is appealable. State v. Hynson, Del. Supr., No. 412, 1990 (Christie, C.J.) (Feb. 24, 1992). If the suppression order is reversed on appeal, the defendant can be tried on the original charge. 10 Del. C. § 9902(c). If the suppression order is affirmed on appeal, the prosecution is barred, by virtue of the certification that the evidence is essential, from attempting to nonetheless try the defendant without the suppressed evidence. State v. Cooley, Del. Super., 473 A.2d 818 (1983), aff'd, Del. Supr., No. 253, 1983, Moore, J. (Mar. 21, 1984).

In appeals of right, the notice of appeal must be filed within 30 days of the entry of the order being appealed. State v. Moorhead, Del. Supr., 623 A.2d 1082 (1993); 10 Del. C. § 9904; Supr. Ct. R. 27(a). When the appeal arises from an order suppressing or excluding evidence, the appeal time runs from the order dismissing the indictment, not from the order suppressing the evidence. State v. Cooley, Del. Supr., 430 A.2d 789 (1981). Under Superior Court Criminal Rule 12(e), the State has 30 days from the order suppressing the evidence in which to certify that the evidence is essential and ask for dismissal of the case.

The State can also apply for leave to appeal a substantial question of law or procedure. 10 Del. C. § 9903. Discretionary appeals do not affect the result in the particular case. Instead, the purpose of the appeal is to determine legal issues for future cases. State v. Gwinn, Del. Supr., 301 A.2d 291 (1972); State v. Clark, Del. Supr., 270 A.2d 371 (1970). Thus, unless the case presents a substantial question, there is little, if any, likelihood of obtaining leave to appeal. See Supr. Ct. R. 27(b). The prosecution's right to appeal under section 9903 is limited to questions of law, not questions of fact. State v. Dwyer, Del. Supr., 570 A.2d 1158 (1990). If the issue presented for review is fact-sensitive and unlikely to appear again, the application will be denied. State v. Nelson, Del. Supr., No. 348, 1991, Holland, J. (Dec. 11, 1991). Discretionary appeals are initiated by filing an application for leave to appeal. Supr. Ct. R. 27(b). As with appeals taken under section 9902, appeals under section 9903 are taken from final orders. See State v. Fischer, Del. Supr., 278 A.2d 324, 326-27 (1971). This application must be filed within 30 days of the entry of the order being appealed. 10 Del. C. § 9904. State v. Moorhead, Del. Supr., 623 A.2d 1082 (1993).

Two procedural questions can arise when the State appeals. First, whether a dismissal is appealable under section 9902 or 9903 can be a difficult question to answer. Misciting the applicable section will not result in dismissal. See State v. Reed, Del. Supr., 567 A.2d 414 (1989). In turn, when the State appeals, defendants occasionally attempt to cross-appeal. However, cross-

appeals by the defense are not allowed under section 9902 or section 9903. State v. Cooley, Del. Supr., 457 A.2d 352 (1983). The defendant can instead advance arguments for what would have been a cross-appeal by asserting them in his answering brief in support of the decision below. State v. Marine, Del. Supr., 464 A.2d 872 (1983).

13.03 APPEALS OF "QUASI-CRIMINAL" DECISIONS. There are several types of cases that, though related to a criminal case or involving provisions under Title 11, 16, or 21 of the Delaware Code, are not criminal cases. The right to appeal in each situation is instead governed by the applicable statute. First, though a petition for state habeas corpus may involve a criminal matter, the prosecution cannot appeal a decision granting the petition. Family Court v. Alexander, Del. Supr., 522 A.2d 1265 (1987). But see Nardini v. Willin, Del. Supr., 245 A.2d 164 (1968) (appeal from order granting habeas relief on basis that Department of Corrections had miscalculated good time credit). Next, under state law, an individual can petition the Superior Court for an order expunging the record of a particular arrest. 11 Del. C. §§ 4371-75. The decision by the Superior Court is appealable to the Supreme Court as in civil actions; because the statute refers to appeals in civil actions, the State can appeal an adverse ruling. 11 Del. C. § 4373(b). See State v. Skinner, Del. Supr., 632 A.2d 82 (1993) (State's appeal of expungement order).

The Superior Court is given the authority to issue licenses to carry concealed deadly weapons. 11 Del. C. § 1441. The Superior Court's decision on an application is not appealable. Application of Buresch, Del. Supr., 672 A.2d 64 (1996); In re Smagala, Del. Supr., No. 37, 1989, Horsey, J. (Mar. 7, 1989); In re Wolynetz, Del. Supr., 545 A.2d 1194 (1988). At most, the decision is reviewable by means of writ of certiorari under Supreme Court Rule 43. In re Smagala, Del. Supr., No. 38, 1989, Horsey, J. (Feb. 27, 1989).

An individual with a number of various traffic violations may be declared a motor vehicle habitual offender. The habitual offender proceeding is a civil proceeding, not a criminal

action. Harrington v. State, Del. Supr., No. 96, 1991, Holland, J. (Nov. 19, 1991); Villa v. State, Del. Supr., 456 A.2d 1229 (1983). 21 Del. C. § 2802. Finally, prosecutions for drug offenses often have related forfeiture proceedings under 16 Del. C. § 4784. Because those actions are civil in nature, both the State and the person seeking return of the seized property can appeal.

13.04 COMMENCING THE APPEAL. The most obvious step in initiating an appeal is the timely filing of a notice of appeal with the Supreme Court. This step alone, however, will not perfect the appeal. It is also necessary to pay the required docketing fee or, as in most criminal cases, obtain a waiver of the docketing fee due to the defendant's indigency. Counsel must also designate and order the transcript he will need for the appeal.

a. Notice of Appeal. The notice of appeal must conform to Official Form A and contain the information required by Rule 7(c). Of critical importance in criminal cases are the date of the order from which the appeal is taken and the indictment numbers (or the Prothonotary's 8-digit identification number for the defendant); this information is needed to ensure that the appeal is facially timely and to advise the Prothonotary of the correct case being appealed. The notice of appeal must also have attached to it a copy of the order being appealed. Supr. Ct. R. 7(c)(9). If a party misidentifies the order from which the appeal is taken, he may amend his notice of appeal if he can show that the appellee will not be prejudiced. State v. Reed, Del. Supr., 567 A.2d 414 (1989); Weston v. State, Del. Supr., 554 A.2d 1119 (1989). The notice of appeal may contain a designation of transcript, or the designation of transcript may be contained in separate directions to the court reporter. Supr. Ct. R. 9(e)(ii). Federal practice requires the appellant to designate the issues on appeal if he orders less than all of the transcript. Fed. R. App. Pro. 10(b)(3). There is no equivalent requirement in Delaware practice.

Two copies of the notice of appeal must be served upon the State. See Supr. Ct. R. 10(b). As a matter of practice, because the Appeals Division of the Department of Justice represents

the State in the vast majority of the criminal appeals filed in the Delaware Supreme Court, the notice of appeal is usually served upon the Appeals Division prosecutor in the particular county. Actual personal service is not required, it being sufficient to leave the requisite number of copies with the receptionist. See Supr. Ct. R. 10(b). The rules require service of the notice of appeal on all parties to the proceedings below. Supr. Ct. R. 7(a). As a result, in multiple defendant cases, the notice of appeal must be served on counsel for any codefendants. If the notice of appeal contains the directions to the court reporter, the notice of appeal must be served upon the appropriate court reporter. See Supr. Ct. R. 9(e)(ii).

Filing must be accomplished by depositing the notice of appeal in the office of the Clerk in Dover or with the deputy clerks in Wilmington and Georgetown. Supr. Ct. R. 10(a). See Supr. Ct. R. 91(a)(ix). Unlike the Prothonotary's office, the Supreme Court's offices close, for filing purposes, at 4:30 p.m. In contrast to federal practice, if the notice of appeal is mailed to the Clerk, it is deemed filed only when the Clerk receives the document. Carr v. State, Del. Supr., 554 A.2d 778 (1989); Supr. Ct. R. 10(a). Furthermore, Rule 10 envisions filing by mailing the paper only to the Clerk in Dover, not to one of the deputy clerks in Wilmington or Georgetown.

It is absolutely critical that the appeal be timely. By statute, the appeal must be filed within 30 days after the date of the entry of the judgment. 10 Del. C. § 147. In direct appeals, the judgment is entered the date the sentence is announced in open court to the defendant, and the time begins to run from that date. Supr. Ct. R. 6(a)(ii). In appeals from post-conviction decisions (including decisions on applications to reduce sentence), the judgment is entered the date the Prothonotary enters it on the docket. Supr. Ct. R. 6(a)(iii). Conversely, the notice of appeal must be filed after sentencing or the lower court's order; a premature appeal is subject to dismissal as being interlocutory, and the defendant's subsequent sentencing does not retroactively validate a premature

appeal. Harding v. State, Del. Supr., No. 404, 1988, Walsh, J. (Nov. 14, 1988). See also Weston v. State, Del. Supr., 554 A.2d 1119, 1123 (1989).

If the notice of appeal is untimely, the Court lacks jurisdiction to entertain the appeal. Carr v. State, Del. Supr., 554 A.2d 778 (1989); Eller v. State, Del. Supr., 531 A.2d 948, 951 (1987); Braxton v. State, Del. Supr., 479 A.2d 831 (1984); Moyer v. State, Del. Supr., 452 A.2d 948 (1982). If the notice of appeal would have been timely but for the action or inaction of court personnel, the Court will treat the appeal as being timely filed. Collins v. State, Del. Supr., No. 77, 1994 (Veasey, C.J.) (Apr. 4, 1994); Bey v. State, Del. Supr., 402 A.2d 362 (1979); Riggs v. Riggs, Del. Supr., 539 A.2d 163 (1988). The time is not extended because of counsel's action or inaction. In re Sheeran, Del. Supr., No. 211, Horsey, J. (Oct. 9, 1985). The time in which to appeal is not extended by the pendency of a motion for a new trial. Eller v. State, Del. Supr., 531 A.2d 948, 951 (1987).

b. Designating and Ordering Transcript. Defense counsel is required to designate the transcript in his notice of appeal or in separate directions to the court reporter. Supr. Ct. R. 9(e)(ii). See Official Form C. Thus, some thought should be given to the issues to be raised and the transcript needed for those issues prior to filing the notice. If the defendant designates less than all of the transcript, the State can designate additional transcript. Supr. Ct. R. 9(e)(iii). In most cases, the entire transcript is ordered by the defense. If, upon receiving the opening brief, the appellate prosecutor ascertains that the defendant did not order all of the relevant transcript, he may seek leave to file, out-of-time, directions to the court reporter on the ground that it was not apparent until the filing of the opening brief that additional transcript was necessary. That result is appropriate for two reasons: first, unlike federal practice, the appellant does not state in his notice of appeal (or related papers) the issues he intends to raise on appeal; and secondly, the appellant must include in the record such parts of the transcript that are necessary to give the court a fair and complete account of what transpired below. Cannon v. State, Del. Supr., No. 215, 1983, McNeilly, J. (Dec. 29, 1983).

Furthermore, the appellant's failure to provide an adequate record for appeal can lead to the rejection of the particular claim on appeal. E.g., Tricoche v. State, Del. Supr., 525 A.2d 151 (1987); Williams v. State, Del. Supr., No. 373, 1995, Hartnett, J. (July 1, 1996); Anderson v. State, Del. Supr., No. 26, 1993, Horsey, J. (July 30, 1993). If the appellant fails to order the transcript, the appeal is subject to dismissal. In re Henkel, Del. Supr., No. 40, 1984, Horsey, J. (Feb. 27, 1984). See Dorman v. State, Del. Supr., No. 189, 1987, Horsey, J. (Mar. 27, 1989) (defendant failed to return transcript to defense counsel, thus preventing counsel from filing opening brief; appeal dismissed under Rule 29(b)).

Financial arrangements must be made with the court reporter before the transcript is deemed to be ordered. Supr. Ct. R. 9(e)(ii). In direct appeals where the defendant is indigent, the defendant must obtain an order from the trial court authorizing a free transcript. Supr. Ct. R. 26(f). When the defendant has been represented at trial by the Public Defender or court-appointed counsel, the application is routine. The problem arises when the defendant is represented by privately retained counsel, but seeks an order directing that the transcript be prepared at State expense. The Court's decision in Pendry v. State, Del. Supr., 367 A.2d 624 (1976), allowing such payment, would seem to have been undercut by subsequent decisions, such as Shipley v. State, Del. Supr., 570 A.2d 1159, 1171 (1990); Office of the Public Defender v. Thompson, Del. Supr., 451 A.2d 835 (1982); and Bailey v. State, Del. Supr., 438 A.2d 877 (1981). However, the Court, in Simpson v. State, Del. Supr., No. 340, 1990, Walsh, J. (Oct. 19, 1990), has reaffirmed Pendry. In Simpson, the Court remanded the case to the Superior Court in order to elicit evidence regarding the fee arrangement, the source of funds paid to defense counsel, and the reasonableness of the fee charged. The federal courts, in similar circumstances, undertake such inquiries to ensure that counsel is not abusing the process. United States v. Lopez-Flores, 701 F.Supp. 597 (S.D. Tex. 1988); United States v. Martinez, 385 F.Supp. 323 (W.D. Tex. 1974), aff'd, 522 F.2d 1279 (5th Cir. 1975) (table).

For designating transcript in Class A felony cases, the rules set out a special procedure. Under Rule 9(e)(i), the Superior Court must enter an order directing the preparation of the transcript, usually all of the testimony and not including jury selection and opening and closing arguments. If one party wishes additional transcript or if the defendant wishes less transcript, an application must be made to the trial judge within 10 days of the original transcription order. Supr. Ct. R. 9(e)(i).

Indigent defendants are not ordinarily entitled to a free transcript in appeals from the denial of post-conviction relief. E.g., Mazzatenta v. State, Del. Supr., No. 366, 1990, Horsey, J. (Jan. 29, 1991). The mere granting of in forma pauperis status does not authorize the production of a transcript at state expense. Cook v. State, Del. Supr., No. 2, 1982, McNeilly, J. (Mar. 29, 1982). In order to obtain a transcript, an indigent defendant must make a "sufficient and specific showing for its need. Bald assertions and conclusory arguments will not be deemed sufficient." Holden v. State, Del. Supr., No. 108, 1982, Quillen, J. (June 21, 1982).

c. Prepayment of Costs. A notice of appeal not accompanied by payment of the docket fee of $250 is accepted and followed by a notice to show cause. Supr. Ct. R. 20(a). Frequently, however, criminal defendants are indigent and therefore may proceed without the payment of the docket fee. If the defendant was represented by the Public Defender or court-appointed counsel, payment of the docketing deposit is waived upon the filing of an appropriate affidavit. If the defendant is indigent, but had privately retained counsel, the defendant must file a motion to proceed in forma pauperis. Supr. Ct. R. 26(e). The Clerk has form motions which can be used.

13.05 ORIGINAL JURISDICTION. The Court has original jurisdiction to issue writs of prohibition, quo warranto, certiorari, and mandamus to lower courts or to any judge of a lower court. Del. Const. art. IV, §11(6). Based on the constitutional language, there is no original

jurisdiction to issue writs against non-judicial officials. In re Hitchens, Del. Supr., 600 A.2d 37 (1991). Under the relevant statutory language (10 Del. C. § 6901), habeas corpus, though often termed an "extraordinary writ," is unavailable, and the Court has no original jurisdiction to issue the writ. Rocker v. State, Del. Supr., 240 A.2d 141 (1968).

Defendants often petition for an extraordinary writ, seeking to obtain review of an interlocutory order, e.g., denial of a suppression motion or a motion to dismiss. The petitions are invariably dismissed since the Court will not allow defendants to use an extraordinary writ to circumvent the final judgment rule. Matushefske v. Herlihy, Del. Supr., 214 A.2d 883, 885 (1965); Petition of Lynch, Del. Supr., No. 72, 1989, Moore, J. (Mar. 9, 1989). The only exception to that rule is in the double jeopardy context. A defendant may apply for a writ of prohibition, seeking to bar his trial on double jeopardy grounds. In re Hovey, Del. Supr., 545 A.2d 626 (1988).

Defendants will also apply for an extraordinary writ, usually certiorari, to review a conviction that is unappealable because the sentence does not meet the jurisdictional requirements. Shoemaker v. State, Del. Supr., 375 A.2d 431 (1977). In that situation, a petition for writ of certiorari should be filed instead of a notice of appeal. If appeal is erroneously chosen as the means for seeking review, the case is subject to dismissal for lack of jurisdiction. The defendant's belated request to change the action from an appeal to certiorari amounts to an amendment of the notice of appeal after the time has expired for filing that notice; that situation is analogous to that precluded by State Personnel Comm'n v. Howard, Del. Supr., 420 A.2d 135, 137-38 (1980). Alternatively, converting the appeal into a certiorari proceeding would subvert the jurisdictional requirements of 10 Del. C. § 147 by permitting retroactive correction of a jurisdictional defect, an approach rejected by the Court in Williams v. West, Del. Supr., 479 A.2d 1253, 1254 n. 3 (1984). See Edwards v. State, Del. Supr., No. 237, 1984 (Christie, C.J.) (Jan. 25, 1985); Sheeran v. State, Del. Supr., No. 59, 1984, McNeilly, J. (Jan. 16, 1985).

Less frequently, the Court is asked by the prosecution to issue a writ of mandamus or prohibition. From the few decisions that exist it is clear that the Court will not issue the writ to review a discretionary ruling by the trial judge, e.g., evidentiary rulings, jury instructions. In re Petition of State (Perry/Kelly), Del. Supr., No. 340, 1986, Walsh, J. (Oct. 30, 1986). Furthermore, the Court will also consider the significance of the issues raised in the petition and whether the issues are of first impression in Delaware. In re Petition of State (Smith), supra.

Secondly, the Court is generally inclined to set the case for briefing on the merits when the State shows that there is no adequate remedy at law, i.e., the State can not appeal under 10 Del. C. § 9902. In re Petition of State (Harris), Del. Supr., 597 A.2d 1 (1991); In re Petition of State (Smith), Del. Supr., 603 A.2d 814 (1992). In the normal course of events, the State can therefore challenge an arguably illegal sentence by means of a petition for a writ of mandamus. In re Petition of State (Smith), supra; In re Petition of State (Chaplin), Del. Supr., 433 A.2d 325 (1981).

13.06 ASSISTANCE OF COUNSEL

a. Right to Appointed Counsel. Under the 6th Amendment, a defendant has the right to counsel for direct appeals in Delaware. Ross v. Moffitt, 417 U.S. 600 (1974); Evitts v. Lucey, 469 U.S. 387 (1985). The defendant has no constitutional right to counsel for proceeding to the U.S. Supreme Court. There is also no 6th Amendment right to counsel in state post-conviction cases or in appeals from decisions on post-conviction motions. Pennsylvania v. Finley, 481 U.S. 551 (1987). If the Superior Court has appointed counsel for proceedings in that court, counsel has a continuing obligation, under court rule, to represent the defendant. Super. Ct. Crim. R. 61(e)(1) (last sentence).

There is no 6th Amendment right to counsel for probation violation proceedings or for the attendant appeals. Instead, the due process clause may require, in certain circumstances, the appointment of counsel. Jones v. State, Del. Supr., 560 A.2d 1056 (1989). Though there is no 6th

Amendment right to counsel for state habeas proceedings (10 Del. C. § 6902), in certain habeas proceedings challenging extradition to another state or the defendant's transfer to another state under the Interstate Agreement on Detainers, the defendant has a statutory right to counsel in the Superior Court. (11 Del. C. § 2510). By operation of Supreme Court Rule 26(j), the defendant, in those particular instances, has the right to counsel on any appeal from the denial of his habeas petition.

b. Duty to Perfect Appeal. Trial counsel has an absolute duty to perfect a direct appeal from a conviction. Erb v. State, Del. Supr., 332 A.2d 137 (1974); Supr. Ct. R. 26(a). Counsel must file the appeal even if he believes the appeal is frivolous. The trial attorney's failure to file the appeal raises two questions: what remedy does the defendant have and what consequences are there for the attorney. The defendant can apply for post-conviction relief under Super. Ct. Crim. R. 61, claiming that counsel was constitutionally ineffective in failing to file the appeal as directed. Braxton v. State, Del. Supr., 479 A.2d 831 (1984); Dixon v. State, Del. Supr., 581 A.2d 1115 (1990). The Superior Court, if it finds that counsel was in fact ineffective, can vacate and immediately reimpose the sentence, thus starting anew the time for filing the appeal. In the alternative, the Superior Court can order briefing on the issues that would have been raised on appeal; the decision of the Superior Court on those claims is then appealable to the Supreme Court. Sanctions under Supreme Court Rule 33 can be imposed on counsel who fails to perfect a timely appeal. Browne v. State, Del. Supr., No. 350, 1983 (Herrmann, C.J.) (Oct. 25, 1984). If the attorney is court-appointed, those sanctions can include forfeiture of any fee paid for representation of the defendant. Browne, supra. In addition, the case can be referred to Disciplinary Counsel since the attorney has violated the Rules of Professional Conduct.

c. Motions to Withdraw. If, after filing the appeal, the trial attorney concludes that there are no meritorious issues, he may move to withdraw, following the procedure set out in Rule 26(c). Anders v. California, 386 U.S. 738 (1967); Penson v. Ohio, 488 U.S. 75

(1988); McCoy v. Court of Appeals, 486 U.S. 429 (1988). Under Rule 26(c), the defendant has the opportunity to submit any arguably appealable issue the defendant wants the Court to consider. Counsel, under the rule, must provide the defendant with a copy of the brief required under the rule. The defendant then has 30 days in which to submit in writing to counsel any issues the defendant wishes to have presented. Though some attorneys may provide the defendant with a copy of the transcript, Rule 26 does not require that; neither does the 6th Amendment. See Brezial v. State, Del. Supr., No. 215, 1988, Horsey, J. (Dec. 19, 1989); United States ex rel. Russo v. Attorney General, 780 F.2d 712, 715-16 (7th Cir. 1986).

d. Self-Representation. A defendant has a constitutional right to represent himself at trial, and there is likely some right to self-representation on appeal. Given the nature of the right to counsel, a defendant's waiver of his right to counsel requires a clear showing of an intelligent, knowing, and voluntary relinquishment of the right. Manchester v. State, Del. Supr., Nos. 134 & 160, 1986, Walsh, J. (June 9, 1986). Rule 26(d)(iii) sets out the applicable procedure. Watson v. State, Del. Supr., 564 A.2d 1107 (1989).

13.07 BAIL PENDING APPEAL. Except in cases where life imprisonment or the death penalty has been imposed, a convicted defendant may be released on bail pending appeal. 11 Del. C. § 4502. Section 4502 is available only for direct appeal or writ of certiorari (if the sentence is not appealable). Manlove v. State, Del. Supr., 523 A.2d 533 (1987). Release on bail under section 4502 is not automatic. Instead, the defendant must obtain a certificate of reasonable doubt from the Superior Court judge or, if the trial judge refuses, from a Justice of the Supreme Court. In order to obtain the certificate, the defendant must show that 1) there is reasonable ground to believe that there is reversible error in the factual or evidentiary aspects of the case or 2) the record presents an important question of substantive law which should be decided by the Supreme Court. 11 Del. C.

§ 4502; Bailey v. State, Del. Supr., 352 A.2d 411, 414, opinion on reargument, 354 A.2d 751, 752 (1976).

In a series of cases, the Court has elucidated the procedure to be followed under section 4502. The application must be made first to the Superior Court within 30 days of sentencing and must be submitted before the notice of appeal is filed. Eller v. State, Del. Supr., 531 A.2d 948 (1987); Manlove v. State, Del. Supr., 523 A.2d 533 (1987); Torres v. State, Del. Supr., 580 A.2d 567 (1990). Once the appeal has been docketed, the Superior Court has no jurisdiction to grant the motion. Davis v. State, Del. Supr., No. 14, 1987, Horsey, J. (May 28, 1987); Anderson v. State, Del. Supr., No. 151, 1987, Walsh, J. (July 20, 1987). Furthermore, if the appeal has been filed, the Court will not remand the case to Superior Court in order for the defendant to file a motion for certificate of reasonable doubt. Perry v. State, Del. Supr., No. 222, 1990, Horsey, J. (Aug. 11, 1990).

If the Superior Court denies the motion, the defendant has 30 days to apply to a Supreme Court Justice. Torres, supra; Eller, supra. On appeal, the defendant must convince a Supreme Court Justice that there is error which is "clear, flagrant, manifest, obvious or plain from the record." Bailey v. State, Del. Supr., 354 A.2d 751, 752 (1976). If the defendant's claim requires an in-depth analysis of the record, the application will be denied. Bailey, 354 A.2d at 752; Anderson, supra.

If the Superior Court grants the certificate and sets bail, the Supreme Court may review the amount of bail. Supr. Ct. R. 32(d). Rule 32(d) also allows the Court, if it decides in the first instance to issue the certificate, to remand the case to the lower court for determination of conditions of release. In addition, if the trial court issues the certificate, the defendant or the State may apply to the Court for a change in the conditions. The Court can, if additional evidence is needed, remand the case to the lower court for the taking of such evidence, or the Court can act on the application in the first instance. Supr. Ct. R. 32(d). See Bilinski v. State, Del. Supr., No. 52,

1984, Moore, J. (Mar. 2, 1984). The factors to be considered in setting the amount of bail are set forth in 11 Del. C. § 2107. See generally Bilinski, supra.

13.08 DEATH PENALTY CASES. The death penalty statute, 11 Del. C. § 4209, provides for an automatic appeal of the sentence. 11 Del. C. § 4209(g). The statutory appeal applies only to the penalty itself; if the defendant wants to appeal the guilt phase proceedings, a separate appeal must be filed. 11 Del. C. § 4209(g)(1), (h). The statutory appeal cannot be waived by the defendant. See Pennell v. State, Del. Supr., No. 407, 1991, Horsey, J. (Dec. 31, 1991), approved en banc (Jan. 7, 1992). The Court can appoint amicus (or grant motions for entry of amicus) for the defendant. 11 Del. C. § 4209(g)(1); State v. White, Del. Supr., 395 A.2d 1082 (1978).

13.09 SELECTION OF ISSUES ON APPEAL. Counsel has no obligation under the 6th Amendment to raise frivolous issues even if his client insists. Jones v. Barnes, 463 U.S. 745 (1983). Because the defendant is represented, he has no right to file a supplemental brief. See In re Haskins, Del. Supr., 551 A.2d 65 (1988); In re Parker, Del. Supr., No. 408, 1990 (Christie, C.J.) (Jan. 4, 1991). If a defendant seeks to have himself named as "co-counsel," thus being able to file a supplemental brief, the Court will generally deny the application. Rose v. State, Del. Supr., No. 310, 1978, Quillen, J. (May 9, 1979).

Failing to raise particular issues on appeal will have substantial implications. If the issue has been raised below, but is not raised on appeal, the issue is viewed as having been waived. E.g., Stilwell v. Parsons, Del. Supr., 145 A.2d 397 (1958); Amos v. State, Del. Supr., No. 126, 1989, Moore, J. (Aug. 17, 1989); Bilinski v. State, Del. Supr., No. 248, 1989, Christie, C.J. (Mar. 6, 1990). If a defendant fails to raise an alleged error on direct appeal, in any subsequent post-conviction action (Super. Ct. Crim. R. 61), he must show cause for his failure to do so and actual prejudice resulting from the alleged error. E.g., Johnson v. State, Del. Supr., 460 A.2d 539 (1983); Flamer v. State, Del. Supr., 585 A.2d 736 (1990); Super. Ct. Crim. R. 61(i)(3). If the state supreme court finds that

the defendant has procedurally defaulted his claim by failing to present it on direct appeal, the claim is generally barred in federal habeas proceedings.

CHAPTER 14. ADVISORY OPINIONS, EXTRAORDINARY WRITS AND APPOINTMENT OF COUNSEL FOR STATE EMPLOYEES

TABLE OF CONTENTS

CHAPTER 14. ADVISORY OPINIONS, EXTRAORDINARY WRITS AND APPOINTMENT OF COUNSEL FOR STATE EMPLOYEES

Kevin Gross
Steven L. Caponi[1]

14.01 INTRODUCTION. This chapter discusses the jurisdiction of the Supreme Court applicable to certain special provisions. The special provisions discussed here are: (1) advisory opinions - Rule 44, (2) extraordinary writs of prohibition, certiorari, mandamus, and quo warranto - Rule 43, and (3) appointment of counsel for state officers and employees - Rule 68. The discussion includes the applicable Rules of the Supreme Court, statutory and constitutional provisions and case law.

14.02 SUPREME COURT JURISDICTION IN SPECIAL ACTIONS. The basis for jurisdiction of the Supreme Court over each of the special provisions discussed in this chapter will be summarized in the paragraph pertaining to the special provision. The grant of jurisdiction to the Supreme Court is governed in most cases by the Delaware Constitution and in others by statute. There are specific Rules of the Supreme Court concerning each of the special provisions discussed in this chapter.

14.03 PARTIES. The parties in the special provisions discussed herein vary depending on the special provision. To illustrate, advisory opinions are unusual -- they are not considered "adjudications" and, therefore, there is not actually a party. On the other hand, the parties to the extraordinary writs discussed in this chapter depend on a wide variety of circumstances. For example, the Attorney General is the only party who may initiate a quo warranto proceeding. As a

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result, counsel should consult the substantive case law underlying each writ as well as the applicable court rule.

14.04 ADVISORY OPINIONS. The Governor and the General Assembly are authorized by 29 Del. C. § 2102 to seek advisory opinions from the justices of the Supreme Court. In turn, the justices are authorized, pursuant to 10 Del. C. § 141, upon request of the Governor or the General Assembly to provide advisory opinions in writing concerning construction of provisions of the Delaware Constitution or of the United States Constitution, or the constitutionality of a proposed amendment to the Delaware Constitution, or the constitutionality of any law or legislation passed by the General Assembly. The justices are authorized by 10 Del. C. § 141(b) to appoint one or more members of the Delaware Bar to brief or argue the legal issues submitted by the Governor or the General Assembly. Supr. Ct. R. 44 governs the procedure in the Supreme Court when the Governor or the General Assembly requests an advisory opinion.

a. Timetable. Supr. Ct. R. 44 prescribes a specific timetable for the delivery and publication of the advisory opinion. Under Supr. Ct. R. 44(a), a request from the Governor or the General Assembly for an advisory opinion must be regarded as confidential for a period of 5 days following receipt or until the request becomes public information, whichever occurs first. Within 5 days of the Governor's request for an advisory opinion, the Governor must notify the leadership of both Houses by sending them a copy of such request. 10 Del. C. § 141(c). Likewise, within 5 days of a request by the General Assembly, the Speaker of the House and the President Pro Tempore of the Senate shall notify the Governor by sending the Governor a copy of such request. Id. Once the opinion is prepared, Supr. Ct. R. 44(c) provides that the opinion must be hand delivered to the office of the Governor or to the Speaker of the House and the President Pro Tempore of the Senate. The opinion is then deemed to be confidential for a period of 5 days unless the Governor or the Speaker of the House and the President Pro Tempore of the Senate, as the case may be, releases

the opinion. Id. Meanwhile, within 5 days of receipt of the opinion, the Governor or the General Assembly shall notify the opposite party by sending a copy of such an advisory opinion. 10 Del. C. § 141(d).

b. Nature of Advisory Opinions. Decisions relating to advisory opinions requested by the Governor (or the General Assembly) elucidate the circumstances under which the Justices will act. First, requests for advisory opinions are addressed to the Justices individually as opposed to the Supreme Court. Opinion of the Justices, Del. Supr., 320 A.2d 735 (1974). No quorum is required. Id. at 736-737. Only the Justices, and no other member of the Delaware judiciary, are qualified to provide advisory opinions to the Governor. Id. at 736. The nature of the advisory function is non-judicial and is not an adjudication. Id.; Opinion of the Justices, Del. Supr., 88 A.2d 128 (1952). Advisory opinions are limited to providing opinions to the person requesting the advice only. The advice to that person is personal and not binding on any court. See Opinion of the Justices, Del. Supr., 413 A.2d 1245, 1248 (1980); Opinion of the Justices, Del. Supr., 358 A.2d 701, 702 (1976). Advisory opinions have limited, if any, precedential value. Chrysler Corp. v. State, Del. Supr., 457 A.2d 345, 351 (1983).

The Justices are cautious in the exercise of their authority to provide advisory opinions. Advisory opinions will be rendered only where required "for public information" and to enable the Governor or the General Assembly "to discharge the duties of [his, her or its] office with fidelity." The Governor or the General Assembly must specify the questioned portions of a statute carefully because the Justices will answer only specific constitutional questions. See e.g., Opinion of the Justices, Del. Supr., 330 A.2d 769 (1974). Moreover, the questions presented must be more than merely "academic." Opinion of the Justices, Del. Supr., 382 A.2d 1364, 1366 (1978). Only questions raised which bear upon a present constitutional duty awaiting performance will be answered. Id. Thus, the Court must be presented with discrete questions of law, supported by

undisputed facts. Statutory construction does not fall within the purview of 10 Del. C. § 141, and therefore is not subject to advisory opinions. But see Opinion of the Justices, Del. Supr., 202 A.2d 276 (1964), where the Justices did give the Governor an advisory opinion even though the question did not involve a constitutional construction or the constitutionality of a statute, but instead involved basically a question of statutory construction. There, the Justices did render an advisory opinion because, had they refused to do so, eligible voters would have been disenfranchised. Time constraints and an important problem affecting the electorate were overriding considerations. If there is a factual dispute and the Justices believe that a question is more appropriately adjudicated in an adversarial, judicial proceeding, they will decline to render an advisory opinion. See, e.g., Opinion of the Justices, Del. Supr., 424 A.2d 663 (1980), where the issue presented was a person's existing claim to office.

Moreover, the Justices will not render an advisory opinion when the issue is exclusively federal in nature and is not an issue which could be resolved by an advisory opinion since the Delaware Supreme Court would not have the final ruling. In Opinion of the Justices, Del. Supr., 413 A.2d 1245 (1980), the unusual issue presented was a request by the Governor for an opinion concerning the constitutionality of the ratification by the Delaware General Assembly of the Equal Rights Amendment to the United States Constitution. The Justices ruled that the issue was one which the Congress of the United States should settle, and that if they rendered an advisory opinion it would merely create additional controversy involving a question of national significance.

Furthermore, if a question propounded to the Justices by the Governor or the General Assembly does not fall within the requirements of 10 Del. C. § 141, the Justices can and will reformulate the question or questions so that they may render an advisory opinion within the purview of their statutory authority. See, e.g., Opinion of the Justices, Del. Supr., 315 A.2d 580 (1974).

14.05 EXTRAORDINARY WRITS - RULE 43. Supr. Ct. R. 43 prescribes the procedural requirements for writ petitions brought originally in the Supreme Court. The Supreme

Court's jurisdiction to issue extraordinary writs derives from Del. Const. art. IV, § 11(6), which provides:

> Section 11. The Supreme Court shall have jurisdiction as follows:
>
> * * *
>
> (6) To issue writs of prohibition, quo warranto, certiorari and mandamus to the Superior Court, the Court of Chancery and the Orphans' Court, or any of the Judges of the said courts and also to any inferior court or courts established or to be established by law and to any of the Judges thereof and to issue all orders, rules and processes proper to give effect to the same. The General Assembly shall have power to provide by law in what manner the jurisdiction and power hereby conferred may be exercised in vacation and whether by one or more Justices of the Supreme Court.

Although Supr. Ct. R. 43 governs the procedural requirements for writ practice in the Supreme Court, the substantive case law which has evolved in Delaware with respect to each writ still applies. Thus, it is equally important to consult the substantive case law to determine whether or not a particular writ, if any, is available under the circumstances. For this reason, included within this chapter is a general but brief discussion of the substantive case law underlying writ practice in Delaware. The substantive discussion addresses the writs of certiorari, mandamus, prohibition and quo warranto.

a. Procedure. The procedural requirements for writ practice in the Supreme Court are straightforward. A writ proceeding is commenced by the filing of a petition or complaint substantially in the form prescribed by Official Form N (sample form 16:14 herein). The petitioner must serve all parties to the proceeding below, if applicable, filing six copies with the Clerk of the Supreme Court. If the petition relates to a current proceeding in a trial court, the Clerk of the Supreme Court will automatically send a copy of the petition to the Clerk of the Court below for filing. All other parties to the action in the trial court will be deemed respondents, even though the relief sought in the petition is not specifically directed to them. If the petition is directed to a trial

judge, or to the court as an entity, the caption of the petition should not include the name of the judge or court, but, instead, the name of the judge or court should be set forth with particularity within the body of the petition. The petition should be captioned only in the name of the petitioner.

Effective February 1, 1990, the Supreme Court amended Rule 43(b)(ii) which now reads as follows:

> (ii) No answer unless requested. Unless requested by the Court, no answer to the complaint shall be served or filed, and the Court shall decide the matter on the basis of the complaint. If an answer is requested it shall be filed within 10 days of the Court's request. The answer may include any affirmative defense or motion seeking the dismissal or denial of the complaint, and unless the Court otherwise directs, no further submission of the parties shall be accepted. If the Complaint is directed against a judge who does not desire to appear or participate in the proceeding, the judge may so advise the Clerk by letter. The Clerk shall notify all other parties to the proceeding. The complaint shall not be taken as admitted whether or not such a letter is submitted.

The amendment makes clear that, absent the Supreme Court's request, Rule 43(b)(ii) does not permit the filing of an answer to a complaint.

The parties must brief the writ petition according to the same rules applicable to appeals. The only exception is that, when the respondent's answer includes a motion or affirmative defense to dismiss or deny the petition, the opening brief is due within thirty (30) days following the Supreme Court's refusal to dismiss the case.

Supr. Ct. R. 43(vi) also requires that a writ petition requesting relief against the Court of Common Pleas, Justice of the Peace Court or the Municipal Court of the City of Wilmington, or a judge thereof, shall not be filed with the Supreme Court unless the writ petition is first presented to the Superior Court and denied. Moreover, the petitioner must serve and file a copy of the Superior Court's opinion denying the original petition, if any, with the writ petition in the Supreme Court.

Under Supr. Ct. R. 43(v), the Supreme Court also may order an issue of fact to be tried before a special master or order testimony to be taken by a commissioner at such time and place and in such manner as the Supreme Court may direct.

Finally, counsel should be aware that the filing of a writ petition does not operate as an automatic stay. Supr. Ct. R. 43(iv). Applications for stays should be made in the same manner under Supr. Ct. R. 32 as stays pending appeal.

b. Writ of Certiorari. When no remedy of appeal exists, certiorari is generally available to test the authority of a lower tribunal to adjudicate the matter sought to be reviewed. Mason v. Board of Pension Trustees, Del. Super., 468 A.2d 298, aff'd, Del. Supr., 473 A.2d 1258 (1983); Schwander v. Feeney's, Del. Super., 29 A.2d 369 (1942); Mellow v. Board of Adjustment, Del. Super., 565 A.2d 947, 951 (1988) ("Review by certiorari traditionally has been limited to errors which appear on the face of the record."). For a discussion of Superior Court extraordinary writ jurisdiction, see Chapter 20, Section 20.16. Review by certiorari requires the lower tribunal to certify and return a transcript of its record so that the Supreme Court or the Superior Court can inspect the record for errors of law. Woolley, Practice in Civil Actions and Proceedings in the Law Courts of the State of Delaware, § 894 at 623 (1906) (hereinafter cited as "Woolley"). Writs of certiorari issued by the Supreme Court and the Superior Court differ only with respect to the tribunals to which the respective writs are directed and the judgments or proceedings reviewed by them. Woolley, § 894 at 623.

Review by certiorari differs from review by appeal since, under certiorari, the reviewing court merely examines the record and the regularity of the proceedings below. Shoemaker v. State, Del. Supr., 375 A.2d 431 (1977); see also In re Butler, Del. Supr., 609 A.2d 1080 (1992). Review by appeal, on the other hand, is essentially unrestricted since the reviewing court hears the case on the merits. Shoemaker, at 437.

Historically, certiorari is one of the oldest common law writs, appearing to have originated with the Norman kings. For an early history of the common law writ of certiorari, see Rash v. Allen, Del. Super., 76 A. 370, 374-75 (1910). In Delaware, the writ of certiorari retains all of its essential common law characteristics except for its discretionary quality, which has been supplanted by statute. See 10 Del. C. §§ 142, 562. (Supreme Court and Superior Court, respectively, shall issue writs of certiorari as a matter of course). Accordingly, the petitioner need only establish the absence of appeal to the Court of Chancery, the Superior Court or the Supreme Court. In re Butler, Del. Supr., 609 A.2d 1080, 1081 (1992) (However, "claims that require weighing of evidence cannot be reviewed on certiorari.") The Supreme Court or the Superior Court will then grant certiorari.

In Semick v. Department of Corrections, Del. Supr., 477 A.2d 707 (1984) the Supreme Court sua sponte issued a writ of certiorari to review a decision of the Delaware Board of Parole. The Supreme Court also affirmed the Superior Court's decision to deny review by writ of mandamus. The petitioner had challenged the Board's exercise of its statutory authority. However, the Board's decision was also discretionary in nature, thereby rendering review by mandamus inappropriate. The Supreme Court decided to hear the matter as though on a writ of certiorari because of the "serious nature of the issues raised." Id. at 708. The Supreme Court then determined the extent of the Board's statutory authority and remanded the matter to the Board for further proceedings consistent with the opinion.

Semick is particularly interesting in light of the Supreme Court's earlier affirmance in Mason v. Board of Pension Trustees, supra. In Mason, the Supreme Court upheld the Superior Court's refusal to issue writs of certiorari and mandamus to review a decision of the Board of Pension Trustees of the State of Delaware. Not only was the Board's decision discretionary, thereby eliminating mandamus as a possible remedy, but the petitioner challenged the Board's evaluation of

the evidence before it. Since certiorari's scope of review does not include an evaluation of the evidence considered by the lower tribunal, certiorari was inappropriate. See also In re Butler, supra; Spencer v. Smyrna Bd. of Educ., Del. Super., 547 A.2d 614 (1988). The Mason Court concluded that the petitioner should seek relief in the Court of Chancery.

Semick and Mason demonstrate the need to understand the function and limitations of each writ. Each writ petition is unique. Counsel should also carefully consider the nature of the decision to be challenged and choose the writ accordingly.

Finally, as previously indicated, counsel should keep in mind that review by certiorari is limited to errors which appear on the face of the record and does not embrace an evaluation of the evidence considered by the inferior tribunal. Mason v. Board of Pension Trustees, supra; In re Butler, supra; Brown v. State, Del. Supr., 245 A.2d 925 (1968). Generally, trial testimony is not considered part of the record in a certiorari proceeding. Castner v. State, Del. Supr., 311 A.2d 858 (1973). Moreover, certiorari will not issue to correct procedural errors. Baxter v. State, Del. Super., 197 A. 678 (1938); Delaware Barrel & Drum Co. v. Mayor and Council of Wilmington, Del. Super., 175 A.2d 403 (1961); Woolley, § 896 at 625. In a rare, unusual case, the reviewing court may consider evidence outside the record where it is necessary to complete or explain an otherwise incomplete or doubtful record. Woolley, § 898 at 626. However, the admission of evidence to show error in judgment upon the merits is never allowed. Id.

In Edwards v. State, Del. Supr., No. 237, 1984, Christie, J. (Jan. 25, 1985) (ORDER), a criminal defendant appealed from a conviction for loitering wherein the defendant had received a sentence of a fine of $100 plus a surcharge for the Victims' Compensation Fund. The sentence was not appealable pursuant to the provisions of the Del. Const. R. IV, § 11(1)(b). The defendant consented to the dismissal of the appeal but sought a ruling that the dismissal "shall be without prejudice to his right to file an appropriate petition of Writ of Certiorari with respect to that

conviction." The Supreme Court ruled that the State had an absolute right to dismissal and the Supreme Court deferred a decision on the effect, if any, dismissal had or might have had on the defendant's right to seek a Writ of Certiorari.

c. Writ of Prohibition. Absent an adequate remedy at law, a writ of prohibition will issue to an inferior court or an administrative agency to prevent it from exceeding the limits of its jurisdiction. Canaday v. Superior Court, Del. Supr., 116 A.2d 678 (1955); In re B&F Towing and Salvage Co., Del. Supr., 551 A.2d 45 (1988). While a writ of prohibition may issue against an administrative agency, the petition should be made in the first instance to the Superior Court. Family Court v. Department of Labor and Indus. Rel., Del. Ch., 320 A.2d 777 (1974).

Although directed to a court, a writ of prohibition is in effect the legal equivalent of the equitable remedy of injunction. Abrahams v. Superior Court, Del. Supr., 131 A.2d 662 (1957); In re Hovey, Del. Supr., 545 A.2d 626 (1988). Thus, the remedy of prohibition may include the complete relief necessary to resolve the jurisdictional question presented according to principles that govern injunctions in equity. Id. at 628. As a result, a court of law may issue an alternative or temporary writ of prohibition in order to preserve the existing status of the proceeding until it has determined whether or not to grant a permanent writ. Family Court v. Department of Labor & Indus. Rel., supra.

The decision to issue a writ of prohibition is discretionary except where it is clear that the court whose action is sought to be prohibited has no jurisdiction over a cause originally and the party has no other remedy. Knight v. Haley, Del. Super., 176 A. 461 (1934). Thus, the petition should clearly (1) identify the court against which relief is to be directed (see Supr. Ct. R. 43(b)(i)) and (2) set forth the grounds for asserting that the court is exceeding its jurisdiction and that the petitioner has no adequate remedy at law.

Whether or not a remedy at law exists which will provide the petitioner with adequate and complete relief is a matter addressed to the sound discretion of the court entertaining the petition. Knight v. Haley, supra at 465. For examples of decisions discussing the adequacy of specific legal remedies, see Knight v. Haley, supra, and Wilmington Trust Co. v. Barron, Del. Supr., 470 A.2d 257 (1983).

As suggested earlier, the petition should also identify, with specificity, the grounds for asserting that the lower court is exceeding the limits of its jurisdiction. Since the lower court's lack of jurisdiction forms the heart of any prohibition proceeding, the grounds must be clearly identified. For examples of decisions discussing the jurisdictional issue, see Canaday v. Superior Court, supra, and Samuels v. Oberly, Del. Super., C.A. No. 83M-JN-16, Bifferato, J. (Feb. 7, 1984).

Since prohibition is an extraordinary remedy, the Supreme Court is often reluctant to grant relief. Thus, prohibition will not lie unless the petitioner first gives notice to the lower court of its purported lack of jurisdiction. Matushefske v. Herlihy, Del. Supr., 214 A.2d 883 (1965). In this regard, prohibition will not lie merely because the Supreme Court disagrees with the lower court's conclusion as to the merits of the underlying cause of action.

A writ of prohibition is not available as a substitute for the ordinary appellate procedure. Therefore, the Court will not allow a writ of prohibition to be "distorted into a writ of error for the correction of error, irregularity or mistake in the proceedings in the court below which can be reviewed by ordinary appellate process." In re B&F Towing and Salvage Co., supra, at 52; Canaday v. Superior Court, supra, at 682.

In re Hovey, Del. Supr., 545 A.2d 626 (1988) presented the interesting issue of whether or not a writ of prohibition will issue to prohibit the Superior Court from trying a defendant who asserts that the federal constitutional bar against double jeopardy and provisions of state statute preclude a pending trial. The defendant entered into a plea agreement on drug charges in United

States District Court for the District of Delaware and was sentenced to two consecutive nine-year terms of imprisonment. After he began serving his sentence, the District Court vacated the convictions with a finding that the District Court lacked subject matter jurisdiction to convict the defendant on the offenses to which the defendant had plead guilty. The State of Delaware thereafter indicted the defendant, and the indictment contained the same allegations as those earlier claimed to be violations of federal law. The Superior Court denied motions to dismiss the indictment in discovery related motions. Since the denial of the motion to dismiss the indictment constituted an interlocutory ruling in a criminal proceeding, the Supreme Court found that it did not have jurisdiction, and further, that a writ of prohibition could not be used to circumvent the unavailability of an interlocutory appeal. The Supreme Court discussed the historic genesis and development of writs of prohibition and ruled that since the defendant did not sustain defendant's burden in demonstrating by clear and convincing evidence that the Superior Court lacked the jurisdiction to conduct this trial, it would not issue the extraordinary writ of prohibition to prevent the pending trial in the Superior Court. See also Petition of B&F Towing and Salvage Co., Del. Supr., 551 A.2d 45 (1988) in which the Supreme Court denied a writ of prohibition where the petitioner claimed that the Family Court had exceeded its jurisdiction in ordering non-party corporations to comply with discovery demands. The Supreme Court found that seeking the writ was tantamount to taking an interlocutory appeal and the Supreme Court does not as a general rule accept interlocutory appeals from discovery rulings. The Supreme Court found that since the petitioners had available opportunity for relief through seeking a protective order, a writ of prohibition was inappropriate. See § 25.04(e), Record on Review, and 25-4(s) for a discussion of evidentiary hearings in certiorari cases.

d. Writ of Mandamus. Mandamus is a command in the name of the State issued by a court of competent jurisdiction to an inferior court to compel the performance of some pre-existing duty. State v. McDowell, Del. Super., 57 A.2d 94 (1947); Mason v. Board of Pension

Trustees, Del. Super., 468 A.2d 298 (1983). If the duty sought to be enforced involves the exercise of discretion, mandamus will not issue since the writ's scope is limited to the enforcement of ministerial duties. Mason v. Board of Pension Trustees, supra, at 300; Remedio v. City of Newark, Del. Supr., 337 A.2d 317 (1975); Darby v. New Castle Gunning Bedford Educ. Ass'n, Del. Supr., 336 A.2d 209 (1975). Thus, the duty in question must result from the official station of the party to whom the writ is directed or by operation of law. Counsel should also be aware that mandamus will not issue to prevent the commission of an act, but only to compel the performance of an act. State v. McDowell, 57 A.2d at 98.

In Delaware, as at common law, the issuance or denial of the writ is a matter resting within the sound discretion of the court entertaining the petition. Ingersoll v. Rollins Broadcasting of Delaware, Inc., Del. Supr., 272 A.2d 336 (1970); In re State, Del. Supr., 616 A.2d 292 (1992). Moreover, before the court will exercise its discretion, the petitioner must demonstrate a clear right to the performance of the duty, that the trial court has arbitrarily failed or refused to perform its duty, and the absence of an adequate remedy at law. State v. McDowell, supra, at 97; In re State, supra, at 293. "[I]n the absence of a clear showing of an arbitrary refusal or failure to act, [the] Court will not issue a writ of mandamus to compel a trial court to perform a particular judicial function, to decide a matter in a particular way, or to dictate the control of its docket." In re Bordley, Del. Supr., 545 A.2d 619, 620 (1988).

Finally, because a wide variety of circumstances is considered by the court in exercising its discretion, counsel should examine the substantive case law and the public policy implications of the particular case.

e. Writ of Quo Warranto. Absent unusual circumstances, a writ of quo warranto is the exclusive remedy available in Delaware for determining the right to hold and occupy a public office. Hampson v. State, Del. Supr., 233 A.2d 155 (1967). For examples of Delaware

cases defining a public office, see Martin v. Trivitts, Del. Super., 103 A.2d 779 (1954) and State v. Glenn, Del. Super., 4 A.2d 366 (1939). Thus, it is essential to every quo warranto proceeding that the office in question is, in fact, a public office and not merely employment.

A quo warranto proceeding is by information brought by the Attorney General in the public interest against the alleged usurper of a public office. Hampson, 233 A.2d at 157. Unlike the procedure in some states, in Delaware the writ must be brought in the name of the Attorney General since the action, at least in theory, is a prosecution. Cleaver v. Roberts, Del. Supr., 203 A.2d 63 (1964); State v. Killen, Del. Supr., 454 A.2d 737 (1982). However, once the Attorney General initiates a quo warranto proceeding, private counsel representing the contestant may prosecute the action to completion without any further participation by the Attorney General. Cleaver v. Roberts, 203 A.2d at 67.

If successful, a quo warranto proceeding affords the single remedy of ouster, which is generally regarded as sufficient. Hampson, 233 A.2d at 157. The reason behind this limitation is that the only public interest involved is the ouster of the usurper. Id. at 157; see also Marshall v. Hill, Del. Super., 93 A.2d 524 (1952). Thus, once ouster is accomplished, the other contestant for the public office is relegated to other remedies, e.g., mandamus. Hampson, 233 A.2d at 157.

Finally, under 8 Del. C. § 322, a writ of quo warranto seeking forfeiture of a corporate charter is the proper remedy if a Delaware corporation fails to obey a peremptory writ of mandamus within thirty days after its issuance by a state court of competent jurisdiction. Supr. Ct. R. 43 should be read with 8 Del. C. § 323 to ascertain the proper procedures to commence such a proceeding.

14.06 APPOINTMENT OF COUNSEL FOR STATE OFFICERS AND EMPLOYEES - RULE 68. Under Supr. Ct. R. 68, a state officer or employee may petition for appointment of counsel if a civil or criminal action is brought against such officer or employee for acts arising out of the employee's employment by the State. Proceedings brought in the Court on the

Judiciary, however, are excluded unless and until the Board of Examining Officers is convened pursuant to Ct. Jud. R. 5.

Supr. Ct. R. 68 also prescribes the procedural requirements for filing the petition. The procedural requirements include how, when and where the petition should be brought. If the Court appoints private counsel, Supr. Ct. R. 68 prescribes the means for filing an application for counsel fees and disbursements as well as a reference for calculating the rate of compensation. Accordingly, before filing a petition under Supr. Ct. R. 68, counsel should read the Rule carefully.

14.07 PRACTICE GUIDE. Since the foregoing special provisions are, for the most part, addressed to the discretion of the Supreme or Superior Courts, it is essential that the Rules be meticulously followed and a convincing case stated.

With respect to extraordinary writs, given the language of Supr. Ct. R. 43, it is unclear whether writ petitions denied in the first instance by the Superior Court should be filed anew in the Supreme Court. For instance, Supr. Ct. R. 43(b)(vi) provides in part that "[a] complaint shall not be filed under this rule for a writ to be issued to a statutory court or judge thereof, or to a justice of the peace, unless a petition for such writ shall have been first presented to and denied by the Superior Court." The authors suggest that, to promote judicial economy, the Superior Court's denial of a writ petition should be challenged by appeal to the Supreme Court instead of refiling the writ petition with the Supreme Court as Supr. Ct. R. 43 seems to suggest.

Also with respect to extraordinary writs, counsel should keep in mind that writs sought originally in the Supreme Court should only concern matters involving the Court of Chancery, the Superior Court, and the Family Court. Most, if not all, matters concerning other lower courts or administrative agencies in which an extraordinary writ might be the appropriate remedy should be brought originally in the Superior Court.

CHAPTER 15. ADMINISTRATION, FEES, AND COSTS

TABLE OF CONTENTS

CHAPTER 15. ADMINISTRATION, FEES, AND COSTS

Loren C. Meyers, Esquire
Margaret L. Naylor, Esquire
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15.01 INTRODUCTION. This chapter of the handbook describes the current organization and administration of the Delaware Supreme Court. This chapter also discusses fees in the Supreme Court and the extent to which appeal costs may be recovered and the procedures by which they are claimed and determined. All references to court rules contained in this chapter are to the Rules of the Delaware Supreme Court, unless otherwise noted. This chapter also references the Delaware Supreme Court Internal Operating Procedures (cited as "Supr. Ct. Op. Proc."), which are published in the Delaware Rules Annotated by the Michie Butterworth Publishing Company.

15.02 SUPREME COURT ADMINISTRATION.

a. Supervisory Powers. The Chief Justice of the Delaware Supreme Court is the "administrative head of all the courts of the State" with "general administrative and supervisory powers over all the courts." Del. Const. art. IV, § 13. Approval by a majority of the Justices of the Supreme Court is required for the adoption of rules for the administration of justice and the conduct of the business of all the courts of the State. Id. The Justices of the Supreme Court meet each month to discuss administrative matters, which are set by agenda prior to the meeting. Supr. Ct. Op. Proc. I, § 2.

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[1]Loren C. Meyers, Esquire is Chief of the Appeals Division for the Department of Justice and a former Clerk of the Delaware Supreme Court. Margaret L. Naylor, Esquire is a Staff Attorney for the Delaware Supreme Court and a former Clerk of the Delaware Supreme Court. Mr. Meyers and Ms. Naylor prepared the original version of this chapter. Gayle P. Lafferty, Esquire, a Staff Attorney for the Delaware Supreme Court and a former Supreme Court law clerk, updated the original chapter.

b. Liaison Justices. The Chief Justice appoints Justices to many administrative committees and designates Justices to act as liaisons between the Supreme Court and other courts and boards established by the Supreme Court, including, for example, all of the trial courts, the Board of Bar Examiners, and the Board on Professional Responsibility. See Supr. Ct. Op. Proc. I, § 3.

c. Supreme Court Administrator. The Court Administrator has such responsibilities as the Court shall determine, including: supervising the Court's own internal administration; working directly with the Justices in discharging the Court's administrative responsibilities over other courts, Supreme Court committees, and arms of the Court; and acting as the primary public spokesperson for the Court. Any inquiry from the public, in writing or by telephone, is routinely referred to the Court Administrator. See Supr. Ct. R. 91(b).

d. Clerk of the Court. The Office of the Clerk is created by article IV, § 27 of the Delaware Constitution. The powers and duties of the Clerk are defined by statute, rule, and Court directive. See, e.g., 10 Del. C. §§ 121(c), 162-63; Supr. Ct. R. 91. The Clerk's primary duties include: preliminary review of the jurisdictional basis for all appeals, review of all filings for compliance with Court rules, coordinating requests for extensions of time by parties or court reporters, docketing all filings, and scheduling cases. The Clerk's office is located in Dover, although the Clerk is assisted by court staff in all three counties. See Supr. Ct. R. 91(a)(ix). The Clerk is authorized to approve: (1) timely, unopposed motions for extensions of time (not to exceed three extensions or a total of 75 days), pursuant to Rule 15(b), in cases that do not have assigned panels; (2) motions to proceed in forma pauperis; and (3) voluntary dismissals of an appeal, pursuant to Rule 29(a), prior to the filing of the appellee's answering brief. Supr. Ct. Op. Proc. XV, § 6.

e. Staff Attorneys. The two Staff Attorneys assist the Court in discharging its constitutional responsibilities as the Court designates orally or in writing from time

to time, including: reviewing pro se filings, assisting the Clerk in the scheduling of cases and securing supplemental filings; undertaking independent research as requested; and assisting the motion Justice each month as requested. Supr. Ct. R. 91(c).

f. Law Clerks. Each Justice employs an attorney or law school graduate as a personal law clerk to assist in legal research and writing. The specific responsibilities of each law clerk are determined by the Justice who employs the clerk. The conduct of all judicial law clerks in Delaware is governed by The Delaware Code of Conduct for Law Clerks, which became effective on June 1, 1995. See also Supr. Ct. Op. Proc. XVIII (setting forth specific rules of conduct governing Delaware Supreme Court law clerks).

g. Administrative Office of the Courts. The Administrative Office of the Courts (AOC) serves as the center for all non-judicial administration in the state court system. This separate office is concerned with appropriations, budgets, accounting, information systems, technical assistance, training, records management, facilities, statistics, reports (including the Annual Report of the Judiciary), and personnel of all courts in Delaware. Supr. Ct. R. 87.

The Director of the AOC is appointed by and works under the direction of the Chief Justice. 10 Del. C. § 128(b). Other personnel may be hired as necessary upon the approval of the Chief Justice. 10 Del. C. § 128(e).

15.03 FEES IN THE SUPREME COURT. Rule 20 sets forth the schedule of fees charged by the Supreme Court. Rule 20(a) requires that any notice of appeal or petition for an extraordinary writ must be accompanied by a $250 non-refundable filing fee. See Supr. Ct. R. 20(a); 10 Del. C. § 163. With a few exceptions set forth in Rule 20(b), the $250 filing fee is the only fee charged by the Supreme Court.

Although the literal terms of Rule 20(a) require pre-payment of the filing fee, the Court may accept a notice of appeal for filing even if it is unaccompanied by payment of the filing fee.

Supr. Ct. Op. Proc. XX, § 4(b)(ii). If thereafter, however, the appellant does not promptly submit either the $250 filing fee or an appropriate motion to proceed in forma pauperis, the Clerk will issue a notice to show cause why the case should not be dismissed. If the appellant takes no action or insufficient action in response to the notice to show cause, the appeal is subject to dismissal. See Cusick v. Neilson, Del. Supr., No. 76, 1988, Moore, J. (May 19, 1988) (ORDER).

A party claiming to be indigent may request the Court's permission to waive the filing fee requirement. Supr. Ct. R. 20(h). The party seeking to proceed in forma pauperis must make an appropriate application to the Court (see Chapter 16, Form 16:03) and supply the Court with sufficient information upon which the Court can determine the validity of the party's assertion of indigency. See Wolfe v. Wolfe, Del. Supr., No. 207, 1987, Holland, J. (Aug. 18, 1987) (ORDER) (denying request to proceed in forma pauperis due to insufficient information regarding appellant's alleged indigency). In some cases, a litigant proceeding in forma pauperis is entitled to a free copy of the transcript or lower court records. See, e.g., Griffin v. Illinois, 351 U.S. 12 (1956) (criminal defendant on direct appeal); Pendry v. State, Del. Supr., 367 A.2d 624 (1976) (same); 13 Del. C. § 814(b) (paternity action). As a general rule, however, in forma pauperis status does not entitle the appellant to reproduction of transcripts or records at public expense. See Mazzatenta v. State, Del. Supr., No. 366, 1990, Horsey, J. (Jan. 29, 1991) (ORDER); Cook v. State, Del. Supr., No. 2, 1982, McNeilly, J. (Mar. 29, 1982) (ORDER). An appellant who seeks trial transcripts or court records at public expense must file a timely application to waive payment of those costs to the trial court. Supr. Ct. R. 9(h); See Johnson v. Johnson, Del. Supr., No. 176, 1990, Horsey, J. (Aug. 7, 1990) (ORDER); Johnson v. Casson, Del. Supr., No. 160, 1988, Holland, J. (June 24, 1988) (ORDER). The appellant also must make a particularized showing of need, i.e., that the transcript or record is essential to the determination of appellant's claim. Griffin v. State, Del. Supr., No. 211, 1991, Holland (Oct. 30, 1991) (ORDER). Accord United States v. MacCollom, 426 U.S. 317 (1976).

The Court does not require appeals by the State to be accompanied by a filing fee. See State v. Kopec, Del. Supr., No. 377, 1986, Moore, J. (Jan. 12, 1987) (ORDER) (denying, on the ground of sovereign immunity, the appellee's motion to dismiss for failure of the State to pay filing fee) (citing Donovan v. Delaware Water & Air Resources Comm'n, Del. Supr., 358 A.2d 717, 723 (1976)). Furthermore, although not provided for in the Supreme Court Rules, the Court, as a matter of practice, does not require payment of the $250 filing fee in matters arising from the Unemployment Insurance Appeal Board or from the Industrial Accident Board. This practice is consistent with the statutory provisions that do not require the posting of an appeal bond in appeals from the UIAB to the Superior Court, 19Del. C. § 3323(c), or advance payment of costs in appeals from the IAB to the Superior Court, 19 Del. C. § 2350(d).

If the judgment of the lower court is reversed on appeal and costs are assessed against the appellee, the filing fee is certified in the mandate as costs to be collected in the trial court for reimbursement of the party who paid the filing fee. Supr. Ct. R. 20(g).

15.04 COSTS.

a. Generally. Although the terms "fees" and "costs" often are used interchangeably, each has a distinct meaning. See generally 20 C.J.S. Costs § 3 (1990). Fees are compensation to public officers for services rendered to litigants in the progress of their case. Black's Law Dictionary 614 (6th ed. 1990); 10 Del. C. chs. 85-89. Costs, on the other hand, are certain "allowances in the nature of incidental damages awarded by law to reimburse the prevailing party for expenses necessarily incurred in the assertion of his rights in court." Peyton v. William C. Peyton Corp., Del. Supr., 8 A.2d 89, 91 (1939). The purpose of awarding costs is to compensate the successful litigant for the expenses to which that litigant has been subjected. See, Donovan v. Delaware Water & Air Resources Comm'n, Del. Supr., 358 A.2d 717, 723 (1976); J.J. White, Inc. v. Metropolitan Merchandise Mart, Inc., Del. Super., 107 A.2d 892 (1954) (costs allowed should not

exceed the expenses of litigation). Sometimes, however, the award of costs is regarded as penal in nature, such as when costs are awarded against the litigant who has pleaded false or frivolous matters. See, e.g., Leighton v. Beatrice, Del. Supr., No. 231, 1987, Christie, C.J. (Sept. 7, 1990) (ORDER) (holding that an appellant must be given notice and an opportunity to respond before costs are assessed as a sanction for filing a frivolous appeal).

Whatever the purpose, costs on appeal usually are determined after the filing of a decision terminating the appeal or other proceeding. Supr. Ct. R. 20(d). The voluntary or involuntary dismissal of an appeal will result in the assessment of costs against the appellant. 10 Del. C. § 5l0l; Supr. Ct. R. 29(a), (b). Though the rules specify what expenses are allowable as costs and who is entitled to costs, see Supr. Ct. R. 20(d), the Court retains the discretion to award additional expenses or to alter the distribution. Peyton v. William C. Peyton Corp., 8 A.2d at 92; Supr. Ct. R. 20(b)(ii), (d), (f). Unless a special order is sought, an award of costs on appeal need not be requested since the Rule operates of its own force. See Supr. Ct. R. 20(d).

b. Expenses Allowable as Costs. Expenses allowed as costs are specified in Rule 20(d). Though Rule 20(d) also allows charges for "such other expenses as shall be incurred and certified by the Clerk," as a matter of practice, only the docket fee and the charge for certification are regularly taxed as costs. But see Peyton v. William C. Peyton Corp., Del. Supr., 8 A.2d 89, 92 (1939) (costs of preparing, certifying, and printing record awarded). Though the Rule is silent on the appropriate procedure, a party who seeks to recover charges beyond those listed in Rule 20(d) should move for an order directing the Clerk to set out in the mandate the extra amounts allowed. See id. at 93; Supr. Ct. R. 20(b)(ii). The motion should specify the amounts involved and explain why a special order is necessary. See Supr. Ct. R. 30(a). Any motion to recover costs on appeal must be filed before the mandate issues, or else the Court loses jurisdiction to entertain such a petition. See, e.g., McCloskey v. Clothier, Del. Supr., No. 283, 1987, Horsey, J. (May 23, 1988) (ORDER). But

see Leighton v. Beatrice Cos., Del. Supr., No. 231, 1987, Christie, C.J. (Nov. 27, 1987) (ORDER) (order granting costs after the mandate had issued).

Generally, attorneys fees are not recoverable in the absence of a statutory or contractual provision, and such fees are not taxable as costs. See, e.g., Stephenson v. Capano Dev., Inc., Del. Supr., 462 A.2d 1069 (1983); CM & M Group, Inc. v. Carroll, Del. Supr., 453 A.2d 788 (1982); Casson v. Nationwide Ins. Co., Del. Super., 455 A.2d 361 (1982); J.J. White, Inc. v. Metropolitan Merchandise Mart, Inc., Del. Super., 107 A.2d 892 (1954). If the Court determines, however, that the appeal is frivolous, attorneys fees may be awarded. See Supr. Ct. R. 20(f). In frivolous appeals, the Court also may grant the costs incurred in preparing and transmitting the record, the cost of the transcripts, and other reasonable expenses of the appellee. Id.

c. Entitlement to Costs.

(i). The Prevailing Party Rule. The general rule, followed in Delaware, is that costs will be awarded to the party who prevails on appeal, unless otherwise ordered by the Court. Peyton v. William C. Peyton Corp., Del. Supr., 8 A.2d 89, 91 (1939); Kennedy v. Emerald Coal & Coke Co., Del. Ch., 30 A.2d 269, 269-70 (1943); 10 Del. C. § 5101; Supr. Ct. R. 20(d). Thus, costs are awarded solely on the basis of the final outcome of the appeal. See Graham v. Keene Corp., Del. Supr., 616 A.2d 827 (1992). Costs may be taxed against the appellant if the appeal is dismissed or the judgment below is affirmed. Supr. Ct. R. 20(e). If the judgment below is reversed, the appellee is assessed costs. Id. The same analysis is applied when determining costs on a cross-appeal. See Bigger v. Unemployment Compensation Comm'n, Del. Supr., 53 A.2d 761 (1947).

If there is no prevailing party, as when the judgment below is affirmed in part and reversed in part, costs are to be allowed as ordered by the Court. Supr. Ct. R. 20(e). The usual result is that the parties bear their own costs, apparently because neither party was successful. See 20 Am. Jur. 2d Costs § 16, at 117-118 (1995). However, an award of costs to both parties would

be equally proper (if a cross-appeal had been taken) since their respective claims were seemingly meritorious. See id. at 15.

(ii). Actions Involving the State of Delaware. In the absence of express statutory waiver, the doctrine of sovereign immunity bars any award of costs against the State of Delaware, a state agency, or a state official. Wilmington Medical Center, Inc. v. Severns, Del. Supr., 433 A.2d 1047 (1981); Donovan v. Delaware Water and Air Resources Comm'n, Del. Supr., 358 A.2d 717 (1976); Wilmington Housing Auth. v. Williamson, Del. Supr., 228 A.2d 782 (1967). A statute that generally authorizes a court to impose costs against the losing party but does not specifically mention the State does not constitute a waiver of sovereign immunity. 20 Am. Jur. 2d Costs § 32, at 27 (1965). See also Dept. of Health and Social Services v. Crossan, Del. Supr., 424 A.2d 3 (1980) (holding that a general waiver of immunity will not be implied from a restricted waiver). Thus, neither 10 Del. C. § 5l0l, which allows the successful party on appeal to recover costs, nor Del. Const. Art. I, § 9, which permits the General Assembly to waive the State's sovereign immunity, necessarily allows the Court to award costs against the State. See Donovan v. Delaware Water & Air Resources Comm'n, 358 A.2d at 723. This conclusion is supported by Rule 20(e), which provides that unless an award of costs is specifically authorized by law, costs cannot be awarded against the State. Under Rule 20(e), costs on appeal in civil actions may be awarded to the State only if an award of costs against the State is authorized by law. The award of costs in criminal cases is governed by 11 Del. C. §§ 4101-05 and is consistent with the prevailing party concept.

(iii). Actions in the Name of the State. In an action brought in the name of the State "for the use of" a person or corporation, costs must be awarded against that person or corporation, not against the State or its agencies or officers. See 10 Del. C. § 5l04.

(iv). Costs in Original Proceedings and Certifications. Rule 20(d) states that costs in original proceedings, i.e., a complaint for an extraordinary writ under Rule 43, and

in proceedings on certification under Rule 41 are to be determined by the Court in each instance. This is consistent with 10 Del. C. § 5103 which gives the court having jurisdiction of a petition for a writ of prohibition or of mandamus the discretion to award costs "as it deems equitable and just." See 10 Del. C. § 5105 (award of costs to be made as court "deems proper" in any proceeding not specifically provided for by statute). In the absence of special circumstances, the party who prevails should be awarded costs. Cotler v. Inter-County Orthopaedic Ass'n, P.A., 530 F.2d 536 (3d Cir. 1976) (petition for mandamus under 28 U.S.C. § 1651)

However, the nominal respondent in a petition for an extraordinary writ frequently is a State judge or lower court. See Del. Const. art. IV, § 11(6). Thus, Rule 20(e) appears to prohibit a successful petitioner from recovering costs. See Section 15.05b. There is no Delaware case law specifically addressing this issue, however, and the Court of Appeals for the Third Circuit in Cotler noted that the question is seldom raised. Cotler, 530 F.2d at 538. The traditional rule is that the judge is exempt from taxation of costs in order to protect the freedom of judicial action. Id.; In re Haight & Freese Co., 164 F. 688 (1st Cir. 1908). Instead, costs may be awarded to the prevailing real party in interest, i.e., to the petitioner or to the actual respondent. Cotler, 530 F.2d at 538. See 20 Am. Jur. 2d Costs § 26, at 21-22 (1965); 52 Am. Jur. 2d Mandamus § 500 (1970).

CHAPTER 16. FORMS

TABLE OF CONTENTS

CHAPTER 16. FORMS[1]

16.01 INTRODUCTION. In contrast to some jurisdictions, there is little distinction drawn between civil and criminal appeals in the forms used in the Delaware Supreme Court. Instead, the forms, as one might expect, parallel the Court's rules. Special forms are used for interlocutory appeals, certifications, and applications for extraordinary writs.

The Court has adopted several "official forms" based on the Rules. However, only substantial compliance with the particular official form is required. Thus, a paper or motion that does not exactly conform to an official form would not be subject to challenge, assuming that the information required by the particular form was adequately set out in the paper actually filed. See State v. Reed, Del. Supr., 567 A.2d 414, 417 (1989); Weston v. State, Del. Supr., 554 A.2d 1119, 1121 (1989); State Personnel Comm'n v. Howard, Del. Supr., 420 A.2d 135, 137(1980); Massey-Ferguson, Inc. v. Wells, Del. Supr., 383 A.2d 640, 642 (1978); Episcopo v. Minch, Del. Supr., 203 A.2d 273, 275 (1964); Supr. Ct. R. 102(a).

16.02 PRINT AND TYPE REQUIREMENTS. Regardless of the particular brief, motion, or other paper filed, specific requirements exist for the size of print or type used and the clarity of reproductions. Briefs and appendices may be printed or typed. Copies may be made by any duplicating process producing a clear black image on opaque, unglazed white paper. Supr. Ct. R. 13(a)(i). If the brief or appendix is printed, the print must be in at least 11 point type. All typed matter must be of a size type permitting not more than 11 characters or spaces per linear inch. Supr.

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[1]The material that follows is largely derived from prior versions prepared by Margaret L. Naylor, Esquire, a staff attorney for the Delaware Supreme Court and a former clerk of the Delaware Supreme Court, and Loren C. Meyers, Esquire, Chief of the Appeals Division for the Department of Justice and a former clerk of the Delaware Supreme Court.

Ct. R. 13(a)(i). Footnotes shall be the same type size as the text of the brief. The text of the brief, except for footnotes and quotations, must be double-spaced. Supr. Ct. R. 13(a)(ii),(b). The Court encourages the practice of printing, typing or reproducing on both sides of a single page, providing legibility is maintained. The Court also encourages the use of recycled paper. Supr. Ct. R. 13(c).

16.03 SIZE AND MARGINS. Typed briefs and all appendices shall have pages not exceeding 8 1/2 by 11 inches and must be firmly bound at the left margin in a transparent plastic cover. Supr. Ct. R. 13(a)(ii). Printed briefs must be firmly bound at the left-hand margin, and the pages must be approximately 7 x 9 ½ inches. Supr. Ct. R. 13(a)(ii). Motions, and other papers produced by any other means cannot be on paper exceeding 8 ½ x 11 inches. Top, bottom and side margins of briefs and other papers must be not less than 1 inch. Supr. Ct. R. 13(a)(ii). Motions and other papers are to be filed without backers. Supr. Ct. R. 13(b).

16.04 BRIEF COVER PAGES. Except where the litigant is in forma pauperis, the cover (or the first sheet underlying a transparent cover) of the appellant's opening brief must be blue; the cover of the appellee's answering brief must be red; the cover of an intervenor's or an amicus curiae's brief must be green; and the cover of the appellant's reply brief must be gray. Supr. Ct. R. 14(a). The cover of any appendix must be white.

16.05 PAGE LIMITATIONS. Page limitations imposed by the Rules are strictly enforced, and requests to extend those limits are viewed with disfavor. Supr. Ct. R. 14(d). The opening brief or answering brief (excluding the table of contents and table of citations) cannot exceed 35 pages without permission of the Court. A reply brief can be no longer than 20 pages, except when there is a cross-appeal, in which case appellant’s reply brief (which is also the answering brief on the cross-appeal) is permitted to be 35 pages. Supr. Ct. R. 14(d). All motions, answers, and replies must

be no more than 4 pages. Supr. Ct. R. 30(a), (b). Notices of appeal, certifications of questions of law, extraordinary writs, and responses to notices to show cause do not have page limitations.

16.06 CAPTIONS AND SIGNATURES. The front cover of each brief and appendix must show the name of the Court, the caption of the case, the case number, the name of the trial court, the name of the party for whom the brief is filed, the name of counsel by whom the brief is filed, and the date of filing. Supr. Ct. R. 14(a). Though not required by Rule, many attorneys also add the case numbers in the trial court and the name of the trial judge. The name of opposing counsel should *not* appear on the cover. Supr. Ct. R. 14(a).

Motions and other papers must contain similar, though less, information, i.e., the name of the Court, the caption of the case, the case number, the date of filing, and a short descriptive title showing the purpose of the motion or paper. Supr. Ct. R. 13(b). Supreme Court Rule 12(a) also requires that all papers filed with the Court include the attorney's address, telephone number and Supreme Court identification number. Unless a party is acting *pro se*, all briefs, motions, and other papers must be signed by an attorney who is a member of the Delaware Bar. Supr. Ct. R. 12(a). The signature must be handwritten on the original. Signatures which are rubber-stamped are unacceptable.

Notices of appeal in all cases, including those in which a lower court previously utilized pseudonyms, must be captioned with the full names of the individual parties. Thereafter, the Court, *sua sponte*, or upon motion, may change the captions of a case to reflect appropriate pseudonyms in matters concerning adoption, termination of parental rights, child custody and visitation, juvenile delinquency proceedings and any other domestic relations matters, which are deemed to be of a sensitive nature. Supr. Ct. R. 7(d).

FORM 16:01

Notice of Appeal
Rule 7(c); Official Form A

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____**[1]**_____, ___**[2]**___ Below, Appellant, v. ____**[3]**_____, ___**[4]**___ Below, Appellee.	No. ___**[5]**___

NOTICE OF APPEAL

To: ___**[6]**___

PLEASE TAKE NOTICE that _____, _____ below-appellant, does hereby appeal to the Supreme Court of the State of Delaware from the order ___**[7]**___ of the ___**[8]**___ Court, in and for ___**[9]**___ County, by ___**[10]**___, dated ___**[11]**___, in case number ___**[12]**___ in that court. A copy of the decision sought to be reviewed is attached hereto **[13]**.

The name and address of the attorney below for appellee is _____. The party against whom the appeal is taken is _____.

The name and address of the attorney below for the party against whom the appeal is not taken is ___**[14]**___. The party against whom the appeal is not taken is ___**[15]**___.

PLEASE TAKE FURTHER NOTICE that appellant hereby designates the transcript in accordance with Rules 7(c)(6) and 9(e)(ii) in the following manner:

___[16]___ or **___[17]___**

Dated: _____ _____

___[18]___
Attorney for _____
_____ Below-Appellant

Insert:

[1] Appellant's name.

[2] Appellant's lower court status.

[3] Appellee's name.

[4] Appellee's lower court status.

[5] Leave blank. The Supreme Court Clerk's Office will assign an appeal number upon receipt of the notice of appeal.

[6] Name and address of the appellee's counsel.

[7] Substantive nature of the decision from which the appeal is taken.

[8] Lower court.

[9] County in which the lower court sits.

[10] Name of the judge who rendered the decision on appeal.

[11] Date of the decision on appeal (and the date of the final order, if different).

[12] Complete lower court case number.

[13] Attach a copy of the decision sought to be reviewed, if available. If the decision is not available, include in the notice of appeal a statement indicating such unavailability.

[14] Name and address of the counsel for the party against whom the appeal is not taken, if any.

[15] Name of the party against whom the appeal is not taken, if any.

[16] If ordering the preparation of transcript for the appeal, either designate transcript or state that a separate designation of transcript is set forth in attached Exhibit A. Whether stated within the notice of appeal or in an attached Exhibit A, the designation should clearly identify by name, date and time, the proceedings, or part thereof, that need to be transcribed for the appeal.

[17] If not ordering the preparation of transcript, either state that here or state that Statement in Lieu of Transcript in accordance with Official Form D is attached hereto.

[18] Name, address, telephone number and Delaware Bar ID number of the appellant's counsel.

FORM 16:02

Notice of Appeal
Rule 7(c); Official Form B

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____**[1]**_____, ___**[2]**___ Below, Appellee/Cross Appellant, v. ____**[3]**_____, ___**[4]**___ Below, Appellant/Cross Appellee.	No. ___**[5]**___

NOTICE OF CROSS-APPEAL

To: ___**[6]**___

PLEASE TAKE NOTICE that _____, _____ below- appellee/cross-appellant, does hereby appeal to the Supreme Court of the State of Delaware from the order ___**[7]**___ of the ___**[8]**___ Court, in and for ___**[9]**___ County, by ___**[10]**___, dated ___**[11]**___, in ___**[12]**___ in that court. The party against whom the cross-appeal is taken is _____. A copy of the decision sought to be reviewed is attached hereto **[13]**.

PLEASE TAKE FURTHER NOTICE that appellee/cross-appellant hereby designates the transcript in accordance with Rules 7(c)(6) and 9(e)(ii) in the following manner:

___**[14]**___ or ___**[15]**___

Dated: _____

_____
___**[16]**___
Attorney for _____,
_____ Below-Appellee,
Cross-Appellant

Insert:

[1] Cross-appellant's name.

[2] Cross-appellant's lower court status.

[3] Cross-appellee's name.

[4] Cross-appellee's lower court status.

[5] Main appeal number, if known.

[6] Name and address of the cross-appellee's counsel.

[7] Briefly identify the substantive nature of the decision from which the cross-appeal is taken.

[8] Lower court.

[9] County in which the lower court sits.

[10] Name of the judge who rendered the decision on cross-appeal.

[11] Date of the decision on cross-appeal.

[12] Lower court case number.

[13] Attach a copy of the decision sought to be reviewed if that decision is not already attached to the notice of appeal. If the decision is not available, include in the notice of cross-appeal a statement indicating such unavailability.

[14] If ordering the preparation of transcript for the cross-appeal, either designate transcript or state that designation is set forth on attached Exhibit A.

[15] If not ordering the preparation of transcript, state that Statement in Lieu of Transcript in accordance with Official Form D is attached hereto.

[16] Name, address, telephone number and Delaware Bar ID number of the cross-appellant's counsel.

Form 16:03

Designation of Transcript
Rule 9(e); Official Form C

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____**[1]**_____, ___**[2]**___ Below, Appellant, v. ____**[3]**_____, ___**[4]**___ Below, Appellee.	No. ___**[5]**___

DIRECTIONS TO COURT REPORTER OF PROCEEDINGS
BELOW TO BE TRANSCRIBED PURSUANT TO RULE 9(e)

To: ___**[6]**___

___**[7]**___ does hereby direct the proceedings in ___**[8]**___ v. _____, Case No. ___**[9]**___, in the ___**[10]**___ of the State of Delaware, in and for ___**[11]**___ County, to be transcribed as set forth below:

(a) ___**[12]**___

I hereby certify that transcription of the above-listed portions of the proceedings below is essential to the ___**[13]**___ of this appeal and that the cost thereof will be paid promptly.

Dated:_____ _____
___**[14]**___

Insert:

[1] Appellant's name.

[2] Appellant's lower court status.

[3] Appellee's name.

[4] Appellee's lower court status.

[5] Supreme Court appeal number, if known.

[6] Name and address of the court reporter.

[7] Party ordering transcript.

[8] Lower court case caption.

[9] Lower court case number.

[10] Name of court below.

[11] County in which the lower court sits.

[12] Proceedings, or part thereof (identified by name, date and time), that need to be transcribed for the appeal.

[13] "Prosecution" or "defense" of the appeal, as appropriate.

[14] Name, address, telephone number and Delaware Bar ID number of the attorney for the party ordering transcript.

FORM 16:04

Designation of No Transcript
Rule 9(e); Official Form

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____**[1]**_____, ___**[2]**___ Below, Appellant, v. ____**[3]**_____, ___**[4]**___ Below, Appellee.	No. ___**[5]**___

STATEMENT PURSUANT TO RULE 9(e) IN LIEU OF
ORDERING TRANSCRIPT OF PROCEEDINGS BELOW

To: ___**[6]**___

___**[7]**___ hereby states that transcription of the proceedings below [___**[8]**___] need not be ordered because ___**[9]**___.

Dated:_____ _____

___**[10]**___

Insert:

[1] Appellant's name.

[2] Appellant's lower court status.

[3] Appellee's name.

[4] Appellee's lower court status.

[5] Supreme Court appeal number, if known.

[6] Name and address of the court reporter.

[7] Party not ordering transcript.

[8] If applicable, add "other than those portions previously ordered by [appellant] [appellee]."

[9] Reason why transcript does not need to be ordered.

[10] Name, address, telephone number and Delaware Bar ID number of the attorney for the party not ordering transcript.

FORM 16:05

Notice of Appearance
Rule 12(a); Official Form E

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____**[1]**_____, ___**[2]**___ Below, Appellant, v. ____**[3]**_____, ___**[4]**___ Below, Appellee.	No. ___**[5]**___

NOTICE OF APPEARANCE

To: Clerk of the Supreme Court
P. O. Box 476
Dover, DE 19903

PLEASE enter my appearance on behalf of ___**[6]**___ in the above-captioned appeal.

Dated:_____ _____

___**[7]**___

Insert:

[1] Appellant's name.

[2] Appellant's lower court status.

[3] Appellee's name.

[4] Appellee's lower court status.

[5] Supreme Court appeal number.

[6] Party's name.

[7] Name, address, telephone number and Delaware Bar ID number of the attorney entering an appearance.

FORM 16:06

Motion and Order for Extension of Time to File Brief
Rule 15(b); Official Form F

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____**[1]**_____, ___**[2]**___ Below, Appellant, v. ____**[3]**_____, ___**[4]**___ Below, Appellee.	No. ___**[5]**___

MOTION UNDER RULE 15(b)

___**[6]**___ moves the Court, pursuant to Rule 15(b), for an order extending the time for service and filing of the ___**[7]**___ brief and appendix under Rule 15(a) from ___**[8]**___ to ___**[9]**___, on the grounds that ___**[10]**___. This is the ___**[11]**___ request for an extension of time to file the ___**[12]**___ brief. Opposing counsel ___**[13]**___ to the extension of time.

Dated:_____ _____

___**[14]**___

O R D E R

So ordered this _____ day of _____, 19____.

_____

Justice

Insert:

[1] Appellant's name.

[2] Appellant's lower court status.

[3] Appellee's name.

[4] Appellee's lower court status.

[5] Supreme Court appeal number.

[6] "Appellant" or "Appellee," as appropriate.

[7] "Opening," "answering" or "reply," as appropriate.

[8] Beginning date of extension period.

[9] Ending date of extension period making sure not to exceed 75 days, total, for all extensions for any given brief.

[10] Reason(s) why an extension of time is necessary.

[11] Indicate whether this is the first, second or third request for an extension of time.

[12] "Opening," "answering" or "reply," as appropriate.

[13] Indicate whether the opposing party objects or consents to the extension of time.

[14] Name, address, telephone number and Delaware Bar ID number of the moving party's attorney.

FORM 16:07

Motion to Affirm
Rule 25(a); Official Form G

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____**[1]**_____, ___**[2]**___ Below, Appellant, v. ____**[3]**_____, ___**[4]**___ Below, Appellee.	No. ___**[5]**___

MOTION TO AFFIRM

Appellee hereby moves the Court pursuant to Rule 25(a) to affirm the judgment below on the grounds that it is manifest on the face of appellant's brief that the appeal is without merit for the following reason(s):

1. ___**[6]**___

Dated:_____ _____

___**[7]**___

Insert:

[1] Appellant's name.

[2] Appellant's lower court status.

[3] Appellee's name.

[4] Appellee's lower court status.

[5] Supreme Court appeal number.

[6] Applicable reason or reasons under Rule 25(a) with citation of authorities and record references to evidence relied upon. Set forth in separate numbered paragraphs.

[7] Name, address, telephone number and Delaware Bar ID number of appellee's attorney.

FORM 16:08

Motion for Leave to Withdraw as Counsel
Rule 26(d); Official Form H

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____**[1]**_____, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee.	No. ___**[2]**___

MOTION FOR LEAVE TO WITHDRAW AS COUNSEL

___**[3]**___, attorney for defendant, hereby moves pursuant to Rule 26(d) that the Honorable Court grant counsel leave to withdraw and respectfully represents:

1. Notice of appeal was filed on ___**[4]**___.

2. Counsel has provided the Office of the Public Defender with:

   a. A copy of the Notice of Appeal;

   b. A written summary of the facts and circumstances relevant to the issues on appeal;

   c. A written statement of the reversible errors of law committed during trial or during the pre-trial stages;

d. A copy of the written request to the Superior Court reporter setting forth which portions of the transcript have been designated and ordered for appeal purposes, pursuant to Delaware Supreme Court Rule 9(e).

3. **___[5]___** herewith enters an appearance as attorney-on-appeal for defendant.

_____
___[6]___

I do hereby enter my appearance for appellant.

_____
___[7]___

SO ORDERED this _____ day of _____, 19____.

_____
Justice

Insert:

[1] Appellant's name.

[2] Supreme Court appeal number.

[3] Withdrawing attorney's name.

[4] Date notice of appeal was filed.

[5] Substituting attorney's name.

[6] Withdrawing attorney's name, address, telephone number and Delaware Bar ID number.

[7] Substituting attorney's name, address, telephone number and Delaware Bar ID number.

Form 16:09

Application by the State for Leave to Appeal
Rule 27(b); Official Form

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE, Plaintiff Below, Appellant, v. **____[1]_____**, Defendant Below, Appellee.	No. **___[2]___**

APPLICATION BY THE STATE FOR LEAVE TO APPEAL

The State hereby moves the Court for leave to appeal in a criminal case pursuant to 10 Del. C. § 9903 and Rule 27(b) of the Rules of this Court, and in support thereof represents:

1. A decision **___[3]___** was entered on **___[4]____** and final judgment was entered on **___[5]___** in a case captioned:

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR _____**[6]**_____ COUNTY

STATE OF DELAWARE,	)
	)
Plaintiff,	)
	) Cr. A. No. ___**[8]**___
v.	)
	)
_____**[7]**_____,	)
	)
Defendant.	)

2. The substantial question of law or procedure the State seeks to have reviewed is ___**[9]**___.

Dated:_____ _____
___**[10]**___

Insert:

[1] Defendant's name.

[2] Leave blank. Supreme Court Clerk's Office will assign an appeal number.

[3] Nature of decision sought to be reviewed.

[4] Date decision sought to be reviewed was entered.

[5] Date final judgment was entered.

[6] County in which Superior Court sits.

[7] Defendant's name.

[8] Superior Court criminal action number.

[9] Question of law or procedure the State seeks to have reviewed.

[10] Name, address, telephone number and Delaware Bar ID number of State's attorney.

FORM 16:10

Supersedeas Bond
Rule 32(b); Official Form J

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

_____**[3]**_____,	)	
	)	
Plaintiff,	)	Civil Action No. ___**[4]**___
	)	
v.	)	
	)	
	)	
_____**[5]**_____**,**	)	
	)	
Defendant.	)	

SUPERSEDEAS BOND

KNOW ALL BY THESE PRESENTS, that ___**[6]**___, a corporation created, organized and existing under and by virtue of the laws of the State of ___**[7]**___, having its principal place f business at ___**[8]**___, and duly authorized to execute surety bonds in the amount and subject to conditions herein provided, is held and firmly bound as surety unto ___**[9]**___ in the full and just sum of ___**[10]**___ Dollars ($_____), to be paid to the said ___**[11]**___, its administrators, executors, successors, attorneys or assigns, to which payment well and truly to be made it binds itself, its successors and assigns firmly by these presents.

Signed and sealed with the corporate seal of said surety this _____ day of _____, 19____.

WHEREAS, in the ___**[12]**___ Court of the State of Delaware, in and for ___**[13]**___ County, between ___**[14]**___, as plaintiff[s], and ___**[15]**___, as defendant[s], Civil Action No.

___**[16]**___, judgment was entered in favor of said ___**[17]**___ and against said ___**[18]**___, for ___**[19]**___, from which judgment said ___**[20]**___ has appealed to the Supreme Court of the State of Delaware;

NOW, THEREFORE, the condition of this obligation is such that if the said ___**[21]**___ shall prosecute its appeal to effect and shall satisfy the judgment in full together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed or shall satisfy in full such modification of the judgment and such costs, interest and damages as the Supreme Court or ___**[22]**___, or both, may adjudge and award, then this obligation shall be void; otherwise, it shall remain in full force and effect.

___**[23]**___ hereby submits itself to the jurisdiction of the ___**[24]**___ and irrevocably appoints ___**[25]**___ as its agent upon whom any notice of papers affecting its liability on this bond may be served, and agrees that its liability on this bond may be enforced on motion without the necessity of an independent action and that such motion, with such notice thereof as that court may prescribe, may be served on ___**[26]**___, who shall forthwith mail copies to ___**[27]**___ at ___**[28]**___.

_____
Attorney-in-Fact

___**[29]**___ is hereby approved, pursuant to ___**[30]**___ Rule 62 and Supreme Court Rule 32, as surety on this bond, and the form and sufficiency of the bond are also hereby approved.

Dated:_____ _____
Judge

Insert:

[1] Lower court.

[2] County of lower court.

[3] Plaintiff's name.

[4] Lower court civil action number.

[5] Defendant's name.

[6] Name of surety.

[7] State in which surety was created.

[8] Surety's principal place of business.

[9] Obligee's name.

[10] Amount of bond.

[11] Obligee's name.

[12] Lower court.

[13] County of lower court.

[14] Plaintiff's name.

[15] Defendant's name.

[16] Lower court civil action number.

[17] Winning party -- "Plaintiff" or "Defendant" -- as appropriate.

[18] Losing party -- "Plaintiff" or "Defendant" -- as appropriate.

[19] Amount of judgment.

[20] Appealing party -- "Plaintiff" or "Defendant" -- as appropriate.

[21] Appealing party -- "Plaintiff" or "Defendant" -- as appropriate.

[22] Lower court.

[23] Name of surety.

[24] Lower court.

[25] Corporate agent.

[26] Corporate agent.

[27] Name of surety.

[28] Surety's address.

[29] Name of surety.

[30] Lower court.

FORM 16:11

Certification of Questions of Law
Rule 41; Official Form K

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

OR

IN THE ___**[3]**___ COURT OF THE STATE OF ___**[4]**___

OR

IN THE SUPREME COURT OF THE UNITED STATES

OR

IN THE UNITED STATES COURT OF APPEAL
FOR THE ___**[5]**___ CIRCUIT

OR

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ___**[6]**___

___**[7]**_____,	)	
	)	
Plaintiff,	)	No. ___**[9]**___
	)	
v.	)	
	)	
___**[8]**_____,	)	
	)	
Defendant.	)	

CERTIFICATION OF QUESTIONS OF LAW

This _____ day of _____, 19____, the Court having found that:

(1) The nature and state of the proceedings are: **___[10]___**.

(2) The following facts are undisputed: **___[11]___**.

(3) The questions of law set forth below should be certified to the Supreme Court of the State of Delaware for the following reasons: **___[12]___**.

(4) The important and urgent reasons for an immediate determination by the Supreme Court of the question certified are **___[13]___**.

(5) If certification is accepted, it is recommended that **___[14]___** be appellant for purposes of the caption on any filings in the Supreme Court of Delaware and that **___[15]___** be appellee for purposes of the caption on any filing in the Supreme Court of Delaware with respect to the questions certified.

NOW, THEREFORE, IT IS ORDERED that the following questions of law are certified to the Supreme Court of the State of Delaware for disposition in accordance with Rule 41 of the Supreme Court: **___[16]___**.

_____

Judge

___[17]___

Insert:

[1] Lower court.

[2] County in which lower court sits.

[3] Highest appellate court.

[4] State.

[5] Circuit.

[6] State.

[7] Plaintiff's name.

[8] Defendant's name.

[9] Case number.

[10] Nature and state of the proceedings in the lower court.

[11] Undisputed facts.

[12] Questions of law.

[13] Reasons for immediate determination by Supreme Court.

[14] Party who should proceed as the appellant.

[15] Party who should proceed as the appellee.

[16] Questions of law certified to the Supreme Court.

[17] List of counsel for the parties.

FORM 16:12

Order Granting Leave to Appeal from Interlocutory Order
Rule 42; Form L

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

____**[3]**_____, Plaintiff, v. ____**[4]**_____, Defendant.	Civil Action No. ___**[5]**___

ORDER GRANTING LEAVE TO APPEAL FROM
INTERLOCUTORY ORDER

This _____ day of _____, 19__, the ___**[6]**___ having made application pursuant to 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 determines substantial issues and establishes legal rights and that the following criteria of Supreme Court Rule 42(b) 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.

_____
Judge

Insert:

[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).

[9] Date of interlocutory order.

FORM 16:13

Notice of Appeal from Interlocutory Order
Rule 42(d)(ii); Official Form M

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____**[1]**_____, ___**[2]**___ Below, Appellant, v. ____**[3]**_____, ___**[4]**___ Below, Appellee.	No. ___**[5]**___

NOTICE OF APPEAL FROM INTERLOCUTORY ORDER

To: ___**[6]**___

PLEASE TAKE NOTICE that _____ hereby petitions this Court to accept an appeal from an interlocutory order of the ___**[7]**___ Court and represents as follows:

(1) The interlocutory order was entered on ___**[8]**___;

(2) Application for certification was filed in the trial court on ___**[9]**___;

(3) Response by appellee was filed in the trial court on ___**[10]**___:

(4) The action of the trial court with respect to such application was as follows:

___**[11]**___

The name and address of the attorney for appellee is as follows: _____

The party(ies) against whom the appeal is taken is (are) _____.

Dated:_____ _____

___[12]___

Attorney for _____

Insert:

[1] Appellant's name.

[2] Appellant's status in the lower court.

[3] Appellee's name.

[4] Appellee's status in the lower court.

[5] Leave blank. Supreme Court Clerk's Office will assign an appeal number.

[6] Name and address of counsel for the appellee.

[7] Trial court.

[8] Date of interlocutory order. Attach a copy of the order.

[9] Date that application for certification was filed in the trial court.

[10] Date that response to the application for certification was filed by the appellee.

[11] Action by trial court, if any, on the application for certification.

[12] Name, address, telephone number and Delaware Bar ID number of appellant's counsel.

FORM 16:13

Supplementary Notice of Appeal from Interlocutory Order
Rule 42(d)(iii); Official Form M

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____**[1]**_____, ___**[2]**___ Below, Appellant, v. ____**[3]**_____, ___**[4]**___ Below, Appellee.	No. ___**[5]**___

SUPPLEMENTARY NOTICE OF APPEAL

PLEASE TAKE NOTICE that _____ hereby supplements the notice of appeal filed herein on ___**[6]**___, and represents that since such date the following action has been taken in the trial court: ___**[7]**___

Date:_____ _____

___**[8]**___

Insert:

[1] Appellant's name.

[2] Appellant's status in the lower court.

[3] Appellee's name.

[4] Appellee's status in the lower court.

[5] Supreme Court appeal number.

[6] Date that notice of interlocutory appeal was filed.

[7] Action taken by the trial court on the application for certification.

[8] Name, address, telephone number and Delaware Bar ID number of the appellant's counsel.

FORM 16:14

Complaint in Proceedings for Extraordinary Writ
Rule 43; Official Form N

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF THE PETITION OF ___**[1]**___ FOR A WRIT OF ___**[2]**___.	No. ___**[3]**___

COMPLAINT IN PROCEEDINGS FOR EXTRAORDINARY WRIT

Complainant prays that a writ of _____ be issued by this Court directed to ___**[4]**___ to review ___**[5]**___. In support of this complaint the following is shown:

(1) The caption of the matter below is ___**[6]**___ v. _____ , ___**[7]**___ Action No. ___**[8]**___, in the ___**[9]**___ of the State of Delaware, in and for ___**[10]**___ County;

(2) The nature of the matter sought to be reviewed is as follows: ___**[11]**___;

(3) The questions presented are: ___**[12]**___;

(4) The relevant facts necessary to an understanding of the issues presented are: ___**[13]**___;

(5) The reasons for granting the writ are: ___**[14]**___.

WHEREFORE, complainant prays that this Court issue a writ of _____ affording complainant the following relief: ___**[15]**___.

Dated: _____ _____

___**[16]**___
Attorney for Complainant

Insert:

[1] Complainant's name.

[2] Type of petition, e.g., mandamus, certiorari, prohibition.

[3] Leave blank. Supreme Court Clerk's Office will assign a case number.

[4] Judge, judges, court or entity to which the writ is directed.

[5] Action, order or matter sought to be reviewed.

[6] Caption of matter below.

[7] "Civil" or "Criminal," as appropriate.

[8] Lower court case number.

[9] Name of lower court.

[10] County in which lower court sits.

[11] Description of the nature of the matter below sought to be reviewed. Attach copies of any order or opinion which may be essential to an understanding of the matter set forth in the petition.

[12] Questions presented.

[13] Concise statement of facts.

[14] Reasons for granting the writ, including with particularity a statement of how the judge, judges, court or entity below is said to have improperly exercised jurisdiction; why the legal right sought to be enforced is clearly established and no other legal remedy available; or why the review should be granted, as the case may be.

[15] Description of the relief sought.

[16] Name, address, telephone number and Delaware Bar ID number of the complainant's attorney.

FORM 16:15

Motion for Admission Pro Hac Vice
Rule 71; Official Form O

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____[1]_____, **___[2]___** Below, Appellant, v. **____[3]_____**, **___[4]___** Below, Appellee.	No. **___[5]___**

MOTION FOR ADMISSION PRO HAC VICE

___[6]___, a member of the Delaware Supreme Court bar, pursuant to Rule 71, moves the admission pro hac vice of **___[7]___** to represent **___[8]___** in this action. Movant certifies that Movant finds the applicant to be a reputable and competent attorney, and Movant is in a position to recommend the applicant's admission. The applicant is admitted, practicing, and in good standing in **___[9]___**.

_____
___[10]___

___[11]___ hereby certifies:

1. That applicant shall be bound by the Delaware Lawyers' Rules of Professional Conduct.

2. That applicant and all attorneys of the applicant's firm who directly or indirectly provide services to the party or cause at issue shall be bound by all Rules of the Court.

3. That applicant has reviewed the Statement of Principles of Lawyer Conduct.

4. That applicant consents to the appointment of the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions, including disciplinary actions, that may arise out of the practice of law under this Rule and any activities related thereto.

5. The applicant has appeared in ___**[12]**___ actions in courts of record of Delaware in the preceding twelve (12) months.

6. Applicant does not maintain an office in the State of Delaware except ___**[13]**___.

7. That applicant is a member in good standing of the bar of the State of ___**[14]**___.

8. Applicant has not been disbarred or suspended and is not the object of any pending disciplinary proceedings in any jurisdiction where the applicant has been admitted generally, pro hac vice, or any other way, except ___**[15]**___.

9. Applicant is admitted for the practice of law in the following states or other jurisdictions: ___**[16]**___.

10. Payment for the pro hac vice application assessment in the amount of One Hundred Dollars ($100.00) is attached for deposit in the Delaware Supreme Court registration fund to be distributed as the Supreme Court directs pursuant to Rule 71.

Dated: _____ _____

Applicant's Signature

ORDER

The foregoing application for admission to practice in this action pro hac vice is hereby granted. IT IS SO ORDERED this____day of _____, 19____.

_____

Justice

Insert:

[1] Appellant's name.

[2] Appellant's lower court status.

[3] Appellee's name.

[4] Appellee's lower court status.

[5] Supreme Court appeal number.

[6] Moving attorney's name.

[7] Applying pro hac vice attorney's name, firm, office address and office telephone number.

[8] Moving party's name.

[9] Jurisdiction in which applying pro hac vice attorney is admitted to practice law.

[10] Moving attorney's name, address, telephone number and Delaware Bar ID number.

[11] Applying pro hac vice attorney's name.

[12] Number of court actions in which applicant has appeared in Delaware in the preceding 12 months.

[13] Applicant's Delaware office address, if any.

[14] State(s) in which applicant is admitted to practice law.

[15] Instances, if any, in which applicant has been disbarred, suspended or is the object of a pending disciplinary proceeding.

[16] Other jurisdictions in which applicant is admitted to practice law.

FORM 16:16

Disclosure of Corporate Affiliations and Financial Interest
Rule 7; Form P

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____[1]_____, **___[2]___** Below, Appellant, v. **____[3]_____**, **___[4]___** Below, Appellee.	No. **___[5]___**

DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

Pursuant to Supreme Court Rule 7(g), **___[6]___** makes the following disclosure:

1. List any entity not named in the caption which is an active participant in the underlying transaction, involved in this proceeding, e.g., financial advisors, lending institutions, equity investors.

2. Is the party identified above a subsidiary or affiliate of a publicly owned corporation?

( ) Yes ( ) No

If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

3. Is there a publicly owned corporation, not a party to the appeal, that has a substantial financial interest in the outcome?

( ) Yes ( ) No

If the answer is YES, list below the identity of such corporation and the nature of the financial interest.

_____ _____

Date Signature of Counsel

INSTRUCTIONS FOR
DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

The disclosure statement must be completed and filed with the Clerk, Delaware Supreme Court, The Green, P.O. Box 476, Dover, Delaware, 19903, within ten (10) days of the notice of docketing the appeal, or concurrently by a party with the filing of a motion or other document seeking to expedite the proceedings and within two (2) days of service of such a document by all other parties.

The names of all reporting parties shall be included on the form.

Attach separate page or pages if additional space is needed.

An original and five (5) copies of this form are to be filed.

Each party shall have a continuing duty to file an amended form within 24 hours of any event affecting that party, which changes or renders incomplete any information previously disclosed.

Insert:

[1] Appellant's name.

[2] Appellant's lower court status.

[3] Appellee's name.

[4] Appellee's lower court status.

[5] Supreme Court appeal number.

[6] Name of party.

FORM 16:17

Motion to Proceed In Forma Pauperis
Rule 20(h)

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____**[1]**_____, ___**[2]**___ Below, Appellant, v. ____**[3]**_____, ___**[4]**___ Below, Appellee.	No. ___**[5]**___

MOTION TO PROCEED IN FORMA PAUPERIS

1. Pursuant to Supreme Court Rules 20, 26, and 30, I, ___**[6]**___, declare that I am the appellant in the above-entitled case; that because of my poverty I am unable to make prepayment of fees or costs or to give security therefor; and that I believe I am entitled to relief.

2. I appeal from an order of the ___**[7]**___ Court, entered on the date of ___**[8]**___ in the case of ___**[9]**___ v. _____, No.___**[10]**___.

3. Circle either A or B and complete, as appropriate:

A I am presently employed. The name and address of my employer are ___**[11]**___. The total monthly amount of my salary or wages is ___**[12]**___.

B I am not employed. My last date of employment was

___[13]___. The total amount I last received as salary or wages was **___[14]___**.

4. Circle "yes" or "no." I have received within the last 12 months money from:

a business, profession, or self-employment	yes	no
rent payment, interest, or dividends	yes	no
pensions, annuities, or life insurance payments	yes	no
gifts or inheritances	yes	no
any other source	yes	no

If answer is “yes” to any portion of the above statement, please describe each source of income and the total amount received within the last 12 months: **___[15]___**.

5. I have $**___[16]___** in cash and $**___[17]___** in checking or savings accounts (including funds in prison accounts).

6. I own:

real estate	yes	no
bonds or stocks	yes	no
notes	yes	no
cars	yes	no
other valuable property (except ordinary household furnishings and clothes)	yes	no

If answer is “yes” to any portion of the above statement, please describe the item and give its approximate value: **___[18]___**.

7. Circle either A or B and complete, as appropriate:

A I have previously moved to proceed in forma pauperis in the Supreme Court of Delaware. The case number was **___[19]___**. The request was **___[20]___**.

B I have not previously moved to proceed in forma pauperis in the Supreme Court of Delaware.

WHEREFORE, having shown just cause for relief, appellant moves for leave to proceed in forma pauperis.

_____
Appellant

SWORN AND SUBSCRIBED before me this _____ day of _____, 19____.

_____
Notary Public

My commission expires _____, 19____.

I hereby certify that the appellant named herein has the sum of $___**[21]**___ on account to the appellant's credit at the institution where the appellant is confined. I further certify that the appellant has the following securities to the appellant's credit according to the institution's records: ___**[22]**___.

_____
Authorized Officer of Institution

O R D E R

This _____day of _____, 19____, upon consideration of appellant's motion for leave to proceed in forma pauperis, it is hereby ORDERED that appellant be GRANTED/DENIED leave to proceed in forma pauperis, limited only to waiver of the docketing deposit required by Supreme Court Rule 20(a).

BY THE COURT:

_____
Justice

Insert:

[1] Appellant's name.

[2] Appellant's lower court status.

[3] Appellee's name.

[4] Appellee's lower court status.

[5] Supreme Court appeal number, if known.

[6] Appellant's name.

[7] Lower court.

[8] Date of decision on appeal.

[9] Lower court case caption.

[10] Lower court case number.

[11] Name and address of employer.

[12] Total monthly amount of salary or wages.

[13] Date last employed.

[14] Total amount of salary or wages last received.

[15] If answer is "yes" to question 4, describe each source of income and the total amount received within the last 12 months.

[16] Total amount of cash on hand.

[17] Total amount of funds available in checking or savings accounts, including funds in prison accounts.

[18] If answer is "yes" to question 6, describe each item and give its approximate value.

[19] Case number(s) of any prior Supreme Court appeal in which a request was made to proceed in forma pauperis.

[20] Indicate whether the prior request(s) to proceed in forma pauperis was granted or denied.
[21] Amount on account at institution.

[22] Securities to credit according to institution's records.

FORM 16:18

Motion and Order to Exceed Page Limitation for Briefs
Rule 14(d)

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____**[1]**_____, ___**[2]**___ Below, Appellant, v. ____**[3]**_____, ___**[4]**___ Below, Appellee.	No. ___**[5]**___

MOTION TO EXCEED PAGE LIMITATION

Pursuant to Rule 14(d), ___**[6]**___ requests permission to file the ___**[7]**___ brief exceeding the prescribed page limits by ___**[8]**___ pages, on the grounds that ___**[9]**___.

Opposing counsel ___**[10]**___ to the additional pages.

Dated:_____ _____
___**[11]**___

O R D E R

SO ORDERED this _____ day of _____, 19____.

_____
Justice

Insert:

[1] Appellant's name.

[2] Appellant's lower court status.

[3] Appellee's name.

[4] Appellee's lower court status.

[5] Supreme Court appeal number.

[6] "Appellant" or "Appellee," as appropriate.

[7] "Opening," "answering," or "reply," as appropriate.

[8] Requested number of pages in excess of prescribed page limits.

[9] Reason(s) why extension of page limit is necessary.

[10] "Objects" or "consents," as appropriate.

[11] Moving counsel's name, address, telephone number and Delaware Bar ID number.

FORM 16:19

Motion for Leave to File Brief as Amicus Curiae
Rule 28

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____**[1]**_____, ___**[2]**___ Below, Appellant, v. ____**[3]**_____, ___**[4]**___ Below, Appellee.	No. ___**[5]**___

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 28, ___**[6]**___ moves the Court for leave to file a brief as amicus curiae in support of ___**[7]**___ position in this appeal.

The movant respectfully states that movant has read the briefs of the parties as filed and can present additional, substantive argument supporting the position of the ___**[8]**___ with appropriate citation of authorities. ___**[9]**___.

Dated: _____ _____
___**[10]**___

Insert:

[1] Appellant's name.

[2] Appellant's lower court status.

[3] Appellee's name.

[4] Appellee's lower court status.

[5] Supreme Court appeal number.

[6] Movant's name.

[7] "Appellant's" or "Appellee's," as appropriate.

[8] "Appellant" or "Appellee," as appropriate.

[9] Include a statement of the movant's relationship to any of the parties, interest in the issues and a general statement of the position movant intends to argue.

[10] Moving counsel's name, address, telephone number and Delaware Bar ID number.

FORM 16:20

Motion for Stay of Proceedings
Rule 30(e)

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____**[1]**_____, ___**[2]**___ Below, Appellant, v. ____**[3]**_____, ___**[4]**___ Below, Appellee.	No. ___**[5]**___

MOTION FOR STAY OF PROCEEDINGS

Pursuant to Rule 30(a) and (e), ___**[6]**___ moves for a stay of the proceedings before this Court pending ___**[7]**___.

Dated: _____ _____
___**[8]**___

Insert:

[1] Appellant's name.

[2] Appellant's lower court status.

[3] Appellee's name.

[4] Appellee's lower court status.

[5] Supreme Court appeal number.

[6] "Appellant" or "appellee," as appropriate.

[7] Explain with particularity why the appeal should not proceed.

[8] Moving counsel's name, address, telephone number and Delaware Bar ID number.

FORM 16:21

Motion for Certificate of Reasonable Doubt and Application for Bond
Rule 32(b), (d)

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____**[1]**_____, ___**[2]**___ Below, Appellant, v. ____**[3]**_____, ___**[4]**___ Below, Appellee.	No. ___**[5]**___

MOTION FOR CERTIFICATE OF REASONABLE DOUBT
AND APPLICATION FOR BOND

Pursuant to 11 Del. C. § 4502 and Rule 32(b) and (d), the defendant, ___**[6]**___, moves for a certificate of reasonable doubt, stay of execution of the sentence, and release on bond. In support of this motion, counsel states the following:

1. On ___**[7]**___, the defendant was sentenced to ___**[8]**___, following the defendant's conviction in the Superior Court for ___**[9]**___, on ___**[10]**___.

2. The defendant applied to the Superior Court for a certificate of reasonable doubt, stay of execution and release on bond on ___**[11]**___. On ___**[12]**___, this application was denied.

3. A notice of appeal from the conviction and sentence was filed in this Court on ___**[13]**___.

4. ___**[14]**___

5. The defendant submits that the following constitute reasonable grounds to believe that there is error in the record ___**[15]**___ [and/or] ___**[16]**___:

___**[17]**___

Dated: _____ _____
___**[18]**___

Insert:

[1] Appellant's name.

[2] Appellant's lower court status.

[3] Appellee's name.

[4] Appellee's lower court status.

[5] Supreme Court appeal number.

[6] Defendant's name.

[7] Date defendant was sentenced.

[8] Defendant's sentence.

[9] Crimes of which defendant was convicted.

[10] Date defendant was convicted.

[11] Date defendant applied for a certificate of reasonable doubt, stay of execution and release on bond in the Superior Court.

[12] Date Superior Court application was denied.

[13] Date notice of appeal was filed.

[14] State whether the defendant had been released on bond during trial. If so, describe the conditions of the bond, give the names of the sureties and state any security posted.

[15] "that presents an important question of substantive law that should be decided by this Court."

[16] "that might require reversal of the judgment below."

[17] List reasons.

[18] Moving counsel's name, address, telephone number and Delaware Bar ID number.

FORM 16:22

Motion and Order for Extended Oral Argument
Rule 16(f)

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____**[1]**_____, ___**[2]**___ Below, Appellant, v. ____**[3]**_____, ___**[4]**___ Below, Appellee.	No. ___**[5]**___

MOTION FOR EXTENDED ORAL ARGUMENT

Pursuant to Rule 16(f), ___**[6]**___ moves that an additional ___**[7]**___ minutes be given to it for oral argument in this appeal because ___**[8]**___.

Dated: _____ _____
___**[9]**___

O R D E R

So ordered this _____ day of _____, 19____.

_____
Justice

Insert:

[1] Appellant's name.

[2] Appellant's lower court status.

[3] Appellee's name.

[4] Appellee's lower court status.

[5] Supreme Court appeal number.

[6] "Appellant" or "appellee," as appropriate.

[7] Requested number of additional minutes.

[8] Explain with particularity why additional time is needed for oral argument.

[9] Moving counsel's name, address, telephone number and Delaware Bar ID number.

FORM 16:23

Motion for Expedited Appeal
Rule 25(d)

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____**[1]**_____, ___**[2]**___ Below, Appellant, v. ____**[3]**_____, ___**[4]**___ Below, Appellee.	No. ___**[5]**___

MOTION FOR EXPEDITED APPEAL

Pursuant to Rule 25(d), ___**[6]**___ moves this Court for an order expediting the appeal procedures in this case for the following reasons: ___**[7]**___. Opposing counsel ___**[8]**___ to the request for expedition.

___**[9]**___ respectfully suggests the following schedule for the filing of briefs:

Appellant's Opening Brief and Appendix due ___**[10]**___.

Appellee's Answering Brief and Appendix due ___**[11]**___.

Appellant's Reply Brief and Appendix, if any, due ___**[12]**___.

Dated: _____ _____
___**[13]**___

Insert:

[1] Appellant's name.

[2] Appellant's lower court status.

[3] Appellee's name.

[4] Appellee's lower court status.

[5] Supreme Court appeal number.

[6] "Appellant" or "appellee," as appropriate.

[7] Give particularized reasons why expedition of the appeal is requested.

[8] "Objects" or "consents," as appropriate.

[9] "Appellant" or "appellee," as appropriate.

[10] Suggested expedited date opening brief and appendix are due.

[11] Suggested expedited date answering brief and appendix are due.

[12] Suggested expedited date reply brief and appendix are due.

[13] Name, address, telephone number and Delaware Bar ID number of the moving counsel.

FORM 16:24

Motion to Dismiss
Rules 29(b) and 30(d)

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____[1]_____, **___[2]___** Below, Appellant, v. **____[3]_____**, **___[4]___** Below, Appellee.	No. **___[5]___**

MOTION TO DISMISS

Pursuant to Rules 29(b) and 30(d), appellee moves to dismiss the above-captioned appeal for the following reasons:

___[6]___

Dated: _____ _____
___[7]___

Insert:

[1] Appellant's name.

[2] Appellant's lower court status.

[3] Appellee's name.

[4] Appellee's lower court status.

[5] Supreme Court appeal number.

[6] State with particularity why the appeal should be dismissed.

[7] Moving counsel's name, address, telephone number and Delaware Bar ID number.

FORM 16:25

Answer to Motion to Dismiss
Rules 29(b) and 30(c)

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____[1]_____, **___[2]___** Below, Appellant, v. **____[3]_____**, **___[4]___** Below, Appellee.	No. **___[5]___**

ANSWER TO MOTION TO DISMISS

Pursuant to Rules 29(b) and 30(c), appellant opposes the motion to dismiss the appeal for the following reasons:

___[6]___

Dated: _____ _____
___[7]___

Insert:

[1] Appellant's name.

[2] Appellant's lower court status.

[3] Appellee's name.

[4] Appellee's lower court status.

[5] Supreme Court appeal number.

[6] State with particularity why the appeal should not be dismissed.

[7] Name, address, telephone number and Delaware Bar ID number of the appellant's counsel.

FORM 16:26

Reply to Answer to Motion to Dismiss
Rules 29(b) and 30(c)

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____**[1]**_____, ___**[2]**___ Below, Appellant, v. ____**[3]**_____, ___**[4]**___ Below, Appellee.	No. ___**[5]**___

REPLY TO ANSWER TO MOTION TO DISMISS

Pursuant to Rules 29(b) and 30(c), appellee replies to appellant's answer to the motion to dismiss the appeal and reasserts its request that the appeal be dismissed. In further support, appellee states the following:

___**[6]**___

Dated: _____ _____
___**[7]**___

Insert:

[1] Appellant's name.

[2] Appellant's lower court status.

[3] Appellee's name.

[4] Appellee's lower court status.

[5] Supreme Court appeal number.

[6] Reply with particularity to any new position of appellant. Repetition of the arguments made in the motion to dismiss is unnecessary.

[7] Name, address, telephone number and Delaware Bar ID number of appellee's counsel.

FORM 16:27

Motion and Order for Voluntary Dismissal Criminal Appeal
Rule 29(a)

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____**[1]**_____, ___**[2]**___ Below, Appellant, v. ____**[3]**_____, ___**[4]**___ Below, Appellee.	No. ___**[5]**___

MOTION FOR VOLUNTARY DISMISSAL

Pursuant to Rule 29(a), appellant, through counsel on appeal, moves this Court to dismiss the appeal filed in the above-captioned cause. In support of this motion, appellant submits an affidavit, attached to this motion.

Dated: _____ _____
___**[6]**___

O R D E R

SO ORDERED this _____day of _____, 19____.

_____
Justice

Insert:

[1] Appellant's name.

[2] Appellant's lower court status.

[3] Appellee's name.

[4] Appellee's lower court status.

[5] Supreme Court appeal number.

[6] Name, address, telephone number and Delaware Bar ID number of appellant's counsel.

FORM 16:28

Affidavit Requesting Dismissal of Appeal

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____**[1]**_____, ___**[2]**___ Below, Appellant, v. ____**[3]**_____, ___**[4]**___ Below, Appellee.	No. ___**[5]**___

AFFIDAVIT REQUESTING DISMISSAL OF APPEAL

STATE OF DELAWARE)
) SS.
COUNTY OF ___**[6]**___)

___**[7]**___, being first duly sworn upon oath, deposes and says:

I am the appellant in the above-captioned appeal, and I no longer want to appeal the judgment of guilt or sentence entered against me in the Superior Court ___**[8]**___.

I have discussed the dismissal of this appeal fully with my attorney. I understand that by signing this affidavit, I authorize my attorney to file on my behalf a motion to dismiss the appeal. I make this decision knowingly and voluntarily. I further realize that if the appeal is dismissed, I will not later be able to appeal the judgment or sentence entered against me in the Superior Court.

Dated: _____ _____
___**[9]**___

SUBSCRIBED AND SWORN to before me this _____ day of _____, 19___.

_____
Notary Public

My commission expires _____.

Insert:

[1] Appellant's name.

[2] Appellant's lower court status.

[3] Appellee's name.

[4] Appellee's lower court status.

[5] Supreme Court appeal number.

[6] County.

[7] Appellant's name.

[8] Superior Court indictment numbers.

[9] Appellant's name.

FORM 16:29

Stipulation and Order for Voluntary Dismissal
Rule 29(a)

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____**[1]**_____, ___**[2]**___ Below, Appellant, v. ____**[3]**_____, ___**[4]**___ Below, Appellee.	No. ___**[5]**___

STIPULATION OF VOLUNTARY DISMISSAL

Pursuant to Rule 29(a) and the appellee's answering brief having been filed, the undersigned attorneys representing the parties stipulate that the above-captioned appeal be dismissed.

Dated: _____ _____
___**[6]**___

Dated: _____ _____
___**[7]**___

ORDER

Pursuant to the above stipulation, IT IS ORDERED that the appeal be, and it hereby is, DISMISSED.

Date: _____ _____
Clerk of the Supreme Court

Insert:

[1] Appellant's name.

[2] Appellant's lower court status.

[3] Appellee's name.

[4] Appellee's lower court status.

[5] Supreme Court appeal number.

[6] Name, address, telephone number and Delaware Bar ID number of appellant's counsel.

[7] Name, address, telephone number and Delaware Bar ID number of appellee's counsel.

FORM 16:30

Motion to Consolidate Appeals

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____**[1]**_____, ___**[2]**___ Below, Appellant, v. ____**[3]**_____, ___**[4]**___ Below, Appellee.	No. ___**[5]**___

MOTION TO CONSOLIDATE APPEALS

The ___**[6]**___ moves this Court to consolidate Supreme Court appeal numbers ___**[7]**___ for purposes of appeal because the listed causes have the following common questions of law or fact:

___**[8]**___

Opposing counsel ___**[9]**___ to consolidation of the appeals.

Dated: _____ _____
___**[10]**___

ORDER

This _____day of _____, 19___, IT IS ORDERED that Supreme Court Nos. _____ are hereby CONSOLIDATED, and the appeals shall proceed under Supreme Court No. _____.

_____
Justice

Insert:

[1] Appellant's name.

[2] Appellant's lower court status.

[3] Appellee's name.

[4] Appellee's lower court status.

[5] Supreme Court appeal number.

[6] "Appellant" or "appellee," as appropriate.

[7] Supreme Court appeal numbers subject to motion to consolidate.

[8] Particularized reasons why appeals are appropriate for consolidation.

[9] "Objects" or "consents," as appropriate.

[10] Moving counsel's name, address, telephone number and Delaware Bar ID number.

FORM 16:31

Stipulation and Order to Consolidate Appeals

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____[1]_____, **___[2]___** Below, Appellant, v. **____[3]_____**, **___[4]___** Below, Appellee.	No. **___[5]___**

STIPULATION TO CONSOLIDATE APPEALS

The undersigned attorneys representing the parties stipulate that Supreme Court Nos. **___[6]___** be consolidated on appeal because they contain the following common questions of law or fact:

Dated: _____ _____
___[7]___

Dated: _____ _____
___[8]___

ORDER

This _____day of _____, 19___, IT IS ORDERED that Supreme Court Nos. _____ be, and they hereby are CONSOLIDATED, and the appeals shall proceed under Supreme Court No. _____.

_____
Justice

Insert:

[1] Appellant's name.

[2] Appellant's lower court status.

[3] Appellee's name.

[4] Appellee's lower court status.

[5] Supreme Court appeal number.

[6] Supreme Court appeal numbers subject to stipulation to consolidate.

[7] Name, address, telephone number and Delaware Bar ID number of appellant's counsel.

[8] Name, address, telephone number and Delaware Bar ID number of appellee's counsel.

FORM 16:32

Stipulation for Non-Transmission of Record
Rule 9(c)

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____[1]_____, **___[2]___** Below, Appellant, v. **____[3]_____**, **___[4]___** Below, Appellee.	No. **___[5]___**

STIPULATION FOR NON-TRANSMISSION OF
RECORD OR PORTIONS THEREOF

The undersigned stipulate and agree that the following portions of the record in this case may, during the pendency of this appeal, remain physically in the possession of the **___[6]___** for use by the Supreme Court and by counsel to the parties to this appeal: **___[7]___**.

Dated: _____

_____
___[8]___

_____
___[9]___

O R D E R

SO ORDERED this _____ day of _____, 19____.

_____
Justice

Insert:

[1] Appellant's name.

[2] Appellant's lower court status.

[3] Appellee's name.

[4] Appellee's lower court status.

[5] Supreme Court appeal number.

[6] Clerk of the trial court.

[7] Portions of the record that counsel stipulate may remain in the physical custody of the clerk of the trial court.

[8] Name, address, telephone number and Delaware Bar ID number of appellant's counsel.

[9] Name, address, telephone number and Delaware Bar ID number of appellee's counsel.

FORM 16:33

Affidavit Requesting to Proceed Pro Se Pursuant to Rule 26(d)(iii)

IN THE SUPREME COURT OF THE STATE OF DELAWARE

____**[1]**_____, ___**[2]**___ Below, Appellant, v. ____**[3]**_____, ___**[4]**___ Below, Appellee.	No. ___**[5]**___

AFFIDAVIT REQUESTING TO PROCEED
PRO SE PURSUANT TO RULE 26(d)(iii)

STATE OF DELAWARE)
) SS.
COUNTY OF ___**[6]**___)

___**[7]**___, being first duly sworn upon oath, deposes and says:

I am the appellant in the above-captioned direct appeal, and I wish to discharge my attorney and represent myself in this appeal.

I request the Supreme Court to remand my case to the Superior Court for an evidentiary hearing pursuant to Supreme Court Rule 26(d)(iii) to determine whether my request to proceed pro se on appeal is made intelligently and voluntarily.

I acknowledge that the Supreme Court will take no further action on my appeal pending a ruling by the Superior Court.

Dated: _____

_____
NAME

_____
ADDRESS

_____
NOTARY PUBLIC

My commission expires _____.

Insert:

[1] Appellant's name.

[2] Appellant's lower court status.

[3] Appellee's name.

[4] Appellee's lower court status.

[5] Supreme Court appeal number.

[6] County where affidavit notarized.

[7] Appellant's name.

CHAPTER 17. FEDERAL REVIEW OF THE STATE COURT DECISION

TABLE OF CONTENTS

CHAPTER 17. FEDERAL REVIEW OF THE STATE COURT DECISION

Loren C. Meyers[1]

17.01 INTRODUCTION. An unsuccessful litigant in the Delaware courts may be able to seek relief in the federal courts. Redress may be sought through direct review by the United States Supreme Court or through collateral attack in the United States District Court for the District of Delaware. This chapter describes generally the availability of direct review and collateral attack. Particularly with regard to the latter, the reader is cautioned to review and update the authorities presented, in light of the highly complex and ever-changing nature of the law in this subject area.

17.02 UNITED STATES SUPREME COURT REVIEW OF DECISION OF DELAWARE SUPREME COURT.

a. Generally. A complete analysis of practice in the United States Supreme Court is beyond the scope of this handbook. The following discussion is limited to describing the circumstances under which a decision of the Delaware Supreme Court may be subject to review by the United States Supreme Court and the time for initiating the review process. See R. Stern, E. Gressman, S. Shapiro & K. Geller, Supreme Court Practice (7th ed. 1993) (hereinafter "Stern & Gressman") for a detailed explanation of Supreme Court practice.

b. Forms of Review. Prior to September 1988, the United States Supreme Court could review a state court judgment by one of two methods, appeal and certiorari. The main distinction between the two methods was that the litigant had a right to an appeal, but a

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[1]Loren C. Meyers is Chief of the Appeals Division in the Department of Justice and a former Clerk of the Delaware Supreme Court.

petition for certiorari was granted solely within the Court's discretion. In a 1988 reform of the Court's jurisdiction, Congress eliminated the appeal procedure. See Stern & Gressman at 88-90. Review of state court decisions is now discretionary with the Court since the review procedure is limited to petitions for certiorari. Jurisdiction to review state court judgments is given by 28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

c. Finality of State Court Decision. Jurisdiction exists only to review "final judgments or decrees." 28 U.S.C. §1257(a). Federal law does not prescribe what form of state court actions may be considered a judgment or decree for purposes of review. Instead, whether a particular order is a judgment or decree is an issue resolved by state law. See La Crosse Tel. Corp. v. Wisconsin Employment Relations Bd., 336 U.S. 18 (1949). All that is required for federal purposes is that under state law, the state court decision establishes the legal rights and responsibilities of the parties. Id. at 24. No formal order of the state court is needed. See Smith v. Hooey, 393 U.S. 374 (1969); Burns v. Ohio, 360 U.S. 252 (1959); In re Summers, 325 U.S. 561 (1945).

Whether the judgment before the United States Supreme Court, i.e., the judgment of the highest state court in which review could be had, is final is a question of federal law. E.g., Cotton v. Hawaii, 211 U.S. 162 (1908). Neither the recitals on the face of the judgment, Pope v. Atlantic Coast Line R.R., 345 U.S. 379 (1953); Gospel Army v. Los Angeles, 331 U.S. 543 (1947), nor the designation of the judgment under state law, Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69 (1946), are controlling. If necessary, the Court will examine state law to determined the effect of the judgment. See Richfield, 329 U.S. at 73.

Federal review is not affected by the question of finality for purposes of state appellate jurisdiction. United States v. Knott, 298 U.S. 544 (1936). Reference to the state trial court's order may be necessary, however, to determine if the order of the state appellate court is final, i.e., affecting the parties' legal rights and relationships. Thus, if the trial court never entered a judgment, National Life Ins. Co. v. Scheffer, 26 L.Ed. 1110 (1882) (not reported officially) (no judgment on verdict in trial court; writ of error dismissed), or where the initial order did not immediately or irreparably affect the rights of the parties, Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1948), the finality requirement is not met, and the case must be dismissed.

A decision of the Delaware Supreme Court becomes final when the decision that terminates the case is filed. See Del. Supr. Ct. R. 17(b), 18 and 19. But see Jackson v. State, Del. Supr., 654 A.2d 829, 832 (1995) (case is final when mandate issues). If a timely motion for reargument or for rehearing en banc is filed, the decision is final only when the motion is decided. Chicago Great W. R.R. v. Basham, 249 U.S. 164 (1919); U.S. Supr. Ct. R. 13.3 (1995). See also Del. Supr. Ct. R. 4(f), 18. If the motion for reargument or rehearing is granted, the judgment becomes final upon the filing of the decision on reargument. Market Street Ry. v. Railroad

Comm'n, 324 U.S. 548 (1945); U.S. Supr. Ct. R. 13.3 (1995). If there is no timely motion for reargument or rehearing en banc, the judgment is considered final as of the date it was filed. Southern Ry. Co. v. Clift, 260 U.S. 316 (1922). An untimely motion for reargument or rehearing en banc does not affect the finality of the judgment. Conboy v. First Nat'l Bank, 203 U.S. 141 (1906). See Stern & Gressman at 110-11. The availability of federal review, however, does not depend on the filing of a motion for reargument or rehearing en banc, and a party need not wait for the mandate to be issued. Department of Banking v. Pink, 317 U.S. 264 (1942); U.S. Supr. Ct. R. 13.3 (1995); see also Del. Supr. Ct. R. 19(a).

d. Decision by Highest State Court. The final judgment or decree being presented to the United States Supreme Court for review must have been rendered by the highest state court in which a decision could be had. 28 U.S.C. § 1257(a). See Stern & Gressman at 111-16. This requirement prevents interference with state court proceedings when the case can possibly be resolved without federal review. See Costarelli v. Massachusetts, 421 U.S. 193 (1975). It also ensures that the state courts have considered issues of state law that may obviate consideration of any federal question.

The "highest state court" is not always the highest appellate court of the particular state. The court instead must be the highest state court which can exercise jurisdiction in the case. Downes v. Scott, 45 U.S. (4 How.) 500 (1846). If, for example, state court jurisdiction is divested by removal of the case to the federal courts, no further review by the state courts is required. See Kanouse v. Martin, 56 U.S. (15 How.) 198 (1854). However, a state court which apparently does not have jurisdiction but assumes jurisdiction (erroneously or not) becomes the

highest state court for purposes of federal review, and the appeal is then from that court to the United States Supreme Court. Pacific Gas & Elec. Co. v. Police Court, 251 U.S. 22 (1919).

The appellant generally must exhaust all opportunities for review by the state courts. If the litigant is entitled to an appeal as of right, the litigant is obligated to take the appeal. In light of the broad appellate jurisdiction of the Delaware Supreme Court, which exists as of right, Del. Const. art. IV, §11(1), this means that an appeal to that Court is generally a prerequisite for consideration by the United States Supreme Court.

In some instances, however, no appeal is available in the state court system. Appellate jurisdiction of the Delaware Superior Court and the Delaware Supreme Court in criminal cases is limited to cases involving a sentence of more than a $100 fine or imprisonment for more than 30 days. Del. Const. art. IV, §§11(1)(b), 28. The defendant whose sentence does not meet the jurisdictional limit might obtain review of defendant's conviction by writ of certiorari. Shoemaker v. State, Del. Supr., 375 A.2d 431 (1977). Since review by certiorari is not as extensive as review by appeal, e.g., DuPont v. Family Court, Del. Supr., 153 A.2d 189 (1959), the defendant need not apply for certiorari before seeking federal review. Largent v. Texas, 318 U.S. 418 (1943); but see Costarelli v. Massachusetts, 421 U.S. 193 (1975) (defendant must seek trial de novo when procedure offers opportunity to raise federal questions). Furthermore, there are a number of administrative agencies from whose decisions no apparent means of judicial review exists. See Chapters 19 and 24. The jurisdiction of the United States Supreme Court under 28 U.S.C. § 1257, however, extends only to review of state court judgments, thus precluding any attempt to seek direct federal review of a state agency decision. See also Olney v. Arnold, 3 U.S. (3 Dall.) 308 (1796); Stern & Gressman at 116.

e. Decision Supportable on Non-Federal Grounds. The United States Supreme Court will not consider a state court judgment which is based upon adequate and independent non-federal grounds. E.g., Bell v. Maryland, 378 U.S. 226 (1964); Wolfe v. North Carolina, 364 U.S. 177 (1960); Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875). See generally Stern & Gressman at 140-57. Even if the state court decision involves federal and non-federal grounds, review is not available if the decision can be based on non-federal grounds alone, regardless of the correctness of the decision on any federal issue. Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961); Herb v. Pitcairn, 324 U.S. 117 (1945); Radio Station WOW, 326 U.S. at 129. See Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977); Black v. Cutter Labs., 351 U.S. 292 (1956). This doctrine is based on the principle that review of the federal question in such a case would be equivalent to making an advisory ruling since the state ground alone is adequate to support the decision. Jurisdiction also may be refused when an adequate and independent state ground for the decision may exist. See, e.g., Paschall v. Christie-Stewart, Inc., 414 U.S. 100 (1973); Stembridge v. Georgia, 343 U.S. 541 (1952).

f. Initiating Review. A petition for a writ of certiorari in either a civil or criminal case must be filed within 90 days after the entry of the judgment. 28 U.S.C. § 2101(c); U.S. Supr. Ct. R. 13.1 (1995). See Stern & Gressman at 270-89. An extension of up to 60 days in which to file the petition may be granted by a single Justice of the Court. 28 U.S.C. § 2101(c); U.S. Supr. Ct. R. 13.5 (1995). The request must be received by the Clerk at least 10 days before the date that the petition is due, "except in extraordinary circumstances." U.S. Supr. Ct. R. 13.4 (1995). Accord U.S. Supr. Ct. R. 30.2 (1995). See Stern & Gressman at 296, 297-

99. However, requests for additional time are disfavored, see U.S. Supr. Ct. R. 13.5 (1995); Penry v. Texas, 116 S. Ct. 2 (1995) (Scalia, Circuit Justice), and no extension beyond the statutorily allowed 60 day period is possible. The Clerk will not file a petition which is "jurisdictionally out of time." U.S. Supr. Ct. R. 13.2 (1995).

No motion to dismiss may be filed in response to a petition for certiorari. U.S. Supr. Ct. R. 15.4 (1995). Instead, the respondent may file a brief in opposition to the petition. A brief in opposition is mandatory in capital cases. U.S. Supr. Ct. R. 15.1 (1995). Indeed, the Court now emphasizes that the respondent should "point out any perceived misstatements of fact or law in the petition" in the brief in opposition and not later. U.S. Supr. Ct. R. 15.2 (1995).

The time periods refer to calendar days, not to monthly periods or units. If the last day of the period falls on a Saturday, Sunday or federal holiday, the time runs until the end of the next day that is neither a Saturday, Sunday, nor a federal holiday. U.S. Supr. Ct. R. 30.1 (1995). Remember that state holidays are not necessarily federal holidays.

To be timely filed, a document must be received by the Clerk within the time specified for filing. U.S. Supr. Ct. R. 29.2 (1995). Any document will be deemed timely filed if, within the time allowed for filing, the document is placed in the U.S. mail (first class and including express mail or priority mail) properly addressed to the Clerk. U.S. Supr. Ct. R. 29.2 (1995). If mailed, the document must be postmarked, by the Postal Service (not by an office postage meter), no later than the last day for filing. Id. However, documents sent through a private delivery or courier service must be received by the Clerk within the time allowed for filing. Id.

Time is computed from the entry of the judgment from which review is sought, excluding the day the judgment is entered, see U.S. Supr. Ct. R. 13.1, 30.1 (1995), and not from

issuance of the mandate. U.S. Supr. Ct. R. 13.3 (1995). When a timely motion for reargument or rehearing en banc under Del. Supr. Ct. R. 4(f) or 18 is filed by any party in the case, the time period for seeking review by the United States Supreme Court runs from the date of the denial of the motion or the entry of a subsequent judgment. U.S. Supr. Ct. R. 13.3 (1995).

Where appropriate, a motion requesting in forma pauperis status and an affidavit in support of the motion must be submitted with the petition for certiorari. U.S. Supr. Ct. R. 39.1 (1995). A litigant who can proceed in forma pauperis saves substantial printing costs since the litigant is required to file only an original and ten copies of any paper, id., and papers submitted by the litigant need not be printed. See U.S. Supr. Ct. R. 33.2, 39.3 (1995).

g. Stay of Enforcement of Judgment. In cases subject to review by certiorari, a Justice of the United States Supreme Court or a judge of the court that rendered the judgment or decree may grant a stay of the judgment for a reasonable time in order to allow a party to obtain a writ of certiorari. 28 U.S.C. § 2101(f). The stay can be conditioned on the posting of a bond, and if the party fails to complete the petition or is otherwise unsuccessful in obtaining relief, the party is subject to payment of damages and costs sustained by reason of the stay. Id.; U.S. Supr. Ct. R. 23.4 (1995).

Absent extraordinary circumstances, the application for a stay should first be presented to the appropriate court or judge below. U.S. Supr. Ct. R. 23.3 (1995). The granting of the stay rests in the sound discretion of the judge or court. Williams v. Keyes, Fla. Supr., 186 So. 250 (1938). Though the authority of the state court to act is created by federal law, state procedures are to be used in determining whether to grant the stay. State ex rel. Coats v. Harris, Okla. Crim. App., 560 P.2d 991 (1977). See also Lawrie v. State, Del. Super., Crim. Act. Nos.

IK92-08-0180, Terry, J. (Nov. 7, 1994) (ORDER), stay issued, Del. Supr., No. 442, 1994, Berger, J. (Nov. 17, 1994) (ORDER). An individual Justice of the United States Supreme Court, acting as Circuit Justice, must find favorably for the petitioner on each of four factors when ruling on an application for a stay: (1) the probability that certiorari will be granted; (2) the chance that the Court will conclude that the decision below was erroneous; (3) the irreparable injury to the applicant prior to the expected time of disposition of the petition for certiorari; and (4) the relative harm to the applicant, the respondent, and the public at large. See, e.g., Packwood v. Senate Select Comm. on Ethics, 114 S.Ct. 1036 (1994) (Rehnquist, Circuit Justice); Autry v. Estelle, 464 U.S. 1301 (1983) (White, Circuit Justice) (stay granted when certiorari granted on same issue in unrelated case); M.I.C. Ltd. v. Bedford Township, 463 U.S. 1341 (1983) (Brennan, Circuit Justice) (irreparable injury; stay granted after state court refused to stay injunction or expedite appeal); Rostker v. Goldberg, 448 U.S. 1306 (1980) (Brennan, Circuit Justice) (describing analysis); Beame v. Friends of the Earth, 434 U.S. 1310 (1977) (Marshall, Circuit Justice) (describing analysis); Annot., 24 L. Ed. 2d 925 (1969); Annot., 2 A.L.R. Fed. 657 (1969).

17.03 FEDERAL HABEAS CORPUS.

a. Introduction. At common law, the writ of habeas corpus was a method by which a person in the custody of another could challenge the legality of the person's detention. The essential purpose of the writ remains unchanged today. Its continued existence is guaranteed by article I, section 9 of the United States Constitution which prohibits suspension of habeas corpus unless required by the public safety in time of rebellion or invasion. The Judiciary Act of 1789 gave the federal courts the authority to entertain petitions for habeas relief from

persons held in federal custody. Congress extended the federal habeas jurisdiction in 1867 to unconstitutional detentions of persons in state custody.

This section focuses on the writ as an extraordinary post-conviction remedy available to state prisoners. A complete examination of theory and procedure, however, is beyond the scope of this handbook. See L. Yackle, Postconviction Remedies (1980) (hereinafter "Yackle") for a detailed explanation of federal habeas practice. The practitioner should note that federal habeas litigation is an extremely specialized field, filled with procedural pitfalls, many of which are not set out in the habeas statutes and rules but which instead come from nearly 30 years of Supreme Court decisions. Furthermore, success is rare: National surveys regularly indicate that outside of the death penalty context, fewer than 10 percent of all federal habeas petitions lead to a favorable result for the petitioner.

b. Preliminary Considerations. The power to grant a writ of habeas corpus lies with the United States Supreme Court, or any justice thereof, and any judge of the court of appeals or district court within their respective jurisdictions. Petitions presented to a Supreme Court justice or judge of the court of appeals are usually transferred to the appropriate district court. See 28 U.S.C. § 2241(b).

A habeas petitioner may file in either of two federal judicial districts: the one in which the petitioner is in custody or the one in which where the state court convicted and sentenced the petitioner. 28 U.S.C. § 2241(d). See Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973); Shelton v. Taylor, 550 F.2d 98 (2d Cir. 1977); McCoy v. United States Bd. of Parole, 537 F.2d 962 (8th Cir. 1976). Both districts have concurrent jurisdiction and have the power to transfer the application to the other district. 28 U.S.C. § 2241(d).

The habeas statute provides that the writ shall be directed to "the person having custody of the person detained." 28 U.S.C. § 2243. Ordinarily, determining who is the custodian and proper respondent to the action is not difficult; it usually is the Director of the Department of Corrections or the warden of the state correctional institution in which the petitioner is held. See generally 11 Del. C. §§ 6502, 6516-17. But see Meades v. Ellingsworth, Civ. Act. No. 91-687-LOT (D. Del. May 5, 1993) (state warden is not proper respondent when prisoner only complains about action by federal parole commission). A sentencing judge usually is not a proper respondent. United States ex rel. Lyle v. Carrey, 277 F. Supp. 250 (W.D. Pa. 1967); but see Hamilton v. Lumpkin, 389 F. Supp. 1069, 1073-74 (E.D. Va. 1975) (judge is proper respondent if petitioner is on probation and subject to reinstatement of sentence by court). The parole board can be a respondent in an action challenging a decision to deny parole. Eskridge v. Casson, 471 F. Supp. 98 (D. Del. 1979).

An applicant for federal habeas relief must generally be "in custody" when the petition is filed. 28 U.S.C. § 2241(c); Maleng v. Cook, 490 U.S. 488 (1989); Guinn v. Snyder, Civ. Act. No. 94-163-LON (D. Del. Dec. 28, 1995) (dismissing petition because prisoner, though "in custody" on unrelated offense, was not "in custody" for conviction prisoner challenged in petition). Once the district court has jurisdiction, that jurisdiction is not defeated by the unconditional release of the petitioner prior to completion of the habeas proceedings. Carafas v. LaVallee, 391 U.S. 234, 238 (1968); but see North Carolina v. Rice, 404 U.S. 244 (1971); Pollard v. United States, 352 U.S. 354 (1957); Weber v. Young, Civ. Act. No. 88-683-JLL (D. Del. Aug. 27, 1990) (challenge only of sentence may be moot after sentence is served). Custody is a jurisdictional requirement under the federal habeas statutes, e.g., Escobedo v. Estelle, 655

F.2d 613, 615 n.5 (5th Cir. 1981); Bowman v. Wilson, 514 F. Supp. 403 (E.D. Pa 1981), and even if there were no such statutory requirement, the historical requirement would probably be in effect. Yackle at 181-82.

Conceptually, custody encompasses a variety of restraints. The paradigm is that of a petitioner who is incarcerated when the habeas petition is filed. It is also clear now that a habeas petitioner is subject to restraints -- and thus "in custody" -- incident to:

- bail or personal recognizance, Hensley v. Municipal Court, 411 U.S. 345 (1973); United States ex rel. Wojtycha v. Hopkins, 517 F.2d 420 (3d Cir. 1975) (bail pending appeal); Hovey v. Bifferato, Civ. Act. No. 88-535-LON (D. Del. Oct. 28, 1988);

- a suspended sentence, Walker v. North Carolina, 372 F.2d 129 (4th Cir. 1967); see Katz v. King, 627 F.2d 568 (1st Cir. 1980);

- probation, Cervantes v. Walker, 589 F.2d 424 (9th Cir. 1978); Drollinger v. Milligan, 552 F.2d 1220 (7th Cir. 1977);

- parole, Jones v. Cunningham, 371 U.S. 236 (1963);

- consecutive sentences, Peyton v. Rowe, 391 U.S. 54 (1968); and

- detainers, Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973).

A petitioner confined under an habitual offender statute (see 11 Del. C. § 4214) may be able to challenge an earlier sentence, which petitioner has fully served, on the theory that if that sentence or conviction is overturned, petitioner's overall term of imprisonment will be reduced. See Tucker v. Peyton, 357 F.2d 115 (4th Cir. 1966); Silva v. Zahradnick, 445 F. Supp. 331 (E.D. Va. 1978).

Though there is some division among lower courts, the weight of authority holds that a petitioner only subject to the payment of a fine is not in custody. Compare Thistlethwaite v. New York, 497 F.2d 339 (2d Cir. 1974) (dictum) (in custody) with Hanson v. Circuit Court,

591 F.2d 404 (7th Cir. 1979) (collecting cases; not in custody); Wright v. Bailey, 544 F.2d 737 (4th Cir. 1976) (same). Custody exists, however, if the petitioner could be imprisoned for failing to pay the fine. See Spring v. Caldwell, 516 F. Supp. 1223 (S.D. Tex. 1981); cf. Wright, 544 F.2d at 739 (no custody where sentence did not allow for incarceration for refusal to pay fine); but see 11 Del. C. § 4105(a) (person sentenced to pay fine or costs cannot be imprisoned for failure to pay). A habeas petitioner also is not in custody if, at the time the petition was filed, he had completed his sentence and was not restrained by parole conditions. See Guinn v. Snyder, Civ. Act. No. 94-163-LOT (D. Del. Dec. 28, 1995). Generally, habeas applicants who die or escape are not in custody. Dove v. United States, 423 U.S. 325 (1976) (death); Gonzales v. Stover, 575 F.2d 827 (10th Cir. 1978) (escape); Taylor v. Egeler, 575 F.2d 773 (5th Cir. 1978) (escape). See In re Kravitz, 504 F. Supp. 43 (M.D. Pa. 1980) (death) (mootness grounds). See also Lewis v. Delaware State Hosp., 490 F. Supp. 177 (D. Del. 1980) (escapee remains in custody because of threat of confinement or recapture; petition may be dismissed at end of thirty-day stay if petitioner still at large).

c. Exhaustion of State Remedies. If habeas petitioners meet the initial prerequisite of custody, "they must next deal with a kaleidoscopic system of procedural rules known as the `exhaustion doctrine.'" Yackle, supra at 231. An application for habeas relief cannot be granted "unless it appears that the applicant has exhausted the remedies available in the courts of the state." 28 U.S.C. § 2254(b); see § 2254(c). This requirement is of long standing, see Ex parte Royall, 117 U.S. 254 (1886), but it is not a jurisdictional requirement. E.g., Brown v. Cuyler, 669 F.2d 155 (3d Cir. 1982); United States ex rel. Trantino v. Hatrack, 563 F.2d 86 (3d Cir. 1977). The purpose of the exhaustion doctrine is to ensure that a petitioner who alleges

a federal constitutional error in petitioner's state criminal trial provides the state courts an opportunity to correct that error before a federal court proceeds to review the conviction or sentence. See Picard v. Connor, 404 U.S. 270 (1971). Under Third Circuit precedent, because exhaustion is based on principles of comity between the state and federal courts, a prosecutor was not allowed to waive or concede the exhaustion question. Slotnick v. O'Lone, 683 F.2d 60 (3d Cir. 1982); Trantino, 563 F.2d at 96. However, in light of recent amendments to the federal habeas statutes, prosecutors may, but are not required to do so, waive the exhaustion issue. See 28 U.S.C. § 2254(b)(3) (1996).

If exhaustion has any meaning, a prisoner must present to the state courts essentially the same claims petitioner later urges upon a federal habeas court. See Picard, 404 U.S. at 275-76; McCollum v. Sullivan, 507 F. Supp. 865 (D. Del. 1981). The federal court must ask whether the same claim or its substantial equivalent has been fairly presented to and considered by the state courts. Bond v. Fulcomer, 864 F.2d 306, 309 (3d Cir. 1989); Brown v. Tard, 552 F. Supp. 1341, 1346 (D.N.J. 1982); Ray v. Howard, 486 F. Supp. 638, 641-42 (E.D. Pa. 1980); see United States ex rel. Wilson v. Anderson, 399 F. Supp. 41 (D. Del. 1975). If the presentation of the issue in the state courts required the same analysis as the one the federal habeas court could use to consider the claim, then the claim was fairly presented. Santana v. Fenton, 685 F.2d 71 (3d Cir. 1982); Zicarelli v. Gray, 543 F.2d 466 (3d Cir. 1976); Tard, 552 F. Supp. at 1346; Hackett v. Mulcahy, 493 F. Supp. 1329 (D.N.J. 1980). See Bisaccia v. Attorney General, 623 F.2d 307 (3d Cir. 1980) (specific citation of federal constitution not required when claim made in state court indistinguishable from that presented to federal court). However, presenting only a state law claim on direct appeal, for example, claims that evidence should not

have been admitted under state evidence rules or that jury instructions were incorrect under state law, does not fairly present any federal claim. As a result, the federal issue is unexhausted. Duncan v. Henry, 115 S. Ct. 887 (1995); Robinson v. Snyder, Civ. Act. No. 95-258-JJF (D. Del. Mar. 7, 1996); Cooper v. Snyder, 888 F. Supp. 613, 615 (D. Del. 1995) (reargument granted on other grounds).

In determining whether the petitioner has fairly presented petitioner's claims, the habeas court will look to the state court's opinion to see if the state court considered the issue. If the opinion is unclear or silent, the federal court then examines the briefs and motions filed in the state courts, the cases cited by the parties, and the trial record. Brown v. Cuyler, 669 F.2d 155, 158-59 (3d Cir. 1982). See Tard, 552 F. Supp. at 1347; McCollum, 507 F. Supp. at 868. Exhaustion, however, does not require a decision on the merits by the state court. Smith v. Digmon, 434 U.S. 332 (1978); Powell v. Keve, 409 F. Supp. 228, 233 (D. Del. 1976). Assuming fair presentation, the exhaustion requirement is nonetheless satisfied if the state court did not consider the issue, compare McCollum, 507 F. Supp. at 868, or if the court disposed of it on procedural grounds. United States ex rel. Fletcher v. Maroney, 413 F.2d 16 (3d Cir. 1969). Any doubt about the petitioner's compliance with the exhaustion prerequisite is to be resolved against petitioner, if only because petitioner has the burden of proof of showing exhaustion. Brown, 669 F.2d at 158.

In the context of Delaware procedure, exhaustion requires that the federal claim be submitted at least once to the Delaware Supreme Court. Since the Court has appellate jurisdiction as of right over all criminal appeals involving a sentence of more than thirty days imprisonment or a fine of more than $100, Del. Const. art. IV, §11(1)(b), exhaustion is

straightforward. The question must be properly raised in the trial court and then presented on appeal. McCollum, 507 F. Supp. at 867-68. A claim not raised on direct appeal must be made to the Delaware courts through a motion for post-conviction relief under Superior Court Criminal Rule 61, or if applicable, Rule 35. If the motion is denied, the decision must be appealed to the Delaware Supreme Court. United States ex rel. Henson v. Redman, 419 F. Supp. 678, 680 (D. Del. 1976); see McCollum, 507 F. Supp. at 868 (intervening change in law). A pending post-conviction motion precludes a finding of exhaustion of any issue that is identical or similar to issues contained in the concurrent federal habeas petition. Ray, 486 F. Supp. at 642.

Exhaustion is not required when state remedies are non-existent or ineffective. Teague v. Lane, 489 U.S. 288, 298 (1989); Castille v. Peoples, 489 U.S. 346, 351-52 (1989); Tully v. Scheu, 607 F.2d 31, 36 (3d Cir. 1979); 28 U.S.C. § 2254(b). The futility exception is often asserted in two circumstances: (1) the state courts have taken a position unfavorable to the petitioner on the merits of the issue, especially when the same issue has been unsuccessfully appealed by a co-defendant or when state law precedent indicates that the courts have recently and repeatedly rejected the particular claim; or (2) the petitioner's claim is clearly outside the scope of available state remedies. In the first situation, if there is any chance that the state court would favorably view the petitioner's federal claim, the futility exception is generally unavailable. See McCollum, 507 F. Supp. at 868. Compare Hallowell v. Keve, 512 F. Supp. 681, 685 (D. Del. 1976); Powell, 409 F. Supp. at 231. However, if the claim being asserted would be procedurally barred by Superior Court Criminal Rule 61(i)(1-3), state post-conviction relief would be unavailable, thus excusing the prisoner from the exhaustion requirement. See Clark v. Pennsylvania, 892 F.2d 1142, 1147-48 (3d Cir. 1989); Bordley v. Kearney, Civ. Act. No. 95-15-

LON (D. Del. July 10, 1995); DeShields v. Snyder, 829 F. Supp. 676 (D. Del. 1993); Flamer v. Chaffinch, 827 F. Supp. 1079 (D. Del. 1993).

The second situation was often exemplified by Delaware procedure for review of decisions to release prisoners on parole--no direct state judicial review is possible under state law. E.g., Norris v. Casson, Del. Super., 460 A.2d 547 (1982). Thus, because there was no state judicial procedure to review parole decisions, a prisoner did not have to worry about exhausting petitioner's state remedies before seeking federal habeas relief. See Eskridge v. Casson, 471 F. Supp. 98 (D. Del. 1979). However, the Delaware courts are now more inclined to review Parole Board actions, and prisoners often present their claims by means of a petition for a writ of mandamus or certiorari. Semick v. Department of Corrections, Del. Supr., 477 A.2d 707 (1984); Bradley v. Delaware Parole Bd., Del. Supr., 460 A.2d 532 (1983). Since claims relating to parole are no longer clearly outside the scope of available state remedies, prisoners are now required to first seek relief in the state courts. E.g., Patrick v. Redman, Civ. Act. No. 90-481-RRM (D. Del. Dec. 2, 1992); Taylor v. Redman, Civ. Act. No. 89-382-LOT (D. Del. May 23, 1990).

d. Procedural Default. A habeas petitioner need only exhaust state remedies that are available to petitioner at the time petitioner files petitioner's federal habeas petition. See Section 17.03(c), supra. Some consideration must be given to the effect of a failure to invoke state remedies at the proper time or in the proper manner. "It would hardly be consistent with an exhaustion requirement, for example, to allow a petitioner to ignore prescribed time limits for presenting claims in state courts until the state courts decline, for that reason, to consider them" and to then ask a federal habeas court to consider the merits of those claims since

state remedies are, by that point, unavailable. Yackle at 297-98. Admittedly, state remedies in this context have been exhausted, but the exhaustion doctrine itself provides no answers.

The federal habeas court instead turns to the "procedural default" concept to solve the problem. Under this principle, a petitioner's substantive claim for relief will never be reached if the state court judgment is supported by an adequate and independent basis in state law. In habeas cases, the usual situation is a failure to take advantage of an opportunity given by state procedural rules to present or raise the federal claim that is subsequently made in the federal habeas petition. Yet care must simultaneously be taken to avoid imposing unfair penalties upon petitioners whose procedural failings should be excused. Otherwise, the function of federal habeas as a general post-conviction device that goes beyond the trial and appellate processes in order to test the lawfulness of the petitioner's detention would be vitiated. See Yackle at 92-101, 298-300.

Throughout this century, the federal courts have developed different doctrines for reconciling the two goals of ensuring compliance with state procedure and maintaining the efficacy of federal habeas corpus. See Yackle at 300-56. From 1963, the standard for determining whether there had been a forfeiture of the right to raise a claim was whether the petitioner had "deliberately bypassed" state remedies. Fay v. Noia, 372 U.S. 391 (1963). Noia gave the federal courts the "discretion to deny relief to an applicant who has deliberately bypassed the orderly procedure of the state courts and in so doing has forfeited his state court remedies." 372 U.S. at 438. The standard for determining whether there was a deliberate bypass was identical to that used to ascertain whether there was a waiver of a constitutional right, i.e., an intentional relinquishment or abandonment of a known right or privilege. After several cases in

the early 1970's indicated the Supreme Court's dissatisfaction with Noia, the Court made a "clean break" in Wainwright v. Sykes, 433 U.S. 72 (1977). Sykes sets forth a much narrower test: a state prisoner, barred by a procedural default from raising a federal claim on direct appeal in state court, cannot present that claim in federal habeas without showing cause for the default and prejudice from the underlying error. Sykes is applicable not only when the default occurred at trial, e.g., failing to object, but also to any default on appeal, e.g., not appealing or not raising an otherwise preserved issue. Coleman v. Thompson, 501 U.S. 722 (1991); Murray v. Carrier, 477 U.S. 478, 489-92 (1986); Reed v. Ross, 468 U.S. 1, 11 (1984).

The habeas petitioner faces the critical step of meeting the "cause" element of the cause and prejudice test by justifying petitioner's failure to comply with state procedure. Clearly, if defense counsel deliberately fails to follow a state's contemporaneous objection rule or other procedural rule, "cause" will not exist. See Sykes, 433 U.S. at 89 (emphasis on "sandbagging"); United States ex rel. Abdus-Sabur v. Cuyler, 653 F.2d 828 (3d Cir. 1981). Furthermore, cause for a procedural default does not exist if the action or omission was unintentional, resulting from inadvertence, neglect or ignorance. Carrier, 477 U.S. at 486-88; Smith v. Murray, 477 U.S. 527, 536 (1986). Instead, cause exists if counsel was constitutionally ineffective or when "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Carrier, 477 U.S. at 488. Those objective obstacles to satisfying the state procedural requirement include "a showing that the factual or legal basis for a claim was not reasonably available to counsel... or 'some interference by officials.'" Carrier, 477 U.S. at 488.

If the petitioner establishes cause, the petitioner must then go on to prove that the errors petitioner alleges not only created the possibility of prejudice, "but that they worked to his

actual or substantial disadvantage, infecting his entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 170 (1982). The Court's decision in Carrier seems to indicate that the term "prejudice" in this context is tantamount to a denial of "fundamental fairness" at trial. 477 U.S. at 494-96.

The effect of Sykes in the context of Delaware procedure is clear. For example, Supreme Court Rule 8 provides that "[o]nly questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented." A ruling on appeal that the claim was not raised below as required by Rule 8 constitutes, for purposes of federal habeas review, a procedural default by the prisoner. E.g., Palmer v. Snyder, Civ. Act. No. 95-335-LOT (D. Del. Feb. 27, 1996); Smith v. Snyder, Civ. Act. No. 93-13-RRM (D. Del. Dec. 21, 1993). Similarly, the failure to file an appeal within the 30-day period set out in Supreme Court Rule 6 is a procedural default, e.g., Wooten v. Ellingsworth, Civ. Act. No. 92-81-JJF (D. Del. June 4, 1993), and dismissal of an appeal under Rule 29(b) also amounts to a procedural default. E.g., Smith v. Delaware Board of Parole, Civ. Act. No. 95-303-JJF (D. Del. Feb. 9, 1996); Gibbs v. Redman, Civ. Act. No. 89-351-LOT (D. Del. Oct. 11, 1991). Finally, failure to comply with the procedural requirements set out in Superior Court Criminal Rule 61(i) will result in a procedural default under Sykes. E.g., Robinson v. Snyder, Civ. Act. No. 95-258-JJF (D. Del. Mar. 7, 1996); Carter v. Neal, 910 F. Supp. 143 (D. Del. 1995); McBride v. Howard, Civ. Act. No. 94-214-SLR (D. Del. Oct. 6, 1995); Walker v. Snyder, Civ. Act. No. 94-96-SLR (D. Del. Aug. 3, 1994); Watson v. Taylor, Civ. Act. No. 91-545-JLL (D. Del. Feb. 26, 1992).

If the state courts rule on a belated claim, instead of barring it because of procedural non-compliance, federal habeas review is available. If the state courts do not choose to enforce their own rules, there is no basis for a federal court to enforce the rule. E.g., Castanada v. Partida, 430 U.S. 482, 485 n.4 (1977). However, if the state court says, for the sake of completeness, that the claim, as well as being procedurally barred, has no merit, then in federal court, the claim is procedurally barred as long as the state court makes a "plain statement" that the claim is procedurally barred. Harris v. Reed, 489 U.S. 255 (1989); United States ex rel. Caruso v. Zelinsky, 689 F.2d 435, 439-41 (3d Cir. 1982).

CHAPTER 18. APPEALS TO THE COURT OF CHANCERY

TABLE OF CONTENTS

CHAPTER 18. APPEALS TO THE COURT OF CHANCERY

The Honorable Jack B. Jacobs[1]

18.01 INTRODUCTION. This Chapter concerns appeals to the Court of Chancery. The Court has statutory authority to review administrative decisions of certain agencies, which include certain decisions of the Secretary of State, the Public Employment Relations Board, and the Department of Agriculture. Several statutes granted appellate jurisdiction to the Court to review decisions of the State Insurance Commissioner (18 Del. C. § 333), the State Banking Commissioner (5 Del. C. §§ 139, 807) and the Public Service Commission (26 Del. C. § 606). These statutes were superseded by the later enacted Delaware Administrative Procedures Act, 29 Del. C. § 10101, et seq., (the "APA"), which empowers the Superior Court to review the decisions of these and other enumerated administrative bodies. See State Dep't of Labor v. Minner, Del. Supr., 448 A.2d 227 (1982) (holding that when a provision of the APA is in direct conflict with provisions of earlier statutes granting appeals from administrative decisions, the APA prevails); Whitney v. State Farm Mut. Auto. Ins. Co., Del. Ch., C.A. No. 8014, Walsh, V.C. (Aug. 22, 1985), appeal refused, Del. Supr., 510 A.2d 491 (1986) (holding that APA supplants earlier grant of appellate jurisdiction to Chancery Court to review decisions of the State Insurance Commissioner); Levinson v. Delaware Compensation Rating Bureau, Inc., Del. Supr., 616 A.2d 1182 (1992) (appeals from the Insurance Commissioner must occur pursuant to the APA). See generally Section [20.10], **Administrative Agencies From Which an Appeal May be Taken Under the Administrative Procedures Act,** and Section

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[1]The Honorable Jack B. Jacobs is Vice Chancellor of Delaware Court of Chancery. He was assisted in the preparation of this chapter by Lisa A. Schmidt, Esquire, who is an associate with the firm of Young, Conaway, Stargatt & Taylor, Wilmington, Delaware.

[20.14], **Review of Agency Decisions Under Administrative Procedures Act.** The statutory provisions discussed in this Chapter have not been affected by the enactment of the APA.

In addition to the Court's statutory right of review, the Court has the power, conferred by common law, to review administrative decisions in cases where the legal remedy is inadequate and the challenged decision is claimed to be arbitrary or an abuse of discretion. This type of review is also treated in this Chapter.

18.02 APPEALS FROM THE SECRETARY OF STATE. The Secretary of State computes the annual franchise tax liability of each corporation incorporated in Delaware, 8 Del. C. § 502, and is authorized to determine petitions by the corporation pursuant to § 505(a) and (b) for a reduction or refund of taxes, penalties, or interest, which the corporation claims to have been erroneously or illegally fixed or paid.

A corporation may seek review of the Secretary of State's determination on a petition filed pursuant to § 505(a) and (b), by filing a petition for review with the Court of Chancery within sixty (60) days from the date of the Secretary's determination, setting forth the facts upon which the corporation relies in seeking an adjustment of the tax, interest and/or penalties due. 8 Del. C. § 505(d). The Secretary of State must be named as a respondent in the petition, and served in the same manner as a defendant in a civil suit. Id.

a. Place to File the Petition for Review. The petition for review must be filed in the Court of Chancery in and for the county where the corporation's registered office or place of business is located. Id.

b. Scope of Review. Court of Chancery's review of the Secretary of State's determination is de novo. Id. If the Court concludes that the tax, interest and/or penalties

assessed by the Secretary of State are excessive or incorrect, in whole or in part, the Court will adjust the assessment accordingly, notify the Secretary of State of its determination, and direct the Secretary to refund to the corporation amounts paid in excess of the proper amount of the tax, interest and/or penalties so determined to be due. 8 Del. C. § 505(e).

18.03 APPEALS FROM THE STATE SECURITIES COMMISSIONER. The State Securities Commissioner (the "Commissioner") may, for good cause, issue a stop order prohibiting the offering and sale of a security or suspending or revoking the effectiveness of a registration statement. 6 Del. C. § 7308. The Commissioner may also issue an order denying, suspending, or revoking the registration of broker-dealers, investment advisors, and agents. 8 Del. C. § 7316.

A person aggrieved by an order issued by the Commissioner may obtain judicial review of the order in the Court of Chancery by filing a written complaint requesting cancellation or modification of the order. 6 Del. C. § 7324(a). The complaint must be filed within sixty (60) days after entry of the order and must be served on the Commissioner. Id.

a. Effect of Pending Appeal. Unless specifically ordered by the Court, the filing of a complaint for review of the Commissioner's order does not operate as a stay of the order. 6 Del. C. § 7324(c).

b. Scope of Review. The Court may affirm, modify, enforce, or set aside the Commissioner's order, in whole or in part. 6 Del. C. § 7324(b). The Commissioner's findings of fact will be deemed conclusive if supported by substantial and material evidence. Id. See, e.g., Flowers v. Hubbard, Del. Ch., C.A. Nos. 11915, 11916, Allen, C. (Oct. 22, 1991). In applying this standard, "[t]he Court must search the entire record to determine whether, on the

basis of all the testimony and exhibits before the agency, it could fairly and reasonably reach the conclusion that it did.'" W.N. Whelen & Co. v. Hubbard, Del. Ch., C.A. No. 10854, slip op. at 6, Jacobs, V.C. (Jan. 19, 1990) (quoting National Cash Register v. Riner, Del. Super., 424 A.2d 669, 674-75 (1980)). The Court reviews questions of law *de novo*. Blinder, Robinson & Co. v. Bruton, Del. Supr., 552 A.2d 466, 470 (1989).

The Court may grant leave to the petitioner or the Commissioner to take additional evidence upon an application demonstrating reasonable grounds for failure to adduce the evidence at the hearing before the Commissioner. 6 Del. C. § 7324(b). The application for the taking of additional evidence must be filed within twenty (20) days after the filing of the record by the Commissioner. Id. The Court may order the additional evidence to be taken before the Commissioner. Id. The Court has "the power to modify any administrative sanction which is deemed disproportionate to the underlying conduct." Blinder, Robinson, 552 A.2d at 475. This power is not limited to cases where the Commissioner abused the Commissioner's discretion. Hubbard v. Hibbard Brown & Co., Del. Supr., 633 A.2d 345, 353 (1993).

c. Record on Review. Within twenty (20) days after service of the complaint, the Commissioner must certify and file a copy of "the filing" and evidence upon which the Commissioner's order was entered. 6 Del. C. § 7324(a). The record on review consists of all matter contained in the record before the Commissioner and any additional matter developed upon an application for further discovery.

18.04 APPEALS FROM THE DEPARTMENT OF AGRICULTURE.

The Department of Agriculture, after public hearing, is required to promulgate definitions and standards of identity for frozen desserts and regulations for the labeling of frozen desserts as well as regulations to implement the purposes of Chapter 41. 16 Del. C. § 4102(b). For appeals from other decisions of the Department of Agriculture, see Section [20.15(p)], **Department of Agriculture.**

An interested person aggrieved by a rule or regulation adopted by the Department of Agriculture under § 4102(b) may appeal by petition to the Court of Chancery within twenty (20) days after the effective date of the rule or regulation. 16 Del. C. § 4102(c).

18.05 APPEALS FROM THE PUBLIC EMPLOYMENT RELATIONS BOARD. The Public Employment Relations Board (the "PERB") is an administrative board created to assist in resolving disputes between public school districts and their employees. 14 Del. C. § 4006. The PERB is authorized to prevent unfair labor practices and issue appropriate orders, including orders directing that a school board, employee or employees' representative cease and desist from engaging in an unfair labor practice and/or to take further reasonable steps to effectuate the policies of the Public School Employment Relations Act, including ordering the payment of damages and/or reinstatement of the employee. 14 Del. C. § 4008.

Any person adversely affected by a decision of the PERB under § 4008 may appeal that decision to the Court of Chancery. 14 Del. C. § 4009(a). The appeal must be filed within fifteen (15) days of the date of the PERB decision complained of. Id.

a. Effect of Pending Appeal. The filing of an appeal under § 4009(a) does not operate automatically to stay the PERB's decision.

18.06 REVIEW OF ARBITRATION AWARDS. The Court of Chancery is vested with jurisdiction to confirm, vacate, modify or correct arbitration awards. 10 Del. C. §§ 5713 - 5715.

a. Time and Place to File an Action for Confirmation or Review of An Arbitration Award. An action to confirm, vacate, modify or correct an arbitration award is commenced by filing a complaint with the Register in Chancery in and for the county in which the arbitration was held. 10 Del. C. § 5702(b). All subsequent pleadings should be filed in the Court hearing the complaint unless the Court directs otherwise. Id.

An application to vacate, modify or correct an arbitration award must be commenced within ninety (90) days after delivery of a copy of the award. 10 Del. C. §§ 5714, 5715. However, if an application to vacate an arbitration award is based upon corruption, fraud or other undue means, the application must be made within ninety (90) days after such grounds are known or should have been known. 10 Del. C. § 5714(b).

An application to confirm an arbitration award must be made within one year after the award is delivered to the applicant. 10 Del. C. § 5713. However, if an application is made to vacate, modify or correct the arbitration award, the application to confirm must be made within the time limits imposed by § 5714 and § 5715.

b. Scope of Review of Applications to Vacate Arbitration Awards. On an application to vacate an arbitration award "a Court may not pass on the merits of claims submitted to an Arbitrator." Malekzadeh v. Wyshock, Del. Ch., 611 A.2d 18, 20-21 (1992) (citing 10 Del. C. § 5701). See also New Hampshire Ins. Co. v. State Farm Ins. Co., Del. Ch., C.A. No. 13092, Hartnett, V.C. (Mar. 31, 1994) (on review, petitioner is not entitled to a *de novo*

hearing). Rather, the Court must vacate an arbitration award where: (1) the award was procured by fraud, corruption, or other undue means; (2) an arbitrator was partial, corrupt, or was guilty of misconduct prejudicing the rights of any party; (3) the arbitrators exceeded their powers or so imperfectly executed them that a final and definite award was not made; (4) the arbitrators refused to postpone the hearing upon sufficient cause or refused to hear evidence pertinent to the controversy, or failed to follow proper procedures, so as to substantially prejudice the rights of a party; or (5) there was no valid arbitration agreement or the arbitration agreement had not been complied with, or the arbitrated claim was barred. 10 Del. C. § 5714(a). A party moving to vacate an award pursuant to Section 5714(a)(3) bears the burden of demonstrating by "strong and convincing evidence that the Arbitrator clearly exceeded his authority." Malekzadeh, 611 A.2d at 21. See also Baltimore Barn Builders v. Jacobs, Del. Ch., C.A. No. 1424, Hartnett, V.C. (Dec. 17, 1990) (ambiguity in the arbitrator's opinion is not sufficient grounds to vacate the award). If the Court vacates an arbitration award on grounds other than those stated in section (5) above, the Court may order a rehearing of any or all issues before new arbitrators. If the award is vacated on the grounds set forth in sections (3) or (4) above, the Court may order a rehearing before the arbitrators who made the award or their successors. 10 Del. C. § 5714(c). The time period within which the agreement requires an award to be made commences from the date of the order requiring a rehearing. Id. If the Court denies the application to vacate the arbitration award and no motion to modify or correct the award is pending, the Court must confirm the award. 10 Del. C. § 5714(d).

c. Scope of Review of Applications to Modify or Correct Arbitration Awards. The Court must modify or correct an arbitration award where: (1) there was an evident

miscalculation of figures or an evident misdescription of any person, property, or thing referred to in the arbitration award; (2) the arbitrators entered an award on matters not submitted to them and the award may be corrected without affecting the merits of the decision on the issues submitted; or (3) the award is imperfect in form, not affecting the merits of the controversy. 10 Del. C. § 5715(a). If the Court grants an application to modify or correct an award, the Court will modify or correct the award so as to effect its intent, and will confirm the award as so modified or corrected. 10 Del. C. § 5715(c).

18.07 APPEALS FROM THE EQUAL EMPLOYMENT REVIEW BOARD. The Equal Employment Review Board (the "Review Board") is authorized to hear complaints filed by the Department of Labor against a person alleged to have engaged in an unlawful employment practice. 19 Del. C. § 712(e).

Any complainant or aggrieved party other than a member of the Department of Labor, respondent, or intervenor aggrieved by an order of the Review Board may obtain judicial review of the order by filing a petition for review in the Court of Chancery. 19 Del. C. § 712(h). The petition must be filed within thirty (30) days after a copy of the Review Board's order is received, unless the Department is the petitioner, and copies must be served on all parties of record. Id.

a. Record on Review. The Review Board must transmit to the Court the original or a certified copy of the entire record on which its order was based within thirty (30) days of service of the petition for review upon the Review Board. Id.

b. Scope of Review. The Court may reverse or modify the Review Board's order if substantial rights of the petitioner have been prejudiced because the findings of

fact of the Department of Labor are clearly erroneous in light of reliable, probative, and substantial evidence on the whole record. Id. The Court may order temporary relief if it deems appropriate, and may enter an order enforcing as modified, or setting aside, in whole or in part, the order of the Review Board. Id. The Court also may remand the case to the Department of Labor for further proceedings. Id.

On review, the Court may not consider an objection that was not raised at the hearing before the Review Board, unless there was good cause for the failure to raise the objection. Id. A party may request that the Court remand the case to the Review Board for the purpose of taking additional evidence and seeking findings thereon, if the party demonstrates good cause for failure to adduce the evidence before the Review Board. Id. The Court is not empowered to review the decisions of the Department of Labor regarding whether a complaint should issue. See Chalawsky v. Sun Ref. & Mktg. Co., 733 F. Supp. 791, 799 (D. Del. 1990) (citing 19 Del. C. § 712(e)).

c. Costs. The Court has discretion to award the prevailing party, other than the Review Board or the State, a reasonable attorney's fee as part of the costs, and the Review Board and the State will be liable for costs, the same as a private person. 19 Del. C. § 712(j).

18.08 APPEALS FROM INVOLUNTARY DETENTION OF MENTALLY RETARDED PERSONS. A mentally retarded person may be involuntarily committed to the Stockley Center after a finding that person's presence in the community would be detrimental to the person or the community. 16 Del. C. § 5522(a).

A person involuntarily committed to the Stockley Center, or a person related to the person by blood or marriage, may appeal the commitment to the Court of Chancery at any time. 16 Del. C. § 5523(b).

a. Scope of Review. The Court of Chancery has the full power to hear and determine the appeal of the involuntary commitment and to protect the patient's constitutional rights. Id. Upon application of the petitioner, the Court may call a jury to determine whether the patient is mentally retarded. Id.

18.09 APPEALS FROM THE REGISTER OF WILLS. Every executor or administrator of an estate is required to render an account of the administration to the Court of Chancery every year from the date of the granting of the executor's or the administrator's letters, until the estate is closed and a final account is passed by the Court. 12 Del. C. § 2301(a). The Register of Wills, for cause, may dispense with that requirement or extend the time within which the account must be filed. 12 Del. C. § 2301(c).

Any interested party may appeal the decision of the Register of Wills under § 2301(c) to the Court of Chancery. Id.

18.10 EQUITABLE RELIEF WHEN THERE IS NO RIGHT OF APPEAL. The absence of a statutory right of appeal from an administrative decision will not necessarily preclude an aggrieved party from seeking relief in the Court of Chancery. Council 81, AFCSME v. New Castle County, Del. Ch., C.A. Nos. 8816, 8817, Jacobs, V.C. (Sept. 16, 1988). Equitable relief is available, but only under a narrowly defined set of circumstances. Id. In absence of the specific statutory authority, equitable relief will be granted if the petitioner has no adequate remedy at law and the challenged administrative decision is alleged to be arbitrary or an abuse of

discretion. Id. See also Choma v. O'Rourke, Del. Ch., 300 A.2d 39, 41 (1972); Two South Corp. v. City of Wilmington, Del. Ch., C.A. No. 9907, Jacobs, V.C. (July 11, 1989, revised July 18, 1989). This common law right of review has formed the jurisdictional basis for Court of Chancery review of decisions of several administrative bodies, including the Commissioner of Public Safety, Choma, 300 A.2d 39, the City of Wilmington Department of Licensing and Inspections, Two South Corp. v. City of Wilmington, the State Board of Pension Trusts, Bramble v. Dannemann, Del. Ch., C.A. No. 5769, Brown, V.C. (Jan. 10, 1980), and the Sussex County Council, Green v. County Council of Sussex County, Del. Ch., 508 A.2d 882, aff'd, Del. Supr., 516 A.2d 480 (1986). For additional discussion of review by the Court of Chancery of zoning ordinances, see Section [25.05].

CHAPTER 19. APPEALS TO SUPERIOR COURT FROM THE COURT OF COMMON PLEAS, MUNICIPAL COURT, ALDERMAN'S COURT AND ADMINISTRATIVE AGENCIES

TABLE OF CONTENTS

CHAPTER 19. APPEALS TO SUPERIOR COURT FROM THE COURT OF COMMON PLEAS, MUNICIPAL COURT, ALDERMAN'S COURT AND ADMINISTRATIVE AGENCIES

William D. Bailey, Jr.[1]
and
John H. Newcomer, Jr.

19.01 INTRODUCTION. This chapter deals with appeals to the Superior Court from the Court of Common Pleas and substantially all of the State's administrative agencies.[2] Statutory provisions principally govern judicial review of agency action, but occasionally review may be obtained through recourse to the extraordinary writs. Both avenues of review are discussed in this chapter.

Special care must be exercised when attending to appeals from agency actions. Although the Administrative Procedures Act governs appeals from most state agencies, exceptions do exist. Moreover, there may be unique procedures contained in each agency's statutory enactments. Since much of the process discussed in this chapter is statutory in origin, consult the latest session laws for amendments that might affect this discussion.

Generally, appeals to the Supreme Court from the intermediate judicial review provided by the Superior Court are governed by the rules and principles treated elsewhere in this

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[1]William D. Bailey, Jr., Esquire is a stockholder in the firm of Bayard, Handelman & Murdoch, P.A. John H. Newcomer, Jr., Esquire is an associate in the same firm. Regina M. Mullen, Esquire was the author for the first edition.

[2]Appeals to the Superior Court from other courts and certain administrative agencies are covered elsewhere in this manual. See Chapters 23 (Family Court); 21 (Industrial Accident Board); 22 (Unemployment Insurance Appeal Board).

Handbook.[3] However, one should note that some statutes articulate a specific standard and scope of review. See, e.g., 29 Del.C. § 10142(d) (standard under the Delaware Administrative Procedures Act, 29 Del.C., ch. 101 ("APA"): a court must take due account of the agency's experience and specialized competence and the basic law under which it acted when reviewing factual determinations.) Furthermore, when the appeal to the Superior Court was "on the record" of the administrative agency or trial court, the Supreme Court will directly examine the factual determinations of the agency itself and not the Superior Court's decision on review. Stoltz Management Co. v. Consumer Affairs Bd., Del. Supr., 616 A.2d 1205, 1208 (1992). In defending an agency's decision, the practitioner must persuade the court at each level of appeal of the correctness of the original agency action. The discussion of standard of review in this chapter notwithstanding, experienced counsel have found that the courts may in fact engage in de novo-like review.

19.02 APPEALS TO THE SUPERIOR COURT FROM THE COURT OF COMMON PLEAS. An aggrieved party may take an appeal to the Superior Court from any final order, rule, decision or judgment of the Court of Common Pleas. 10 Del.C. § 1326(a). The

[3]Orders of remand from the Superior Court to an administrative agency are interlocutory and not final orders, unless the remand is for purely ministerial functions. A failure to comply with Supr.Ct.R. 42 (appeals of interlocutory orders) may result in a dismissal of the appeal. Violent Crimes Compensation Bd. v. Linton, Del. Supr., 545 A.2d 624 (1988).

Supr.Ct.R. 42 clearly provides that interlocutory orders of a trial court acting as an intermediate appellate court in the review of a ruling, decision or order of an administrative agency may be reviewed by the Supreme Court according to the same criteria as other non-final orders of a trial court in a civil case.

procedure on appeal is to be established by the Superior Court. 10 Del.C. § 1326(d). Thus, Super.Ct.Civ.R. 72 generally governs the procedure on appeal.

19.03 TIME AND PLACE TO FILE APPEAL. The notice of appeal must be filed in the office of the Prothonotary for the county in which the judgment was rendered within 30 days of the final order, ruling, decision or judgment from which the appeal is taken. 10 Del.C. § 1326(b). The proper filing fee must also be paid. The time for an appeal is calculated according to the rules of the Superior Court, the first day being the day after the entry of the order appealed from. See Landis Supply of Delaware v. Joseph A. Capaldi, Inc., Del. Super., 415 A.2d 497, 498 (1980). The 30-day limit is jurisdictional and must be complied with strictly. Cf. Delaware Citizens for Clean Air v. Water and Air Resources Comm'n, Del. Super., 303 A.2d 666, aff'd, Del. Supr., 310 A.2d 128 (1973). But see Riggs v. Riggs, Del. Supr., 539 A.2d 163 (1988).

19.04 FORM AND PROCEDURE FOR REVIEW OF COURT OF COMMON PLEAS DECISIONS. This notice of appeal shall specify the parties taking the appeal, designatee the order appealed from, state the grounds of the appeal, name the court to which the appeal is taken, and be signed by counsel for the appellants. Super. Ct. Civ. R. 72(c). On receipt of the notice of appeal, the Prothonotary dockets it and issues a citation to the Clerk of the Court of Common Pleas directing the Clerk to send a certified copy of the record below, including a typewritten copy of the evidence, within 20 days. The parties may by stipulation, filed with the Court of Common Pleas within 10 days after the filing of the notice of appeal, eliminate the need for the typewritten transcript. However, the Superior Court may order the transcript filed at any time notwithstanding such a stipulation. Super.Ct.Civ.R. 72(e).

When the certified copy of the record (including the transcript) is filed, the Prothonotary gives written notice to all parties. Super.Ct.Civ.R. 72(g). The notice includes the briefing schedule. Appellant's brief shall be served and filed 20 days after the record is filed. Super.Ct.Civ.R. 72(g). Appellee's answering brief is due 20 days thereafter. Id. Any reply brief by appellant is due 10 days later. Id. In the assigned judge's discretion, the assigned judge may set the matter for oral argument. Id. There is no prohibition against asking that the case be set for oral argument.

See also Section 19.12 for a discussion of expedited procedures on appeal under Rule 72.1.

19.05 CROSS-APPEALS. Any party may file a cross-appeal within 10 days of the filing of the first notice of appeal. The cross-appeal carries the same docket number as the original appeal. No additional filing fee is required. Super.Ct.Civ.R. 72(h).

19.06 EFFECT OF INCORRECTLY DESIGNATED APPEAL. As a general rule, a technical error in denominating the basis for an appeal will not be considered good cause for denying an appeal which was filed timely. See Weston v. State, Del. Supr., 554 A.2d 1119, 1121 (1989).

19.07 CONSIDERATION GOVERNING REVIEW. Appeals from the Court of Common Pleas are "on the record" and shall not be tried de novo. 10 Del.C. § 1326(c). Neither 10 Del.C. § 1326 nor Super.Ct.Civ.R. 72 sets a standard of review on the record. The Superior Court's review of the trial court's legal conclusions, however, is plenary. See Mullen v. Alarmguard of Delmarva, Inc., Del. Supr., 625 A.2d 258 (1993); E. I. du Pont de Nemours v. Shell Oil Co., Del. Supr., 498 A.2d 1108, 1113 (1985). Generally, when reviewing factual

findings, an appellate court will not disturb a decision of the trial judge unless it is clearly erroneous or not the product of a logical and deductive reasoning process. Cede & Co. v. Technicolor, Inc., Del. Supr., 634 A.2d 345, 360 (1993). The same rules have been applied to appeals from the Court of Common Pleas. State v. Cagle, Del. Supr., 332 A.2d 140 (1974). For further discussion of standard and scope of review on appeal, see Chapter 6, Section 6.02, supra.

19.08 ADMINISTRATIVE AGENCIES FROM WHICH AN APPEAL MAY BE TAKEN UNDER THE ADMINISTRATIVE PROCEDURES ACT. The Delaware Administrative Procedures Act, 29 Del.C., ch. 101 (the "APA") only applies to those agencies designated by the statute. The agencies covered by the APA at this writing are:

(1) Alcoholic Beverage Control Commission;

(2) State Banking Commissioner;

(3) Public Service Commission;

(4) Real Estate Commission;

(5) State Human Relations Commission;

(6) Tax Appeal Board;

(7) State Insurance Commissioner;

(8) Industrial Accident Board;

(9) Environmental Appeals Board;

(10) Coastal Zone Industrial Control Board;

(11) State Board of Education;

(12) State Personnel Commission;

(13) Board of Veterinary Medicine;

(14) Board of Landscape Architecture;

(15) Board of Clinical Social Work Examiners;

(16) Board of Architects;

(17) Board of Podiatry;

(18) Board of Pilot Commissioners;

(19) Board of Chiropractic;

(20) State Board of Electrical Examiners;

(21) Board of Medical Practice;

(22) Council of the Delaware Association of Professional Engineers;

(23) Board of Occupational Therapy Practice;

(24) Division of Child Support Enforcement;

(25) Board of Professional Counselors;

(26) Board of Dental Examiners;

(27) Board of Nursing;

(28) Board of Examiners in Optometry;

(29) Board of Examiners of Psychologists;

(30) Board of Speech/Language Pathologists, Audiologists and Hearing Aid Dispensers;

(31) Board of Registration for Professional Land Surveyors;

(32) Board of Accountancy;

(33) Board of Pharmacy;

(34) Board of Registration of Geologists;

(35) Board of Cosmetology;

(36) Commission on Adult Entertainment Establishments;

(37) Board of Physical Therapy;

(38) Real Estate Commission;

(39) Board of Funeral Services;

(40) Board of Examiners of Nursing Home Administrators;

(41) Delaware Gaming Control Board;

(42) Committee of Dietetics/Nutrition; and

(43) Election Commissioner.

29 Del.C. § 10161.

Although one purpose of the APA was to standardize judicial review of state agency actions, 29 Del.C. § 10101, pay scrupulous attention to the provisions both of the APA and the particular agency's organic statute to determine whether potentially inconsistent appeals provisions exist. The safer course of action is to comply with the stricter standard in all cases.

As the later-enacted statute, the APA's provisions govern in the event of "irreconcilable conflicts" with preexisting statutory provisions governing judicial review of a particular covered agency's actions. State Dept. of Labor v. Minner, Del. Supr., 448 A.2d 227 (1982); Blue Cross and Blue Shield of Delaware, Inc. v. Elliott, Del. Super., 449 A.2d 267 (1982); In re Delmarva Power & Light Co., Del. Super., 486 A.2d 19 (1984), rev'd on other grounds, Del. Supr., 508 A.2d 849 (1986) (to the extent any previously applied administrative standard is at variance with the provisions of the APA, the APA governs through the principle of

implicit legislative repeal.). However, nonconflicting provisions remain effective and should be construed together. Minner, 448 A.2d at 229.

When an agency is added to the coverage provisions of the APA and the General Assembly simultaneously provides a nonuniform appeals provision in the agency's organic act, the more specific nonuniform appeals provisions will control Rooney v. Board of Chiropractic, Del. Super., C.A. No. 90A-12-4 Bifferato, J. (Nov. 5, 1992). In Rooney, the Court held that the de novo appeal provisions of the Board of Chiropractic statute applied over the appeal on the record provisions of the APA. The Court noted that the APA was enacted before the revised Board of Chiropractic statute and that the specific provisions of the latter should prevail over the general statutory scheme of the APA.

The problems that can result from conflicting statutes was also noted but not resolved in In Re Surcharge Classification 0133 by the Delaware Compensation Rating Bureau, Inc., Del. Super., 655 A.2d 295, 299 n.5 (1994), aff'd, Del. Supr., 655 A.2d 309 (1995).

19.09 REVIEW OF AGENCIES' DECISIONS. Quasi-judicial decisions by administrative agencies may be reviewed according to the terms of the agency's organic act, the APA (if the agency is covered by that Act) or, absent a statutory method of review, by reference to the extraordinary writs, such as certiorari or mandamus. In the absence of an expressly conferred right of review in the Superior Court, a party aggrieved by an agency decision has no basis to invoke the Superior Court's appellate jurisdiction. Where no remedy exists at law, however, the Court of Chancery provides an avenue of relief to prevent abuse of the administrative process. Plumbers & Pipefitters Local 74 v. Department of Labor, Del. Supr., No. 332, 1992, Walsh, J. (Dec. 18, 1992) (ORDER).

19.10 AGENCY REVIEW UNDER SUPERIOR COURT CIVIL RULE 72.

Super.Ct.Civ.R. 72 provides that the Rule governs appeals on the record from all boards, commissions or courts from which an appeal may lie. Rule 72(g), however, provides that appeals should be determined from the record below, except as may be otherwise provided by statute.

Under Rule 72, an appeal is perfected by filing a notice of appeal with the Prothonotary of the appropriate county. While some statutes specify the county in which the appeals must be filed, see, e.g., 7 Del.C. § 7008 (State Coastal Zone Industrial Control Board--county in which land in question is located), most do not have a venue requirement. The notice must be filed within 15 days after the entry of the final judgment, order or disposition from which the appeal is being taken, unless another appeal time is prescribed by statute. Super.Ct.Civ.R. 72(b). Many statutes do contain different appeal deadlines. The APA, for example, sets a 30 day period from the date the notice of decision was mailed. 29 Del.C. § 10142(b). The filing fee must also be paid to the Prothonotary.

The notice of appeal must specify the parties taking the appeal; designate the order, award, determination or decree (or part thereof) appealed from; state the grounds for the appeal; specify the court to which the appeal is taken; and be signed by the attorney for the appellant. Super.Ct.Civ.R. 72(c).

Upon receipt of the notice of appeal, the Prothonotary issues a citation to the agency, directing the custodian of the record below to file with the Prothonotary a copy of the record, including a typewritten transcript of the evidence. The record must be filed within 20 days thereafter. The parties may stipulate that a typewritten transcript is unnecessary to the decision of the case within 10 days after the filing of the notice of appeal. Such a stipulation is

filed with the board or agency from which the appeal is taken and becomes part of the record certified to the court. The court may order that a typewritten transcript be filed at any time during the pendency of the appeal, notwithstanding any stipulation by the parties. Rule 72(e).

While a bond is not ordinarily required under Rule 72,[4] the appellee may move in writing that a non-resident appellant be required to give a bond for costs. Proof of no-residency should be put on the record. Rule 72(f).

Any party may file a cross-appeal within 10 days after the date on which the first notice of appeal is filed. The 10-day limitations period does not run against an agency subject to the APA until the notice of appeal is filed and the agency receives notice of the appeal. T.V. Spano Bldg. Corp. v. DNREC, Del. Supr., 628 A.2d 53, 57 (1993). The notice of cross-appeal must designate the order from which it is taken. The cross-appeal bears the same docket number as the main appeal. No filing fee is required for a cross-appeal. Rule 72(h).

Upon the filing of the record below, the Prothonotary gives written notice to all of the parties. The filing of the record triggers the briefing schedule for the appeal. Appellant's opening brief must be served and filed within 20 days after the record is filed. The appellee's answering brief must be served and filed within 20 days after the appellant's brief. Finally, any reply brief must be served and filed by appellant within 10 days after the answering brief. The judge assigned to the case may schedule the case for argument. Rule 72(g). A party is not

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[4] But see 26 Del.C. § 511, which permits the Superior Court to require a bond in an appeal from an order of the Public Service Commission where a stay of the Commission's order is requested. The APA does not contain any specific provisions on the need for a bond.

prohibited from requesting oral argument. A request for oral argument should be made to the assigned judge.

19.11 EXPEDITED PROCEDURES ON APPEAL UNDER RULE 72.1. Superior Court Civil Rule 72.1 applies to all appeals to the Superior Court from commissions, boards or courts.

a. Grounds. Rule 72.1 permits the appellee to file a motion to affirm within 10 days after receipt of the appellant's opening brief. The three grounds specified for a motion to affirm are:

(1) the issue on appeal is clearly controlled by settled Delaware law;

(2) the issue appealed from is factual, and clearly there is sufficient evidence to support the findings of fact below;

(3) the issue on appeal from a commission or board is factual, and clearly there is sufficient evidence to support the findings of fact below; or

(4) the issue on appeal is one of judicial or administrative discretion, and there clearly was no abuse of discretion below. Super. Ct. Civ. R. 72.1(b).

Rule 72.1(c) also provides for affirmance sua sponte by the court. Rule 72.1 is nearly identical to Supr.Ct.R. 25. In the absence of a great number of reported decisions of the Superior Court construing Super.Ct.Civ.R. 72.1, the controlling precedent under Supr.Ct.R. 25 may be used with due caution.

b. Limitations on Motion to Affirm. The appellee may not file a brief in presenting a motion to affirm. The motion to affirm should include a statement of the grounds for granting the motion to affirm, together with citation of authorities and record references

supporting the motion. The motion to affirm shall not contain argument. The court may, however, request briefing and argument in a proper case. Super.Ct.Civ.R. 72.1(b)(4). While no page limits are specified in Rule 72.1, the best approach is to limit a motion to affirm to less than four pages, as is called for by Supr.Ct.R. 30(a).

c. Standards. The court is limited to determining whether (1) any error of law was committed by the trial court, and (2) there exists sufficient evidence to support findings of fact made below. Transamerica Relocation Service, Inc. v. Tevebaugh, Del. Super., C.A. No. 85A-JN-1, Gebelein, J. (July 24, 1986). If the appellant's opening brief shows the appeal is clearly without merit because the decision is controlled by well-settled law, or the findings of fact are clearly supported by the evidence, the court should grant the motion to affirm. Id. If the court has any substantial doubt that the evidence may be insufficient, or the case is not controlled by well-settled law, then the motion to affirm should be denied. Id.

d. Affirmance Sua Sponte. The court itself may also enter an affirmance sua sponte after the appellant's brief has been filed, if the court finds that the appeal is meritless because (1) the issue is clearly controlled by settled Delaware law; (2) the facts found below are supported by substantial evidence; (3) the issue on appeal from a commission or board is factual, and clearly there is sufficient evidence to support the jury verdict or findings of fact below; or (4) the issue is one of judicial or administrative discretion, and there was no abuse of discretion below. Super.Ct.Civ.R. 72.1(c).

e. Expedited Scheduling. Rule 72.1(d) allows the appellee, the appellant, upon motion for good cause shown, or the court, sua sponte, to order expedited

scheduling of any proceeding before the court, including shortening the time for filing briefs and other papers.

19.12 APPEALS UNDER SUPERIOR COURT CIVIL RULE 3. Certain statutes provide that appeals from agency decisions shall be de novo. See, e.g., 23 Del.C. § 105 (Board of Pilot Commissioners); 24 Del.C. § 316(c) (Board of Architects); 24 Del.C. § 515(c) (Board of Podiatry Examiners); 24 Del.C. § 1431 (Board of Electrical Examiners); 24 Del. C. 3315(c) (Board of Veterinary Medicine); 24 Del.C. § 1923 (Board of Nursing); 24 Del.C. § 2015(d) (Board of Occupational Therapy); 24 Del.C. § 2616(b) (State Examining Board of Physical Therapists); 24 Del.C. § 3611(d) (Board of Registration of Geologists); 24 Del.C. § 3113(c) (Board of Funeral Services); and 24 Del.C. § 5211(c) (Board of Examiners of Nursing Home Administrators). In such a case, Super.Ct.Civ.R. 3(c) governs the processing of the appeal.

Rule 3(c) provides that the appeal is commenced in the Superior Court by the appellant filing with the Prothonotary a praecipe within the time prescribed by statute for the filing of an appeal. If no time is prescribed by statute, the praecipe must be filed within 15 days from the entry of the final judgment, order, or disposition from which an appeal is permitted by law. The appellant must also file a certified copy of the record below, not including the evidence, within 10 days of the filing of the praecipe. No process shall issue until the record is filed. Rule 3(d). The appeal is not docketed until the certified copy of the record is filed. Super.Ct.Civ.R. 77(e)(3).

At a de novo hearing, the parties are in the same positions that they occupied before the administrative agency, and they bear the same burdens. Lindsay v. Beaver Brook Section One Inc., Del. Supr., 322 A.2d 13 (1974).

When the appellant has the duty of filing the complaint or other first pleading, the appellant must do so at the time appellant files the praecipe. When the appellee has the duty of filing the complaint or other first pleading on appeal, appellee must do so within 20 days after service of process on appeal or, if appellee has not been served, within 40 days after the date of the process. After the complaint or other first pleading on appeal is filed, the pleadings follow as in other actions. Rule 3(c).

19.13 REVIEW OF CASE DECISIONS UNDER THE ADMINISTRATIVE PROCEDURES ACT. "Case decisions," i.e., administrative adjudications by covered agencies "that a named party as a matter of past or present fact, or of threatened or contemplated private action, is or is not in violation of law or regulation, or is or is not in compliance with any existing requirement for obtaining a license or other right or benefit," 29 Del.C. § 10102(3), are reviewable in the Superior Court. 29 Del.C. § 10142; see 29 Del. C. 10102(4). For guidance on the definition of "case decisions," see Minner, 448 A.2d at 230; Cat Hill Water Co. v. Public Service Comm'n., Del. Super., C.A. No. 90A-09-10 Taylor, J. (Apr. 10, 1991). Cf. Cebrick v. Peake, Del. Supr., 426 A.2d 319, 320 (1981).

a. Parties to the Review of Case Decisions. An appeal may be taken by any party to the administrative adjudication against whom the case was decided. 29 Del.C. § 10142(a). A "party" is "each person or agency named or admitted in an agency proceeding as a

party, or properly seeking and entitled as of right to be admitted as a party to an agency proceeding." 29 Del.C. § 10102(6).

The agency issuing the decision must be named as an appellee. Cf. Nepi v. Lammot, Del. Super., 156 A.2d 413, 416 (1959) (statutory certiorari proceeding). Whether the board or commission that conducted the hearing is deemed to be a "party" to the appeal from its decision is a question that has not been clearly resolved. The Alcoholic Beverage Control Commission was permitted to appear as a "party" with standing to appeal in Cebrick v. Peake, supra, 426 A.2d at 319. Similarly, the Public Service Commission was deemed a necessary party to an appeal from its ruling in Liborio II, L.P. v. Artesian Water Co., Del. Super., 621 A.2d 800, 803-804 (1992).

A board that exercised only quasi-judicial powers was relieved of its status as sole appellee in Tidewater Utilities, Inc. v. Environmental Appeals Bd., Del. Super., C.A. No. 80A-SE2, Tease, J. (Sept. 3, 1981). As a general rule, a quasi-judicial tribunal has no standing as a litigant to defend its decision. Zoning Board of Adjustment v. Dragon Run Terrace, Inc., Del. Supr., 216 A.2d 146, 147 (1965). It is the practice of quasi- judicial boards to note on the record in the Superior Court that they consider themselves as nominal parties only and will not actively participate in a pending appeal. Any agency that wishes to participate actively in the appeal process should demonstrate in its first brief that it has standing under Cebrick/Liborio.

b. Finality of Decision Sought to be Reviewed. Generally, an order must be "final" before it is subject to review. Quaker Hill Place v. Saville, Del. Super., 523 A.2d 947, 953, aff'd, Del. Supr., 531 A.2d 201 (1987). Ordinarily, an action of an administrative agency is final if it determines or concludes rights of parties or denies parties a means of further

prosecuting or defending their rights and interests in the proceedings before the agency, thus leaving the agency with nothing more to do. Maryland Comm'n on Human Relations v. Baltimore Gas & Elec. Co., Md. Supr., 459 A.2d 205 (1983). See also, Cat Hill Water Co. v. Public Service Comm'n., Del. Super., C.A. No. 90A-09-10, Taylor, J. (Apr. 10, 1991) (appealable order must be case dispositive).

c. Time and Place to Petition for Review. An appeal from a case decision must be filed with the Prothonotary within 30 days of the day the notice of the decision was mailed. 29 Del.C. § 10142(b). No appeal is taken properly, however, until it is filed with the Prothonotary and served on the agency pursuant to court rules. 29 Del.C. § 10145. There is no venue requirement in the APA. Again, it is imperative that counsel carefully examine the APA, the agency's organic act and court rules when preparing to perfect an appeal, because each may impose separate requirements.

d. Considerations Affecting Review. The appeal under the APA is heard on the record and not de novo*[5] and where the record is insufficient for review, the Court may remand the matter for additional proceedings. 29 Del.C. § 10142(c). The parties to an appeal are bound by the record before the agency. Petty v. University of Delaware, Del. Supr., 450 A.2d 392, 396 (1982); 29 Del.C. § 10142(d).

The practice before the agency, although governed by principles of due process and statutory procedural constraints, nevertheless may be decidedly less formal than a judicial proceeding. Recognizing that the agency members rarely are law trained, the careful practitioner

[5]But see the agencies cited in § 19.13.

will ensure that a full evidentiary record is made before the agency either by stipulation or through the presentation of testimonial and documentary evidence.

e. Scope of Review. On appeal from a decision of an administrative agency, the appellate court must determine whether the agency ruling is supported by substantial evidence and free from legal error. Stoltz, 616 A.2d at 1208; 29 Del.C. § 10142(d).

The term "substantial evidence" "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It is also defined as more than a scintilla but less than a preponderance of the evidence." Breeding v. Contractors- One-Inc., Del. Supr., 549 A.2d 1102, 1104 (1988). It is also evidence from which the agency fairly and reasonably could have reached the conclusion it did. National Cash Register v. Riner, Del. Supr., 424 A.2d 669, 674-75 (1980).

With factual determinations the court must take due account of the experience and specialized competence of the agency and the purposes of the basic law under which the agency acted. 29 Del.C. § 10142(d). Where legal issues are presented on appeal, the court's review is plenary. Stoltz, 616 A.2d at 1208.

The agency and not the court must weigh the evidence presented and resolve conflicting testimony and issues of credibility. Mooney v. Benson Mgt. Co., Del. Super., 451 A.2d 839 (1982), rev'd on other grounds, Del. Supr., 466 A.2d 1209 (1983). "Weighing the evidence and determining questions of credibility which are implicit in factual findings are functions reserved exclusively for the [agency]." Downes v. State, Del. Supr., No. 25, 1993, Walsh, J. (Mar. 30, 1993) (ORDER).

f. Stay of Agency Case Decision. Except when the agency's organic act provides for an automatic stay, see, e.g., 24 Del.C. § 3315(c) (Board of Veterinary Medicine), the filing of an appeal does not work a stay of the agency's case decision. A stay may be granted only when, after preliminary hearing, the Superior Court determines that the issue and facts to be reviewed are substantial and a stay is needed to prevent irreparable harm. 29 Del.C. § 10144. See Blue Cross and Blue Shield of Delaware, Inc. v. Elliott, Del. Super., 449 A.2d 267, 270-71 (1982); see also Public Service Comm'n v. Diamond State Tel. Co., Del. Supr., 468 A.2d 1285 (1983).

No court has required that a party seeking a stay satisfy preliminary injunction standards before the stay will issue. Instead, it appears that demonstration of pecuniary harm alone may be sufficient without any consideration of the likelihood of eventual success on the merits. See Blue Cross and Blue Shield of Delaware, supra, and Diamond State Tel. Co., supra. However, the party defending against a stay application should argue that a more stringent requirement applies until the question is settled.

The APA does not require posting a bond--whether secured or unsecured--in the Superior Court as a condition of the issuance of a stay. However, some agencies' organic acts may authorize the Court to require a bond in connection with an appeal. See, e.g., 26 Del.C. § 511.

19.14 ADMINISTRATIVE AGENCIES, BOARDS AND COMMISSIONS FROM WHICH APPEALS MAY BE TAKEN BY SPECIAL STATUTES OTHER THAN THE ADMINISTRATIVE PROCEDURES ACT. Amendments to the APA reflect significant reductions in the number of agencies from which special forms of appeal to the Superior Court

may be taken. A cursory review of the following list of statutory review processes (which differ from the APA) shows that any attorney who practices administrative law must closely examine each statute that governs the agency from whose decisions the attorney may plan to appeal. Reference should be made to sections 19.11 (Rule 72), 19.12 (Rule 72.1) and 19.13 (Rule 3) for the general rules governing appeals. While the following list is intended to be all inclusive, other agencies with organic appeal procedures may exist.

a. Department of Transportation, Delaware Transportation Authority, Aeronautics Administration. The Aeronautics Administration licenses or otherwise approves airports, restricted landing areas, air schools, aeronautics instructors, airmen and aircraft. 2 Del.C. § 101. Any person aggrieved by an order of the Administration or by the grant or denial of a license may seek review by the Superior Court "in the manner provided for the review of the orders of other administrative bodies of the State, and the rules of law applicable to such reviews shall apply." 2 Del.C. § 175. While the Delaware Supreme Court has expressed the view that agencies not covered by the APA should nevertheless be guided by that Act's precepts to the greatest extent possible, Strauss v. Silverman, Del. Supr., 399 A.2d 192 (1979), there is no decision suggesting that the APA governs rather than Super.Ct.Civ.R. 72. The latter generally imposes more stringent requirements (e.g., time within which to file an appeal). Public carriers affected by a final order of the Department of Transportation, or any other party to or intervening in proceedings before the Department, may take an appeal to Superior Court from such decision within 30 days after service of the order. Notice of the appeal must be filed with the Prothonotary. There is no venue requirement. A "summons in the appeal" must be served personally or by certified mail on the Secretary of the Department in Dover and also on other

parties to the proceeding below. 2 Del.C. § 1819(a). The appeal is on the record before the Department. 2 Del.C. § 1819(b). The scope of review is whether the Department's decision is based on substantial evidence. 2 Del.C. § 1819(c). The Superior Court may stay the decision of the Department and require the posting of a bond. 2 Del.C. §1819.

Any interested party who appears at the departmental hearing concerning the Department of Transportation's decision to vacate or abandon a public road may appeal the decision to the Superior Court within 30 days of the final order. 17 Del.C. §1312. Any person has the right to appeal a decision of the Secretary of Transportation regarding the assessment of additional tax and interest due when it is determined that a person has failed to pay motor fuel taxes. 30 Del.C. § 5220(c).

Any person may appeal to the Superior Court from a decision by the Secretary of Transportation concerning a petition for redetermination of motor fuel tax within 60 days of the Secretary's decision. 30 Del.C. § 5136(k).

b. Department of Agriculture. A person adversely affected by an order of the Department relating to the registration of commercial feed may appeal that decision to the Superior Court in the county in which the enforcement officer is located, within 45 days of the order. The appeal results in a new trial before the Superior Court. 3 Del.C. § 1712(e).

An owner or custodian of a pesticide or device who does not prevail at a hearing on a "stop sale, use or removal" order may appeal the decision of the Department to the Superior Court. The appeal is on the record. 3 Del.C. § 1236.

Any person aggrieved by an action of the Department denying, suspending, modifying or revoking the person's license, permit or certificate for pesticides may appeal to the

Superior Court within 30 days of that action. The court may make any order it deems just after a full hearing. 3 Del.C. § 1222. It is not clear whether this section calls for a de novo review, although it refers to a "full hearing."

A decision of the State Apiarist to destroy diseased bees and infected equipment may be appealed to the Superior Court in the county in which the apiary, bee equipment or appliances are located, within 5 days of the destruction order. 3 Del.C. § 7503.

The holder of a nursery or nursery dealer's license may appeal a decision by the Department denying, suspending, modifying or revoking the license to the Superior Court within 30 days of the Department's action. The hearing is on the record. 3 Del.C. § 1313.

Orders issued by the Secretary relating to meat and poultry inspections may be appealed to the Superior Court within 15 days after issuance. The review is on the record. 3 Del.C. § 8718(a).

Appeals to the Superior Court from revocation of a livestock dealer's license may be taken within 10 days after notification of the Department's decision. 3 Del.C. § 7605(b).

Appeals from a decision of the Department to remove lands from the commercial forest classification may be taken to the Superior Court by filing a copy of both the recommendation of the State Forester and the decision of the Department, as certified by the Secretary of the Department. 7 Del.C. § 3508(b). The statute calls for the appeal to be filed within the "two terms next" after the Department's determination. Id. Superior Court Rules no longer provide for "terms," although former Super.Ct.Civ.R. 77(b) provided for four terms each year.

c. Soil and Water Conservation -- Department of Natural Resources and Environmental Control. An owner of land within a watershed or tax ditch who is aggrieved by an action of the Department may appeal to the Superior Court within 30 days after the Department's hearing. The sole grounds for reversal by the Court are abuse of discretion, infringement of constitutional rights or impairment of the complainant's vested interests. 7 Del.C. § 3911.

d. Solid Waste Authority. A person whose waste disposal license has been suspended or revoked, or who is assessed an administrative penalty by the Authority may appeal to the Superior Court in the county in which the hearing was held, within 30 days of the date on which notification of the Authority's decision was received. The appeal is on the record. A stay may be granted for good cause shown. 7 Del.C. § 6417(c).

e. Department of Natural Resources and Environmental Control. Any person or taxpayer aggrieved by a decision of the Secretary on beach erosion control may appeal to the Superior Court in and for the county in which the activity principally is located by filing a verified petition specifying the grounds of the illegality of the order. The appeal must be perfected within 30 days of the date of receipt of the Secretary's order. The appeal is on the record. 7 Del.C. § 6803(d). The Court may remand to the Secretary for completion of the record if necessary. 7 Del.C. § 6803(e).

f. Department of Public Safety. A person whose motor vehicle registration has been refused, rescinded, cancelled or suspended may take a appeal from that decision to the Superior Court in the county of the person's residence. 21 Del.C. § 2163.

A person may appeal from a decision of the Department to refuse or revoke a certificate of title. 21 Del.C. § 2314.

g. Consumer Protection Board. Any party to an action before the Board, including the Director of Consumer Protection, may appeal a decision to the Superior Court. The appeal is on the record. 29 Del.C. § 8824(b)(1).

h. School Boards. A teacher terminated by a school board may, after appearing before the terminating board, appeal that action to the Superior Court in the county in which the teacher was employed within 10 days after receipt of a copy of the board's decision. The appeal is on the record. The Court may remand for further factual findings if necessary. 14 Del.C. § 1414.

i. Harness Racing Commission. A person whose harness racing license has been suspended or revoked by the Commission may appeal to the Superior Court of the county wherein the license was granted. The appeal is upon questions of law only. 3 Del.C. § 10026.

j. Department of Health and Social Services. An applicant for or holder of a soft drink and non-alcoholic beverage manufacturer's or bottler's license may appeal an adverse decision of the Board to the Superior Court in the county of the applicant's residence within 10 days from the adverse decision. A trial is called for by the statute, and the Superior Court's decision shall be final. 16 Del.C. § 4310.

A person holding a poultry processing license may appeal within 10 days from an adverse decision of the Department to the Resident Associate Judge of the Superior Court of the

county within which the licensee resides. A trial is called for by the statute, and the Resident Associate Judge's decision shall be final. 16 Del.C. § 3709.

An applicant for or holder of a hospital license may appeal from a decision of the Department to the Superior Court for the county in which the hospital is or is to be located within 30 days after the mailing or service of the notice. 16 Del.C. § 1014.

Appeals from hearings on public assistance benefits are taken to Superior Court, and must be filed within 30 days of the final administrative decision. Such appeals are on the record. 31 Del.C. § 519.

k. Board of Pension Trustees. An applicant for a pension aggrieved by a decision of the Board after a hearing may appeal to the Superior Court. The appeal procedure is governed by the provisions dealing with review of case decisions under the APA. 29 Del. C. 8308(i).

l. Board of Medical Practice. A person whose medical license is revoked, suspended or otherwise affected by an adverse decision of the Board may appeal to the Superior Court within 30 days after the day the written decision and order of the Board is issued. The appeal is on the record presented to the Board, not de novo. It should be kept in mind that any action by the Board revoking, suspending or otherwise curtailing an individual's authority to practice medicine is not stayed automatically on appeal. Rather, the appellant must seek an order from the Superior Court for such a stay. 24 Del. C. 1736.

19.15 EXTRAORDINARY WRITS AS AN ALTERNATIVE TO OTHER FORMS OF REVIEW OF ADMINISTRATIVE COMMISSIONS, BOARDS AND OTHER COURTS OF LIMITED JURISDICTION. While modern statutes usually incorporate statutory

review procedures, it is not unusual to find that the basic act governing an agency not covered by the APA does not contain a statutory review mechanism. See, e.g., 24 Del.C., ch. 9 (deadly weapons dealers). In such circumstances, limited review of agency decisions in the Superior Court may be accomplished by reference to the writs of certiorari and mandamus. Note also that, where the grounds for appeal are that the decision is contrary to the evidence and arbitrary because the decision is at odds with those reached by the agency in identical cases, review may be had in the Court of Chancery. Mason v. Bd. of Pension Trustees, Del. Super., 468 A.2d 298, aff'd, Del. Supr., 473 A.2d 1258 (1983). For a further discussion, see Chapter 19 (Appeals to the Court of Chancery).

a. Certiorari. The writ of certiorari historically has been employed to test the authority of a lower judicial or administrative tribunal to adjudicate the matter before it. Mason, supra; Schwander v. Feeney's, Del. Super., 29 A.2d 369 (1942); Woolley, Delaware Practice, § 894. (1906). Review is generally confined to jurisdictional matters, errors of law or irregularity in the proceedings that appear on the face of the record. Goldstein v. City of Wilmington, Del. Supr., 598 A.2d 149, 152 (1991).

The evidence received by the inferior tribunal is not part of the record on review in a certiorari proceeding. duPont v. Family Court, Del. Supr., 153 A.2d 189 (1959); Thompson v. Thompson, Del. Supr., 140 A. 697 (1928); Kowal v. State, Del. Super., 121 A.2d 675 (1956). Thus, the sufficiency of the evidence before the inferior tribunal is not reviewable by means of a certiorari proceeding. Castner v. State, Del. Supr., 311 A.2d 858 (1973); Mason, supra, at 299.

For a further discussion of the use of, and application for, a writ of certiorari, see Chapter 14.

b. Mandamus. A writ of mandamus will issue to compel an inferior court or administrative body to perform a clear legal duty. Mason, supra, at 300; State v. McDowell, Del. Super., 57 A.2d 94 (1947); II Woolley, Delaware Practice, § 1655. The writ is only appropriate where the duty sought to be compelled is ministerial. Mason, supra, at 300; Remedio v. City of Newark, Del. Supr., 337 A.2d 317 (1975). A duty is ministerial where it is prescribed with such precision and certainty that nothing is left to discretion or judgment. Darby v. New Castle Gunning Bedford Educ. Ass'n., Del. Supr., 336 A.2d 209 (1975).

The writ has been used to review whether an administrative agency's action is legally correct where there are no disputed facts in issue. See Sabo v. Williams, Del. Ch., 303 A.2d 696 (1973); Dorsey v. State ex rel. Mulrine, Del. Supr., 283 A.2d 834 (1971). But mandamus is unavailable where the tribunal must hear and weigh evidence. Mason, supra. The APA also specifically incorporates relief by way of a writ of mandamus, if an agency fails to take action required of it by law. 29 Del.C. § 10143.

19.16 REVIEW OF REGULATIONS. Regulations issued by administrative agencies may be reviewed directly under the APA or by way of declaratory judgment or suit for injunctive action.

19.17 DIRECT REVIEW OF AGENCY RULES UNDER THE ADMINISTRATIVE PROCEDURES ACT. Regulations, i.e., "statements of law, procedure, policy, right, requirement or prohibition" issued by a covered agency as a rule, standard or guide

for the decision of subsequent cases by any tribunal, 29 Del.C. § 10102(7),[6] are subject to direct review in the Superior Court. 29 Del.C. § 10141.[7]

a. Parties to the Review of Agency Regulations. Any person aggrieved by and claiming the unlawfulness of any regulation may bring an action for declaratory relief in the Superior Court. 29 Del.C. § 10141(a).

b. Finality of the Regulation to be Reviewed. No agency action relating to the making or consideration of a regulation, or its amendment or repeal, may be reviewed until final agency action has been taken on the proposal. 29 Del.C. § 10141(b). However, mandamus is available to any person aggrieved by the failure of an agency to take action required of it by law. 29 Del.C. § 10143.

c. Time and Place to Petition for Review. A complaint for direct review of an agency regulation must be filed within 30 days of the order adopting the regulation. 29 Del.C. § 10141(d). The appeal is not perfected until the complaint for declaratory judgment is filed with the Prothonotary and served upon the agency in accordance with the rules of the Superior Court. 29 Del.C. § 10145. There is no venue requirement.

d. Scope of Review. Agency regulatory actions are accorded a presumption of validity. The complainant has the burden of proving that the action was taken in a substantially unlawful manner and that complainant was prejudiced as a result, or that the

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[6]Not included in the definition are locally operative highway signs, or an agency's explanation of, or reasons for, its decision of a case, or an advisory opinion given on a stated fact situation, or terms of an injunctive order or license. Id.

[7]The lawfulness of a regulation may also be reviewed by the Superior Court by way of a defense to an enforcement action under the regulation. 29 Del.C. § 10141(c).

regulation, where required, was adopted without a reasonable basis on the record or otherwise is unlawful. When factual determinations are at issue, the Superior Court must take account of the experience and specialized competence of the agency and the purposes of the basic law under which it acted. 29 Del.C. § 10141(e).

e. Stay of Agency Rule Making. A stay of rules and regulations issued by APA covered agencies may be granted by the court after a preliminary hearing. See discussion at Section 19.14 f., supra.

19.18 OTHER METHODS OF REVIEW OF AGENCY REGULATIONS. A person with an interest may maintain a declaratory judgment action prior to any enforcement action being taken against the person. See 10 Del.C., ch. 65. The person may also seek an injunction against enforcement. Cf. Strauss v. Silverman, Del. Supr., 399 A.2d 192 (1979). For a more detailed discussion, see Chapter 19, Section 19.09.

CHAPTER 20. WORKER'S COMPENSATION REVIEWS

TABLE OF CONTENTS

TABLE OF FORMS

CHAPTER 20. WORKER'S COMPENSATION REVIEWS

John J. Schmittinger[1]

20.01 INTRODUCTION. This chapter concerns Superior Court and Supreme Court reviews of worker's compensation awards made by the Industrial Accident Board of the State of Delaware (the "IAB"). An award is the final determination of the IAB in any worker's compensation case. Eastburn v. Newark School District, Del. Supr., 324 A.2d 775 (1974). By contrast, interlocutory orders, such as an order issued by the IAB denying an application for a physical examination, are not appealable, id. at 776, although a writ of prohibition may be issued against the IAB in a proper case when it has exceeded its jurisdiction. See Lind v. Industrial Accident Board, Del. Super., C.A. No. 78M-DE-5, Taylor, J. (Feb. 8, 1979). Appeals to the Superior Court from the IAB follow, in general, the procedure for appeal of other civil and administrative decisions in Superior Court. See Chapter 20 for a discussion of administrative review procedures.

20.02 APPEALS TO THE SUPERIOR COURT.

a. Jurisdiction. Title 19 Del. C. Sections 2349 and 2350 grant the Superior Court jurisdiction to hear and determine all appeals from awards of the IAB. 29 Del. C. Section 10161(8) makes proceedings before the Superior Court on review of IAB awards subject to the regulations of the Delaware Administrative Procedures Act of 1976 (the "APA"). Under 29 Del. C. Section 10142, any party against whom a case decision has been decided may appeal such decision to the Superior Court. IAB proceedings fall within the scope of the definition of "case" set out in 29 Del. C. Section 10102(3). However, the twenty day period for filing a notice

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of appeal from an IAB decision set out in 19 Del. C. Section 2349 conflicts with the thirty day time limit for filing an appeal set out in 29 Del. C. Section 10142(b).

The Supreme Court held, in State v. Minner, Del. Supr., 448 A.2d 227 (1982), that the APA controls in cases in which two statutes are in irreconcilable conflict. Id. at 229. Consequently, the longer thirty day time limit for filing a notice of appeal in IAB cases should prevail. According to Gooden v. Mitchell, Del. Super., 19 A.2d 13 (1941), "sent to" is equivalent to "served on" and the appeal period in IAB cases begins to run upon receipt of the IAB decision by the parties. However, 29 Del. C. Section 10142(b) provides that an appeal from a case decision "shall be filed within 30 days of the day the notice was mailed." Id. Accordingly, a careful practitioner, noting this conflict between the Worker's Compensation Act and the APA, will file the notice of appeal within twenty days after the date of mailing of the IAB decision, whenever possible, to avoid the necessity of defending a motion to dismiss the appeal.

An appeal from an IAB award must be filed in the Superior Court for the county in which the injury occurred. If the injury occurred outside Delaware, the appeal should be filed in the county in which the original IAB hearing was held in the matter. 19 Del. C. Section 2349. With the IAB's current practice of conducting hearings involving both Kent County cases and Sussex County cases in Milford (in Sussex County), it is additionally important to be cognizant of the county in which the injury occurred. If an appeal is lodged in the wrong county, 10 Del. C. Section 1902 may allow a transfer of the appeal to a court having subject-matter jurisdiction within sixty days after an order denying jurisdiction is final. Consequently, an appeal from the IAB which is filed in the wrong county will probably be dismissed by the Superior Court, giving the losing party an opportunity to transfer the appeal to the appropriate county within sixty days.

b. Cross-Appeals. Cross appeals are also permitted in IAB cases. Super. Ct. Civ. R. 72(h) allows a party to file a notice of cross-appeal within ten days after the date of the filing of the first notice of appeal in the case. While the APA allows thirty days for the initial filing of a notice of appeal, it makes no provision for cross-appeals which would conflict with Super. Ct. Civ. R. 72(h). Consequently, a cross-appeal would be untimely filed if not filed within the period prescribed by Super. Ct. Civ. R. 72(h). See Section 20.04.

c. Reargument in Superior Court and Appeals to the Supreme Court.

Either party may appeal to the Supreme Court from the Superior Court's decision after the appeal has been finally decided by the Superior Court. For a discussion of interlocutory decisions of the Superior Court, see Section 20.11. Alternatively, the losing party may move for reargument in the Superior Court. A motion to reargue must be filed within five days of the filing of the Court's decision. Super. Ct. Civ. R. 59(e). A motion for reargument tolls the running of the appeal period. Hessler, Inc. v. Farrell, Del. Supr., 260 A.2d 701 (1969). Post-trial motions such as a motion for a new trial filed after the 10 days prescribed by Super. Ct. Civ. R. 50 and 59 will not extend the time limit for filing a notice of appeal to the Supreme Court. Fisher v. Biggs, Del. Supr., 284 A.2d 117 (1971). By analogy, a late motion for reargument in an IAB appeal will not toll the time for taking an appeal from the original decision of the Superior Court.

20.03 STANDARD AND SCOPE OF REVIEW.

a. Errors of Law. There are two standards for Superior Court or Supreme Court review of an IAB award. The first standard is whether the IAB erred as a matter of law in its award. Chicago Bridge and Iron Co. v. Walker, Del. Supr., 372 A. 2d 185 (1977). If the IAB has erred as a matter of law in granting, denying or modifying an award, the Supreme

Court may reverse or remand to the Superior Court. The Superior Court, in turn, may remand or reverse and remand the case to the IAB. For a further discussion, see Section 20.11.

b. Errors of Fact. The second standard for review relates to the facts as found by the IAB. According to pre-APA case law, findings of fact made by the IAB will stand if supported by substantial competent evidence. Johnson v. Chrysler, Corp., Del. Supr., 203 A.2d 64 (1965). This standard corresponds to that established by the Supreme Court for review of facts found by a jury. See Turner v. Vineyard, Del. Supr., 80 A.2d 177 (1951). However, 29 Del. C. Section 10142(d) provides the Superior and Supreme Courts' review of case decisions, "in the absence of fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency." A. Mazzetti & Sons, Inc. v. Ruffin, Del. Supr., 437 A.2d 1120, 1122 n.2 (1981). This difference in wording between the earlier case law and the APA ("substantial competent evidence" as opposed to "substantial evidence") appears to have little present significance.[2]

The Superior Court has the duty as a reviewing court to weigh and evaluate the evidence to determine whether the decision of the IAB is supported by substantial evidence. M. A. Hartnett, Inc. v. Coleman, Del. Supr., 226 A.2d 910, 912 (1967). For a definition of "substantial evidence" see Delaware ABCC v. A. I. DuPont School District, Del. Supr., 385 A.2d

[2]The Superior Court has referred to "substantial competent evidence" as the test for upholding IAB awards in a number of cases since 1979. See, e.g., Cale v. Governor Bacon Health Center, Del. Super., C.A. No. 83A-NO-16, Stiftel, P.J. (June 19, 1984); Johnson v. Chrysler Corp., Del. Super., C.A. No. 82A-OC-2, Taylor, J. (Nov. 3, 1982). The Court has also stated that the test for review of an IAB award is whether there is substantial evidence in the record to support the Board's findings. See, e.g., Signal Delivery Service, Inc. v. Garrett, Del. Super., C.A. No. 82A-JL-20, Stiftel, P.J. (June 13, 1983); Stewart v. Rosenberg & Son Floor Coating Contractor, Del. Super., C.A. No. 79A-DE-9, Stiftel, P.J. (June 27, 1981).

1123, 1125 (1978); Board of Education v. Shockley, Del. Supr., 155 A.2d 323, 327 (1959). See also Olney v. Cooch, Del. Supr., 425 A.2d 610, 614 (1981); National Cash Register v. Riner, Del. Supr., 424 A.2d 669, 674-675 (1980). However, the Superior Court does not sit as a trier of fact with authority to weigh evidence, determine credibility, and make factual findings and conclusions on its own. Johnson v. Chrysler Corp., Del. Supr., 203 A.2d 64 (1965). Only the IAB may make findings of fact in the first instance. Ciccamore v. Alloy Surface Co., Del. Supr., 244 A.2d 278 (1968). Thus, the scope of review of factual determinations of the IAB exercised by the Superior Court and the Supreme Court is very narrow. Craig v. Synvar Corporation, Del. Super., 233 A.2d 161 (1967).

Perhaps the best explanation of the limitations on judicial review of fact-finding by the IAB is found in Air Mod Corporation v. Newton, Del. Supr., 205 A.2d 434 (1965). In that case, the Supreme Court stated that, although it found great inconsistencies in the evidence in the record, it was bound by the IAB's determination of the credibility of witnesses and the weight to be accorded the evidence. Although Air Mod was decided prior to the adoption of the APA, it represents an attitude of deference that was also embodied in 29 Del. C. Section 10142. Consequently, attorneys taking appeals from the IAB may expect the Superior Court or the Supreme Court to show great deference to facts found by the Board. It must be noted, however, that the Superior and Supreme Courts will not give deference to orders of the IAB that fail to state the facts upon which the IAB has based its decision. See Bordley v. Mid-Del Employment, Del. Super., C.A. No. 94A-06-002, Terry, J., (Feb. 13, 1995). Furthermore, findings of fact made by the IAB based on incompetent evidence in the record will not support an award on review.

Ware v. Baker Driveway, Inc., Del. Super., 295 A.2d 734 (1972), aff'd, Del. Supr., 303 A.2d 358 (1973).

The Superior Court has never accepted any theory by which the burden of disproving the employee's claim somehow shifts to the employer, and no presumption theory has been honored in IAB reviews supporting the findings of fact of the IAB. A. H. Angerstein, Inc. v. Jankowski, Del. Super. 187 A.2d 81 (1962). The burden of proof remains on the employee to show entitlement to relief, although the burden shifts on an appeal from the IAB to the moving party to show that the findings of the IAB are not supported by substantial evidence. Id. at 86.

20.04 SERVICE AND FILING OF NOTICE OF APPEAL. An appeal from the decision of the IAB is initiated by filing a notice of appeal within the time limits described in Section 20.02a. The notice of appeal must specify the party taking the appeal. It must also designate the order or award, or portion thereof appealed from, and state the grounds for the appeal, naming the Court to which the appeal is taken. The appellant's attorney must sign the notice of appeal. A praecipe is filed with the notice of appeal which instructs the Prothonotary to file the notice of appeal and issue, by registered mail, a citation to all parties to the proceeding below. Super. Ct. Civ. R. 72(c). The Prothonotary serves both the IAB and the non-appealing party below with the citation of appeal.

20.05 PARTIES TO REVIEW. Only the parties to the IAB hearing have standing to appeal the award of the IAB. Edwin Bell Co. v. Rogers, Del. Super., 138 A. 903 (1927). The Superior Court held in Rogers that the insurance company for the employer was not a party and could not appeal an IAB award. However, that case involved a dispute between the employer and the employer's insurance company. Even in that particular factual circumstance, the

Superior Court held that the insurance carrier was not a proper party. In typical cases, the insurance carrier acting as a subrogee for the employer appeals in the name of the employer. 29 Del. C. Section 10142(a), which allows any party against whom a case has been decided to take an appeal from the adverse decision, may modify this holding. See Cebrick v. Peake, Del. Supr., 426 A.2d 319 (1981) (Alcoholic Beverages Control Commission, although not a party, permitted to appeal under APA).

20.06 RECORD ON REVIEW. The record on review consists of the transcript of the hearing, the exhibits introduced into evidence, and the IAB's written award. 19 Del. C. Section 2350(b). As previously noted, after the notice of appeal is filed, the Prothonotary issues a citation to the IAB. This citation directs the custodian of the records of the IAB to send to the Superior Court of the county out of which the citation was issued a certified copy of the record of the proceedings below within twenty days of service of the citation. Super. Ct. Civ. R. 72(e). Although 19 Del. C. Section 2351 permits the Superior Court to supplement the IAB record in a limited manner by appointing one or more impartial physicians to examine the claimant or to take testimony and inspect the premises where an industrial accident allegedly occurred, the Superior Court seldom, if ever, has done so. Furthermore, 29 Del. C. 10142(c) requires the Superior Court to remand a case to the IAB for further fact-finding if the court deems the facts insufficient to support the IAB's decision. In a case involving an award for disfigurement, therefore, the prudent attorney should include as part of the record before the IAB photographs of the disfigurement to enable the reviewing court to determine whether the IAB award constituted "proper and equitable compensation" and was supported by substantial evidence. See Bagley v. Phoenix Steel Corporation, Del. Supr., 369 A.2d 1081, 1083 (1977).

20.07 BRIEFS. After the appellant files the notice of appeal and the record below is filed with the Superior Court, as set out above, the appellant's brief shall be served and filed within twenty days after the date of the filing of the record. The appellee's answering brief shall be served and filed within twenty days of appellant's brief. The appellant's reply brief, if any, shall be filed not later than ten days after the filing of the appellee's answering brief. Super. Ct. Civ. R. 72(g).

The form and contents of briefs on appeal to the Superior Court from IAB awards are the same as other civil briefs filed in the Superior Court. Super. Ct. Civ. R. 107 governs the form and style of briefs. For a more detailed discussion of the proper form of briefs before the Superior Court see Chapter 8.

Super. Ct. Civ. R. 107(a) provides that the original and one copy of the brief of each party shall be filed with the Prothonotary in the county in which the case is pending. Two copies shall be served on counsel for the opposing party.

20.08 ORAL ARGUMENT. Super. Ct. Civ. R. 72(g) provides that "[i]f appropriate, the assigned judge shall schedule the case for argument." IAB cases are not routinely scheduled for oral argument. However, counsel may move for oral argument, and the Superior Court, in its discretion, can grant the motion. See Super. Ct. Civ. R. 78. For a general discussion of oral argument on appeal, see Chapter 10.

20.09 MOTIONS. Once a brief schedule is set by the Case Scheduling Office, and unless an appropriate motion to amend the brief schedule or stipulation to amend the brief schedule is filed, the Superior Court can invoke Super. Ct. Civ. R. 107(e) to permit discretionary dismissal or summary denial or granting of a motion. Super. Ct. Civ. R. 107(e) authorizes the

Court to dismiss an appeal if briefs are not served and filed within the time limits prescribed in Super. Ct. Civ. R. 72 and 107. Alternatively, the Court may consider the appeal as abandoned, or it may summarily grant or deny the appeal or take any other action it may deem necessary to expedite disposition of the case. Moreover, upon the filing of a motion to compel under Super. Ct. Civ. R. 37(a)(2), the Court may issue an order requiring the party, person or attorney whose conduct necessitated the motion to pay to the other party reasonable expenses incurred in obtaining or attending the motion to compel. Super. Ct. Civ. R. 37(a)(4). This order may include attorney's fees, unless the Superior Court finds the delay to be justified, or other circumstances make the award of expenses unjustified. Id.

Ordinarily, motions for extension of time within which to file a brief or to amend the brief schedule and motions for oral argument or to extend time for oral argument will be treated by the Superior Court in its discretion.

Super. Ct. Civ. R. 72.1 allows expedited procedure for appeals from the IAB. The rule essentially tracks Supr. Ct. R. 25 and allows the Superior Court to grant a motion to affirm if any of the following conditions are met:

(i) the issue on appeal is clearly controlled by settled Delaware law;

(ii) the issue on appeal from the IAB is factual, and clearly there is sufficient evidence to support the findings of fact below;

(iii) the issue on appeal is one of judicial or administrative discretion, and clearly there was no abuse of discretion.

Procedurally, the motion to affirm shall be served and filed within ten days of the receipt of appellant's opening brief. The filing of the motion tolls the time for filing of the

appellee's brief. The Superior Court may also affirm a decision of the IAB sua sponte under Super. Ct. Civ. R. 72.1(c).

20.10 DISPOSITION AND MANDATE, ATTORNEY'S FEES AND COSTS.

The Superior Court may affirm, reverse or modify the award of the IAB on appeal and assess costs to the party who does not prevail. Although 19 Del. C. Section 2350(d) waives the requirement for security or bond for costs, Super. Ct. Civ. R. 72(f) provides that, upon motion, security for costs in cases involving a non-resident appellant may be required. The cost of such bond is also includable in the costs which may be taxed against the losing party on appeal. 19 Del. C. Section 2350(d).

Pursuant to a 1994 amendment, 19 Del. C. Section 2350(f) authorizes the Superior Court to award a reasonable attorney's fee in those appeals from the IAB award where the claimant's position before the IAB prevails on appeal. 19 Del. C. Section 2350(f). This is a significant change in practice. Prior to the amendment, the claimant had to win before the IAB and also win on appeal to receive an award of attorneys' fees. Now, all that the claimant must do is prevail on appeal. If the claimant ultimately prevails in either the Superior Court or the Supreme Court, the Superior Court may retain jurisdiction for the purpose of fixing fees and costs and it may allow a reasonable attorneys' fee to the claimant. All American Engineering Co. v. Price, Del. Super., 348 A.2d 333 (1975).

The Superior Court looks to the factors laid out in the Delaware Lawyers' Rules of Professional Conduct (D.R.P.C.), particularly Rule 1.5 and considers the employer's ability to pay and the claimant's attorney's affidavit regarding the time expended as well as additional sources for the recovery of fees and expenses, etc., in exercising its discretion to award attorneys' fees on

appeal. General Motors Corporation v. Cox, Del. Supr., 304 A.2d 55 (1973). See also In re Cox, Del. Ch., C.M. No. 3487, Longobardi, V.C. (June 7, 1984).

In DiGiacomo v. Board of Public Education, Del. Supr., 507 A.2d 542 (1986), the Supreme Court held that it was an abuse of discretion for the Superior Court to reduce the attorney's fee allowed under 19 Del. C. Section 2350(f) because a particular issue before the Board was not sustained on appeal even though the claimant prevailed on appeal. The Court held that it was appropriate for the Superior Court to award an attorney's fee for time spent in preparing and presenting the fee application, the amount of such fee being in the Superior Court's discretion.

Thereafter, in Board of Public Education v. DiGiacomo, Del. Supr., No 305,1986, Walsh, J. (Feb. 9, 1987) (ORDER), the Supreme Court affirmed the Superior Court's allowance of an attorney's fee under Section 2350(f) for the time spent in prosecuting the successful appeal from the initial denial of an attorneys' fee for the time spent in preparing for and presenting the initial fee application. The Court based its decision upon the remedial nature of the statute and relied upon the rationale in Bagby v. Beal, 606 F.2d 411 (3rd Cir. 1979).

The Supreme Court also ruled that the Superior Court has discretion, under Section 2350(f), to determine whether a "reasonable fee" requires the separate addition of prejudgment interest, but in that case the denial of such interest was not an abuse of discretion.

A motion for rehearing was filed by the employer which was denied by the Supreme Court en banc. Board of Public Education v. DiGiacomo, Del. Supr., No. 305,1986, Walsh, J. (Mar. 9, 1987) (ORDER).

20.11 INTERLOCUTORY ORDERS OF THE SUPERIOR COURT IN WORKER'S COMPENSATION CASES. When the Superior Court assumes jurisdiction over an appeal from the IAB, it may remand the case for further proceedings before the IAB. This remand order is interlocutory and is subject to the procedures and requirements of Super. Ct. Civ. R. 42 if further review is sought. See Supr.Ct.R. 42(a) and (b)(iii).

Perhaps the best expression of the relationship between Rule 42 and such remand orders can be found in DiSabatino Bros. v. Wortman, Del. Supr., 453 A.2d 102 (1982). There, the Supreme Court, following its earlier per curiam decision in Taylor v. Collins and Ryan, Inc., Del. Supr., 440 A.2d 990 (1981), held that the Superior Court, when reviewing IAB cases, is subject to the provisions of Supr. Ct. R. 42. DiSabatino Bros. 453 A.2d at 104. The Court thus held that a remand order to the IAB could be appealed as an interlocutory order if it met the criteria of Supr. Ct. R. 42. Id. at 105. However, in a footnote, the Supreme Court in DiSabatino suggested that the interlocutory appeal procedure was not applicable to remands for "purely ministerial" functions, presumably suggesting that such remands were final orders appealable to the Supreme Court as a matter of right. See id. at 104 n.3. This dichotomy may present a dilemma to the practitioner. If there exists any doubt as to the proper characterization of the IAB's function on remand, the appropriate notice of appeal should be filed. Consideration should also be given as to whether the Rule 42 procedure should be pursued at the same time, with the thought that at some stage of the appellate proceeding the Supreme Court will indicate which procedure is applicable.

In cases in which more than one issue is raised on appeal or where there is a consolidated case involving more than one appellant, it is necessary to address whether the

Superior Court decision constitutes a final and appealable order. Pursuant to Super. Ct. Civ. R. 54(b) when there is more than one party or more than one claim for relief involved, the Court can direct the entry of a final judgment upon one or more but fewer than all of the claims or parties if it finds that there is no reason to delay the entry of a final judgment.

For a detailed discussion of the procedures and requirements of Supr. Ct. R. 42, see Chapter 5.

20.12 APPEALS TO THE SUPREME COURT. Appeals to the Supreme Court from the order of the Superior Court in IAB cases are governed by the rules generally applicable to civil appeals.

FORM 20:1 Praecipe for Appeal from an Award of the Industrial Accident Board

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR _____ COUNTY

_____-Appellant,	)	
v.	)	Civil Action No. _____
_____-Appellee	)	

PRAECIPE

TO: PROTHONOTARY OF _____
COUNTY
(Address)

PLEASE ISSUE to the Sheriff of _____ County a Citation on Appeal pursuant to Rule 72(e) in the above-captioned appeal from a decision of the Industrial Accident Board.

_____
[Attorney for Appellant]

DATED:

FORM 20:2 Notice of Appeal, Worker's Compensation Case

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR _____ COUNTY

_____-Appellant,	)	
v.	)	Civil Action No. _____
_____-Appellee	)	

NOTICE OF APPEAL

(Name of Appellant, _____-Appellant ("_____") hereby gives notice of its appeal to the Superior Court of the State of Delaware in and (Name) County from the Award and Decision [of part thereof] of the Industrial Accident Board of the State of Delaware in and for _____ County in Hearing No. _____, dated _____ and mailed on _____, a copy of which is attached hereto.

The grounds for this appeal are as follows:

1. The Board erred as a matter of law in (set out specific errors of law and fact);

2. The decision of the Board is unsupported by and is against the weight of the evidence adduced at the hearing;

3. The decision of the Board is not supported by substantial competent evidence.

_____

[Attorney for Appellant]

DATED:

CHAPTER 21. REVIEW OF UNEMPLOYMENT INSURANCE DECISIONS

TABLE OF CONTENTS

CHAPTER 21. REVIEW OF UNEMPLOYMENT INSURANCE DECISIONS

Kevin R. Slattery[1]

21.01 INTRODUCTION. This chapter is devoted to the administrative and judicial appellate processes involving unemployment insurance benefits and taxes. 19 Del. C. §§ 3317 through 3361. The first two sections address the issues surrounding determinations of a claimant's entitlement to unemployment benefits and the recoupment of benefits subsequent to a disqualification decision. The last section addresses issues pertaining to employer tax assessments and related appeals. Much of the caselaw in these areas is unreported. This chapter cites a select number of those cases for purposes of illustration and is not intended to be comprehensive.

21.02 APPEALS FROM DISPUTED BENEFIT CLAIMS. Entitlement to unemployment compensation is based upon two related components: whether a claimant is "eligible" and "not otherwise disqualified." 19 Del. C. §§ 3314, 3315. The initial determinations as to eligibility and disqualification are made by an employee of the Department of Labor, Division of Unemployment Insurance ("Department" or "Division") referred to as a Claims Deputy. 19 Del. C. § 3318(a). The Claims Deputy gathers readily available information regarding an employee's separation from employment from both the employee and employer in writing or by personal and telephone interviews. While a pre-determination hearing may be available at this level, it is discretionary on the part of the Claims Deputy and is rarely utilized. Office of the Public Defender v. Beck and the Unemployment Insurance Appeal Board, Del. Super., C.A. No. 93A-01-009, Carpenter, J. (June 22, l994).

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[1]Kevin R. Slattery, Esquire is a Deputy Attorney General with the Department of Justice. Mr. Slattery formerly represented the Department of Labor, Division of Unemployment Insurance and the Unemployment Insurance Appeal Board.

Two levels of administrative appellate review are available from the decision of a Claims Deputy. The employee (hereafter "claimant") or the last employer may appeal to an Appeals Tribunal (19 Del. C. § 3318(b)) and, on further appeal, to the Unemployment Insurance Appeal Board ("Board")(19 Del. C. § 3318(c)).

a. The Appeals Tribunal. An appeal to the Appeals Tribunal must be made in writing within ten (10) calendar days from the date of mailing of the decision by the Department of Labor. 19 Del. C. § 3318(b). As this time limitation is jurisdictional, it may not be extended. See e.g., Reagan National Advertising, Inc. v. Unemployment Insurance Appeal Board, Del. Super., C.A. No. 89A-SE-1, Poppiti, J. (July 19, l990), affirmed, Del. Supr., 586 A.2d 1202 (l990); Creswell v. Unemployment Insurance Appeal Board, Del. Super., C.A. No. 91A-12-010, Babiarz, J. (Nov. 22, l993). Weekends and holidays are included in the calculation unless the last day to appeal falls on such a day in which case the filing deadline is extended to the next business day. 19 Del. C. § 3304. An appeal is effective as of the date it is postmarked and need not be filed in person. 19 Del. C. § 3304. The courts have rejected the argument that the appeal period begins to run when a Claims Deputy's determination is received. See David Dorn v. Unemployment Insurance Appeal Board, Del. Supr., No. 259, 1986, Horsey, J. (Dec. 30, l985)(ORDER). An appeal may be filed with the Referees' offices or any of the Division's local offices throughout the State. While the Appeals Referees generally have been accepting a facsimile (FAXed) notice of appeal as an effective filing, because this is not statutorily permissible and there is no caselaw approving this practice, it is recommended that notices of appeal be filed either by mail or in person. A notice of appeal may simply be in the form of a letter requesting a hearing.

An administrative appeal before the Appeals Tribunal is heard by an Appeals Referee ("Referee"). Most, but not all, of the Referees are attorneys or law school graduates. Hearings before the Referees are de novo. As such, the employer will bear the burden of proof in a "discharge" separation and the claimant will bear the burden of proof in a "voluntary quit" separation. Boughton v. Division of Unemployment Insurance, Del. Super., 300 A.2d 25 (l972); Longobardi v. Unemployment Insurance Appeal Board, Del. Super., 287 A.2d 690 (l971), aff'd, Del. Supr., 293 A.2d 295 (l972). While the hearings are relatively informal, the Rules of Evidence are generally followed. Witnesses may be subpoenaed to testify by written application to the Referees' offices. As the subpoenas are mailed, it is recommended that such a request be made as far in advance of the hearing as possible to ensure adequate time for delivery. A written Referee's decision is usually issued to both parties within two to three weeks after the hearing.

b. The Unemployment Insurance Appeal Board. A party may appeal a Referee's decision to the Board by filing a written notice of appeal to the Board's office, Referees' offices or any local office of the Division throughout the state. As with an appeal to the Appeals Tribunal, the appeal must be filed within ten (10) calendar days from the date of mailing of the decision by the Department or notification. 19 Del. C. § 3318(c). Again, the time limitation is jurisdictional and cannot be extended. See e.g., Chrysler Corporation v. Dillon, Del. Supr., 327 A.2d 604 (l974); Manlove v. Sears Fashion Center and Unemployment Insurance Appeal Board, Del. Super., C.A. No. 94A-09-005, Toliver, J. (Dec. 19, l994). While the Board cannot permit an untimely appeal to proceed, it may assume jurisdiction on its own motion over an appeal that was not timely filed. 19 Del. C. § 3320; Funk v. Unemployment Insurance Appeal Board, Del.

Supr., 591 A.2d 222 (l991). Requests to assume jurisdiction, however, are rarely granted and must involve severe circumstances. Funk, at 225.

Unlike an appeal to the Referees, however, the Board does not have to permit an appeal or a hearing. The Board may consider the appeal on the record from below, consider additional testimony at a hearing, or simply deny the appeal. 19 Del. C. § 3320; Evelyn Carroll v. Food Lion and Unemployment Insurance Appeal Board, Del. Super., C.A. No. 94A-02-001, Lee, J. (Dec. 28, l994). For this reason, it is recommended that the appealing party state the grounds for the appeal in the notice or letter requesting the appeal. Id.

The Board is composed of five laypersons drawn from both the labor and employer communities and from all three counties of the state. They receive legal advice from a Deputy Attorney General who sits with them during the hearings and deliberations. Hearings before the Board are **not** de novo and are **severely** limited in time. The Board routinely schedules its hearings at twenty (20) minute intervals. This means that each party has approximately ten (10) minutes to present their respective cases, and even this time is not guaranteed as the Board members frequently interrupt a presentation to ask questions. The Board members prefer that the parties limit their cases to previously unpresented evidence, legal argument and perhaps a brief overview of the evidence presented below. The Board's scheduling limitation has been unsuccessfully challenged several times on due process grounds. See e.g., Morris v. Southern Metals Processing Co. and the Unemployment Insurance Appeal Board, Del. Supr., No. 88, l987, Moore, J. (July 2, l987)(ORDER); DART v. Charles Jones and Unemployment Insurance Appeal Board, Del. Super., C.A. No. 94A-04-027, Babiarz, J. (Jan. 23, 1995); Kowalski v. Unemployment Insurance Appeal Board & Diamond Fuel Oil, Del. Super., C.A. No. 88A-JL-3,

Gebelein, J. (Jan. 22, l990). Because of the limited time to present an appeal before the Board, it becomes imperative for the practitioner to make the best record possible before the Referee and not rely upon a Board appeal to make the case. See e.g., DART, supra. Often, however, a party will not bring an attorney into the case until an adverse Referee's decision has been received. In such situations, it may be the best strategy to request that the Board remand the matter to the Referee for the taking of additional testimony. 19 Del. C. § 3320; Board Rule D.

Witnesses may also be subpoenaed to testify before the Board by written application to the Board's Secretary. As with the Referees, the subpoenas are mailed and it is recommended that such a request be made as far in advance of the hearing as possible in order to ensure adequate time for delivery. As a matter of unwritten policy, the Board usually limits the number of subpoenas it will issue to no more than five (5). Continuances (or "postponements") are **rarely** granted unless there are exceptional circumstances. The Board's file of the proceedings below is available at the Board's office along with the tapes of the Referee's hearing upon request. A written transcript of the Referee's hearing is not routinely made, however, one may be obtained at the requesting party's expense through the Board's transcriptionist.

Hearings before the Board are more formal than those before the Referee. While the Board is not strictly bound by the Rules of Evidence, there must be competent evidence with probative value in the record to support its decision. See Dixon v. Lower Kensington Environmental Center and Unemployment Insurance Appeal Board, Del. Super., C.A. No. 93A-06-008, Bifferato, J. (July 8,. l994); Geegan v. Unemployment Compensation Commission, Del. Super., 76 A.2d 116 (l950). Consequently, the Board permits little if any hearsay as part of its hearings with the exception of medical and hospital reports on physicians' stationery or

Department of Labor medical certificates. Board Rule B. Thus, witnesses should be present to testify briefly.

The Board's decision is issued in writing within two to three weeks of the hearing. 19 Del. C. § 3321. The Board's decisions are always mailed and become final ten (10) calendar days after the date of mailing. 19 Del. C. § 3321. Weekends and holidays are included within this ten day period. Within that ten (10) day period, a party may file a motion for reargument (or "rehearing") which will toll the running of the time for appeal to Superior Court. Board Rule F; Henry v. Department of Labor, Del. Super., 293 A.2d 578 (l972). Once the Board renders its decision on the request for rehearing, the Board's decision on the merits of the appeal becomes final ten (10) calendar days thereafter. Wilkerson v. Schwan's Sales and Unemployment Insurance Appeal Board, Del. Super., C.A. No. 94A-07-001, Graves, J. (Nov. 30, l994).

c. Judicial Review by the Superior Court. Once the Board decision becomes final, a party has ten (10) days thereafter to seek judicial review by the Superior Court in the county where the party resides or conducts business. 19 Del. C. § 3323(a). Due to the application of Superior Court Civil Rule 6(a), the ten day period excludes weekends and holidays. Wilkerson, supra. It does not, however, include the three-day "service-by-mail" extension provided in Rule 6(b). Compare Davidson v. R.F. Hewlett and Delaware Department of Labor, Del. Super., C.A. 93A-12-001, Balick, J. (July 1, l994)(ORDER). The additional ten day period effectively creates a twenty (20) day appeal period from the date of mailing of the Board's decision. While there is caselaw indicating otherwise (State, Department of Labor v. Minner, Del. Supr., 448 A.2d 227 (l982)), the Board is no longer covered under the Administrative Procedures

Act (29 Del. C. § 10142) and a practitioner should not be misled by the thirty (30) day appeal period contained therein. 65 Del. Laws ch. 416 (signed by the Governor on June 12, l986).

A request for judicial review is perfected by filing a Notice of Appeal (or "Petition") stating the grounds for the appeal, along with a Citation on Appeal, with the Prothonotary in the county where the party resides or does business. 19 Del. C. § 3323(a). The Citation on Appeal is simply a Praecipe (under another name) directing the Sheriff of the county to cite the Board to certify and forward the record to the Superior Court. Both the Notice and Citation on Appeal should include the Board as a party/appellee in the caption. 19 Del. C. § 3323(a). It should be noted that the Division of Unemployment Insurance is also a party as a matter of law. 19 Del. C. § 3322(b). While the Board has an option to participate in the appeal, more often than not, where the issues pertain to the facts surrounding an employee's separation from employment, the Board will not file a brief. Practitioners should note that the current practice for perfecting an appeal follows the procedure established for all Rule 72 appeals from administrative boards and agencies. For appeals from the Board to Superior Court by claimants, there is no filing fee. 19 Del. C. § 3372(a). While at present, it is the practice of the Prothonotary's office not to require a filing fee from employers, it is not clear whether they are entitled to the same exemption reserved for claimants.

Once the Citation on Appeal is received by the Board, the Board's Secretary prepares the record of the proceedings before the Board and the Referee. Where the appeal is being taken by a claimant, the Board must provide the transcript of both proceedings to the claimant free of charge. Holmes v. Rosbrow, Del. Supr., 297 A.2d 51 (l972). Where the employer takes the appeal, the employer must arrange to provide the transcript at its own

expense. Appeals from Board decisions are on the record, and as a general rule, the record cannot be supplemented on appeal. 19 Del. C. § 3322(a); Hubbard v. Unemployment Insurance Appeal Board, Del. Supr., 352 A.2d 761 (l976); But see Henry v. Department of Labor, Del. Super., 293 A.2d 578 (l972).

The standard and scope of review in an appeal from a decision of the Board is whether there is substantial evidence on the record sufficient to support the Board's findings, and whether such findings are free from legal error. Unemployment Insurance Appeal Board v. Duncan, Del. Supr., 337 A.2d 308 (l975); Longobardi v. Unemployment Insurance Appeal Board, Del. Super., 287 A.2d 690 (l971), aff'd, Del. Supr., 293 A.2d 295 (l972). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Histed v. E.I. duPont de Nemours & Co., Del. Supr., 621 A.2d 340 (l993); Olney v. Cooch, Del. Supr., 425 A.2d 610 (l981). It is more than a scintilla but less than a preponderance of the evidence. Hundley v. Riverside Hospital, Del. Super., C.A. No. 92A-11-19, Cooch, J. (Sept. 27, l993). Questions of conflict in the testimony and witness credibility are to be resolved by the Board and not the court on review. Starkey v. Unemployment Insurance Appeal Board, Del. Super., 340 A.2d 165 (l975), aff'd, Del. Supr., 364 A.2d 651 (l976); Coleman v. Department of Labor, Del. Super., 288 A.2d 285 (l972). Thus, the court must give proper deference to the Board's decision. Accord State Department of Transportation v. Unemployment Insurance Appeal Board, Del. Supr., No. 501, l994, Berger, J. (July 17, 1995) (ORDER).

In many appeals from Board decisions, the practitioner representing the appellee should consider filing a Motion to Affirm under Superior Court Civil Rule 72.1(b). Rule 72.1(b) provides that the appellee may file the motion within 10 days after receipt of the appellant's

opening brief. The standard and scope of review is the same as that for similar motions filed pursuant to Supreme Court Rule 25(a). The Prothonotary usually requires adherence to the five (5) page written motions limitation contained in Rule 78(a)(1) for Motions to Affirm. Should the motion be denied, the appellee has twenty (20) days thereafter in which to file an answering brief.

The Superior Court will dispose of the case as a civil matter on the record. The court may affirm, reverse or remand the matter to the Board with instructions. Settlement during an appeal is not always an option in appeals from the Board. The Superior Court has held that a settlement that would result in the reversal of a Board decision cannot be accomplished without the consent of the Board. Robbins v. Glenn Deaton, Inc. and Unemployment Insurance Appeal Board, Del. Super., C.A. No. 93A-05-001, Terry, J. (Feb. 6, 1995).

d. Appeals to the Supreme Court. An appeal from a Superior Court decision is provided as a matter of right to the Delaware Supreme Court. 19 Del. C. § 3323(b).

21.03 APPEALS FROM RECOUPMENT ORDERS. Pursuant to 19 Del. C. § 3325, a claimant who has been disqualified from receiving unemployment benefits is subject to recoupment of any benefits previously received. The Department of Labor issues a Notice of Overpayment and Order for Recoupment which can be appealed to the Appeals Tribunal within ten (10) days after the Notice and Order were mailed. 19 Del. C. § 3325. The Referee's decision can thereafter be appealed to the Board within ten (10) days after the decision is mailed. Id. The matter is processed in the same manner as appeals taken pursuant to 19 Del. C. § 3318(c), and the right of appeal to the Superior Court is also preserved.

The Department may issue its Notice and Order at the time of the initial disqualification or once the decision on the merits of the disqualification has become final.

Sandefur v. Unemployment Insurance Appeal Board, Del. Super., C.A. No. 89A-JL-6, Balick, J. (July 18, 1990). The Department almost always issues the Notice and Order after the decision on the merits has become final. The Department interprets the term "final" to mean the point at which there are no further avenues of appeal available to the claimant on the merits of the disqualification.

On appeal, the issues before the administrative tribunals and the courts are rather limited. As the merits of the underlying disqualification have already been finally determined, the claimant will be collaterally estopped from raising those issues. Kelly v. Department of Labor, Del. Super., C.A. No. 93A-01-008, Herlihy, J. (Aug. 19, 1993). This leaves only issues such as notice, identity of the party, accuracy of the overpayment, or discharge in bankruptcy to resolve. Costello v. Department of Labor, Del. Super., C.A. No. 92A-12-005, Terry, J. (Sept. 20, 1994).

The practitioner should be aware that equitable considerations no longer play a part in overpayment appeals. In the case of Snead v. Unemployment Insurance Appeal Board, Del. Supr., 486 A.2d 676 (1984), the Court held that the Department could not recoup a non-fraud overpayment of benefits unless equitable considerations preponderated in favor of the Department. This is no longer valid law. While the Snead case remains as an annotation in the Delaware Code, its holding was rendered ineffective by legislative amendments in 1985 and 1995. House Bill 291 was signed into law by the Governor on July 12, 1985 and expressly references the Snead decision in its synopsis. 65 Del. Laws ch. 179. It negates equitable considerations in overpayment appeals. Odom v. Department of Labor, Del. Super., C.A. No. 93A-02-008, Toliver, J. (Sept. 29, 1993); Costello v. Department of Labor, Del. Super., C.A. No. 92A-12-005, Terry, J. (Sept. 20, 1994). Senate Bill 159 (June 26, 1995) clarified that the election of

either a cash recoupment or recoupment from future benefits is a discretionary decision of the Department and is not reviewable by either the Board or the courts. 70 Del. Laws ch. 97, 19 Del. C. § 3325.

21.04 EMPLOYER TAX AND BENEFIT LIABILITY APPEALS. The unemployment benefits system is funded through a quarterly tax imposed upon employers. 19 Del. C. §§ 3341-3367. Appeals from the administrative tax determinations of the Department of Labor may be pursued by employers in several instances.

a. Initial Liability Determination Appeals. The Department of Labor makes the initial determination as to whether an employer is liable to pay the quarterly tax assessments. 19 Del. C. § 3344(a). An employer not previously subject to the tax, and which does not believe liability should attach, may appeal an initial determination of liability directly to the Board. Id. The appeal must be filed within fifteen (15) days from the date of the administrative ruling. Id. The Board is required to hear the matter and render a decision in writing. 19 Del. C. §§ 3344(a),(b). If the employer is not satisfied with the Board's determination, it may pursue a further appeal to the Superior Court in the county where the employer's representative ("complainant") resides. 19 Del. C. § 3344(c). Unlike appeals from benefit entitlement determinations, the employer has only ten (10) days from the date of "notice" in which to file the appeal in Superior Court. Id. As caselaw in this area is minimal, there are no precedents that have determined whether "notice" constitutes the date of the mailing of the Board's decision or the date of actual receipt of the decision. As noted above, as the Board is no longer subject to the Administrative Procedures Act, the practitioner should not be misled into believing the appeal period is thirty (30) days.

The standard and scope of review on appeal is similar to that for appeals from Board decisions in benefit entitlement determinations. Appeals are on the record and review is limited to whether substantial evidence exists to support the Board's decision and to whether the Board committed any error of law. See Chaiken v. Employment Security Commission, Del. Super., 274 A.2d 707 (197l).

Practitioners should not automatically assume there exists a right of further appeal to the Delaware Supreme Court from the Superior Court's decisions in initial employer liability determinations. Unlike the appellate provisions in benefit entitlement determinations (19 Del. C. § 3323), and the tax rate appeals considered below (19 Del. C. § 3354(d)), the General Assembly was silent on the right of further appeal in this area.

b. Tax Rate Appeals. An appeal may also be pursued from annual tax rate notifications. The Department is required to give yearly notice to employers of their tax rates for the upcoming calendar year. 19 Del. C. § 3354(a). These annual notices are generally mailed in late December or early January and will legally bind an employer to the tax rate stated in the notice unless an appeal is pursued. An administrative appeal (called an "application for review and redetermination") must be filed with the Department within fifteen (15) days after the mailing of the notice of the rate of assessment. 19 Del. C. § 3354(b). A letter directed to the Division of Unemployment Insurance's Employer Tax Contributions Administrator requesting such an appeal, and enumerating the reasons for the review, usually is sufficient to perfect the appeal. It should be noted that not all tax rate appellants are provided an administrative hearing as the granting of the review is discretionary. While such hearings are commonplace and routinely granted where an issue is raised, there are situations where the Tax Administrator has considered requests to be

frivolous. Should the practitioner be faced with a situation where the practitioner believes the denial of the review to be unwarranted, an appeal may be pursued in Superior Court to challenge the Department's discretionary ruling. 19 Del. C. § 3354(c).

Tax rate appeals are heard by the Appeals Tribunal. The Appeals Referees sit by designation of the Director of the Division of Unemployment Insurance as the Department's hearing officers in such matters. Separation issues which were, or could have been, litigated in the administrative appeals process under sections 3318 through 3323 cannot be raised in the context of a tax rate appeal. 19 Del. C. § 3354(b). Once the Referee issues a decision, the employer may appeal an unfavorable determination to the Superior Court in the county where the employer's place of business is located. 19 Del. C. § 3354(c); Baldini's Concord Service Station, Inc. v. Division of Unemployment Insurance and Unemployment Insurance Appeal Board, Del. Super., C.A. No. 89A-AP-9, Stiftel, P.J. (Oct. 30, 1989). The employer has fifteen (15) days from the date of mailing of the Referee's decision in which to file the appeal. Id.

As with initial liability appeals, the standard and scope of review on appeal is similar to that for appeals from Board decisions in benefit entitlement determinations. Appeals are on the record and review is limited to whether substantial evidence exists to support the Board's decision and to whether the Board committed any error of law. 19 Del. C. § 3354(c). The right of further appeal to the Delaware Supreme Court is available. 19 Del. C. § 3354(d).

c. Chargeable Benefits Appeals. The Department of Labor also issues a statement of benefits chargeable to each employer's account on a quarterly basis. 19 Del. C. § 3355. The employer may request a review and redetermination of the charges in the same manner as an appeal of a tax rate determination. Id.; Baldini's Concord Service Station, Inc. v. Division

of Unemployment Insurance and Unemployment Insurance Appeal Board, Del. Super., C.A. No. 89A-AP-9, Stiftel, P.J. (Oct. 30, 1989). Practitioners should note that amendments to Title 19 provide that an employer who fails to timely complete and return a separation notice (Form UC-119 or UC-119(c)) will be barred from claiming that a former employee should be disqualified, as well as from claiming relief from benefit charges under 19 Del. C. § 3355. 19 Del. C. § 3317(b); 19 Del. C. § 3355(b); 70 Del. Laws, ch. 121 (July 3, 1995). A good cause exception is provided which may release an employer from such liability. Id. Nonetheless, in both section 3354 and 3355 tax appeals, an employer, as a general rule, should expect to be estopped from raising the underlying merits of a claimant's entitlement to benefits.

d. Reimbursable Employer Appeals. Non-profit organizations and governmental entities occupy a unique position in the unemployment system. They have the option to be excluded from the requirement to pay tax assessments on a quarterly basis. 19 Del. C. § 3345(b). They may choose instead to reimburse the Unemployment Compensation Fund ("Fund") on a case-by-case, and dollar-for-dollar, basis whenever a former employee is determined to be entitled to receive unemployment benefits. Id. Those non-profit and governmental employers who make this election are referred to as "reimbursable" employers.

Unfortunately for such reimbursable employers, there is a down side to the election. Under the provisions of section 3345(b), a reimbursable employer cannot challenge a charge to its reimbursable employer account whenever a former employee becomes eligible for benefits as a result of a separation from subsequent employment. See Osteopathic Hospital Association of Delaware v. Unemployment Insurance Appeal Board, Del. Super., C.A. No. 88A-JL-11-1-AP, Stiftel, P.J. (May 9, 1989). More specifically, even where an employee is discharged

for just cause by, or quits without good cause from, a base period reimbursable employer, the base period reimbursable employer will be liable for a portion (or even all) of the benefits collected by a former employee due to a valid claim after separation from subsequent employment. 19 Del. C. §§ 3315(1),(2). Reimbursable employers, therefore, are not accorded the same recourse afforded tax assessed employers under section 3355. See Delaware Symphony v. Ward and Unemployment Insurance Appeal Board, Del. Super., C.A. No. 93A-06-018, Carpenter, J. (Dec. 5, 1994).

e. Judicial Review of Certificates of Indebtedness. In situations where an employer has failed to pay the employer's tax assessments, the Department of Labor may institute a civil action in the Superior Court to obtain a judgment against the employer. 19 Del. C. § 3358. There is an alternative remedy, however, that the Department of Labor is more likely to pursue. Under 19 Del. C. § 3361(a), the Department may simply file a "Certificate of Indebtedness" with the Prothonotary which certifies the name of the employer and the amount of the debt owed for failure to pay the tax assessments. Upon filing with the Prothonotary, the debt becomes a judgment and a lien against the real property of the employer. 19 Del. C. § 3361(b). Upon filing, the Prothonotary must send notice of the entry of the judgment to the employer by registered mail. Id. An employer may contest a certificate of indebtedness by filing a petition in Superior Court within ten (10) days of the date of the notice. 19 Del. C. § 3361(c). The petition stays all proceedings on the judgment. Id. The scope of the court's review of the certificate is limited to the correctness of the identity of the employer and the amount of the debt. Id.

CHAPTER 22. FAMILY COURT APPEALS

TABLE OF CONTENTS

CHAPTER 22. FAMILY COURT APPEALS

The Honorable Charles K. Keil
Patricia A. Dailey
Alan N. Cooper
Thomas D. Shellenberger
Kara H. Goodchild[1]

22.01 INTRODUCTION. The general rule with regard to appeals from the Family Court is set forth at 10 Del. C. § 1051 [originally 10 Del. C. § 960 (1971)]. A 1987 amendment expanded the Supreme Court's jurisdiction over appeals from the Family Court. Section 1051 provides that the Supreme Court has jurisdiction to hear all appeals from Family Court civil decisions. The Superior Court has jurisdiction to hear appeals in adult criminal matters and criminal support cases.

22.02 JURISDICTION. The areas covered by this chapter are:

(1) Those matters that are appealable from the Family Court to the Supreme Court, including divorces and ancillary property division and alimony awards, paternity proceedings, termination of parental rights, adoptions, spousal support and separate maintenance proceedings, custody, visitation, child support, adult criminal proceedings, juvenile delinquency and specialized proceedings on appeals relating to both civil and criminal contempt, and extraordinary writs;

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[1]The Honorable Charles K. Keil is a retired Judge of the Family Court of the State of Delaware. Patricia A. Dailey, Esquire is a Deputy Attorney General for the State of Delaware. Alan N. Cooper, Esquire is a Director of the firm of Berkowitz, Schagrin, Coonin, Cooper & Dougherty, P.A., Wilmington, Delaware. Thomas D. Shellenberger, Esquire is a Director of the firm of Cooch and Taylor, Wilmington, Delaware. Along with the previous authors, Kara H. Goodchild, Esquire former Family Court law clerk and member of the Pennsylvania Bar, assisted in the preparation of the materials for the second edition.

(2) Those intra-court reviews of Commissioners' and Masters' dispositions in both criminal and civil actions; and

(3) Those unique situations where Family Court acts as an appellate court in foster care review, Division of Child Support Enforcement tax intercept determinations, and handicapped education proceedings.

22.03 CIVIL APPEALS TO THE DELAWARE SUPREME COURT.

a. Standard and Scope of Review. The Delaware Supreme Court has jurisdiction to hear appeals from Family Court decisions relating to annulment, divorce and matters ancillary to a divorce, including property division and alimony under Title 13, Chapter 15, and spousal support brought either under Title 13, Chapter 5 or pursuant to a separation agreement. See Husband G. v. Wife G., Del. Supr., 379 A.2d 1111 (1977); 13 Del. C. §§ 1522 and 1522. The Delaware Supreme Court has jurisdiction to hear appeals in paternity, adoption, and termination of parental rights cases as well. See 13 Del. C. §§ 818, 917 and 1110. Since January 1, 1987, the Supreme Court also has had jurisdiction to hear appeals in all remaining civil matters heard in Family Court including but not limited to custody and child support. See 10 Del. C. §§ 1051-1052, l3 Del. C. § 515(a)(3). Such appeals shall be in the form and manner provided by the Rules of the Supreme Court.

The standard of review is as follows:

(1) As to findings of fact, the Court may draw its own inferences and deductions if it finds that the trial court's findings of fact are not supported by the record or are not the product of an orderly and logical deductive process. See Wife (J.F.V.) v. Husband, (O.W.V.,Jr.), Del. Supr., 402 A.2d 1202 (1979); Levitt v. Bouvier, Del. Supr., 287 A.2d 671

(1972); Wife (D.S.) v. Husband (G.F.W.), Del. Super., 521 A.2d 634 (1986); see generally Chapter 6, Section 6.02.

(2) As to conclusions of law, the Court will determine whether the Family Court has committed an error of law requiring reversal. See Wife F. v. Husband F., Del. Supr., 358 A.2d 714 (1976).

(3) As to the exercise of discretion, the Court will determine whether the Family Court abused its discretion. See Wife B. v. Husband B., Del. Supr., 395 A.2d 358 (1978); W. v. W., Del. Supr., 339 A.2d 726 (1975).

The Supreme Court has defined judicial discretion as follows:

> The essence of judicial discretion is the exercise of judgment directed by conscience and reason, as opposed to capricious or arbitrary action; and where a court has not exceeded the bounds of reason in view of the circumstances, and has not so ignored recognized rules of law or practice, so as to produce injustice, its legal discretion has not been abused; for the question is not whether the reviewing court agrees with the court below, but rather whether it believes that the judicial mind in view of the relevant rules of law and upon due consideration of the facts of the case could reasonably have reached the conclusion of which complaint is made.

Pitts v. White, Del. Supr., 109 A.2d 786, 788 (1954) (citations omitted).

b. Service and Filing of Appeals. A notice of appeal must be served and filed within thirty (30) days from entry upon the docket of the final order of judgment. See Supr. Ct. R. 6. A timely filed motion for reargument in the initial trial court will, however, toll the time for appeal. Linda D.P. v. Robert J.P., Del. Supr., 493 A.2d 968 (1985); Hessler, Inc. v. Farrell, Del. Supr., 260 A.2d 701 (1969).

Supreme Court Rule 7(c) sets out the information to be included in a notice of appeal. All appeals from the Family Court should be captioned with the full names of the parties. In matters concerning adoption, termination of parental rights, child custody and visitation, and

juvenile delinquency proceedings, the parties shall submit to the Court a stipulation providing for the use of pseudonyms, or the Court may order the use of pseudonyms, sua sponte.

Service of the notice may be by mail or by personal service on a clerk at the office of the attorney of record of each party or if there is no attorney of record notice shall be served upon each party. See Supr. Ct. R. 7(a) and 10(b). Thereafter, papers together with proof of service must be filed with the Clerk of the Supreme Court in Wilmington, Dover, or Georgetown. See Chapters 4 and 17.

The perfection of an appeal must include directions for the preparation of a transcript as a part of the body of the notice of appeal or as a separate exhibit attached to the notice pursuant to Supreme Court Rule 9. Rule 9 mandates that the party seeking an appeal shall "promptly serve a copy of the notice of appeal upon the appropriate court reporter." However, the majority of Family Court proceedings are recorded on audio tape, rather than by a stenographer. Therefore, the notice of appeal and instructions for preparation of the transcript must be served on the Clerk of the Family Court. The Clerk will respond with a letter setting out an estimate for the cost of preparing the transcript, which must be paid within a designated number of days. A $250.00 deposit is required following the docketing of the appeal. See Fam. Ct. Civ. R. 73 and 73.1, See also Section 4.06(3) *Filing Fees* and Section 15.06, *Fees in the Supreme Court.*

An appeal does not automatically stay the Family Court Order. See 10 Del. C. § 1051(d); Supr. Ct. R. 32. To obtain a stay, a party must file a motion in the Family Court. Fam. Ct. Civ. R. 62(c). The stay pending appeal may be granted or denied in the discretion of the trial court, whose decision shall be reviewable by the Supreme Court. Supr. Ct. R. 32(a). The Family

Court or the Supreme Court, as a condition of granting or continuing a stay pending appeal, may impose whatever terms and conditions it deems appropriate in addition to the requirement of indemnity.

If the Court grants the motion for a stay, it will require a bond approved by the Clerk of the Family Court. See Supr. Ct. R. 32(c) and Del. Const. art. IV § 24; Chapter 23, Section 22.08 infra.

A cross-appeal must be served and filed within fifteen (15) days from the date of filing of the notice of appeal or within thirty (30) days after the entry of the judgment, whichever is later. See Supr. Ct. R. 6. An appellee cannot seek a reversal of a trial court decision unless the appellee has filed a cross-appeal. Fairfield Builders, Inc. v. Vattilana, Del. Supr., 304 A.2d 58 (1973).

The parties can agree to fill in blanks in the trial transcript by a stipulation certified by the trial court. Where it may be impossible to gather sufficient information to supply a record for a proper review, the Court may remand the matter for a new trial. Moore v. Moore, Del. Supr., 144 A.2d 765 (1958); see also Supr. Ct. R. 9(g).

The general rule is that the Family Court loses jurisdiction over a case while the matter is on appeal to the Supreme Court. See Dixon v. Division of Child Support Enforcement, Del. Supr., No. 5, 1993, Walsh, J. (Mar. 24, 1993) (ORDER). The Family Court does, however, retain the authority to stay its order following an appeal, Supr. Ct. R. 32(a) or to proceed with the case while an interlocutory appeal is pending absent or stay. Supr. Ct. R. 42(e).

The Family Court retains jurisdiction to enforce, through its contempt powers, its orders not stayed pending appeal. Wife B. v. Husband B., Del. Super., C.A. No. 5101, 1977, Christie, J. (Aug. 24, 1977) (ORDER).

c. The Parties to Appeal. In divorce, annulment and spousal support cases, the parties to an appeal from the Family Court are the parties to the proceeding below. In addition, irrespective of whether it was a party to the proceedings in the Family Court, the Department of Services for Children, Youth and Their Families may file an appeal in adoption cases. 13 Del. C. § 917. Only a party may appeal a child visitation or support decision. While parents are usually the parties, presumably a grandparent who had petitioned the Family Court for visitation under 10 Del. C. § 1031 may appeal a denial of such visitation rights. In a custody case, in addition to the parties, the child's parent, guardian, next friend or any interested person or agency may appeal. 10 Del. C. § 1052(b).

In the briefing, the parties are identified by their names or by their relationship, such as husband or wife. See Supr. Ct. R. 14(b)(v).

d. Record on Appeal. The record on appeal is the record created in the Family Court, including transcripts of the testimony, exhibits, pleadings and other papers filed by the parties.

e. Interlocutory Appeals. The Supreme Court may only hear appeals of interlocutory orders of the Family Court when the appellant has complied with the requirements of Supreme Court Rule 42. Linda D.P. v. Robert J.P., Del. Supr., 493 A.2d 968 (1985). The appeal is interlocutory if the decision from which the appeal is taken does not finally determine and terminate the cause before the Family Court. Memmolo v. Memmolo, Del. Supr.,

576 A.2d 181 (1990); Gallucio v. Lavjonne, Del. Supr., No. 362, 1988, Horsey, J. (Feb. 27, 1989) (ORDER). It may not always be clear whether a particular Family Court order "finally determines" a case, making it ripe for appeal. In Moskowitz v. Moskowitz, Del. Supr., Nos. 413, 1990 and 441, 1990, Moore, J. (Mar. 4, 1991) (ORDER), the Supreme Court held that when an appeal was filed after a Family Court decision, but before the Family Court's decision on an application for counsel fees, the appeal was interlocutory. Mistiming an appeal may have the consequence of the loss of the right of appellate review. See Glenn v. Schlerf, Del. Supr., No. 266, 1991, Horsey, J. (Nov. 25, 1991) (SUBSTITUTE ORDER); see also Mease v. Butterworth, Del. Supr., No. 204, 1994, Walsh, J. (Aug. 25, 1994) (ORDER). Family Court Civil Rule 54(b) may be helpful in determining finality of judgments and orders when several issues are before the court.

f. Briefing. In all cases in which no transcript has been ordered, appellant's opening brief and appendix must be served and filed no later than forty-five (45) days after the notice of appeal. Supr. Ct. R. 15(a)(i). In all other cases, the opening brief must be filed within thirty (30) days of filing the record. Id.

Appellee's Answering Brief is due thirty (30) days after the filing of appellant's brief. Supr. Ct. R. 15(a)(ii). A reply brief is due fifteen (15) days later. Supr. Ct. R. 15(a)(iii). The form and content requirements of the brief are found in Supreme Court Rules 13 and 14.

g. Motion to Affirm. Under Supreme Court Rule 25(a), within ten (10) days after receiving service of an appellant's opening brief, an appellee may serve and file a motion to affirm. The motion tolls the time for filing the appellee's brief. In cases where a party's

motion is based on an unreported decision of the Family Court, a copy of the opinion should be attached to the motion.

Unless the Court requests a response, appellants are not afforded an opportunity to respond to a Motion to Affirm. The Appellee's answering brief must be filed twenty (20) days after the denial of a Motion to Affirm.

h. Appeal Bonds. The requirement for an appeal bond, previously found in 10 Del. C. § 960(d), was eliminated by action of the General Assembly in 67 Delaware Laws, c. 149 (effective July 21, 1989). In the same legislation, the General Assembly eliminated the appeal bond requirement stated in 10 Del. C. § 961(c). The General Assembly, however, left in place what is now designated § 1052(c), which permits the court's discretion to waive surety for costs in the case of an indegent person upon affidavit that he is without funds and means of prosecuting the appeal. The significance, if any, of the provision allowing the waiver of surety when no surety is required remains unclear.

i. Disposition and Mandate. The Supreme Court may affirm, modify, remand, or reverse the Family Court's decision. See Husband M. v. Wife D., Del. Supr., 399 A.2d 847 (1979). In adoption cases where the effect of the Supreme Court's decision is to deny the petition, the Court must remand the case to the Family Court for further proceedings. See 13 Del. C. § 917(c). Under Supreme Court Rule 4, a party may file a motion for rehearing en banc. Under Supreme Court Rule 18, a party may file a motion for reargument. Both motions must be filed within fifteen (15) days from the filing of the Court's opinion. There is no provision in the rules for a party to answer or respond to a motion for reargument or a motion for rehearing en banc.

While the Supreme Court has the power to award fees and costs for cases on appeal, it traditionally prefers that the parties seek such relief in the trial court. Husband N.R. v. Wife H.C., Del. Supr., No. 22, 1979, Horsey, J. (Aug. 17, 1979) (ORDER); Topper v. Topper, Del. Super., C.A. No. 83A-JN-10, O'Hara, J. (Aug. 6, 1984).

22.04 CRIMINAL AND DELINQUENCY APPEALS: ADULT CRIMINAL, JUVENILE DELINQUENCY, AMENABILITY AND CONTEMPT.

a. Standard and Scope of Review. The Supreme Court has jurisdiction to hear appeals from the Family Court in juvenile delinquency and contempt cases. 10 Del. C. § 1051(a). The Superior Court has jurisdiction to hear appeals from the Family Court in adult criminal cases. 10 Del. C. § 1051(b). There is a further right of appeal to the Supreme Court in adult criminal cases. 10 Del. C. § 1051(b). An adult appellant may elect an appeal de novo, with or without a jury, or an appeal on the record. Clements v. Family Court, Del. Supr., 401 A.2d 72 (1979). Appeals in juvenile delinquency matters are on the record. G.D. v. State, Del. Supr., 389 A.2d 764 (1978); Poe v. Poe, Del. Super., 333 A.2d 403 (1975). For an appeal on the record, the standard of review is whether the lower court abused its discretion or otherwise committed an error of law requiring a reversal.

The State may, as a matter of right, appeal to the Supreme Court in cases where the Family Court has entered an order of dismissal based on the invalidity or construction of the statute cited in the petition, or alternatively a lack of personal or subject matter jurisdiction. 10 Del. C. § 1053(a)(1). The State also has an absolute right of appeal in any case in which the Family Court grants the accused a new trial or judgment of acquittal after conviction, a modification of the verdict, arrest of judgment, relief in any post-conviction proceeding or in any

action collateral [sic] attacking a criminal judgement, or any order of judgment declaring any act of the General Assembly, or any portion of any such act, to be unconstitutional under either the Constitution of the United States or the State of Delaware, except that no appeal shall lie where otherwise prohibited by the double jeopardy clause of the Constitutions of the United States or this State.

Under 10 Del. C. § 1053(a)(2), the State may apply to the Superior Court for an interlocutory appeal to determine substantial questions of law or procedure. A defendant or respondent may have a right to an interlocutory appeal under 10 Del. C. § 1051(a). See also Fam. Ct. Civ. R. 74., Fam. Ct. Crim. R. 37.

b. Service and Filing of Appeals. A notice of appeal must be filed with the Prothonotary within thirty (30) days from the date of the order or judgment. See 10 Del. C. § 1051(c).

An appeal does not automatically stay the Family Court judgment. A defendant or respondent may apply to the Family Court for a stay under Family Court Civil Rule 62 and post an appropriate bond as set by the Family Court. In the alternative, a defendant may apply to the Supreme Court under Supreme Court Rule 32 or to the Superior Court under Superior Court Criminal Rule 38. Quentin W.K. v. Debbie L.K., Del. Supr., No. 285, 1987, Moore, J. (Feb. 5, 1988) (ORDER). The time for appeal in an adult criminal or a juvenile delinquency matter begins at the date of sentencing, not the date of adjudication. Supr. Ct. R. 6(2).

Superior Court Civil Rule 72 governs the procedure for appeals from Family Court. Superior Court Civil Rule 72.1 governs the expedited procedure for an appeal on the record.

c. The Parties to Appeal. The State and the defendant are parties to the appeal in adult cases. The State and the respondent are parties to the appeal in juvenile cases.

d. Record on Appeal. The record on appeal is the record created in the Family Court, including transcripts of the testimony, exhibits, pleadings and other papers filed by the parties. See Supr. Ct. R. 9.

e. Briefing. The original and a copy for each of the sitting judges of all briefs are filed with the Prothonotary in the county where the case is pending. The briefs must be filed not less than five (5) days before the argument to which they pertain, unless otherwise ordered by the Court. If any brief or other necessary material is not served and filed within the time and manner required by the Superior Court Rules, the Court may in its discretion dismiss the action or take any other measures it deems necessary. See Anderson v. State, Del. Supr., No. 26, 1993, Horsey, J. (July 30, 1993) (ORDER). The form and content requirements of the brief are found in Superior Court Civil Rule 107. Regarding briefs to the Supreme Court, see Section 22.03(e), supra.

f. Motion to Stay. To obtain a stay, a party must file a motion for a stay in the Family Court. If the Family Court grants the motion, bond must be filed. If the Family Court denies the motion, an application for a stay may be made to the Superior Court. See Fam. Ct. Civ. R. 62.

g. Disposition and Mandate. After reviewing the decision of the Family Court, the Superior Court may affirm, affirm in part, reverse in part, reverse, or reverse and remand the matter to the Family Court with instructions.

The Supreme Court lacks jurisdiction to hear interlocutory appeals in adult criminal and juvenile delinquency matters. Hickey v. State, Del. Supr., 474 A.2d 118 (1984).

22.06 AMENABILITY.

a. Amenability in the Family Court. Under 10 Del. C. § 1010(a)(2), the Family Court may determine that a juvenile sixteen (16) years of age or older is not amenable to rehabilitative processes available to the Family Court and transfer the case to the Superior Court or to any other court having jurisdiction over the offense for trial as an adult. The appeal from a finding that a child is not amenable is to the Supreme Court. Once a case is transferred to the Superior Court for trial as an adult, the State must provide a preliminary hearing within the time periods established by Family Court Criminal Rule 6C, or the Superior Court lacks jurisdiction to proceed. See State v. Hickey, Del. Super., C.A. No. IN83-03-0472, Martin, J. (July 8, 1983), appeal dismissed, Del. Supr., 474 A.2d 118 (1984).

b. Amenability in the Superior Court. Under 10 Del. C. § 1011, the Superior Court, when it has original jurisdiction due to the nature of the offenses charged, may determine whether it would be in the best interests of justice that a child be tried in the Family Court. Such a determination is known as a reverse amenability or a reverse transfer proceeding. A party losing an amenability proceeding in the Family Court cannot proceed by reverse amenability under 10 Del. C. § 1011. State v. Lee, Del. Super., C.A. No. IN83-03-1545, Martin, J. (June 3, 1983).

22.07 APPEALS FROM A DECISION OF A MASTER OF THE FAMILY COURT.

a. Standard and Scope of Review. Under 10 Del. C. § 913, a Family Court Master has the authority to hear uncontested divorces, child support, paternity, adult criminal, and juvenile delinquency misdemeanor matters as well as to make findings and recommendations to the Judges of the Family Court. See Fam. Ct. Civ. R. 53. A Master also has the authority to recommend custody, visitation, imperiling of family relationships, and consent orders to the Judges of the Family Court. See A.L.W. v. J.H.W., Del. Supr., 416 A.2d 708 (1980). A Master, however, does not have the authority to conduct adult bail and juvenile detention hearings, or hearings involving charges against a juvenile that are classified as felonies when committed by an adult. 10 Del. C. § 913; Redden v. McGill, Del. Supr., 549 A.2d 695 (1988); State v. Wilson, Del. Supr., 545 A.2d 1178 (1988).

b. Filing the Appeal. A party may appeal a decision of a Master within fifteen (15) days from the date the decision is announced by filing a written request for review de novo with the Clerk of the Family Court. 10 Del. C. § 913(d)(l). A Master's decision in a juvenile delinquency or adult criminal proceeding must be final before an appeal may be taken under Family Court Criminal Rule 49 and Family Court Civil Rule 53, so as to avoid double jeopardy. Technically, no grounds for appeal need be stated, however, the court prefers amplification. The filing of the review de novo automatically renders the Master's order enforceable only as an interim order. 10 Del. C. § 913(e); Fam. Ct. Civ. R. 53(b)(3).

De novo review is the sole remedy of any party with respect to a Master's order, except for post-hearing motions. 10 Del. C. § 913(f). A Master's order may not be appealed directly to the Supreme Court. Redden, 549 A.2d 695. A review de novo, however is not the

proper forum for presenting "new evidence" to the court. Grimes v. Grimes, Del. Fam., File No. CN93-09675, Wakefield, J. (May 17, 1994).

Although the language of 10 Del. C. § 913(d)(1) is broad, the court has interpreted the statute so as to place limitations on the appropriateness of a review de novo. An interim order of a Master is not subject to a review de novo. Alexander v. Alexander, Del. Fam., File No. C-4601, Gallagher, J. (Dec. 18, 1987). Also, a party who willfully failed to participate in or to appear at a Master's hearing does not have a right to a review de novo of the order entered against the party. Hamm v. Davis, Del. Fam., File No. CN87-1535, Ableman, J. (Mar. 31, 1995), Latavitz v. Latavitz, Del. Fam., File No. 667-83, Tumas, J. (Mar. 22, 1995) (ORDER).

22.08 APPEALS FROM A DECISION OF A COMMISSIONER OF THE FAMILY COURT.

a. Standard and Scope of Review. 10 Del. C. § 915 grants a Commissioner of the Family Court the authority to hear all civil matters. The statute also authorizes Commissioners to conduct all juvenile delinquency and criminal proceedings, including but not limited to, amenability hearings, arraignments, preliminary hearings, case reviews and trials. 10 Del. C. § 915(c)(8). Commensurate with this power is the power to accept pleas and the power to enter sentence, including incarceration. Id. at (9), (10), & (11). Commissioners may also impose sanctions for civil contempt, including incarceration. Id. at (12).

Appeals from Commissioner's orders are taken to a Judge of the Family Court. The Supreme Court does not have jurisdiction to hear appeals from Commissioner's orders. Harvey v. Hamill, Del. Supr., No. 193, 1995, Berger, J. (June 23, 1995) (ORDER).

Upon the filing of an appeal from a Commissioner's final order, a Judge of the Family Court determines de novo the portions of the order to which exceptions were made. A de novo determination, unlike a review de novo, does not require a full hearing, but rather a review of the underlying record. State v. Sabb, Del. Fam., File No. AS94-00286, Millman, J. (Oct. 17, 1994); Minor v. Minor, Del. Fam., File No. CN90-6024, Wakefield, J. (May 17, 1994).

The standard of review from a Commissioner's order is not dependent on the function performed by the Commissioner. Thus, even though in a particular instance a Commissioner may hear a case scheduled to be heard by a Master, the appeal is governed by the standard for Commissioners. See Hamm v. Davis, Del. Fam., File No. CN87-1535, Ableman, J. (Mar. 31, 1995).

Review of an interim order is discretionary and imposes a higher standard of review. The appellant of an interim order must show that the order is based upon findings of fact that are clearly erroneous, contrary to the law, or an abuse of discretion. 10 Del. C. § 915(d)(2). See also Huff v. Huff, Del. Fam., File No. CS94-3380, Millman, J. (Oct. 11, 1994).

b. Filing the Appeal. A party, except a party in default, may appeal a final or interim order of a Commissioner by filing and serving written objections to the order within ten (10) days of the date of the order. 10 Del. C. § 915(d)(1) and (2); Fam. Ct. Civ. R. 53.l(a) and (b). Unless all parties agree to a statement of facts, the objecting party shall have a transcript of the Commissioner's proceeding prepared. Fam. Ct. Civ. R. 53.l(c). Where the objecting party is proceeding *in forma pauperis*, upon request, the court may accept a recording of the Commissioner's proceeding in lieu of a transcript. Id. The Judge may accept, reject, or modify in whole or in part the Commissioner's order. The Judge may also receive further

evidence or return the matter to the Commissioner with instructions. 10 Del. C. § 915(d)(1); Fam. Ct. Civ. R. 53.l(e),(f),and (g).

The filing of an appeal of a Commissioner's order does not stay that order unless a stay is specifically ordered by a Judge. Fam. Ct. Civ. R. 53.1(h).

22.09 ADMINISTRATIVE APPEALS TO THE FAMILY COURT.

a. Education for Handicapped Children. The Family Court has concurrent jurisdiction with the federal district courts to review decisions of statutorily created panels selected by the Department of Public Instruction to determine whether a handicapped child is receiving an appropriate education under the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 et seq. 10 Del. C. § 921(12). The Family Court also has jurisdiction to resolve administrative appeals regarding gifted or talented children under 14 Del. C. Chapter 31. The petition must be filed with the Family Court within thirty (30) days from the date of the panel's decision. 14 Del. C. § 3142(d).

The scope of review is based on the record as supplemented by the parties. 14 Del. C. § 3142(b). The issue on review is whether the Department met the Act's procedural requirements and the program for the child is reasonably calculated to enable the child to receive educational benefits. See Board of Educ. v. Rowley, 458 U.S. 176 (1982).

b. Foster Care Review. The Family Court has jurisdiction to hear petitions from the Foster Care Review Board and from other parties when the Board and placement agency disagree as to a foster child's proper placement or progress toward permanency. 31 Del. C. §§ 3815-17.

c. Child Support Enforcement. The Family Court has jurisdiction to hear appeals from administrative decisions of the Division of Child Support Enforcement. 10 Del. C. § 921(13); 29 Del. C. 10141-43; West v. Division of Child Support Enforcement, Del. Fam., File No. E-9880, Gallagher, Jr. (Feb. 16, 1988). Such administrative decision of the Division of Child Support Enforcement may include a determination not to issue or renew a motor vehicle operator's license or a professional license issued by the Division of Revenue or by any commission, board or agency under the authority of the Division of Professional Regulation. 13 Del. C. § 520.

Sample forms for appeals to and from the Family Court follow. The captions on the forms will have to be altered for an individual case, for example the appellant may be the petitioner instead of the respondent. "In re the Marriage of" is only used where the action pertains to the parties' marriage.

TABLE OF FORMS

Form 22:01 Application for Certification of
Interlocutory Appeal in Family Court

IN THE FAMILY COURT OF THE STATE OF DELAWARE
IN AND FOR _____ COUNTY

In Re the Marriage of:	)	
	)	
_____,	)	
	)	
Petitioner,	)	
	)	
and	)	Petition No. _____
	)	
_____,	)	
	)	
Respondent.	)	

APPLICATION FOR CERTIFICATION
OF INTERLOCUTORY APPEAL

Petitioner hereby applies to this Court for an order granting leave to appeal from an interlocutory order and, in support thereof, shows as follows:

1. On ____, 19__, Petitioner moved this Court to enter an order implementing its decision on ancillary matters dated _____, 19__. A copy of that Motion is attached hereto.

2. In support of that Motion, Petitioner showed that Respondent failed to object to or move for reargument of that decision and, to the contrary, he/she selected one of the alternatives offered him/her in that decision.

3. By an Order dated _____, 19__, this Court denied the Motion.

4. Petitioner applies for an order granting leave for him/her to file an interlocutory appeal on the ground that a review of the order may terminate the litigation or may otherwise serve considerations of justice. Specifically, Petition will argue on appeal that:

_____
[Attorney for Petitioner]

Dated: _____, 19__

Form 22:02 Order Granting Leave to Appeal From Interlocutory Order in Family Court

IN THE FAMILY COURT OF THE STATE OF DELAWARE
IN AND FOR _____ COUNTY

In Re the Marriage of:	)	
	)	
_____,	)	
	)	
Petitioner,	)	
	)	
and	)	Petition No. _____
	)	
_____,	)	
	)	
Respondent.	)	

ORDER GRANTING LEAVE TO APPEAL
FROM INTERLOCUTORY ORDER

This _____ day of _____, 19__, having made application pursuant to Rule 42 of the Supreme Court for an Order certifying an appeal from the interlocutory Order of this Court dated _____, 19__, and the Court having found that such Order determines substantial issues and establishes legal rights and that the following criteria of Supreme Court Rule 42(b) apply: a review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice;

IT IS ORDERED that the Court's Order of ____, 19__ is hereby certified to the Supreme Court of the State of Delaware for disposition in accordance with Rule 42 of that Court.

_____
Judge

Form 22:03 Notice of Motion for Stay in Family Court

IN THE FAMILY COURT OF THE STATE OF DELAWARE
IN AND FOR _____ COUNTY

In Re the Marriage of:	)	
	)	
_____,	)	
	)	
Petitioner,	)	
	)	
and	)	No. _____
	)	
_____,	)	
	)	
Respondent.	)	

NOTICE OF MOTION

TO:

PLEASE TAKE NOTICE that the within Motion for a Stay will be presented to the Court at a time to be determined by the Court.

_____

Dated:_____, 19__

Form 22:04 Motion for Stay in Family Court

IN THE FAMILY COURT OF THE STATE OF DELAWARE
IN AND FOR _____ COUNTY

In Re the Marriage of:	)	
	)	
_____,	)	
	)	
Petitioner,	)	
	)	
and	)	No. _____
	)	
_____,	)	
	)	
Respondent.	)	

MOTION FOR STAY

Petitioner, _____, having filed an appeal with the Supreme Court of the State of Delaware from this Court's decision of _____, 19__, moves the Court pursuant to Supr. Ct. R. 32(a) and Del. Const. art. IV, § 24 to enter an Order staying the enforcement of the _____, 19__ Order pending the appeal.

(Specify Grounds) _____

Dated: _____, 19__

Form 22.05 Order Granting Stay in Family Court

IN THE FAMILY COURT OF THE STATE OF DELAWARE
IN AND FOR _____ COUNTY

_____,	)	
Petitioner,	)	
	)	
and	)	Nos.
	)	
_____,	)	
Respondent.	)	

ORDER

AND NOW, TO WIT, this _____ day of _____ l9___, Petitioner having moved for a stay pending his appeal in this matter, and it appearing to the Court that the Motion should be granted, it is

ORDERED that enforcement of this Court's _____; 19___ Judgment in the amount $_____ be stayed pending the determination of his/her appeal from that Order, provided the Petitioner shall file and have approved by this Court on or before _____, 19____ a bond in the sum of $_____.

_____

Form 22.06 Supersedeas Bond

IN THE FAMILY COURT OF THE STATE OF DELAWARE
IN AND FOR _____ COUNTY

_____,	)	
Respondent-Below,	)	
Appellant,	)	
	)	Civil Action No. _____
v.	)	
	)	Appeal No. _____
	)	
_____,	)	
Petitioner-Below,	)	
Appellee.	)	

SUPERSEDEAS BOND

KNOW ALL PERSONS BY THESE PRESENTS, THAT _____ a corporation created, organized and existing under and by virtue of the laws of the State of _____, having its principal place of business at _____ and duly authorized to execute surety bonds in the amount and subject to the conditions herein provided, is held and firmly bound as surety unto Petitioner-Below, Appellee, in the full and just sum of _____, to be paid to the said Petitioner-Below, Appellee, its administrators, executors, successors, attorneys or assigns, to which payment well and truly to be made it binds itself, its successors and assigns firmly by these presents.

Signed and sealed with the corporate seal of said surety this _____ day of _____, l9___.

WHEREAS, in the Family Court of the State of Delaware, in and for _____ County, between _____ as Petitioner, and _____ as Respondent, Civil Action No._____, judgment was entered in favor of said Petitioner and against said Respondent for _____
_____
_____
_____, from which said Judgment said Respondent has appealed to the Supreme Court of the State of Delaware;

NOW, THEREFORE, the condition of this obligation is such that if the said [appellant] shall prosecute his/her appeal to effect and shall satisfy the judgment in full together with costs, interest,

and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed or shall satisfy in full such modification of the judgment and such costs, interest, and damages as the Supreme Court or Family Court or both may ajudge and award, then this obligation shall be void, otherwise, it shall remain in full force and effect.

[_____] hereby submits itself to the jurisdiction of the Family Court and irrevocably appoints the Clerk of the Family Court as its agent upon whom any notice or papers affecting its liability on this Bond may be served, and agrees that its liability on this Bond may be enforced on motion without the necessity of an independent action and that such motion, with such notice thereof as the court may prescribe, may be served on the Clerk of the Family Court, who shall forthwith mail copies to [name and address of surety].

[SURETY]

BY:_____
Attorney-in-Fact

Form 22.07 *Motion for Bond on Appeal
Pursuant to l0 Del. C. § 1052

IN THE SUPREME COURT OF THE STATE OF DELAWARE

_____,	)	
Petitioner-Below, Appellant,	)	No. _____
v.	)	Court Below- Family Court of the State of Delaware in and for New Castle County
_____,	)	
Respondent-Below, Appellee.	)	Civil Action No. _____

MOTION FOR BOND ON APPEAL

Petitioner _____, having filed an appeal with the Supreme Court of the State of Delaware, pursuant to the provisions of 10 Del. C. § 1052 moves the Court to enter an Order providing that Petitioner shall give bond to the State of Delaware in the amount of $_____ with surety as approved by the Court.

BY:_____
Attorney for Petitioner

Date: _____, 19____

*See 22.04(h) for discussion of the necessity for bond on appeal.

Form 22.08 *Order Setting Bond on Appeal
Pursuant to 10 Del. C. § 1052

IN THE SUPREME COURT OF THE STATE OF DELAWARE

_____,	)	
	)	
Respondent-Below,	)	Court Below-Family
Appellant,	)	Court of the State
	)	of Delaware in and
v.	)	for _____ County
	)	
	)	Civil Action No.
_____,	)	_____
	)	
Petitioner-Below	)	
Appellee.	)	

ORDER

THIS _____ day of _____, 19__, Appellant having made application pursuant to 10 Del. C. § 1052, for bond.

IT IS HEREBY ORDERED that Appellant, shall give bond to the State of Delaware in the amount of $_____ with corporate surety as approved by the Court.

_____
Justice

*See 22.04(h) for discussion of the necessity for bond on appeal.

Form 22.09 *Bond Pursuant to 10 Del. C. § 1052

IN THE SUPREME COURT OF THE STATE OF DELAWARE

_____,	)	
	)	No. _____
Respondent-Below,	)	Court Below-Family
Appellant,	)	Court of the State of
	)	Delaware in and for
v.	)	_____ County.
	)	
	)	Civil Action No. _____
_____,	)	
	)	
Petitioner-Below,	)	
Appellee.	)	

BOND WITH SURETY

KNOW ALL PERSONS BY THESE PRESENTS, that [name of surety], a corporation created, organized and existing under and by virtue of the laws of the State of _____, having its principal place of business at _____ and duly authorized to execute surety bonds in the amount and subject to the conditions herein provided, is held and firmly bound as surety unto the State of Delaware in the full and just sum of $_____, to be paid to the said State of Delaware, its successors, attorneys or assigns, to which payment well and truly to be made it binds itself, its successors and assigns firmly by these presents.

Signed and sealed with the corporate seal of the said surety this _____day of _____, 19__.

WHEREAS, in the Family Court of the State of Delaware in and for _____, between _____, as Respondent-Appellant, and _____ as Petitioner-Appellee, Petitioner No. _____, judgment was entered in favor of the said _____ and against said _____, from which judgment said _____ has appealed to the Supreme Court of the State of Delaware in and for _____ County.

NOW, THEREFORE, the condition of this obligation is such that if the said [Name of Appellant] shall prosecute his/her appeal to effect and shall satisfy the judgment in full together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed or shall satisfy in full such modification of the judgment and such costs, interest and damages

as the Supreme Court may adjudge and award, then this obligation shall be void; otherwise, it shall remain in full force and effect.

The [name of surety] hereby submits itself to the jurisdiction of the Supreme Court of the State of Delaware and irrevocably appoints the Prothonotary of _____ County as its agent upon whom any notice or papers affecting its liability on this Bond may be served, and agrees that its liability on this Bond may be enforced on motion without the necessity of an independent action and that such motion, with such notice thereof as that court may prescribe, may be served on the Prothonotary of _____, who shall forthwith mail copies to [name and address of surety].

[SURETY]

BY: _____
Attorney-in-Fact

*See 22.04(h) for discussion of the necessity for bond on appeal.

Form 22.l0 Praecipe for Criminal Appeal
for Adult (De Novo Review)

IN THE FAMILY COURT OF THE STATE OF DELAWARE
IN AND FOR _____ COUNTY

_____,	)	
	)	
Defendant-Below,	)	
Appellant,	)	Civil Action
	)	No._____
v.	)	
	)	
_____,	)	
	)	
Petitioner-Below,	)	
Appellee.	)	

PRAECIPE

TO: Prothonotary, Criminal Section
Superior Court of the State of
Delaware in and For New Castle County
Public Building
Wilmington, Delaware l980l

PLEASE ISSUE a Citation for the Record to the Family Court of the State of Delaware in and for _____ County in the above-captioned case for an appeal from the judgment and sentence of the Family Court dated _____, 19__, in Family Court Petition No. _____, File No. _____.

_____
Attorney for Defendant-Below,
Appellant

Form 22:11 Criminal Appeal-- Notice of Appeal
with request for Jury Trial

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR _____ COUNTY

_____,	)	
	)	
Defendant-Below,	)	
Appellant,	)	Civil Action
	)	No._____
v.	)	
	)	
_____,	)	
	)	
Petitioner-Below,	)	
Appellee.	)	

NOTICE OF APPEAL

PLEASE TAKE NOTICE _____, Defendant-Below, Appellant, does hereby appeal to the Superior Court from the judgement and sentence of the Family Court, in and for _____ County, by the Honorable _____, Judge of the Family Court, in Family Court Petition No._____, File No._____.

Pursuant to Superior Court Criminal Rule 38, Appellant states as follows:

1. Nature of the Appeal. This is an appeal de novo.
2. Request for a Jury. Appellant elects to have this matter tried to a jury.
3. Attorney for the State. The attorney for the State is _____, Deputy Attorney General, State of Delaware, Department of Justice, _____, _____, _____, Delaware _____.
4. Judgment Appealed from. Appellant appeals from the Judgment and Order of the Honorable _____, Judge of the Family Court, on _____, 19__, adjudicating the Appellant guilty of [crime] and sentencing him on _____, 19__, to _____.
5. Grounds of the Appeal. The grounds of the appeal are [state with specificity].

_____
Attorney for Defendant-Below
Appellant

Date:_____, 19___

CHAPTER 23. JUSTICE OF THE PEACE COURT APPEALS

TABLE OF CONTENTS

CHAPTER 23. JUSTICE OF THE PEACE COURT APPEALS

Patricia W. Griffin[1]

23.01 INTRODUCTION. This chapter describes procedures for appeals in civil, traffic and criminal cases from the Justice of the Peace Courts. These Courts have an extremely heavy caseload. In fiscal year 1994, over 285,000 criminal and traffic and 31,000 civil cases were filed in the Courts of the Justices of the Peace. Since the earlier version of this handbook, jurisdiction of appeals from the Justice of the Peace Courts was transferred by statute from the Superior Court to the Court of Common Pleas. For guidance in practicing before a Justice of the Peace, the reader is referred to the Chief Magistrate's Legal Memoranda and Police Directives to the Justices of the Peace which are on file in law libraries of each county, and available under "JP" on the Digilaw computer-based research system. With regard to traffic cases, one of the most serious offenses which the Justices of the Peace have jurisdiction to hear, try and finally determine is the offense of driving while under the influence of intoxicating liquor in violation of 21 Del. C. § 4177(a). In 1994, the Justices of the Peace disposed of almost 4,800 such cases.

23.02 CIVIL DEBT, TRESPASS AND REPLEVIN ACTIONS. Justice of the Peace Courts have jurisdiction to hear, try and finally determine actions in debt, trespass (excluding personal injury actions) and replevin where the amount in controversy does not exceed $15,000. 10 Del. C. §§ 9301, 9303, 9304.

a. Right of Appeal. A party to a civil action in debt, trespass or replevin that originates in and proceeds to judgment in a Justice of the Peace Court has a right of

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[1]The Honorable Patricia Griffin is Chief Magistrate for the State of Delaware. The Honorable Norman A. Barron should also be recognized for his work on the earlier version of this chapter, which was completed while he served as Chief Magistrate of the State of Delaware.

appeal to the Court of Common Pleas for a trial de novo where the judgment exceeds five dollars, exclusive of costs, or where either the plaintiff's demand or the defendant's counterclaim, exceeds five dollars, and is disallowed. 10 Del. C. §§ 9570, 9614, 9640. Justices of the Peace, immediately after passing judgment in all civil cases, are required by law to advise the party litigants of their right to take an appeal from the decision and must inform them of the time and manner in which the appeal may be taken. The law further requires that the records of the Justice of the Peace contain an entry indicating the information given by the Justice of the Peace. 10 Del. C. § 9505. Justice of the Peace civil Form No. 14A, containing information on post judgment procedures, is provided to the parties with each written judgment order.

b. Taking an Appeal. A civil appeal to the Court of Common Pleas from a final judgment or order in a Justice of the Peace Court debt, trespass or replevin action is taken by the timely filing of a notice of appeal with the clerk of the Court of Common Pleas in the county in which the judgment was rendered by the Justice of the Peace Court. The Court of Common Pleas is responsible for establishing appeal procedures and supersedeas bond requirements by rule. 10 Del. C. § 9571(d).

c. Appeal Requirements.

(1) Time Requirements. Immediately upon the entry of an order or judgment, the clerk of the Justice of the Peace Court is required to serve by mail upon every party affected thereby a notice of the entry of judgment and the time and manner of appeal and to make a notice of the mailing in the case docket. J. P. Ct. Civ. R. 19(j). A party entitled to an appeal from a Justice of the Peace Court final judgment or order in a civil action must file a notice of appeal with the Court of Common Pleas in the county in which the judgment was

rendered within fifteen days from the date of the judgment, starting the day after the judgment was ordered. 10 Del. C. § 9571(a) and Ct. Com. Pls. Civ. R. 72.3(a). If the last day of the appeal period falls on a Saturday, Sunday or legal holiday, then the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday. J. P. Ct. Civ. R. 8(a); Ct. Com. Pls. Civ. R. 6(a).

Unless an appeal from the Justice of the Peace Court is timely filed, the [Court of Common Pleas] lacks jurisdiction to consider it. Ademski v. Ruth, Del. Supr., 229 A.2d 837 (1967). However, if improper notification of the time, manner and right to an appeal is provided by the court to the parties and the appellants are pro se and rely in good faith on the reasonable instructions of the court, appellate courts have generally refused to dismiss an appeal for failure to timely file. Bey v. State, Del. Supr., 402 A.2d 362 (1979). This policy does not apply in cases in which the appellant has legal representation. Lenape Associates v. Callahan, Del. Supr., No. 171, 1992, Moore, J. (Oct. 26, 1992) (ORDER); Freedman and Sutton v. Burton and Aronoff, Del. Super., C.A. No. 94C-05-041, Lee, J. (Aug. 25, 1994); Catts v. Al-Arnasi, Del. Super., C.A. No. 89C-SE18, Lee, J. (Feb. 12, 1990).

(2) Filing Requirements. Within fifteen days from the date of judgment, the notice of appeal (form available from the Clerk's Office of the Court of Common Pleas), including an original and one copy, must be filed with the Court of Common Pleas. If the plaintiff is filing the appeal, the following documents must be filed within the fifteen day appeal period: (1) original complaint plus one copy for each party to be served; (2) original praecipe (form available from the Clerk's Office of the Court of Common Pleas) plus one copy; and (3) original Summons on Appeal (form available from the Clerk's Office of the Court of Common

Pleas) plus one copy for each party to be served. If the defendant is filing the appeal, there is an additional ten day period after the notice of appeal is filed to provide the Court with the (1) original praecipe (form available from the Clerk's Office of the Court of Common Pleas) plus one copy; and (2) original Summons on Appeal (form available from the Clerk's Office of the Court of Common Pleas) plus one copy for each party to be served. Ct. Com. Pls. Civ. R. 72.3(a) and Court of Common Pleas' Instructions for Filing an Appeal.

Either party has an additional ten day period after the notice of appeal is filed to provide the Court of Common Pleas with an original certified copy of the transcript from the Justice of the Peace Court, plus a copy for each party to be served, the non-refundable $125 filing fee, as well as the fee for service. Ct. Com. Pls. Civ. R. 72.3(b).

If all of the required documents are not filed in a timely manner with the Court of Common Pleas, the appeal may be dismissed by the Court.

(3) Proper Identification of Parties. For the Court of Common Pleas to have jurisdiction of an appeal de novo from the Justice of the Peace Courts, the parties below and on appeal must be identical in name, number and character or right in which they sue or are sued. Cf. Vailati v. Berman, Del. Super., C.A. No. 89C-NO24, Graves, J. (June 28, 1991), citing Wilson v. Eastern Electric Heating, Inc., Del. Supr., No. 209, 1987, Walsh, J. (Oct. 4, 1988) (ORDER). The substitution of different parties or inclusion of additional parties on appeal deprive the appellate court of jurisdiction. Vailati, supra, and Panzer Management Co. v. Farrall, Del. Super., C.A. No. 85C-DE-5, O'Hara, J. (Mar. 3, 1987). Further, the "right of appeal extends only to a retrial of the same cause of action that was heard and decided [in the Justice of the

Peace Court]." Wilson v. Eastern Electric & Heating, Inc., supra, citing Gaster v. Belak, Del. Super., 318 A.2d 628 (1974).

d. Stay of execution. There shall be no stay of execution or other proceedings below unless ordered by the Court of Common Pleas pursuant to Ct. Com. Pls. Civ. R. 62(c). See Ct. Com. Pls. Civ. R. 72.3(b). To stop execution on a judgment during the appeal proceedings, the appellant must file a motion with the Court of Common Pleas, which usually must be accompanied by a supersedeas bond or cash deposit sufficient to pay the amount of the judgment appealed from plus interest and court costs. *Id*. [The bond requirement is waiveable for those truly unable to pay. See Lecates v. Justice of the Peace Court No. 4, 3rd. Cir., 637 F.2d 898, 911 (1980).] The judgment will be stayed if the motion and the supersedeas bond or cash deposit are filed.

e. Appeal Procedures. After all the required documents have been served on the other party:

- if the plaintiff filed the appeal, the defendant will have 20 days in which to answer the complaint in writing; upon receipt of the defendant's timely response, the Court will set the date for a pre-trial conference or trial on the matter.

- if the defendant filed the appeal, the plaintiff will have 20 days in which to file the complaint with the Court and serve a copy on the defendant; upon the defendant's receipt of the complaint, defendant will have 20 days in which to file an answer; when both the complaint and answer are filed, the Court will set the date for a pre-trial conference or trial on the matter.

f. Effect of Post-Judgment Motions in a Justice of the Peace Court on Civil Appeals.

Timely motions for new trial and motions to alter or amend judgment brought under J. P. Ct. Civ. R. 20(c), (d) or (e) toll the time period within which an appeal must be made. Because a judgment is not final while a J. P. Ct. Civ. R. 20(c), (d) or (e) motion is pending, the time for appeal is suspended upon the filing of such a post-judgment motion. Trowell v. Diamond Supply Co., Del. Supr., 91 A.2d 979, 799, 801 (1952); Hessler, Inc. v. Farrell, Del. Supr., 260 A.2d 701, 702 (1969); Long v. Lee, Del. Super., 168 A.2d 536, 538 (1960). For the time period to be tolled, however, the J. P. Ct. Civ. R. 20(c), (d) or (e) motion must be made within ten days after judgment. Further, if relief pursuant to the timely motion is denied, the 15 day appeal period resumes running the day immediately following the date of the denial.

Unlike the motions discussed above, the finality of the underlying substantive decision is not affected by a J. P. Ct. Civ. R. 20(b) motion or a motion to vacate a default judgement unless relief from the original judgment is actually ordered. Sleek v. J.C. Penney Co., 292 A.2d 256, 258 (3d Cir. 1961) (discussing Fed. R. Civ. Pro. 60(b) (which is analogous to J. P. Ct. Civ. R. 20(b)), and the effect of motion to vacate a default judgment based upon excusable neglect). Furthermore, Rule 20(b) expressly states that a motion based upon mistake, inadvertence, excusable neglect, fraud or similar grounds does "not effect the finality of a judgment or suspend its operation." Since the substantive judgment's finality remains intact (along with its susceptibility to appeal), even after a J. P. Ct. Civ. R. 20(b) motion has been filed, there is no reason to toll the time within which an appeal of that judgment must be made.

Similarly, a motion to vacate a default judgment brought under 10 Del. C. § 9538 does not effect the original judgment's finality. Werb v. D'Allessandro, Del. Supr., 606 A.2d 117, 119 (1992) citing Ney v. Polite, Del. Supr., 399 A.2d 527, 529 (1979). Ney v. Polite is cited by

the courts as authority for holding that a default judgment is a final, appealable decision and that an appeal upon a denial of a motion to vacate will only review that denial (never the original judgment). Kenyon v. Setting, Del. Super., No. 91C-10-217, Taylor, J. (Feb. 20, 1992); See also Werb v. D'Alessandro, Del. Supr., 606 A.2d 117 (1992); Matt Slap Subaru v. Podolecki, Del. Super., No. 89C-FE-203-1-CV, Bifferato, J. (June 8, 1989).

In general, a default judgment is a final judgment for all purposes including appeal. Werb, 606 A.2d at 119; 6 J. Moore, Moore's Federal Practice ¶55.09 (2d ed. 1994). Because a motion to vacate seeks relief from a *final* judgment, it does not alter finality of that judgment, nor does it toll the time for appeal. The finality of the original judgment is only affected if it is actually vacated, opening up the judgment for rehearing and removing the possibility of appeal, because the judgment no longer survives. Sleek, 292 F.2d at 528; 10 Del. C. § 9538. Additionally, a default judgment is customarily vacated based upon excusable negligence, which is a proper ground for granting a motion brought under Rule 20(b) (which does not toll the time for appeal). See Sleek, 292 F.2d at 258. Because a motion to vacate a default judgment (like a Rule 20(b) motion) does not alter the finality of the original decision unless it is granted, the fifteen day time period within which an appeal of that judgment may be taken is not tolled. As a consequence, it is likely that the right to appeal the original default judgment will be lost if a party chooses to file a motion to vacate the default judgment (since the 15 days will continue to run). However, a party has 15 days from the denial of a motion brought under 10 Del. C. § 9538 or J. P. Ct. Civ. R. 20(b) to appeal that denial because such a denial possesses all of the attributes of finality. Ney, at 529; Werb, at 119.

g. Prohibition of Appearance of Justice of the Peace on Appeal. The Justice of the Peace who heard the case below is precluded from appearing or being compelled to appear as a witness in the Court of Common Pleas for a case on appeal from that Judge's decision below. Evans v. Justice of the Peace Court 19, Del. Supr., No. 215, 1994, Holland, J. (Jan. 30, 1994), citing Brooks v. Johnson, Del. Supr., 560 A.2d 1001, 1002 (1989). The Court based its conclusion on the United States Supreme Court's holding in *U.S. v. Morgan*, 313 U.S. 409, 422 (1941) (citing Fayerweather v. Ritch, 195 U.S. 276 (1904)), that "the examination of a judge's mental process would be destructive of judicial responsibility and undermine the integrity of the judicial process."

23.03 LANDLORD/TENANT CASES. Justices of the Peace have jurisdiction to hear, try and finally determine matters arising under the Landlord/Tenant Code. The usual landlord/tenant action heard before a Justice of the Peace is a summary proceeding for possession of premises filed pursuant to Chapter 57 of Title 25. The Justice of the Peace Court which is closest to the leased premises and in the same county has jurisdiction to entertain such actions. 25 *Del. C.* § 5701. These proceedings may include demands for back rent and other charges enumerated in the Landlord/Tenant Code. Stoltz Management v. Consumer Affairs Bd., Del. Supr., 616 A.2d 1205, re1209 (1992) (listing landlord's monetary entitlements, consisting of agreed-upon rent, late rent charge, separate charge for utilities, security deposit, and reimbursement for certain "repairs, maintenance tasks, alterations or remodeling," for the cost of remedying breaches of contracts, cost of waste and failure to report defective conditions, harm resulting from tenant's extended absence or early termination, and cost of summary possession and removal and storage of tenant's property). 25 Del. C. § 5707(5). The Justice of the Peace

court has jurisdiction to hear, try and finally determine the back rent and specified other issues where the amount demanded does not exceed the Court's jurisdictional limit of $15,000. 10 Del. C. § 9301.

a. Right of Appeal. There is no right to an appeal to the Court of Common Pleas for a trial de novo from a Justice of the Peace Court summary proceeding for possession. Bomba's Restaurant & Cocktail Lounge, Inc. v. Lord De La Warr Hotel, Inc., Del. Supr., 389 A.2d 766 (1978). Instead, a party aggrieved by the judgment rendered in such a proceeding may request a trial de novo before a special court comprised of three Justices of the Peace other than the Justice of the Peace who heard the case originally. 25 Del. C. § 5717. A party to a summary proceeding for possession has a right to a trial by jury in a Justice of the Peace Court. 25 Del. C. § 5713; Hopkins v. Justice of the Peace Court No. 1, Del. Super., 342 A.2d 243 (1975). Where the original proceeding was tried before a jury, a party aggrieved by the judgment rendered in such a proceeding may request an appeal on the record before a special court comprised of three Justices of the Peace who will review the tape recording of the proceeding below to determine if errors of law occurred. McMakin v. Justice of the Peace Court No. 14 and Levenberg, Del. Super., C.A. No. 81M-NO-1, Bifferato, J. (Oct. 18, 1982). The decision on the record shall be by majority vote. 25 Del. C. § 5717(b).

b. Taking an Appeal. An appeal from a Justice of the Peace Court summary proceeding for possession to a special three judge court consisting of three other Justices of the Peace is taken by (1) timely filing a written notice of appeal with the Justice of the Peace Court and (2), so as to stay proceedings on the judgment, executing and filing with the Court an undertaking to the successful party, with such bond or other assurances as may be

required by the Court, to the effect that the aggrieved party shall pay all costs which may be awarded against the aggrieval party and pay all damages, including rent justly accruing during the pendency of the appeal. 25 Del. C. § 5717(b). Once an appeal has been perfected, the special court shall hear the appeal within ten days from the filing thereof. 25 Del. C. § 5717(a).

c. Appeal Requirements. A party wishing to appeal from a summary proceeding for possession must file a written notice of appeal with the Justice of the Peace Court out of which the judgment was rendered within five days after judgment, starting the day after the judgment was ordered. J. P. Civ. Form 32 is the form of notice prescribed by the Justice of the Peace Court. In compliance with 25 Del. C. § 5717(b), J. P. Civ. Form 32 also sets forth the undertaking to the successful party, with such bond or other assurances as may be required by the Court, to the effect that the aggrieved party will pay all costs of such proceedings which may be awarded against the aggrieval party and abide the order of the Court therein, and pay all damages, including rent justly accruing during the pendency of such proceedings. When the form containing the execution is filed with the Court, whether or not bond is required, all further proceedings in execution of the trial court judgment are stayed. 25 Del. C. § 5717(b). The parties must be properly identified and identical to the parties in the Justice of the Peace Court. See § 23.02(c)(3), supra.

d. Scope of Review. An appeal to the three judge panel of Justices of the Peace taken pursuant to § 5717 may include any issue on which judgment was rendered at the trial court level, including the issue of back rent due, any other statute to the contrary notwithstanding. 25 Del. C. § 5717(c). The Supreme Court recognized that no appeal may be taken to the Superior Court (which was then the appellate court for Justice of the Peace Court

cases) in summary possession actions. Capano Investments v. Levenberg, Del. Supr., 564 A.2d 1, 30, 131 (1989). However, the Superior Court has held that the proper avenue for relief from denial of a Rule 20(b) motion or of a motion to vacate a default or nonsuit judgment in a summary possession landlord/tenant case is an appeal to the Court of Common Pleas. Gibson v. North Delaware Realty Co., Del. Super., 95A-08-011-JOH, Herlihy, J. (June 6, 1996); Miles v. Justice of the Peace Court #13, Del. Super., C.A. No. 93A-02-12, Del Pesco, J. (Nov. 3, 1993) (ORDER).

In Miles, Wilmington Housing Authority ("WHA") filed a summary possession proceeding in J.P. Court No. 13 against Miles for failure to pay rent. A nonsuit was entered in favor of Miles when WHA failed to appear for trial. WHA then requested that the matter be set for trial and the Court referred the matter for a trial de novo before a three judge panel pursuant to 25 Del. C. § 5717. A default judgment was entered against Miles when she failed to appear for trial. Miles filed for relief from the default judgment along with a counterclaim and the matter was referred before a three judge panel. The three judge panel ruled for WHA on its possession claim and against Miles on her counterclaim. Miles filed a writ of certiorari alleging that the J.P. Court exceeded its jurisdiction in allowing the appeal of the nonsuit to the three judge panel pursuant to 25 Del. C. § 5717(a).

The Superior Court determined that, based upon 10 Del. C. § 9539, a nonsuit should be handled in the same manner as a default judgment and that the procedures for providing relief from default judgments are contained in Justice of the Peace Court Civil Rule 20(b) and 10 Del. C. § 9538. The Court found that both Rule 20(b) and section 9538 establish procedures for vacating a judgment "which require a movant to show that he or she was not wilfully negligent or

neglectful" and that "[n]either section provides for a trial de novo before a three judge panel." Miles at *3. Accordingly, the Court held that requests for relief from default judgments or nonsuits in summary possession landlord/tenant cases should be directed to a Justice of the Peace, who will conduct a hearing and, upon determining that the party requesting relief was not wilfully negligent in letting judgment go against them, vacate the nonsuit or default judgment. If the nonsuit or default judgment is vacated, the Justice of the Peace (or jury, if a jury trial is requested by the party) would consider the merits of the case and make a determination, which would be subject to an appeal to the three judge panel. Id. at 3. If the request for relief from a nonsuit or default judgment is denied, then the proper method for relief from the denial would be an appeal to Superior Court (or presently the Court of Common Pleas).

The Superior Court in Gibson broadly applied the Miles findings to hold that the proper avenue for relief from the denial of a motion under J.P. Civil Rule 20(b) to vacate a judgment after trial (not a default or nonsuit judgment) in a summary possession landlord/tenant case is an appeal to the Court of Common Pleas. Gibson, Mem. Op. at 5. In Gibson, the defendant-tenant did not appeal to the three judge panel within five days of the judgment after trial. Sixteen days after the judgment, the defendant/tenant filed a motion under Rule 20(b), which was denied by the Justice of the Peace Court. The defendant/tenant then filed a timely appeal of the denial with the Court of Common Pleas, arguing that the appeal procedures set forth in 10 Del. C. § 9572, rather than those in 25 Del. C. § 5717, controlled. The Court of Common Pleas dismissed the appeal and denied the defendant/tenant's application to transfer the appeal to a three judge panel, holding that the underlying summary possession action required appeal to the three judge panel and that the defendant/tenant had failed to file the appeal in a timely manner.

Gibson v. North Delaware Realty Co., Del. Ct. Com. Pls., C.A. #1995-06-11, DiSabatino, C.J. (June 20, 1995). The Superior Court reversed the decision of the Court of Common Pleas regarding dismissal and transfer of the appeal, and determined that the defendant/tenant's initial appeal of the denial was properly and timely taken. Gibson, C.A. No. 95-08-011-JOH, Mem. Op. at 5. Thus, the Superior Court held that the proper method for relief from a denial of a Rule 20(b) motion to vacate a judgment after trial is an appeal to the Court of Common Pleas and not to the three judge panel.

In Summary, the process for requesting relief from a judgment is to direct a motion to vacate a judgment to an individual Justice of the Peace, who conducts a hearing and either vacates the judgment or denies the motion. If the judgment at issue is a nonsuit or default judgment, the Justice of the Peace applies the "wilfully negligent" standard set forth in 10 Del. C. § 9538 in determining whether to grant or deny the motion. If the judgment is vacated, the Justice of the Peace then considers the merits of the case and makes a determination, which is subject to an appeal to the three judge panel. If the request for relief is denied, then the proper method of relief from the denial is an appeal to the Court of Common Pleas.

23.04 TRAFFIC AND CRIMINAL CASES. Generally speaking, Justices of the Peace have jurisdiction to hear, try and finally determine all Title 21 traffic offenses committed within the State. 21 Del. C. § 703. They have jurisdiction to hear, try and finally determine all Title 11 criminal code violations. 11 Del. C. § 2701. They also have jurisdiction to hear, try and finally determine all criminal misdemeanors which are listed under 11 Del. C. § 2702.

a. Right of Appeal.

(1) In Traffic cases. The right to appeal from a Justice of the Peace Court traffic conviction to the Superior Court for a trial de novo exists when the conviction occurs and the sentence includes any period of incarceration, or the fine exceeds $100. 21 Del. C. § 708(b). All Justices of the Peace, immediately after passing final judgment in all traffic cases, are required by law to advise the defendant of the right to take an appeal from the decision and must inform the defendant of the time and manner in which the appeal may be taken. The law further requires that the records of the Justice of the Peace contain an entry indicating the information given by the Justice. 10 Del. C. § 9505. The standard sentencing order contains such an entry.

(2) In Criminal cases. Appeals from Justice of the Peace Court Title 11 criminal cases are permitted when, after trial and conviction, the sentence is incarceration exceeding one month, or a fine which exceeds $100. Del. Const. art. IV, § 28. A sentence of 30 days imprisonment is a sentence of one month. Marker v. State, Del. Supr., 450 A.2d 397 (1982); see also Joseph Walls v. State, Del. Super., Cr.A. Nos. N-86-08-1104-A, N-86-08-1105-A, at 2, Poppiti, J. (Aug. 25, 1988) (ORDER). All Justices of the Peace, immediately after passing final judgment in all criminal cases, are required by law to advise the defendant of the defendant's right to take an appeal from the decision and must inform the defendant of the time and manner in which the appeal may be taken. The law further requires that the records of the Justices of the Peace contain an entry indicating the information given by the Justice of the Peace. 10 Del. C. § 9505. The standard sentencing order contains such an entry.

b. Taking an Appeal. Appeals from Justice of the Peace Court traffic or criminal cases to the Court of Common Pleas are taken by (1) timely giving notice of appeal

with the Justice of the Peace Court and (2) giving bond with surety satisfactory to the Justice of the Peace Court in which the defendant was convicted. 21 Del. C. § 708(b); Ct. Com. Pls. Crim. R. 39(b).

c. Appeal Requirements. A defendant wishing to appeal must inform the Justice of the Peace Court out of which the judgment was rendered of the defendant's intention to appeal, within fifteen days from the date of sentencing (not counting the date of the sentence), unless otherwise provided by statute. Ct. Com. Pls. Crim. R. 39(a). If the last day of the period falls on a Saturday or Sunday or legal holiday (as provided by statute or designated by the Governor or the Chief Justice of the State of Delaware), then the period shall run until the end of the next day on which the Clerk's office is open. The $75 fee for taking the appeal to the Court of Common Pleas will be collected by the Justice of the Peace Court and transferred to the Court of Common Pleas with the appeal documents.

When an appeal is taken, the Justice of the Peace Court shall forthwith transmit the appeal bond, appeal fee, and a certified transcript of the record to the Court of Common Pleas in the county in which the judgment was rendered. The Clerk of the Court of Common Pleas shall not enter an appeal de novo until the appeal bond and certified transcript of the record is filed with the Clerk's office. Ct. Com. Pls. Crim. R. 39(b).

d. Appeal Bond.

(1) In Traffic cases. The defendant must give bond with surety satisfactory to the Justice of the Peace within the fifteen day appeal period. 21 Del. C. § 708(b). The amount of the bond and type of surety are determinations to be made by the Justice of the Peace utilizing sound judicial discretion. In the usual traffic case, the Justice of the Peace will set

bond in the amount of the fine plus court costs and the Victim's Compensation Fund assessment. The bond may either be secured or unsecured in the Justice of the Peace's discretion. A traffic defendant who proves defendant's indigency to the satisfaction of the court shall be allowed an unsecured appeal bond.

(2) In Criminal cases. Pursuant to Ct. Com. Pls. Crim. R. 39, Justices of the Peace shall require the defendant who files an appeal from a Justice of the Peace Court Title 11 criminal case to give bond with surety satisfactory to the Justice of the Peace before whom the defendant was convicted. In determining the amount thereof, the Justice of the Peace is to be guided by J. P. Ct. Crim. R. 28, Chapter 21 of Title 11, and the Constitutions of the United States and the State of Delaware. A criminal defendant who proves defendant's indigency to the satisfaction of the court shall be allowed an unsecured appeal bond.

(3) Stay of Proceedings. An appeal of a criminal or traffic conviction which is timely filed and in which the required bond and surety is given operates as a stay of the Justice of the Peace Court judgment and proceedings. 21 Del. C. § 708(b) and Ct. Com. Pls. Crim. R. 39(d). The decision of the Justice of the Peace as to bond and surety may be reviewed by a Court of Common Pleas judge. Id.

e. The Appeal Threshold. As previously stated, an appeal to the Court of Common Pleas for a trial de novo from a Justice of the Peace Court traffic conviction is allowed when the sentence includes any period of incarceration, or the fine exceeds $100, and from a criminal conviction when the sentence is incarceration exceeding one month or a fine which exceeds $100.

With regard to the fine appeal threshold, the fine does not include costs or the Victim's Compensation Fund assessment. Thus, a person who is fined in the amount of $90, plus court costs of $30, plus 18% of the amount of the fine for the Victim's Compensation Fund, 11 Del. C. § 9012(a), for a total of $136.20, has no right to appeal to the Superior Court for a trial de novo from a Justice of the Peace court conviction after trial regarding a Title 21 traffic or Title 11 criminal offense. Brookens v. State, Del. Supr., 466 A.2d 1218, 1219 (1983). If a defendant is fined $150, with $75 of the fine suspended unconditionally, the appeal threshold is also not met. Carole Ternahan v. State, Del. Super., Cr.A. No. 89-09-0000A, Graves, J. (Nov. 21, 1990). The Court in Ternahan stated that "there is no possibility of any conduct by the defendant which could trigger payment of the suspended portion" so that Superior Court has no jurisdiction over an appeal. Id. at 2. If a defendant is fined $125 for three offenses, the fine amounts are not aggregated. Id. at 3; Goldstein v. City of Wilmington, Del. Super., C.A. No. 89A-AP-13, at 8, Gebelein, J. (Mar. 20, 1991).

With regard to the appeal threshold for a sentence of incarceration, a term of incarceration suspended for a period of probation or a sentence of probation does not satisfy the appeal threshold. In Sack v. State, Del. Supr., No. 46, 1986 (Mar. 31, 1986) (ORDER), the defendant had been sentenced to two years probation. The Court held that it had no jurisdiction over the appeal since "'imprisonment' means 'to be put in or as if in prison [citing Marker, supra]' " and the sentences imposed on the defendant "do not require any term of imprisonment", and "probation is defined as 'sentencing without imprisonment of an offender",' citing 11 Del. C. § 4302(13). Id. at 2. See also Jewell v. State, Del. Supr., No. 136, 1986 (June 5, 1986) (ORDER). Similarly, in Harris v. State, Del. Super., Nos. K04-05-0392AC thru 0393AC, Ridgely, P.J. (Dec.

2, 1994) (ORDER), the defendant had been sentenced in the Court of Common Pleas to incarceration for a term of six months at Level V, suspended for a one year term of probation at Level II. President Judge Ridgely held that Superior Court was without jurisdiction to hear the appeal since the sentence imposed did not require any term of imprisonment, citing Jewell, supra.

f. Appeal Procedures. Upon entry of an appeal in a traffic case, the Clerk of the Court of Common Pleas is required to give notice in writing forthwith to the Attorney General. Ct. Com. Pls. Crim. R. 39(b). On receipt of such notice, the Attorney General is required to file promptly an information with the Clerk's office, whereupon the proceeding will continue in accordance with the Rules of the Court of Common Pleas. Id.

g. Prohibition of Appearance of Justice of the Peace on Appeal. See § 23.02(g), supra.

h. County and Municipal Ordinances. Justices of the Peace have jurisdiction to hear, try and finally determine all violations of any ordinance, code or regulation of the governments of any County or municipality; however, any person convicted of such violations may be fined not more than $1,000 for each violation. 11 Del. C. § 5917(a). Every defendant convicted, after trial, of such a violation shall have the right to appeal to the Court of Common Pleas for a trial de novo irrespective of the amount of the fine imposed. In other words, there is an automatic right to appeal such cases to the Court of Common Pleas. 11 Del. C. § 5917(b). [In contrast, 11 Del. C. § 5920 provides a monetary appeal threshold of $100.00 from Justice of the Peace Court judgments "in a criminal action pursuant to [Title 11]."] Violations of governmental ordinances, codes or regulations are not criminal actions pursuant to Title 11; in addition, a specific statutory section (11 Del. C. § 5917(b)) applies to appeals of county and municipal

ordinance violations, thereby taking precedence over the more general statutory provisions of § 5920.] No such conviction or sentence shall be stayed pending appeal unless the person convicted shall give bond in an amount and with surety to be fixed by the Justice of the Peace before whom such person was convicted, at the time such appeal was taken. Such appeal shall be taken and bond given within five days from the time of conviction. 11 Del. C. § 5917(b). For purposes of interpreting § 5917(b), a conviction does not result until sentence has been imposed. Only then is the judgment final and, therefore, appealable. 4 Am.Jur.2d, Appeal and Error, § 161.

23.05 EXTRAORDINARY WRITS AS AN ALTERNATIVE TO NORMAL APPEAL. Several extraordinary appellate avenues are available to party litigants who appear before Justice of the Peace Courts on civil or criminal matters. These special petitions are all directed to the Superior Court which will grant relief only with caution and not in doubtful cases. Knight v. Hale, Del. Super., 176 A. 461 (1934). They fall, generally, into three underlying types of writs: certiorari, prohibition and mandamus. The Superior and Supreme Court have the authority to issue these writs. 10 Del. C. §§ 142, 562, 564.

a. The Writ of Certiorari. This extraordinary writ is limited to jurisdictional and not factual review. Kowal v. State, Del. Super., 121 A.2d 675 (1956); Woolley Practice, §§ 899, 900, at 627. Briefly, "certiorari is a writ issued by a superior to an inferior court. . .requiring the latter to send to the former. . .the record and proceedings in some cause already terminated, to the end that the party who considers himself aggrieved by the determination of his rights by the inferior court. . .may have justice done him." Woolley, § 894, at 623. A certiorari proceeding differs fundamentally from an appeal in that the latter "brings the case up on its merits while the . . .[former] brings up the record only so that the reviewing court can merely

look at the regularity of the proceedings." Schwander v. Feeney's, Del. Super., 29 A.2d 369 (1942). 4 C.J.S. Appeal and Error, § 17, at 93 (1957). Review of claims raised by a petition for a writ of certiorari is generally confined to jurisdictional matters, errors of law, or irregularity of proceedings which appear on the face of the record. Matter of Butler, Del. Supr., 609 A.2d 1080, 1081 (1992). Certiorari permits the reviewing court to determine the constitutionality of a statute under which a conviction was had in an inferior court, with no right of appeal, even if the constitutional issue was not presented in the lower court. Shoemaker v. State, Del. Supr., 375 A.2d 431 (1977); Becker v. State, Del. Super., 185 A. 92 (1936).

Although there is no time limit fixed by statute or court rule, it has been held that there is a 30 day period from the date of judgment for filing a praecipe for a writ of certiorari and the certified transcript of the record, to allow for the prompt entry of the recognizance and the issuance of the writ. See Elcorta, Inc. v. Summitt Aviation, Inc., Del. Super., 528 A.2d 1199 (1987). The 30 day filing period is discretionary, not jurisdictional. Id. at 1201.

b. The Writ of Prohibition. This extraordinary writ should issue, as a preventative measure, where it is clear that a court has exceeded its jurisdiction or exercised powers beyond its authority. Continental Coach Crafters Co. v. Fitzwater, Del. Super., 415 A.2d 785 (1980); Matushefske v. Herlihy, Del. Supr., 214 A.2d 883 (1965). Thus, where a Justice of the Peace Court refused a tenant his right to a jury trial in a summary proceeding for possession of premises brought under Chapter 57 of Title 25, the Superior Court issued a writ of prohibition directed to that Justice of the Peace Court as the only remedy available to prevent the denial of trial by jury. Hopkins v. Justice of the Peace Court No. 1, Del. Super., 342 A.2d 243 (1975). A

writ of prohibition may not usurp the function of the writ of certiorari and can never be used to correct errors of law. Continental Coach Crafters Co., supra.

c. The Writ of Mandamus. The object and purpose of this extraordinary writ is to procure the performance of a duty by a public official or agency. Milford 2nd Street Players v. Delaware Alcoholic Beverage Control Comm'n, Del. Super., 552 A.2d 855, 856 (1988). The writ of mandamus can neither increase nor diminish the duty which the law prescribes; its function is not to create a duty but only to coerce the performance of a preexisting duty. Capital Educators Ass'n v. Camper, Del. Ch., 320 A.2d 782 (1974); State ex rel. Cooke v. New York - Mexican Oil Co., Del. Super., 122 A. 55 (1923). Thus, mandamus is an appropriate remedy to compel a lower court to take jurisdiction in a case where it had erroneously declined jurisdiction. Schagrin Gas Co. v. Evans, Del. Supr., 418 A.2d 997 (1980). It will not issue unless the party seeking mandamus establishes a clear legal right to the relief requested. Milford 2nd Street Players, 552 A.2d at 856. Mandamus will not be awarded where there is other adequate legal remedy and may not be used as a substitute for appeal. Id.; Williams v. Marvel, Del. Supr., 158 A.2d 486 (1960); Hastings v. Henry, Del. Super., 40 A. 1125 (1894).

CHAPTER 24. JUDICIAL REVIEW OF ZONING AND SUBDIVISION CONTROL DECISIONS

TABLE OF CONTENTS

TABLE OF FORMS

CHAPTER 24. JUDICIAL REVIEW OF ZONING AND SUBDIVISION CONTROL DECISIONS

Edward M. McNally[1]

24.01 INTRODUCTION. This chapter reviews the available ways in which an aggrieved party may seek judicial review of the decision of a Delaware municipality or county relating to adoption and amendment of zoning ordinances and subdivision control ordinances, and appeal from the granting or denial of an internal appeal, exception or variance by the Zoning Board of Adjustment in Delaware municipalities and counties. Judicial review of decisions relative to the Coastal Zone Act, 7 Del.C. §§ 7001-13, is addressed in Chapter 20.

24.02 AUTHORITY TO ADOPT ZONING AND SUBDIVISION CONTROL LAWS. Article II, § 25 of the Delaware Constitution authorizes the General Assembly, in part, to "enact laws under which municipalities and the County of Sussex and the County of Kent and the County of New Castle may adopt zoning ordinances." This article expressly provides that such regulations are within the police power of the State. The General Assembly passed comprehensive planning and zoning enabling acts for Delaware Municipalities, 22 Del.C. §§ 301-332; 22 Del.C. §§ 70l-7ll, modeled on the Standard Zoning Enabling Act promulgated by the U.S. Department of Commerce. Similar legislation was also enacted to permit Kent, New Castle and Sussex County to adopt zoning laws, subdivision controls and an official Map. See 9 Del.C. §§ 1341-53, §§ 2601-11,

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[1]The material that follows is largely derived from prior versions prepared by Edward M. McNally, Esquire a member of the Wilmington, Delaware firm, Morris, James, Hitchens & Williams; Thomas J. Reed, Professor of Law at the Delaware Law School of Widener University; Harvey Bernard Rubenstein, Esquire who maintains his own practice in Wilmington; and Jonathan B. Taylor, Esquire who is with the firm, Taylor & Gruver.

§§ 3001-12 (New Castle); 9 Del.C. §§ 4801-19; 4901-99 (Kent); 9 Del.C. §§ 6801-20; 6901-99 (Sussex).

Zoning ordinances are enacted and amended by the appropriate legislative body after proper notice and hearing. Municipalities which adopt zoning ordinances must hold a public hearing on adoption, on at least 15 days notice of the time and place of hearing in an "official paper" or paper of general circulation in the municipality. 22 Del.C. § 304. In New Castle County and Kent County, county zoning ordinances may be enacted only after the County Planning Commission certifies the zoning plan to the County Council, which must hold a public hearing on adoption of the ordinance on 30 days' notice given by publication in a newspaper of general circulation in the County. See 9 Del.C. §§ 2606, 1153(b) (New Castle Dept. of Planning must also make recommendations on proposed ordinance); 9 Del.C. § 4907, 4908, 4910 (Kent). In Sussex County, the public hearing must be held on 15 days notice given by publication in two newspapers of general circulation in the county. See 9 Del.C. § 6910 (Sussex). In Kent and Sussex Counties, the Planning Commission must also hold a preliminary public hearing on the proposed zoning ordinance on 15 days' notice by publication in a newspaper of general circulation in the county 9 Del.C. §§ 4907, 4908; 9 Del.C. §§ 6907, 6908.

A similar procedure followed for adopting a general comprehensive zoning ordinance must also be followed in amending the ordinance. 9 Del.C. § 2607 (New Castle); 9 Del.C. § 4911 (Kent) (hearing on 15 days notice); 9 Del.C. § 6911 (Sussex); 22 Del.C. § 305 (protest signed by 20% of lot holders within 100 feet of proposed rezoning requires 3/4 majority vote to pass). Consequently, most cases involving challenges to the efficacy of zoning ordinances deal with the validity of an ordinance rezoning a parcel of land. No direct appeal from the enactment of a zoning

ordinance is authorized by the enabling statutes for planning commissions, zoning ordinances, subdivision control ordinances and official maps.

a. Authority to Adopt Subdivision Controls. County Councils and municipal legislative bodies are authorized to adopt subdivision control ordinances regulating the platting and recording of subdivisions. 9 Del.C. § 1345 (New Castle); 9 Del.C. §§ 4810-11 (not expressly providing for an ordinance by establishing guidelines for Planning Commission approval of plats) (Kent); 9 Del.C. §§ 6810-11 (Sussex) (same as Kent); 22 Del.C. § 708 (requiring approval of opening or layout of streets). Planning Commission approval of any subdivision plat is required in all counties and in each municipality. See 9 Del.C. § l341(2), 1343(2), 1344(b); 9 Del.C. § 1154 (New Castle Dept. of Planning approval also required); 9 Del.C. § 4810(a) (approval of Kent County Council also required); § 4811 (hearing required within 40 days); 9 Del.C. § 6810(b); § 6811 (Sussex) (also requires County Council approval); 22 Del.C. § 706 (requiring approval of change affecting public ways and parks). Additionally, subdivision plats must be approved by the County Council as well (9 Del.C. § 1344(b); § 4810(b); 9 Del.C. § 6810(b)). An unapproved plat may not be submitted for recordation by the Recorder. See 9 Del.C. § 1345 (New Castle); 9 Del.C. § 4812 (Kent); 9 Del.C. § 6810 (Sussex). 22 Del.C. § 701 et seq. does not provide for a bar to recording unapproved plats for municipalities.

Any person aggrieved by the approval or denial of a proposed subdivision plat by the Kent or Sussex County Planning Commissions or by municipal planning commissions may appeal the granting or denial to the County Council, 9 Del.C. § 4811; 9 Del.C. § 6811, or to the municipal legislative body. 22 Del.C. § 708. No formal appeal to County Council is expressly authorized for New Castle County, but the effect of automatic review of all Planning Commission recommendations

on subdivision plats amounts to automatic appeal rights for aggrieved persons. See 9 Del.C. § 1344(b).

b. Authority to Adopt Official Map. County Councils and municipal legislative bodies are also empowered to adopt an official map for the county or municipality showing both current and future public facilities. See 9 Del.C. § 1346 (New Castle); 9 Del.C. § 4809 (Kent); 9 Del.C. § 6809 (Sussex); 22 Del.C. § 704 (municipalities). After adoption of an official map by the relevant governmental body, no new streets or public facilities may be added, nor old public facilities or streets vacated or discontinued without referral of the proposed change in public facilities to the relevant Planning Commission and legislative body for approval. See 9 Del.C. § 1347 (New Castle); 9 Del.C. § 4809(b) (Kent); 9 Del.C. § 6809(b) (Sussex); 22 Del.C. § 706 (municipalities). Any addition or deletion of streets or public facilities constitutes an amendment of the official map. Consequently, approval of a subdivision plat showing public facilities automatically amends the official map pro tanto.

Any person aggrieved by the Planning Commission's failure to grant or deny an amendment to the official map has automatic review of grant or denial by the relevant legislative body. (See 9 Del.C. § 1346 (New Castle); 9 Del.C. § 4809(b) (Kent); 9 Del.C. § 6809(b) (Sussex); 22 Del.C. § 705 (municipalities).) No direct appeal from the adoption or amendment of an official map is authorized by statute.

In New Castle and Kent Counties, future rights of way and public facilities shown on the official map preclude affected property owners from erecting structures in the proposed bed of future streets. See 9 Del.C. § 1347(a) (New Castle); 9 Del.C. § 4816(c)(d) (Kent). Sussex County has no such restriction pertaining to its official map statute. Municipalities adopting official maps are

permitted to apply to the Court of Chancery for equity enforcement of their ordinances or by-laws relative to subdivision controls and official maps.

Aggrieved persons wishing to build structures in the bed of proposed streets in New Castle and Kent Counties may appeal denial of a building permit to the Board of Adjustment. See 9 Del.C. §§ 1347(a), 1352(a) (New Castle); 9 Del.C. §§ 4816(a), 4916(a) (Kent). Since the effect of an official map designation of a proposed street or other public facility in Sussex and in all Delaware municipalities is unclear, denial of an improvement location permit in Sussex on the basis of location of the improvement in a street bed may be appealed to the Board of Adjustment. 9 Del.C. § 6916. A similar appeal should lie from refusal of a building permit in any municipality based on locating the improvement in a proposed street bed. See 22 Del.C. § 324.

Judicial review of Board of Adjustment decisions is addressed in Section 24.04.

24.03 THE BOARD OF ADJUSTMENT. A Board of Adjustment must be established in all counties and municipalities having a zoning ordinance, subdivision control ordinance or official map to act as a quasi-judicial body for purposes of review of administrative decision making. See 9 Del.C. § 1350 (New Castle); 9 Del.C. § 4913 (Kent); 9 Del.C. § 6913 (Sussex); 22 Del.C. § 321 (municipalities).

a. Jurisdiction of Boards of Adjustment. The Board of Adjustment may hear appeals from any person refused a building permit, from any decision made by a person charged with administering the zoning ordinance, subdivision control ordinance or official map. 9 Del.C. § 1352 (New Castle). See New Castle County Code §§ 523-84 and § 585 regarding ancillary jurisdiction; 9 Del.C. § 4916 (Kent); 9 Del.C. § 6916 (Sussex); 22 Del.C. §§ 324, 327 (municipalities). The Board also may accept and act on applications by aggrieved parties for

exceptions to the zoning ordinance, subdivision control ordinance or official map. See 9 Del.C. § l352(b)(2) (New Castle); 9 Del.C. § 4917(2) (Kent); 9 Del.C. § 6917(2) (Sussex); 22 Del.C. § 327(a)(2) (municipalities). The Board of Adjustment for New Castle, Kent and Sussex Counties may also give official advisory interpretations of the zoning ordinance, subdivision control ordinance or official map (See 9 Del.C. § 1352(a)(2) (New Castle); 9 Del.C. § 4917(2) (Kent); 9 Del.C. § 6917(2) (Sussex)), a power not expressly granted to the boards of adjustment of municipalities, 22 Del.C. § 327(a)(2), but fairly implied by its delegated authority to take appeals from the decisions of administrative personnel.

Finally, the Board of Adjustment is allowed to hear and determine the granting of variances from the zoning ordinance, subdivision ordinance or official map, when strict application of any ordinance or map provision would result in substantial hardship to the affected property owner. See 9 Del.C. § 1352(a)(3) ("unnecessary hardship" or "exceptional practical difficulties to the owner of property"--New Castle); 9 Del.C. § 4917(3) ("peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the owner of such property"--Kent); 9 Del.C. § 6917(3)(a) ("unnecessary hardship or exceptional practical difficulty" -- Sussex); 22 Del.C. § 327(a)(3) ("literal enforcement of the ordinance will result in unnecessary hardship"--municipalities).

b. Standard for Granting Appeal from Decision of Administrator. Since the decision of an administrator to grant or deny a building permit, occupancy permit, or other permit seldom is separated from the issue of granting or denying a variance from the ordinance, few Delaware cases address the standards for granting an appeal from refusal to grant a building permit or occupancy permit. The sole reported case, Reinbacher v. Conley, Del. Ch., 141 A.2d 453 (1958), construing the power of the Board of Adjustment to give relief from adverse decisions of zoning

administrators, contains dicta to the effect that such power is limited to correcting errors on the part of the administrator and not to rewriting the zoning ordinance's internal errors. Id. at 457-58. Consequently, if the denial of a permit is arbitrary or unreasonable, the Board of Adjustment should overrule the denial and order the permit issued.

c. Standards for Granting Exception to Ordinance. The standards for granting special exceptions to the zoning ordinance, subdivision control ordinance or official map must be included in the text of the ordinance itself. See III Rathkopf, Law of Planning and Zoning § 41.08 (hereafter cited as "Rathkopf"). The Zoning Board of Adjustment is clearly unable to grant to an aggrieved party a "special permit" that is not authorized as an exception to the zoning ordinance. See Franklin Bldrs. Inc. v. Sartin, Del. Super., 207 A.2d 12 (1964). The express legislative standards for the grant or denial of an exception to the zoning ordinance or subdivision control ordinance must be reasonable. Rathkopf at § 41.09.

d. Standards for Granting Variances to Ordinance. The statutory standard for granting or denying a variance is that of substantial hardship to a property owner adversely affected by a zoning or subdivision control ordinance. See 9 Del.C. § 1352(a) (New Castle); 9 Del.C. § 4917(3) (Kent); 9 Del.C. § 6917(c) (Sussex); 22 Del.C. § 327(a) (municipalities). There are three types of variances normally available to aggrieved property owners: area variances, height and density variances, and land use variances. The standard for granting or denying an area variance has been judicially modified. Unlike use variances, the applicant for an area variance need only show "exceptional practical difficulties" connected with compliance with the minimum lot area, set back, and related rules regarding improvement of property. Vassallo v. Penn Rose Civic Ass'n, Del. Supr., 429 A.2d 168 (1981); Board of Adjustment v. Kwik-Check Realty, Inc., Del. Supr., 389 A.2d 1289,

1291 (1978). The Board of Adjustment should consider, in reviewing an area variance application, the following:

> (1) the nature of the zone in which the property lies;
>
> (2) the character of the immediate vicinity of the proposed variance and the land use in that vicinity;
>
> (3) whether removal of the zoning restriction would seriously affect neighboring property and uses; and
>
> (4) if the restriction is not removed, whether the affected property owner would be able to make normal improvements in the character of the permitted use or size authorized by the zoning ordinance.

Board of Adjustment v. Kwik-Check Realty, Inc., Del. Supr., 389 A.2d 1289, 1291 (1978). See Concord Hotel Management v. Marriott Corp., Del. Super., C.A. No. 89A-MY-13, Herlihy, J. (Dec. 28, 1989), rev'd in part on other grounds, Del. Supr., No. 2, 1990, Holland, J. (July 13, 1990) (ORDER). But see Dale v. Town of Elsmere, Del. Super., C.A. No. 87A-JA-4, Poppiti, J. (Apr. 20, 1988) (refusing to apply same standard to Elsmere zoning ordinance area variance enacted under authority of 22 Del.C. § 307). The same rationale probably would apply to examination of an application for an area variance from a subdivision ordinance limitation on minimum lot size or structure size, and to height variances under both the zoning and subdivision control ordinances as well.

The standard for granting or denying a use variance generally has been that of "substantial hardship." The courts have adopted the following series of factors involved in determining whether the applicant has demonstrated hardship:

(l) the hardship must not have been created by the applicant's own prior conduct, Janaman v. New Castle County Bd. of Adjustment, Del. Super., 364 A.2d 1241, 1253 (1976);

(2) the hardship must be peculiar to the property and not common to other properties similarly zoned and located adjacent to the applicant's property Turner v. Richards, Del. Supr., 366 A.2d 833, 835 (1975); Searles v. Darling, Del. Supr. 83 A.2d 96, 101 (1951); In re Emmet S. Hickman Co., Del. Supr., 108 A.2d 667, 674-75 (1954);

(3) mere economic hardship is insufficient to establish "substantial hardship" to support a use variance, Searles v. Darling, Del. Supr., 83 A.2d 96, 100 (1951); Janaman v. New Castle County Bd. of Adjustment, Del. Super., 364 A.2d 1241, 1244 (1976); Reagan v. Heintz, Del. Super., 246 A.2d 710, 712 (l968) (setback);

(4) purchase of the property after the zoning restriction has been imposed may be a self-imposed hardship from which the petitioner cannot seek relief, Richards v. Turner, Del. Super., 336 A.2d 58l, 584 (l975) (dicta);

(5) the extent to which property values peculiar to the affected property are diminished by the zoning ordinance, Richards v. Turner, Del. Super., 336 A.2d 581, 585 (1975);

(6) whether the property can yield a reasonable return when used for its permissible land uses, Homan v. Lynch, Del. Supr., 147 A.2d 650, 654 (1959);

(7) the proposed use variance will not substantially alter the essential character of the locality, Homan v. Lynch, Del. Supr., 147 A.2d 650, 654 (1959).

Ordinarily, the Board of Adjustment may not grant a variance on grounds of hardship over a parcel adjacent to the tract for which the hardship is claimed, particularly if the two parcels

fall in different zoning classifications. Turner v. Richards, Del. Supr., 366 A.2d 833, 835 (1976). Judicial review of Board of Adjustment variance decisions centers on the Board's application of the foregoing standards.

24.04 APPEALS FROM THE BOARD OF ADJUSTMENT. The decisions of the Board of Adjustment may be reviewed by the Superior Court on a petition for certiorari as provided for by statute. See 9 Del.C. § 1353(a) (New Castle); 9 Del.C. § 4918(a) (Kent); 9 Del.C. § 6918 (Sussex); 22 Del.C. § 322(a) (municipalities). This system of review, which has much in common with the ancient common law writ of certiorari (see Woolley, Practice in Civil Actions in the Law Courts of the State of Delaware §§ 894-947 (1906) (hereafter cited as "Woolley")), is controlled by statute, and in case of conflict between common-law procedure and the statute, the statute controls. Searles v. Darling, Del. Supr., 83 A.2d 96, 98 (1951); see 10 Del.C. § 562.

a. Contents of Petition. A petition for review must allege, at a minimum, that the decision of the Board of Adjustment was illegal. See 9 Del.C. § l353(a) (New Castle); 9 Del.C. § 4918(a) (Kent); 9 Del.C. § 6918(a) (Sussex); 22 Del.C. § 322(a) (municipalities). The petition must be verified. Since the common law writ of certiorari lies to correct errors in inferior courts or administrative agencies (see Woolley at § 896) and the statute requires that "the grounds of illegality" should be stated, the verified petition for certiorari from the Board of Adjustment should set out the facts upon which the alleged illegality is asserted. See also Woolley at § 899. Superior Court Civil Rule 72(c) prescribes a more summary form of notice of appeal from administrative boards and tribunals. This procedure has not been applied to appeals from the Board of Adjustment. However, the Superior Court has, on occasion, overlooked the formalities required for writ of certiorari and has treated an appeal under Rule 72 as if it were certiorari. See, e.g., Kostyshyn v.

Board of Adjustment, Del. Super., C.A. No. 89A-DE-1, Del Pesco, J. (Apr. 12, 1990) (side yard variance case in which petitioner took a Rule 71 appeal, and court decided case on merits).

b. Signature of Judge Required. The petitioner should present the petition and writ of certiorari to the appropriate judge of the Superior Court for signature before the Prothonotary issues the petition and writ to the Board and all other parties. Coastal Resorts Properties, Inc. v. Board of Adjustment of the City of Rehoboth Beach, Del. Super., 558 A.2d 1105, 1107-08 (1988); Concord Hotel Management v. Marriott Corp., Del. Super., C.A. No. 89A-MY-13, Herlihy, J. (Dec. 28, 1989), rev'd in part on other grounds, Del. Supr., No. 2, 1990, Holland, J. (July 13, 1990) (ORDER). Prior practice in New Castle County encouraged attorneys to present their petition and writ of certiorari to the Prothonotary who routinely signed the writ and issued it without judicial supervision. The Prothonotary apparently followed the procedure set down in Nepi v. Lammot, Del. Super., 156 A.2d 413 (1959), which held that 22 Del.C. § 328, authorizing review of the Board of Adjustment of the City of Wilmington by writ of certiorari, did not require judicial action to issue the writ. This practice was contrary to the holdings of such cases as Chadwick v. Janaman, Del. Supr., 349 A.2d 742 (1975), which required judicial action before a writ of certiorari could be issued, and Board of Adjustment v. Barone, Del. Supr., 314 A.2d 174 (1973), which held that the court must sign the writ of certiorari if the form of the order is complete, which implied that judicial action was necessary to initiate the writ.

This conflict was clarified by the Supreme Court in Coastal Resorts Properties, Inc. v. Board of Adjustment, Del. Super., 558 A.2d 1105, 1107-08 (1988). The Supreme Court reaffirmed its position taken in Chadwick v. Janaman, Del. Supr., 349 A.2d 742 (1975), that 22 Del.C. § 328(b) requires judicial action before a writ will issue to a Board of Adjustment. See also

Concord Hotel Management v. Marriott Corp., Del. Super., Herlihy, J. (Dec. 28, 1989), rev'd in part on other grounds, Del. Supr., No. 2, 1990, Holland, J. (July 13, 1990) (ORDER). See Form 24:03 for the correct form of the writ.

c. Time for Filing Petition. The petition for review must be filed with the Prothonotary within 3O days after the filing of the Board of Adjustment's decision in the Board's offices. See 9 Del.C. § 1353(a) (New Castle); 9 Del.C. § 49l8(a) (Kent); 9 Del.C. § 6918(a) (Sussex); 22 Del.C. § 328 (municipalities). Although Board of Adjustment decisions are often announced orally before filing, a petition for review filed with the Prothonotary before the decision has been reduced to writing and filed with the Board is premature. A motion before the Board of Adjustment to rehear the original application for review, exception or variance, or to vacate the original decision, will not extend the time for filing a petition with the Superior Court. In re Robelen, Del. Super., 136 A. 279 (1926). The petition for review must be filed with the Prothonotary of the Superior Court, and need not be presented to a Judge for consideration in order to satisfy the 30 day limitation. Chadwick v. Jana, Del. Supr., 349 A.2d 742, 743 (1975); Nepi v. Lammot, Del. Super., 156 A.2d 413 (1959). While the statutes do not specify in which county petitions for review shall be filed, presumably the county in which the Board of Adjustment sits and to which the statute pertains is proper for jurisdiction and venue. Although Superior Court Civil Rule 72 generally requires filing of a notice of appeal in other administrative cases within 15 days of final judgment, order or disposition from which an appeal may be taken by law, the specific provisions of the various enabling statutes with respect to certiorari review of Board of Adjustment decisions should prevail over Rule 72's shorter time limits for filing "appeals" from the Board of Adjustment.

d. Parties to Petition. An appeal from the Board of Adjustment must name the Board as defendant. Nepi v. Lammot, Del. Super., 156 A.2d 413 (1959). It is not necessary, however, to join as a party to review every person or entity who gives argument or testimony before the Board. Id. at 416. Such individuals are not indispensable parties to the appeal. Id. Any aggrieved person has standing to petition for an appeal. This includes civic associations, see Vassallo v. Penn Rose Civic Ass'n., Del. Supr., 429 A.2d 168, 170 (1981), acting as representative bodies for aggrieved parties, as well as individual and corporate property owners. The objector who sues must name the landowner. See Council of Civil Organizations of Brandywine Hundred v. New Castle County, Del. Ch., 1991 Del. Ch. LEXIS 210 (1991).

e. Service of Writ. Service of the writ of certiorari is controlled by Superior Court Civil Rule 4. Failure to comply with the provisions of the Rule will lead to dismissal of the petitioner's application for a writ of certiorari. Board of Adjustment of New Castle County v. Barone, Del. Supr., 314 A.2d 174, 175 (1973).

f. Record on Review. Ordinarily, the record on review is that which is specified in the return to the Superior Court's writ of certiorari. See Form 24:5 for suggested inclusions in record. Factual determinations of the Board of Adjustment, if supported by substantial evidence, are part of the record on appeal and bind the Superior Court. In re Beattie, Del. Super., 180 A.2d 741, 744 (1962). The evidence taken before the Board may constitute the entire record on appeal in such cases. If the Superior Court finds that the record from the Board does not contain substantial evidence in support of the conclusions of the Board it may take evidence in its own right. See Searles v. Darling, Del. Supr., 83 A.2d 96, 99 (1951). The record on review physically consists of the findings of fact and conclusions of the Board. When the Board sends up a record showing its

conclusions without submitting its facts as found, the record is inadequate. Id. In practice, the Superior Court has restricted itself to reviewing the findings of fact and conclusions submitted by the Board to ascertain whether there is substantial evidence to support the findings entered by the Board. Janaman v. New Castle County Bd. of Adjustment, Del. Super., 364 A.2d 1241 (1976). The record on review will not include unauthorized examinations of the site of a proposed variance by Board members. Cooch's Bridge Civic Ass'n v. Pencader Corp., Del. Supr., 254 A.2d 608 (1969).

In this regard, the careful practitioner should consider the warning delivered by the Supreme Court in Sussex County Council v. Green, Del. Supr., No. 176, 1986, Christie, C.J. (Oct. 3, 1986), stating the minimum requirements for a fair hearing before the County Council. The Court required adequate notice to all concerned, a full opportunity to be heard for every aggrieved person, followed by a decision which reflects the reasons underlying the results. The decision should also adhere to the statutory or decisional standards which control the rezoning process. Id.

At common law, the Superior Court could receive evidence itself in an action to review error under a writ of certiorari. See Woolley, § 897 (citing Cullen v. Lowery, Del. Super., 2 Harr. 292 n.2 (1837)); see also Woolley § 898. The general practice of Delaware courts, however, was to consider themselves bound by the record below. Woolley § 897. Certiorari to review the decision of the Board of Adjustment is a statutory right of review. The Superior Court appeared to have the right to take evidence in an appeal from the Board of Adjustment under 9 Del.C. § 1353(e). The Supreme Court had expressly held that the Superior Court cannot remand a case to the Board of Adjustment to make specific factual findings. Auditorium, Inc. v. Board of Adjustment, Del. Supr., 91 A.2d 528, 532 (1952). However, the Supreme Court often authorized remands in later years to the Board for fact finding. See, e.g., Kwik-Check Realty Co. v. Board of Adjustment, Del. Super., 369 A.2d 694,

699 (1977) (area variance application ordered remanded to Board for particularized findings of fact); Wilson v. Pencader Corp., Del. Supr., 199 A.2d 326, 330 (1964) (Superior Court directed to remand case to Board for findings on whether rock crusher was accessory use); In re Emmett S. Hickman Co., Del. Supr., 108 A.2d 667, 674-75 (1954) (variance for parking lot adjacent to Diamond State Telephone office building; Superior Court ordered to remand case to Board to give Diamond State opportunity to make supplemental record on proposed use).

The conflicting decisions on the Superior Court's power to remand a case to the Board for further findings of fact have been resolved by Mellow v. Board of Adjustment of New Castle County, Del. Super., 565 A.2d 947, 950-51, aff'd without opinion, Del. Supr., 567 A.2d 422 (1988). The Superior Court originally ordered the case remanded to the Board because the Board lacked substantial evidence to support its finding that the affected property owner's non-conforming use had predated 1954, the date of adoption of the New Castle County zoning ordinance. The court then certified an interlocutory appeal from the remand decision on the issue of whether the court had jurisdiction to remand. The Superior Court withdrew its original opinion and granted the motion to reargue the entire case. Id. at 494-50. The court then held that it lacked jurisdiction to order a remand to the Board for the purpose of making findings of fact. Id. at 951. It also determined that the court had the power to supplement the record on certiorari in order that a just decision may be reached, without a preliminary showing that a procedural flaw prevented its introduction before the Board. Id. at 952-53.

Since the Supreme Court affirmed the Superior Court without opinion, all practitioners are cautioned that under ordinary circumstances, the Superior Court cannot remand a matter on certiorari to the Board of Adjustment for additional findings of fact. However, the court

may allow supplemental evidence to be taken in Superior Court, although the court does not encourage evidentiary hearings to amplify the Board of Adjustment's fact findings, preferring to be bound by the record of facts made by the Board.

g. Burden on Party Seeking Review. As might be expected, the burden of persuasion is on the party seeking to overturn the decision of the Board of Adjustment to show that the decision was arbitrary and unreasonable. McQuail v. Shell Oil Co., Del. Supr., 183 A.2d 572, 575 (1962); Mobil Oil Corp. v. Board of Adjustment of the Town of Newport, Del. Super. 283 A.2d 837, 839 (1971). If the error cited is failure to follow the mandatory notice of hearing required by statute, the Board's action is presumed valid and the burden of establishing lack of notice would also fall on the objecting party. See Rathkopf at § 42.07.

h. Remedies on Appeal. By statute, the Superior Court may either reverse or affirm in part or in whole, or may modify the determination of the Board. 9 Del.C. § 1353(f) (New Castle); 9 Del.C. § 3918(f) (Kent); 9 Del.C. § 6918(f) (Sussex); 22 Del.C. § 329(c) (municipalities). Temporary restraining orders also may be issued by the Superior Court in proper cases to suspend action upon the Board's order until a determination can be made on the merits of an appeal. 9 Del.C. § 1353(c) (New Castle); 9 Del.C. § 4918(e) (Kent); 9 Del.C. § 6918(c) (Sussex); 22 Del.C. § 328(b) (municipalities).

i. Expedited Appeal. Superior Court Civil Rule 72.1 applies to all appeals from commissions, boards or courts which may be taken to the Superior Court on appeal. While certiorari has never been classified as an "appeal", Rule 72.1 does not specifically exclude certiorari provisions from its scope. Rule 72.1 permits the appellee to file a motion to affirm within

ten (10) days after receipt of the appellant's opening brief. For further treatment of expedited appeals and motions to affirm in the Superior Court, see section 20.12.

j. State Immunity. The exact relationship of the State of Delaware to local land use regulations has not been spelled out by statute. However, in Hayward v. Gaston, Del. Supr., 542 A.2d 760 (1988), the Supreme Court did clarify the relationship of the Delaware Department of Services for Children, Youth and Their Families to local zoning ordinances. The Department leased a single family residence for a half-way house for emotionally disturbed juveniles in Kent County in an Agricultural-Conservative use zone. The Department had not applied for rezoning of the tract or an exception to the ordinance before executing the lease. The Vice Chancellor enjoined the Department. The Department appealed claiming it was immune from local land use controls because of its hierarchical position in state government. The Court held that in such instances, the Department was not immune from local zoning regulations and rejected the simplified hierarchical view of immunity from land use controls urged by the Department. The Court engaged in a balancing of all the governmental interests at stake in the case in order to determine whether the county or the state as a whole had a greater interest in local land use regulations. Id. at 764-66. The Supreme Court also held that the General Assembly made a complete delegation of its police power over land use to Kent County, reserving nothing to any of its agencies. Id. at 766.

Cautious practitioners should be alert to the fact that Hayward could very well be limited to its facts, leaving other state governmental agencies free to initiate new land uses on state owned or state leased properties, if the courts determine that the interests of the state as a whole outweigh the interests of the zoning agency responsible for land use controls in that area.

24.05 JUDICIAL REVIEW OF ADOPTION OF ZONING OR SUBDIVISION ORDINANCES OR AMENDMENTS. No direct appeal from the adoption of a zoning ordinance or subdivision control ordinance is provided for by statute. In the absence of specific enabling legislation, an aggrieved party who wishes to challenge a zoning ordinance or an amendment to the ordinance or a failure to rezone a tract of land must resort to an original law suit. However, because zoning is legislative and a legislative body ordinarily cannot be enjoined before it acts, a zoning ordinance can be challenged only after enactment. Shellburne, Inc. v. Buck, Del. Supr., 240 A.2d 757 (1968). Commonly, such law suits are actions for a declaratory judgment and for an injunction filed in the Court of Chancery under 10 Del.C. §§ 6301-6308, which statutes permit the Superior Court and the Court of Chancery to exercise concurrent jurisdiction in declaratory judgment actions. Additionally, specific authorization is granted to aggrieved parties in New Castle, Kent and Sussex Counties to file an action in law or in equity or to petition for a writ of mandamus to prevent, enjoin, abate or remove a structure erected or proposed to be erected in violation of a county zoning ordinance. 9 Del.C. § 2609(d) (New Castle); 9 Del.C. § 4919(d) (Kent); 9 Del.C. § 6919(d) (Sussex). No parallel authorization of a "private attorney general's action" for property owners in municipalities was granted by the General Assembly. Although a declaratory judgment action could be filed in Superior Court, Superior Court lacks the power to grant equitable relief, hence the preference for Court of Chancery review of the validity of zoning and subdivision ordinances.

a. Parties to Suit. Normally, the municipality is joined as a defendant. See Green v. County Council of Sussex County, Del. Ch., 415 A.2d 481 (1980). It is also good practice to join each and every individual member of the County Council and Planning Commission. (Id.) Although no decisions have been reported on this issue, joining remonstrators or persons

participating in a hearing before the Planning Commission, County Council or municipal legislative body is no more necessary than it would be to join such individuals in a variance appeal from the Board of Adjustment. See New Castle County v. Richeson, Del. Supr., 347 A.2d 135 (1975) (county sought prohibition against appeal from Plan Dept. to Planning Board by applicant; applicant not made a party). Objectors to a rezoning must join the landowner in the suit. See Council of Civic Organizations of Brandywine Hundred, Inc. v. New Castle County, Del. Ch., C.A. No. 12048, Hartnett, V.C. (Sept. 21, 1993), aff'd, Del. Supr., No. 336, 1992 (Dec. 29, 1993) (ORDER).

b. Time for Filing Complaint. Since equity follows the statute of limitations, Vredenburgh v. Jones, Del. Ch., 349 A.2d 22 (1975), an action for a declaratory judgment of invalidity and an injunction must usually be filed within the prescribed statute of limitations or within 60 days after the date of publication of the proposed ordinance in a newspaper of general circulation of the municipality or county on the matter sought to be challenged. See lO Del.C. § 8126. See also Council of Civic Organizations of Brandywine Hundred, Inc. v. New Castle County, supra. However, if the imposition of zoning controls is a continuing wrong, the statute of limitations may not begin to run until such time as the aggrieved party takes some affirmative action to obtain rezoning or subdivision approval. See l0 Del.C. § 8106 (cause arising under statute).

c. Record on Review. In an action for a declaratory judgment and injunction, the Court of Chancery may take evidence in addition to the record of proceedings below. Green v. County Planning & Zoning Comm'n of Sussex County, Del. Ch., 340 A.2d 852 (1974), aff'd sub nom. Sea Colony, Inc. v. Green, Del. Supr., 344 A.2d 386 (1975). However, the Court of Chancery normally confines its inquiry to determining whether or not a full and fair hearing has taken place, including an inquiry into whether the zoning authority has taken into consideration all the

elements required by statute. Town of Bethany Beach v. County Planning & Zoning Comm'n of Sussex County, Del. Ch., C.A. No. 642, Hartnett, V.C. (Oct. 10, 1980). The Court of Chancery views its role in reviewing rezoning akin to an appellate review and it will not retry facts found by the legislative body. It ordinarily limits its review to the record of the proceedings below. Id. Although the record of the proceedings before the legislative body does not bind the court, the court grants the proceedings a presumption of regularity and constitutionality. In re Cersinsi, Del. Super., 189 A. 443 (1936). Likewise, evidence of the motive or purpose of the legislative body in enacting a zoning or subdivision control ordinance or in refusing to approve a rezoning or special use classification is not admissible, because the court may not inquire into the motivation of the members of such body. Daniel D. Rappa, Inc. v. Hanson, Del. Supr., 209 A.2d 163 (1965).

The sole issue on judicial review is whether the legislative action in question was arbitrary and capricious because it was not reasonably related to the public health, safety or welfare. Shellburne, Inc. v. Conner, Del. Supr., 336 A.2d 568 (1965). Any evidence the Court of Chancery may allow must be limited to what is relevant to the nature of the legislature's actions, i.e., the conditions of land use, economics and environmental hazards, if any, relevant to the site at issue. The Court of Chancery does not ordinarily remand a case for the purpose of making evidentiary findings of fact when it deems the record below insufficient; it generally grants judgment for the moving party. See Bachman v. Daniel D. Rappa, Inc., Del. Ch., 267 A.2d 625 (1970); Miles v. County Council of Sussex County, Del. Ch., C.A. 1030, Berger, V.C. (Oct. 19, 1985).

The lack of an adequate record led to an invalidation of a zoning ordinance before the Court of Chancery, in New Castle County Council v. BC Development, Del. Supr., 567 A.2d 1271 (1989). The Court of Chancery ordered the New Castle County Council and the Planning Board to

re-initiate the entire rezoning process for a parcel of land located along Concord Pike in Brandywine Hundred. The County Council reversed a favorable decision by the Planning Board but made absolutely no findings of fact in support of its reversal. The Chancellor required the Council to make findings of fact in support of its reversal, and the Supreme Court affirmed, emphasizing that the County Council must make express findings of fact in support of a decision to reverse the Planning Board. See also Green v. County Council of Sussex County, Del. Ch., C.A. No. 1479, 1994 Del. Ch. LEXIS 147, Berger, J. (Aug. 11, 1994).

The Supreme Court, while recognizing that the County Council is a legislative body which operates more informally than a court, has demanded that it exercise its zoning power in a way which gives minimum due process to petitioners and other interested parties. The Court held that, at a minimum, a rezoning hearing must be held after adequate notice is given to all concerned. The contending parties must enjoy a full opportunity to be heard. The legislative body must come to a decision which reflects the reasons underlying the result, and the decision must adhere to the statutory or decisional standards which control the grant or denial of petitions to rezone land. County Council of Sussex County v. Green, Del. Supr. 516 A.2d 480 (1986). See also Shevock v. Orchard Homeowners Assoc', Del. Supr., 621 A.2d 346 (1993).

Petitioners who represent county councils, levy courts, and other municipal legislative bodies which decide rezoning petitions may wish to prepare written findings of fact sufficient to support the decision of the legislative body to attach to any zoning ordinance which is adopted by the body. When a petition to rezone is denied, written findings of fact may be prepared to support the decision to deny rezoning. These findings should be set out in the record in the appropriate municipal legislative journal. The record also should reflect compliance with statutory notice provisions. It

should show that all interested parties have been afforded an opportunity to be heard before a vote is taken on the measure.

The Court of Chancery has applied similar standards to the actions of the County Council in conditional use cases. The scope of review for decisions of the County Council to grant a conditional use is a review of the record below for substantial evidence in favor of the decision, and a showing that the decision was not arbitrary, capricious or an abuse of discretion. Steen v. County Council of Sussex County, Del. Ch., 576 A.2d 642 (1989). The Sussex County Council made three specific findings of fact in Steen supporting its decision to deny a conditional use for a borrow put in an AR-1 agricultural land use district. Id. at 645.

d. Burden of Proof. The plaintiff has the burden of proving that the zoning measure or subdivision control measure under attack is arbitrary and capricious. Willdel Realty Inc. v. New Castle County, Del. Ch., 270 A.2d 174, 176 (1970). The petitioner further has the burden of proving that the remedy at law is inadequate. See Daniel D. Rappa, Inc. v. Hanson, Del. Supr., 209 A.2d 163 (1965).

e. Remedies. The Court of Chancery may declare all or part of a zoning ordinance, subdivision control ordinance, or official map invalid. Additionally, the Court may enjoin either the enforcement of the ordinance at issue against the plaintiff or the interference with plaintiff's processes. See Leon N. Weiner & Associates, Inc. v. Carroll, Del. Supr., 276 A.2d 732 (1971) (remanding for injunction against Dover City Council's interference with Planning Commission approval of proposed subdivision plat).

f. Initiation of Declaratory Judgment Suit in Court of Chancery to Test Zoning or Subdivision Ordinance. A declaratory judgment and injunction suit in the Court of

Chancery for the purpose of testing the validity of a zoning ordinance or subdivision control ordinance may be brought by any person whose property rights are substantially affected by the zoning or subdivision measure under attack. This certainly makes a property owner whose property values are allegedly significantly diminished a proper party to bring suit. See, e.g., Willdel Realty, Inc. v. New Castle County, Del. Ch., 270 A.2d 174 (1971) (plaintiff was landowner whose land was rezoned by an "interim emergency" ordinance from a commercial classification to residential); Green v. County Council of Sussex County, Del. Ch., 415 A.2d 481 (1980) (plaintiffs were adjacent landowners affected by rezoning beachfront property to high rise). Civic associations representing aggrieved property owners in an area affected by a proposed zoning or subdivision measure also would have sufficient standing to initiate a declaratory judgment action. Cf. Vassallo v. Penn Rose Civic Ass'n, Del. Supr., 429 A.2d 168, 170 (1981) (standing to appeal Board of Adjustment decision).

A declaratory judgment suit is initiated by service of process on the defendants according to Chancery Court Rule 4. The time for filing a responsive pleading, and the general procedure for discovery, if any, are no different from those applicable in an ordinary civil action before the Court of Chancery. If a temporary restraining order is sought by the plaintiff, the pleadings should be verified, and accompanied by appropriate orders on notice for the signature of the Chancellor in compliance with Chancery Court Rule 65. If a preliminary injunction is sought against a municipality or a county, then a proper bond must be presented to the Chancellor in accordance with Chancery Court Rule 65(c). If a temporary restraining order or preliminary injunction is sought against a private party, then the provisions of Chancery Court Rule 65(c) must be followed. For a further discussion, see Chapter 19.

24.06 EXTRAORDINARY WRITS IN LIEU OF AN APPEAL OR DECLARATORY JUDGMENT ACTION. Appeals from the Board of Adjustment are statutory versions of the common law extraordinary writ of certiorari. Mandamus is available as an alternative to an appeal from the decision of a zoning administrator or building inspector. When the public official responsible for issuing building permits has a nondiscretionary duty to issue a building permit, mandamus is available to compel issuance of the permit. City of Wilmington v. Baynard Court, Inc., Del. Super., 281 A.2d 493 (1971). Thus, the fact that an alternative appeal to the Board of Adjustment is provided for by statute does not bar use of mandamus in this situation.

However, mandamus is appropriate only when the petitioner is able to establish a clear legal right to the performance of a non-discretionary duty. Remedio v. City of Newark, Del. Supr., 337 A.2d 317, 318 (1975). When the responsible official or agency has any discretion, the writ is inappropriate. See Woolley at § 1655. Consequently, the use of mandamus as a means for reviewing the actions of a Planning Commission on approval of a subdivision, or of a municipal legislative body on adoption of a zoning or subdivision control ordinance, would be inappropriate.

FORM 24:1 PETITION FOR CERTIORARI FROM BOARD OF ADJUSTMENT

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR _____ COUNTY
[insert name of County]

Name of Petitioner(s),	)	
	)	
Petitioner(s),	)	C.A. No._____
	)	
v.	)	
	)	
Name of Respondent(s),	)	
	)	
Respondent(s).	)	

PETITION PURSUANT TO ___ Del.C. §_____ FOR JUDICIAL REVIEW OF THE DECISION OF THE BOARD OF ADJUSTMENT OF [name of County or Municipality] AND APPLICATION FOR RESTRAINING ORDER STAYING ALL PROCEEDINGS UPON THE DECISION BELOW

_____

l. On or about [date], l9__, [Name of applicant] (hereafter the "Applicant") applied to the Board of Adjustment of [name of County/Municipality] for purpose of obtaining the following variance:

[here describe the nature of the variance sought] as shown by copy of application, attached, marked Exhibit "A" and made a part of this petition.

2. On or about [date], 19__, the Board of Adjustment for [name of county or municipality] held a hearing on the application for variance, and on that date it [state if granted, denied, etc.] the application. A copy of the decision of the Board of Adjustment is attached, marked Exhibit "B" and made a part of this petition.

3. The petitioners are aggrieved persons within the meaning of 9 Del.C. § 1353 for the following reasons:

(a) [state the basis on which the petitioners rely for standing to appeal the Board's decision, e.g., the original petitioners who have been denied relief, owners of real estate affected by the proposed variance, a civic association representing affected property owners, etc.]

4. Respondents are the members of the Board of Adjustment of [name of county or municipality].

5. The action of the Board of Adjustment of [name of county or municipality] is unlawful and illegal for the following reasons:

(a) [state the grounds on which the alleged grant, denial, etc. of variance is illegal and unlawful, e.g., the petitioner has failed to show substantial hardship unique to the parcel for which the variance is sought]

WHEREFORE, Petitioner prays for the following relief:

(l) The Court issue a writ of certiorari to the Board of Adjustment of [name of county or municipality] to review the action of the Board and prescribe therein the time within which a return of said writ must be made and served upon counsel for petitioner;

(2) The Court direct that testimony be taken by the Court or by a referee appointed to it pursuant to 9 Del.C. §[insert proper statute], to take such testimony as may be necessary for the proper disposition of this matter; and FORM 24:1 PAGE THREE

(3) The Court grant a restraining order staying the further action of the Board of Adjustment, the Building Inspector or other officials in furtherance of the actions of the Board including but not limited to [state specific restraint requested, e.g., prohibition of issuance of improvement location permit, building permit, etc.] pending the determination of the merits of the Petitioner'S claim for review by the Court

(4) The Board of Adjustment be reversed, with costs to be taxed to the respondents; and

(5) all other proper relief.

[name of attorney for Petitioner]
[address of attorney]
Attorney for Petitioner(s)

Dated:

FORM 24:2 VERIFICATION OF PETITION FOR CERTIORARI

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR ___[name]___ COUNTY

Name of Petitioner(s),	)	
	)	
Petitioner(s),	)	
	)	
v.	)	C.A. No. _____
	)	
Name of Respondent(s),	)	
	)	
Respondent(s).	)	

VERIFICATION OF PETITION FOR JUDICIAL REVIEW OF DECISION OF BOARD OF ADJUSTMENT OF [name of county or municipality]

STATE OF DELAWARE)
) SS.
__[name]__ COUNTY)

On this ___ day of l9 ___, appeared before me, the subscriber, a Notary Public, for the state and county aforesaid _[name of petitioner]_, known to me to be such, who being sworn, did aver as follows:

l. [allegation of status of affiant as petitioner and his/her standings to be a petitioner as person aggrieved]

2. Affiant has read the foregoing petition and is familiar with the facts as set forth in the petition.

3. Affiant avers that the facts set forth in the petition are true and correct to the best of [his/her] information, knowledge and belief.

_____
[signature of affiant]

SWORN TO AND SUBSCRIBED before me the day and year aforesaid.

_____
[signature of notary or
other officer]

FORM 24:3 WRIT OF CERTIORARI FROM SUPERIOR COURT

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR [name] COUNTY

Name of Petitioner(s),	)	
	)	
Petitioner(s),	)	
	)	
v.	)	CERTIORARI
	)	
Name of Respondent(s),	)	
	)	
Respondent(s).	)	

THE STATE OF DELAWARE

TO THE SHERIFF OF [name] COUNTY:

YOU ARE COMMANDED

To serve a copy hereof upon [name the Board of Adjustment of the municipality or county], requiring the said [name of the Board of Adjustment] to send up to this Court within 20 days from service hereof, a certified copy of the entire record and proceedings below.

Dated: [signature of Judge]
Judge

FORM 24:4 RESTRAINING ORDER OF SUPERIOR COURT

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR ___[name]___ COUNTY

Name of Petitioner(s)	)	
	)	
Petitioner(s),	)	
	)	
v.	)	C.A. No. _____
	)	
Name of Respondent(s),	)	
	)	
Respondent(s).	)	

RESTRAINING ORDER

The Petitioner now files [its] [his] [her] [their] petition for review of the action of the Board of Adjustment of [name of county or municipality] pursuant to __ Del.C. §[appropriate section no.]. The petitioner, having shown good cause for issuance of a restraining order, it is

ORDERED that the decision of the Board of Adjustment of [name of county or municipality] dated _____, 19__ is hereby stayed pending the review of the petition in this matter by the Court on the merits. The stay includes but is not limited to a prohibition against the issuance of any building permit by [name of appropriate officer] or any other action in furtherance of the decision by any officer or agent of the Board of Adjustment of [name of county or municipality] or of [name of county or municipality] authorizing or permitting any construction, reconstruction, demolition, alteration, relocation or other activities

on the real estate which is the subject matter of the petition.

Dated:

_____

Judge

FORM 24:5 RETURN ON WRIT OF CERTIORARI

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR ___[name]___ COUNTY

Name of petitioner(s),	)	
	)	
Petitioner(s),	)	
	)	
v.	)	C.A. No._____
	)	
Name of Respondent(s),	)	
	)	
Respondent(s).	)	

RETURN ON WRIT OF CERTIORARI TO THE BOARD OF ADJUSTMENT

Comes now the Board of Adjustment of [name of county or municipality] and files with the Court its return on writ of certiorari and the record of proceedings before the Board of Adjustment in the above entitled cause.

[Note: typically the record of proceedings before the Board of Adjustment will include (l) the original application for a variance, (2) the decision of the Board, (3) the transcript of any hearing or hearings on the application (signed by the Secretary of the Board), and (4) any other exhibits, e.g. maps, charts, legal notices.]

_____
(Attorney for Board)
(Address of Attorney)

Dated:

FORM 24:6 AFFIDAVIT OF SERVICE OF RETURN ON
WRIT OF CERTIORARI

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR ___[name]___ COUNTY

Name of Petitioner(s)	)	
	)	
Petitioner(s),	)	
	)	
v.	)	C.A. No._____
	)	
Name of Respondent(s),	)	
	)	
Respondent(s).	)	

AFFIDAVIT OF SERVICE OF RETURN ON
WRIT OF CERTIORARI

STATE OF DELAWARE)
) ss.
NEW CASTLE COUNTY)

[Name of Secretary], deposes and says that:

l. [he/she] is a secretary in the [name of county office or of law firm] and makes this affidavit on [his/her] own knowledge.

2. On _____, l9__ ,[he/she] deposited a notice of the filing of the return on writ of certiorari and of the filing of the record of proceedings before the Board of Adjustment of [name of county or municipality] in the above captioned cause to:

[Name of attorney for petitioner and of attorneys for any

other party of record entitled to receive notice] [Addresses of attorneys]

_____
[Signature of secretary]

SWORN TO AND SUBSCRIBED before me this ___ day of_____

l9__.

_____
[Notary Public]