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"Pennsylvania Appellate Practice: Procedural Requirements and the Vagaries of Jurisdiction" (Part 1)

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* Assistant Chief and Senior Staff Attorney, Central Legal Staff, Pennsylvania Superior Court; Adjunct Instructor, University of Pennsylvania. B.A. 1970, Wilkes College; J.D. 1974, Cleveland State University College of Law; LL.M. 1978, University of Pennsylvania. Learning, of course, is not a solitary process. Although this exposition reflects the personal views of the author, there are many who have indirectly contributed in this endeavor. This author is appreciative to the judges of the Pennsylvania Superior Court and the members of the Central Legal Staff, both past and present, for they have been, in a sense, this author's tutors. Special thanks must go to Theresa Ramos; without her patient assistance and friendship, this Article would not have been possible.

'In my youth,' said his father, 'I took to the law,
And argued each case with my wife;
And the muscular strength, which it gave to my jaw,
Has lasted the rest of my life.' **

'Contrariwise,' continued Tweedledee, 'if it was so, it might be; and if it were so, it would be; but as it isn't, it ain't. That's logic.' ***

I. Introduction

In an age of burgeoning appellate caseloads and multiple appeals in a single case, the right of appellate review is often routinely invoked but seldom appraised. So many appellate opinions have been written and read that the incantation of stock legal phrases and principles can become commonplace and the effect can become almost mesmerizing. The insular preoccupations of the present diminish the value of past experience. Occasionally, however, there comes a reminder that invokes reflection. Chief Justice Burger, in *Abney v. United States*,[1] began his analysis of a seemingly routine jurisdictional problem with an historical perspective on the "right" of appellate review. He noted:

> We approach the threshold appealability question with two principles in mind. First, it is well settled that there is no constitutional right to an appeal. . . . Indeed, for a century after this Court was established, no appeal as of right existed in criminal cases, and, as a result, appellate review of criminal convictions was rarely allowed. As the Court described this period in *Reetz v. Michigan*. . .
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> "[T]rials under the Federal practice for even the gravest offenses ended in the trial court, except in cases where two judges were present and certified a question of law to this court. . . ." The right of appeal, as we presently know it in criminal cases, is purely a creature of statute; in order to exercise that statutory right of appeal one must come within the

** L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND 34 (Bantam Classic ed. 1981).
*** L. CARROLL, THROUGH THE LOOKING GLASS 141 (Bantam Classic ed. 1981).
1. 431 U.S. 651 (1977).

terms of the applicable statute. . . .[2]

The constitutional right of appeal, as distinguished from the statutory right, imports a sense of almost sacred immutability. Pennsylvania citizens now have both the statutory[3] and constitutional right of appeal. Yet it was not until 1968 that the right of appeal in all cases achieved constitutional status. Pennsylvania citizens now possess the constitutional right of appeal as a result of the following constitutional amendment:

> There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law.[4]

The right of appeal in Pennsylvania is one that case law says the law favors and protects from abrogation.[5]

The right of appeal, however, is a very specialized, complicated, and oftentimes expensive right with enormous impact upon the courts and the practitioners. Recent statistics and contemporary studies, for example, verify that Pennsylvania's three appellate courts, with their limited resources, must discharge their solemn obligation of appellate review on a staggering scale.[6] The orderly and

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2. *Id.* at 656; *see also* Jones v. Barnes, 463 U.S. 745 (1983); McKane v. Durston, 153 U.S. 684 (1894); Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 694 (1963); *cf. infra* note 70.

3. *See* 42 PA. CONS. STAT. ANN. §§ 5105 (Purdon 1981) (right to legal redress), 5105(a) (right to appellate review from final orders of every court, district justice and government unit); *see also id.* § 5105(b) (successive appeals).

4. PA. CONST. art. V, § 9. The historical note indicates, for example, that the Constitution of 1874, art. V, § 3 provided in part: "The jurisdiction of the Supreme Court shall extend over the State, and the judges thereof . . . shall have appellate jurisdiction by appeal, certiorari or writ of error in all cases, as is now or may hereafter be provided by law." *See also* DEPARTMENT OF GENERAL SERVICES, 106 THE PENNSYLVANIA MANUAL 401 (1982-1983). Other commentators have observed that there is a strong American tradition demanding that there be at least one right of appeal in cases. *See, e.g.*, POUND, APPELLATE PROCEDURE IN CIVIL CASES (1941); A. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 400-01 (1949); Vestal, *The Certified Question of Law*, 36 IOWA L. REV. 629, 638 (1951).

5. *See* Ege's Appeal, 2 Watts 283 (Pa. 1834); *see also* City of Philadelphia v. Gould, 497 Pa. 599, 442 A.2d 1104 (1982).

6. A study, initiated by the Pennsylvania Supreme Court, verified the magnitude of the Pennsylvania appellate courts' work loads. *See* AMERICAN JUDICATURE SOCIETY, PENNSYLVANIA'S APPELLATE COURTS — A REPORT OF THE AMERICAN JUDICATURE SOCIETY TO THE SUPREME COURT OF PENNSYLVANIA (1978) [hereinafter REPORT OF THE AMERICAN JUDICATURE SOCIETY].

Statistics concerning the three appellate courts from 1976 to 1984 are also revealing. In the Pennsylvania Supreme Court, the following number of direct appeals (in parentheses) were filed: 1976 (830), 1977 (823), 1978 (798), 1980 (758), 1981 (246), 1982 (102), 1983 (194),

efficient administration of appellate justice would not be possible under such onerous circumstances were it not for the intricate system of rules and procedures known as the Pennsylvania Rules of Appellate Procedure.[7]

Anyone - whether seasoned appellate practitioner or novice - familiar with appellate rules and procedures can attest to the complexity and intricacies of appellate practice. The codified rules of appellate procedure, for example, contain approximately 240 "rules"; yet this ballpark figure is misleading because there are so many rules within rules and so many noncodified principles incorporated by such rules. Most practitioners and trial litigators do not have the time, expense or luxury to specialize in appellate practice, which requires a competent understanding of procedures and language that, to some, may be as arcane and idiomatic as $E = mc^2$. Nevertheless, the probability that a practitioner will someday — voluntarily or involuntarily — face a peering appellate tribunal is significant. Depending upon the practitioner's level of preparedness, the *terra incognita* of the appellate courtroom may be like the Land of Oz, the Twilight

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and 1984 (268). The significant change in the figures for 1980 and 1981 is attributable to jurisdictional realignment among the three appellate courts. Also significant is the number of "petitions for allowance of appeal" that were filed in the supreme court for the following years: 1976 (906), 1977 (844), 1978 (1126), 1979 (1052), 1980 (1016), 1981 (888), 1982 (1245), 1983 (1222), and 1984 (1537). The supreme court also filed a significant number of opinions during this time span: 1976 (583), 1977 (740), 1978 (958), 1979 (659), 1980 (667), 1981 (832), 1982 (485), 1983 (389), and 1984 (181).

The Pennsylvania Superior Court received the following number of appeals for the individual years: 1976 (3631), 1977 (3700), 1978 (4495), 1979 (4047), 1980 (4523), 1981 (5037), 1982 (5593), 1983 (5556), and 1984 (5793). Petitions filed in three of those years indicate the following volumes: 1981 (4212), 1982 (6131), and 1983 (6355). In the face of such a crowded appellate docket, opinions filed for each year totaled as follows: 1976 (1596), 1977 (1550), 1978 (2416), 1979 (2604), 1980 (1750), 1981 (2003), 1982 (3025), 1983 (2305), and 1984 (3941) The figure for 1984 includes appeals disposed of by filed decision.

The Pennsylvania Commonwealth Court received the following appeals from the common pleas courts: 1976 (668), 1977 (671), 1978 (696), 1979 (672), 1980 (1004), 1981 (825), 1982 (775), 1983 (838), and 1984 (815). The following direct appeals in administrative agency matters were filed: 1977 (1166), 1978 (1414), 1979 (1260), 1980 (1300), 1981 (1321), 1982 (1334), 1983 (1647), and 1984 (1961). Appeals in fiscal code matters are represented by the following numbers: 1977 (438), 1978 (491), 1979 (502), 1980 (584), 1981 (850), 1982 (1000), 1983 (971), and 1984 (874). Not included in these statistics are matters entertained by the commonwealth court within its original jurisdiction.

These statistics can be found in the yearly reports for the Pennsylvania courts. *See* ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS, ANNUAL REPORTS (1978-1984). A comparative statistical recap of the United States Supreme Court's workload during the last three terms indicates the following "paid cases" docketed: 1983-84 (2168), 1984-85 (2036), and 1985-86 (2171). The following *in forma pauperis* cases were docketed: 1983-84 (2050), 1984-85 (2007), and 1985-86 (2239). *See* 55 U.S.L.W. 3098 (1986); *see also* Kaufmann, *Must Every Appeal Run the Gamut?*, 95 YALE L.J. 755, 756-57 n.6 (1986) (indicating that in fiscal 1974, there were 1,802 filings in the Second Circuit Court of Appeals, of which 1,288 were civil cases). In 1984, there were 2,914 appeals, of which 1,979 were civil. *Id.*

7. *See* PA. R. APP. P. 101-5101 [hereinafter rules].

Zone or Mount Olympus.

It is thus important for the appellate practitioner to realize at the outset that appellate practice or success does not begin or end with the writing of a legal document, euphemistically called the "brief." The study of appellate practice is, to a large extent, the study of procedure. There can be no factor more critical in appellate practice than a thorough knowledge of appellate procedures, as codified in the statutes and rules, and as interpreted in and supplemented by appellate case law. The journey of asserted rights and responsibilities occurs in a severely compressed time frame — from the moment in which the lower court issues its order to the time of appellate oral argument — during which the practitioner must maneuver a procedural maze.[8] Appellate practice is the distillation of litigation to its adversarial essence. The proceedings in the lower court are but a spectral presence when lawyer must face lawyer in the appellate courtroom. Constrained by procedure and the written word (the lower court record), the lawyers must rely on their own procedural and communicative skills in convincing the appellate court of the merits of their arguments in order to obtain the justice that often only the appellate court can give.

A thorough exposition of appellate practice is an enormous task, one which is clearly beyond the capabilities of this writer. It is perhaps evident to the practitioner that discussions about appellate practice can usually be simplistically useless or impractically arcane. As the Dodo aptly stated to Alice, "The best way to explain it is to do it."[9] Nevertheless, thought must precede action. Given the unavoidable theoretical and practical limitations of any discourse, the following survey must serve purely expository purposes; it is intended to be neither exhaustive nor prescriptive. The discussion is a topographical view of some fundamental, preliminary appellate concepts that the procedural rules treat scantily. It is the first stage in the study of appellate practice. The approach to the topic is a step-by-step linear movement toward a progressive indoctrination of some essential appellate principles of gradual complexity. The methodology is eclectic and, to an extent, idiosyncratic. Cases are collated, principles condensed, and explanatory syntheses offered. The idiosyncrasies concern the labeling of concepts and the compartmentaliza-

8. *See, e.g.*, PA. R. APP. P. 108 (date of entry of orders), 903 (time for appeal), 1931 (transmission of record), 1934 (filing of the record), 2111 (brief of appellant), 2312 (notice of arguments).

9. *See supra* note **, at 17.

tion of principles that are arguably distinct in theory and function. The belief — or one should say hope — is that labeling may be a helpful analytical tool and that the segregation or categorization of concepts may work in tandem toward an understanding that appellate practice is one of method, not madness.

Notwithstanding this initial indoctrination into appellate practice, the practitioner is cautioned that interpretation is itself an idiosyncratic process. The extensive parenthetical information in the footnotes, including professional commentaries and comparative federal cases for the more inquisitive reader, and the analytical constructs can never substitute for an independent, thorough examination of appellate rules, amendments, and authoritative judicial pronouncements. Moreover, the practitioner must be vigilant to the reality that today's law may be merely tomorrow's history. However, for the reader whose interests are perhaps more general or academic, this case study of appellate practice in a particular jurisdiction of the American legal system may be of more than parochial interest since the concepts herein are commonplace in many other jurisdictions.

The following analysis proposes, *sub silentio*, that the first major stage in the appellate process is the short interval, usually thirty days but sometimes less, from the date of the entry of the lower court's order to the day when a party must file a notice of appeal in the lower court.[10] During this preliminary stage, the practitioner or litigant must confront two of the most important and difficult concepts in the appellate process: jurisdiction and standing. The procedural rules do not explain these concepts because the rules are primarily concerned with orderly procedure once the appellate process formally begins, that is, after the filing of a "notice of appeal." These unavoidable concepts, however, have generated a formidable plethora of case law and related doctrines, some of which could result in the preemption of appellate review, thereby leaving an unsuspecting appellant empty-handed. In a sense, then, the appellate process begins before the beginning. After the lower court has issued its order but before the litigant formally files a notice of appeal, three preparatory questions must be addressed by the litigant: (1) Do I have standing or the legal right to appeal? (2) Is the lower court's

10. *See* PA. R. APP. P. 902 (manner of taking appeal), 903 (time for appeal), 905 (filing of notice of appeal) and 907 (docketing of appeal). It is important to note preliminarily that the scope of this Article is limited to *appeals* of lower court orders. The discussion herein will not consider the particular requirements of a functionally similar but procedurally distinct mechanism of review under the appellate rules, that being the "petition for review." *See* PA. R. APP. P. 1511-1561.

order presently appealable? (3) If the lower court's order is appealable, where do I go?

II. Standing and Conflict: Preliminary Requirements of Status

An appellate script, just like a novel or mystery, must possess, in a basic and simplistic sense, a formulaic threshold: a suffering protagonist embroiled in an active controversy or dilemma that is amenable to resolution. The critical difference in a lawsuit, of course, is that the script is not fictional; the controversy facing an appellate court usually involves substantial rights of liberty and property. Nevertheless, the fundamental analogy is often disguised by fancy and arcane legal jargon. This legal jargon can create confusion and, as an examination of multitudinous cases involving thwarted litigants confirms, result in much wasted time and effort. Thus an understanding of the formula requires an understanding of legal jargon. The suffering protagonist is nothing more than an "aggrieved party" or an "aggrieved appellant," which, in legal shorthand, is encapsulated into the concept of "standing." The active dispute or festering dilemma means that there must be an actual "conflict," "case," or "controversy." In order to be amenable to resolution, the dispute or dilemma must be, in the broadest sense of the word, "justiciable." To address these preliminary concerns is really to address methodically, in a three step fashion, the simple issue of *status* — status of the party appealing and status of the controversy. These three steps involve *standing* to appeal, *justiciability*, and *abstention.*

A. Standing to Appeal

The law requires that one who files an appeal, namely the appellant,[11] must have "standing" to appeal. Justice Rehnquist once noted that "the concept cannot be reduced to a one sentence or one paragraph definition."[12] In Pennsylvania, the legal requirement is embodied in the following procedural rule and accompanying note:

> Except where the right of appeal is enlarged by statute, any party who is aggrieved by an appealable order, or a fiduciary whose estate or trust is so aggrieved, may appeal therefrom.

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11. PA. R. APP. R. 102 and 908 do not define the term "appellant." For purposes of this discussion, the term shall mean the person or entity that initially files a "notice of appeal." *See also* 42 PA. CONS. STAT. ANN. § 102 (1981) (definitions); BLACK'S LAW DICTIONARY 89 (5th ed. 1979).

12. Valley Forge Christian College v. Americans United, 454 U.S. 464, 475 (1982). In the federal context, the concept of standing is of constitutional dimension and an aspect of Article III's "case or controversy" requirement. *See* U.S. CONST. art. III, § 2, cl. 1.

> *Note*: Whether or not a party is aggrieved by the action below is a substantive question determined by the effect of the action on the party, etc.[13]

As one can see, the rule itself does not use the term "standing." Case law, however, uses this abbreviated concept and, like the terms "consideration," "brief," or "malice," "standing" has a distinct legal meaning for practitioners. Reduced to its essence, the procedural rule is twofold: first, it requires that the appealable order produce *aggrievement*; second, it requires, for the most part,[14] that the aggrieved appellant be a *party* to the proceeding below.

1. Aggrievement: Direct, Vicarious, Representational.—For appeal purposes aggrievement generally requires that a party have a direct interest in the immediate consequences of the judgment from which the appeal is taken.[15] The Supreme Court noted that a person who is not adversely affected in any way by the matter[16] is not aggrieved and has no standing to obtain a judicial resolution. Thus, in determining aggrievement, the court stated that one must see whether the litigant's[17] interest is *substantial*, *direct*, *immediate*, and not a remote consequence of the lower court's action.[18]

It is perhaps commonplace to recognize at the outset that one who loses or is about to lose freedom or property as a result of a lower court's adverse judgment or order has the requisite interest to satisfy the aggrievement aspect of standing. The satisfaction of this criterion is, in fact, so commonplace that appellate cases rarely raise the issue unless there is a substantial problem. Standing, in most cases, exists *sub silentio*. Thus, in order to understand standing, a glance at those cases that fail to satisfy the criterion of aggrievement is advisable. Oftentimes, if a party does not possess standing to sue[19]

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13. PA. R. APP. P. 501.

14. As to standing of fiduciaries, see *infra* note 26.

15. *See* Tripps Park Civic Ass'n v. Pennsylvania Pub. Util. Comm'n, 52 Pa. Commw. 317, 415 A.2d 967 (1980) (citing Wm. Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975)).

16. 42 PA. CONS. STAT. ANN. § 102 (Purdon 1981) defines "matter" as an action, proceeding, or appeal. In PA. R. APP. P. 102, the term also includes a petition for review, which is similar to but distinct from the procedures governing appeals from lower courts. *See* PA. R. APP. P. 1511-1561; *supra* note 10.

17. PA. CONS. STAT. ANN. § 102 (Purdon 1981) defines "litigant" as a party or any other person legally concerned with the results of a matter. One should ask whether this definition is synonymous with or broader than the definition of aggrieved party in PA. R. APP. P. 501.

18. *Wm. Penn Parking Garage*, 464 Pa. at 191-202, 346 A.2d at 280-86.

19. "Standing to sue" has been defined as follows:

Standing to sue doctrine. "Standing to sue" means that party has sufficient

as a litigant in the lower court, he or she will likely not have the requisite standing to appeal in the appellate court.

In constitutional matters, for example, litigants do not have standing to assail legislation on the basis of overbreadth when they do not claim specific, subjective harm or the threat of specific future harm or when the alleged overbreadth is not substantial.[20] An appellant, therefore, cannot assert aggrievement vicariously. In the recent Supreme Court case of *Diamond v. Charles*,[21] for example, a physician intervened in a lower court proceeding that involved the constitutionality of Illinois' abortion statute. The Court noted that only the State had a judicially cognizable interest in defending the constitutionality of its abortion statute. Since Illinois chose not to file an appeal, the appeal was dismissed because the intervenor-physician could not establish any individualized aggrievement or injury to himself.[22]

Likewise, in *In Re Estate of Dorone*,[23] the superior court concluded that although parents could appeal from the lower court's order refusing to appoint them as guardians, they had no standing as parents to contest the alleged violation of their son's constitutional rights concerning the appointment of a temporary guardian for purposes of an emergency blood transfusion. Pivotal to the no standing conclusion was the fact that the son was not a party. Additionally, in a similar but nonconstitutional context, plaintiffs had no standing to challenge the lower court's refusal to permit two others to intervene as class representatives in a class action when those who were denied intervention did not appeal. Since two petitioners who did not appeal were the only ones affected by the lower court's order, the plaintiffs could not assert, in effect, vicarious aggrievement in order to challenge the denial of intervention. Their claims were not affected in

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> stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. . . . Standing is a concept utilized to determine if a party is sufficiently affected so as to insure that a justiciable controversy is presented to the court. The requirement of "standing" is satisfied if it can be said that the plaintiff has a legally protectable and tangible interest at stake in the litigation . . . Standing is a jurisdictional issue which concerns power of federal courts to hear and decide cases and does not concern ultimate merits of substantive claims involved in the action . . . . (citations omitted)

BLACK'S LAW DICTIONARY 1260 (5th ed. 1979).

20. *See* Commonwealth v. De Francesco, 481 Pa. 595, 393 A.2d 321 (1978).

21. 106 S. Ct. 1697 (1986).

22. The Court noted further that the physician could not maintain the appeal in his capacity as a parent or as a protector of the constitutional rights of unborn fetuses. The appeal was dismissed. *Diamond*, 106 S. Ct. at 1703-06.

23. ___ Pa. Super. ___, 502 A.2d 1271 (1985).

any way.[24] When, however, the granting of intervention would adversely affect the party-plaintiff's interest, plaintiff would have standing to appeal.[25]

Can an association, representative, or person in close relationship to one injured-in-fact establish standing? In certain circumstances the answer is yes, depending upon the proximity of the relationships and the impact of the harm. When, for example, minor children were directly affected by a decree allowing a claim for counsel fees against their mother's estate, the minors' father had standing to assert the interests of the minors, even though the administrator did not appeal the final decree.[26] Standing may also be predicated on an associational basis because harm to individual members may, in effect, constitute harm to the association. In one case, book distributors and trade associations had standing to litigate the constitutionality of Pennsylvania's obscenity statute because they alleged specific harms to their members. The court noted that an association may have standing if it alleges that any of its members is suffering or will suffer immediate or threatened injury because of the challenged action. In that case, the members' loss of first amendment freedoms and financial gain, causally related to the challenged statute, demonstrated sufficient aggrievement.[27] As one federal court noted, however, feelings of solidarity do not confer standing to sue.[28] When there is no evidence that any of the members of an association would suffer direct and substantial harm, there is no foundation of

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24. *See* Miller v. Federal Kemper Ins. Co., ___ Pa. Super. ___, ___, 508 A.2d 1222, 1233-34 (1986).

25. *See* Cohen v. Jenkintown Cab Co., 300 Pa. Super. 528, 535, 446 A.2d 1284, 1288 (1982).

26. *See In re* Estate of Cecchine, 336 Pa. Super. 111, 485 A.2d 454 (1984). Note that PA. R. APP. P. 501 specifies "or a fiduciary whose estate or trust is so aggrieved." *See also* Estate of Karahuta, 481 Pa. 512, 393 A.2d 22 (1978) (executors who were not aggrieved had no standing to appeal) (citing *In re* Estate of Hain, 464 Pa. 349, 353, 346 A.2d 774, 776 (1975) ("Unless an executor has been surcharged or has been ordered to distribute more than the admitted balance in the estate, the executor is not a 'party aggrieved' by the final order or decree of the orphans' court."). *But cf. In re* Estate of Patrick, 487 Pa. 355, 409 A.2d 388 (1979) (executors of estate had standing given that they were aggrieved in capacity of beneficiaries); Brose Estate, 423 Pa. 420, 223 A.2d 661 (1966) (order directing executor to include moneys not yet in his hands is appealable by executor); Gramm Estate, 420 Pa. 510, 218 A.2d 342 (1966) (order directing filing of account is interlocutory but appealable when it directs personal representatives to charge themselves with certain specific assets).

27. *See* American Booksellers Ass'n v. Rendell, 332 Pa. Super. 537, 481 A.2d 919 (1985); *see also* Tripps Park v. Pennsylvania Pub. Util. Comm'n, 52 Pa. Commw. 317, 415 A.2d 967 (1980) (association had representational standing to assert rights of individual members).

28. *See* Minority Police Officers Ass'n of South Bend v. City of South Bend, 721 F.2d 197, 202 (7th Cir. 1983).

standing upon which such an entity can lodge an appeal.[29]

As noted previously, one who is not adversely affected by the lower court's order has no standing to appeal. Thus, one who was not a "loser" in the lower court, and who ultimately received the relief requested, cannot appeal even though one of the proffered issues or theories of recovery was rejected below.[30] In addition, a defendant who is, in effect, removed as a party and substituted by another defendant certainly has sustained no injury for purposes of standing.[31]

2. "Party" Status.—A significant aspect of the concept of standing under Pennsylvania's procedural rule is that the aggrieved person or entity must be a "party."[32] The Judicial Code defines a party as "a person who commences or against whom relief is sought in a matter. The term includes counsel for such a person who is represented by counsel."[33]

When the person appealing is not a party, the appeal may arguably be subject to dismissal. Nevertheless, dismissal based on nonparty status appears to be rare.[34] For example, an appeal brought by a nonparty witness from a pretrial order denying a request for a protective order was quashed on jurisdictional grounds; standing was

29. *See In re* Family Style Restaurant, Inc., 503 Pa. Commw. 109, 468 A.2d 1088 (1983) (association had no standing to appeal when no evidence was presented that grant of liquor license would harm association or its members) (citing 2 PA. CONS. STAT. ANN. § 702 (Purdon Supp. 1986) (Administrative Agency Law)).

30. *See* Burchanowski v. County of Lycoming, 32 Pa. Commw. 207, 378 A.2d 1025 (1977) (housewife, who successfully challenged tax classification of "housewife" as discriminatory but lost on theory that housewife was not an "occupation," had no standing). *Burchanowski* was decided in the context of a petition for review (*see supra* note 10). *See also* Appeal of Radio Broadcasting Co., 55 Pa. Commw. 147, 159, 423 A.2d 444, 450 (1980), *cert. denied* 454 U.S. 941 (1981) (party who prevailed below cannot appeal, but appellee can take issue with lower court's conclusions or findings); De Fazio v. Labe, ___ Pa. Super. ___, 507 A.2d 410 (1986) (appellees, who cross-appealed lower court's denial of their motion for judgment n.o.v., did not have standing since they were not losing parties or aggrieved); Thill v. Larner, 321 Pa. Super. 62 n. 1, 467 A.2d 894 n. 1 (1983).

31. *See* Tate v. MacFarland, 303 Pa. Super. 182, 449 A.2d 639 (1982) (defendant's appeal from order, granting plaintiff's motion to amend complaint, to name defendant's father as defendant, and to remove defendant, was not appealable since defendant is completely out of court and, hence, not aggrieved).

32. *But see supra* note 26. The limitation of the right of appeal to parties of record has been questioned and criticized. At common law, the practice was to limit the right of review of judgments to parties, privies to the record below, or persons prejudiced by the judgment. One commentator has noted that, aside from a few exceptions, a majority of jurisdictions have restricted the right to appeal to parties. *See* Note, *Non-Parties' Right of Appeal in Civil Actions*, 48 COLUM. L. REV. 1233-41 (1948). The author notes that the limitation is especially problematic in the context of intervention.

33. *See* 42 PA. CONS. STAT. ANN. § 102 (Purdon 1981). One may safely assume that "person" is used in an expansive, legal sense to include entities such as corporations. PA. R. APP. P. 102 does not define "party."

34. *See infra* note 45 and accompanying text.

not discussed.[35] Technically, the doctor in that case was not a party to the underlying defamation action; however, since the doctor filed a motion for a protective order, the doctor arguably satisfied the definitional requirement of the Judicial Code.

Federal case law, for example, has defined a party to the record as including only original parties and those who have become parties by intervention, substitution or third party practice.[36] Furthermore, federal case law has recognized that a nonparty may appeal if the trial court's judgment has affected that nonparty's interest.[37] In *Doe v. United States*,[38] the federal court noted that a pretrial evidentiary order, permitting introduction of evidence of the sexual behavior of the prosecutrix-victim, was appealable by the victim, especially in view of the immediate need of the victim to protect her privacy.

The status of "party" includes those who intervene as well as those who timely attempt to intervene before adjudication.[39] When the press attempts to intervene in order to challenge a trial court's closure of a pretrial hearing, the press arguably possesses the requisite party status to appeal.[40]

What are the limits to the party aspect of standing? Can a party's attorney appeal? Can a lower court judge challenge a higher court's order reversing the trial court's decision? An order granting the petition of plaintiffs to have their counsel withdraw his appearance is appealable by the attorney.[41] Additionally, in one extraordi-

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35. *See* Steel v. Weisberg, ___ Pa. Super. ___, 500 A.2d 428 (1985).

36. *See* United States v. LTV Corp., 746 F.2d 51 (D.C. Cir. 1984).

37. *See* Martin-Trigona v. Shiff, 702 F.2d 380 (2nd Cir. 1983); see also Diamond v. Charles, 106 S. Ct. 1697 (1986), which recognizes that status as a "party" below does not automatically equate with status as an "appellant." To be a party for purposes of appeal, for example, the party below must file a notice of appeal.

38. 666 F.2d 43, 46 (4th Cir. 1981). The discussion was essentially jurisdictional with the focus placed on whether the order was appealable and not whether the victim had standing. For situations in which the victim's standing is not qua victim but qua complainant or "private prosecutor," however, see *infra* note 46, and accompanying text.

39. As to the importance of a timely attempt to intervene, see *infra* note 45 and accompanying text. In Diamond v. Charles, 106 S. Ct. at 1707 n. 21, Justice Blackmun noted the conceptually difficult relationship of intervention to standing. The federal courts have not agreed whether parties seeking to intervene as of right must themselves possess standing. *See* Annot., 15 A.L.R. 2d 336 (1951); Note, *Non-Parties' Right of Appeal*, *supra* note 32, at 1240-41.

40. *See* Commonwealth v. Genovese, 337 Pa. Super. 485, 487 A.2d 364 (1985) (news media was aggrieved by pretrial restraining order in criminal case and therefore was entitled to appeal); Commonwealth v. Buehl, 316 Pa. Super. 215, 462 A.2d 1316 (1983).

41. *See* Seifert v. Dumatic Indus., 413 Pa. 395, 197 A.2d 454 (1964); Woolard v. Burton, 345 Pa. Super. 366, 498 A.2d 445 (1985). Note, however, that the issue is phrased in terms of jurisdiction, (namely, was the attorney "out of court" and appealing a "final order"), not standing. Note also that 42 PA. CONS. STAT. ANN. § 102 specifically includes counsel as a "party." As to the jurisdictional propriety of appeals filed by parties, other than counsel, when the lower court grants or refuses to grant a motion to disqualify counsel, see *infra* notes 261-62

nary case, the Pennsylvania Supreme Court peripherally questioned whether a lower court judge had standing to challenge an appellate court's order remanding the criminal case to a different judge.[42]

When the nonparty's status rises no higher than that of an amicus curiae or "friend of the court," the requirement of standing to appeal is not satisfied. From a technical view, an amicus is not a party; the term merely reflects the status of a spectator rather than an actual participant. It implicates academic interest rather than actual, personal aggrievement. Although an appellate court may hear an amicus if it is "interested" in the questions presented,[43] an amicus is neither entitled to independently file a notice of appeal nor permitted to request the appellate court to extend relief.[44] Recognizing that the appellate procedural rules do not define "party," the superior court concluded that an amicus curiae had no standing to appeal a final decree, especially when it belatedly sought to intervene after the lower court's adjudication.[45]

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and accompanying text.

42. *See* Commonwealth v. Chimenti, ___ Pa. ___, ___ n.4, 507 A.2d 79, 81 n. 4 (1986). The supreme court's exercise of plenary jurisdiction in effect preempted any potential problem of standing. Even if the lower court judge were considered a "party," there would be a serious question whether such a party was "aggrieved" as that term is commonly understood.

43. PA. R. APP. P. 531(a) provides as follows:

> *Participation by Amicus Curiae*
>
> (a) *Briefs.* Anyone interested in the questions involved in any matter pending in an appellate court, although not a party, may, without applying for leave to do so, file a brief amicus curiae in regard to those questions. Unless otherwise ordered by the court, any amicus curiae shall file and serve its brief in the manner and number required and within the time allowed by these rules with respect to the party whose position as to affirmance or reversal the amicus brief will support, or with respect to the appellant, if the amicus brief does not support the position of any party.

See also BLACK'S LAW DICTIONARY 75 (5th ed. 1979), which defines *amicus curiae* as follows:

> Means, literally, friend of the court. A person with strong interest in or views on the subject matter of an action may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views. Such amicus curiae briefs are commonly filed in appeals concerning matters of a broad public interest; *e.g.*, civil rights cases. Such may be filed by private persons or the government. In appeals to the U.S. courts of appeals, such brief may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof . . .

And see S. Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1963).

44. *See, e.g., In re* Petition for Referendum to Amend Home Rule Charter of Pittsburgh, 69 Pa. Commw. 292, 450 A.2d 802 (1982); *see also* Cathcart v. Keene Indus. Insulation, 324 Pa. Super. 123, 154 n. 16, 471 A.2d 493, 509 n. 16 (1984) (anyone interested can file a brief).

45. *See* Newberg by Newberg v. Board of Pub. Educ., 330 Pa. Super. 65, 478 A.2d 1352 (1984). In Commonwealth v. Buehl, 316 Pa. Super. 215, 462 A.2d 1316 (1983), for example, the press sought timely intervention before the decision.

Finally, party status presents a particularly bothersome procedural dilemma in those criminal cases in which a private citizen attempts to litigate as a prosecutor and then appeals an adverse decision which precludes such prosecution. In a criminal case, the state and defendant are clearly parties to the proceeding. Nevertheless, in some circumstances, a private citizen-complainant has standing as a "party" to appeal the lower court's order sustaining a district attorney's disapproval of a private criminal complaint.[46] The line of permissibility, however, is not easy to ascertain.

B. Justiciable Controversy: Actual, Present Conflict

An essential counterpart to the requirement of standing is the existence of an actual conflict. Appellate courts have neither the luxury nor the resources to consider "how many angels can dance on the head of a pin"-type controversies. Judges cannot be academic arbiters of hypothetical dilemmas or controversies. Effective appellate litigation, like trial litigation, is predicated on adversarial, partisan advocacy so that the competing interests are, with some degree of assurance, vigorously pursued and the issues carefully framed. In *Valley Forge Christian College*, the Supreme Court considered the case or controversy aspect of standing and noted, "Were the federal courts merely publicly funded forums for the ventilating of public grievances or the refinement of jurisprudential understanding, the concept of standing would be quite unnecessary."[47]

An appellate court, therefore, will generally not consider an appeal unless there is a subsisting, actual conflict between parties who have a tangible interest in contesting the conflict.[48] A shorthand legal translation of such a requirement is that there must be a "justiciable controversy."[49] Conversely paraphrased in legal jargon, when

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46. *See* Commonwealth v. Muroski, ___ Pa. Super. ___, 506 A.2d 1312 (1986). The distinguishing factor in support of such standing seems to be the absence of an actual judicial determination regarding the alleged insufficiency of the complainant's case. *Muroski* distinguished, for example, Commonwealth v. Malloy, 304 Pa. Super. 297, 450 A.2d 689 (1982), in which the complainant had no standing to appeal a judicial determination dismissing a complaint based on insufficient evidence. *See also* Commonwealth v. Eiseman, 276 Pa. Super. 543, 419 A.2d 591 (1980) (standing not analyzed); Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057 (1955).

47. 454 U.S. at 473; *see also* De Funis v. Odegaard, 416 U.S. 312 (1974); Roe v. Wade, 410 U.S. 113 (1973).

48. *See* Camiel v. Thornburgh, 507 Pa. 337, 489 A.2d 1360 (1985), in which the supreme court denied a petition for review because there was no actual, present conflict.

49. "Justiciable controversy" has been defined as follows:

> A controversy in which the claim of right is asserted against one who has an interest in contesting it. A question as may properly come before a tribunal for decision. . . . Courts will only consider a "justiciable" controversy, as distin-

the controversy reaches the appellate stage it must not be *moot*.[50] A case will be considered moot if the issues presented are no longer "live" or the parties lack a legally cognizable interest in the resolution and outcome of the controversy.[51] Appellate procedural rules provide that if there is no actual, present conflict, the appeal will be dismissed. Furthermore, if pending an appeal an event occurs that renders appellate relief impossible, the appellate court will dismiss the appeal.[52] An appellate court will not expend its time or energy if relief is impractical or impossible.

A controversy may be moot when the parties have complied with the appealed order. In *Easton Theatres, Inc. v. Wells Fargo, Inc.*,[53] the appellant-defendant was given an opportunity to file a bond pending appeal in order to suspend implementation of the lower court's order. The appellant chose not to file a bond and instead complied with the order requiring it to construct the building.

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guished from a hypothetical difference or dispute or one that is academic or moot. . . . Term refers to real and substantial controversy which is appropriate for judicial determination, as distinguished from dispute or difference of contingent, hypothetical or abstract character.

BLACK'S LAW DICTIONARY 777 (5th ed. 1979) (citations omitted). Compare this definition with the concept of "abatement" in Hall v. Hall, 333 Pa. Super. 483, 482 A.2d 974 (1984) (death of one party during direct appeal from the entry of a divorce decree did not cause divorce action to be abated). *But see* Reese v. Reese, ___ Pa. Super. ___, 506 A.2d 471 (1986); *cf. infra* note 59; Drumhiller v. Drumhiller, ___ Pa. Super. ___, 505 A.2d 305 (1986) (general rule is that pending divorce action abates upon death of one spouse).

50. The following is a typical definition of "moot:"

A case is "moot" when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. . . . Question is "moot" when it presents no actual controversy or where the issues have ceased to exist . . . .

Generally, an action is considered "moot" when it no longer presents a justiciable controversy because issues involved have become academic or dead. . . . Case in which the matter in dispute has already been resolved and hence, one not entitled to judicial intervention unless the issue is a recurring one and likely to be raised again between the parties. . . .

BLACK'S LAW DICTIONARY 909 (5th ed. 1979) (citations omitted). A related but distinct concept on the other end of the temporal spectrum is that an appellate court will review only "ripe" controversies. *See* Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Steffel v. Thompson, 415 U.S. 452 (1974); Young J. Lee, Inc. v. Commonwealth, 504 Pa. 367, 380, 474 A.2d 266, 272 (1983) (constitutional question not ripe given case's procedural posture); *see also* Note, *Mootness and Ripeness: The Postman Always Rings Twice*, 65 COLUM. L. REV. 867 (1965) (takes a critical look at such procedural barriers in the context of constitutional challenges); Note, *Cases Moot on Appeal: A Limit on Judicial Power*, 103 U. PA. L. REV. 772 (1955).

51. *See In re* Establish Insp. of Metal Bank of America, 700 F.2d 910, 913 (3d Cir. 1983).

52. *See* PA. R. APP. P. 1972 (4); *see also* Commonwealth v. Caffrey, ___ Pa. Super. ___, 508 A.2d 322 (1986) (defendant's appeal from denial of writ of habeas corpus to prevent extradition quashed since defendant already had been extradited); Commonwealth v. Smith, 336 Pa. Super. 636, 486 A.2d 445 (1984) (appeal from denial of habeas corpus petition dismissed because appellant was no longer in custody and relief sought was already achieved).

53. 498 Pa. 577, 449 A.2d 1372 (1982). Justices Flaherty and McDermott dissented in the case.

The supreme court dismissed the case as moot. Likewise, payment of a fine imposed by a contempt order resulted in an appellate court quashing the appeal from the order of contempt as moot.[54]

There are two major exceptions to the general rule that appellate courts will not review moot issues. First, when the issue is capable of repetition and likely to evade future review as a result of a strict application of mootness, the appellate court will review the issue. This exception is often applied in cases involving substantial questions of importance or constitutionality, such as are presented in press closure[55] or blood transfusion cases.[56] Second, in criminal cases appellate review of sentences served will be reviewed under the doctrine of "collateral criminal consequences." A defendant, thus, will be allowed to attack a sentence already served or mooted when there is a possibility that the challenged sentence may or will affect the defendant in the future.[57] This exception has been extended to include the possibility of adverse social[58] and civil[59] consequences.

C. Judicial Abstention[60]

Sometimes the better part of judicial discretion is abstention, that is, the decision — or some would say the courage — not to

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54. *See* Phoenix Glass Co. v. Local Union No. 8381, United Steel Workers of Am., 244 Pa. Super. 16, 366 A.2d 293 (1976); *see also* McDonald's Corp. v. Victory Investments, 727 F.2d 82 (3d Cir. 1984) (noting that the contemner, who complied with the order, was not challenging the underlying validity of the order to pay fees).

55. *See* Commonwealth v. Buehl, 316 Pa. Super. 215, 462 A.2d 1316 (1983).

56. *See In re* Estate of Dorone, ___ Pa. Super. ___, ___, 508 A.2d 1271, 1274-75 (1985).

57. *See* Johnson v. Commonwealth Bd. of Probation & Parole, 505 Pa. 569, 482 A.2d 235 (1984) (some possible adverse consequence sufficient to permit right to review by paroled defendant); Commonwealth v. Adams, 350 Pa. Super. 506, ___, 504 A.2d 1264, 1270 (1986) (legality of expired sentence reviewable where sentence may affect defendant's entitlement to credit for time served).

58. *See* Commonwealth v. Markley, ___ Pa. Super. ___, 501 A.2d 1137 (1985) (discussing relevant cases); *see also* Commonwealth v. Berthesi, ___ Pa. Super. ___, 504 A.2d 891 (1986).

59. *See* Commonwealth v. Rohde, 485 Pa. 404, 402 A.2d 1025 (1979); Commonwealth v. Doria, 468 Pa. 534, 364 A.2d 322 (1976); Commonwealth v. Sheehan, 446 Pa. 35, 285 A.2d 465 (1971). As for death, while it may moot a criminal defendant's life, it does not necessarily moot his appeal. *See* Commonwealth v. Walker, 447 Pa. 146, 147-48, 208 A.2d 741, 742 (1972) (court refuses to dismiss appeal or vacate conviction because of appellant's death; court reviews case in interests of both defendant's estate and society). Henszey v. Henszey, 195 Pa. Super. 377, 382-83, 171 A.2d 837, 840 (1961) (death of appellee during appeal from divorce decree did not abate appeal). *Cf. supra* note 49.

60. The term "abstention" is used in this discussion in a broad, generalized sense to simply indicate a withholding of appellate relief. The "abstention" doctrine is defined, in the context of federal law, as follows: "Doctrine of 'absention' permits a federal court, in the exercise of its discretion, to relinquish jurisdiction where necessary to avoid needless conflict with the important administration by a state of its own affairs." BLACK'S LAW DICTIONARY 9 (5th ed. 1979).

decide. There is no discernible uniform principle. Generic illustrations that highlight when principle, comity or policy influence an appellate court in withholding the hand of relief must guide the practitioner.

1. Bankruptcy Matters—One of the fundamental protections for debtors who have filed petitions for bankruptcy in federal courts is the automatic stay provision of the federal laws. The purpose is to give the debtor a breathing spell from his creditors.[61] A bankruptcy petition operates as a stay of the commencement or continuation of a judicial proceeding as well as the enforcement of a judgment. When the stay provision applies, an appellate court will abstain from the controversy;[62] if the stay provision does not apply, the merits of the controversy will be considered.[63]

2. Political Questions—When an appellate controversy has a sensitive relationship to a legislative or executive matter, the appellate court may refuse to interject itself into such a controversy.[64] The political question doctrine is arguably political in nature since it concerns the democratic principle of separation of powers. Whether judicial abstention in such matters is rooted in principle or prudence is unclear.

3. Case Stated—When parties in the lower court agree to present their dispute to the lower court judge on a "case stated" basis,

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61. *See* 11 U.S.C. § 362(a) (1982).

62. *See, e.g.*, Ellison v. Northwest Eng'g Co., 707 F.2d 1310 (11th Cir. 1983); *cf.* Association of St. Croix Condominium Owners v. St. Croix Hotel Corp., 682 F.2d 446 (3d Cir. 1982); Acie v. Braunstein, ___ Pa. Super. ___, 509 A.2d 405 (1986) (appellate court affirms lower court's dismissal of action based on lack of subject matter jurisdiction). *Acie* referred to 28 U.S.C.A. § 1334 (West 1976) (district court shall have exclusive jurisdiction of all cases having a significant connection with pending bankruptcy proceedings).

63. *See* Foulke v. Lavelle, 308 Pa. Super. 131, 454 A.2d 56 (1982) (automatic stay does not apply to acts against property which is neither the property of the debtor or the estate, nor property in which debtor does not have an interest).

64. *See, e.g., In re* Jones, 505 Pa. 50, 476 A.2d 1287 (1984) (appellate refusal to consider qualifications of members of state legislature); *but cf.* Thornburgh v. Lewis, 504 Pa. 206, 470 A.2d 952 (1983) (decision that governor was required to supply requested information to minority chairman of the senate appropriations committee); *see also* Baker v. Carr, 369 U.S. 186 (1962); Zemprelli v. Davis, 496 Pa. 247, 436 A.2d 1165 (1981); Sweeney v. Tucker, 473 Pa. 493, 375 A.2d 698 (1977); BLACK'S LAW DICTIONARY 1043 (5th ed. 1979) ("A matter which can be handled more appropriately by another branch of the government is not a 'justiciable' matter for the courts.").

For insightful commentaries, see Bickel, *The Supreme Court, 1960 Term — Foreward: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); Henkin, *Is There a 'Political Question' Doctrine?*, 85 YALE L.J. 597 (1976); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-8, 9 (1959). Constitutional transgressions, however, are neither political nor nonjusticiable even though they may implicate governmental authority. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

they must carefully and explicitly reserve their right to subsequent appellate review; otherwise, the appellate court will deem the right forfeited.[65] Generally, a case stated is different from a case tried by a court without a jury on a stipulation of facts because, in a case stated, the parties request the court to enter judgment[66] on an agreed statement of facts. In a nonjury trial, based on a stipulation of facts, the lower court first renders a verdict or decision, from which the parties can file a motion for post-trial relief and then appeal.

4. Criminal (Acquittal of Defendant)—As a matter of constitutional principle, an appellate court will not entertain a state's appeal from an order acquitting the defendant. The basis of the principle is the defendant's right not to be placed twice in jeopardy (that is, retried) after a final determination of insufficient evidence.[67] For example, the Supreme Court firmly decided that a Pennsylvania trial judge's granting of a defendant's demurrer[68] to the Commonwealth's case was an acquittal under the double jeopardy clause of the United States Constitution, and the Commonwealth's appeal was barred.[69] The important distinction to be made in this category is that, unlike

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65. *See* Commonwealth v. Callahan, 153 Pa. 625, 25 A.2d 100 (1893) (appeal quashed); Clearfield Bank v. American Mfrs. Mut. Ins. Co., 344 Pa. Super. 588, 497 A.2d 247 (1985) (appeal dismissed because appellant failed to reserve right to appeal) (distinguishing Sweeney v. Lakeland School Dist., 13 Pa. Commw. 485, 319 A.2d 207 (1974)); County of Allegheny v. Allegheny County Prison, 53 Pa. Commw. 350, 417 A.2d 864 (1980) (appeal dismissed for failure to reserve right of appeal); Wertz v. Anderson ___ Pa. Super. ___, 508 A.2d 1218 (1986) (appeal from lower court's order of support was not a case stated, despite appellant's characterization, when parties proceeded with a nonjury trial on stipulation of facts but did not request an entry of judgment; lower court's decision was in the form of an adjudication and decree nisi to which appellant correctly filed post trial motions; appeal from denial of post trial motions proper); *cf.* Wedgewood Assocs. v. Caln Township, 54 Pa. Commw. 557, 422 A.2d 1190 (1980) (nonjury adjudication was not procedurally a "case stated" case).

66. A judgment is final and, ordinarily, immediately appealable; a "decision" or adjudication is not. *See, e.g.*, PA. R. APP. P. 301(c). *See also* East Coast Properties v. The Hartford Mut. Ins. Co., ___ Pa. Super. ___, ___ A.2d ___ (1986) (past-verdict motions improper and cannot extend time to appeal).

67. *See* U.S. CONST. amend. V.

68. *See* PA. R. CRIM. P. 1124(a)(1).

69. *See* Smalis v. Pennsylvania, 106 S. Ct. 1745 (1986), *rev'g* Commonwealth v. Zoller, 507 Pa. 344, 490 A.2d 394 (1985), *on remand*, ___ Pa. ___, 512 A.2d 634 (1986); *but cf.* Commonwealth v. Williams, ___ Pa. ___, ___ A.2d ___ (1986) (defendant's appeal from order denying his motion for acquittal proper under PA. R.C.P. 311(a)(5) where order results in new trial and defendant claims right to absolute discharge); Commonwealth v. Parker, 305 Pa. Super. 516, 451 A.2d 767 (1982) (Commonwealth could appeal lower court's sua sponte post-verdict order changing verdict of guilty to not guilty since an appellate reversal would result only in the reinstatement of the original verdict); *see also* Commonwealth v. Bowden, 456 Pa. 278, 282 n. 3, 309 A.2d 714, 717 n. 3 (1973) (Commonwealth can appeal an arrest of judgment based on a pure question of law); Commonwealth v. Trader, ___ Pa. Super. ___, 512 A.2d 693 (1986) (appeal quashed); Commonwealth v. Baker, ___ Pa. Super. ___, 507 A.2d 872 (1986).

the other categories discussed, the principle of abstaining is mandatory, not discretionary. The appellate rules provide that the Commonwealth may file an appeal in criminal matters "only in the circumstances provided by law."[70]

5. Criminal (Fugitive Defendant)—Somewhat similar to the forfeiture of the right to appeal in a "case stated" situation is the forfeiture imposed upon a criminal defendant when he illegally absconds the jurisdiction. The essential difference between the two, however, is that the forfeiture by the criminal defendant is arguably not attributable to his inadvertence but to a voluntary decision to be beyond the reach of those from whom he seeks relief. In such circumstances, the appellate court will not give that which the defendant avoids. In short, the defendant suffers the consequences of his illicit venture.[71] The appellate rules, in fact, authorize dismissal when the appellant is a fugitive.[72]

6. Discretionary Sentencing—When the Commonwealth files an appeal challenging the lower court's imposition of sentence, the appellate court may decide that review is not appropriate. In a sense, the Commonwealth possesses a defeasible right of appeal; review of the merits will occur only if the appellate court initially permits the Commonwealth to proceed with the appeal.[73] The notice of appeal acts as a petition to appeal a final order. Technically, one may argue that standing or abstention is not implicated. Although such a con-

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70. *See* PA. R. APP. P. 341(c). In a few states, the prosecution is denied any right of appeal. *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 1527 (5th ed. 1980); Kronenberg, *Right of State to Appeal in Criminal Cases*, 49 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 473 (1959).

71. *See* Commonwealth v. Passaro, 504 Pa. 611, 476 A.2d 346 (1984) (stating that the constitutional right of appeal is conditioned upon compliance with procedural requirements). In *Passaro*, the defendant's prior appeal was quashed and the supreme court refused to grant defendant's petition to reinstate his appeal. *See also* Commonwealth v. Ciotti, 496 Pa. 232, 436 A.2d 983 (1981), *on remand*, 318 Pa. Super. 549, 465 A.2d 690 (1983), *vacated*, 506 Pa. 10, 483 A.2d 852 (1984); *but cf.* Commonwealth v. Milligan, 307 Pa. Super. 129, 452 A.2d 1072 (1982) (appellate permission granted so that defendant, previously a fugitive, could refile post trial motions *nunc pro tunc*).

72. *See* PA. R. APP. P. 1972 (6).

73. *See* 42 PA. CONS. STAT. ANN. § 9781(b) (Purdon 1982); PA. R. APP. P. 341 and note thereto, which states that such an appeal will be entertained by the appellate court only if it appears to the court that there is a substantial question that the sentence imposed is not appropriate under the applicable sentencing guidelines; PA. R. APP. P. 902 and note thereto; *see also* Commonwealth v. Days, ___ Pa. Super. ___, 502 A.2d 13339 (1986); Commonwealth v. Fluellen, 345 Pa. Super. 167, 497 A.2d 1357 (1985); Commonwealth v. Dixon, 344 Pa. Super. 293, 496 A.2d 802 (1985); Commonwealth v. Drumgoole, 341 Pa. Super. 468, 491 A.2d 1352 (1985); *cf.* Commonwealth v. Becker, No. 386 Pitts. 1985 (Pa. Super. July 23, 1986) (available Sept. 17, 1986, on WESTLAW, Allstates library) (applying 75 PA. CONS. STAT. ANN. § 3731(e)(4) (Purdon Supp. 1986)); Commonwealth v. Easterling, ___ Pa. Super. ___, 509 A.2d 345 (1986) (identifying three circumstances which may establish a substantial question).

clusion may be accurate, the major point is that this category of case is another example of the exercise of appellate jurisdiction in deciding not to decide.

III. Subject Matter Jurisdiction: The Final and Collateral Order Doctrines

A. Jurisdiction and the Appealable Order

The concepts of standing and justiciability are essential steps in the appellate process. Nevertheless, they are only a prologue to perhaps the most important and difficult question in the appellate process: Is the lower court's order appealable? If there is an aggrieved protagonist (the appellant) with an actual conflict amenable to judicial resolution (justiciable controversy), appellate jurisdiction does *not* necessarily exist. One must switch the focus from the general status of the party appealing the case to the most fundamental question in appellate practice: the subject matter jurisdiction of the appellate court. Without *subject matter jurisdiction*, an appellate court cannot entertain a dispute or grant relief.

Jurisdiction is one of those labyrinthine concepts of law expressed repeatedly in varying degrees that range from almost platitude to talismanic maxims.[74] Yet the issue of jurisdiction in an appeal can never be ignored or superficially assumed. Subject matter jurisdiction is essentially a political concept that circumscribes and allocates the political and adjudicatory power of the courts. In *Ex parte Bollman*,[75] Chief Justice Marshall noted in principle, "Courts which originate in the common law possess a jurisdiction which must be regulated by the common law . . .; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."[76] Transcending that jurisdiction would effectively be an invitation to anarchy. The power of the Pennsylvania courts rests on written law, including the constitution,

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74. "Jurisdiction" has been defined as follows:

> The word is a term of large and comprehensive import, and embraces every kind of judicial action. . . . It is the authority by which courts and judicial officers take cognizance of and decide cases. . . . The legal right by which judges exercise their authority. . . . It exists when court has cognizance of class of cases involved, proper parties are present, and point to be decided is within powers of court. . . . Power and authority of a court to hear and determine a judicial proceeding. . . . The right and power of a court to adjudicate concerning the subject matter in a given case. . . .

BLACK'S LAW DICTIONARY 766 (5th ed. 1979) (citations omitted).

75. 8 U.S. (4 Cranch) 75 (1807), *cited in* Commonwealth ex rel. Burton v. Baldi, 147 Pa. Super. 193, 201, 214 A.2d 76, 80-81 (1942).

76. *Id.* at 93.

statutes and implementing rules of court.[77] One can glean the paramount importance of subject matter jurisdiction in the following litany of fundamental principles often cited in appellate cases: (1) jurisdiction cannot be acquired by consent of the parties or by silence;[78] (2) the issue of jurisdiction can be raised by the appellate court on its own motion (sua sponte) at any time;[79] (3) the question of whether an order is appealable goes to the jurisdiction of the appellate court;[80] (4) subject matter jurisdiction is the power and competence of the court to determine controversies of the general class to which the case belongs;[81] (5) jurisdiction must be kept within strict limits;[82] (6) neither the parties nor the appellate court can waive the lack of subject matter jurisdiction;[83] and (7) the Pennsylvania Supreme Court is the final arbiter of appellate jurisdictional issues.[84] Four procedural corollaries pivotal to these general principles are: (1) the question of appellate jurisdiction is determined at the time an appeal is filed;[85] (2) the failure to file exceptions or post-trial motions

77. *See infra* notes 373-97 and accompanying text.

78. *See, e.g.*, Commonwealth v. Saunders, 483 Pa. 29, 394 A.2d 522 (1978); T.C.R. Realty, Inc. v. Cox, 472 Pa. 331, 372 A.2d 721 (1977); *In re* Petitions of Bell, 396 Pa. 592, 152 A.2d 731 (1959); Stadler v. Mt. Olive Borough, 373 Pa. 316, 95 A.2d 776 (1953); Tunstall v. Penn Federal Savings & Loan Ass'n, 287 Pa. Super. 511, 430 A.2d 1007 (1981).

79. Fried v. Fried, 509 Pa. 89, 501 A.2d 211 (1985); Commonwealth v. Little, 455 Pa. 163, 314 A.2d 270 (1974); Givens v. Givens, 304 Pa. Super. 571, 450 A.2d 1386 (1982); Suburban East Tires v. Duquesne Light Co., 302 Pa. Super. 204, 448 A.2d 638 (1982); Bracken v. Bracken, 294 Pa. Super. 371, 439 A.2d 1247 (1982).

80. *See* Fried v. Fried, 509 Pa. 89, 501 A.2d 211 (1985).

81. Strank v. Mercy Hosp. of Johnstown, 376 Pa. 305, 102 A.2d 170 (1954); *see also* Nagle v. American Casualty Co., 317 Pa. Super. 164, 463 A.2d 1136 (1983); Kaiser v. 191 Presidential Corp., 308 Pa. Super. 301, 454 A.2d 141 (1982).

82. Commonwealth ex rel. Burton v. Baldi, 147 Pa. Super. 193, 24 A.2d 76 (1942); *see also* Toll v. Toll, 293 Pa. Super. 549, 439 A.2d 712 (1981).

83. *See* 42 PA. CONS. STAT. ANN. § 704(b) (Purdon 1981); PA. R. APP. P. 741(b) (absence of appellate jurisdiction not subject to waiver); *see also supra* note 76. Prior case law had suggested that jurisdictional defects were subject to waiver. *See* McConnell v. Schmidt, 234 Pa. Super. 400, 339 A.2d 574 (1975), *vacated and quashed*, 463 Pa. 118, 344 A.2d 277 (1975). The appellate rules now clearly provide otherwise.

84. *See* Commonwealth v. Dugger, 506 Pa. 537, 486 A.2d 382 (1985). The right to appellate review of final orders, for example, includes those final orders as defined by "general rule." *See* 42 PA. CONST. STAT. ANN. § 5105(a) (Purdon 1981). A "general rule" is one promulgated by the "governing authority," which includes the supreme court. *Id.* § 102 (definitions).

85. *See* Praisner v. Stocker, 313 Pa. Super. 332, 343-44 n.4, 459 A.2d 1255, 1261 n.4 (1983); Rosen v. Rosen, ___ Pa. Super. ___, ___ n.2, 510 A.2d 732, 734 n.2 (1986) (juridiction implicitly viewed at time appeal is taken); *but see* PA. R. APP. P. 905(a) ("A notice of appeal filed after the announcement of a determination but before the entry of an appealable order shall be treated as filed after such entry and on the day thereof."). *See* Minick v. City of Sharon, 325 Pa. Super. 178, 472 A.2d 706 (1984) (absent entry of judgment, verdict is not final or appealable but jurisdiction is perfected upon entry of judgment; legal fiction makes premature appeal relate forward); *cf.* Aloi v. Aloi, 290 Pa. Super. 125, 434 A.2d 161 (1981) (premature appeal quashed and subsequent divorce decree, entered during appeal, vacated). *Aloi* preceded the amendment to PA. R. APP. P. 905(a). As to the effect of

does not implicate appellate jurisdictional power but only relates to the parties' preservation of issues for appellate review;[86] (3) the mere filing of a notice of appeal does not, in itself, confer jurisdiction when none specifically exists;[87] and (4) the absence of a lower court's jurisdiction is not synonymous with the existence or absence of appellate jurisdiction.[88]

The exposition of these broad jurisdictional principles brings one full circle to the focal point of such principles, namely, the appellate court's *subject matter*. The subject matter of appellate jurisdiction is the *lower court's order*.[89] It may sound tautological, but if the lower court's order is not appealable by statute or specific rule, then appellate jurisdiction cannot be obtained no matter how severe the aggrievement. The lower court's order is essentially the nucleus or building block of an appeal. Neither the lower court's opinion[90] nor the gravity of aggrievement attending a prior nonfinal order can

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the premature filing of a notice of appeal in the federal courts, see F.R.A.P. 4(a)(4); Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982); *but cf.* Cape May Greene, Inc. v. Warren, 698 F.2d 179, 185 (3rd Cir. 1983); Tibbs v. Great Amer. Ins. Co., 755 F.2d 1370 (9th Cir. 1985).

86. *See, e.g.*, Estate of Kotz, 486 Pa. 444, 406 A.2d 524 (1979); Estate of McGrorey, 474 Pa. 402, 404 n.3, 378 A.2d 855, 856 n.3 (1977) (appellant's failure to file exceptions not grounds for quashing appeal because, pursuant to local rule, adjudication became final as of course when no exceptions were filed); *cf.* Paul v. Paul, 281 Pa. Super. 202, 211, 421 A.2d 1219, 1224 (1980) (appeal before disposition of exceptions is premature); *see also* PA. R. APP. P. 302(a) (requisites for reviewable issue).

87. *See* Pennsylvania Higher Educ. Assistance Agency v. Di Massa, 296 Pa. Super. 529, 442 A.2d 1177 (1982); *cf.* Diamond v. Charles, 106 S. Ct. 1697 (1986) (mere status as a "party" or filing notice of appeal did not guarantee that intervening defendant was entitled to seek appellate review). One cannot assume that an order is appealable simply because, in another case, an appellate court reviewed an order without a jurisdictional analysis. *See* Stadler v. Mt. Olive Borough, 373 Pa. 316, 95 A.2d 776 (1953).

88. One may appeal a lower court's order on the basis that the lower court lacked jurisdiction. For cases in which appellate jurisdiction existed in matters in which the lower court exceeded the scope of its jurisdiction, see, for example, Love v. Temple Univ., 422 Pa. 30, 220 A.2d 838 (1966); Simpson v. Allstate Ins. Co., 350 Pa. Super. 239, 504 A.2d 335 (1986); Commonwealth v. Fiore, 341 Pa. Super. 305, 491 A.2d 276 (1985); Commonwealth v. Zuder, 322 Pa. Super. 411, 469 A.2d 687 (1983); Kaiser v. 191 Presidential Corp., 308 Pa. Super. 301, 454 A.2d 141 (1982); Commonwealth v. Lynch, 304 Pa. Super. 248, 450 A.2d 664 (1982); *see also* 42 PA. CONS. STAT. ANN. § 5505 (time within which a lower court can modify its order).

89. There have been times, however, when the appealable order was examined or construed in light of the lower court's opinion. *See* Conaway v. 20th Century Corp., 491 Pa. 189, 420 A.2d 405 (1980) (opinion examined to determine whether the final order is actually final and puts appellant out of court); Rappaport v. Stein, 351 Pa. Super. 370, 506 A.2d 393 (1985) (review of lower court's opinion to determine finality); Independence Hall Parking Inc. v. Commonwealth Dept. of Transp., 86 Pa. Commw. 573, 486 A.2d 534 (1984) (on remand, appellate court considers issue which was not in order appealed but was discussed in accompanying opinion of the lower court); Rodgers v. Nationwide Mut. Ins. Co., 344 Pa. Super. 311, 315 n.2, 496 A.2d 811, 813 n.2 (1985) (vague order read in light of lower court's opinion).

90. *See* PA. R. APP. P. 1921 (composition of record on appeal); *supra* note 87; *see also* Cohen v. Jenkintown Cab Co., 300 Pa. Super. 528, 538 n. 8, 446 A.2d 1284, 1289 n. 8 (1982) (citing Lengyel v. Black, 293 Pa. Super. 297, 438 A.2d 1003 (1981)).

serve to establish or circumvent the essential jurisdictional component, that being a final appealable order upon which an appellate case can be built and reviewed.

Appealability of an order, therefore, is really a question whether there is a route of access to an hospitable appellate forum in which that nucleus or building block, the appealed order, can be received. One of the most egregious errors that a litigant can commit is to ignore or fail to appreciate the *specific jurisdictional base* that will provide access to the appellate forum. The appellate rules, in fact, highlight the importance of this access route by requiring the appellant to separately and prominently identify in her brief both the jurisdictional basis of the appeal and the specific lower court order forming the basis of the appeal.[91]

The initial discussion adverted to the fact that jurisdiction is a labyrinthine concept in the law. This description applies because there are many and varied access routes to the appellate forum. An appellant must recognize and distinguish among the different and conceptually complicated jurisdictional bases for an appeal. For purposes of simplicity, this discussion must now examine in a step-by-step fashion the following, prevalent routes that a litigant might select in trying to reach an appellate forum: (1) the final order doctrine (denominated herein as the classical or technical version); (2) the final order doctrine (labeled herein as the constructive or pragmatic version); (3) the collateral order doctrine; (4) interlocutory appellate review of nonfinal orders specifically authorized by law; (5) permissive appellate review of nonfinal orders; (6) exceptional circumstances jurisdiction; and (7)piggyback appellate jurisdiction. Case law occasionally will delineate or emphasize the importance of the different jurisdictional foundations.[92]

B. The Final Order Doctrine: Technical, Classical Finality (The End of Litigation)

As a general rule, subject to significant exceptions and qualifications discussed later, the entrance requirement to the appellate forum is a *final order.* If a litigant timely presents the court with a final order, the appellate court will ordinarily permit access. Yet the skeletal simplicity of the term "final order," which is not defined by

91. *See* PA. R. APP. P. 2111(a).

92. See, for example, the helpful jurisdictional delineations in Commonwealth v. Wills, 328 Pa. Super. 342, 476 A.2d 1362 (1984); Praisner v. Stocker, 313 Pa. Super. 332, 459 A.2d 1255 (1983); Commonwealth Dept. of Transp. v. Rollins Outdoor Ad. Co., Inc., 76 Pa. Commw. 554, 557 n. 1, 464 A.2d 653, 655 n. 1 (1983).

statute or procedural rules, is dangerously deceptive.[93] An examination of the myriad cases on the subject will quickly reveal how holophrastic and conceptually troublesome the two words can be, not only to Pennsylvania courts but to other courts in general. In *Dickinson v. Petroleum Conversion Corp.*,[94] Justice Jackson remarked:

> Half a century ago this Court lamented, "Probably no question of equity practice has been the subject of more frequent discussion in this court than the finality of decrees. . . . The cases, it must be conceded, are not altogether harmonious." This lamentation is equally fitting to describe the intervening struggle of the courts; sometimes to devise a formula that will encompass all situations and at other times to take hardship cases out from under the rigidity of previous declarations; sometimes choosing one and sometimes another of the considerations that always compete in the question of appealability, the most important of which are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.[95]

The *final order doctrine*, whose historical origins can be found in

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93. The following are definitional excerpts on the simple theme of "finality": *Final.* Last; conclusive; decisive; definitive; terminated; completed. In its use in reference to legal actions, this word is generally contrasted with "interlocutory". . . . *Final appealable order.* To constitute a "final, appealable order" the order must terminate the litigation and finally determine, fix and dispose of the parties' rights as to the issues in the suit. . . . *Final decision.* One which leaves nothing open to further dispute and which sets at rest cause of action between parties. Judgment or decree which terminates action in court which renders it. One which settles rights of parties respecting the subject-matter of the suit and which concludes them until it is reversed or set aside. The filing of signed findings and conclusions and order for judgment. Synonymous with final judgment or decree. Also, a decision from which no appeal or writ of error can be taken. . . . "Final decision" which may be appealed is one that ends litigation on merits and leaves nothing for courts to do but execute judgment.*Final decision rule.* Appeals to federal courts of appeals from U.S. district courts must be from "final decisions" of district courts. 28 U.S.C.A. sec. 1291. In other words, the courts of appeals lack jurisdiction over nonfinal judgments. The object of this restriction is to prevent piecemeal litigation which would otherwise result from the use of interlocutory appeals.*Final judgment.* One which finally disposes of rights of parties, either upon entire controversy or upon some definite and separate branch thereof . . . Judgment is considered "final" only if it determines the rights of the parties and disposes of all of the issues involved so that no future action by the court will be necessary in order to settle and determine the entire controversy.*Final order.* One which terminates the litigation between the parties and the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.

BLACK'S LAW DICTIONARY 567 (5th ed. 1979) (citations omitted).

94. 338 U.S. 507 (1950); *see also* Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539 (1932).

95. 338 U.S. at 511 (citation omitted).

common law,[96] is, in a sense, the categorical imperative of appellate jurisdiction. Exposed in its most pristine, strict form, the final order doctrine authorizes an appeal only when litigation is *terminated* in the lower court[97] or, to state the requirement in a different fashion, when the lower court disposes of the entire case. Thus, the terminal point of litigation in the lower court is, at the same time, the point of embarkation to the appellate court for an aggrieved party. For ease of analysis, this aspect of finality shall be termed *classical* or *technical finality*, denoting that a litigant is actually and completely out of court and that litigation in the lower court is completed.

One might ask what is the rationale for such an arbitrary rule of thumb. The reasons are many, varied and sensible. The final order doctrine is a compound of legal requirement, policy, fairness and efficiency. Of paramount importance is the fact that most of the jurisdictional statutes invest the courts with jurisdiction (political, judicial power) only over "final orders" of the lower courts.[98] The doctrine also represents a prudential standard by which to best allocate and maximize limited judicial resources. The process of lower court litigation, for example, involves a sequential, on-going process of multiple decision-making. If an appellate court were to open its doors to every person aggrieved by a decision that occurred in the course of litigation, the appellate courts — financed by the citizenry — would be quickly overwhelmed and become bankrupt.[99] Aside from avoiding the potentially debilitating effects upon the judiciary of a carte blanche rule of access to the appellate courts, the final order doctrine offers fairness and a comforting assurance to the litigants. The rule attempts to reasonably assure that the parties will economically have their "day in court" and that the risks of expensive, piecemeal, and perhaps strategically dilatory appeals will be avoided. In a related but different context, the American Judicature Society to the Supreme Court of Pennsylvania observed:

> Double appeals are seldom necessary. It is almost axiomatic that

96. *See* Catlin v. United States, 324 U.S. 229, 233-34 (1945); Cobbledick v. United States, 309 U.S. 323 (1940); McLish v. Roff, 141 U.S. 661, 665 (1891); Commonwealth v. Nugent, 291 Pa. Super. 421, 423 n. 1, 435 A.2d 1298, 1299 n.1 (1981).

97. *See, e.g.*, St. Louis Iron Mountain and S. Ry. Co. v. Southern Express Co., 108 U.S. 24, 28-29 (1883).

98. *See infra* notes 373-97 and accompanying text; *see also* PA. R. APP. P. 341(a) (final orders generally appealable). See particularly the specific jurisdictional statutes that specify final orders as the basis for the respective appellate court's jurisdiction. 42 PA. CONS. STAT. ANN. §§ 722-725 (supreme court), 742 (superior court), 762 (commonwealth court), 5105(a) (right of appellate review as to final orders) (Purdon 1981 & Supp. 1986).

99. As to the difficulties in identifying the economic equation and balancing economic with non-economic interest, however, see *infra* note 174.

> every losing litigant in a one-judge court ought to have a right to appeal to a multijudge court. It is almost equally axiomatic that one appeal is enough to insure justice between parties. A second appeal carries with it no assurance that justice will be more nearly achieved by mere repetition . . . .[100]

1. Final Orders Illustrated—The classic formulation of finality in terms of termination or disposition of the entire case is ubiquitous in Pennsylvania case law.[101] In application, however, how is a case "terminated" in the lower court? The following is merely an illustrative list of final orders that literally dispose of a case and put an aggrieved party out of court. In criminal cases, final appealable orders include the imposition and docketing of a sentence (e.g. imprisonment or fine) after consideration and denial of post-trial motions;[102] the denial of post-conviction relief;[103] and the discharge of a defendant or the dismissal of the Commonwealth's case or information filed against a defendant,[104] provided that such a discharge is not tantamount to an acquittal.[105] The opportunity for review of non-final orders in criminal cases is severely limited. As a general rule,

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100. REPORT OF THE AMERICAN JUDICATURE SOCIETY, *supra* note 6, at 2. As to the economical underpinnings of the final order doctrine, see also Fried v. Fried, 509 Pa. 89, 501 A.2d 211 (1985); Sanderbeck v. Sanderbeck, 327 Pa. Super. 461, 476 A.2d 44 (1984); Gordon v. Gordon, 293 Pa. Super. 491, 439 A.2d 683 (1981).

101. *See* Adoption of G.M., 484 Pa. 24, 398 A.2d 642 (1979); T.C.R. Realty Inc. v. Cox, 472 Pa. 331, 337, 372 A.2d 721, 724 (1977); Pilzer v. Independence Savings & Loan Ass'n, 456 Pa. 402, 404, 319 A.2d 677, 678 (1974); Banda Inc. v. Virginia Manor Apartments, Inc., 451 Pa. 408, 409, 303 A.2d 925, 926 (1973); Bracken v. Bracken, 294 Pa. Super. 371, 439 A.2d 1247 (1982).

102. *See* Commonwealth v. Sites, 430 Pa. 115, 242 A.2d 220 (1968); Commonwealth v. Kilgallen, 379 Pa. 315, 108 A.2d 780 (1954); Commonwealth v. Nugent, 291 Pa. Super. 421, 435 A.2d 1298 (1981). The principle of finality is said to be more strict in criminal cases. *See* United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982); *cf.* Korematsu v. United States, 319 U.S. 432 (1943) (order placing defendant on probation, without first imposing and suspending sentence, considered as final appealable judgment); *cf.* United States v. Wilson, 440 F.2d 1103 (5th Cir. 1971) (when court imposed sentence as fine on three counts of six-count conviction, withholding sentence on the other counts, there was no final judgment from which an appeal could be taken).

103. If the lower court denies post-conviction relief, the defendant is, of course, out of court and the action is terminated. Thus, he may appeal. Also, the Commonwealth may appeal the lower court's grant of post-conviction relief when it results in a discharge. *See* Commonwealth v. Scott, ___ Pa. Super. ___, 509 A.2d 1301 (1986); *see also* 42 PA. CONS. STAT. ANN. §§ 9541-9551 (Purdon 1982 & Supp. 1986) (Post Conviction Hearing Act).

104. *See* Commonwealth ex rel. Bryant v. Hendrick, 444 Pa. 83, 280 A.2d 110 (1971); Commonwealth v. Henkel, 338 Pa. Super. 368, 487 A.2d 1010 (1985); Commonwealth v. Gemelli, 326 Pa. Super. 388, 474 A.2d 294 (1984); Commonwealth v. Smerechenski, 321 Pa. Super. 549, 468 A.2d 1129 (1983); Commonwealth v. Murray, 217 Pa. Super. 307, 272 A.2d 201 (1970); Commonwealth ex rel. Burton v. Baldi, 147 Pa. Super. 193, 24 A.2d 76 (1942). For federal courts, see 18 U.S.C. § 3731 (1982); *cf.* Commonwealth v. Scott, ___ Pa. Super. ___, 509 A.2d 1301 (1986).

105. As to when principles of double jeopardy bar a state's right of appeal, see *supra* notes 67-70 and accompanying text.

therefore, an appellate court will not review a case until sentence has been imposed.[106] Appeals improperly filed before judgment of sentence will thus be quashed by the appellate court because they are prematurely presented before the final, formal termination of litigation.

There are so many various appealable final orders in non-criminal matters that one can only offer an illustrative, but lengthier, list of those orders that literally and finally terminate a case. In non-criminal cases (for example, trespass, assumpsit, equity, support, probate, divorce, etc.), the following orders are *generally* appealable:[107] (1) final judgment following a decision or verdict on liability, damages and dismissal of post-trial motions;[108] (2) final decree in equity after the denial of post-trial relief;[109] (3) judgment on the pleadings;[110] (4) summary judgment;[111] (5) judgment in a "case stated" in which the parties have reserved the right to appeal;[112] (6) default judgment as to both liability and damages;[113] (7) non pros or the refusal to remove a non pros;[114] (8) dismissal of a complaint;[115]

106. *See* Commonwealth v. Pollick, 420 Pa. 61, 215 A.2d 904 (1966); Commonwealth v. Wright, 383 Pa. 532, 119 A.2d 492 (1956); Commonwealth v. Reagan, 330 Pa. Super. 417, 479 A.2d 621 (1984); Commonwealth v. Wills, 328 Pa. Super. 342, 476 A.2d 1362 (1984); Commonwealth v. Nugent, 291 Pa. Super. 421, 435 A.2d 1298 (1981); Commonwealth v. Bennett, 236 Pa. Super. 509, 345 A.2d 754 (1975).

107. *But see infra* note 123 and accompanying text.

108. *See* PA. R. CIV. P. 227.1 and note thereto (post-trial relief), 227.4 (entry of judgment upon praecipe of party); PA. R. APP. P. 301(c), 301(d).

109. *See* PA. R. CIV. P. 1501 (conformity to civil action), 1520 (form of decree in equity); *see also* Stotsenburg v. Frost, 465 Pa. 187, 348 A.2d 418 (1975) (final decree, not judgment, determines appealability), mentioned in note following PA. R. APP. P. 301(a).

110. *See* PA. R. CIV. P. 1034 (judgment on the pleadings); see also Indiana County Hosp. v. McCarl's Plumbing, 344 Pa. Super. 226, 496 A.2d 767 (1985) (exceptions to judgment on pleadings not proper); Dudash v. Palmyra Borough Auth., 335 Pa. Super. 1, 483 A.2d 924 (1984).

111. *See* PA. R. CIV. P. 1035 (summary judgment).

112. *See, e.g.*, Wertz v. Anderson, ___ Pa. Super. ___, 508 A.2d 1218 (1986); *supra* notes 65-66 and accompanying text.

113. *See* PA. R. CIV. P. 237.1 (notice requirement), 4019(c)(3) (default as sanction), 1037 (civil action, default judgment), 1511 (equity action, default judgment); *see also* Livolsi v. Crosby, 344 Pa. Super. 34, 495 A.2d 1384 (1985); Miller Oral Surgery v. Dinello, 342 Pa. Super. 577, 493 A.2d 741 (1985); Sims v. Feingold, 329 Pa. Super. 437, 478 A.2d 868 (1984). The appealability of such judgments is problematic and deserves careful attention. *See, e.g.*, Wills Equip. Co. v. Goldman Enter., 325 Pa. Super. 116, 472 A.2d 674 (1984) (appeal from order entering default judgment as sanction entertained without discussion of jurisdiction); Marshall v. Southeastern Pa. Transp. Auth., 76 Pa. Commw. 205, 463 A.2d 1215 (1983) (sanction order precluding defense is appealable notwithstanding absence of assessment of damages). *See also infra* notes 196, 204-11; *cf.* PA. R. APP. P. 311 (appealability of order striking/opening or refusing to strike/open judgments) (discussed *infra* notes 272-82 and accompanying text.

114. *See* PA. R. CIV. P. 218 (non pros or nonsuit if plaintiff is not ready), 1037 (entry of non pros for failure to file complaint), 4019(c)(3) (entry of non pros as discovery sanction); *see also* Salladino v. Patrolman Brooks No. 4035, 324 Pa. Super. 172, 471 A.2d 518 (1984); Erie Human Rel. Comm'n ex rel. Dunson v. Erie Ins. Exch., 304 Pa. Super. 172, 450 A.2d 157

(9) refusal to remove a nonsuit;[116] (10) grant or denial of support, including the grant or refusal to modify a support order;[117] (11) entry of a divorce decree;[118] (12) order of equitable distribution;[119] (13) determinations of custody;[120] (14) imposition of fine or sentence after a finding of civil contempt;[121] and (15) order confirming a last will following the dismissal of exceptions or post-trial motions.[122] In

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(1982) (direct appeal from entry of non pros suggested); Hatalowich v. Bednarski, 315 Pa. Super. 303, 461 A.2d 1292 (1983); *cf.* Iole v. Western Auto Supply, ___ Pa. Super. ___, ___ n.3, 508 A.2d 600, 602 n.3 (1986) (plaintiff's appeal from order refusing to open or strike non pros is proper; *Erie* distinguished); Walker v. Pugliese, 317 Pa. Super. 595, 464 A.2d 482 (1983) (appeal from order denying petition to open non pros); *see also* PA. R. APP. P. 311.

115. *See* Boden v. Tompkins, 306 Pa. Super. 494, 452 A.2d 833 (1982) (order dismissing complaint ends litigation and is appealable); *cf.* United States Nat'l Bank in Johnstown v. Johnson, 506 Pa. 622, 487 A.2d 809 (1985) (dismissal of appellee has same effect as dismissal of complaint and was immediately appealable without need to reduce order to judgment); *but see* Leach v. Hough, ___ Pa. Super. ___, 507 A.2d 848 (1986) (noting general rule that sustaining preliminary objections without dismissal lacks requisite finality); Sullivan v. Philadelphia, 378 Pa. 648, 107 A.2d 854 (1954) (sustaining preliminary objections without dismissing complaint is not final order).

116. *See* PA. R. CIV. P. 230 (voluntary nonsuit), 230.1 (compulsory nonsuit at trial), 227.1(a)(3) (removal of nonsuit), 218 (non pros or nonsuit if party is not ready for trial), 1512 (equity, nonsuit), 224 (nonsuit on question of liability before receipt of testimony), 2231(g), (h) (nonsuit when parties have been joined), 2232(d) (nonsuit in case in which defendants have been joined), 2035, 2057 (nonsuit in cases involving unrepresented minors or incompetents); *see also* Steiner v. Lurie, 308 Pa. Super. 295, 454 A.2d 138 (1982) (appeal from refusal to remove nonsuit not from the entry of a nonsuit); Miller v. Hurst, 302 Pa. Super. 235, 448 A.2d 614 (1982) (en banc); *accord*, Panepinto v. Dummy's Delightful Saloonery, 304 Pa. Super. 256, 450 A.2d 668 (1982). Arguably, the jurisdictional principle goes one step beyond the classical finality rule but the reason for the additional requirement is a necessary and reasonable one, especially in terms of meaningful appellate review. *Cf.* Butler v. Emreson, 76 Pa. Commw. 156, 463 A.2d 109 (1983) (appeal from partial peremptory judgment in mandamus was premature; appellant must first file a petition to open judgment; appeal quashed).

117. *See* Fortune/Forsythe v. Fortune, ___ Pa. Super. ___, 508 A.2d 1205 (1986) (appeal from order in nature of denial of petition for modification of support); PA. R. CIV. P. 1910.1-1910.31 (procedures governing support actions); *see also* PA. R. CIV. P. 1910.11(k), 1910.12(g) (motion for post-trial relief not permitted).

118. *See* PA. R. CIV. P. 1920.55, 1920.76; *see also* Hall v. Hall, 333 Pa. Super. 483, 482 A.2d 974 (1984); Wolf v. Wolf, 318 Pa. Super. 311, 464 A.2d 1359 (1983).

119. *See* Semasek v. Semasek, 509 Pa. 282, 502 A.2d 109 (1985); Braderman v. Braderman, 339 Pa. Super. 185, 488 A.2d 613 (1985); PA. STAT. ANN. tit. 23, §§ 101-801 (Purdon 1986).

120. *See* Hartman v. Hartman, 328 Pa. Super. 154, 476 A.2d 938 (1984) (modification of prior custody order); Shaffer v. Goal, 312 Pa. Super. 399, 458 A.2d 1020 (1983) (custody); PA. R. CIV. P. 1915.1-1915.25.

121. *See* Fenstermaker v. Fenstermaker, 337 Pa. Super. 410, 487 A.2d 11 (1985); *but cf.* Johnston v. Johnston, 346 Pa. Super. 427, 499 A.2d 1074 (1985) (order threatening contempt and directing defendants to execute agreement characterized as in nature of mandatory injunction and reviewed); Rulli v. Dunn, 337 Pa. Super. 613, 487 A.2d 430 (1985) (citing defendants in contempt and directing compliance with order of expunction not appealable until sanctions imposed; defendants not yet found in contempt for appeal purposes); Lehigh Township v. Tahos, 91 Pa. Commw. 568, 498 A.2d 30 (1985) (appeal from order finding defendants in contempt, after they refused to obey order to raze or sell property, quashed as interlocutory until lower court complied with necessary procedural steps for contempt).

122. *See, e.g.*, Estate of Younger, ___ Pa. Super. ___, 508 A.2d 327 (1986) (appeal from order denying exceptions and confirming last will of decedent).

all of these generic examples, if the order disposes of the entire case and terminates litigation, the party aggrieved by the order may appeal from such final orders. In all of these examples, however, it is imperative that the aggrieved party ascertain the proper procedural requirements[123] that may be required in the lower or appellate courts. The aggrieved party must continually examine the appealability of such orders by keeping informed of any new cases or procedural rules that may modify the right to appeal.

2. Interlocutory Orders Distinguished—As a general rule, therefore, an order which does not terminate the case is not final and is not immediately appealable. Such nonfinal orders are termed *interlocutory*.[124] They are subject to immediate appellate review only in those infrequent circumstances in which an interlocutory appeal is specifically authorized by statute or rule of court. Thus, interlocutory decisions, which naturally occur throughout the course of a proceeding below, cannot be reviewed until the bag and baggage of the entire terminated lower court case arrives in the appellate court. At that time, all the interlocutory orders or decisions that preceded the final order appealed are then eligible for appellate review.

As with the discussion of classically final orders, a selective list of interlocutory orders may promote some understanding of the limits of appellate jurisdiction. In all of the following examples, a case is neither disposed of nor terminated. The episodic decisions in a case are only steps toward its ultimate, final disposition, although some decisions may recognizably be temporally closer to the case's definitive terminal point. In *civil matters*, for example, the following re-

123. For example, a litigant may have to file exceptions or post-trial motions in order to preserve issues for appellate review. *See* PA. R. APP. P. 302; PA. R. CIV. P. 227.1. The filing of an appeal after the entry of a final order may be sufficient for jurisdictional purposes, but such an important procedural step, in itself, does not necessarily preserve issues for appellate review. *See supra* note 86; *cf. supra* note 117.

124. "Interlocutory" has been defined as follows: "Provisional; interim; temporary; not final. Something intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy." BLACK'S LAW DICTIONARY 731 (5th ed. 1979). Consider also the following definition of an "appealable order":

> A decree or order which is sufficiently final to be entitled to appellate review, as contrasted with an interlocutory order which generally is not appealable until the case has been tried and judgment entered, *e.g.*, a denial of motion for summary judgment is not appealable but the allowance of such motion is a final judgment and hence appealable . . .

Id. at 89. *See also* Note, *The Finality and Appealability of Interlocutory Orders — A Structural Reform Toward Redefinition*, 7 SUFFOLK L. REV. 1037 (1973); Cochran v. M & M Transp. Co., 110 F.2d 519 (1st Cir. 1940) (piecemeal appeals are undesirable but allowable in exceptional circumstances).

present interlocutory decisions:

(1) dismissal of preliminary objections;[125]

(2) entry of verdict or dismissal of post-trial motion without formal entry of final judgment;[126]

(3) granting the right to intervene;[127]

(4) adjudication of contempt without imposition of sanctions;[128]

(5) entry of default judgment on liability only, without determination of damages;[129]

(6) granting a petition to proceed on a class action basis;[130]

(7) granting or denying discovery requests,[131] including the imposition of costs;[132]

(8) ordering consolidation or severance;[133]

(9) denying or granting motion to disqualify counsel;[134]

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125. United Erectors v. Pratt & Lambert Corp., 338 Pa. Super. 577, 488 A.2d 43 (1985); Foulke v. Lavelle, 308 Pa. Super. 131, 454 A.2d 56 (1982).

126. *See* Slagter v. Thrifty Clean, Inc., 441 Pa. 272, 272 A.2d 885 (1971); Straw v. Sands, 426 Pa. 81, 231 A.2d 144 (1967); Minich v. City of Sharon, 325 Pa. Super. 178, 472 A.2d 706 (1984). *And see* Murphy v. Brong, 321 Pa. Super. 340, 468 A.2d 509 (1983) (dismissal of exceptions without entry of judgment is interlocutory and not appealable); Litt v. Rolling Hill Hospital, 293 Pa. Super. 97, 437 A.2d 1008 (1981) (post verdict appeal premature before disposition of post trial motions). Note, however, that PA. R. APP. P. 905(a) attempts to address the problem of premature appeals, i.e., those filed before entry of an appealable order, by providing for, in a sense, retroactive appealability, which operates to perfect an otherwise premature or defective appeal. *See supra* note 85.

127. *See In re* Manley, 305 Pa. Super. 332, 451 A.2d 557 (1982) (order permitting intervention not appealable); Sailor Planing Mill & Lumber Co. v. Moyer, 35 Pa. Super. 503 (1908); *but cf.* Boise Cascade Corp. v. East Stroudsburg Sav., 300 Pa. Super. 279, 446 A.2d 614 (1982); *infra* notes 222-25 and accompanying text (appealability of orders denying intervention).

128. *See* Hester v. Bagnato, 292 Pa. Super. 322, 437 A.2d 66 (1981); *supra* note 121.

129. *See supra* note 113; *infra* notes 195-211 and accompanying text.

130. *See* Piltzer v. Independence Sav. & Loan Ass'n, 456 Pa. 402, 319 A.2d 677 (1974); Canulli v. Allstate Ins. Co., 315 Pa. Super. 460, 462 A.2d 286 (1983); *but see infra* notes 239-241 (orders denying class action certification).

131. *See* Pennsylvania Human Relations Comm'n v. Jones & Laughlin Steel Corp., 483 Pa. 35, 394 A.2d 525 (1978); Kine v. Forman, 412 Pa. 163, 194 A.2d 175 (1963); Quinn v. Pennsylvania R. Co., 219 Pa. 24, 67 A. 949 (1907); *In re* McGovern, 291 Pa. Super. 222, 435 A.2d 878 (1981).

132. *See* McManus v. Chubb Group of Ins. Cos., 342 Pa. Super. 405, 493 A.2d 84 (1985), distinguishing and perhaps overruling *sub silentio* Pitell Co., Inc. v. Penn State Constr., 277 Pa. Super. 575, 419 A.2d 1299 (1980) (pretrial discovery sanction "reduced to judgment" appealable); *cf.* Garris v. McClain, 399 Pa. 261, 160 A.2d 398 (1960) (order imposing costs appealable when issued in conjunction with order withdrawing juror and declaring mistrial; appeal from order granting continuance); *see also* Hall v. Lee, 285 Pa. Super. 542, 428 A.2d 178 (1981) (costs order not appealable); Glisson v. Carlin, 204 Pa. Super. 335, 204 A.2d 285 (1964) (pretrial order imposing costs not appealable); PA. R. CIV. P. 4019; *but cf.* Trustees v. Greenough, 105 U.S. 527, 531 (1882) (collateral orders allowing attorney's fees or costs appealable); Swanson v. American Consumer Indus. Inc., 517 F.2d 555 (7th Cir. 1975). For a discussion of the "collateral order doctrine," see *infra* notes 242-70 and accompanying text.

133. *See* Matthews v. Johns-Manville Corp., 307 Pa. Super. 300, 453 A.2d 362 (1982).

134. *See* Pittsburgh & New England v. Reserve Ins., 277 Pa. Super. 215, 419 A.2d 738 (1980) (citing Middleberg v. Middleberg, 427 Pa. 114, 233 A.2d 889 (1967)); *cf.* Slater v. Rimar, 462 Pa. 138, 152 n. 15, 338 A.2d 584, 591 n. 15 (1975) (where court characterized an

(10) denial of a motion for reconsideration;[135]

(11) denial of a motion for a non pros;[136]

(12) denial of summary judgment[137] or the grant of partial summary judgment, for example, with respect to liability only;[138]

(13) refusal to grant a protective order;[139]

(14) order imposing or striking a lis pendens;[140]

(15) remand of a case to the worker's compensation referee;[141]

(16) sustaining preliminary objections without dismissal or contemporaneously granting the plaintiff leave to amend the complaint;[142]

(17) refusing a request for permission to amend a complaint or

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order disqualifying counsel as final when it also dismissed action); Seiffert v. Dumatic Indus., 413 Pa. 395, 197 A.2d 454 (1964); Woolard v. Burton, 345 Pa. Super. 366, 498 A.2d 445 (1985) (appeal by counsel from order directing his withdrawal from case was proper); *see also* 42 PA. CONS. STAT. ANN. § 102 (Purdon 1981) ("party" includes counsel); Annot., 5 A.L.R. 4th 1251 (1981); *infra* notes 242-70 and accompanying text (discussion of collateral order doctrine).

135. *See* PA. R. APP. P. 1701; *see also* Indiana County Hosp. v. McCarl's Plumbing, 344 Pa. Super. 226, 496 A.2d 767 (1985); Commonwealth v. Gordon, 329 Pa. Super. 42, 477 A.2d 1342 (1984); Boden v. Tompkins, 306 Pa. Super. 494, 452 A.2d 833 (1982).

136. *See* Goldfine v. Zatz, 422 Pa. 27, 221 A.2d 126 (1966); Cathcart v. Keene Indus. Insulation, 324 Pa. Super. 123, 153, 471 A.2d 493, 509 (1984); *see also supra* note 114.

137. Pennsylvania Turnpike Comm'n v. Atlantic Richfield Co., 482 Pa. 615, 394 A.2d 491 (1978); Cathcart v. Keene Indus. Insulation, 324 Pa. Super. 123, 471 A.2d 493 (1984); Nordmann v. Commonwealth, 79 Pa. Commw. 187, 468 A.2d 1173 (1983). Note, however, that in *Pennsylvania Turnpike*, the court reviewed an appealed order that granted summary judgment on less than all the claims. The concurring and dissenting opinions by Justices Pomeroy and Nix (now Chief Justice) are noteworthy on the jurisdictional issue. *See Pennsylvania Turnpike*, 482 Pa. at 621, 624, 394 A.2d at 495, 496 (Pomeroy and Nix, JJ., concurring and dissenting).

138. *See, e.g.*, Metropolitan Life Ins. v. Bodge, ___ Pa. Super. ___, 507 A.2d 837 (1986); Robson v. State Farm Mut. Auto Ins. Co., 335 Pa. Super. 365, 484 A.2d 177 (1984); Szwecki v. Travelers Ins. Co., 324 Pa. Super. 32, 471 A.2d 109 (1984); Canulli v. Allstate Ins. Co., 315 Pa. Super. 460, 462 A.2d 286 (1983); *but see* Pennsylvania Turnpike Comm'n v. Atlantic Richfield Co., 482 Pa. 615, 394 A.2d 491 (1978) (discussed *supra* note 137).

139. *See* Steel v. Weisberg, 347 Pa. Super. 106, 500 A.2d 428 (1985).

140. *See* United States Nat'l Bank in Johnstown v. Johnson, 506 Pa. 622, 487 A.2d 809 (1985); 6 & 8 Builders Supply, Inc. v. Buell, 292 Pa. Super. 307, 437 A.2d 58 (1981); *but cf.* McCahill v. Roberts, 421 Pa. 233, 219 A.2d 306 (1966) (order, in effect, striking lis pendens, was final and appealable since it effectively denied plaintiffs their ownership rights); *see also infra* notes 283-86 and accompanying text (concerning interlocutory appeals involving property rights under PA. R. APP. P. 311).

141. *See* Croll v. Workmens Compensation App. Bd., 50 Pa. Commw. 483, 413 A.2d 439 (1980) (involving appeal in the nature of a petition for review); Murhon v. Workmen's Compensation Appeal Bd., 51 Pa. Commw. 214, 414 A.2d 161 (1980) (reverting to prior practice that remand orders of Board to referee are unappealable without exception), prospectively applied in Brennan & Sons Inc. v. Workmen's Compensation Appeal Bd., 72 Pa. Commw. 243, 457 A.2d 135 (1983).

142. *See* Sullivan v. Philadelphia, 378 Pa. 648, 107 A.2d 854 (1954); Leach v. Hough, ___ Pa. Super. ___, 507 A.2d 948 (1986); Jones v. Nissenbaum, Rudolph & Seidner, 244 Pa. Super. 377, 368 A.2d 770 (1976); Graybill v. Fricke, 53 Pa. Commw. 8, 416 A.2d 626 (1980). However, if the plaintiff is so restricted in his pleadings as to be effectively put out of court, the order will be deemed final. *See infra* notes 174-94 and accompanying text.

pleading;[143]

(18) directing that a specified judgment, sentence, or order be entered without actual entry of the specified order on the lower court's docket;[144]

(19) denying a motion for a new trial.[145]

In *criminal matters*, in which the concept of finality or policy against protracted litigation is more rigid, the following orders are noticeably interlocutory in nature:

(1) conviction without imposition of sentence;[146]

(2) denial of defendant's request for habeas corpus relief;[147]

(3) order permitting the withdrawal of a guilty plea;[148]

(4) revocation of bail;[149]

(5) refusal to quash a subpoena;[150]

(6) denial of defendant's pretrial speedy trial claim;[151]

(7) denial of defendant's motion to suppress evidence;[152]

(8) refusal to consolidate;[153]

(9) certification of a juvenile as an adult for trial.[154]

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143. *See* Stadler v. Mt. Olive Borough, 373 Pa. 316, 95 A.2d 776 (1953); Marks v. Marks, 300 Pa. Super. 288, 446 A.2d 618 (1982) (order denying plaintiff wife's petition to proceed under new divorce code was not final) (distinguishing Gordon v. Gordon, 293 Pa. Super. 491, 439 A.2d 683 (1981) *aff'd*, 498 Pa. 570, 449 A.2d 1378 (1982) (order denying defendant's petition appealable)).

144. *See* PA. R. APP. P. 301(c).

145. *Id.*

146. *See* Commonwealth v. Myers, 457 Pa. 317, 322 A.2d 131 (1974); Commonwealth v. Nugent, 291 Pa. Super. 421, 435 A.2d 1298 (1981).

147. *See* Commonwealth v. Ballard, 501 Pa. 230, 460 A.2d 1091 (1983); Commonwealth v. Hess, 489 Pa. 580, 414 A.2d 1043 (1980); Commonwealth v. Burkett, ____ Pa. Super. ____, 507 A.2d 1266 (1986); *see also infra* notes 352-64 and accompanying text (discussion concerning "exceptional circumstances" jurisdiction).

148. *See* Commonwealth v. Wise, 328 Pa. Super. 491, 477 A.2d 552 (1984).

149. *See* Commonwealth v. Colleran, 323 Pa. Super. 1, 469 A.2d 1130 (1983). The proper procedure in bail matters is to file a "petition for review." *See* Commonwealth v. Cabeza, 489 Pa. 142, 145 n. 2, 413 A.2d 1054, 1055 n. 2 (1980); Commonwealth v. Heiser, 330 Pa. Super. 70, 71 n. 1, 478 A.2d 1355, 1356 n.1 (1984); *see also* PA. R. APP. P. 1762, 1503 *supra* notes 10 and 16.

150. *See* Petition of Specter, 455 Pa. 518, 317 A.2d 286 (1974); *cf. In re* January, 1974 Special Grand Jury, 238 Pa. Super. 479, 357 A.2d 628 (1976) (order denying motion to quash subpoena certified for review); see also *infra* notes 315-51 and accompanying text regarding appellate review of certified orders.

151. *See* Commonwealth v. Myers, 457 Pa. 317, 322 A.2d 131 (1974); Commonwealth v. Bennett, 236 Pa. Super. 509, 345 A.2d 754 (1975).

152. *See* Commonwealth v. Washington, 428 Pa. 131, 236 A.2d 772 (1968); *but cf.* Commonwealth v. Barnes, 307 Pa. Super. 143, 452 A.2d 1355 (1982) (defendant's cross-appeal from order denying suppression was reviewable) (citing Commonwealth v. Bordner, 432 Pa. 405, 247 A.2d 612 (1968)). As to the Commonwealth's right to appeal orders granting motions to suppress, see *infra* notes 233-36 and accompanying text.

153. *See* Commonwealth v. Saunders, 483 Pa. 29, 394 A.2d 522 (1978).

154. *See* Commonwealth v. Madden, 342 Pa. Super. 120, 492 A.2d 420 (1985) (appeal from order decertifying defendant from adult to juvenile court was entertained; note, however, Judge Beck's jurisdictional analysis in her dissent).

In addition to those theoretically applicable jurisdictional circumstances discussed with regard to civil actions, in matters relating to family and probate law, the following orders do not terminate litigation and would not traditionally be considered final for appeal purposes:

(1) granting or denying interim support, costs, or counsel fees in a divorce action;[155]

(2) finding of paternity without a determination of amount of support;[156]

(3) bifurcation of a divorce action from equitable distribution or dismissal of exceptions without entry of divorce decree;[157]

(4) denial of a motion for blood tests;[158]

(5) directing executors to pay funds or directing the filing of an accounting before final distribution.[159]

C. *Constructive Finality: The Pragmatic Approach*

The classical aspect of the final order doctrine is relatively simple to apply because the focal point is an easily identifiable criterion, namely, the termination or complete disposition of a case. At that point, the parties are literally "out of court" and there is no need for further action by the lower court. This aspect of the final order doctrine is, one might say, technical or mechanical in nature. Its rigidity suggests a per se rule.[160] As with many such rules, however, rigid application may produce draconian consequences upon the litigants.

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155. The major pronouncement in this area is Fried v. Fried, 509 Pa. 89, 501 A.2d 211 (1985), which referred to Judge Beck's dissent in Sutliff v. Sutliff, 326 Pa. Super. 496, 504, 474 A.2d 599, 603 (1984). Note the variable appealability of such support orders under prior caselaw in Henderson v. Henderson, 458 Pa. 97, 100 n.5, 327 A.2d 60, 61-62 n.5 (1974) (allowance of interim alimony and fees is appealable); Morelli v. Morelli, 316 Pa. Super. 54, 462 A.2d 789 (1983); Brady v. Brady, 168 Pa. Super. 538, 79 A.2d 803 (1951); Rutherford v. Rutherford, 152 Pa. Super. 517, 32 A.2d 921 (1943) (denial of such interim relief is not appealable).

156. *See* PA. R. CIV. P. 1910.15; *see also* Gainer v. Jones, 347 Pa. Super. 462, 500 A.2d 1148 (1984).

157. *See* Beasley v. Beasley, 348 Pa. Super. 124, 501 A.2d 679 (1985); *see also* Mandia v. Mandia, 341 Pa. Super. 116, 491 A.2d 177 (1985), which presented a clearly unusual and difficult jurisdictional dilemma; Hammond v. Hammond, 301 Pa. Super. 439, 447 A.2d 1047 (1982) (appeal from dismissal of exceptions to Master's Report quashed).

158. *See* Sanderbeck v. Sanderbeck, 327 Pa. Super. 461, 476 A.2d 44 (1984).

159. *See* Stewart Estate, 423 Pa. 189, 223 A.2d 685 (1966); Gramm's Estate, 420 Pa. 510, 218 A.2d 342 (1966); *but cf.* Brose's Estate, 423 Pa. 420, 223 A.2d 661 (1966) (order directing executor to account and include moneys not yet in his hands is appealable); *In re* Williams' Estate, 338 Pa. 98, 12 A.2d 103 (1940) (appealable order surcharging fiduciary); *see also supra* note 26 (discussion concerning an executor's standing to appeal).

160. The term "per se" has been defined as meaning "by itself" and referring to "in its own nature without reference to its relations." *See* BLACK'S LAW DICTIONARY 1028 (5th ed. 1979).

A litigant may, metaphorically speaking, be bound and gagged by a lower court's order; yet he is still in court for purposes of technical finality until the case is finally over. Literally, it's not over until it's over. In contrast to the federal courts, the Pennsylvania courts have produced a body of case law that signifies a sympathetic shift in values favoring the aggrieved, but not technically out-of-court, litigant.[161] The Pennsylvania courts, not facing the specific statutory obstacles imposed upon the federal courts,[162] have assuaged the potential hardship of the classical finality rule by adding a component of pragmatism. To borrow antitrust phraseology, one might say that the classical aspect of the final order doctrine represents a per se rule; the pragmatic aspect represents a "rule of reason." For convenience purposes, this pragmatic version of the final order doctrine shall be referred to as *constructive finality*.[163]

The pragmatic aspect of the final order doctrine, therefore, goes beyond the frontiers of classical finality into a jurisdictional terrain that is rocky. Constructive finality reveals the holophrastic and capacious quality of the disingenuously simple term, final order. The principle of constructive finality is really a distinct procedural concept, distinguishable, for example, from technical finality or the collateral order doctrine, although there is some consanguinity with the latter doctrine.[164] In essence, pragmatic or constructive finality arguably applies to those causes of action or claims for relief that are integral to final disposition. In application, constructive finality may categorize an order as final when it effectively places a litigant "out of court" as to her cause of action or claim.[165] The conclusion of

161. *Cf. infra* note 174.

162. In the federal courts, appealability of orders disposing of less than all claims is controlled by 28 U.S.C. § 1292 (1984) and FED. R. CIV. P. 54(b). *See infra* notes 212-21 and accompanying text.

163. "Constructive" has been defined, in part, as follows: "That which has not the character assigned to it in its own essential nature, but acquires such character in consequence of the way in which it is regarded by a rule or policy of law; hence, inferred, implied, or made out by legal interpretation. . . ." BLACK'S LAW DICTIONARY 283 (5th ed. 1979).

164. Perhaps the most significant relationship between constructive finality and the final order doctrine is the underlying policy judgment that the rights involved are too important to be denied review, which is sometimes the second prong of the "collateral order doctrine." Certainly, constructive finality does not concern matters collateral to the main cause of action or claims for relief; and rarely would constructive finality concern rights that would be irreparably lost unless immediate appellate review was granted. Despite those considerations, one often sees opinions interchangeably citing cases involving constructive finality, the collateral order, and final order doctrines in support of discussions on finality.

165. *See generally*, T.C.R. Realty, Inc. v. Cox, 472 Pa. 331, 372 A.2d 721 (1977); Commonwealth v. Orsatti, 448 Pa. 72, 292 A.2d 313 (1972); Marino Estate, 440 Pa. 492, 269 A.2d 645 (1970) (order is final if it precludes one from presenting merits of claim); Ventura v. Skylark Motel, Inc., 431 Pa. 459, 246 A.2d 353 (1968); Foulke v. Lavelle, 308 Pa. Super. 131, 454 A.2d 56 (1982); Gordon v. Gordon, 293 Pa. Super. 491, 439 A.2d 683 (1981), *aff'd*, 498

finality applies notwithstanding the fact that litigation is not actually terminated. In such circumstances, the order, which effectively places a litigant out of court, will be considered the functional equivalent of a final order for purposes of appellate jurisdiction.[166]

The principle of finality, considered in the context of constructive finality or the rule of reason, is an especially nettlesome one. As the commonwealth court once remarked, "Although the . . . standard [of finality] is rhetorically clear, its application is often difficult."[167] Pennsylvania case law has emphasized that finality is a judicial conclusion achievable only after the individual facts of a case have been carefully examined.[168] Although an examination of the particular facts of a case is always necessary, one can safely identify some examples that are beyond the pale of the rule and some broad categories that are clearly within it.

For example, constructive finality must, by definition, import some meaning of finality or completion. Therefore, orders that in form or function involve inactivity or temporariness cannot come within the spirit or definitional rubric of constructive finality. Thus, an order that either postpones decision-making[169] or specifically imposes an interim[170] or conditional aspect[171] upon the lower court's

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Pa. 570, 449 A.2d 1378 (1982).

166. The note to PA. R. APP. P. 341 (citing, inter alia, Bell v. Beneficial Consumer Discount Co., 465 Pa. 225, 348 A.2d 734 (1975)) indicates that the rules are not meant to change prior practice as to the appealability of orders which have a "final aspect."

167. *See* Weiss v. City of Philadelphia, 65 Pa. Commw. 260, 266, 442 A.2d 378, 381 (1982).

168. *See* Pugar v. Greco, 483 Pa. 68, 394 A.2d 542 (1978) (appeal quashed). Note, however, that the doctrinal foundation of this case is really the "collateral order doctrine." *See infra* notes 242-70 and accompanying text.

169. *See* Cribb v. United Health Clubs, Inc., 336 Pa. Super. 479, 485 A.2d 1182 (1984) (refusal to review lower court's inaction on collateral petition to intervene); Lasco v. Lasco, 300 Pa. Super. 494, 446 A.2d 963 (1982) (order postponing decision on defendant's petition to modify alimony pendente lite did not constitute final determination on merits of the petition; appeal quashed as premature); *cf. supra* note 155 as to subsequent nonappealability of interim alimony orders; *see also* Cheney v. Village 2 at New Hope, Inc., 429 Pa. 626, 642-643, 241 A.2d 81, 89 (1968) (orders deferring decision on preliminary objections not appealable; two appeals quashed); *but see* Carpenter v. Carpenter, 326 Pa. Super. 570, 574 n.2, 474 A.2d 1124, 1126-27 n.2 (1984) (stay of custody order tantamount to denial of relief); PA. R. APP. P. 301(e) and note thereto (emergency appeals when party is unable to secure entry of an appealable order).

170. Rodgers v. Yodock, 309 Pa. Super. 154, 454 A.2d 1129 (1983) (temporary stay of writ of execution for 30 days not final) (noting and distinguishing Cherry v. Empire Mutual Ins. Co., 417 Pa. 7, 11, 208 A.2d 470, 471 (1965); and National Council of Junior Order v. Roberson, 214 Pa. Super. 9, 248 A.2d 861 (1969)); West v. West, 301 Pa. Super. 75, 446 A.2d 1342 (1982) (interim order compelling payment of support "until further notice" not final since litigant not precluded from presentation of merits); *but see* Laczkowski v. Laczkowski, 344 Pa. Super. 154, 496 A.2d 56 (1985) (appellate review of order granting temporary possession of marital residence to wife pending divorce). Note Judge Beck's dissent in *Laczkowski* and the fact that the appellate issue actually involved the collateral order doctrine

action is not constructively or pragmatically final. The litigant is certainly not "out of court" and relief is not necessarily precluded.

Nevertheless, the court must look to the substance and practical effect of the appealed order. An important consideration, although not dispositive of finality, is the possibility of irreparable harm. This factor may be considered in conjunction with the primary concern, that is, whether the appellant is *effectively* deprived of the ability to present a claim.[172] When the denial of relief does not effectively or in practical terms put the litigant out of court, then the order is not constructively final and an appeal will be quashed as interlocutory.[173]

With these broad guidelines as a backdrop, specific types of cases that concern applications of the principle of constructive finality deserve attention.

1. Multiple Claims and Parties—Partial Dismissal

(a) *The plaintiff's case: one foot in and one foot out of the courtroom*—One of the most difficult jurisdictional dilemmas is determining the existence of appellate jurisdiction when the lower court has truncated a plaintiff's case. Often, a lower court will decide that a plaintiff can only proceed on part of his complaint or that

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in the context of a decision affecting the welfare of a child. *Cf.* Fried v. Fried, 509 Pa. 89, 501 A.2d 211 (1985) (interim support orders not reviewable under the collateral order doctrine).

171. *See* Harasym v. Pennsylvania, Dept. of Transp., 321 Pa. Super. 492, 468 A.2d 817 (1983) (expressly conditional sanction order finding additional defendant liable to defendant on defendant's cross-claim not appealable since there was no determination as to defendant's liability to the plaintiff); *but cf.* Carrollo v. Forty-Eight Insulation, Inc., 252 Pa. Super. 422, 381 A.2d 990 (1970) (defendant or additional defendant may appeal order letting one or the other out of the case); *see also* Brandywine Area Joint School Auth. v. VanCor, Inc., 426 Pa. 448, 451, 233 A.2d 240, 241 (1967). One could argue that in these cases, unlike *Harasym*, one party is out of court vis-a-vis another party.

172. *See* Gordon v. Gordon, 293 Pa. Super. 491, 439 A.2d 683 (1981), *aff'd*, 498 Pa. 570, 449 A.2d 1378 (1982) ("out of court" not to be interpreted literally or synonymously with finality; order which prevented wife-defendant from proceeding under new divorce law put her out of court insofar as her own claims were concerned and deprived her of her day in court); *cf.* Marks v. Marks, 300 Pa. Super. 288, 446 A.2d 618 (1982) (order denying wife-plaintiff's petition to proceed under new divorce code not appealable since she is not "out of court" in her cause of action for divorce).

173. *See* Stadler v. Mt. Olive Borough, 373 Pa. 316, 95 A.2d 776 (1953) (mid-trial denial of motion to amend complaint is interlocutory since order does not prevent plaintiff from presenting case to jury); Wilkes-Barre Clay Prods. v. Koroneos, 342 Pa. Super. 582, 493 A.2d 744 (1985) (lower court's order reinstating defendant's appeal from decision of district magistrate not appealable since appellant is still in lower court for a de novo trial); Tsioukas v. Penn Nat'l Mut. Casualty, 339 Pa. Super. 78, 488 A.2d 317 (1985) (lower court's denial of motion to quash appeal to lower court from an arbitration award not appealable since appealed order did not end litigation or put parties out of court). As a number of these cases indicate, if a party is forced to litigate in court, he cannot claim that he is constructively "out of court" for appeal purposes. Marks v. Marks, 300 Pa. Super. 288, 446 A.2d 618 (1982) (order denying wife-plaintiff's petition to proceed under new divorce code not appealable since she is not "out of court" in her cause of action for divorce).

the plaintiff does not have a cause of action as to some of the defendants. In either situation, from the perspective of "classical" or "technical" finality, the litigation is not completely terminated and plainly the plaintiff is not "out of court." Must the plaintiff proceed with trial or can she appeal the piecemeal erosion of her case? Notwithstanding the inherent problem of balancing competing policies or ascertaining whether one alternative would be more cost efficient from the courts' (appellate *or* lower) or parties' point of view,[174] in limited circumstances piecemeal appellate review is indeed permissible. The caveat here, however, is that there are *no* easy answers, and appellate practice could conceivably be subject to dramatic changes given the aggressive aspects of the burgeoning case law in this area.

In assessing the appealability of an order[175] that does not terminate litigation in a multiple claims/parties situation, one perhaps should focus on four distinct aspects: (1) placing the plaintiff out of court by effectively foreclosing any avenue of relief; (2) restraining the plaintiff in his pleadings so as to practically place the plaintiff out of court; (3) dismissing some but not all of the plaintiffs' claims; and (4) dismissing a cause of action as to less than all of the defendants. The constructive finality concept would suggest the following

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174. The "notwithstanding" caveat could be the subject of a separate specialized study or article as to the economic ramifications of the various principles of finality. There are a number of difficult economic questions which cannot be answered with assumptions or impressions. For example, do the various principles of finality actually discourage duplicative litigation? What is Pennsylvania's experience with piecemeal or duplicative appellate review? What is the statistical likelihood that a case, which has already received pretermination appellate review, will re-enter the appellate court system for further review? And from whose vantage point does one determine economic impact — the appellate court, the lower court, or both? Is the "problem" of piecemeal appellate review more expensive in the long run for the appellate or the lower court?

Assessment of the impact of piecemeal appellate review arguably should be done in the context of balancing the interests of the courts and parties. Impinging upon this balance-of-interest analysis would be the plain fact that appellate caseloads have soared nationally. *See, e.g.*, BUREAU OF JUSTICE STATISTICS BULLETIN, THE GROWTH OF APPEALS, 1973-1983 TRENDS, (U.S. DEPT. OF JUSTICE, 1985); Marvell, *Appellate Court Caseloads: Historical Trends*, APPELLATE COURT CT. AD. REV. 3 (1983). Note also Judge Posner's economic analysis in Minority Police Officers Ass'n of South Bend v. City of South Bend, 721 F.2d 197 (7th Cir. 1983). *See also supra* note 6 (statistics). Another significant factor is the value or policy judgment disfavoring the protraction of litigation.

In Bell v. Beneficial Consumer Discount Co., 465 Pa. 225, 232, 348 A.2d 734, 738 (1975), Justice Roberts stated as follows: "We do not perceive our appellate responsibilities as a variable function of our caseload. Appellate review at this juncture [pre-trial denial of class action certification] is a judicial duty which we may not abdicate by simply saying that we do so to avoid 'congestion, delay and expense.' "

175. This discussion is limited primarily to the appealability of such orders in the civil context. The problem of appealability of such interlocutory orders is neither novel or indigenous to Pennsylvania. *See, e.g.*, Comment, *Partial Appeals*, 41 CALIF. L. REV. 277-89 (1953); Note, *Final Judgment As to Some But Not All Defendants*, 20 S. CAL. L. REV. 235-36 (1947).

results.

In 1977, the Pennsylvania Supreme Court was faced with a situation in which the lower court dismissed a plaintiff's action with prejudice. The order, however, did not terminate the litigation because the defendant's counter-claim remained to be tried. Emphasizing the importance of focusing on the practical ramifications of the lower court's order, the court in *T.C.R. Realty Inc., v. Cox*[176] concluded that the appealed order effectively and completely denied the plaintiff any opportunity for relief. For practical purposes, the order was final and appealable since it precluded the plaintiff from presenting the merits of its claim[177] to the lower court. In contrast, an order which strikes some damage portions of a plaintiff's complaint would not be constructively final since the order does not terminate litigation or deprive the plaintiff of an opportunity for relief.[178]

The next variation of constructive, pragmatic finality, from the aggrieved plaintiff's point of view, is when the lower court severely restricts the plaintiff's ability to plead so as to effectively put the plaintiff out of court. For example, a plaintiff may be pragmatically "out of court" when preliminary objections are sustained to the plaintiff's complaint, even though the lower court has extended what turns out to be a meaningless or inadequate opportunity to amend the complaint[179] or present the case in another forum.[180] In such circumstances, appellate jurisdiction may exist because there is con-

176. 472 Pa. 331, 372 A.2d 721 (1977).

177. *Id.* at 337, 372 A.2d at 724. The court, for example, cited Marino Estate, 440 Pa. 492, 494, 269 A.2d 645, 646 (1970) (order granting petition of an administrator for leave to retain additional counsel for estate in condemnation proceeding not appealable). The terminology (claim, cause of action) may be important when one considers later the dismissal of some counts of a plaintiff's complaint, *supra* notes 182-94.

178. *See* Safety T. Corp. v. Hoffman T. Co., Inc., 458 Pa. 102, 329 A.2d 834 (1974).

179. *See* Freeze v. Donegal Mut. Ins. Co., 504 Pa. 218, 221 n.5, 470 A.2d 958, 960 n.5 (1983) (sustaining of preliminary objections on no-fault work loss claim, with leave to amend to assert funeral and survival benefits, drastically altered plaintiff's cause of action so as to put plaintiff out of court); Ciletti v. City of Washington, 378 Pa. 641, 107 A.2d 871 (1954) (leave to amend so limited in scope that order was definitive and appealable); Jones v. Nissenbaum, Rudolf & Seidner, 244 Pa. Super. 377, 368 A.2d 770 (1976) (order sustaining preliminary objections with leave to amend was appealable); *c.f.* Capanna v. Travelers Ins. Co., ___Pa. Super. ___, 513 A.2d 397 (1986) (discussion *infra* text accompanying note 193).

180. *See* Goldman v. McShain, 432 Pa. 61, 247 A.2d 455 (1968) (in plaintiff's action for specific performance, certification of case to law side, in effect, dismissed complaint and denied relief, and was therefore appealable); *but see* D'Aloiso v. Chung, 347 Pa. Super. 392, 500 A.2d 891 (1985); Pittsburgh Airport Motel v. Airport Asphalt, 322 Pa. Super. 149, 469 A.2d 226 (1983) (order certifying case to law side of court not appealable because order did not put plaintiffs out of court on request for accounting); Husted v. Bd. of Directors of Wellsboro Area, 57 Pa. Commw. 520, 427 A.2d 272 (1981) (appeal from order dismissing complaint in equity but granting leave to file on law side quashed since plaintiffs still had opportunity to litigate and to be made whole).

structive finality. However, when the lower court sustains preliminary objections or enters an adverse judgment, but gives the plaintiff a meaningful alternative to amend the complaint, such an order will not be immediately appealable.[181]

The third aspect is perhaps the most difficult and elusive to grasp from a practical or conceptual approach. The seminal case in this area is *Praisner v. Stocker*,[182] in which the superior court held that the dismissal of less than all *separate and distinct causes of action*, joined under the permissive joinder standards,[183] is a final, immediately appealable order. Decisions to the contrary were specifically overruled. In *Praisner*, the lower court dismissed two counts (false arrest and malicious abuse of process) with the remaining cause of action (assault and battery) relegated to compulsory arbitration. Interestingly, subsequent to the filing of the appeal, the entire case was terminated because no appeal had been filed from the award on the remaining count.[184] The superior court pronounced that an aggrieved party can immediately appeal the partial dismissal of a case that represents a distinct cause of action. Thus, the judgment entered on Praisner's separate causes of action was "final" and jurisdictionally appealable at the time Praisner filed his notice of appeal.

After *Praisner* came *Cloverleaf Development v. Horizon Financial*,[185] involving an appeal from an order that sustained preliminary

181. *See* Hudock v. Donegal Mut. Ins. Co., 438 Pa. 272, 264 A.2d 668 (1970); Sullivan v. City and County of Philadelphia, 378 Pa. 648, 107 A.2d 854 (1954); Commonwealth, Dept. of Transp. v. Rollins Outdoor Ad. Co., Inc., 76 Pa. Commw. 554, 464 A.2d 653 (1983).

182. 313 Pa. Super. 332, 459 A.2d 1255 (1983) (en banc).

183. *See* PA. R. CIV. P. 1020(a), which states that "[t]he plaintiff may state in the complaint more than one cause of action against the same defendant heretofore asserted in assumpsit or trespass. Each cause of action and any special damage related thereto shall be stated in a separate count containing a demand for relief." *Praisner* was based on the prior rule, PA. R. CIV. P. 1044(a) (rescinded July 1, 1984).

184. *See Praisner*, 313 Pa. Super. at 340, 459 A.2d at 1260. Prior cases oftentimes stated as a general rule that the partial dismissal of a complaint was interlocutory and not appealable. *See, e.g.* James Banda, Inc. v. Virginia Manor Apts., Inc., 451 Pa. 408, 303 A.2d 925 (1973) (order sustaining preliminary objections to part of plaintiff's complaint in equity, concerning constructive trust of real estate, without prejudice to assumpsit claim, and dismissing preliminary objection as to claim for constructive trust over funds held was not appealable); McAnany v. Moeller, 304 Pa. Super. 81, 450 A.2d 110 (1982) (quashed); Suburban East Tires v. Duquesne Light Co., 302 Pa. Super. 284, 448 A.2d 638 (1982) (quashed); Bracken v. Bracken, 294 Pa. Super. 371, 439 A.2d 1247 (1982) (dismissal of five of six counts with leave to amend did not put plaintiff out of court and was not appealable); *but see* Turnpike Comm'n v. Atlantic Richfield Co., 482 Pa. 615, 394 A.2d 491 (1978) (order granting summary judgment for defendant as to less than all of plaintiff's claim was final and appealable, despite views expressed in concurring and dissenting opinions); *see also Praisner* 313 Pa. Super. at 345-46, 459 A.2d at 1262 (Cavanaugh, J., concurring) concerning the complete termination of the case below during appeal.

185. 347 Pa. Super. 75, 500 A.2d 163 (1985).

objections to five of six counts of the plaintiff's complaint. The superior court, noting that there was one viable count (breach of contract), concluded that the dismissal of four counts (one count in damages for wrongful interference in negotiation and three counts for intentional infliction of emotional distress) was reviewable since the plaintiff was effectively out-of-court on these distinct causes of action. *Cloverleaf*, however, relied on *Praisner* in refusing to review the second count (wrongful withholding of funds alleged in the first count and punitive damages) because it represented nothing more than a rejection of an alternate theory of the first count.[186] In this regard, one should note that *Praisner* offered examples that might delineate the scope of the "alternative theory" exception to the "partial dismissal rule" of appellate jurisdiction. The court stated:

> Thus, the dismissal of a count alleging damages for breach of an express contract is not appealable if an alternate count seeking to recover the same damages based on quantum meruit remains undecided. *J. A. & W. A. Hess, Inc. v. Hale Township, supra.* Similarly, there is no final order where a count averring negligence has been dismissed but there remains undetermined a count alleging liability for a defective product under Section 402A of the Restatement (Second) of Torts. For similar reasons, where one of several counts seeks to recover punitive damages in a complaint alleging breach of contract, a dismissal of that count does not put the plaintiff out of court on his underlying cause of action. Only if he is successful in his cause of action for breach of contract does the measure of damages become relevant.[187]

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186. *Id.* at 80-82, 500 A.2d at 166-67.

187. *Praisner*, 313 Pa. Super. at 341, 459 A.2d at 1260; *see also* General Mach. Corp. v. Feldman, ___ Pa. Super. ___, 507 A.2d 831 (1986), which involved a complaint for attorney malpractice stated in six counts (count I for breach of contract; count II, which incorporated facts of count I, for damages resulting from defendant's tortious conduct; count III, alleging an additional breach of contract claim; count IV, which incorporated Count III, requested damages as a result of tortious conduct; count V, alleging conversion; and count VI for assault and robbery of documents). The lower court sustained demurrers to counts II, IV, and VI. Noting that counts I to IV stated alternative theories of recovery, the superior court quashed that part of the appeal relating to counts II and IV. *See also*, Vogel v. Berkley, ___ Pa. Super. ___, 511 A.2d 878 (1986). The complaint therein contained five counts: (1) fraudulent inducement to enter into a lease agreement; (2) fraudulent inducement to enter the land; (3) failure to pay royalties; (4) failure to reclaim the site; and (5) conspiracy to defraud and breach of the lease. All counts except the fourth were dismissed. The superior court stated that the appeal was proper. *But see* Freeze v. Donegal Mut. Ins. Co., 504 Pa. 218, 470 A.2d 958 (1983) (order sustaining preliminary objections as to no-fault work loss claim, with leave to amend to assert claim for funeral and survival benefits, drastically altered plaintiff's cause of action and was appealable); Pullium v. Laurel School Dist., 316 Pa. Super. 339, 462 A.2d 1380 (1983) (in no-fault action in which plaintiff requested damages for injuries to person and property in single complaint, order dismissing personal injury claim was not appealable;

In summary, pretrial appellate review will exist in civil cases[188] when the lower court dismisses less than all of plaintiff's counts of a complaint provided (1) the dismissed counts represent separate and distinct causes of action and (2) the dismissed counts are not alternative theories to or a restatement of the remaining, viable count(s). Despite the surface simplicity of this summary, the relative youth of the *Praisner* rule suggests a need for caution in two particular respects. First, the application of *Praisner*'s jurisdictional principle is not clear when the dismissed counts were joined under the compulsory joinder provisions of the procedural rules.[189] Is such a distinction important for purposes of pretrial appellate review? Second, what is the scope or meaning of *Praisner*'s "separate and distinct causes of action"? This second issue raises the perennial legal dilemma of the meaning of a "cause of action." Does it have a distinct meaning under our newly revised procedural rules for appellate jurisdiction purposes?[190] Is it synonymous with "claims for relief"?[191]

Praisner distinguished); Capanna v. Travelers Ins. Co., ___ Pa. Super. ___, 513 A.2d 397 (1986).

188. For partial dismissal of the Commonwealth's case against a criminal defendant, see, for example, Commonwealth v. Gemelli, 326 Pa. Super. 386, 474 A.2d 294 (1984) (Commonwealth's appeal from order quashing 27 counts of a criminal complaint when effect was to terminate prosecution).

189. PA. R. CIV. P. 1020 and note thereto provides in part as follows:

(c) Causes of action and defenses may be pleaded in the alternative.

(d) (1) If a transaction or occurrence gives rise to more than one cause of action against the same person, including causes of action in the alternative, they shall be joined in separate counts in the action against any such person.

Note: Subdivision (d) (1) requires the joinder of related causes of action. The joinder of unrelated causes of action is permissive. *See* subdivision (a); *see supra* note 183.

190. *See* PA. R. CIV. P. 1001, which uses the term "action" as follows:

(a) As used in this chapter, "action" means a civil action brought in or appealed to any court which is subject to these rules.

(b)(1) All claims heretofore asserted in assumpsit or trespass shall be asserted in one form of action to be known as "civil action."

Note: The procedural distinctions between the forms of action in assumpsit and trespass are abolished.

(2) Other forms of action which incorporate these rules by reference shall be known as "civil action — [type of action]".

Note: For example, the action of mandamus shall be known as "civil action — mandamus".

Consider also the explanatory note preceding PA. R. CIV. P. 1001. *See also* Junk v. East End Fire Dept., 262 Pa. Super. 473, 490-91, 396 A.2d 1269, 1277 (1978) (stating that a new cause of action does arise if an amendment proposes a different theory or a different kind of negligence than the one previously raised or if the operative facts supporting the claim are changed); *cf.* Spinelli v. Maxwell, 430 Pa. 478, 481, 243 A.2d 425, 427 (1968) (cause of action equated with wrongful act) (citing Fields v. Philadelphia Rapid Transit Co., 273 Pa. 282, 286, 117 A.2d 59, 60 (1922); Emert v. Larami, 414 Pa. 396, 400 n.4, 200 A.2d 901, 903 n.4 (1964) (noting term's multiple meanings); Derry Township School Dist. v. Day & Zimmerman, 345 Pa. Super. 487, 496 A.2d 928 (1985) (stating that plaintiff's cause of action is not to be equated with plaintiff's theory of recovery; case law defines cause of action to mean

What is the determinative factor in analyzing a "cause of action"; is it the legal theory proposed or relief sought?[192] Whether these questions are relevant to a determination of *Praisner*'s scope must await future exploration. In the recent en banc case of *Capanna v. Travelers Ins. Co.*,[193] the superior court dismissed that part of an appeal from an order that dismissed two counts of a complaint in a no fault automobile accident case. The two counts sought work loss benefits. When the plaintiff sought to raise the propriety of the earlier dismissal of the two counts in her subsequent appeal from the order dismissing the final count of the complaint, which asserted a claim for survivor's benefits, the court refused to address the merits. The appellate court reasoned that since work loss and survivors benefits were separate and distinct, the failure to immediately appeal the prior dismissal of the first two counts was fatal; the untimely appeal of the first order was therefore quashed.

Finally, the remaining scenario in the context of partial dismissal is when the lower court dismisses a plaintiff's cause of action or case as to less than all of the defendants. Clearly, in such a situation, the plaintiff is effectively "out of court" vis-a-vis that particular defendant. The supreme court has stated that the dismissal of a plaintiff's complaint as to one defendant in a multiparty suit is immediately appealable and that the failure to timely appeal renders the prior order res judicata.[194] As with the other scenarios, plaintiff is not literally "out of court" and the litigation is not completely terminated. The order, however, is constructively final because, from a practical viewpoint, litigation is effectively terminated as to one of

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damages or injuries for which the plaintiff seeks recovery); Staub v. Southwest Butler County School Dist., 263 Pa. Super. 413, 421, 398 A.2d 204, 207 (1979), *aff'd*, 489 Pa. 196, 413 A.2d 1082 (1980) (joinder context).

191. *See, e.g.*, T.C.R. Realty, Inc. v. Cox, 472 Pa. 331, 337, 372 A.2d 721, 724 (1977) (citing Marino's Estate, 440 Pa. 492, 494, 269 A.2d 645, 646 (1969)).

192. Under the new civil rules, the procedural distinctions between trespass and assumpsit are abolished. *See* PA. R. CIV. P. 1001. As to that aspect of *Praisner*, 313 Pa. Super. 332, 459 A.2d 1255 (1983), which precludes appeals in cases involving alternative trespass/assumpsit theories of recovery, such a rule retains prior practice. *See* Epstein v. State Farm Ins. Co., 308 Pa. Super. 33, 453 A.2d 1054 (1982) (trespass and assumpsit alternatives); *cf.* R. B. Equip. Co. v. Williams, Shields, Snyder & Goas, 304 Pa. Super. 31, 450 A.2d 85 (1982) (strict liability and breach of contract alternatives).

193. ___ Pa. Super. ___, 513 A.2d 397 (1986) (citing Smiley v. Ohio Casualty Ins. Co., 309 Pa. Super. 247, 455 A.2d 142 (1983).

194. *See* Love v. Temple Univ., 422 Pa. 30, 220 A.2d 838 (1966); *see also* United States Nat'l Bank in Johnstown v. Johnson, 506 Pa. 622, 487 A.2d 809 (1985); Hudock v. Donegal Mut. Ins. Co., 438 Pa. 272, 264 A.2d 668 (1970); Dash v. Wilap Corp., 343 Pa. Super. 584, 495 A.2d 950 (1985) (order affecting plaintiff's rights against additional defendant was appealable); Preto v. Travelers Ins. Co., 338 Pa. Super. 593, 488 A.2d 51 (1985); Temtex Products, Inc. v. Kramer, 330 Pa. Super. 183, 479 A.2d 500 (1984); Cathcart v. Keene Indus. Insulation, 324 Pa. Super. 123, 471 A.2d 493 (1984) (non pros).

the parties.

(b) Defendant's case: down but not out?—In contrast to the partial dismissal of a plaintiff's cause of action, one needs to focus upon those orders that effectively put a defendant "out of court"[195] before the technical termination of a case. Again, there are certain well-defined categories of situations that are identifiable in order to determine whether a specific order against an aggrieved defendant is constructively appealable. The four major categories include orders that: (1) restrict the defendant in pleading affirmative defenses; (2) preclude the defendant from asserting an independent claim or a counterclaim; (3) prevent the defendant from asserting any claims against other defendants; and (4) preclude the defendant from either entering any defense or challenging the plaintiff's claims. As one can see, there are analytical parallels to the principle of constructive finality regarding the partial dismissal of a plaintiff's cause of action.

When the lower court order precludes a defendant from asserting an affirmative defense,[196] the question of appealability has traditionally turned on whether the defense involves issues of fact or law. The Pennsylvania Supreme Court has stated that if an order precludes the defendant from asserting affirmative defenses involving the presentation of proof at trial that might be a complete defense, then such an order is constructively final and immediately appealable.[197] When, however, the proposed affirmative defense or new matter constitutes only a denial or does not involve the presentation of facts, an order restricting the defendant will not be deemed construc-

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195. Recognizably, the "out of court" expression is, at first glance, paradoxical when applied to the defendant.

196. PA. R. CIV. P. 1030, which concerns affirmative defenses, provides as follows:

> All affirmative defenses including but not limited to the defenses of accord and satisfaction, arbitration and award, assumption of the risk, consent, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fair comment, fraud, illegality, immunity from suit, impossibility of performance, justification, laches, license, payment, privilege, release, res judicata, statute of frauds, statute of limitations, truth and waiver shall be pleaded in a responsive pleading under the heading "New Matter". A party may set forth as new matter any other material facts which are not merely denials of the averments of the preceding pleading.

197. *See* Commonwealth v. Wheeling-Pittsburgh Steel Corp., 473 Pa. 432, 375 A.2d 320 (1977), *cert. denied*, 434 U.S. 969 (1977) (affirmative defense involving the validity of an administrative order; factual predicate for the appellate jurisdiction issue is not clear); Grota v. La Boccetta, 425 Pa. 620, 230 A.2d 206 (1967) (affirmative defense of release); Posternack v. American Casualty Co. of Reading, 421 Pa. 21, 218 A.2d 350 (1966) (affirmative defense of res judicata and collateral estoppel); Urban v. Urban, 332 Pa. Super. 373, 481 A.2d 662 (1984) (order effectively precluded defendant-wife from denying validity of agreement and asserting affirmative defense); Pellegrine v. Home Ins. Co., 200 Pa. Super. 48, 186 A.2d 662 (1962) (statute of limitations).

tively final or immediately appealable.[198]

Second, when the lower court has prevented the defendant from asserting a counterclaim,[199] the lower court has, in effect, placed the defendant "out of court" on an independent claim. This situation is thus analogous to the one in which a plaintiff is out of court in asserting a separate and distinct cause of action or claim for relief. In *Commonwealth v. Orsatti*,[200] the supreme court stated that an order, which sustained plaintiff's preliminary objections to defendant's counterclaim, in effect, put the defendant out of court. Such an order was immediately appealable.[201]

Whereas the second example involved a defendant's claim against the plaintiff, the third example concerns a defendant's claim against other defendants. The relationship thus is analogous to a plaintiff versus a defendant. Cases have stated and applied the general rule that an order is immediately appealable if it lets a defendant or additional defendant out of the case entirely as to that defendant. In *Brandywine Joint Area School Authority v. Van Corp., Inc.*, the supreme court permitted an appeal from an order sustaining preliminary objections, resulting in the dismissal of a third party com-

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198. *See* Ventura v. Skylark Motel, Inc., 431 Pa. 459, 246 A.2d 353 (1968) (order sustaining objections to defendant's new matter, concerning worker's compensation, involved a pure legal question and was not appealable); Adcox v. Pennsylvania Mfrs.' Ass'n Casualty Ins. Co., 419 Pa. 170, 213 A.2d 366 (1965) (immunity from suit based on worker's compensation defense); Weiss v. City of Philadelphia, 65 Pa. Commw. 260, 442 A.2d 378 (1982) (striking new matter which was purely legal). For a discussion of the concept of new matter and citations to relevant cases, see Sechler v. Ensign-Bickford Co., 322 Pa. Super. 162, 469 A.2d 233 (1983) (affirmative defenses, concerning the existence of warnings and disclaimer of warranties, were only denials of plaintiff's averments). In Leflar v. Gulf Creek Industrial Park, ___ Pa. ___, ___ A.2d ___ (1986) the supreme court concluded that an allegation, based on the Workmen's Compensation Act, is not an affirmative defense which may be waived if not timely pleaded. Such a claim, the court stated, involves a jurisdictional bar. Prior appellate cases to the contrary were overruled.

199. PA. R. CIV. P. 1031, concerning counterclaims, states as follows:

> (a) The defendant may set forth in the answer under the heading "counterclaim" any cause of action heretofore asserted in assumpsit or trespass which he has against the plaintiff at the time of filing the answer.
>
> (b) A counterclaim need not diminish or defeat the relief demanded by the plaintiff. It may demand relief exceeding in amount or different in kind from that demanded by the plaintiff.

200. 448 Pa. 72, 292 A.2d 313 (1972).

201. *See also* Broido v. Kinneman, 375 Pa. 568, 101 A.2d 647 (1954); Rittenhouse Regency Affiliates v. Passen, 333 Pa. Super. 613, 482 A.2d 1042 (1984); *see also* Gordon v. Gordon, 293 Pa. Super. 491, 439 A.2d 683 (1981) (order, in divorce action, which prevented defendant-wife from proceeding under new divorce law, put her out of court as to her purported claims and was immediately appealable); *cf.* Marks v. Marks, 300 Pa. Super. 288, 446 A.2d 618 (1982) (order denying wife-plaintiff's petition to proceed under new divorce law not appealable since plaintiff is not out of court and can still present her case).

Note, however, that at the time of publication, the superior court had decided to reconsider *en banc* the proper analytical framework of appeals from orders dismissing a counterclaim in Fidelity Bank v. Duder (unreported opinion).

plaint. The supreme court stated:

> We conclude that while an order overruling preliminary objections to an additional party complaint is interlocutory, an order granting such objections and dismissing the complaint is final and appealable. Although the plaintiff in the additional party complaint may have a further cause of action against the defendant in the additional party complaint subsequent to the resolution of the basic litigation, he is precluded in the basic litigation from determining his rights vis-a-vis the additional defendant in the litigation.[202]

In addition, an order that precludes a defendant from joining an additional defendant is also an interlocutory order reviewable before the entry of final judgment.[203]

The last category is a problematic one. Often, as a result of a defendant's dilatoriness or noncompliance in pretrial discovery matters,[204] the lower court will impose a sanction upon the defendant. The available sanctions may vary from (1) precluding proof at trial on a particular issue; (2) precluding the defendant from entering a defense; (3) imposing a judgment on liability only;[205] (4) precluding the defendant from introducing any evidence and/or cross-examining witnesses; and (5) imposing a judgment on liability and damages.[206] Metaphorically speaking, one could say that these sanctions bound and gag a defendant. The traditional analytical framework in such situations considers whether the order resulted in a constructive termination of the case against the defendant. Some cases have held that an order that prevents a defendant from entering a defense or from cross-examining witnesses is sufficiently final to permit an immediate appeal.[207]

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202. 426 Pa. 448, 451, 233 A.2d 240, 241 (1967). Joinder of additional defendants is governed by PA. R. CIV. P. 2251 - 2275. *See also* Dudash v. Palmyra Borough Auth., 335 Pa. Super. 1, 483 A.2d 924 (1984); English v. Lehigh County Auth., 286 Pa. Super. 312, 428 A.2d 1343 (1981); Carrollo v. Forty-Eight Insulation, Inc., 252 Pa. Super. 422, 381 A.2d 990 (1977); *but see* Harasym v. Pennsylvania, Dept. of Transp., 321 Pa. Super. 492, 468 A.2d 817 (1983) (expressly conditional sanction order finding additional defendant liable to the defendant on defendant's cross-claim not final or immediately appealable since there was no determination yet as to defendant's liability to the plaintiff); *cf.* Guarino v. DiBiase, 310 Pa. Super. 211, 456 A.2d 575 (1983) (summary judgment in favor of additional defendant and against plaintiffs only is not properly appealable by the defendant when defendant's cross-claim against additional defendant is still in the case and court did not enter judgment against defendant on his cross-claim).

203. *See* Riccobono v. Keystone Helicopter Corp., ___ Pa. Super. ---, 507 A.2d 834 (1986); PA. R. CIV. P. 2253 (joinder).

204. *See* PA. R. CIV. P. 4019 (sanctions in discovery matters).

205. *See supra* notes 126, 129, 138.

206. *See supra* note 108 and accompanying text; *cf. supra* note 129.

207. *See* Roman v. Pearlstein, 329 Pa. Super. 392, 478 A.2d 845 (1984); Marshall v.

Caution is imperative as to the fourth category, however, because there is recent case law that has limited appellate jurisdiction in such matters. For example, in *Elderkin v. Sedney*,[208] a superior court panel analyzed a defense sanction order from the perspective of the "collateral order doctrine."[209] *Elderkin* quashed an appeal from a pretrial order that precluded the defendants from opposing the plaintiff's claims *or* from entering their own defense. The court noted, however, that the order would not prohibit the defendants from cross-examining and impeaching the plaintiff's witnesses and objecting to the admission of evidence; thus, a judgment for the defendant was still possible. This comment, although offered in the context of the collateral order doctrine, might also suggest that the order did not constructively deny the defendant an opportunity for relief. Whether *Elderkin* requires a new analysis for all such defense sanction orders is uncertain. The application of the "collateral order doctrine" to orders that preclude a defense signifies perhaps an important new analytical development in appellate jurisprudence. In addition, the superior court has declined to follow the commonwealth court[210] and has concluded that a denial of a petition to open a default judgment, entered on liability as a sanction, was not appealable until after damages were determined.[211]

(c) Counterpoint: the federal approach—As a prominent treatise on federal practice and procedure has noted, "[t]he line between deciding one of several claims and deciding only part of a single claim is sometimes very obscure."[212] The cases and principles previously discussed should suggest the dangers of obscurity and ignorance of Pennsylvania law. The definitional dilemma of "cause of action" and the attempt to place traditional problems in new analytical frameworks are not peculiar to Pennsylvania. It may be helpful, therefore, to pause, take a step back, and look in the direction of the federal forum to see how others have grappled with the capacious

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Southeastern Pa. Transp. Auth., 76 Pa. Commw. 205, 463 A.2d 1215 (1983).

208. ___ Pa. Super. ___, 511 A.2d 858 (1986).

209. For a discussion of the collateral order doctrine as a distinct and limited basis for appellate jurisdiction, see *infra* notes 242-70 and accompanying text.

210. *See supra* note 207; *see also* Scharfman v. Philadelphia Transp. Co., 234 Pa. Super. 563, 340 A.2d 539 (1975) (under prior PA. STAT. ANN. tit.12, § 1100 (Purdon 1969) (repealed), an order denying petition to open default judgment on liability is constructively final and immediately appealable).

211. *See* Miller Oral Surgery, Inc. v. Dinello, 342 Pa. Super. 577, 493 A.2d 741 (1985).

212. *See* 10 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE, § 2657 (2d ed. Supp. 1986) [hereinafter cited as FEDERAL PRACTICE 2D] (citing Tolson v. United States, 732 F.2d 998, 1001 n.8 (D.C. Cir. 1984).

and confusing concept of jurisdiction in multiple claims situations.

The federal courts, unlike the Pennsylvania courts, are restrained by a particular procedural rule governing decisions or judgments in cases involving multiple claims and parties. Rule 54(b)[213] specifically provides:

> (b) Judgment upon multiple claims or involving multiple parties When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Since the federal appellate courts are also statutorily constrained by the principle of finality,[214] piecemeal appellate review is the very limited exception rather than the rule. Rule 54(b), however, permits appellate review of interlocutory decisions, involving fewer than all claims, only upon an express determination by the lower court of "no just reason for delay" and an express, contemporaneous direction for entry of judgment.[215] Thus, in the federal courts, litigants generally do not have carte blanche to appeal decisions disposing of only part of a case. Arguably, underlying policy or values are weighted more heavily for the federal courts rather than the aggrieved litigants.

Therefore, in the absence of such an express determination under Rule 54(b), the federal courts have concluded, for example, that there is no automatic right to appeal the following interlocutory orders: (1) dismissal of a plaintiff's claim(s) or parties as to less than

213. FED. R. CIV. P. 54.

214. *See* 28 U.S.C. § 1291 (1984).

215. In I.L.T.A., Inc. v. United Airlines, Inc., 739 F.2d 82, 84 (2nd Cir. 1984), the court stated that there are two prerequisites that must be satisfied by the lower court; (1) finality and (2) no just reason for delay. As to the former, the court stated that a judgment is final if it is an ultimate disposition of an individual claim among multiple claims. As to the latter, the court identified judicial administration, economy, and separability of claims as important factors.

all of the defendants;[216] (2) dismissal of a defendant's counterclaim;[217] and (3) denial of an affirmative defense.[218] Some commentators, furthermore, have suggested that, although Rule 54(b) has a problematic relationship with the final order doctrine, Rule 54(b) should be the distinct jurisdictional test that applies to orders which dispose of fewer than all the claims of a case.[219] In addition, as to the inherently troublesome nature of a "cause of action," some federal courts have stated that Rule 54's "claim" contemplates one legal right growing out of a single transaction or series of related transactions and that a complaint, which seeks to vindicate a single right through multiple remedies, states but a single claim for relief.[220] Judge Posner has noted that there is a presumption against characterizing a pleading as containing multiple claims for relief and that claims cannot be separate if they constitute a single cause of action for res judicata purposes.[221]

2. Intervention.—When the lower court has denied a nonparty's motion to permit intervention[222] into a pending case, the effect of that order is certainly not to dispose of or terminate litigation as to those parties presently before the court. As to the aggrieved person seeking intervention, it is theoretically difficult to conclude

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216. *See, e.g.*, Matthews v. Ashland Chemical Co., 703 F.2d 921 (5th Cir. 1983); Alley v. Dodge Hotel, 551 F.2d 442 (D.C. Cir. 1977), *cert. denied*, 431 U.S. 958 (1977), *reh'g denied*, 433 U.S. 916 (1977); Hodgson v. U.S. Slicing Mach. Co., 370 F.2d 565 (3d Cir. 1967) (dismissing one of two defendants).

217. *See* United States v. Walter Nugent Enterprises, 506 F.2d 461 (6th Cir. 1974), *cert. denied*, 420 U.S. 982 (1975).

218. *See* Freeman v. Kohl & Vick Machine Works, Inc., 673 F.2d 196 (7th Cir. 1982); Hennepin County v. Aetna Casualty & Sur. Co., 587 F.2d 945 (8th Cir. 1978); *but see* Nixon v. Fitzgerald, 457 U.S. 731 (1982) (denial of absolute immunity defense is immediately appealable); *see also* Mitchell v. Forsyth, 105 S. Ct. 2806 (1985) (*Nixon* was extended to the defense of qualified governmental immunity).

In *Hennepin County* the court noted that the striking of two of the defendant's affirmative defenses (real party in interest and privity of contract) was more in the nature of an "interlocutory summary adjudication," not a partial summary judgment, and was "interlocutory as any pleading ruling can be," for it simply removed two roadblocks to the plaintiff's recovery. 587 F.2d at 946.

219. *See* 10 FEDERAL PRACTICE 2D *supra* note 212 at 91.

220. *See* Oyster v. Johns-Manville Co., 568 F. Supp. 83 (E.D. Pa. 1983); *see also* Hooks v. Washington Sheraton Corp., 642 F.2d 614 (D.C. Cir. 1980).

221. *See* Minority Police Officers Ass'n of South Bend v. City of South Bend, 721 F.2d 197 (7th Cir. 1983), noting, however, that claims can be "separate" even if they have a factual overlap. Judge Posner's economic analysis stated that a rule precluding review if the claims arise out of the same factual setting would be personally preferable, although it would not be in accord with prevailing precedent. *Id.* at 200-01. *See also* Smith v. Benedict, 279 F.2d 211 (7th Cir. 1960) (Rule 54's "claim" refers to cause of action); *cf. supra* note 190 regarding "cause of action."

222. *See* PA. R. CIV. P. 2326-50. Also, consider the status of intervenor as appellant in Note, *Non-Parties' Right of Appeal in Civil Action, supra* note 32.

that such an order places him "out of court" since he really was not in court in the first place. Nevertheless, denial of intervention may be constructively final for jurisdictional purposes because such orders may, in fact, result in effectively denying the relief that the proposed intervenor seeks. The appellate courts have stated, as a general rule, that the denial of intervention is interlocutory and not immediately appealable.[223] Review of such orders must be on an ad hoc basis and, if the order effectively denies the proposed intervenor a remedy that can be obtained in no other way, such an order will be considered constructively final and immediately appealable.[224] In such circumstances, the appellate court will examine the potential merits of the proposed claim as it tries to maneuver the jurisdictional hurdle.

On the other hand, when the lower court grants a request for intervention, there usually is no satisfaction of technical or constructive finality. The litigation is not terminated and no one is effectively put out of court. The general rule, therefore, is that orders granting intervention are not immediately appealable for they are not final.[225]

3. Denial of I.F.P. relief.—When litigants are unable to expend the necessary funds in the course of litigation, they may ask for financial relief in the form of a petition to proceed *in forma pauperis*, that is, as indigents. When the lower court refuses such a request, a litigant may be unable to proceed with litigation. For example, the litigant may not have the funds to have the trial court's notes of testimony transcribed. In such circumstances, cases have stated that an order denying such financial requests may effectively put the litigant "out of court."[226] Hence, such interlocutory orders

223. *See* Frey's Estate, 237 Pa. 269, 271, 85 A. 147, 148 (1912); *see also* Shapiro, *Some Thoughts on Intervention Before Courts, Agencies and Arbitrators*, 81 HARV. L. REV. 721, 748-51 (1968).

224. *See* Boise Cascade Corp. v. East Stroudsburg Sav. Ass'n, 300 Pa. Super. 27, 446 A.2d 614 (1982) (appeal quashed); Richard Held Builders v. A.G. Allebach, Inc., 266 Pa. Super. 101, 403 A.2d 113 (1979) (appeal quashed); *but see* Wilson v. State Farm Mut. Ins. Co., 339 Pa. Super. 576, 582 n.8, 489 A.2d 791, 794 n. 8 (1985) (denial of petition to intervene in class action, in which petitioner's alleged status as representative of certain class foreclosed only means by which he could assert his claims, was appealable).

225. *See* Sailor Planing Mill & Lumber Co. v. Moyer, 35 Pa. Super. 503 (1908); *In re* Manley, 305 Pa. Super. 332, 451 A.2d 557 (1982); *but cf.* Cohen v. Jenkintown Cab Co., 300 Pa. Super. 528, 446 A.2d 1284 (1982) (plaintiffs could appeal order granting intervention when effect of order was to reduce amount of interest plaintiffs would be able to collect). The discussion in *Cohen* was brief and focused on standing, not jurisdiction.

226. *See* Thompson v. Garden Court, Inc., 277 Pa. Super. 460, 419 A.2d 1238 (1980) (order denying petition to file complaint in forma pauperis had practical consequences of putting litigant out of court); Selby v. Brown, 292 Pa. Super. 463, 437 A.2d 787 (1981) (denial of relief at post-verdict stage); Griffin v. Tedesco, 336 Pa. Super. 586, 486 A.2d 419 (1984) (summary denial of petition to proceed in forma pauperis on motion to remove a nonsuit).

may be final when they have such a practical, final effect. One should recognize, however, that the jurisdictional basis for the appeal might also be expressed in terms of the collateral order doctrine.[227] The grant of such relief is an unappealable interlocutory order.[228]

4. Disguised Final Orders: Stays, Conditional Orders, etc.—Since finality is a matter of judicial interpretation requiring an appellate court to ascertain the substance and effect of an order, orders that appear temporary or nonfinal on the surface may nevertheless be constructively final and immediately appealable. For example, the vacating and staying of a prior, temporary custody order, until another state decided the custody issue, effectively amounted to a denial of relief and precluded the parties from litigating in Pennsylvania. The superior court treated such an order as pragmatically final.[229] Similarly, in another case, the supreme court held that an order staying proceedings, in order to await termination of proceedings in another court, was tantamount to a dismissal and denial of relief. In practical terms, the order was final for the aggrieved litigant.[230]

In *Parker v. McDonald*,[231] the superior court concluded that an order, awarding shared custody to the parties which was "subject to further review," was final and immediately appealable since the lower court did not specifically establish a timetable or schedule for further review. In this regard, the appellate court noted that custody orders are inherently temporary. Furthermore, in another case, the lower court's order refusing to act on a defendant's motion to amend its answer to assert an affirmative defense was treated *sub silentio* as a constructively final order denying the requested relief.[232]

5. Orders Granting Suppression of Evidence.—In a criminal case, a statement or a tangible shred of evidence may provide the critical link between the defendant and a crime. When the lower

227. *See, e.g.*, Pugar v. Greco, 483 Pa. 68, 394 A.2d 542 (1979) (interlocutory appeal from order denying motion to appeal arbitration award to common pleas court without first having to pay the costs of arbitration as required by local rule; quashing of appeal affirmed).

228. *See* Cameron v. Escofil, 321 Pa. Super. 347, 468 A.2d 513 (1983) (appeal from order granting in forma pauperis relief quashed).

229. *See* Carpenter v. Carpenter, 326 Pa. Super. 570, 574 n.2, 474 A.2d 1124, 1126-27 n.2 (1984).

230. *See* Philco Corp. v. Sunstein, 429 Pa. 606, 241 A.2d 108 (1968). As to an order involving conditional liability, see Harasym v. Pennsylvania Dept. of Transp., 321 Pa. Super. 492, 468 A.2d 817 (1983) (appeal from expressly conditional sanction order finding additional defendant liable to defendant quashed); *see supra* notes 202-203.

231. 344 Pa. Super. 552, 496 A.2d 1244 (1985).

232. *See* Pellegrine v. Home Ins. Co., 200 Pa. Super. 48, 186 A.2d 662 (1962).

court has suppressed[233] vital evidence at the pretrial stage, the Commonwealth may feel that, for all practical purposes, it has already lost its case. In recognition of such extraordinary situations, the appellate courts have recognized the Commonwealth's right to appeal an order of suppression if such an order, in effect, terminates the Commonwealth's prosecution or substantially handicaps its case against the defendant.[234] The supreme court has stated that the Commonwealth has an absolute right to appeal such a pretrial order of suppression when the Commonwealth certifies in good faith that the order terminates or substantially handicaps the prosecution.[235] The defendant, however, does not have a reciprocal right to appeal a pretrial order denying his motion to suppress.[236]

6. Double Jeopardy.—Another extraordinary example of the exception to the strict finality rule in criminal cases is when the lower court denies a defendant's pretrial motion to dismiss based on a violation of his constitutional right not to be twice placed in jeopardy.[237] The denial of such a meritorious motion effectively constitutes an irreparable denial of relief and is immediately appealable. However, since the constitutional right is collateral to the prosecution of the case, the jurisdictional analysis more properly belongs to the later discussion of the collateral order doctrine.[238]

7. Denial of Class Action Certification—When the lower court denies a motion for class action certification or dismisses the class action aspects of a suit, the class members are effectively put out of court.[239] The supreme court has stated that such orders termi-

233. *See* PA. R. CRIM. P. 323 (suppression of evidence).

234. *See* Commonwealth v. Bosurgi, 411 Pa. 56, 190 A.2d 304 (1963), *cert. denied*, 375 U.S. 910 (1963).

235. *See* Commonwealth v. Dugger, 506 Pa. 537, 486 A.2d 382 (1985); Commonwealth v. Miller, 334 Pa. Super. 374, 483 A.2d 498 (1984) (appeal in which the Commonwealth also had other evidence, that being the victim's identification, against the defendant). *Dugger* noted that such suppression orders are final by general rule pursuant to the supreme court's statutory authority. 506 Pa. at 544 n.5, 486 A.2d at 385 n. 5 (citing 42 PA. CONS. STAT. ANN. §§ 1701, 1722, 5105(a)). *See also* PA. R. APP. P. 341(c) (final criminal orders; Commonwealth's right of appeal); *supra* note 84.

Must the order suppress all of the Commonwealth's evidence for appealability purposes? *Dugger* emphasized the importance of a piece or shred of evidence in a case but preliminarily observed that "[w]e granted the Commonwealth an appeal, and defined it a substantial handicap whenever the Commonwealth is denied the use of *all* their evidence." *Dugger*, 506 Pa. at 545, 486 A.2d at 386 (emphasis in original). *See also* Commonwealth v. Bruening, ___ Pa. Super. ___, 512 A.2d 704 (1986) (emphasizing "all").

236. *See* Commonwealth v. Washington, 428 Pa. 131, 236 A.2d 772 (1968).

237. *See supra* notes 67-70.

238. *See infra* notes 242-70 and accompanying text.

239. One could argue that, as in intervention situations, the "out of court" analysis may

nate the ousted members' participation in the case and are, therefore, immediately appealable.[240] Whether the proper jurisdictional framework, however, is the collateral order doctrine or constructive finality is not clear. In any event, one should note that the federal courts have held that an order denying class action certification is not immediately appealable either as a final order or under the collateral order doctrine.[241]

D. Collateral Finality — The Collateral Order Doctrine

From the technical, wholesale termination of a case to the practical, and sometimes piecemeal, disposition of a cause of action or claim, we must proceed to the limits of the concept of finality - the collateral order doctrine. When the strictures of a rule of law, such as the final order doctrine, are unable to accommodate circumstances of hardship or necessity, judicial construction or legislative rule-making may offer a solution compatible with the spirit or purpose of the constraining rule of law. The collateral order doctrine is a judicial, interpretative compromise that affords an aggrieved litigant a narrow avenue of pretrial appellate review in circumstances of arguable hardship or necessity.

Preliminarily, it is important to recognize the fundamental nature of the collateral order doctrine. The doctrine has two distinct characteristics. First, as one commentator has noted, the collateral order doctrine is premised on equitable considerations.[242] It represents, in a sense, the final order doctrine's equitable safety valve. (Admittedly, one could plausibly argue that the constructive approach to the final order doctrine, with its emphasis on practicality and the plight of the aggrieved litigant, likewise exhibits equitable concerns within the formalistic structure of that doctrine.) Second, as to the formalistic structure of the final order doctrine, it is clear that although decisions concerning the application of the final order doctrine sometimes speak of the reviewed orders as interlocutory, the

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be theoretically troublesome. *See supra* note 32.

240. *See* Bell v. Beneficial Consumer Co., 465 Pa. 225, 348 A.2d 734 (1975); Janicik v. Prudential Ins. Co. of America, 305 Pa. Super. 120, 126 n.1, 451 A.2d 451, 454 n.1 (1982). Justice Roberts in *Bell* considered and rejected the contrary theories and practice of other jurisdictions.

241. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), specifically refusing to judicially extend the federal concept of finality under 28 U.S.C. § 1291 and holding that the collateral order doctrine is not applicable. *See also* Demasi v. Weiss, 669 F.2d 114 (3d Cir. 1982); Schlick v. Penn-Dixie Cement Corp., 551 F.2d 531 (2d Cir. 1977); *but see* Pettivay v. American Cast Iron Pipe Co., 681 F.2d 1259 (11th Cir. 1982); Bowe v. First of Denver Mortgage Investors, 562 F.2d 640 (10th Cir. 1977).

242. *See* 10 FEDERAL PRACTICE 2D, *supra* note 212, at 89.

raison d'etre of the collateral order doctrine is, in fact, the concept of finality, albeit finality of a special sort.[243] There must be, for purposes of theoretical congruency, a final determination of the collateral matter.

From theory, we now proceed to the genesis and substance of the collateral order doctrine. In 1949, the United States Supreme Court granted *certiorari* and reviewed *Cohen v. Beneficial Industrial Loan Corp.*, a minority shareholder's derivative action suit against a corporation for alleged mismanagement and fraud.[244] Since the plaintiff's shares represented only 0.0125 percent of the outstanding stock owned by 16,000 stockholders, an applicable New Jersey statute required such minority shareholder - litigants to post adequate security for future indemnification purposes in the event that the corporation were to prevail. The corporate defendant in *Cohen* demanded that the minority shareholder, whose stock had a market value of only $9,000, post a bond in the amount of $125,000. The district court concluded that the statute was not applicable. On appeal by the corporation in order to secure the estimated interim costs of litigation, the court of appeals reversed. Having granted the writ of certiorari, the Supreme Court had to first maneuver the jurisdictional hurdle regarding the appealability of the district court's order refusing the corporation's request for interim security. For example, there was no final decision whatsoever; the lower court's decision did not even concern the merits of the derivative suit; and the parties were not "out of court." Distinguishing the limits of appellate review of decisions that are "but steps toward final judgment," the Supreme Court succinctly concluded that appellate jurisdiction over the collateral pretrial matter existed within the practical confines of the finality principle. The Court stated:

> We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case.
>
> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

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243. *See* 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3911 (1976) [hereinafter cited as FEDERAL PRACTICE]. In federal practice, the collateral order doctrine is related to 28 U.S.C. § 1291's requirement of finality.

244. 337 U.S. 541 (1949). The civil action in federal court was based on diversity of citizenship.

> The Court has long given this provision of the statute this practical rather than a technical construction.[245]

The Supreme Court's acknowledgment of this jurisdictional principle is often cited interchangeably with the jurisdictional concept previously identified as constructive or practical finality.[246] From a jurisprudential point of view, however, it is important to note that the collateral order doctrine is now a very specialized concept. As *Cohen* indicates, the doctrine applies only to a small class of claims that are collateral to rights asserted in the action and that are too important to be denied immediate, effective appellate review. In the course of the doctrine's growth, formulation has been refined to specifically include the requirement that if appellate review is postponed, the claimed right will probably be "irreparably lost."[247] Two

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245. *Id.* at 546 (citations omitted). Justice Jackson's opinion did not label the excerpted portion of the opinion as a doctrine or jurisdictional test; subsequent cases have. Likewise, the opinion does not elaborate specifically how the now traditional formula was satisfied. Arguably, one could say that the significance of the *Cohen* formula was its emphasis on a practical approach to the dilemma of jurisdiction. Such an emphasis would therefore make *Cohen* but a restatement of the principle identified herein as "constructive finality." The Pennsylvania Supreme Court, in fact, in Bell v. Beneficial Consumer Co., 465 Pa. 225, 348 A.2d 734 (1975), focused on the practicality aspects of *Cohen*, not the doctrine's specific criteria. Cases subsequent to *Bell* have suggested, however, that the adoption of *Bell* imported the attending formulaic criteria of *Cohen*. *See* Pugar v. Greco, 483 Pa. 68, 394 A.2d 542 (1979); *see also* Fried v. Fried, 509 Pa. 89, —, 501 A.2d 211, 214 (1985), which specifically identified the tripartite version of the doctrine in *Cohen* and affirmed the adoption of *Cohen*.

Nevertheless, one must come back to the basic observation that *Cohen* did not explain how the collateral order rule applied to the facts. If viewed from the constructive finality practicality approach, *Cohen*'s rationale would be based arguably on the fact that a denial of immediate pretrial review of the district court's order refusing to require interim costs and security would not necessarily place an onerous burden on the corporation. In effect, however, it would likely foreclose the opportunity for the corporation to obtain reimbursement for costs that it would incur to the individual defendants and shareholders in successfully defending the suit. From the perspective of the collateral order doctrine, however, the order was clearly collateral and, to the court at least, involved an important "right" of the litigant.

The federal court of appeals below had utilized a practical and liberal approach to the jurisdictional problem, noting that there was precedent for reviewing interlocutory appeals involving counsel fees and expenses. *See* Beneficial Indus. Loan Corp. v. Smith, 170 F.2d 44 (3d Cir. 1948) (citing Sprague v. Ticonic, 307 U.S. 161 (1939); Trustees v. Greenough, 105 U.S. 527, 531 (1881)). See also *infra* note 249 concerning the historical context of the collateral order doctrine.

246. As to the interpretation and categorization of *Bell*, see *supra* note 245. One treatise has noted that the collateral order doctrine is invoked and its criteria glossed over because an appellate court may conclude sub silentio that the threat of significant injury is enough to tip the scales in favor of immediate review. *See* 15 FEDERAL PRACTICE, *supra* note 243 at 480. Thus, the common denominators in the constructive finality and collateral order doctrines may be the importance of the right involved and simply the value judgment or policy in favor of immediate appellate review. The points of departure, however, between the two concepts are necessarily the collateral nature of the right involved in the order and the potential for irreparable loss of the claimed right, factors that are not necessarily implicated in the final order doctrine.

247. *See, e.g.*, Pugar v. Greco, 483 Pa. at 73, 394 A.2d at 545. The irreparable loss criterion is the third factor mentioned in *Pugar*. Although the quoted portion of *Cohen* does

necessary corollaries arise: (1) the lower court's determination on the collateral matter must be final and (2) deferred appellate review of the lower court's determination would be either ineffective or impossible.[248]

Both federal and Pennsylvania cases have adopted the collateral order doctrine, although pronouncements by both jurisdictions as to the specific requirements of the rule are not uniform. One may plausibly argue that under the original formulation of the rule in *Cohen*, finality and potential unreviewability are necessarily implicated in the collateral order doctrine. Pennsylvania's formulation of the collateral order doctrine was stated in *Pugar v. Greco* in the following manner:

> In *Cohen*, the Supreme Court of the United States carved out an exception to the final judgment rule for situations where postponement of appeal until after final judgment might result in irreparable loss of the right asserted. Under *Cohen*, an order is considered final and appealable if (1) it is separable from and collateral to the main cause of action; (2) the right involved is too important to be denied review; and (3) the question presented is such that if review is postponed until final judgment in the case, the claimed right will be irreparably lost.[249]

The recapitulation of the *Cohen* doctrine highlights those ingredients that are considered to be essential by the Pennsylvania courts.

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not mention irreparable loss, the Court's preceding discussion had mentioned the danger of probable irreparable loss. *Cohen*, 337 U.S. at 546. Irreparable loss certainly may be also implied when the Court spoke of the need for effective appellate review.

248. Cases vary in the selection and stress of the collateral order doctrine's requirements. The two corollaries mentioned may be found, for example, in Speiss v. C. Itoh & Co. (America), Inc. 725 F.2d 970 (5th Cir. 1984); Ohio-Sealy Mattress Mfg. Co. v. Duncan, 714 F.2d 740 (7th Cir. 1983); United States v. Richardson, 702 F.2d 1079 (D.C. Cir. 1983), *rev'd on other grounds* 468 U.S. 317 (1984). See particularly the Supreme Court's formulation in Flanagan v. U.S., 465 U.S. 259, 265 (1984) (emphasizing the factors of a conclusive determination of a disputed question, collaterally, and effective unreviewability).

249. *Pugar*, 483 Pa. 241 at 73, 394 A.2d at 545; *see also* Fried v. Fried, 509 Pa. 89, 501 A.2d 211 (1985).

It is interesting to place *Cohen* in an historical perspective. Most practitioners and scholars today would agree that *Cohen* is a significant case. But how significant and for what purpose? If one examines, for example, some of the major law reviews that followed the birth of *Cohen*, one will note that the appellate jurisdictional issue received no prominence or extended discussion. The featured issue in such reviews was the application of the state statute in a federal suit involving corporations. *See* Note, *Federal Applicability of State Statutes Requiring Security of Shareholder-Plaintiffs*, 48 COLUM. L. REV. 435 (1948); Note, *Federal Procedure: The "Outcome" Test Applied in Actions Based on Diversity of Citizenship*, 35 CORNELL L. Q. 420 (1950); 62 HARV. L. REV. 309-11 (1948); 35 VA. L. REV. 789 (1949). Consistent with this historical fact is one commentator's observation that *Cohen* had little impact prior to 1970. In fact, of the 463 cases citing *Cohen* and the 183 cases mentioning the collateral order doctrine from 1945 to 1981, only 145 and 19 respectively came before 1970. *See* Note, *Tightening the Collateral Order Doctrine*, 50 UMKC L. REV. 99, 106 nn.65-66 (1981).

The difficulty with the collateral order doctrine, however, goes beyond the comparative identification of its specific requirements under either *Cohen* itself or its state and federal progeny. Even if there is some consensus as to *Cohen*'s explicit or implicit components, there is the problem of definition or semantics. One commentary has noted that the inherent problem of definition is due, in part, to the ambiguous nature of "collateral" and its uneasy jurisdictional relationship to the piecemeal determination of a case under Rule 54(b), that is, when the lower court enters judgment on fewer than all the claims.[250] The commentary discusses the "separateness" quality of the collateral criterion and suggests that

> [t]he *Cohen* opinion suggests two different aspects of separability: the question should be capable of decision *without reference to the merits of the main claims* that are the subject of litigation, *and* it should be something that will not 'merge' in a judgment on the merits so as to be subject to effective review on appeal from a conventionally final judgment.[251]

The "separateness" quality of the collateral component implicates the problematic jurisdictional relationship to pretrial elimination of causes of action or claims for relief under the theory of "constructive finality",[252] which is specifically controlled in the federal courts by Rule 54(b). The same treatise quoted earlier suggests that these concepts — collateral order doctrine and appealable claims under Rule 54(b) — are conceptually and functionally distinct. As the commentator notes: "Without question the better view is that Rule 54(b) applies only when there are multiple claims and the collateral order doctrine applies only to the determination of a matter that really is not an ingredient of any identifiable claim."[253] Thus, in the federal view, decisions that are but steps toward final judgment (as *Cohen* noted) would not be within the definitional ambit of the collateral order doctrine. Such decisions, for example, might include a dismissal of a claim as to less than all the defendants,[254] denial of an af-

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250. *See* 10 FEDERAL PRACTICE 2D, *supra* note 212, at 91; 15 FEDERAL PRACTICE, *supra* note 243 at 470-71.

251. 15 FEDERAL PRACTICE, *supra* note 243, at 480 (emphasis added). This observation would be in conformity with *Cohen*'s reluctance to review decisions that are "but steps toward final judgment." *Cohen*, 337 U.S. at 546.

252. *See supra* note 219, and text accompanying note 219.

253. *See* 10 FEDERAL PRACTICE 2D, *supra* note 212, at 91. Judge Wieand in Praisner v. Stocker, 313 Pa. Super. 332, 459 A.2d 1255 (1983), in fact, noted that the collateral order doctrine does *not* apply to noncollateral matters. *See also* Swanson v. American Consumer Indus. Inc., 517 F.2d 555, 561 (7th Cir. 1975).

254. *See, e.g.*, Matthews v. Ashland Chemical, Inc., 703 F.2d 921 (5th Cir. 1983).

firmative defense,[255] or denial of claims concerning third parties.[256] However, the Supreme Court has ruled that, in federal courts, the denial of the legal defense of absolute or qualified immunity is immediately appealable under the collateral order doctrine.[257]

The observations and practice concerning the collateral order doctrine are offered as a backdrop to the comparatively few Pennsylvania cases on the subject. Perhaps the clearest example of the application and satisfaction of the collateral order doctrine is in the area of double jeopardy. A pretrial motion to dismiss, based on double jeopardy, is purely collateral to the merits of a criminal case. Furthermore, postponing appellate relief may effectively result in the irreparable loss of that right.[258] Thus, federal and Pennsylvania cases, which apply the collateral order doctrine to civil and criminal cases,[259] hold that denial of such pretrial claims are immediately appealable as a general rule.[260]

Other examples can only suggest the contours of the doctrine. Pretrial orders disqualifying counsel are not immediately appealable by the party in Pennsylvania[261] or in the federal courts[262] under the

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255. *See* Freeman v. Kohl & Vick Machine Works, Inc., 673 F.2d 196 (7th Cir. 1982); Hennepin County v. Aetna Casualty & Sur. Co., 587 F.2d 945 (8th Cir. 1978); *but see* Elderkin v. Sedney, ___ Pa. Super. ___, 511 A.2d 858 (1986) and *supra* text accompanying note 208.

256. *See* Hooks v. Washington Sheraton Corp., 642 F.2d 614 (D.C. Cir. 1980). *See also* Cipollone v. Liggett Group Inc., 785 F.2d 1108, 1116-17 (3rd Cir. 1986) (appeal from interlocutory discovery order did not satisfy collateral order doctrine since claims touched on merits of underlying action; court of appeals, however, could review claims pursuant to its mandamus jurisdiction).

257. *See* Mitchell v. Forsythe, 105 S.Ct. 2806 (1985); Nixon v. Fitzgerald, 457 U.S. 731 (1982). The Court noted that the defenses were purely legal in nature, did not involve the merits of the action, and were subject to irreparable loss if not reviewed before trial.

258. The supreme court in Pennsylvania, however, has recently qualified the right of immediate appeal in double jeopardy matters. If a hearing court has made written findings that the appeal involves a frivolous double jeopardy claim, there is no automatic right of immediate appellate review. *See* Commonwealth v. Brady, ___ Pa. ___, 508 A.2d 286 (1986); *see also supra* note 243; *Learn and Commonwealth v. Learn*, ___ Pa. Super. ___, ___ A.2d ___ (1986) (where superior court remanded case to trial court for specific finding as to frivolousness).

259. *See* Abney v. United States, 431 U.S. 651, 660 n.4 (1977). The rationale, of course, is that the underlying concept of finality has similar impact in civil and criminal actions.

260. Abney v. United States, 431 U.S. 651 (1977); United States v. Barket, 530 F.2d 181 (8th Cir. 1975); Commonwealth v. Brady, ___ Pa. ___, 508 A.2d 286 (1986); Commonwealth v. Bolden, 472 Pa. 602, 373 A.2d 90 (1977) (plurality opinion, later adopted in Commonwealth v. Haefner, 473 Pa. 154, 373 A.2d 1084 (1971)).

Also, in federal courts in criminal cases, orders denying pretrial bail or infringing upon the speech and debate clause have been found appealable under the collateral order doctrine. *See, e.g.*, Helstoski v. Meanor, 442 U.S. 500 (1979); Stack v. Boyle, 342 U.S. 1 (1951). As to jurisdiction over a government's appeal in matters concerning grand jury secrecy, see United States v. Eisenberg, 711 F.2d 959 (11th Cir. 1983).

261. *See* Pittsburgh & New England Trucking Co. v. Reserve Ins. Co., 277 Pa. Super.

collateral order doctrine because they fail to satisfy one or more of the doctrine's criteria. Orders denying class action certification are appealable immediately in the Pennsylvania courts,[263] but they are not immediately appealable in federal courts under the collateral order doctrine.[264] The denial of appointment of counsel for plaintiff in an employment discrimination case was deemed appealable by a federal court;[265] such an order is somewhat similar to prefinal orders denying *in forma pauperis* relief, which are appealable in Pennsylvania, although the specific jurisdictional basis is unclear.[266]

In such circumstances, the collateral requirement is clear but the requirement of potential irreparable loss or unreviewability is difficult to ascertain if one views it, for example, from the paradigm illustration of double jeopardy claims. One can also point to various, nebulous situations in which the jurisdictional basis for permitting pretrial appeals may concern either constructive finality or the collateral order doctrine, depending upon how one construes and emphasizes the collateral and irreparable loss (final? unreviewable?) factors.[267] It is clear, however, that notwithstanding the definitional problems of the collateral order doctrine and its kinship with the principle of constructive or practical finality, the supreme court has clearly articulated that the collateral order doctrine in Pennsylvania does not provide immediate appellate jurisdiction for interim orders

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215, 419 A.2d 738 (1980) (noting at that time the contrary practice in some of the federal circuit courts); *see also supra* note 134; *but see* Seiffert v. Dumati Indus., 413 Pa. 395, 197 A.2d 454 (1964) (appeal by counsel from order of disqualification).

262. The United States Supreme Court has applied the doctrine in criminal and civil disqualification cases. *See* Flanagan v. United States, 465 U.S. 259 (1984) (criminal); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) (civil).

263. *See* Bell v. Beneficial Consumer Co., 465 Pa. 225, 348 A.2d 734 (1975).

264. *See, e.g.*, Katz v. Carte Blanche Corp. 496 F.2d 747 (3d Cir. 1974), *cert. denied*, 419 U.S. 885 (1974).

265. Slaughter v. City of Maplewood, 731 F.2d 587 (8th Cir. 1984).

266. See cases cited in *supra* notes 226-28 and accompanying text. One may question whether such orders result in an irreparable loss or are effectively unreviewable for purposes of applying the collateral order doctrine.

267. These cases are merely offered for reflection. *See In re* Estate of Georgione, 312 Pa. Super. 339, 458 A.2d 989 (1983), *aff'd*, 504 Pa. 510, 475 A.2d 764 (1984) (collateral order doctrine applied to orders removing executor); *accord* Collins v. Miller, 198 F.2d 948 (D.C. Cir. 1952) (dismissal of petition to remove executor appealable under collateral order doctrine); *see also In re* Estate of Croessant, 482 Pa. 188, 393 A.2d 443 (1978) (appeal from order removing appellant as trustee); Senseman's Appeal, 21 Pa. 331 (1853) (refusal to appoint testamentary guardian is appealable); *but see* Givens v. Givens, 304 Pa. Super. 571, 450 A.2d 1386 (1982) (denial of petition to appoint guardian ad litem not appealable) (distinguishing Senseman's Appeal); Sutliff v. Sutliff, 339 Pa. Super. 523, 489 A.2d 764 (1985) (wife's appeal from order denying petition to remove husband and business associate as guardian for children's funds considered on the merits); *In re* White, 321 Pa. Super. 102, 467 A.2d 1148 (1983), *rev'd on other grounds*, 506 Pa. 218, 484 A.2d 763 (1984) (appeal by trust beneficiaries from order denying, inter alia, petition to remove trustee considered without discussion of jurisdictional basis).

that will not result in the irreparable loss of a claimed right.[268]

In summary, the distinctive jurisdictional feature of the collateral order doctrine is that it expands the traditional concepts of finality to permit an immediate appeal from a final, determinative decision regarding an important right purely collateral to the main action. If deferral of appellate review may (or will) result in the irreparable loss of the important right, or if subsequent appellate review may be unavailable or practically ineffective, then review of the interlocutory, collateral order may be appropriate under that rare exception to the finality principle known as the collateral order doctrine. Caution, however, is advised, especially with respect to delineating what is "collateral" in Pennsylvania law. Recently, a Pennsylvania appellate court panel considered the appealability of an order precluding the defendants from asserting a defense, previously analyzed in case law in the context of constructive finality, from the perspective of the collateral order doctrine.[269] Whether this case portends a refinement of the collateral order doctrine or a viable doctrinal alternative to or substitute for what has been termed herein as "constructive finality" remains to be seen.[270] Such a change would

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268. See Fried v. Fried, 509 Pa. 89, 501 A.2d 211 (1985), which involved an appeal in a pending divorce action concerning alimony pendente lite, interim counsel fees, and costs. The supreme court found that there would be no irreparable loss if review were deferred. One should ask whether all three items are "collateral" or separable from the main action if accommodation can be made at the time of final judgment.

Other collateral orders relating to discovery sanctions, expenses, costs, or temporary measures would not satisfy the collateral doctrine's criteria. *See, e.g.*, Sanderbeck v. Sanderbeck, 372 Pa. Super. 461, 476 A.2d 44 (1984) (order denying blood tests in support cause of action not immediately appealable under collateral order doctrine); Steel v. Weisberg, 347 Pa. Super. 106, 500 A.2d 428 (1985) (order denying protective relief not appealable under collateral order doctrine); *but cf* McManus v. Chubb Group of Ins. Cos., 342 Pa. Super. 405, 493 A.2d 84 (1985) (expenses, discovery sanctions; appeal quashed); Gray v. State Farm Ins. Co., 328 Pa. Super. 532, 477 A.2d 868 (1984) (counsel fees); Doe v. United States, 666 F.2d 43 (4th Cir. 1981) (pretrial order as to admissability of victim's sexual behavior appealable).

269. *See* Elderkin v. Sedney, ___ Pa. Super. ___, 511 A.2d 858 (1986). *See also supra* cases cited in notes 196-98. *Query*: For purposes of applying the collateral order doctrine to affirmative defenses, is the prior distinction of precluding facts at trial important in determining the criterion of separability or collaterallity? It is also essential to note that *Elderkin*'s limitation of jurisdiction over orders concerning affirmative defenses may rest upon the case's procedural context, namely, precluding an affirmative defense as a discovery sanction.

270. The discussion about finality and its limits shall not go beyond the traditional confines of the collateral order doctrine. For those interested in the darker recesses of the concept and jurisprudential gymnastics, attention is directed to the idea of the existence of a "reverse collateral order doctrine." The concept applies to a collateral order entered after final judgment. *See, e.g.*, Swanson v. American Consumer Indus. Inc., 517 F.2d 555 (7th Cir. 1975); *cf.* Crossman v. Maccoccio, 792 F.2d 1 (1st Cir. 1986); *see also* Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COL. L. REV. 89 (1975); Comment, *Collateral Orders and Extraordinary Writs as Exceptions to the Finality Rule*, 51 NW. U.L. REV. 746 (1957).

be significant.

IV. Subject Matter Jurisdiction: Interlocutory Orders Immediately Appealable by Statute or Rule

A nonfinal order is not necessarily a nonappealable order. Although finality - classic (technical), constructive (practical) or collateral - represents the major access route to the appellate courts, interlocutory appeals will be reviewed if they are specifically authorized by statute or rule of court. The exceptions, however, are limited.

There are various statutes or procedural rules of court that constitute exceptions to the final order doctrine. It is difficult to extract from these exceptions any particular rationale or policy supporting appellate review. Thus, in the absence of such legislative or judicial information, the task of explaining must yield to that of describing. Most of the following exceptions are contained in an appellate rule, hereinafter referred to as Rule 311.[271]

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271. PA. R. APP. P. 311 reads in part as follows:

Rule 311. Interlocutory Appeals as of right

(a) General rule. Except as otherwise prescribed by general rule, an appeal may be taken as of right from:

(1) *Affecting judgments.* An order opening, vacating or striking off a judgment, or refusing to open, vacate or strike off a judgment. If orders opening, vacating or striking off a judgment are sought in the alternative, no appeal may be filed until the court has disposed of each claim for relief. (2) *Attachments, etc.* An order confirming, modifying or dissolving or refusing to confirm, modify or dissolve an attachment, custodianship, receivership or similar matter affecting the possession or control of property. (3) *Change of criminal venue or venire.* An order changing venue or venire in a criminal proceeding. (4) *Injunctions.* An order granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. (5) *New trials.* An order in a civil action or proceeding awarding a new trial, or an order in a criminal proceeding awarding a new trial where the defendant claims that the proper disposition of the matter would be an absolute discharge or where the Commonwealth claims that the lower court committed an error of law. (6) *Partition.* An order directing partition. (7) *Other cases.* An order which is made appealable by statute or general rule.

(b) Order sustaining venue or personal or in rem jurisdiction. An appeal may be taken as of right from an order in a civil action or proceeding sustaining the venue of the matter of jurisdiction over the person or over real or personal property if:

(1) the plaintiff, petitioner or other party benefiting from the order files of record within ten days after the entry of the order an election that the order shall be deemed final; or (2) the court states in the order that a substantial issue of jurisdiction is presented.

(c) Changes of venue, etc. An appeal may be taken as of right from an order in a civil action or proceeding changing venue, transferring the matter to another court of coordinate jurisdiction, or declining to proceed in the matter on the basis of forum non conveniens or analogous principles.

A. Orders Affecting Judgments

The appellate rules[272] provide generally that an order opening, vacating or striking off a judgment is appealable; further, an order refusing to open, vacate or strike off a judgment is also appealable. In the latter situation, the result is arguably akin to a reinforced termination of a case; in the former, the termination of the case has been, in effect, rescinded so as to put the parties back into court. The procedural rule has been applied to various types of judgments. In *Dole v. Western Auto Supply Co.*,[273] the superior court stated that an appeal from an order refusing to open or strike a non pros, issued upon praecipe by defendant because plaintiff failed to file a complaint, was proper under Rule 311.[274]

An order which *reactivates* a previously dismissed case has also been considered appealable under the same procedural rule since it is an order affecting a judgment.[275] Such orders are immediately appealable.[276] Appeals have also been entertained from orders vacating a prior summary judgment.[277] In addition, the partial opening of a confessed judgment for the purpose of determining damages was held to be an immediately appealable order.[278] In another case, although the procedural basis was not discussed, an appeal from an order opening a divorce decree was entertained.[279]

It should be carefully noted, however, that sanction orders imposing judgment for noncompliance with discovery may likely be beyond the ambit of the procedural rule and are not immediately appealable. One case has stated that the proper procedure is not to file

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272. *See* PA. R. APP. P. 311(a) (*see supra* note 271 for text).

273. ___ Pa. Super. ___, ___ n.3, 508 A.2d 600, 602 n.3 (1986); *see also* Buxbaum v. Peguero, 355 Pa. Super. 289, 484 A.2d 137 (1984); Storm v. Golden, 388 Pa. Super. 570, 488 A.2d 39 (1985) (appeal from order opening judgment of non pros).

274. *See* PA. R. CIV. P. 1037. Note, however, that a federal court has questioned the constitutionality of the rule in Hines v. Pettit, Jr., 638 F. Supp. 1269 (E.D. Pa. 1986). In addition, one should distinguish appeals involving a non pros entered as a discovery order. *See infra* notes 281-82; *supra* notes 204-11; *cf. supra* note 11.

275. *See, e.g.*, Sporkin v. Affinito, 326 Pa. Super. 481, 474 A.2d 343 (1984); Stawiarski v. Hall, 300 Pa. Super. 67, 445 A.2d 1303 (1982).

276. *See* Scoumiou v. United States Steel Corp., 293 Pa. Super. 254, 438 A.2d 981 (1981) (order vacating prior dismissal and reactivating case was in nature of order opening judgments and was immediately appealable; no exceptions permitted; untimely appeal quashed).

277. *See* Hunter v. Employers Ins. of Wausau, 347 Pa. Super. 227, 500 A.2d 490 (1985); *see also supra* notes 111, 137, 138 (summary judgments); Nordmann v. Commonwealth, 79 Pa. Commw. 187, 468 A.2d 1173 (1983).

278. *See* Haggerty v. Fetner, 332 Pa. Super. 333, 481 A.2d 641 (1984); *see also* Pittsburgh Nat. Bank v. Larson, ___ Pa. Super. ___, 507 A.2d 867 (1986) (opening of confessed judgment).

279. *See* Fenstermaker v. Fenstermaker, 337 Pa. Super. 410, 502 A.2d 185 (1985).

a petition to open or strike the judgment on liability or damages but to file an appeal from the entry of a final judgment.[280] In *Simpson v. Allstate Insurance Co.*,[281] however, the superior court distinguished default judgments entered pursuant to a party's praecipe and ruled that the lower court's opening of a judgment, which was not in the nature of a default judgment, was an appealable order under the procedural rule. The court noted that the prior default judgment, which nevertheless was a sanction order necessitated because of non-compliance with discovery, was entered *by the court* in a *contested* proceeding. Thus, as to orders concerning a request to open or strike a judgment under the procedural rule, the litigator should be careful in determining the following: whether the prior judgment (non pros, default judgment) was entered as a discovery sanction; whether the sanction order was entered by the court or through a party's praecipe; whether a petition to open or strike is procedurally proper; and whether the particular appellate court recognizes an immediate appeal in such circumstances.[282]

B. Orders Affecting Possession/Control of Property

An order that affects one's possession or control of property may be immediately appealable.[283] These appealable orders may concern, for example, the dissolution or modification of attachments, custodianships, or receiverships, as well as the refusal to dissolve or modify such similar interests in property.[284] Nevertheless, when the lower court's order does not tangibly affect the control or possession of property, such as in situations involving a *lis pendens*, the rule of appealability would seem to be inapplicable.[285] The few cases that

280. *See* Livolsi v. Crosby, 344 Pa. Super. 34, 493 A.2d 1384 (1985) (appeal from denial of petition to open default judgment on liability and damages, entered as a sanction, was quashed); Miller Oral Surgery v. Dinello, 342 Pa. Super. 577, 493 A.2d 741 (1985) (appeal from denial of petition to open default judgment entered as a sanction on liability only was quashed) (refusing to follow Marshall v. Southeastern Pa. Transp. Auth., 76 Pa. Commw. 205, 463 A.2d 1215 (1985)). For prior caselaw on immediately appealing order that refused to open judgment on liability, entered as a sanction, see Scharfman v. Philadelphia Transp. Co., 234 Pa. Super. 564, 340 A.2d 539 (1975) (interpreting and applying the predecessor of PA. R. APP. P. 311(a)(1), PA. STAT. ANN. tit. 12, § 1100 (Purdon 1969) (repealed)); *see also* PA. R. APP. P. 311(a) comments.

281. 350 Pa. Super. 239, 504 A.2d 335 (1968) (en banc).

282. The qualification of appealability of orders stemming from discovery matters has occurred in other areas. *See* Elderkin v. Sedney, ___ Pa. Super. ___, 511 A.2d 858 (1986) (commented upon *supra* in notes 208 and 269); *see also supra* note 280.

283. *See* PA. R. APP. P. 311(a)(2) (*see supra* note 271 for text).

284. *See, e.g.*, Triffin v. Interstate Printing Co., ___ Pa. Super. ___, 515 A.2d 956 (1986); Foulke v. Lavelle, 308 Pa. Super. 131, 454 A.2d 56 (1982); *cf.* Teradyne, Inc. v. Mostek Corp., 797 F.2d 43 (1st Cir. 1986).

285. *See, e.g.*, United States Nat'l Bank in Johnstown v. Johnson, 321 Pa. 352, 487

concern this appealability issue sometimes do not discuss the specific procedural rule.[286]

C. *Orders Changing Criminal Venue*

An interlocutory order which changes venue or venire in a criminal case is appealable under the rules.[287] However, an order refusing to change venue is not appealable under the rule.[288]

D. *Injunctions*

The appellate rules authorize an interlocutory appeal from an order relating to the grant, dissolution, modification, continuation or denial of injunctive relief.[289] Presently, although the rule specifies that it concerns interlocutory orders,[290] there is some appellate disagreement whether the injunction provision concerns both preliminary and final injunctions.[291] In this regard, it is important perhaps to note that the procedural rule is patterned after a federal statute.[292]

A.2d 809 (1985) (order striking lis pendens is interlocutory and not appealable); *cf.* 6 & 8 Builders Supply, Inc. v. Buell, 292 Pa. Super. 307, 437 A.2d 58 (1981) (order striking lis pendens did not put plaintiff out of court when cause of action was not concerned with title to or sale of real estate); *but see* McCahill v. Roberts, 421 Pa. 233, 219 A.2d 306 (1966) (order, in effect, striking lis pendens, was appealable and final since it effectively put plaintiffs out of court on their claims for full and complete ownership of a building); *see also* Rappaport v. Stein, 351 Pa. Super. 370, 506 A.2d 393 (1985) (quiet title action involving, inter alia, appointment of real estate management firm did not present an appealable order involving control or possession of property under PA. R. APP. P. 311).

286. *See* Ziegler Lumber v. Golden Triangle Dev. Co., 320 Pa. Super. 557, 467 A.2d 853 (1983) (order setting aside writ of execution as to some property and permitting execution as to other property not immediately appealable since there was no final determination yet regarding specific property subject to mechanics lien); *cf.* Rodgers v. Yodock, 309 Pa. Super. 154, 454 A.2d 1129 (1983) (temporary stay of writ of execution not final) (distinguishing National Council of Junior Order v. Robertson), 214 Pa. Super. 9, 248 A.2d 861 (1969)).

287. *See* PA. R. APP. P. 311(a)(3) (*see supra* note 271 for text).

288. *See* PA. R. CRIM. P. 312; Commonwealth v. Swanson, 424 Pa. 192, 225 A.2d 231 (1967). As to change of venire, see 42 PA. CONS. STAT. ANN. § 8702 (Purdon 1982).

289. *See* PA. R. APP. P. 311(a)(4) (*see supra* note 271 for text); *see also* Temtex Products, Inc. v. Kramer, 330 Pa. Super. 183, 190, 479 A.2d 500, 503 (1984).

290. Recognizably, an examination of Rule 311 indicates that technically not all of the provisions concern interlocutory matters. Some orders under Rule 311 arguably put the litigants out of court, if the rule is interpreted to include, for example, final injunction orders.

291. The significance of the distinction concerns the necessity of filing exceptions or post-trial motions in the lower court preliminary to an appeal. *See, e.g.*, Commonwealth ex rel. Lewis v. Allouwill Realty Corp., 330 Pa. Super. 32, 478 A.2d 1334 (1984); Humphreys v. Cain, 84 Pa. Commw. 222, 474 A.2d 353 (1984) (exceptions required before appealing in permanent injunction case) (disapproving of Agra Enterprises Inc. v. Brunozzi, 302 Pa. Super. 166, 448 A.2d 579 (1982)). The issue of exceptions and preservation of issues for appellate review is not within the scope of this Article. *See supra* note 123.

292. *See* PA. R. APP. P. 311(a)(4) comment, which refers to 28 U.S.C. § 1292(a)(1). *See* Teradyne, Inc. v. Mostek Corp., 797 F.2d 43 (1st Cir. 1986) (order enjoining defendant from disposing or encumbering $4 million of its assets and directing it to set aside an amount in an interest bearing account was appealable as a preliminary injunction, not as an unappealable attachment order).

Federal case law has noted that an interlocutory order granting, continuing, modifying, refusing or dissolving an injunction is one that temporarily awards or refuses to award all or part of the injunctive relief sought by a claimant. An order that merely continues the case and does not reach the merits of the claim is nothing more than a step in the processing of the case and does not come within the scope of the federal injunction statute.[293] Thus, an order that restrains or directs the conduct of the parties is not immediately appealable in the federal courts under the statute unless the restraint or direction is related to the substantive issues in the case.[294]

Two aspects of the procedural rule on injunctions should be considered. First, an order appealable as an injunction under the appellate rule would arguably contemplate that the lower court's action preceding the order was in conformity with the procedural requirements under the rules of civil procedure.[295] Second, it is correlatively clear that the mere compelling of performance or refusing to grant relief that is analogous to an injunction does not necessarily mean that, for appellate jurisdiction purposes, the lower court's action comes within the scope of the appellate rule. Care should be observed in this regard.[296] One case, for example, has also stated that

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293. *See* Rodger v. United States Steel Corp., 508 F.2d 152, 160 (3d Cir. 1975), *cert. denied*, 423 U.S. 832 (1975).

294. *See* State of N.Y. v. United States Metals Ref. Co., 771 F.2d 796, 801 (3d Cir. 1985).

295. *See* PA. R. CIV. P. 1531 (special relief, injunctions); Beckman v. Abramovitz, 344 Pa. Super. 149, 496 A.2d 53 (1985) (appeal from order granting petition to freeze corporate assets not appealable as a preliminary injunction under Rule 311 since lower court did not follow procedural requirements for preliminary injunction and court itself characterized order as relating to a petition to enforce a settlement agreement; Rule 311 is extraordinary in order to prevent irreparable harm before ultimate decision); *see also* Teradyne, Inc. v. Mostek Corp., 797 F.2d 43 (1st Cir. 1986) (order affecting and controlling ownership of property treated as an appealable preliminary injunction since order was a significant restraint and parties treated order as an injunction); *but cf.* Johnston v. Johnston, 346 Pa. Super. 427, 499 A.2d 1074 (1985) (order threatening contempt and directing defendants to execute trust agreements characterized as "in nature of mandatory injunction"; no specific discussion, however, of appealability under Rule 311). As to contempt orders and appellate jurisdiction, see *supra* notes 121, 128; Lehigh Township v. Tahos, 91 Pa. Commw. 568, 498 A.2d 30 (1985) (appeal from order finding defendants in contempt for failure to raze or sell property quashed as interlocutory until lower court follows necessary procedural steps).

296. Consider the following cases, which, one should note, do not directly address the particular procedural rule of jurisdiction as to injunctions: *In re* Handwriting Exemplar of Casale, 338 Pa. Super. 111, 487 A.2d 877 (1985) (appeal from court's order requiring civilian to submit copy of handwriting exemplar was not in nature of subpoena or final and had to await possible final order of sentence should appellant be found in contempt); Gottschall v. Jones & Laughlin Steel Corp., 333 Pa. Super. 493, 482 A.2d 979 (1984) (protective order restricting dissemination of information in shareholders' suit did not prevent litigation of action and was not appealable as a final order).

As to lower court orders compelling one to submit to a medical examination, consider Myers v. Travelers Ins. Co., 353 Pa. 523, 46 A.2d 224 (1946) (in assumpsit action to recover

the filing of an appeal in injunction matters may await the subsequent final determination of the case.[297]

E. New Trials

In civil cases, an interlocutory order awarding a new trial is immediately appealable.[298] A denial of a motion for judgment notwithstanding the verdict is reviewable when it is issued in conjunction with an appealable order granting a new trial.[299]

In criminal cases, an order granting a new trial is appealable when (1) the defendant claims that the proper disposition of the matter would be an absolute discharge; or (2) the Commonwealth claims that the lower court committed an error of law.[300]

F. Partition

An order directing partition is immediately appealable under the procedural rule,[301] although case law has stated that the order

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disability benefits, order making absolute a rule to show cause upon the plaintiff why proceedings should not be stayed until plaintiff submits to a physical examination is a final, appealable order since it precludes plaintiff from further action); State Farm Mut. Auto. Ins. Co. v. Morris, 289 Pa. Super. 137, 432 A.2d 1089 (1981) (stating general rule that an order requiring a party to submit to a medical examination is interlocutory because it does not preclude further litigation; but when petition is not ancillary to any cause of action, such an order is appealable since action is, in effect, terminated). *Morris* would seem to be in conformity with the federal view, *see supra* notes 292-94, if one regards the order therein from the perspective of injunctions rather than finality. As to federal practice, see also United Bonding Ins. Co. v. Stein, 410 F.2d 483 (3d Cir. 1969) (bill for specific performance lacks the elements of an action for injunctive relief).

297. *See* Valley Forge Historical Soc'y v. Washington Memorial Chapel, 330 Pa. Super. 494, 502 n. 3, 479 A.2d 1011, 1016 n. 3 (1983); *cf.* Geyer v. Steinbronn, 351 Pa. Super. 536, 506 A.2d 901 (1986) (post-verdict appeal as to prior order opening non pros); Lombardo v. DeMarco, 350 Pa. Super. 490, ___ n. 4, 504 A.2d 1256, 1258 n.4 (1985) (partition).

298. *See* PA. R. APP. P. 311(a)(5) and comments thereto (citing Hoban v. Conroy, 347 Pa. 487, 32 A.2d 769 (1943)).

299. *See* Buck v. Scott Township, 325 Pa. Super. 148, 472 A.2d 691 (1984); Schroeder Bros. v. Sabelli, 156 Pa. Super. 267, 40 A.2d 170 (1944).

300. *See* Commonwealth v. White, 482 Pa. 197, 393 A.2d 447 (1978); Commonwealth v. Gabor, 209 Pa. 201, 58 A. 278 (1904); PA. R. APP. P. 311(a)(5) (*see supra* note 271 for text); Commonwealth v. Williams, ___ Pa. Super. ___, ___ A.2d ___ (1986) (appeal from order denying defendant's motion for acquittal proper under Rule 311(a)(5) where order results in new trial and defendant claims right to absolute discharge); *see also* Commonwealth v. Antonini, 165 Pa. Super. 501, 69 A.2d 436 (1949) (Commowealth's right to appeal new trial for defendant regarding the allegedly prejudicial admission of evidence), *cited in* Commonwealth v. Dincel, 311 Pa. Super. 470, 474-75 n.2, 457 A.2d 1278, 1280 n.2 (1983); *cf.* Commonwealth v. Pollick, 420 Pa. 61, 215 A.2d 904 (1966) (defendant's appeal from order refusing his motion for a discharge after jury deadlock quashed).

301. *See* PA. R. APP. P. 311(a)(6) (*see supra* note 271 for text); PA. R. CIV. P. 1531-1551; *see also* Zottola v. Venturino, 343 Pa. Super. 289, 494 A.2d 471 (1985); *cf.* Koba v. Koba, 307 Pa. Super. 245, 453 A.2d 17 (1982) (appeal from order dismissing wife's exceptions of master quashed as interlocutory) (citing Recktenwald v. Recktenwald, 284 Pa. Super. 185, 425 A.2d 765 (1981)).

can be challenged later in an appeal from a final decree.[302]

G. *Orders Sustaining Jurisdiction or Venue in Civil Cases*

Contrary to prior case law,[303] the general rule now is that an order sustaining venue or jurisdiction, which is clearly interlocutory, is not immediately appealable.[304] The appellate rules, however, permit the aggrieved party to file an immediate interlocutory appeal from the order sustaining jurisdiction if (1) the plaintiff or nonaggrieved party files of record within ten days after the entry of the order an election that the order shall be deemed final; or (2) the lower court states in the order[305] that a substantial issue of jurisdiction exists.[306] The commentary to the rule notes that as to the first condition, the party *benefiting*, which is presumably and usually the plaintiff, is given the option to gamble that the venue of the matter or jurisdiction will be sustained on appeal. It is important for the defendant to note that, if the plaintiff timely elects final treatment, the failure of the defendant to appeal the interlocutory order results in a waiver of the issue in a later appeal.[307] The commentary also notes that presumably a plaintiff would file such an election when he or she desires to force the defendant to decide quickly whether the objection to venue or jurisdiction will be seriously pursued.

The applicable rule, one should note, is addressed to venue and jurisdiction over the person, thing, or property. Thus, as one case has noted, the appellate rule does not confer jurisdiction over interlocutory orders sustaining subject matter jurisdiction.[308] Also, if the plaintiff elects to file an election within the ten day period, the time in which to appeal for the defendant would ordinarily be at least twenty days since the appeal period begins to run from the day that

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302. *See* Lombardo v. DeMarco, 350 Pa. Super. 490, ____ n.4, 504 A.2d 1256, 1256 n.4 (1985) (citing Grubb v. Dembec, 241 Pa. Super. 18, 359 A.2d 418 (1976)).

303. *See, e.g.*, Grier v. Scientific Living, Inc., 253 Pa. Super. 113, 384 A.2d 1254 (1978) (citing PA. STAT. ANN. tit. 12, § 672 (Purdon 1969) (repealed)).

304. *See* Centerre Bank v. Arthur Young & Co., 348 Pa. Super. 364, 502 A.2d 251 (1985) (order denying preliminary objections based on *forum non conveniens* not appealable or final).

305. The rule specifies certification in the order. *But see* Temtex Products, Inc. v. Kramer, 380 Pa. Super. 783, 479 A.2d 500 (1984) (belated certification by lower court three months after appeal not fatal to appellate jurisdiction).

306. *See* PA. R. APP. P. 311(b) (*see supra* note 271 for text); United Erectors v. Pratt & Lambert Corp., 338 Pa. Super. 577, 488 A.2d 43 (1985) (appeal quashed because neither condition was satisfied); *see also* Adkins v. Empire Kosher Poultry, Inc., 321 Pa. Super. 30, 467 A.2d 877 (1983).

307. *See* PA. R. APP. P. 311(d)(2) and comments thereto.

308. *See* Pennsylvania Higher Educ. Assistance Agency v. DiMassa, 296 Pa. Super. 529, 442 A.2d 1177 (1982).

the order is entered.[309]

H. Orders Changing Venue in Civil Cases

An interlocutory order that (1) changes venue; (2) transfers a matter to another court of coordinate jurisdiction; or (3) refuses to permit the action to proceed on the basis of *forum non conveniens* is automatically appealable in civil cases under the appellate rules.[310] Unlike the examples in the prior discussion on jurisdiction, these appealable orders represent either a jurisdictional change or a jurisdictional stalemate. In such instances, there is no need to obtain an opposing party's election on the record or a jurisdictional certification by the lower court. As with the preceding section, however, the comments to the rule indicate that there is no automatic right of appeal from a transfer order based on improper subject matter jurisdiction.[311]

I. Statutory and Common Law Arbitration Matters

Rule 311 contains a residual provision to permit interlocutory appeals from orders that are made appealable by statute or general rule.[312] The Judicial Code, for example, addresses the appealability of lower court orders relating to nonjudicial statutory[313] and common

309. *See* PA. R. APP. P. 311(b) commentary. As to when the lower court certifies a substantial issue of jurisdiction in its order, see Martin v. Gerner, 332 Pa. Super. 507, 481 A.2d 903 (1984) (order dismissing defendant's preliminary objections, which were based on lack of jurisdiction and improper venue, was appealable from the time that the lower court amended its order, not from the time of the entry of the original order); *see also* PA. R. APP. P 108 (date of entry of orders).

310. *See* PA. R. APP. P. 311(c) (*see supra* note 271 for text); PA. R. CIV. P. 1006(d) (venue, change of venue); Centerre Bank v. Arthur Young & Co., 348 Pa. Super. 365, 502 A.2d 251 (1985) (*forum non conveniens*, appeal quashed).

311. The commentary to Rule 311 also indicates that it does not relate to a transfer under 42 PA. CONS. STAT. ANN. §§ 933(c)(1) (concurrent and exclusive jurisdiction), 5103 (transfer of erroneously filed matter), or under any other similar provision of law. The option is to seek permission from the lower and appellate courts to appeal the interlocutory order. *See* PA. R. APP. P. 312, 1311, discussed *infra* notes 315-51 and accompanying text.

312. *See* PA. R. APP. P. 311(a)(7) (*see supra* note 271 for text). The comment to Rule 311 advises that one should consult the criminal and civil procedural rules, for example, to identify any avenues for interlocutory appeals.

313. 42 PA. CONS. STAT. ANN. § 7320 (Purdon 1982) (provides for the right of appeal from the following orders relating to statutory arbitration:

> *(a) General rule.* — An appeal may be taken from:
>
> (1) A court order denying an application to compel arbitration made under section 7304 (relating to proceedings to compel or stay arbitration). (2) A court order granting an application to stay arbitration made under section 7304(b). (3) A court order confirming or denying confirmation of an award. (4) A court order modifying or correcting an award. (5) A court order vacating an award without directing a re-hearing. (6) A final judgment or decree of a court entered pursuant to the provisions of

law[314] arbitration. The statutory provisions should be carefully examined to determine whether an appeal from orders concerning common law or statutory arbitration is permissible.

V. Subject Matter Jurisdiction — Permission to Appeal Nonfinal Orders

A. Generally

Unless a statute or rule of court provides otherwise, an aggrieved party cannot immediately appeal a nonfinal or interlocutory order.[315] Nevertheless, appellate review of an interlocutory order, which is generally not immediately reviewable, can be obtained through permission from both the lower and appellate courts. Both the Judicial Code[316] and appellate rules[317] provide this route of access to the appellate forum. The applicable statute specifies the following:

> (b) *Interlocutory appeals by permission.* - When a court of other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.[318]

This procedure is known as the certification process of appellate jurisdiction.

B. Procedural Requirements: Certification, Petition, Filing

Preliminarily, the aggrieved party must note that he or she must

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this subchapter.

(b) Procedure. — The appeal shall be taken in the manner, within the time and to the same extent as an appeal from a final order of court in a civil action.

314. 42 PA. CONS. STAT. ANN. § 7342 (Purdon 1982) concerns common law arbitration and now incorporates 42 PA. CONS. STAT. ANN. § 7320 (*see supra* note 313 for text). For prior caselaw, see, for example, Brennan v. General Accident Fire & Life Assurance Co., 307 Pa. Super. 288, 453 A.2d 356 (1982); Heller v. Allstate Ins. Co., 233 Pa. Super. 240, 446 A.2d 273 (1982). The statutory provisions are now controlling.

315. Of course, an aggrieved party can appeal an order that has been judicially construed as "final."

316. *See* 42 PA. CONS. STAT. ANN. § 702 (Purdon 1981).

317. *See* PA. R. APP. P. 312, 1311. Rule 1311(b) is substantially similar to 42 PA. CONS. STAT. ANN. § 702(b). *See infra* text accompanying note 325.

318. *See* 42 PA. CONS. STAT. ANN. § 702(b).

seek permission to appeal *first* from the lower court and *then* from the appellate court. It is thus a double discretionary process. Certification by the lower court alone does not automatically entitle one to appeal the interlocutory order as certified; a direct appeal from the certified order, without the condition precedent of specific appellate approval, is fatal and will result in the dismissal of the appeal.[319]

As the Judicial Code's provision plainly indicates, the lower court's certification must assure that three substantive conditions are met: (1) existence of a controlling question of law; (2) which is subject to a substantial ground for difference of opinion; and (3) the immediate resolution of which may materially advance the ultimate termination of the matter. If these conditions are met, then the appellate court may in its sound discretion grant a petition to permit an interlocutory appeal from the certified order.

One should consider the potential dangers or inadvisability of a *pro forma*, unexplanatory certification. Although there is no directly relevant Pennsylvania case law on point, a federal court, addressing similar statutory certification requirements,[320] stated that the routine, unexplained recitation of the statutory formula in the lower court's certified order constituted an abuse of discretion. Under such nebulous circumstances, the appellate court stated that it was unable to give deference to a conclusion totally devoid of merit.[321] Aside from questions as to such possible disadvantages, a generalized statement from the lower court will likely be of little assistance initially to the appellate court, especially if there is no lower court opinion.

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319. *See, e.g., In re* Handwriting Exemplar of Casale, 338 Pa. Super. 111, 487 A.2d 877 (1958), *appeal granted*, 508 Pa. 605, 499 A.2d 577 (1985); Commonwealth v. Wills, 328 Pa. Super. 342, 476 A.2d 1362 (1984); Pennsylvania Higher Educ. Assistance Agency v. DiMassa, 296 Pa. Super. 529, 442 A.2d 1177 (1982) (lower court's opinion was not an adequate certification and appellants failed to petition appellate court); Gellar v. Chambers, 292 Pa. Super. 324, 437 A.2d 406 (1981); *cf.* Commonwealth v. Pfender, 280 Pa. Super. 417, 421 A.2d 791 (1980) (failure to comply with certification requirements not fatal when order of suppression was independently final and appealable).

320. The abusive certification, it should be noted, concerned FED. R. CIV. P. 54(b), not 28 U.S.C.S. § 1292(b) (1984). *See supra* text accompanying note 219.

321. *See* Coalition for Equitable Minority Participation in Architectural Contract in Tenn. v. Metropolitan Government of Nashville and Davidson County, Tenn., 786 F.2d 227 (6th Cir. 1986). In one critical commentary, for example, an author lamented that the application of the criteria for review-by-certification is confusing and divergent. The author suggested that the appellate courts should use short opinions setting forth reasons for acceptance or denial of an application especially since more and more district courts have provided skeletal certifications without any supporting rationale or analysis for the appellate courts. *See* Note, *Section 1292(b): Eight Years of Undefined Discretion*, 54 GEO. L.J. 940, 945, 961 (1966); *see also* Vestal, *The Certified Question of Law*, 36 IOWA L. REV. 629-47 (1951), noting that the certification procedure may be a useful vehicle in establishing a well-rounded jurisprudence at the intermediate level; Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C.S. § 1292(b)*, 88 HARV. L. REV. 607 (1975).

The petition[322] in support of a petition to permit appeal, if sufficiently particularized as to the previously stated three requirements, is not only advisable but mandatory[323] under the procedural rules and would obviously obviate the potential disadvantages resulting from a generalized certification. Once the appellate court grants the petition to appeal, the time limitations in filing an appeal are governed by the general rules or rules of court.[324]

The procedural requirements governing filing are specific. The applicable procedural rules provides as follows:

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322. The petition must be particularized; supporting briefs are not permitted from the petitioner, although a brief in opposition to the petition is permitted. *See* PA. R. APP. P. 1312(c), 1314.

323. PA. R. APP. P. 1312 provides, in part as follows:

> *(a) General rule.* The petition for permission to appeal need not be set forth in numbered paragraphs in the manner of a pleading, and shall contain the following (which shall, insofar as practicable, be set forth in the order stated):
>
> (1) A statement of the basis for the jurisdiction of the appellate court. (2) The text of the order in question, or the portions thereof sought to be reviewed (including the statement by the lower court or other government unit that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter), and the date of its entry in the court or other government unit below. If the order is voluminous, it may, if more convenient, be appended to the petition. (3) A concise statement of the case containing the facts necessary to an undertaking of the controlling questions of law determined by the order of the lower court or other government unit. (4) The controlling questions of law presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of questions presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition, or fairly comprised therein, will ordinarily be considered by the court in the event permission to appeal is granted. (5) A concise statement of the reasons why a substantial ground exists for a difference of opinion on the questions and why an immediate appeal may materially advance the termination of the matter. (6) There shall be appended to the petition a copy of any opinions delivered relating to the order sought to be reviewed, as well as all opinions of lower courts or other government units in the case, and, if reference thereto is necessary to ascertain the grounds of the order, opinions in companion cases. If whatever is required by this paragraph to be appended to the petition is voluminous, it may, if more convenient, be separately presented. (7) There shall be appended to the petition the verbatim texts of the pertinent provisions of constitutional provisions, statutes, ordinances, regulations or other similar enactments which the case involves, and the citation to the volume and page where they are published, including the official edition, if any.
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> . . .
>
> *(d) Essential requisites of petition.* The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.

324. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 5571(e) (Purdon 1981); PA. R. APP. P. 903 and note thereto (time to appeal).

> (b) *Petition for permission to appeal.*
> Permission to appeal from an interlocutory order containing the statement prescribed by 42 Pa.C.S. Sec. 702(b) may be sought by filing a petition for permission to appeal with the prothonotary of the appellate court within 30 days after entry of such order in the lower court or other government unit with proof of service on all other parties to the matter in the lower court or other government unit and on the government unit or clerk of the lower court, who shall file the petition of record in such lower court. An order may be amended to include the prescribed statement at any time, and permission to appeal may be sought within 30 days after the entry of the order as amended.[325]

Thus, the particularized petition to permit an interlocutory appeal must be filed in the appellate court within 30 days of the entry of the certified order.[326]

C. *Pennsylvania Cases*

The difficulty in illustrating the three substantive requirements of certification is that there is hardly any published case law specifically explaining the reasons supporting appellate review of a certified interlocutory order. What is, for example, a "controlling question of law"? What factors indicate a "substantial ground" for a "difference of opinion"? How is the ultimate termination of a matter "materially advanced"?

In one published opinion, however,[327] the superior court vacated its prior order permitting an appeal and quashed the appeal. The appeal was taken from a certified order (striking a supplemental pretrial statement naming an expert witness to be called at trial) which was clearly interlocutory. The purported effect of the order was to

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325. PA. R. APP. P. 1311(b). The rule states that the interlocutory order can be amended at any time to include the prescribed statement. *Cf.* 42 PA. CONS. STAT. ANN. § 5574 (Purdon 1981), which states as follows:

> *Effect of application for amendment to qualify for interlocutory appeal.* If an application is made to a tribunal within 30 days after the entry of an interlocutory order not appealable as a matter of right for an amendment of such order to set forth expressly the statement specified in section 702(b) (relating to interlocutory appeals by permission), the time for filing a petition for permission to appeal from such order shall run from the entry of the order denying the amendment or amendment the order, as the case may be.

See also id. § 5571(a) (the time for filing a petition for permission to appeal shall be governed by general rules).

326. *See also* 42 PA. CONS. STAT. ANN. § 5571(d) (Purdon 1981) (petition must be filed within 30 days after its entry); PA. R. APP. P. 108(a), 301 (entry of order).

327. Miller v. Krug, 255 Pa. Super. 39, 386 A.2d 124 (1978). Of the seven judges in the case, two dissented and two did not participate.

bar the appellant's expert from testifying. The court's opinion attempted to provide some critical analysis to the issue of appellate review of certified orders. Former President Judge Spaeth questioned the propriety of such *pro forma* certification in terms of the three substantive requirements. As to "material advancement," Judge Spaeth noted that the mere saving of time was not enough; if the order was reversed or affirmed, the case would still go to trial. As to the "controlling question of law" criterion, Judge Spaeth was not quite sure what the "question" was and, in any event, he said that any question of abuse of discretion would not likely satisfy the controlling question of law criterion.

Notwithstanding the dilemmas of definition and application, one can try to identify in list form some of those cases in which the appellate courts reviewed certified, interlocutory orders. Appellate review of certified orders has been exercised in both civil and criminal cases.[328] In civil cases, for example, interlocutory appellate review of certified orders concerned the following general issues: a husband's right in a divorce action to present evidence regarding his counterclaim;[329] the respective liabilities of an employer and employee in a no fault automobile accident case of first impression;[330] the production of documents subject to prior sealing;[331] propriety of the commonwealth court's certified order staying revocation of a lottery license;[332] a litigant's right to proceed *in forma pauperis*;[333] and application of strict liability to a public utility.[334]

Appellate review of certified interlocutory orders in criminal cases, in which the concept of finality is said to be more onerous, has involved some of the following issues: subject matter jurisdiction of the lower court;[335] transfer of a juvenile to the criminal adult divi-

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328. A federal court, however, has stated that the federal statutory counterpart, *see* 28 U.S.C. § 1292(b) (1986) (*see infra* note 339 for text), is not applicable to criminal proceedings. *See* United States v. Selby, 476 F.2d 965 (2nd Cir. 1973).

329. Restifo v. Restifo, 339 Pa. Super. 152, 489 A.2d 196 (1985) (counterclaim was based on fault grounds; wife's action based on no fault).

330. Wozniak v. Harleysville Ins. Co., 347 Pa. Super. 356, 500 A.2d 872 (1985).

331. Jaden Elec. v. Wyoming Valley W. School Dist., 342 Pa. Super. 587, 493 A.2d 746 (1985).

332. Young J. Lee, Inc. v. Commonwealth Dep't of Revenue, 504 Pa. 367, 474 A.2d 266 (1983).

333. Selby v. Brown, 250 Pa. Super. 134, 437 A.2d 767 (1981); *but see supra* notes 226-28.

334. Shriner v. Pennsylvania Power & Light Co., 348 Pa. Super. 117, 501 A.2d 1128 (1985).

335. Commonwealth v. Boyle, 347 Pa. Super. 602, 500 A.2d 1221 (1985); Commonwealth v. Diaz, 235 Pa. Super. 352, 340 A.2d 559 (1975), *rev'd*, 477 Pa. 122, 383 A.2d 852 (1978).

sion for trial;[336] refusal to quash subpoenas;[337] and violation of the defendant's right to a speedy trial.[338] Although Pennsylvania appellate cases generally do not elaborate upon the particular components of the certification process, a litigant may wish to examine the aforementioned cases to determine whether a proposed petition to permit an appeal may present meritorious grounds for certified interlocutory appellate review.

D. The Federal Approach

The federal system contains a certification statute that is substantially similar to the Pennsylvania statute.[339] The federal courts, however, in applying the statute have provided more detail as to the specific components of the certification process. Some of the federal judicial comments may be instructive to a litigant who attempts to bridge the lacunae between theory and practice in Pennsylvania. The federal approach, however, is clearly not dispositive of state practice.

In *Katz v. Carte Blanche Corp.*,[340] the Third Circuit Court of Appeals initially noted that the satisfaction of the three statutory criteria does not preclude a court from using its discretion in refusing to certify. The court then considered the statutory element of a "controlling question of law." In the court's view, this requirement must encompass, at the very least, every order, which if erroneous,

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336. Commonwealth v. Brown, 485 Pa. 368, 402 A.2d 1007 (1979) (review by supreme court after denial of petition by superior court); *but see* Commonwealth v. Madden, 342 Pa. Super. 120, 132, 492 A.2d 420, 426 (1985) (Beck, J., dissenting).

337. *In re* January, 1974 Special Grand Jury, 238 Pa. Super. 479, 357 A.2d 628 (1976); *cf.* Petition of Spector, 455 Pa. 518, 317 A.2d 289 (1974).

338. Commonwealth v. Mancuso, 247 Pa. Super. 266, 372 A.2d 454 (1977); *cf.* Commonwealth v. Bennett, 236 Pa. Super. 509, 345 A.2d 754 (1978).

339. 28 U.S.C. § 1292(b) (1986) provides as follows:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involved a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Note also that PA. R. APP. P. 1311's comment adverts to the federal statute. The reference to federal caselaw, however, should not be interpreted to mean that there is a uniformity of practice or application in the federal courts. There apparently is no elucidating uniformity, attributable in part to the fact that Congress did not establish standards for the courts. *See* Note, *Section 1292(b): Eight years of Undefined Discretion*, *supra* note 321.

340. 496 F.2d 747 (3d Cir. 1974).

would be reversible error on final appeal.[341] The order, however, need not be determinative of any of the plaintiff's claims on the merits. As to the issue of the "substantial ground" element, the court noted that a question of first impression is not necessarily sufficient to guarantee review.

In another case, involving a dismissal of negligence, strict liability and breach of warranty portions of a complaint, a federal district court denied certification with an accompanying opinion. In *Oyster v. Johns-Manville Corp.*,[342] the district court agreed with the *Katz* analysis of a controlling question as one that would require reversal on appeal if erroneously decided. In proceeding to the "substantial ground" factor, the court stated that an inquiry into the merits may be necessary. Conflicting or contradictory opinions of courts, which have ruled on the issue, may satisfy the "substantial ground" requirement. Not having found the second requirement satisfied, the district court refused to certify. In another case from the same district, the district court noted that the second factor is not necessarily established by proof of a substantial numerical disparity of opinions on an issue.[343] Thus, the substantial ground factor may involve an examination of a case's possible merits and the existence of differences or numerical disparity of opinions among other courts and, perhaps, professional commentators.

The material advancement element, the third factor, is often difficult to assess and apply. As noted previously, Judge Spaeth attempted a clarifying analysis in *Miller*.[344] The court in *Oyster* sim-

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341. *Id.* at 755-56; *see also* Note, *Section 1292(b): Eight Years of Undefined Discretion*, *supra* note 321, at 947, which suggests that the undefined "controlling question of law" may be a meaningless term. The commentator notes that the term may encompass various meanings such as "serious to the conduct of the litigation," either practically or legally, and that controlling is not necessarily tantamount to dispositive. Consider also Phelps, *What Is A Question of Law*, 18 U. CINN. L. REV. 259 (1949).

342. 568 F. Supp. 83 (E.D. Pa. 1983), *appeal dismissed sub nom.*, Bell Asbestos Mines Ltd. v. Asbestos Corp., Ltd., 770 F.2d 1066, 1074 (3d Cir. 1985).

343. *See* Max Daetwyler Corp. v. R. Meyer, 575 F. Supp. 280 (E.D. Pa. 1983); *cf.* United States v. Smith, 793 F.2d 85 (3d Cir. 1986), in which, in the different context of analyzing a defendant's right to be released on bail, the majority and dissenting opinions grappled with the definitional dilemma of what is a "substantial question of law."

"Substantial grounds" might also involve questions that are novel or of first impression, those that take a position contrary to the great weight of authority, and those that conform with judicial authority but which are subject to a substantial ground for difference of opinion. *See In re* Heddendorf, 263 F.2d 887 (2d Cir. 1959) (focusing on unsettled legal question); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1190, 1243-45 (E.D. Pa. 1980) (emphasizing novelty, complexity and facial uncertainty as to sixty-four year old statute of first ipression); Seven Up Co. v. O-So Grape Co., 179 F. Supp. 167 (S.D. Ill. 1959) (holding that substantial ground synonymous with likelihood that appellant will prevail on appeal). *See* Note, *Section 1292(b), Eight years of Undefined Discretion*, *supra* note 321, at 948.

344. *See* Miller v. Krug, 255 Pa. Super. 39, 386 A.2d 124 (1978); United States v.

ply stated that the third factor was neutral. In *Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*,[345] a district court could not conclude that advancement was satisfied since the attempted pretrial appeal came at a stage when the pretrial preparation was complete and the case was ready for trial.

In applying the statutory criteria, however, some of the federal appellate courts have made clear that they will not be bound by the controlling question of law as formulated or identified by the trial courts. They have stated that their emphasis is primarily on the certified order of the lower court.[346] Again, while these cases may provide some understanding of the certification process, they are not dispositive of what is required by the state appellate courts.[347]

E. Lower Court's Refusal to Certify

The lower court's refusal to provide the requisite statutory certification is a severe, but not necessarily irremovable, obstacle to obtaining interlocutory appellate review. Nevertheless, a litigant who has been denied certification must be rational and cognizant about the realities of the situation. First, she is asking an appellate court to create a special exception to the finality principle and snatch from the lower court a case that, under ordinary and orderly procedures, would proceed to litigation and judgment. Second, aside from the possible impact or effect upon the lower court of having its case flow disrupted, the litigant seeking appellate review is, in effect, attacking the lower court's refusal to certify, that is, its refusal to have its proceedings interrupted. Third, and perhaps most important, the petitioner must demonstrate to the appellate court that the lower court's refusal to certify indicates an egregious abuse of discretion.

The aggrieved party, faced with the lower court's refusal to certify, thus has the option under the rules to file a "petition for review"[348] with the appellate court. The commentary to the appellate rules notes:

9947.71 Acres of Land, 220 F. Supp. 328 (D. Nev. 1963); Herschel v. Eastern Airlines, Inc., 216 F. Supp. 347 (S.D.N.Y. 1963) (no advancement when case was already on court calendar); *see also* Note, *Section 1292(b): Eight Years of Undefined Discretion*, *supra* note 321, at 944 in which the author indicates that "materially advance" may vary from "probable termination of the action," to "controlling the result," or "prevention of reversible error."

345. 611 F. Supp. 281 (D.C.N.Y. 1985).

346. *See* Cipollone v. Liggett Group Inc., 789 F.2d 181 (3d Cir. 1986); Johnson v. Alldredge, 488 F.2d 820 (3d Cir. 1973).

347. *See also* Note, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 YALE L.J. 333 (1959).

348. *See* PA. R. APP. P. 1511-1571 (petition for review) *supra* note 10.

> Where the administrative agency or lower court refuses to amend its order to include the prescribed statement, a petition for review under Chapter 15 of the unappealable order of denial is the proper mode of determining whether the case is so egregious as to justify prerogative appellate correction of the exercise of discretion by the lower tribunal. If the petition for review is granted in such a case, the effect (as in the Federal practice under 28 U.S.C. Sec. 1292(B)) is the same as if a petition for permission to appeal had been filed and granted, and no separate petition for permission to appeal need be filed.[349]

Thus, the petitioner would arguably have to show to the appellate court not only how the three certification requirements are satisfied but also whether the case presents egregious circumstances as to justify immediate interlocutory review. In some cases, perhaps, the clear satisfaction of the three requirements may help to satisfy the flagrant or egregious standard. Obviously, the burden is a difficult one.

F. Discretionary Appeals Regarding Sentencing

Of peripheral relevance to the subject of appellate review by permission is the Commonwealth's (or defendant's) apparently qualified right to appeal the lower court's discretionary aspects of sentencing. The obvious point of departure from the present topic is the fact that such appeals concern final, not interlocutory, orders. The essential similarity, however, is that the appellant must seek appellate permission to appeal. The right to appeal is automatic but defeasible. The procedure is recognizably idiosyncratic: the aggrieved party files a notice of appeal, not a petition. A comment to the appellate rules notes:

> Section 9781 of the Sentencing Code (42 Pa.C.S. Sec. 9781) states that the defendant or the Commonwealth may "petition for allowance of appeal" of the discretionary aspects of a sentence for a felony or a misdemeanor. The practice under these rules is to file a notice of appeal. See note to Rule 902 (manner of taking appeal). If the defendant has a right to an appeal with respect to the discretionary aspects of a sentence, the appellate court must, of course, entertain the appeal. Otherwise, such an appeal may be entertained by an appellate court if, but only if, it appears to the court that there is a substantial

349. *See* PA. R. APP. P. 1311 comment *supra* note 325 and accompanying text; *see also* Butler Educ. Ass'n v. Butler Area School Dist., 34 Pa. Commw. 143, 382 A.2d 1283 (1978).

> question that the sentence imposed is not appropriate under the applicable guidelines.[350]

A subsequent comment to the appellate rules further notes the proper procedure:

> Section 9781 of the Sentencing Code (42 Pa.C.S. Sec. 9781) provides that the defendant or the Commonwealth may file a "petition for allowance of appeal" of the discretionary aspects of a sentence for a felony or a misdemeanor. The notice of appeal under this chapter (See Rule 904 (content of the notice of appeal)) operates as the "petition for allowance of appeal" under the Sentencing Code. It automatically raises all possible questions under 42 Pa.C.S. Sec. 9781 and is available and appropriate even where no issue relating to guilt or the legality of the sentence (in the sense that the sentence falls outside of the range of discretion vested by law in the sentencing court) is presented. No additional wording is required or appropriate in the notice of appeal.
>
> In effect, the filing of the "petition for allowance of appeal" contemplated by the statute is deferred by these rules until the briefing stage, where the question of the appropriateness of the discretionary aspects of the sentence may be briefed and argued in the usual manner. See Rule 2116 (statement of questions involved) and Rule 2119 (argument).[351]

VI. Subject Matter Jurisdiction — The Exceptional Circumstances Doctrine

One of the great scientific writers of our time, Dr. Douglas R. Hofstadter, has reflected on the dilemma of the relationship of two words, "letter" and "spirit" in the legal context. As he points out, these two words suggest a contrast between the "letter of the law" and the "spirit of the law" in the mapping out of the legal system.

> In law, extant rules, statutes, and so on, are never enough to cover all possible cases (reminding us once again of the fact that no fixed and rigid set of 'A'-defining rules can anticipate all 'A's). The legal system depends on the notion that people, whose experience covers much more than the specific case and rules at hand, will bring to bear their full range of experience not only

350. *See* PA. R. APP. P. 341 and comment thereto. In Commonwealth v. Easterling, ___ Pa. Super. ___, 509 A.2d 345 (1986), the court identified three circumstances which may satisfy the substantial question requirement: erroneous application of guidelines, unreasonable application of guidelines, and unreasonable sentence outside guidelines.

351. *See* PA. R. APP. P. 902 and note thereto; *see also supra* note 73.

> with many categories but also with the whole process of categorization and mapping. This allows them to transcend the specific, rigid, limited *rules*, and to operate according to more fluid, imprecise, yet more powerful *principles*. Or, to revert to the other vocabulary, this ability is what allows people to transcend the letter of the law and to apply its spirit.[352]

The problematic, and sometimes antagonistic, relationship between "letter" and "spirit" may be appropriate prologue to the presentation of the final concept in the discussion of feasible jurisdictional alternatives - the exceptional circumstances doctrine. Two questions arise: (1) does this doctrine represent a viable, independent jurisdictional base for interlocutory appeals?, and (2) is the substance of the doctrine one implicating "letter" or "spirit"?

These questions are not easy to answer, primarily because case law is not clear as to the doctrine's present status or its source. To paraphrase Dr. Hofstadter, it is not clear whether the jurisdictional concept is one of rule or principle. For example, in 1954, the supreme court in *Commonwealth v. Kilgallen*[353] quoted with apparent approval the superior court's application of the "exceptional circumstances" doctrine to justify that court's exercising jurisdiction over a defendant's appeal from the lower court's refusal to quash the indictments. The court therein noted that the jurisdictional concept was important to safeguard basic human rights and the public interest. The 1977 seminal case of *Commonwealth v. Bolden*,[354] which permitted a defendant to appeal a pretrial order denying a claim of double jeopardy, also spoke in terms of exceptional circumstances. Although the jurisdictional basis for that appeal seems more appropriately now to have been the collateral order doctrine,[355] the case noted that exceptional circumstances authorizing an appeal exist when (1) the appeal is necessary to prevent great injustice to the defendant; or (2) the issue of basic human rights is involved; or (3) an issue of great public importance is involved.[356] Previously, in *Commonwealth v. Washington*,[357] the supreme court noted that the

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352. D. HOFSTADTER, METAMAGICAL THEMAS: QUESTING FOR THE ESSENCE OF MIND AND PATTERN 287 (1985).

353. 379 Pa. 315, 108 A.2d 780 (1954).

354. 472 Pa. 602, 373 A.2d 90 (1977).

355. *See supra* notes 242-70 and accompanying text.

356. 472 Pa. at 611, 373 A.2d at 94.

357. 428 Pa. 131, 236 A.2d 772 (1968); *see also* Commonwealth v. Hess, 489 Pa. 580, 414 A.2d 1043 (1980); Commonwealth ex rel. Fitzpatrick v. Bullock, 471 Pa. 292, 370 A.2d 309 (1977) (involving pre-trial review of propriety of lower court's order determining that murder prosecution was not a capital case, since it involved serious public interest). The *Bullock* opinion referred to PA. STAT. ANN. tit. 17, § 211.501(b) (Supp. 1976-77) (appeals by

exceptional circumstances doctrine had been limited to the post-trial/presentence stage and was later expanded to apply to the pre-trial stage.

The source and the viability of the doctrine may be easier to resolve in terms of the supreme court's jurisdiction. The primary reason for this observation is that, of the three appellate courts, the supreme court is the only one that possesses extraordinary powers of review unencumbered by the principle of finality. Often, this extraordinary aspect of judicial review is called the King's Bench power.[358] More important, however, is the fact that the Judicial Code contains a provision specifically entitling the supreme court to exercise extraordinary or plenary jurisdiction in matters of "immediate public importance."[359] Whether this statutory provision is the functional equivalent of or broad enough to cover the three aspects of the exceptional circumstances doctrine remains unclear. If there is such equivalency, then one could maintain that the exercise of jurisdiction is in accordance with the "letter" of the law.

The application of the doctrine to the intermediate appellate courts, however, is more troublesome. On occasion, the intermediate appellate courts have disagreed whether exceptional circumstances is a distinct basis for their jurisdiction.[360] The only plausible rationale in favor of jurisdiction would arguably be that exceptional circumstances is an aspect of finality, the principle that statutorily empowers and circumscribes the intermediate appellate courts. In a sense, one might argue that exceptional circumstances is, like constructive

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permission), now repealed.

358. *See, e.g.*, Commonwealth v. Dincel, 311 Pa. Super. 479 n.6, 457 A.2d 1278, 1283 n. 6 (1983). The other courts, appellate and lower, do not possess King's Bench powers.

359. *See* 42 PA. CONS. STAT. ANN. § 726 (*see infra* note 387 for text); *see also* Silver v. Downs, 493 Pa. 50, 425 A.2d 359 (1981); PA. R. APP. P. 3309 (supreme court; extraordinary relief), referred to *infra* note 388.

360. Some decisions have recognized such a basis for jurisdiction either explicitly or implicitly. *See, e.g.*, Commonwealth v. Donahue, ___ Pa. Super. ___, ___ A.2d ___ (1986) (appeal from denial of habeas corpus relief permissible under exceptional circumstances where denial of preliminary hearing claim required appellate court to safegurd basic human rights); Commonwealth v. Burkett, ___ Pa. Super. ___, 507 A.2d 1266 (1986) (citing Commonwealth v. Hess, 489 Pa. 580, 414 A.2d 1043); Commonwealth v. Reagan, 330 Pa. Super. 417, 479 A.2d 621 (1984) (no exceptional circumstances found, however, with regard to order finding defendant competent to stand trial in homicide prosecution); Commonwealth v. Lindlsey, 241 Pa. Super. 522, 366 A.2d 310 (1976) (involving refusal to review denial of defendant's habeas corpus petition). Other cases have rejected the doctrine. *See* Commonwealth v. Wise, 328 Pa. Super. 491, 477 A.2d 552 (1984); Commonwealth v. Wills, 328 Pa. Super. 342, 476 A.2d 1362 (1984); Toll v. Toll, 293 Pa. Super. 549, 439 A.2d 712 (1981) (rejecting proposition that superior court has a broad discretionary power of review) (overruling Gurnick v. Government Employees Ins. Co., 278 Pa. Super. 437, 439-40 n.2, 420 A.2d 620, 621 n.2 (1980)) *cf.* Commonwealth v. Billett, 294 Pa. Super. 612, 614 n.1, 440 A.2d 633, 634 n.1 (1982).

finality, the spiritual aspect of the final order doctrine, although such a version of finality would face obvious theoretical problems. There are three observations, however, that suggest caution in recognizing exceptional circumstances as a definite, independent jurisdictional base for the intermediate appellate courts. First, aside from cases maintaining that such jurisdiction is not authorized, commentary to the appellate rules strongly indicates that such jurisdiction no longer exists.[361] Second, the absence of appellate jurisdiction is no longer a waivable defect.[362] Third, in instances in which the intermediate appellate courts have attempted to exercise jurisdiction beyond traditional confines, the supreme court has firmly taken a conservative approach in carefully limiting jurisdictional power.[363]

The litigator, however, should be aware that what may be viable in theory may be unavailing in practice. In a number of cases, the exceptional circumstances doctrine, as applied, did not provide a jurisdictional alternative.[364] It is important to note that these opinions

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361. The concluding comments to PA. R. APP. P. 311 state as follows:

> Formerly, there was case law to the effect that interlocutory appeals would be considered in "exceptional circumstances." *See, e.g.*, Commonwealth v. Swanson, *supra. Under these rules an appeal in exceptional circumstances from an interlocutory order not covered by this rule is to be taken under Rule 312.* In appropriate circumstances relief in the nature of mandamus or prohibition may be available under Chapter 15 (judicial review of governmental determinations) with respect to interlocutory action. In truly extraordinary cases relief may be available by direct application to the Supreme Court under Rule 3309 (applications for extraordinary relief) (emphasis supplied).

362. *See supra* notes 78, 83 and accompanying text.

363. This restriction upon the intermediate appellate courts' powers has involved original jurisdiction or mandamus. *See* Municipal Publications, Inc. v. Court of Common Please of Phila. County, 501 Pa. 194, 489 A.2d 1286 (1985) (superior court had no jurisdiction to entertain prohibition action when no appeal was pending in that court and superior court's jurisdiction was not being infringed); Baker v. Commonwealth, 507 Pa. 325, 329 n.1, 489 A.2d 1354, 1356 n.1 (1985) (commonwealth court's original jurisdiction in mandamus is extremely limited); Pennsylvania Dep't of Aging v. Lindberg, 503 Pa. 423, 430 n.5, 469 A.2d 1012, 1016 n.5 (1983) (resort to commonwealth's court's original jurisdiction not appropriate when an appeal is an adequate available remedy); O'Brien v. Commonwealth State Employees' Retirement System, 503 Pa. 414, 469 A.2d 1008 (1983), *cert. denied*, 105 S. Ct. 83 (1984) (original jurisdiction of commonwealth court remains for addressing the very limited class of cases in which appellate review of agency action is not provided by statute or statutory review would be inadequate); *see also* 42 PA. CONS. STAT. ANN. §§ 471 (original jurisdiction of superior court), 761 (original jurisdiction of commonwealth court) (Purdon 1981).

364. *See, e.g.*, Commonwealth v. Hess, 489 Pa. 500, 414 A.2d 1043 (1980) (appeal from order denying defendant's motion to quash information); Commonwealth v. Myers, 457 Pa. 317, 322 A.2d 131 (1974) (appeal from order denying pretrial motion alleging violation of right to speedy trial); Commonwealth v. Washington, 428 Pa. 131, 236 A.2d 772 (1968) (appeal from order denying defendant's motion to suppress); Commonwealth v. Bruno, 424 Pa. 96, 225 A.2d 241 (1967) (appeal from order regarding appointment of sanity commission to determine defendant's competency); Commonwealth v. Byrd, 421 Pa. 513, 219 A.2d 293 (1966) (appeal from pretrial order granting the Commonwealth's petition for neuropsychiatric examination of defendant); Commonweatlh v. Lindsley, 241 Pa. Super. 522, 366 A.2d 310 (1976) (appeal from denial of writ of habeas corpus).

emanate primarily from the supreme court and concern criminal pretrial matters.

VII. Subject Matter Jurisdiction: "Piggyback Jurisdiction"

Once the parties have gained access to the appellate forum by presenting the court with an appealable order, there is often the temptation to, in effect, bring with them excess baggage to the appellate court. The appellant, for example, may want to obtain appellate review of other contemporaneous orders or decisions that would not be independently appealable. For example, a criminal defendant who files an omnibus pretrial motion[365] might assert a double jeopardy violation and other constitutional claims. In a single order, the lower court may deny all of the defendant's claims. The defendant might then attempt to appeal the order's dismissal of all such claims. A similar situation may arise with the appellee. Once past the appellate threshold, the appellee might seek to "tack on" (in his brief) any denials of relief to the appellant's appeal. These denials of relief may have been separately entered by the lower court[366] or contained in the appealed order. Both instances represent a situation that shall be euphemistically referred to as "piggyback jurisdiction" - an attempt by one of the parties to piggyback an independently unappealable claim or order to a properly appealable order.

Piggyback jurisdiction is generally improper in the appellate courts. Although the parties may argue that once an appeal is properly perfected, all claims disposed below should be resolved above, appellate courts will not conduct wholesale appellate review. In such circumstances, the appellate courts will interpret jurisdiction strictly and review conservatively. An appellant cannot tack on unappealable claims, decisions, or orders to the appeal; similarly, an aggrieved appellee cannot ask the appellate court to review nonappealable orders or issues that were not the subject of a proper cross-appeal.[367]

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365. *See* PA. R. CRIM. P. 306 (omnibus pretrial motion).

366. In this regard, see PA. R. APP. P. 301(b) (every order shall be set forth on a separate document).

367. *See* PA. R. APP. P. 511 and 903(b) (cross-appeals). For example, hypothetically, a plaintiff who appeals a lower court order, entering an adverse judgment on one of her claims (for example, strict liability), yet entering judgment in her favor on other claims, may appeal the adverse judgment and challenge the adequacy of the verdict. The defendant, however, if he wanted to contest the sufficiency of the evidence to support the judgment would necessarily have to file a cross-appeal raising, for example, the lower court's refusal to grant its motion for judgment notwithstanding the verdict.

For example of situations generally involving cross appeals, see DeFazio v. Labe, ___ Pa. Super. ___, 507 A.2d 410 (1986); Keiper v. Keiper, 343 Pa. Super. 256, 494 A.2d 454 (1985) (petition for allowance of appeal granted); Braderman v. Braderman, 339 Pa. Super.

The United States Supreme Court has refused to exercise such wholesale appellate review of claims that are not independently appealable. In *Abney v. United States*,[368] Chief Justice Burger refused to review claims that the appellant tried to incorporate in his jurisdictionally proper double jeopardy appeal. In limiting the scope of an appeal under the collateral order doctrine, the Chief Justice stated:

> In determining that the courts of appeals may exercise jurisdiction over an appeal from a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds, we, of course, do not hold that other claims contained in the motion to dismiss are immediately appealable as well. . . . Our conclusion that a defendant may seek immediate appellate review of a district court's rejection of his double jeopardy claim is based on the special considerations permeating claims of that nature which justify a departure from the normal rule of finality. Quite obviously, such considerations do not extend beyond the claim of former jeopardy and encompass other claims presented to, and rejected by, the district court in passing on the accused's motion to dismiss. Rather, such claims are appealable if, and only if, they too fall within Cohen's collateral-order exception to the final-judgment rule. Any other rule would encourage criminal defendants to seek review of, or assert frivolous double jeopardy claims in order to being more serious, but otherwise nonappealable questions to the attention of the courts of appeals prior to conviction and sentence.[369]

In Pennsylvania, although appeals were properly perfected, appellate courts have refused to review companion interlocutory claims that were not independently appealable. The refusal to exercise such broad review has concerned those claims or portions of orders that an appellant has tried, in effect, to tack onto his appeal,[370] as well as

185, 488 A.2d 613 (1985). The failure to file a cross appeal may result in serious adverse consequences. *See* Commonwealth ex rel. Robinson v. Robinson, 505 Pa. 226, 233 n.4, 478 A.2d 800, 804 n.4 (1984) (failure to cross appeal in child custody case precluded non-appealing party from challenging separate issue); Commonweatlh v. Moser, 328 Pa. Super. 237, 476 A.2d 980 (1984); Appeal of Pesante, 82 Pa. Commw. 242, 476 A.2d 474 (1984) (without taking cross appeal, appellee could not raise issues adversely decided). *And see* U.S. v. Amer. R. Express Co., 265 U.S. 425, 435-36 (1924); Cochran v. M & M Transp. Co., 110 F.2d 519 (1st Cir. 1940) (if litigant fails to appeal or cross appeal from judgment granting him only part of the relief sought and denying the rest, he can be heard only in support of such judgment).

368. 431 U.S. 651 (1977).

369. *Id.* at 662-63 (citing United States v. Barket, 530 F.2d 181 (8th Cir. 1975) *cert. denied*, 429 U.S. 917 (1976)).

370. *See* Commonwealth v. Klobuchir, 486 Pa. 241, 248 n.5, 405 A.2d 881, 884-85 n.5 (1979) (no appellate review of other interlocutory decisions in defendant's pretrial double jeopardy appeal); Hudock v. Donegal Mut. Ins. Co., 438 Pa. 272, 264 A.2d 668 (1970) (plaintiffs'

those nonappealable interlocutory decisions or orders that an appellee tried to piggyback on to an appellant's appeal.[371] In addition to such jurisdictional infirmities, the appellate courts have refused to review contemporaneous judgments of sentence when the notice of appeal presented fatal procedural noncompliance, such as the failure to specifically identify the specific indictment or information upon which a specific sentence was imposed.[372]

Therefore, in securing the jurisdictional propriety of an appeal,

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appeal from order granting defendant adjustment companies' preliminary objections, which, in effect, terminated plaintiffs' cause of action against them for breach of contract, was proper; but other appeal by plaintiffs from order sustaining defendant insurance companies' demurrer as to breach of contract claim was not proper since order did not effectively terminate that cause of action); Brandywine Area Joint School Auth. v. Van Cor, Inc., 426 Pa. 448, 233 A.2d 240 (1967) (appellate review of interlocutory order, precluding evidence of an affirmative defense, was proper; but defendant could not tack on interlocutory order, denying right to jury trial, for appellate review even though there was partial compliance with the certification procedures) (Justice Pomeroy dissented in *Brandywine Area*, favoring instead judicial review of the other claim for economy reasons); Village 2 at New Hope, Inc. Appeals, 429 Pa. 626, 642-43, 241 A.2d 81, 89 (1968) (appeals from portions of interlocutory orders, deferring decision on preliminary objections, quashed sua sponte). *See also* Commonwealth v. Perrin, 272 Pa. Super. 24, 414 A.2d 650 (1979) (no appellate review of speedy trial claim in double jeopardy appeal); Commonwealth v. Rende, 335 Pa. Super. 509, 485 A.2d 9 (1985) (defendant cannot tack on other interlocutory issues in double jeopardy appeal); Pittsburgh Airport Motel v. Airport Asphalt, 322 Pa. Super. 149, 469 A.2d 226 (1983) (plaintiff's appeal from portion of order dismissing complaint as to one defendant was proper; but plaintiff's appeal from that portion of the order transferring the case to the law side of the court was quashed); Rappaport v. Stein, 351 Pa. Super. 370, 506 A.2d 393 (1985) (appeal from practically final order determining rights in quiet title action proper but companion appeal from interlocutory order, not covered by PA. R. APP. P. 311, was quashed); *but see* Temtex Products, Inc. v. Kramer, 330 Pa. Super. 183, 479 A.2d 500 (1984) (in multi-issue appeal, review of interlocutory order of lower court's jurisdiction permitted in interests of judicial economy and in view of lower court's belated certification); Roman v. Pearlstein, 329 Pa.Super. 392, 478 A.2d 845 (1984) (appellate review of portion of order imposing costs in appeal from sanction order precluding a defense).

371. *See* Pennsylvania Turnpike Comm'n v. Atlantic Richfield Co., 482 Pa. 615, 394 A.2d 615 (1978) (plaintiff's appeal from order granting defendant's motion for summary judgment, albeit partial, was proper; but defendant's cross-appeal for order denying its motion for summary judgment quashed); Cathcart v. Keene Indus. Insulation, 324 Pa. Super. 123, 471 A.2d 493 (1984) (defendants as appellees could not seek appellate review of interlocutory order denying their motions for summary judgment and non pros in plaintiffs' appeal from final orders granting summary judgment and non pros in favor of other defendants); *but see* Commonwealth v. Barnes, 307 Pa. Super. 143, 452 A.2d 1355 (1982) (defendant may file cross-appeal from lower court's order denying his motion to suppress when Commonwealth has filed an appeal from order suppressing evidence) (citing Commonwealth v. Bordner, 432 Pa. 405, 247 A.2d 612 (1968)).

372. *See* Commonwealth v. Keys, 313 Pa. Super. 410, 460 A.2d 253 (1983) (defendant's notice of appeal, having erroneously identified informations for which defendant was not convicted, was fatal and compelled quashing of appeals); Commonwealth v. Hill, 267 Pa. Super. 140, 142 n.1, 406 A.2d 558, 559 n.1 (1979) (failure of appellant to specifically appeal judgment of sentence imposed as to particular indictment was fatal notwithstanding fact that appellate court would review other properly identified and appealable judgments of sentence contained in the notice of appeals); *but see* Commonwealth v. Brown, 264 Pa. Super. 127, 127 n.1, 399 A.2d 699, 699 n.1 (1979) (erroneous identification of indictments in notice of appeal viewed as clerical error and overlooked); *see also* PA. R. APP. P. 301 (separate document required), and 904 (content of the nature of appeal).

it is essential to identify and segregate those orders or portions of an order that are independently appealable. Furthermore, it is incumbent to carefully and specifically identify the particular order or decision that is properly appealable in the notice of appeal.

VIII. Subject Matter Jurisdiction: Locus of the Appeal

The focus of the discussion on subject matter jurisdiction has been on the lower court's order. Once the aggrieved party has determined that the lower court's order is appealable the next inquiry must concern the proper appellate court in which to appeal. This inquiry is an aspect of subject matter jurisdiction. Whereas the prior inquiry examined the particular lower court's order, the present analysis must look to the broader aspect of the *category of case* involved in the appeal. Once the litigant has identified the category of case, he or she can then select the locus of appellate jurisdiction, namely the proper appellate forum. Significantly, the litigant should note that a mistake in selecting the proper appellate forum is not fatal. As long as the lower court's order is appealable and an appeal is properly and timely filed,[373] jurisdiction is vested in the appellate court.[374] If the wrong appellate forum is chosen, the appellate court, on its own or pursuant to a party's motion, can transfer the appeal to the proper appellate court.[375]

A. Supreme Court

The appellate court system in Pennsylvania is three-tiered, and

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373. *See* PA. R. APP. P. 903 (time for appeal).

374. *See, e.g*, 42 PA. CONS. STAT. ANN. § 704 (Purdon 1981), which states in part as follows:

> *(a) General rule.* — The failure of an appellee to file an objection to the jurisdiction of an appellate court within such time as may be specified by general rule, shall, unless the appellate court otherwise orders, operate to perfect the appellate jurisdiction of such appellate court, notwithstanding any provision of this title, or of any general rule adopted pursuant to section 503 (relating to reassignment of matters), vesting jurisdiction of such appeal in another appellate court.

Id. § 704(b)(2) specifically provides that there can be no waiver of a jurisdictional defect concerning a nonappealable interlocutory order. See also PA. R. APP. P. 741 (waiver of objections to jurisdiction), which is section 704's procedural counterpart.

375. 42 PA. CONS. STAT. ANN. § 705 (Purdon 1981) provides as follows:

> The Superior Court and the Commonwealth Court shall have power pursuant to general rules, on their own motion or upon petition of any party, to transfer any appeal to the other court for consideration and decision with any matter pending in such other court involving the same or related questions of fact, law, or discretion.

Section 705's counterpart is located in PA. R. APP. P. 752. *See also* PA. R. APP. P. 751 (transfer of erroneously filed cases as to appeals mistakenly brought "in a court or magisterial district which does not have jurisdiction of the appeal").

it is comprised of the supreme, superior and commonwealth courts. Each court has appellate jurisdiction over distinct categories of cases. The highest and oldest appellate judicial tribunal[376] is the supreme court, comprised of seven elected justices.[377] The supreme court exercises both original[378] and appellate jurisdiction. Its appellate jurisdiction, furthermore, includes those cases that it reviews as a matter of *right* and those that it hears as a matter of *discretion.*

There is a right of appeal, for example, in the supreme court from final orders of the courts of common pleas[379] in matters involving, inter alia, the right to hold public office, judicial tenure and qualifications, imposition of the death penalty,[380] unconstitutionality of various laws and treaties as declared by the court of common pleas,[381] and the right to practice law.[382] Another section of the Judi-

376. The supreme court was established in 1722 and is said to be the oldest appellate court in the nation, predating the United States Supreme Court by sixty-seven years. *See* DEPARTMENT OF GEN. SERVICES, 106 THE PENNSYLVANIA MANUAL 401-02 (1982-1983).

377. *See* PA. CONST., art. 5, § 2.

378. Original jurisdiction refers to cases heard in the first instance. The supreme court has original jurisdiction in all cases of habeas corpus, mandamus or prohibition to courts of inferior jurisdiction, and quo warranto as to any officer of statewide jurisdiction. *See* 42 PA. CONS. STAT. ANN. § 721 (Purdon 1981); *see also* PA. STAT. ANN. tit. 17, § 211.201 (predecessor of section 721); PA. R. APP. P. 3307 (application for leave to file original process).

An informative history of the Pennsylvania Supreme Court indicates that the court was predominantly a trial court at first and that for a number of years it acted as a trial court for Philadelphia county. From its trial court functions, the supreme court developed its power of appellate review through three special procedural devices (writ of error, writ of appeal and certiorari). In its early history, the High Court of Errors and Appeals, rather than the supreme court, was the highest court in the state for corrections of errors of law. *See* Surrency, *The Development of the Appellate Function: The Pennsylvania Experience*, 20 AM. J. LEGAL HIST. 173-91 (1976).

379. *See* 42 PA. CONS. STAT. ANN. § 102 (Purdon 1981) (definition of "court of common pleas"). These courts generally exercise trial court functions.

380. *See, e.g.*, Commonwealth v. Frederick, 508 Pa. 527, 498 A.2d 1322 (1985); Commonwealth v. Holcomb, 508 Pa. 425, 498 A.2d 833 (1985); Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937 (1982), *cert. denied*, 461 U.S. 970 (1983), *reh'g denied*, 463 U.S. 1236 (1983).

381. *But see* Scott v. Adal Corp., ___ Pa. Super. ___, 509 A.2d 1279 (1986) (lower court's declaration of unconstitutionality of *rules* of court, even though they have force and effect of *statutes*, is implicitly within superior court's jurisdiction); *cf.* Schreiber v. Republic Intermodal Corp., 473 Pa. 614, 375 A.2d 1285 (1977) (supreme court accepts appeal without resolving jurisdictional issue).

382. *See* 42 PA. CONS. STAT. ANN. § 722 (Purdon 1981) which states as follows:

> *Direct Appeals from Courts of Common Pleas* The Supreme Court shall have exclusive jurisdiction of appeals from final orders of the courts of common pleas in the following classes of cases:
>
> (1) Matters prescribed by general rule. (2) The right to public office. (3) Matters where the qualifications, tenure or right to service, or the manner of service, of any member of the judiciary is drawn in question. (4) Automatic review of sentences as provided by 42 Pa.C.S. sec. 9711(h) (relating to review of death sentence). (5) Supersession of a district attorney by an Attorney General or by a court or where the matter relates to the convening, supervision, administration, operation or discharge of an investigating grand jury or otherwise directly affects such a grand jury or any

cial Code gives the supreme court exclusive appellate jurisdiction from final orders of the commonwealth court when such actions were originally commenced in the commonwealth court rather than coming to that court as an appellate action.[383] These types of cases may be appealed to the court as a matter of right. The supreme court also possesses exclusive appellate jurisdiction over final orders of constitutional and judicial agencies that concern peculiarly legislative, judicial and professional (legal) matters.[384]

The discretionary aspect of the supreme court's appellate jurisdiction represents a significant portion of the supreme court's onerous reviewing function. Probably the most important or commonplace jurisdictional provision for the practitioner who wishes to appeal to the supreme court is section 724 of the Judicial Code.[385]

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investigation conducted by it. (6) Matters where the right or power of the Commonwealth or any political subdivision to create or issue indebtedness is drawn in direct question. (7) Matters where the court of common pleas has held invalid as repugnant to the Constitution, treaties or laws of the United States, or to the Constitution of this Commonwealth, any treaty or law of the United States or any provision of the Constitution of, or of any statute of, this Commonwealth, or any provision of any home rule charter. (8) Matters where the right to practice law is drawn in direct question.

383. *See id.* § 723 which states as follows:
Appeals from Commonewalth Court (a) General Rule. — The Supreme Court shall have exclusive jurisdiction of appeals from final orders of the Commonwealth Court entered in any matter which was originally commenced in the Commonwealth Court except an order entered in a matter which constitutes an appeal to the Commonwealth Court from another court, a district justice or another government unit. *(b) Board of Finance and Revenue matters.* — Any final order of the Commonwealth Court entered in any appeal from a decision of the Board of Finance and Revenue shall be appealable to the Supreme Court, as of right, under this section.

384. *See id.* § 725, which states as follows:
Direct appeals from constitutional and judicial agencies The Supreme Court shall have exclusive jurisdiction of appeals from final orders of the following constitutional and judicial agencies:
(1) Legislative Reapportionment Commission. (2) Judicial Inquiry and Review Board. (3) The agency vested with the power to determine whether those members of the minor judiciary required to do so have completed a course of training and instruction in the duties of their respective offices and passes an examination. (4) The agency vested with the power to admit or recommend the admission of persons to the bar and the practice of law. (5) The agency vested with the power to discipline or recommend the discipline of attorneys at law.

385. *See id.* § 724, which provides in part as follows:
Allowance of appeals from Superior and Commonwealth Courts (a) General rule. — Except as provided by Section 9781(f) (relating to limitation on additional appellate review), final orders of the Superior court and final orders of the Commonwealth Court not appealable under section 723 (relating to appeals from Commonwealth Court) may be reviewed by the Supreme Court upon allowance of appeal by any two justices of the Supreme Court upon petition of any party to the matter. If the petition shall be granted, the Supreme Court shall have jurisdiction to review the order in the manner provided by section

Under this broad provision of appellate review, the supreme court, upon petition,[386] may permit an appeal from final orders of the superior and commonwealth courts. The provision does not specify particular classes of cases.

The supreme court also possesses a power unique to the appellate courts. It is the power of *plenary review*, unencumbered by principles of finality, to assume jurisdiction in any matter "involving an issue of immediate public importance."[387] This power of extraordinary review is also referred to as the power of the King's Bench.[388]

B. Superior Court

For the non-specialist practitioner generally involved in non-specialized appeals, the major repository of appellate review is located in the superior court which has been referred to as "one of the most overworked appellate courts in America in terms of caseload and number of written opinions per judge per year."[389] The superior court is the second oldest appellate court in Pennsylvania and was accorded constitutional status when it was incorporated into the Pennsylvania Constitution of 1968.[390] The superior court presently has fifteen judges, supplemented by senior judges.

Basically, the superior court has very limited original jurisdiction.[391] However, the Judicial Code gives the superior court a broad, generic appellate jurisdiction over final orders of common pleas courts in those matters that are not within the jurisdiction of either

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5105(d)(1) (relating to scope of appeal).

386. The procedure is known as "Petition for Allowance of Appeal," often referred to as a "Petition for Allocatur." *See* PA. R. APP. P. 1111-23.

387. 42 PA. CONS. STAT. ANN. § 726 (Purdon 1981) provides as follows:

> *Extraordinary Jurisdiction* Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or district justice of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done.

See also *supra* notes 352-64 and accompanying text regarding jurisdiction based on "exceptional circumstances."

388. *See, e.g.*, Bocchetta v. Bocchetta, 498 Pa. 227, 445 A.2d 1194 (1982) (plenary jurisdiction assumed in divorce case involving issue of equitable jurisdiction); *see also* PA. R. APP. P. 3309; Surrency, *supra* note 378, at 176.

389. *See* REPORT OF THE AMERICAN JUDICATURE SOCIETY, *supra* note 6, at 15.

390. The superior court was created in 1895. In 1980 an amendment was passed that increased the number of judges from seven to fifteen. The superior court achieved constitutional status by the constitutional amendments in 1968. *See* PA. CONST. art. 5, § 3 (superior court); *see also* THE PENNSYLVANIA MANUAL, *supra* note 376, at 402; Surrency, *supra* note 378, at 189-90, (indicating that the superior court was created to ease the burdensome caseload of the supreme court).

391. *See* 42 PA. CONS. STAT. ANN. § 741 (Purdon 1981); *see also supra* note 363.

the supreme or commonwealth courts.[392] A party, aggrieved by such a final order, may appeal as of right to the superior court pursuant to this specific statutory provision.

C. *Commonwealth Court*

The commonwealth court is the youngest and arguably most specialized of Pennsylvania's appellate courts. Existing since 1970, the commonwealth court, to a great degree, possesses jurisdiction over actions by or against the Commonwealth, its officers and its agencies.[393] Although the American Judicature Society noted that there is perhaps no logical or socioeconomic justification for the separateness of the commonwealth and superior courts, and that the margins of their respective jurisdictions are sometimes inevitably vague,[394] the practitioner must be aware of the commonwealth court's distinct jurisdictional powers. Aside from its original jurisdiction,[395] the commonwealth court has exclusive appellate jurisdiction, for example, of final orders of the courts of common pleas in (1) civil actions to which the Commonwealth is a party; (2) criminal actions arising from violations of regulatory statutes administered by a state agency; and (3) civil and criminal actions involving local government matters that draw into question the application, interpretation or enforcement of home rule charters, statutes relating to elections, and statutes regulating the affairs of political subdivisions, municipalities, local authorities or public corporations and their agents.[396] The com-

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392. 42 PA. CONS. STAT. ANN. § 742 (Purdon 1981) provides as follows:

> *Appeals from courts of common pleas* The Superior Court shall have exclusive appellate jurisdiction of all appeals from final orders of the courts of common pleas, regardless of the nature of the controversy or the amount involved, except such classes of appeals as are by any provision of this chapter within the exclusive jurisdiction of the Supreme Court or the Commonwealth Court.

The prior statute was PA. STAT. ANN. tit. 17, § 211.302 (repealed).

393. *See* PA. CONST. art. 5, § 4 (commonwealth court); *see also* THE PENNSYLVANIA MANUAL, *supra* note 376, at 402-03, which notes that previously, cases involving the Commonwealth had been heard by the Dauphin County Court of Common Pleas, sitting in Harrisburg.

394. *See* REPORT OF THE AMERICAN JUDICATURE SOCIETY, *supra* note 6, at 32. The study also noted that at that time, the commonwealth court, partly because of its newness, was the most efficient and effective of the appellate courts. *Id.* at 33.

395. *See* 42 PA. CONS. STAT. ANN. § 761 (Purdon 1981); *see also supra* note 363.

396. *See* 42 PA. CONS. STAT. ANN. § 762 (Purdon 1981 & Supp. 1986), which provides as follows:

> *Appeals from courts of common pleas (a) General Rule.* — Except as provided in subsection (b), the Commonwealth Court shall have exclusive jurisdiction of appeals from final orders of the courts of common pleas in the following cases:
>
> (1) Commonwealth civil cases. — All civil actions or proceedings:
>
> (i) Original jurisdiction of which is vested in another tribunal by virtue of any of the exceptions to section 761(a)(1) (relating to

monwealth court is also empowered to hear direct appeals from final orders of government agencies in particular categories of cases.[397]

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original jurisdiction), expect actions or proceedings in the nature of applications for a writ of habeas corpus or post-conviction relief not ancillary to proceedings within the appellate jurisdiction of the court. (ii) By the Commonwealth government, including any officer thereof acting in his official capacity.

(2) Governmental and Commonwealth regulatory criminal cases. — All criminal actions or proceedings for the violation of any:

(i) Rule, regulation or order of any Commonwealth agency. (ii) Regulatory statute administered by any Commonwealth agency subject to Subchapter A of Chapter 5 of Title 2 (relating to practice and procedure of Commonwealth agencies). The term "regulatory statute" as used in this subparagraph does not include any provision of Title 18 (relating to crimes and offenses).

(3) Secondary review of certain appeals from Commonwealth agencies. — All appeals from Commonwealth agencies which may be taken initially to the courts of common pleas under section 933 (relating to appeals from government agencies)

(4) Local government civil and criminal matters.

(i) All actions or proceedings arising under any municipality, institution, district, public school, planning or zoning code or under which a municipality or other political subdivision or municipality authority may be formed or incorporated or where is drawn in question the application, interpretation or enforcement of any:

(A) statute regulating the affairs of political subdivisions, municipality and other local authorities or other public corporations or of the officers, employees or agents thereof, acting in their official capacity; (B) home rule charter or local ordinance or resolution; or (C) statute relating to elections, campaign financing or other election procedures.

(iii) All appeals from government agencies other than Commonwealth agencies decided under section 933 or otherwise.

(5) Certain private corporation matters. —

(i) All actions or proceedings relating to corporations not-for-profit arising under Title 15 (relating to corporations and unincorporated associations) or where is drawn in question the application, interpretation or enforcement of any provision of the Constitution, treaties or law of the United States, or the Constitution of Pennsylvania or any statute, regulating in any such case the corporate affairs of the members, security holders, directors, officers, employees or agents thereof, as such. (ii) All actions or proceedings otherwise involving the corporate affairs of any corporation not-for-profit subject to Title 15 or the affairs of the members, security holders, directors, officers, or employees or agents thereof, as such.

(6) Eminent domain. — All eminent domain proceedings or where is drawn in question the power or right of the acquiring agency to appropriate the condemned property or to use it for the purpose condemned or otherwise.

(7) Immunity waiver matters. — Matters conducted pursuant to Subchapter C of Chapter 85 (relating to action against local parties).

397. *See* 42 PA. CONS. STAT. ANN. § 763 (Purdon 1981), which states as follows:

Direct appeals from government agencies (a) General rule. — Except as provided in subsection (c), the Commonwealth Court shall have exclusive jurisdiction of appeals from final orders of government agencies in the following cases:

(1) All appeals from Commonwealth agencies under Subchapter A of Chapter 7 of Title 2 (relating to judicial review of Commonwealth agency

There are presently nine elected judges on the court, supplemented by senior judges.

IX. Conclusion

A New York Times correspondent, reporting on the 1986 International Congress of Mathematicians, observed that the ideal mathematics talk is said to consist of three parts. The first part should be understood by most of the audience. The second part should be understood by a handful of specialists in the field. And the third part should be understood by no one. Otherwise, how would people know that the speaker is serious?[398]

It is with some trepidation and dismay that this writer appreciates the possible relevance of the mathematicians' gibe to the present discourse. The end of a discussion is usually reserved for a simplified summarization of essential themes or concepts. Summarization, however, is often only meaningless trivialization. How, for example, does one capsulize an idea such as standing? How can one tersely and intelligently recapitulate finality's subtle variations — classical, constructive and collateral? There will be no such attempt here. Rather this conclusion is simply intended to remind the reader that the purpose of the preceding discussion was primarily to synthesize and elucidate — not harmonize — complex material in the hope that the topographical perspective will reveal a discernible and sensible mosaic of procedures. The preceding discussion may have startled the reader that so many have labored, for example, on such a simple dilemma as deciding whether one can decide. Although there may

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action) or otherwise and including appeals from the Environmental Hearing Board, the Pennsylvania Public Utility Commission, the Unemployment Compensation Board of Review and from any other Commonwealth agency having Statewide jurisdiction. (2) All appeals jurisdiction of which is vested in the Commonwealth Court by any statute hereafter enacted.

(b) Awards of arbitrators. — The Commonwealth Court shall have exclusive jurisdiction of all petitions for review of an award of arbitrators appointed in conformity with statute to arbitrate a dispute between the Commonwealth and an employee of the Commonwealth. The petition for review shall be deemed an appeal from a government unit for the purposes of section 723 (relating to appeals from Commonwealth Court) and Chapter 55 (relating to limitation of time). *(c) Exceptions.* — The Commonwealth Court shall not have jurisdiction of such classes of appeals from government agencies as are:

(1) By section 725 (relating to direct appeals from constitutional and judicial agencies) within the exclusive jurisdiction of the Supreme Court.(2) By section 933 (relating to appeals from government agencies) within the exclusive jurisdiction of the courts of common pleas.

398. Gleick, *But Aren't Truth and Beauty Supposed to Be Enough?*, N.Y. Times, Aug. 12, 1986, at C3, col. 5.

inevitably be quibbles at times with a result reached or a road taken, only the politically naive would argue that the elaborate edifice of rules[399] and precise judicial expositions on judicial power are nothing more than semantic or scholastic gamesmanship. Thus, rather than attempt to bestow quick and easy answers, this conclusion suggests that in a future appeal, the reader should consider the following preliminary "appellate checklist."

A. *Standing and Justiciability*

1. Does the appealing party, the appellant, have standing to appeal?[400]

2. Is the appellant adversely affected by the lower court's order?[401]

3. Is the appellant a party to the lower court's proceedings?[402]

4. Does the appeal present a subsisting, justiciable controversy?[403]

B. *Appealability (Jurisdiction)*

1. Is the lower court's order appealable as a "final" order? In other words, is there appellate jurisdiction?[404]

a. Is the litigation in the lower court completed? Are the parties actually "out of court"?[405]

b. If the litigation in the lower court is not formally and actually terminated, is the appellant effectively or pragmatically "out of court" and deprived of an opportunity for relief?[406]

c. If the appellant is the plaintiff and the litigation below is not terminated, has the lower court's order denied the plaintiff relief as to a "separate and distinct cause of action" as to one or more of the parties?[407]

d. If the appellant is the defendant and the litigation be-

399. Americans may have a peculiar penchant for intricate rules and regulations, one author noted in comparing the American and British addictions to football and soccer with the different systems of government. For example, in contrast to the flexible, fast-moving and simple strategy of soccer, there is the "rougher American football, with its elaborate system of rules, measurement of yardage, calculation of time-outs, and frequent substitution of players." D. PRICE, AMERICA'S UNWRITTEN CONSTITUTION 74 (1983).

400. *See generally supra* notes 11-46 and accompanying text.

401. *See supra* notes 15-31 and accompanying text.

402. *See supra* notes 32-46 and accompanying text.

403. *See supra* notes 47-73 and accompanying text.

404. *See supra* notes 74-92 and accompanying text.

405. *See supra* notes 93-159 and accompanying text.

406. *See generally supra* notes 160-241 and accompanying text.

407. *See supra* notes 174-94 and accompanying text. Caution is advised here because case law may be in a state of flux.

low is not terminated, has the lower court's order effectively deprived the defendant of a special fact-based defense or a separate claim for relief?[408]

2. If the lower court's order does not actually terminate litigation or effectively deprive the parties of a cause of action, claim for relief, or defense, does the order dispose of an important collateral claim that may be irreparably lost if not immediately reviewed?[409]

3. If the answers to the above are negative, is the lower court's order appealable because of a special statute, rule of court or doctrine?[410]

4. If the answers to the above are negative, has the appellant properly asked the lower *and* appellate courts to certify the lower court's nonfinal order for an immediate appeal?[411]

5. If the appeal from the lower court's order is jurisdictionally proper, has the appellant or appellee improperly attempted to seek review of additional, nonappealable issues? (Often, this question can be answered only after the briefs are filed.)[412]

C. *Jurisdictional Forum*

If the appeal is jurisdictionally proper, is the appeal presented to the proper appellate forum in accordance with the statutory allocations of judicial power?[413]

The answers to the checklist of questions require knowledge and application of complex conceptual constructs, superimposed by man on a reality that can be understood only in terms of human rationality — and fallibility. The abstract constructs of the legal profession are no more — or less — arcane or intelligible than, for example, the equations of a mathematician or the theorems of a physicist.[414] The difference is nothing more than the conjugation of words as a replacement for numbers, in a context impervious to meaningful

408. *See supra* notes 195-211 and accompanying text. Caution is likewise advised here because case law may be in a state of flux.

409. *See supra* notes 242-270 and accompanying text.

410. *See supra* notes 271-314, 352-64 and accompanying text.

411. *See supra* notes 315-51 and accompanying text.

412. *See supra* notes 365-72 and accompanying text.

413. *See supra* notes 373-97 and accompanying text.

414. One could easily, for example, translate the collateral order doctrine or the principle of *Praisner*, *supra* notes 242-70, 174-94 and accompanying text, respectively, into more abstract, sentence-less, arithmetical equations of appealability. The conversion, however, would not necessarily guarantee any greater degree of intelligibility or infallibility. There is perhaps a common perception that pure science is somehow more logical or rational than the social sciences. That pure science has been a victim of its own incertitude and illogical and self-imposed surreality is vividly demonstrated in a recent book about quantum mechanics written especially for the layperson. *See* ZUKAV, THE DANCING WU LI MASTERS (Bantam 1979).

human visualization. Moreover, it is man's perception of a desired or understood reality that frustratingly defies comfortable stasis. As the reader wanders through the maze of appellate rules and opinions, certainty becomes nothing more than a perishable commodity, a delusion; the desuetude and obscurity of concepts being but an opinion or statute away.

> [W]hat we take to be reality can be meaningfully understood only insofar as it is organized and described by language. From this point of view, court opinions, like other forms of discourse, can be understood as exercises in reality making. The legal rules that an opinion promulgates derive from the assumptions that the court makes about the nature, both actual and desired, of reality. Any opinion, in short, encodes an entire world view, in the service of which its rules operate. Like any set of world views, those encoded in legal opinions are continually in the process of being formed and reformed. . . Each time a case is decided and a new opinion is issued, the legal world view is reformed in varying degree, depending upon the outcome of the case.[415]

Thus, the ever changing nature of the legal universe can have a value beyond its apparent mundane and perfunctory existence. For with uncertainty comes excitement. "[W]hen your work seems to present only mean details you may realize that every detail has the mystery of the universe behind it and may keep up your heart with an undying faith," said Oliver Wendell Holmes, Jr., to a friend yet youthful in his craft.[416] Regardless of context, whether craft or profession, there will always be the ambiguity factor. All that one can expect then is to wisely use one's intellectual gifts, learn and try to benefit others. But in the endeavor, one can perhaps develop a world view of the universe and its participants with a sense of wonderment. The amalgam of practices and procedures have been the cooperative creation of a vast human chain in a peculiar cosmic process — from secretaries who typed, to law students who researched, to teachers who taught, to legislators who promulgated, to lawyers who advocated, to law clerks who assisted, to judges who pronounced, and to the supporting staffs that communicated the system's message.[417]

Of course, there are also the parties themselves, who presented

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415. Michel, *Hood v Dumond: A Study of the Supreme Court and the Ideology of Capitalism*, 134 U. PA. L. REV. 659-60 (1986).

416. *See* C. WYZANSKI, JR., WHEREAS — A JUDGE'S PREMISES 289-90 (1965).

417. Of course, one could also include in the scheme the electorate who chose the ones who created and applied the law.

their prosaic or monumental antagonisms for the courts to resolve. Plaintiff's like Sol and Hannah Cohen, Bruce Praisner, and Robert Fried, as well as defendants, such as Donald Abney, Billy Dugger, and James Brady, may be all momentary, technical "losers" of the vast legal system, names simply appended to historical case citations, their individual publicized sagas long forgotten. Yet little did they know that in their defeat would emerge a principle or concept that would affect the lives and fortunes of others to follow. Little did they know that, as a result of their internecine squabbles, the legal participants would trod a path toward a new destination, a new idea, a new reality. The New York Times correspondent, who attended the mathematicians' conclave, shared a vision that may have meaning for all of us. In lifting the curtain of the specialist's arcane and microscopic details, the reporter discovered a panoramic wonderland of truth and beauty:

> If the mathematicians were inclined toward parable and metaphor — and they most definitely are not — they might describe a vast wilderness, and in it a small society of men and women whose business it is to lay railroad track. This has become an art, and they have become artists — artists of track, lovers of track, connoisseurs of track. Almost perversely, they ignore the landscape around them. A network of track may head to the northeast for many years and then be abandoned. An old, nearly forgotten line to the south may sprout new branches, heading toward a horizon that the tracklayers seem unable or unwilling to see. As long as each new piece of track is carefully joined to the old, so that the progression is never broken, an odd thing happens. People come along hoping to explore this forest or that desert, and they find that a certain stretch of track takes them exactly where they need to go. The tracklayers, for their part, may have long since abandoned that place. But the track remains, and track, of course, is the stuff on which the engines of knowledge roll forward.[418]

418. *See* Gleick, *supra* note 398, at C3, col. 6.