Volume 91
Issue 2 *Dickinson Law Review - Volume 91, 1986-1987*

1-1-1987

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I. Introduction

The preceding Article[1] on appellate practice emphasized *concepts*: jurisdiction, standing, finality, and the like. This Article, in contrast, shall focus on *precepts*, that is, the codified rules that constitute the nuts and bolts of the procedural processing of an appeal, from birth to briefing. These precepts or rules are known as the Pennsylvania Rules of Appellate Procedure.[2]

The prior Article was an essential prologue to the material herein. Admittedly, the reader may have viewed the concepts discussed in the prior Article as frustratingly arcane and elusive. Those theories and concepts, however, are the fundamental preliminaries to an appeal's genesis; in a sense, ideas such as jurisdictional power and standing to appeal are just that — ideas — the primordial matter of an appeal. Once the appeal is filed, those ideas take form and become an integral part of a new, distinct procedural entity whose existence will be dictated, sustained, or destroyed by the rules of an intricate procedural universe.

There is perhaps some basis for the lamentation that today's society is preoccupied too much with procedure and rules rather than

1. *See* Pines, *Pennsylvania Appellate Practice: Procedural Requirements and the Vagaries of Jurisdiction*, 91 DICK. L. REV. 55-149 (1986).

2. Hereinafter referred to as rules. The major codification of the appellate rules occurred in 1976 pursuant to article V, section 10 of the Constitution of Pennsylvania. The codification represented an outstanding collaborative attempt to establish uniformity of practice, predictability, and fairness in appellate practice.

substance and values. Yet rules are indeed necessary to the enjoyment of life and the pursuit of justice. Almost all rational human endeavors — from the mundane erection of cities, to the creation of laws, the ritualization of faith, the codification of moral behavior, the dramatization of the human predicament or the communal enterprise of a sporting event — yearn for order. For it is through order that one can express and achieve those values that we so deeply cherish, be it comfortability, justice, salvation, aesthetic enjoyment, or vicarious victory. In all such endeavors and aspects of our lives, rules play a pivotal role, symbolically and functionally. The philosopher Isaiah Berlin once noted in his essay on equality that

> [a]ll rules, by definition, entail a measure of equality. In so far as rules are general instructions to act or refrain from acting in a certain way, in specified circumstances, enjoined upon persons of a specific kind, they enjoin uniform behavior in identical cases. To fall under a rule is *pro tanto* to be assimilated to a single pattern. *To enforce a rule is to promote equality of behavior or treatment.* This applies whether the rules take the form of moral principles and laws or codes of positive law, or the rules of games or of conduct adopted by professional associations, religious organizations, political parties, wherever patterns of behavior can be codified in a more or less systematic manner.[3]

As he further notes, "some minimum degree of prevalence of rules is a necessary condition for existence of human society . . . and the kind of equality with which obedience to rules is virtually identical is among the deepest needs and convictions of mankind."[4]

Having had the opportunity of working for the appellate courts for almost ten years and having seen thousands of appeals come and go, this writer can preliminarily suggest that there are two critical elements to competent appellate advocacy: obedience and knowledge. As to the first, the appellate process demands obedience to its rules. Disobedience, regardless of intent or ignorance, subverts order, creates disequilibrium, and invites grave consequences, including the extinction of an appeal. The rules impose a sense of rationality and order that are essential to maintaining procedural parity among the parties, as well as consistency and predictability. Only through order can the system's ideal of justice for all attain maximum fulfillment.

Aside from the obvious necessity of obedience, the reader is again forewarned that there can be no substitute for a thorough, per-

3. I. BERLIN, CONCEPTS AND CATEGORIES 84-85 (1978) (emphasis added).
4. *Id.* at 85.

sonal knowledge of the procedural rules, rules that are subject to the ongoing process of ad hoc amendments. One need only examine caselaw and the rule books of the past to appreciate the appellate system's ancestry of obsolete rules and practices. Indicative of this occupational hazard is the last minute incorporation into this text of amendments recently proposed by the procedural rules committee.[5]

Now, a word about this Article's exposition. The format of this Article is actually simpler than the volume and contents superficially suggest. The Article basically parallels the five major steps of the appellate process, which is essentially an eminently rational method for the channeling of grievances. The five steps, the reader is cautioned, is an arbitrary construct designed for purely pedagogical simplicity and convenience. While the steps are distinct, some of them are temporally overlapping. Again, the reader is warned that the subject of this segment is appellate practice at the primary stage. No attempt is made to analyze specialized procedures concerning appellate analogues (the petition for review) or post-appeal options (reargument or the petition for allowance of appeal).[6]

The text attempts to synthesize a mass of material into manageable chunks. Buttressing the text's exposition is an intricate underground network of footnotes, selectively collating relevant cases and rules. A significant amount of parenthetical information is offered so that the references may provide the reader with greater meaning and guidance. Purposely avoided are numerous skeletal references.

Thus, this Article begins at the beginning — the creation of the appeal. The focus is on the following major steps of an appeal's growth:

1. the timely filing of the notice of appeal after the entry in the lower court of an appealable order;

2. the filing of the lower court's statement of explanation (often referred to as the opinion) and the appellant's statement of grievances;

3. the transcription and transmission of the original record from

5. *See infra* notes 39 and 143.

6. *See, e.g.*, PA. R. APP. P. 1511-1561 (petition for review), 2541-2547 (reargument), 1111-1123 (petition for allowance of appeal to the supreme court).

the lower court to the appellate court;

4. the preparation and filing of the reproduced record; and

5. the preparation and filing of the parties' briefs.

II. Phase One: Filing the Notice of Appeal and Cross Appeal

The filing of a *notice of appeal* in the *lower court* is the first major step in formally commencing the appeal. Aside from the careful presentation of specific issues in the lower court, the existence of a jurisdictionally appealable (final or interlocutory) order, and the procedural prerequisite of standing,[7] the timely filing of an accurate notice of appeal is one of the most critical events in the appellate process. Careful compliance with various procedural rules is mandatory because the timely filing of a notice of appeals concerns and affects a matter that can be neither overlooked nor waived by the parties or the court — namely, the jurisdiction of the appellate court.[8] The notice of appeal serves to invoke the jurisdiction of the appellate court. If a party fails to invoke the appellate court's jurisdiction in a procedurally proper manner, the result may be drastic and devastating.

Because the right of appeal is an important statutory and constitutional right,[9] appellate courts have recognized a policy in favor of preserving the right of appeal when there is substantial compliance with the appellate rules. The appellate rules are not intended to be so rigidly applied as to result in manifest injustice.[10] This policy of preservation is, in fact, in conformity with the expressed philosophy of the rules of appellate procedure. Rule 105(a) reads as follows:

> (a) *Liberal construction and modification of rules.* These rules shall be liberally construed to secure the just, speedy and inexpensive determination of every matter to which they are applicable. In the interest of expediting decision, or for other good cause shown, an appellate court may, except as otherwise provided in Subdivision (b) of this rule, disregard the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceed-

7. *See* Pines, *supra* note 1, at 62-69.

8. *See id.* at 75-78. If a notice of appeal is not timely filed, the briefs of a purported appellant will not be considered. *See* Hanover Bank of Pa. v. United Penn Bank, 326 Pa. Super. 593, 598 n.1, 474 A.2d 1137, 1139 n.1 (1984).

9. *See* Pines, *supra* note 1, at 57-58.

10. *See* Stout v. Universal Underwriters Ins. Co., 491 Pa. 601, 421 A.2d 1047 (1980), *on remand*, 320 Pa. Super. 240, 467 A.2d 18 (1983); Peterson v. Philadelphia Suburban Transit Co., 435 Pa. 232, 255 A.2d 577 (1969).

ings in accordance with its direction.

The liberal policy in the construction of the appellate rules must, however, be carefully distinguished from the discretionary authority vested in the appellate courts as to the application of the rules when the parties fail to comply with procedural requirements. Existing Rule 902[11] authorizes an appellate court to take any action it deems appropriate, including dismissal of the appeal, when there is a violation of the appellate rules. Knowledge of the various procedural requirements is, therefore, imperative. In order to invoke the appellate court's jurisdiction, the aggrieved party appealing should be aware of the following procedural requirements in connection with the filing of a notice of appeal.

A. Filing the Notice of Appeal: Procedural Requirements

1. "Entry" of an Appealable Order.—As the prior Article pointed out, an aggrieved party cannot file an appeal unless there is an *appealable order*, that is, a lower court order that is within an appellate court's specific jurisdiction.[12] A necessary corollary to this jurisdictional principle is that an order is not appealable until the lower court clerk or prothonotary[13] formally "enters" the appealable order on the "docket".[14] The "date of entry," as the reader will later see, is of utmost significance because it is the focal point for determining the mandatory time within which an aggrieved party must file the notice of appeal. Rule 301 makes clear that the entry of an appealable order is a condition precedent to the filing of an appeal:

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11. PA. R. APP. P. 902 provides as follows:

Manner of Taking Appeal

An appeal permitted by law as of right from a lower court to an appellate court shall be taken by filing a notice of appeal with the clerk of the lower court within the time allowed by Rule 903 (time for appeal). Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but it is grounds only for such action as the appellate court deems appropriate, which may include dismissal of the appeal.

The proposed amendment to Rule 902 would delete the option of dismissal in the last sentence of the text but recognize it in the accompanying comment as an ultimate sanction when counsel fails to correct *formal defects*. *See infra* note 39.

12. The appealable order may be final or nonfinal (that is, interlocutory). See Pines, *supra* note 1, at 75-136. Jurisdiction may be based on the statutes or rules of court.

13. "Prothonotary" is described as the "title given (in e.g. Pennsylvania) to an officer who officiates as principal clerk of some courts." BLACK'S LAW DICTIONARY 1101 (5th ed. 1979). For the statutory provisions regarding the prothonotary, see 42 PA. CONS. STAT. ANN. §§ 2731-2738. (Purdon 1981). *See also* PA. R. APP. P. 3301, 3502, 3702.

14. "Docket" has been described as a "minute, abstract, or brief entry; or the book containing such entries . . . A book containing an entry in brief of all the important acts done in court in the conduct of each case from its inception to conclusion." BLACK'S LAW DICTIONARY 431 (5th ed. 1979).

> (a) *Entry upon docket below.* No order of a court shall be appealable until it has been entered upon the appropriate docket in the lower court. Where under the applicable practice below an order is entered in two or more dockets, the order has been entered and *reduced to judgment* for the purposes of appeal when it has been entered in the first appropriate docket.[15]

The rules, however, provide for an exception in emergency situations.[16] The requirement that an appealable order be entered on the dockets in the lower court is jurisdictional and, therefore, mandatory.[17] The appellate rules also require that every order shall be set forth on a separate document.[18] The appellant must be careful in distinguishing the specific entry requirements based upon the nature of the case in the following situations.

(a) Entry of appealable orders (civil cases).—Under the rules of civil procedure, in a civil case, the lower court clerk must give the parties notice of an order of the lower court by forwarding the order to the parties by regular mail.[19] The lower court clerk must also record the fact of such notice on the docket in the lower court. For purposes of identifying the date of entry under the appellate rules,

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15. PA. R. APP. P. 301(a) (requisites for an appealable order) (emphasis added). As to the requirement of reducing an order to judgment, however, see the proposed amendment, *infra* note 39.

16. PA. R. APP. P. 301(e) provides as follows:

> (e) *Emergency appeals.* Where the exigency of the case is such as to impel an immediate appeal and the party intending to appeal an adverse action is unable to secure the formal entry of an appealable order pursuant to the usual procedures the party may file in the lower court and serve a praecipe for entry of an adverse order, which action shall constitute entry of an appealable order for the purposes of these rules. The interlocutory or final nature of the action shall not be affected by this subdivision.

17. *See, e.g.*, Murphy v. Brong, 321 Pa. Super. 340, 468 A.2d 509 (1983); Coren v. DiDomenico, 291 Pa. Super. 331, 435 A.2d 1252 (1981).

18. *See* PA. R. APP. P. 301(b); *see also* Grossman v. Commissioner of Police, 318 Pa. Super. 584, 588, 465 A.2d 1007, 1009 (1983); G.E. Credit Corp. v. Aetna Casualty & Surety Co., 437 Pa. 463, 263 A.2d 448 (1970) (citing cases). The commentary to PA. R. APP. P. 512 indicates that there should be one appeal per appealable order. The comments to Rule 301 note that subdivision (b) is patterned after Fed. R. Civ. P. 58, as interpreted in United States v. Indrelunas, 411 U.S. 216 (1973), "so as to render certain the date on which an order is entered for purposes of computing the running of the time for appeal." *See also* Bankers Trust Co. v. Mallis, 435 U.S. 381 (1978) (separate document requirement may be waived by appellee). In a recent statement dissenting to the denial of a petition for writ of certiorari, Justices Blackmun and O'Connor stated that "the separate document requirement must be applied mechnically in order to protect a party's right of appeal, although the parties may waive this requirement in order to maintain appellate jurisdiction of their case." Amoco Oil Co. v. Jim Heiling Oil & Gas, Inc., 55 L.W. 3355 (emphasis in original).

19. PA. R. CIV. P. 236 states as follows: "(a) The prothonotary shall immediately give written notice by ordinary mail of the entry of any order, decree of judgment; (b) The prothonotary shall note in the docket the giving of the notice and, when a judgment by confession is entered, the mailing of the required notice and documents."

the date of entry is the date that (a) the lower court clerk gave notice to the parties and (b) made a Rule 236(b) notation[20] on the docket in the lower court.[21] *Therefore, a lower court's order is not appealable in a civil case until the order has been entered upon an appropriate docket in the lower court and a proper notation appears that notice has been given to the parties regarding the entry of the order.*[22] The appellate rules, in fact, specifically recognize that the "date of entry of order in a matter subject to the Pennsylvania Rules of Civil Procedure shall be the day on which the clerk makes the notation in the docket that notice of the entry of the order has been given as required by Pa. R. Civ. P. 236(b)."[23]

(b) Entry of appealable orders (criminal cases).—The appellate rules contain a general provision defining what is the "date of entry." Technically, the applicable rule[24] contains four possibilities for the date of entry of an order in noncivil matters. These possibilities include: (1) the day the clerk of the court mails or delivers copies of the orders to the parties; (2) if such delivery is not required, the day the clerk makes such copies available to the public; (3) the day of the order's adoption by the court; or (4) any subsequent day, as required by the actual circumstances.[25]

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20. *See supra* note 19.

21. *See* State Farm Mut. Auto. Ins. Co. v. Schultz, 281 Pa. Super. 212, 421 A.2d 1224 (1980); Ruh v. Ruh, 268 Pa. Super. 82, 407 A.2d 447 (1979).

22. *See* Yeaple v. Yeaple, 485 Pa. 399, 402 A.2d 1022 (1979); *see also* Estate of Kefauver, ___ Pa. Super. ___, ___ A.2d ___ (1986) (appeal filed more than 30 days after date of final decree not defective where no record notation of Rule 236 notice).

23. *See* PA. R. APP. P. 108(b); but *cf. In re* Fourth Statewide Investigating Grand Jury, ___ Pa. ___, 509 A.2d 1260 (1986), involving an appeal from a civil contempt order in which the supreme court rejected the dates of mailing or delivery as the "day of entry." The court applied a "date of adoption" test. According to the court, the order was entered when the contempt finding was made, imprisonment was imposed, and a contemporaneous written order embodying the finding was made.

24. PA. R. APP. P. 108(a)(1) states as follows:

> (a) *General rule.* (1) Except as otherwise prescribed in this rule, in computing any period of time under these rules involving the date of entry of an order by a court or other government unit, the day of entry shall be the day the clerk of the court or the office of the government unit mails or delivers copies of the order to the parties, or if such delivery is not otherwise required by law, the day the clerk or office of the government units makes such copies public. The day of entry of an order may be the day of its adoption by the court or other government unit, or any subsequent day, as required by the actual circumstances.

25. The rules do not indicate any preference among the various options. The ascertainment of the critical "day of entry" event may, therefore, prove troublesome especially if more than one event applies. It would seem that the safest course would be to choose whatever entry event first applies in order to estimate the applicable time constraints conservatively. The last event of subsection (a)(1) ("or any subsequent day, as required by the actual circumstances") is noticeably ambiguous.

In *Commonwealth v. Dorman*,[26] the superior court noted that the rules of criminal procedure do not contain the equivalent of the notice requirement of Rule 236 in civil cases.[27] The court noted that, in any event, such a requirement would be superfluous since, in a criminal case, the sentence is placed on the record in the presence of the defendant who is appearing before the sentencing court. At the time of the opinion, however, the rules of criminal procedure did contain a provision that is substantially similar to the following present rule:

> *Notice and Docketing of Orders*
>
> Upon receipt of an order from a judge, the clerk of court shall immediately docket the order and record in the docket the date it was made. Except as may be provided by local rules, the clerk shall forthwith furnish a copy of the order, by mail or personal delivery, to each party or attorney, and shall record in the docket the time and manner thereof.[28]

The significance of the criminal procedural rule regarding notice and docketing of orders lies in its relationship to the four variable possibilities of the "date of entry" contained in the general appellate rule.[29] In criminal cases, is the all-important "date of entry" (a) the date of mailing or delivering a copy of the order to the parties, (b) the date such copies are made public, (c) the date of the "adoption" by the court, or (d) "any subsequent day, as required by the actual circumstances?" The court in *Dorman* stated that the possible dates of mailing, delivering, or making public could not be determined by the court from the record.[30] Therefore, the court determined that, in that case, the "date of entry" would be construed as the "date of adoption," that is, the date when the court (1) entered the order on the docket and (2) informed the defendant of the sentence and his right to appeal.[31] In a recent appeal from a civil contempt order that imposed imprisonment, the supreme court also used a "date of adoption" approach to determine when the lower court's order was "entered" for purposes of determining the relevant time to

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26. 272 Pa. Super. 149, 414 A.2d 713 (1979).
27. *Id.* at 154-55 n.6, 414 A.2d at 716 n.6.
28. PA. R. CRIM. P. 9024, which is derived from former PA. R. CRIM. P. 309(d).
29. *See supra* note 24.
30. *See Dorman*, 272 Pa. Super. at 155-56, 414 A.2d at 717; see also Commonwealth v. Mays, 288 Pa. Super. 129, 132 n.1, 431 A.2d 322, 323 n.1 (1981); Commonwealth v. Gottshalk, 276 Pa. Super. 102, 419 A.2d 115 (1980).
31. *Dorman* did not consider the nature or applicability of the nebulous fourth "actual circumstances" option for determining date of entry under Rule 108(a).

appeal.[32] Because the defendant did not timely appeal from the date of entry, the supreme court quashed the defendant's appeal.

(c) Entry of orders (miscellaneous cases).—In a case governed by the Juvenile Act, the superior court determined that the first three "entry" possibilities (date of mailing, date of delivery, date of making public) of Rule 108(a) could not be determined from the record. Therefore, the panel determined that the second sentence of Rule 108(a) governed and that the date of entry would be the "date of adoption" by the court. Under the circumstances, the date of entry/adoption would be the date that the lower court both informed the appellant's attorney of the custody order and also entered the final order on its dockets.[33]

2. Existence of an Appealable Order (final orders, judgments).—The preceding discussion of the importance of the "date of entry" requirement presupposes the existence of a jurisdictionally appealable order. The first segment of this Article noted that the appealability of an order goes to the heart of appellate jurisdiction.[34] An appealable order is the nucleus or basic building block of an appeal. In most cases, an appealable order for jurisdictional purposes is a "final order." Appeals may be taken "as of right" from any final order of an administrative agency or lower court.[35] A "final order" is generally one that either finally terminates the litigation between the parties or denies a litigant relief so as to effectively put him or her "out of court."[36]

Often a final order is a judgment entered at the conclusion of a case. For example, in criminal cases, interlocutory or nonfinal orders are not generally appealable. The general rule is that a defendant may appeal only from a final judgment of sentence.[37] Therefore, dismissal of post-verdict motions, even though entered on the docket, would not be an appealable order until judgment of sentence was

32. *See In re* Fourth Statewide Investigating Grand Jury, ___ Pa. ___, 509 A.2d 1260 (1986).

33. *See In re* Gorham, 272 Pa. Super. 145, 414 A.2d 712 (1979). The court quashed the appeal as untimely.

34. *See* Pines, *supra* note 1, at 75-78.

35. *See* 42 PA. CONS. STAT. ANN. § 5105 (Purdon 1981 & supp. 1986) (right to appellate review); *see also* PA. R. APP. P. 341(a) (final orders generally), 702(a) (final orders).

36. *See* Pines, *supra* note 1, at 78-107. A final appealable order may also include a pretrial order "collateral" to the merits of the controversy. *See id.* at 107-115.

37. *See* Commonwealth v. Myers, 457 Pa. 317, 319, 322 A.2d 131, 132 (1974); Commonwealth v. Sites, 430 Pa. 115, 117, 242 A.2d 220, 221 (1968); Commonwealth v. Pollick, 420 Pa. 61, 62-63, 215 A.2d 904, 905 (1966); Commonwealth v. Nugent, 291 Pa. Super. 421, 435 A.2d 1298 (1981).

imposed.

Likewise, in civil cases, the general rule is that an appellant usually appeals from a final judgment entered after the disposition of post-trial or post-verdict motions.[38] In pretrial or nontrial matters, one would appeal, for example, the entry of a summary judgment or a judgment on the pleadings, both of which effectively terminate a case.

The general rule, therefore, is that an appealable order is often (though not always)[39] a judgment actually entered on the dockets in the lower court that effectively terminates the litigation. The appellate rules make clear that it is the actual entry of an appealable order on the docket that is dispositive. Rule 301(d) is captioned "Reduction of decision to judgment"[40] and should be considered in conjunction with the applicable civil procedural rules providing for entry of final judgments upon praecipe[41] of a party.[42] Rule 301 also specifies that an anticipatory or directory judgment is not appealable until it has been entered on the docket.

Rule 301 states as follows:

> (c) *Orders not appealable.* A direction by the lower court that a specified judgment, sentence or other order shall be entered, unaccompanied by actual entry of the specified order in the docket, or a direction that a verdict of a jury be recorded or entered, or an order denying a motion for a new trial, does not constitute an appealable order. Any such order shall be reduced to judgment and docketed before an appeal is taken.[43]

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38. *See* PA. R. CIV. P. 227.1 (post-trial relief).

39. It is important to note that, inasmuch as appealable orders and final judgments are not necessarily equivalent, the proposed amendment to appellate rule 904 would require appellant to simply specify in the notice of appeal that the appealed order has been entered in the docket. *See* LEGAL INTELLIGENCER, Oct. 16, 1985, at 1, 12, 13, *published in* 16 Pa. Bull. 3924-3933 (1986).

40. PA. R. APP. P. 301(d) states as follows:

> (d) *Reduction of decision to judgment.* Subject to any inconsistent general rule applicable to particular classes of matters, the clerk of the lower court shall on praecipe of any party (except a party who by law may not praecipe for entry of an adverse order) forthwith prepare, sign and enter an appropriate order evidencing any action from which an appeal lies either as of right or upon permission to appeal or allowance of appeal.

41. "Praecipe" definitionally includes "an order to the clerk of court to issue an execution on a judgment already rendered . . . . [or] requesting him to issue a particular writ." *See* BLACK'S LAW DICTIONARY 1055-56 (5th ed. 1979).

42. *See, e.g.*, PA. R. CIV. P. 227.4 (entry of judgment upon praecipe of a party), which is made applicable to actions at law and in equity, tried with or without a jury.

43. PA. R. APP. P. 301(c). *See also* Novoseller v. Royal Globe Ins. Co., 293 Pa. Super. 93, 437 A.2d 1007 (1981) (judgment must be actually entered). It is also important to note that a valid judgment cannot be entered in the lower court until the time for filing a motion for new trial has expired. A prematurely filed judgment, before disposition of the pending motion

Thus, before perfecting an appeal, the litigant must be extremely cautious that an appealable order, which is often a final judgment,[44] has been entered on the docket in the lower court. In this regard, the appellant should be aware that the procedural propriety of an appeal is determined at the time the appeal is taken.[45] If an appeal is filed from an unappealable order, the appellee may file a motion to dismiss or quash the appeal because of the absence of appellate jurisdiction, that is, the appellate power to decide.[46]

(a) Exceptions to requirement of entry of final judgment.—The preceding discussion indicates that, in most cases, one may only appeal a final judgment actually entered on the docket in the lower court. There are instances, however, in which the absence of a final judgment will not be detrimental to the appellant. The circumstances are very limited.

(i) Interlocutory orders.—The first and obvious exception to the jurisdictional requirement of the entry of a "judgment" is the special class of cases in which an appeal from an interlocutory, nonfinal order is permitted by statute or rule of court. In a criminal case, for example, the entry of a judgment is not a condition precedent to an appeal from an order changing criminal venue, awarding a motion for new trial, or denying a defendant's motion to dismiss based on double jeopardy.[47] Such orders, however, must be formally entered on the lower court dockets before an appeal can be filed.[48]

Likewise, in civil cases, an appeal may be filed in some instances without the entry of a judgment on the dockets in the lower court. An appellant should be careful to determine what is specifically an appealable order because the failure to timely appeal an immediately appealable order may result in the dismissal of an appeal. This is true even if the appellant filed a timely appeal from the subsequent entry of a judgment, given that the entry of the judgment

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for new trial or before the expiration of the time within which to file a motion for post-trial relief (*see* PA. R. CIV. P. 227.1(c); PA. R. CRIM. P. 1123) has been construed as void and of no legal effect. *See* Moore v. Quigley, 402 Pa. 636, 168 A.2d 334 (1961); Murphy v. Brong, 321 Pa. Super. 340, 468 A.2d 509 (1983). Local rules of court should also be examined in order to determine the appropriate time limitations for filing post trial motions.

44. *See supra* notes 34-39.

45. *See* Pines, *supra* note 1, at 76 n. 85.

46. *See* PA. R. APP. P. 1972 (dispositions on motion), 123 (applications for relief).

47. *See, e.g.*, PA. R. APP. P. 311 (interlocutory orders identified); *see also* Pines, *supra* note 1, at 81, 82, 112, 118 and 120.

48. PA. R. APP. P. 301(a) (entry upon docket below), *supra* note 15.

may have been superfluous or unnecessary.[49] For example, orders opening or refusing to open or strike a judgment, confirming or dissolving an attachment, granting or refusing an injunction, granting a new trial, or directing partition would be immediately appealable orders under the appellate rules without the necessity of entry of a formal "judgment."[50]

(ii) Exceptions to "reduction to judgment" rule.—Not all final orders (in the sense that they actually, constructively, or pragmatically terminate litigation between the parties) require the formal entry of "judgment" in order to be appealable.[51] For example, the Pennsylvania Supreme Court noted in *United States National Bank v. Johnson*[52] that, in a multidefendant lawsuit, the dismissal of a party had the same effect as the dismissal of a complaint and was immediately appealable without the need to "reduce" such an order to judgment. The date of entry of the appealable order (the dismissal of the complaint) was thus the focal point for computing the time period within which the appellant had to file the notice of appeal in the lower court.

There are other final orders that do not require the formal entry of a judgment as a procedural precondition for an appeal. The refusal to strike or remove a nonsuit in a civil case is an immediately appealable order; no reduction to judgment is required.[53] In an equity case, the supreme court noted that the docketing of a final decree in equity (declaring a partnership and awarding fees), not the subsequent entry of a judgment, was the determinative event for computing whether appellant timely filed his notice of appeal.[54]

The commonwealth court has also recognized that, in certain situations, the entry of a final appealable order does not necessarily require the entry of a judgment. In *Commonwealth v. Kayden Corp.*,[55] the lower court's order sustaining an appeal from the Pennsylvania Liquor Control Board and directing issuance of a restaurant

49. *See* Hawthorne v. Dravo Corp., 313 Pa. Super. 436, 439 n.2, 460 A.2d 266, 267 n.2 (1983) (appeal from refusal to remove a nonsuit is proper; amending notice of appeal from subsequent judgment was unnecessary surplusage).

50. *See* PA. R. APP. P. 311 (interlocutory appeals as of right); *see also* Pines, *supra* note 1, at 115-123.

51. In recognition of this fact, the appellate rules committee has recommended changes in the appellate rules. *See supra* note 39.

52. 506 Pa. 622, 487 A.2d 809 (1985).

53. *See* Miller v. Hurst, 302 Pa. Super. 235, 448 A.2d 614 (1982); *see also* Hawthorne v. Dravo Crop. 313 Pa. Super. 436, 460 A.2d 266 (1983).

54. *See* Stotsenberg v. Frost, 465 Pa. 187, 348 A.2d 418 (1975).

55. ___ Pa. Commw. ___, 505 A.2d 393 (1986).

liquor license did not have to be reduced to judgment, especially since the procedural requirement of post-trial motions had no applicability. The order was appealable when it was formally entered on the docket. The judgment rule was, likewise, inapplicable in a mandamus action. The commonwealth court stated that an order dismissing exceptions in a mandamus cause of action was a final, appealable order; judgment was not necessary because the appealed order decided the only matter in dispute.[56]

If there is more than one relevant docket, entry in one docket may be sufficient without the necessity of entry of judgment.[57] The commonwealth court, in *Commonwealth v. Hess*,[58] noted that in an eminent domain proceeding, a final order concerning detention damages was appealable once it was entered in the appropriate appearance docket, notwithstanding the practice in Montgomery County of entering such orders on both the "appearance" and "judgment" dockets. However, when an appealed order admittedly had not been entered formally on the appearance docket or reduced to judgment in any way prior to the filing of the appeal, the commonwealth court granted a motion to quash the appeal.[59]

(b) The premature appeal exception (appeals filed before the formal entry of an appealable order).—Generally, an appeal cannot be filed from a verdict or the dismissal of post-trial, post-verdict motions until a final judgment or sentence has been formally entered on the lower court dockets.[60] Although the procedural propriety of an appeal is determined at the time the appeal is filed,[61] an appeal prematurely filed from a nonappealable order will be "perfected" if an appealable order is subsequently entered on the dockets. The appel-

56. See Beharry v. Mascara, 92 Pa. Commw. 484, 488 n.5, 499 A.2d 1129, 1131 n.5 (1985); *see also* Shellen v. Springfield School Dist., 6 Pa. Commw. 527, 297 A.2d 179 (1972).

57. *See* PA. R. APP. P. 301(a), *supra* note 15, which recognizes the entry of an order in more than one docket.

58. 55 Pa. Commw. 27, 423 A.2d 435 (1980). The court noted, in denying the motion to quash, that the rules of civil procedure were not applicable.

59. *See* Commonwealth, Dept. of Transp. v. Jennings, 76 Pa. Commw. 453, 463 A.2d 1290 (1983).

60. *See* Straw v. Stands, 426 Pa. 81, 231 A.2d 144 (1967) (absent entry of judgment, a verdict is not a final appealable order); Litt v. Rolling Hill Hosp., 293 Pa. Super. 97, 437 A.2d 1008 (1981) (post-verdict appeal premature before lower court's disposition of post trial motion); Kopchak v. Springer, 292 Pa. Super. 441, 437 A.2d 756 (1981) (appeal from dismissal of exceptions premature until judgment has been entered); Commonwealth v. Nugent, 291 Pa. Super. 421, 435 A.2d 1298 (1981) (defendant may appeal only from final judgment of sentence); *see also* supra note 12-33 (entry of orders on the docket).

61. *See, e.g.*, Rosen v. Rosen, ___ Pa. Super. ___, ___ n.2, 510 A.2d 732, 734 n.2 (1986) (by implication); Praisner v. Stocker, 313 Pa. Super. 332, 343 n.4, 459 A.2d 1255, 1261 n.4 (1983). *See supra* note 45.

late rules have made an accommodation for the precipitous, premature filing of an appeal by providing that "[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."[62] Thus, if an appellant, for example, has prematurely appealed within 30 days from the denial of post-trial or post-verdict motions, the appeal will be considered jurisdictionally proper if the formal entry of judgment on the lower court's docket is subsequently accomplished.[63] As one superior court judge noted, the rules of appellate procedure provide for a legal fiction — the notice of appeal "relates forward" to the day of the entry of judgment.[64] Thus, although an appellate court may not have jurisdiction over an appeal taken when only the denial of a post-trial motion had been entered on the lower court's docket, jurisdiction will be perfected when the judgment or appealable order is thereafter entered on the docket in the lower court.[65] A litigant, however, should be careful not to confuse a prematurely filed appeal with a prematurely filed void judgment of the lower court; the former concerns appellate court jurisdiction while the latter concerns the lower court's jurisdiction.[66]

3. The Notice of Appeal: Form and Content.—The current appellate rules specify the proper form and content of the notice of appeal that is to be filed in the lower court. Rule 904 states the following:

> (a) Form. The notice of appeal shall be in substantially the following form:
>
> COURT OF COMMON PLEAS
>
> OF . . . . . COUNTY
>
> A.B., Plaintiff Docket or File No. . . . . .
>
> v.

62. *See* PA. R. APP. P. 905(a) (filing of notice of appeal with clerk).

63. Compare the prior practice before the amendment to PA. R. APP. P. 905(a) in Aloi v. Aloi, 290 Pa. Super. 125, 434 A.2d 161 (1981) (premature appeal quashed and subsequent divorce decree entered during appeal vacated).

64. See Minich v. City of Sharon, 325 Pa. Super. 178, 472 A.2d 706 (1984).

65. *Id.*

66. *See supra* note 17; *see also* Pines, *supra* note 1, at 77 n. 88.

C.D., Defendant Offense Tracking Number

NOTICE OF APPEAL

Notice is hereby given that C. D., defendant above named, hereby appeals to the (Supreme) (Superior) (Commonwealth) Court of Pennsylvania from the order entered in this matter on the . . . . . day of . . . . . ., 19. . . . This order has been reduced to judgment and entered in the docket as evidenced by the attached copy of the docket entry.

(S) . . . . . .

. . . . . .

(Address and Telephone Number)

b. Caption. The parties shall be stated in the caption as they stood upon the record of the lower court at the time the appeal was taken.

The "reduction to judgment" certification arguably would be unnecessary in those previously identified situations[67] in which appellate jurisdiction is not predicated on the existence of a judgment (for example, order refusing to remove a nonsuit or order denying a motion to dismiss based on double jeopardy), as the recently proposed amendments to the appellate rules acknowledge.[68] In such cases, an assertion that the appeal is taken from an "appealable order" and that it has been entered on the docket would seem sufficient.

(a) Specific identification of lower court's order(s).—A failure to properly identify the lower court's order(s) in the notice of appeal may constitute a critical or fatal technical pitfall, especially in criminal cases. On a few occasions, for example, the superior court has refused to review issues concerning a defendant's convictions when the notice of appeal failed to specifically identify the informations upon which defendant was sentenced or the specific judgments of sentence imposed on the defendant.[69] There have been instances,

67. *See supra* text accompanying notes 49 and 50.

68. *See supra* notes 15 and 39.

69. *See* Commonwealth v. Montgomery, 341 Pa. Super. 573, 578 n.2, 492 A.2d 14, 17 n.2 (1983) (review of Commonwealth's appeal limited to bills of information listed in notice of appeal); Commonwealth v. Keys, 313 Pa. Super. 410, 460 A.2d 253 (1983) (defendant's notice of appeal erroneously listed information for which defendant was not convicted; since appellate court cannot extend time to appeal, appeal was quashed); Commonwealth v. Dozier, 294 Pa.

however, in which an appellate court has overlooked or excused a notice of appeal that was defective in such form or content.[70] In any event, the practitioner should be careful in drafting and typing the notice of appeal because the notice of appeal is the critical event that invokes the appellate court's jurisdiction.

(b) Caption and parties (appeals, cross appeals, joint appeals).—The appellate rules specify that the "parties shall be stated in the caption as they stood upon the record of the lower court at the time the appeal was taken."[71] The aggrieved party filing the notice of appeal is the "appellant"; the nonappealing party is designated as the "appellee". In a cross appeal situation[72] in which more than one party files a notice of appeal, the plaintiff or moving party in the lower court is designated the appellant for purposes of briefing and argument.[73] In a joint appeal situation, parties interested jointly or severally in the same matter may join as appellants or be joined as appellees in a single appeal when the grounds for the appeal are similar.[74] All parties in the appellate court, other than the appellant, are appellees.[75] An *amicus curiae* is not a "party" to an appeal.[76]

(i) Disinterested parties.—All parties in the lower court are deemed to be parties in the appellate court.[77] Parties who have no interest in the appeal, however, can be designated as "disinterested."

Super. 249, 252 n.1, 439 A.2d 1185 n.1 (1982) (defendant's arguments concerning convictions on informations not identified in notice of appeal not considered); Commonwealth v. Hill, 267 Pa. Super. 140, 142 n.1, 406 A.2d 558, 559 n.1 (1979) (failure to specifically appeal judgment of sentence fatal notwithstanding appellate court's review of other judgments of sentence).

70. *See, e.g.*, Commonwealth v. Gumpert, ___ Pa. Super. ___, 512 A.2d 699 (1986) (erroneous caption identifying lower court's disposition of post verdict motion rather than sentence overlooked); Commonwealth v. Brown, 264 Pa. Super. 127, 127 n.1, 399 A.2d 699, 699 n.1 (1979) (erroneous notice of appeal, listing wrong informations, viewed as nonfatal clerical or typing error); Commonwealth Dept. of Transp. v. Florek, 71 Pa. Commw. 615, 455 A.2d 1263 (1983) (timely filed appeal not quashed even though notice of appeal did not comply in form or content with procedural requirements); *see also* Hawthorne v. Dravo Corp., 313 Pa. Super. 436, 460 A.2d 266 (1983); Commonwealth v. Dozier, 294 Pa. Super. 249, 258 n.3, 439 A.2d 1185, 1190 n.3 (1982) (notice of appeal listed only one bill of information; in fairness to appellant, appellate court said that on remand, lower court should consider appellant's entire sentence); *see also* the policy of the proposed amendments in affording an appellant an opportunity to correct formal defects, *supra* note 11.

71. *See* PA. R. APP. P. 904(b) (caption of notice of appeal).

72. *See* PA. R. APP. P. 903(b), 511 (cross appeals); *see also infra* notes 177-182 and accompanying text.

73. *See* PA. R. APP. P. 2136; *see also* Kremer v. State Ethics Comm'n, 503 Pa. 358, 469 A.2d 593 (1983).

74. *See* PA. R. APP. P. 512 (joint appeals).

75. *See* PA. R. APP. P. 908 (parties on appeal).

76. *See* PA. R. APP. P. 531 (participation by amicus curiae); infra text accompanying notes 183-185.

77. *See* PA. R. APP. P. 908 (parties on appeal).

In such circumstances, the appellant can advise the appellate court prothonotary of that person's disinterested status. A copy of the notice must be served on all parties. The disinterested party, however, may elect to remain a party on appeal by notifying the appellate prothonotary.[78]

(ii) Substitutions or Additions (death of a party).—If a party dies after a notice of appeal is filed or while the appeal is pending in the appellate court,[79] the personal representative of the deceased party may be substituted as a party pursuant to an application[80] filed by the representative or by any party. The application should be filed with the prothonotary of the appellate court.[81] If the deceased party has no representative, "any party may suggest the death on the record and proceedings shall be had as the appellate court may direct."[82]

When a party against whom an appeal is filed (the appellee) dies before an appeal is taken, the appellant may proceed with the filing of the appeal as though the party were still alive. After the appeal is filed, necessary steps should be taken in the appellate court to substitute the party or suggest death on the record.[83] Where the appellant dies before the taking of the appeal, that party's attorney or personal representative may file the appeal and thereafter obtain substitution in the manner prescribed by the rule.[84]

(iii) Parties: substitution (public officer).—If a public officer is a party to an appeal in his official capacity and, during its pendency, the officer dies, resigns, or otherwise ceases to hold office, his or her successor is automatically substituted as a party. The proceedings shall thereafter be in the name of the substituted party.[85]

(iv) Attorney General or Court Administrator as an Intervening Party.—When a party seeks to question the constitutionality of a statute of the Commonwealth in an appeal in which the Common-

78. *Id.*

79. Death of a party does not necessarily abate or moot the appeal. *See* Henszey v. Henszey, 195 Pa. Super. 377, 382-83, 171 A.2d 837, 840 (1961) (death of appellee in appeal from divorce decree did not abate appeal); *see also* Pines, *supra* note 1, at 71 n. 59.

80. *See* PA. R. APP. P. 123 (applications for relief).

81. *See* PA. R. APP. P. 502(a) (substitution; death of a party).

82. *Id.*

83. *See* PA. R. APP. P. 502(a); *see also* Rhinehart v. Rhinehart, 197 Pa. Super. 558, 180 A.2d 82 (1962) (death of appellee pending appeal from divorce decree; appellate court permits executor to be substituted as appellee).

84. PA. R. APP. P. 502(a).

85. PA. R. APP. P. 502(c).

wealth or its officers are not parties, the party must give notice to the attorney general in writing. If the attorney general thereafter wishes to be heard and files a brief, the attorney general is designated as an intervening party.[86] The same practice applies when a party wishes to question the constitutionality of any general rule. Notice in writing must be given to the Pennsylvania Court Administrator, who may then be heard as an intervening party.[87] The failure to give proper notice may preclude a party from raising on appeal an issue of constitutionality.[88]

4. Timely Filing of Notice of Appeal (Jurisdictional Prerequisite).—Appellant must timely file the notice of appeal in the lower court because the appellate courts and rules view timeliness as essentially a jurisdictional matter. The appellate courts may independently question the timeliness of an appeal and quash on its own an untimely filed appeal. In *Bass v. Commonwealth*, Justice Roberts explained the importance of such time limits: "The statutory thirty day filing requirement is a legislative determination that appeals if taken must be within that period. That requirement is a legislative judgment that statutory timely appeals and adjudicative finality advance the quality of our jurisprudence."[89]

The appellate rules are strict as to the time requirements for filing a notice of appeal.[90] The policy of liberal construction of the

86. *See* PA. R. APP. P. 521 (notice to attorney general regarding constitutional challenge). When a party seeks to challenge the constitutionality of an Act of Assembly in the lower court, the party must likewise give prompt notice by registered mail to the attorney general. See PA. R. CIV. P. 235; *see also* Faust v. Messinger, 345 Pa. Super. 155, 497 A.2d 1351 (1985) (failure to give notice barred claim); Commonwealth v. Hassine, 340 Pa. Super. 318, 490 A.2d 438 (1985); Irrera v. Southeastern Pa. Transp. Auth., 231 Pa. Super. 508, 331 A.2d 705 (1974); cf Ekin v. Board of Commissioners, ___ Pa. Commw. ___, 502 A.2d 303 (1985) (Rule 235 not applicable absent constitutional challenge to an Act of Assembly).

87. *See* PA. R. APP. P. 522 (notice to court administrators regarding constitutional challenge to rules). In both cases, the attorney general or the court administrator must be given written notice upon the filing of the official record, *see infra* notes 229-316 and accompanying text, "or as soon thereafter as the question is raised in the appellate court." PA. R. APP. P. 521(a). As with the failure to notify the attorney general in the court below, failure to notify the court administrator may preclude a party from challenging a rule of court in the appellate court. *See, e.g.*, Havelka v. Sheraskey, 295 Pa. Super. 326, 441 A.2d 1255 (1982).

88. *See supra* note 86; cf Commonwealth v. Linder, 284 Pa. Super. 327, 333 n.4, 425 A.2d 1126, 1129 n.4 (1981) (no waiver of constitutional issue for failure to notify attorney general in accordance with PA. R. APP. P. 521(a) in the interests of judicial economy and in view that Rule 521(a) is not applicable where Commonwealth is in fact a party); James v. Southeastern Pa. Transp. Auth., 321 Pa. Super. 512, 515 n.6, 459 A.2d 338, 340 n.6 (1983) (failure to give notice in lower court overlooked when party gives notice at appellate stage), *rev'd*, 505 Pa. 137, 477 A.2d 1302 (1984).

89. 485 Pa. 256, 266, 401 A.2d 1133, 1138 (1979) (dissent on denial of application for reargument).

90. Time limitations for filing appeals are strictly construed. See Commonwealth v. Hos-

appellate rules is specifically subject to the proviso that the appellate court "may not enlarge the time for filing a notice of appeal."[91] Therefore, if a notice of appeal is untimely filed, the appellate court will quash the appeal.[92]

(a) Appellate time clock: critical time restrictions.—Since the timeliness of an appeal is a critical jurisdictional factor, specific rules and statutes must be consulted in order to ascertain particular time limitations. The time limitations vary. The general appellate rule provides that the notice of appeal must be filed within thirty days after the entry of the order from which the appeal is taken.[93]

Generalities, such as the thirty day rule, may prove deceptively dangerous. In a small minority of cases, the appellate rules provide for a lesser time limit within which to file a notice of appeal. For example, the appellate rules specifically require that a notice of appeal be filed within ten days from the entry of the following orders: (1) an order changing venue or venire in a criminal proceeding;[94] (2) an order in any matter arising under the Pennsylvania Election Code; and (3) an order in any matter arising under the Local Government Unit Debt Act or any other similar statute relating to the authorization of a public debt.[95] Likewise, when a lower court order in a civil action has sustained venue or personal or in rem jurisdiction,[96] the actual time to appeal may be less than the general thirty day period when the plaintiff elects to treat the interlocutory order

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kins, 329 Pa. Super. 226, 478 A.2d 45 (1984). *See also* Pines *supra* note 1 at 76 n. 82.

91. *See* PA. R. APP. P. 105(b); *see also* 42 PA. CONS. STAT. ANN. §§ 5501 (general rule, time limitations), 1722 (time limitations), and 5504 (judicial extension of time) (Purdon 1981 and Supp. 1986).

92. The parties cannot by agreement or otherwise consent to an extension of the appellate court's jurisdiction nor, as the rules make clear, can the appellate court extend its jurisdictional authority beyond the limits of the law. See Commonwealth v. Riebow, 299 Pa. Super. 458, 445 A.2d 1219 (1982); Commonwealth v. Molyneaux, 277 Pa. Super. 264, 419 A.2d 763 (1980); Baker v. Commonwealth Human Relations Comm'n, 75 Pa. Commw. 296, 462 A.2d 881 (1983) (timeliness of appeal concerns subject matter of court and can be raised at any time). *See also* Pines, *supra* note 1 at 76.

93. *See* PA. R. APP. P. 903(a) (time for appeal), which provides as follows: (a) *General Rule.* Except as otherwise prescribed by this rule, the notice of appeal required by Rule 902 (manner of taking appeal) shall be filed within 30 days after the entry of the order from which the appeal is taken; *see also supra* note 22 as to effect of record absence of notice.

94. *See* PA. R. APP. P. 311(a)(3) (change of venue or venire). In *In re* Fourth Statewide Investigating Grand Jury, ___ Pa. ___, 509 A.2d 1260 (1986), the supreme court quashed an appeal from a civil contempt order because it was not filed within the applicable 10 day time limit of PA. R. APP. P. 1512(b)(3).

95. *See generally* PA. R. APP. P. 903(c) (time for appeal, special provisions).

96. *See* PA. R. APP. P. 311(b). Such an order sustaining jurisdiction does not put anyone out of court and is generally an unappealable interlocutory order. See Pines, *supra* note 1, at 121-122.

as final.[97] Although beyond the scope of this Article, caution is also suggested as to the special constricting time limits applicable to petitions for review.[98]

(b) Appellate time clock: computation of appeal period.—The date of entry of the lower court's order is generally the pivotal event that causes the appellate clock to begin ticking. As noted previously, the formal entry of the lower court's order may, in civil cases, be the day on which the clerk makes the notation in the docket that notice of the formal entry of the order has been given.[99] In criminal cases, the formal entry may be the day that the lower court "adopts" the order by entering the judgment of sentence on the docket and informing the defendant of his rights.[100]

To compute the appeal period, one excludes the date that the lower court's order was entered, but includes the final day (that is, the thirtieth day) of the appeal period.[101] If, for example, the appeal period is thirty days from the lower court's entry of the appealed order, a notice of appeal filed on the thirty-first day creates a jurisdictionally untimely appeal subject to dismissal or quashing.[102] To be

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97. *See* PA. R. APP. P. 903(c) (special provisions), 311(b) (order sustaining venue or personal or in rem jurisdiction). The comment to Rule 311(b) states as follows: "The appeal period under Rule 903 (time for appeal) ordinarily runs from the entry of the order, and not from the date of the filing of the election, which procedure will ordinarily afford at least 20 days within which to appeal. See Rule 903(c) as to the treatment of special appeal times." Rule 903(c), in turn, states that "Where an election has been filed under Rule 311(b) . . . the ten day period under this subdivision shall run from the filing of the election." As to the computation of appeal time when the lower court certifies the interlocutory jurisdictional order under PA. R. APP. P. 311(b)(2), see Martin v. Gerner, 322 Pa. Super. 507, 481 A.2d 903 (1984) (thirty day appeal period runs from date lower court amended its initial order).

98. *See* PA. R. APP. P. 1512 (time for petitioning for review); *see also In re* Fourth Statewide Invest. Grand Jury, ___ Pa. at ___, 509 A.2d at 1261 (civil contempt, 10 day time limit).

99. *See supra* text accompanying notes 19-23.

100. *See supra* text accompanying notes 24-32.

101. *See* 1 PA. CONS. STAT. ANN. § 1908 (Purdon Supp. 1986), which states as follows:

> When any period of time is referred to in any statute, such period in all cases, except as otherwise provided in section 1909 of this title (relating to publication for successive weeks) and section 1910 of this title (relating to computation of months) shall be so computed as to exclude the first and include the last day of such period. Whenever the last day of any such period shall fall on Saturday or Sunday, or on any day made a legal holiday by the law of this Commonwealth or of the United States, such day shall be omitted from the computation.

See also State Farm Mut. Auto Ins. Co. v. Schultz, 281 Pa. Super. 212, 421 A.2d 1224 (1980). The proposed amendments to the appellate rules would modify the official commentary to PA. R. APP. P. 903 by incorporating reference to § 1908. *See supra* note 39.

102. *See* Commonwealth v. Baines, 334 Pa. Super. 97, 99, 482 A.2d 1099, 1100 (1984) (untimely pro se appeal filed on thirty-first day quashed), (citing Commonwealth v. Molyneaux, 277 Pa. Super. 264, 265-67, 419 A.2d 763, 764 (1980)); Commonwealth v. Riebow, 299 Pa. Super. 458, 445 A.2d 1219 (1982) (appeal quashed). Note, however, that accommodations are made if the thirteenth day falls, for example, on a Saturday or Sunday. See 1

distinguished from such an untimely filed appeal is an appeal that is prematurely filed. The appellate rules now make accommodation for such premature appeals, which will not be quashed as long as a proper appealable order is subsequently entered.[103]

(c) Extension of time: impermissible attempts.—The time limitations for filing a notice of appeal are strictly construed. The courts have recognized that various common procedural maneuvers in the lower court will not extend the time to appeal after the formal entry of an appealable order in the lower court. For example, a "motion for reconsideration" of the lower court's order will not, by itself, extend the time within which to appeal.[104] Likewise, a petition for special relief in the supreme court does not extend the time in which an aggrieved party must appeal to the commonwealth court.[105] Similarly, in criminal cases, a motion for modification of sentence[106] does not in itself stop or affect the time limitations for filing a notice of appeal.[107]

If an aggrieved litigant wants to preserve her appellate rights while still pursuing the option of reconsideration by the lower court, the preferable procedure according to the appellate commentary is to (a) file an application for reconsideration and (b) file a notice of appeal in the lower court.[108] The appellate rules specify the proper

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PA. CONS. STAT. ANN. § 1908, *supra* note 101.

103. *See* PA. R. APP. P. 905(a); *see also supra* text accompanying notes 60-66.

104. A denial of a motion to reconsider is not an appealable order. The appeal must be timely filed from the initial order if the lower court denies reconsideration. *See* Provident Nat'l Bank v. Rooklin, 250 Pa. Super. 194, 378 A.2d 893 (1977).

105. *See* Beharry v. Mascara, 92 Pa. Commw. 484, 499 A.2d 1129 (1985) (appeal quashed as untimely).

106. *See* PA. R. CRIM. P. 1410.

107. *See* Commonwealth v. Hoskins, 329 Pa. Super. 226, 478 A.2d 45 (1984). However, the time for taking an appeal may be extended when there is pending a timely motion to withdraw a guilty plea under PA. R. CRIM. P. 32. The commentary to PA. R. APP. P. 343 provides that the "time for filing an appeal from the judgment on the plea does not begin to run until such motion is decided by the lower court." The comments to PA. R. APP. P. 343 also state as follows:

> In the event an appeal from the judgement on a plea of guilty has been filed before a timely motion under Pa. R. Crim. P. 321 has been made, the filing of such motion acts as an automatic grant of reconsideration under Rule 1701(b)(3) (authority of lower court or agency after appeal), so as to render inoperative the prior appeal. In such event, an appeal could be filed anew after disposition of the Pa. R. Crim. P. 321 motion.

See Commonwealth v. Villaloz, 303 Pa. Super. 518, 450 A.2d 47 (1982), reviewed disapprovingly in Commonwealth v. Hoskins, 329 Pa. Super. at 231, 478 A.2d at 48 (Spaeth, J., dissenting); *see also* Commonwealth v. Sayko, 333 Pa. Super. 265, 268 n.4, 482 A.2d 559, 561 n.4 (1984). The cases suggest that a motion to withdraw a guilty plea could not extend the period of time to appeal when the appellant is basically challenging a sentence rather than the refusal of the lower court to permit withdrawal.

108. *See* PA. R. APP. P. 1701(b)(3) commentary, which states in part as follows:

procedure to be followed if the lower court timely grants a motion for reconsideration:

> A timely order granting reconsideration under this paragraph shall render inoperative any such notice of appeal or petition for review of a quasijudicial order theretofore or thereafter filed or docketed with respect to the prior order, and the clerk of any court in which such an inoperative notice or petition has been stricken under this rule. Where a timely order of reconsideration is entered under this paragraph, the time for filing a notice of appeal or petition for review begins to run anew after the entry of the decision on reconsideration, whether or not that decision amounts to a reaffirmation of the prior determination of the trial court or other government unit. No additional fees shall be required for the filing of the new notice of appeal or petition for review.[109]

If the lower court decides to grant reconsideration, it must formally and expressly do so within the relevant time period (usually thirty days) measured from the entry of the appealable order.[110] After reconsideration is timely and expressly granted, the appeal then lies from the subsequent new order, which may or may not amount to reaffirmation of the initial order reconsidered by the lower court.[111]

(d) Extension of time: permissible reasons.—Other than a

> The better procedure under this rule will be for a party seeking reconsideration to file an application for reconsideration below and a notice of appeal, etc. If the application lacks merit the trial court or other government unit may deny the application by the entry of an order to that effect or by inaction. The prior appeal paper will remain in effect, and appeal will have been taken without the necessity to watch the calendar for the running of the appeal period. If the trial court or other government unit fails to enter an order "expressly granting reconsideration" (*an order that "all proceedings shall stay" will not suffice*) within the time prescribed by these rules for seeking review, Subdivision (a) becomes applicable and the power of the trial court or other government unit to act on the application for reconsideration is lost.

(emphasis added.)

109. PA. R. APP. P. 1701(b)(3); *see infra* text accompanying notes 186-209.

110. PA. R. APP. P. 1701(b)(3)(ii) states that the lower court can grant reconsideration of an order after an appeal is filed if:

> an order expressly granting reconsideration of such prior order is filed in the trial court or other government unit within the time prescribed by these rules for the filing of a notice of appeal of petition for review of a quasijudicial order with respect to such order, or within any shorter time provided or prescribed by law for the granting of reconsideration.

The lower court must grant reconsideration expressly and in a timely manner. A stay of proceedings in itself is insufficient and does not amount to reconsideration. *See* Commonwealth v. Gordon, 329 Pa. Super. 42, 477 A.2d 1342 (1984).

111. *See* Dillon by Dillon v. National R. Corp. (Amtrak), 345 Pa. Super. 126, 497 A.2d 1336 (1985) (when reconsideration is granted, prior appeal becomes inoperative).

lower court's timely and express grant of a motion for reconsideration, an extension of time to file an appeal may be possible in certain, very limited circumstances. Cases recognize that the untimely filing of an appeal may be excused and the filing of an appeal *nunc pro tunc*[112] may be permitted when the failure to timely file a notice of appeal is attributable to any one of the following: (a) fraud or breakdown in the lower court's operations,[113] including a wrongful or negligent act by a governmental officer;[114] (2) non-negligent failure to timely file a notice of appeal;[115] (3) ineffectiveness of counsel in a criminal case in failing to file an appeal or failure of the lower court to specifically inform the criminal defendant of his right to appeal;[116] or (4) service of an inaccurate notice.[117] When such factors exist, a procedural option is apparently to file a motion in the lower court seeking permission to file an untimely notice of appeal or, as is com-

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112. *Nunc pro tunc* has been defined as "[a] phrase applied to acts allowed to be done after the time when they should be done, with a retroactive effect, i.e., with the same effect as if regularly done." BLACK'S LAW DICTIONARY 964 (5th ed. 1979).

113. *See generally* Purdy Estate, 447 Pa. 439, 291 A.2d 92 (1972) (failure of court official to mail); Pierce v. Penman, ___ Pa. Super. ___, 515 A.2d 948 (1986) (additional time to appeal proper since failure to notify counsel of court's adjudication represented breakdown in operation of court); Nixon v. Nixon, 329 Pa. 256, 198 A.2d 154 (1938) (failure of prothonotary to notify). The appellate rules specifically acknowledge in the official commentary that the proscription against extensions of time is not intended to affect the power of a court to grant relief when there is fraud or a breakdown in the processes of a court. See PA. R. APP. P. 105 commentary; *see also* 42 PA. CONS. STAT. ANN. § 5504(b) (Purdon 1981) (judicial extension of time, fraud).

114. *See* Baker v. Commonwealth Pa. Human Relations Comm'n, 75 Pa. Commw. 296, 462 A.2d 881 (1983) (error of public official in misleading complainant as to proper appellate procedure may be equivalent to fraud).

115. *See* Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979). This exception is a troublesome one and, as one superior court judge noted, has not been readily applied. *See* Moring v. Dunne, 342 Pa. Super. 414, 418, 493 A.2d 89, 91 (1985) (Beck, J.). In *Bass*, the permissible non-negligent failure to timely appeal involved an illness of a secretary who had typed the appeal papers and placed them in a folder on her desk. The death of appellant's attorney in *Moring* did not establish non-negligent failure under the particular facts.

The federal rules permit untimely appeals only upon showing of excusable neglect or good cause. See FED. R. APP. P. 4(a)(5); *see also* Winchell v. Lortscher, 377 F.2d 247 (8th Cir. 1967).

116. *See* Commonwealth ex rel Light v. Cavell, 422 Pa. 215, 217, 220 A.2d 883, 884 (1966) (appeal must be taken within time prescribed by law unless the failure to do so resulted from an unconstitutional deprivation of assistance of counsel) (*citing* Douglas v. California, 372 U.S. 353 (1963); Commonwealth v. Martin, 346 Pa. Super. 129, 499 A.2d 344 (1985) (untimely appeal, filed more than 30 days after sentence, reviewed when lower court failed to adequately inform the defendant of his right to appeal; therefore, no evidence that defendant waived his right to appeal); *cf.* Commonwealth v. Riebow, 299 Pa. Super. 458, 445 A.2d 1219 (1982) (untimely appeal quashed when defendant was advised); *see also* PA. R. CRIM. P. 1405(c) (at sentencing proceeding, trial court advises defendant of right of appeal and time limits).

117. *See* Commonwealth v. Horner, 449 Pa. 322, 296 A.2d 760 (1972) (Commonwealth's appeal *nunc pro tunc* permitted because of service of inaccurately dated order from court office).

monly described, an appeal *nunc pro tunc*.[118] Once the lower court grants such a petition, the appeal must be filed within the relevant time period, often thirty days.[119] If the lower court denies a petition to appeal *nunc pro tunc*, the aggrieved party can nonetheless file a notice of appeal from the entry of the order of denial.[120] Such an appeal could raise the propriety of the lower court's order of refusal to permit an untimely appeal.

The out-of-time appeal is a rare exception subject to careful appellate scrutiny. If the lower court, for example, has improperly granted a motion to file a notice of appeal *nunc pro tunc*, the appellate court may review the lower court's action and conclude that the jurisdictionally untimely appeal was not justified. Such an action, in effect, represents an attempt by the lower court to extend appellate jurisdiction beyond the limits of the law. In one case, the death of an appellant's attorney, for example, did not justify an untimely appeal; the superior court therefore quashed the appeal.[121] Hardship alone will not authorize an untimely appeal. It is important to recognize that *nunc pro tunc* appeals are not permissible when the failure to appeal is attributable to mere negligence or inadvertence.

5. Filing the Notice of Appeal: Place.—Two copies[122] of the notice of appeal must be timely filed with the clerk of the trial court.[123] The comments to the appellate rules indicate that insofar as the clerk of the trial court is concerned, the notice of appeal serves as a writ in the nature of certiorari.[124] Upon the receipt of the notice of appeal, the lower court clerk must immediately stamp the notice with the date of receipt. The stamped date constitutes the official date when the appeal was taken[125] and it is from this stamped date

118. *See, e.g.*, *Moring*, 342 Pa. Super. 414, 493 A.2d 89; Commonwealth v. Smith, ___ Pa. Super. ___, 501 A.2d 273 (1985) (denial of post-conviction relief to file appeal *nunc pro tunc* affirmed). It would seem that the lower court is in the best position to ascertain the existence and veracity of facts concerning why a timely appeal was not filed. *But see* Commonwealth v. Moore, 321 Pa. Super. 1, 10 n.5, 467 A.2d 862, 867 n.5 (1983); Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979); Purdy's Estate, 477 Pa. 439, 291 A.2d 92 (1972).

119. *See* 42 PA. CONS. STAT. ANN. § 5571(e) (Purdon 1981); Commonwealth v. Moore, 321 Pa. Super. 1, 467 A.2d 862 (1983).

120. *See, e.g.*, Commonwealth v. Smith, ___ Pa. Super. ___, 501 A.2d 273 (1985).

121. *See, e.g.*, Moring v. Dunne, 342 Pa. Super. 414, 493 A.2d 89 (1985) (superior court quashes erroneously granted appeal *nunc pro tunc* when no evidence of fraud or breakdown) and cases cited therein. The death of appellant's attorney did not establish non-negligent failure.

122. Parties and counsel should always be alert to changes in the filing requirements. Presently, two copies are required.

123. *See* PA. R. APP. P. 905(a) (filing of notice of appeal).

124. *See id.* commentary.

125. *See id.*

that one determines if a notice of appeal was timely filed.

(a) Filing the appeal in erroneous place.—Unlike the untimely filing of a notice of appeal, the timely filing of a notice of appeal in the wrong forum is not necessarily fatal from a jurisdictional point of view. The appellate rules provide as follows:

> If a notice of appeal is mistakenly filed in an appellate court, or is otherwise filed in an incorrect office within the unified judicial system, the clerk shall immediately stamp it with the date of receipt and transmit it to the clerk of the court which entered the order appealed from, and upon payment of an additional filing fee the notice of appeal shall be deemed filed in the trial court on the date originally filed.[126]

(b) Transfers and the improper designation of the appellate forum.—The appellant must designate in the notice of appeal the proper appellate forum that has jurisdiction of the appealable order. Whether exclusive, concurrent, or original jurisdiction exists, for example, in the supreme, superior, or commonwealth court can only be determined after one has examined the order to be appealed and the relevant jurisdictional statutes.[127] If the notice of appeal designates the wrong appellate forum, the mistake is not fatal. The appeal, for example, can be reviewed by the designated appellate court, if it so decides, or it can be transferred by the appellate court to the proper appellate forum.[128] The policy is thus to preserve the right of appellate review.[129]

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126. *Id.* 905(a); *cf.* 42 PA. CONS. STAT. ANN. § 5103(a) (Purdon Supp. 1986); PA. R. APP. P. 751 (transfer of erroneously filed cases), which states as follows:

> *Transfer of erroneously filed matters*
>
> (a) *General rule.* — If an appeal or other matter is taken to or brought in a court or magisterial district of this Commonwealth which does not have jurisdiction of the appeal or other matter, the court or district justice shall not quash such appeal or dismiss the matter, but shall transfer the record thereof to the proper tribunal of this Commonwealth, where the appeal or other matter shall be treated as if originally filed in the transferee tribunal on the date when the appeal or other matter was first filed in a court of magisterial district of this Commonwealth. A matter which is within the exclusive jurisdiction of a court or district justice of this Commonwealth but which is commenced in any other tribunal of this Commonwealth shall be transferred by the other tribunal to the proper court or magisterial district of this Commonwealth where it shall be treated as if originally filed in the transferee court or magisterial district of this commonwealth on the date when first filed in the other tribunal.

127. *See* Pines, *supra* note 1, at 139-145.

128. *See* PA. R. APP. P. 751 (transfer of erroneously filed cases), 752 (transfers between superior and commonwealth courts); *see also* 42 PA. CONS. STAT. ANN. §§ 705 (transfers between intermediate appellate courts), 5103 (transfer of erroneously filed matters) (Purdon 1981). See Pines, *supra* note 1, at 139.

129. *See* Commonwealth v. Carter, 36 Pa. Commw. 569, 575, 389 A.2d 241, 244 (1978)

If an appellee has failed to file an objection to the jurisdiction of the improperly designated appellate forum on or prior to the last day for the filing of the lower court record in the appellate court,[130] the failure to object may operate to "perfect" the jurisdiction of the appellate court under Rule 741(a). Waiver of jurisdiction, however, does not apply to untimely filed appeals from nonappealable orders.[131]

The appellate courts, on their own motion or an application[132] of any party, may transfer an appeal to another court when there is pending any matter involving the same or related questions of fact, law, or discretion.[133] An application for transfer, however, does not stay proceedings in the appeal or the other related matter.[134] The superior court, for example, has suggested the following considerations in determining the advisability of transfers: (1) whether the case has already been transferred; (2) whether conflicting lines of authority might develop with regard to the same subject matter; and (3) whether transfer would disrupt the legislatively ordained division of labor.[135] It has also been noted that, in appropriate circumstances, an appellate court may refuse in the interests of judicial economy to transfer a matter when the court determines that under no circumstances could the transferee tribunal grant the requested relief.[136]

6. Contemporaneous Filing Requirements (the transcript order and docket entries).—In addition to the filing of the notice of appeal, the appellant may also have to comply with other contemporaneous procedural requirements. For example, if at the time of the

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(citing Gaitley's Adoption, 303 Pa. 200, 202, 154 A. 368, 369 (1931)); Field's Appeal, 305 Pa. 125, 157 A. 262 (1931); *but see* State Farm Mut. Auto. Ins. Co. v. Schultz, 281 Pa. Super. 212, 421 A.2d 1224 (1980) (docketing of appeal with prothonotary of appellate court did not constitute the proper filing of an appeal nor excuse tardy filing), an isolated case that reached a harsh result under prior practice, which is now rectified by the 1982 amendments to PA. R. APP. P. 905(a) and note thereto. The policy to preserve appeals is also reflected in the commentary to the proposed amendment to Rule 902, *supra* note 11.

130. *See infra* notes 321-326 and accompanying text.

131. *See* PA. R. APP. P. 741(b)(1), (2).

132. *See supra* note 80.

133. *See* PA. R. APP. P. 752(a) (transfer between superior and commonwealth courts; general rule).

134. *See* PA. R. APP. P. 752(c) (transfer between superior and commonwealth courts; effect of filing application).

135. *See* United Plate Glass v. Metal Trims Industries, ___ Pa. Super. ___, 505 A.2d 613 (1986) (citing Karpe v. Borough of Stroudsburg, 315 Pa. Super. 185, 461 A.2d 859 (1983)).

136. *See* Smock v. Commonwealth, 496 Pa. 204, 208-09, 436 A.2d 615, 617-18 (1981) (citing Meehan v. Cheltenham Township, 410 Pa. 446, 189 A.2d 593 (1963)); Lyons v. Port Auth. of Allegheny County, 327 Pa. Super. 166, 170 n.4, 475 A.2d 151, 153 n.4 (1984) (quashed).

filing of the notice of appeal, the lower court's record has not been transcribed, appellant will have to accompany the notice of appeal with an *order for transcript.*[137] The order for transcript will thus put the lower court's stenographer on notice of the necessity for transcribing all or part of the lower court's testimony to be reviewed by the appellate court. The rules of judicial administration also require appropriate service of the "transcript order" on various individuals.[138] The absence of or defect in the order for transcript, however, does not affect the validity of an appeal.[139] In addition to the notice of appeal and order for transcript, the appellant must file (1) proof of service[140] and (2) a copy of the lower court's docket entry evidencing that the appeal is taken from an appealable order.[141]

(a) Superior court: docketing statement.—Counsel should also consult the appellate rules and amendments for any other procedural requirements, either contemporaneous with or closely related in time to the filing of the notice of appeal. For example, the superior court requires counsel for appellant to complete a *docketing statement* shortly after the superior court receives notice that an appeal has been filed and docketed.[142] This docketing statement will be filed in the appellate court.

(b) Supreme court: jurisdictional statement.—The Advisory Committee on Appellate Court Rules has proposed changes and additions to the appellate rules.[143] At the time of preparing this Article, the proposed rule change would require the filing and service of

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137. *See* PA. R. APP. P. 904(c) (order for transcript), 905(a) (filing notice of appeal and transcript order with clerk of trial court), 1911 (order for transcript); *see also* PA. R. CIV. P. 227.3 (transcript of testimony). *See infra* text accompanying notes 282-292.

138. *See* PA. R. J. A. 5000.5(a), which specifies service on the (1) reporter, (2) clerk of the trial court, (3) district court administrator or designee, and (4) clerk of the appellate court. PA. R. J. A. 5000.5(b) states that the transcript order shall be made part of the notice of appeal.

139. *See* PA. R. APP. P. 904(c) (order for transcript).

140. *See* PA. R. APP. P. 905(a); *see also infra* text accompanying notes 151-153.

141. *See* PA. R. APP. P. 904; *see also supra* notes 12-46 and accompanying text.

142. PA. R. APP. P. 3517 states as follows:

> Whenever a notice of appeal to the Superior Court is filed, the Prothonotary shall send counsel for appellant a docketing statement form which counsel shall complete and return within ten (10) days in order that the Court shall be able to more efficiently and expeditiously administer the scheduling of argument and submission of cases on appeal.

143. *See supra* note 39. The proposed rules are PA. R. APP. P. 909, 910 and 911, *reported in* LEGAL INTELLIGENCER, Oct. 16, 1986 at 1, 12, 13. Additions have also been proposed to PA. R. APP. P. 905(a) (filing of notice of appeal) and 906(b) (service of notice of appeal) to accommodate the proposed jurisdictional statement requirements.

a *jurisdictional statement* in direct[144] appeals to the supreme court. The proposed new rule[145] would require (1) filing of the jurisdictional statement with the clerk of the trial court; (2) serving copies of the jurisdictional statement upon all parties to the matter in the trial court; and (3) completing proof of service. The proposed rule requires an original and eight copies of the jurisdictional statement to be filed with the prothonotary of the trial court.[146]

According to the proposed rule,[147] the jurisdictional statement would have to contain the following in the order set forth: (1) reference to the official and unofficial opinions of the lower courts, including citations if reported, and the inclusion of unreported opinions; (2) statements in support of the basis for the supreme court's jurisdiction in the case, including reference to supporting cases; (3) text of the appended order (or portions thereof) to be reviewed and the date of its entry; and (4) a succinct identification of questions, including subsidiary questions, presented for review. The statement, excluding the appendix, should not exceed five pages. Noncompliance with the jurisdictional statement rule could result in sanctions, including dismissal.[148] The proposed rule would also entitle an opposing party to file a brief in opposition to the jurisdictional statement with the supreme court prothonotary within fourteen days after service of the appellant's jurisdictional statement.[149] Since these requirements are proposals, the practitioner is cautioned to ascertain and carefully review any procedural amendments specifically concerning appeals in the supreme court.[150]

7. Service, Proof of Service and Filing Fees, and Pauper Status.—Concurrently with the filing of the notice of appeal in the lower court, appellant must serve the following individuals with copies of the notice of appeal and, if appropriate, the transcript order: (1) all parties to the matter in the trial court; (2) the trial court

144. *See* Pines, *supra* note 1, at 139-142.

145. *See* PA. R. APP. P. 906(b) (service of notice of appeal) and 909(a) (appeals to supreme court; jurisdictional statement) (proposed amendment), *supra* note 143.

146. *See* PA. R. APP. P. 909(a) (appeals to the supreme court; jurisdictional statement) (proposed amendment), *supra* note 143.

147. *See* PA. R. APP. P. 910 (jurisdictional statement; content; form) (proposed amendment), *supra* note 143.

148. *See* PA. R. APP. P. 909(d) (appeals to the supreme court; jurisdictional statement; sanctions) (proposed amendment), *supra* note 143.

149. *See* PA. R. APP. P. 909(b) (appeals to the supreme court; jurisdictional statement; brief in opposition) (proposed amendment), *supra* note 143.

150. The comments to the proposed rule indicate that the purpose of the jurisdictional statement rules is to provide the supreme court with sufficient information to screen attempted direct appeals that have no jurisdictional basis.

judge; (3) the official court reporter of the trial court; and (4) the district court administrator or his/her designee.[151] Appellant must file two copies of the proof of service, showing compliance with the rule, along with the notices of appeal.[152] The appellate rules provide an example of the appropriate content and form of the proof of service.[153]

Filing fees for the lower and appellate courts are payable upon the filing in the lower court. The comment to the rules[154] suggests that the better practice is to pay the fee for the filing of the notice of appeal in the lower court and the docketing[155] fee in the appellate court by separate checks payable to the respective clerks or prothonotaries. The respective clerks of the courts should be contacted for information concerning current fee requirements.[156]

A party entitled to proceed *in forma pauperis* (I.F.P.) is not required to pay the filing fees. I.F.P. status may be obtained in the lower or appellate courts. Parties who have been granted leave by the lower court to proceed I.F.P. may likewise proceed in an appellate court provided they file with the lower court two copies of a verified statement. The statement must state (1) the date that the lower court granted I.F.P. relief; (2) the absence of any substantial change in the financial condition of the appellant since the grant of such relief; and (3) the inability of the party to pay the fees and costs in the appeal.[157]

If the appellant is not eligible to file such a verified statement to secure automatic I.F.P. status upon filing the notice of appeal, the appellant can apply for I.F.P. relief in the lower court. The application may be filed before or after the filing of the notice of appeal.[158] The application must be accompanied by a verified statement as specified by the appellate rules.[159] No contemporaneous filing fee is required in the lower court.[160] The application, one should note, will

151. *See* PA. R. APP. P. 906 (service of notice of appeal).

152. *See* PA. R. APP. P. 905(a) (filing of notice of appeal).

153. *See* PA. R. APP. P. 122 (content and form of proof of service). PA. R. APP. P. 121 concerns the filing and service of papers filed in the appellate court. A knowingly false proof of service constitutes a misdemeanor of the second degree. *See* PA. R. APP. P. 122 commentary.

154. PA. R. APP. P. 905(c) (filing of notice of appeal; fees).

155. *See infra* notes 168-169 and accompanying text.

156. *See also* PA. R. APP. P. 2701 (payment of fees required).

157. *See* PA. R. APP. P. 551 (continuation of *in forma pauperis* status for purposes of appeal).

158. *See* PA. R. APP. P. 522 (application to lower court for leave to appeal *in forma pauperis*).

159. *See* PA. R. APP. P. 561 (form of I.F.P. verified statement) and 552(b). Cf. PA. R. CIV. P. 240 (*in forma pauperis* relief in civil actions).

160. PA. R. APP. P. 552(c).

be automatically approved if the applicant is represented by counsel who certifies on the application or in a separate document that the applicant is indigent and counsel is providing free legal service.[161] The lower court must decide the application within twenty days of filing and state its reasons if it denies the application in whole or part.[162] The comments to the rules[163] also recommend that a party who intends to request I.F.P. relief in the lower court should transmit a copy of the application to the appellate court's prothonotary.

If the appellant is unable to secure I.F.P. relief automatically or upon application in the lower court, the appellant can request relief in the appellate court by filing an application with the required verified statement.[164] The rules specify the effect of the application upon the pending or subsequent appeal.[165] If the application is denied, all applicable fees must be paid.[166] Failure to comply with these procedural requirements may lead the appellate court to deny a request for I.F.P. relief.[167]

8. "Docketing" of the Appeal in the Appellate Court.—After the notice of appeal, proof of service and, if applicable, the transcript orders are filed with the clerk of the trial court, the trial court clerk must immediately transmit to the prothonotary of the appellate court a copy of the notice of appeal, proof of service, and receipt of docketing fees collected.[168] Upon receipt of the transmitted papers from the trial court, the appellate court prothonotary enters the appeal on the docket.[169] Thus, the notice of appeal is filed in the lower court and the appeal is docketed in the appellate court. The appellate prothonotary will then give notice of the appellate docket assignment number to the lower court clerk, appellant, and parties.

9. Appearances.—Counsel on appeal will be those listed on the notice of appeal. Counsel for purposes of appeal can be changed upon the praecipe of a counsel for a party within thirty days after

161. PA. R. APP. P. 552(d).
162. *See* PA. R. APP. P. 552(e).
163. *See* PA. R. APP. P. 2701 (payment of fees required).
164. *See* PA. R. APP. P. 553 (application in appellate court), 561 (form of *in forma pauperis* verified statement).
165. *See* PA. R. APP. P. 554 (effect of application and approval thereof).
166. *See* PA. R. APP. P. 554(c).
167. *See* Commonwealth v. Frisoli, 255 Pa. Super. 593, 595 n.2, 389 A.2d 136, 137 n.2 (1978).
168. *See* PA. R. APP. P. 905(b) (filing of notice of appeal; transmission to appellate court).
169. *See* PA. R. APP. P. 907 (docketing of appeal). As the official comments note, the present procedure makes the appeal "self-docketing."

the filing of the notice of appeal. Thereafter, one must request permission from the appellate court to withdraw.[170]

(a) Criminal Cases: duty of representation and requirements for withdrawal.—The criminal procedural rules provide that when counsel has been assigned, such assignments shall be effective until judgment, including any proceedings on direct appeal.[171] The constitutional right to assistance of counsel includes assistance to those who seek appellate review.[172] Appointed counsel for a defendant, therefore, has an important and special obligation to preserve the client's appellate rights. Once an appeal is filed, counsel is obligated to file a proper brief and serve as the client's advocate in the appellate court. Assigned counsel must strictly comply with particular procedural requirements in seeking to obtain permission from the appellate court to withdraw as counsel in an allegedly frivolous appeal.[173]

(b) Criminal cases: "pro se" appeals.—A defendant has a constitutional right to represent himself, that is, to appear *pro se*.[174] Nevertheless, one case has stated that a *pro se* appeal, filed prior to appellant's acquiring leave to proceed *pro se*, has no legal effect while defense counsel remains authorized to represent the accused in all respects.[175]

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170. *See* PA. R. APP. P. 907(b) (entry of appearance).

171. *See* PA. R. CRIM. P. 316(c)(iii) (implements Douglas v. California, 372 U.S. 353 (1963)); *see also* Commonwealth v. Hickox, 433 Pa. 144, 249 A.2d 777 (1969).

172. *See* Commonwealth v. Daniels, 491 Pa. 289, 420 A.2d 1323 (1980) (regardless of merits of petition, defendant was entitled to representation by public defender in seeking petition for allowance of appeal; counsel directed to file proper petition within 30 days); Commonwealth v. West, 334 Pa. Super. 287, 482 A.2d 1339 (1984) (assistance of counsel includes assistance to those seeking allowance of appeal); *cf.* Commonwealth v. Finley, 330 Pa. Super. 313, 479 A.2d 568 (1984), *cert. granted*, 107 S. Ct. 61 (1986) (application of constitutional right of counsel to collateral criminal proceedings).

173. *See* Anders v. California, 386 U.S. 738 (1967); Commonwealth v. McClendon, 495 Pa. 467, 434 A.2d 1185 (1981); Commonwealth v. Thomas, ___ Pa. Super. ___, 511 A.2d 200 (1986); Commonwealth v. Wallace, 322 Pa. Super. 157, 469 A.2d 230 (1983).

174. *See* McKaskle v. Wiggins, 465 U.S. 168 (1984).

175. The superior court characterized the represented defendant's *pro se* appeal as a nullity. See Commonwealth v. Hall, 327 Pa. Super. 390, 476 A.2d 7 (1984) (citing Commonwealth v. Williams, 270 Pa. Super. 27, 410 A.2d 880 (1979)) One should compare the nugatory effect in the appellate court when a represented defendant independently profers issues *pro se*. Commonwealth v. Kibler, 294 Pa. Super. 30, 439 A.2d 734 (1982), *distinguished in* Commonwealth v. Moore, 321 Pa. Super. 1, 9 n.4, 467 A.2d 862, 866-67 n.4 (1983); *see also* Commonwealth v. Johnson, No. 00113 Harris. 1986 (Pa. Super. ___, 1986) (WESTLAW, Pa.-CS library) (trial court properly denied defendant's *pro se* motion to suppress when he was represented by counsel).

(c) Corporations.—In *Walcavage v. Excell 2000, Inc.*,[176] the superior court noted that the federal and state courts have consistently held that a corporation may appear in court only through an attorney at law admitted to practice before the court. The superior court concluded that the same rule applied in Pennsylvania.

B. Filing a Cross Appeal: The Nondelegable Duty to Appeal

As a general rule, any party that is separately aggrieved by an order should independently file a notice of appeal in the lower court. Generally, a *cross appeal* should be filed after the filing of a notice of appeal when an appellee also wants to challenge an appealable order. Although an aggrieved party has initially filed a notice of appeal, that party's notice of appeal will not automatically provide the requisite jurisdictional base for another aggrieved party to challenge the lower court's order.[177] For example, a plaintiff might appeal the inadequacy of a monetary judgment in a civil case. In order for the defendant to challenge or attack the propriety of the judgment itself, he should file a cross appeal. If the party does not wish to challenge the order already appealed, such party would not have to file a cross appeal.[178]

1. Cross-Appeal: Procedural Requirements.—A cross appeal, generally, must be (1) timely filed[179] in the lower court and (2) must

176. 331 Pa. Super. 137, 480 A.2d 281 (1984) and cases cited therein; *cf.* Phoenix Mut. Life Ins. Co. v. Radcliffe on the Delaware, Inc., 439 Pa. 159, 266 A.2d 698 (1970).

177. *See* Pines, *supra* note 1, at 136-139, characterizing this procedural situation as "piggy back jurisdiction." Chief Justice Nix presented an insightful analysis of this particular jurisdictional vagary in his dissent in *Commonwealth v. Goldhammer*, ___ Pa. ___, ___ A.2d ___ (1986).

178. *See, e.g.*, R. I. Lampus Co. v. Neville Cement, Inc., 474 Pa. 199, 378 A.2d 288 (1977) (appellee could not question correctness of superior court's order disallowing certain of its claims when it did not file a petition for allowance of appeal from that court's order; motion to strike portion of appellee's brief granted); Donegal Mut. Ins. Co. v. Egler, ___ Pa. Super. ___, ___, n. 4, ___ A.2d ___, n. 4 (1987) (failure to cross appeal fatal); Goodrich v. Luzerne Apparel Mfg. Co., ___ Pa. Super. ___, 514 A.2d 188 (1986) (issues raised in brief of defendants, in support of appeal of other defendants, not considered when they did not appeal separately or join in the appeal); PA. R. APP. P. 512 (joint appeals); *see also* 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 judgment, and such judgment becomes res judicata as to issues decided against him) (citing Alexander v. Cosden Pipe Line Co., 290 U.S. 484, 487 (1934); United States v. Hickey, 84 U.S. (17 Wall.) 9 (1872)); *see also* Peoria & P.U.R.Y. Co. v. United States, 263 U.S. 528, 536 (1924); Robertus v. Candee, ___ Mont. ___, 670 P.2d 540 (1983) (failure to cross appeal fatal). For a detailed discussion, see Stein, *When to Cross-Appeal or Cross-Petition — Certainty or Confusion?*, 87 HARV. L. REV. 763 (1974). *See also* 4 AM. JUR. 2D *Appeal and Error* §§ 117, 294; BLACK'S LAW DICTIONARY 338 (5th ed. 1979) (defining cross appeal as an appeal filed by the appellee).

179. *Cf.* Welsh v. Elevating Boats, Inc., 698 F.2d 230 (5th Cir. 1983) (federal practice).

concern an order, or portion thereof, that is within the appellate court's jurisdiction. The appellate rules provide that "if a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires."[180] If an aggrieved litigant fails to cross appeal, the appellate court may refuse to consider any argument or claims challenging the lower court's order.[181]

The procedures, herein described concerning the entry of an appealable order, the importance of timely filing, the content of the notice of appeal, the appearance of counsel, the place of filing, and the appropriate service and fees, apply equally to the filing of a cross-appeal. For purposes of briefing, if a cross appeal is filed, the plaintiff or moving party in the lower court is designated as the appellant, unless the parties agree or the appellate court otherwise orders.[182]

2. Amicus Curiae's Participation Distinguished.—An *amicus curiae* (that is, a friend of the court) is not a party to an appellate proceeding[183] and is therefore neither obligated nor permitted to file a notice of appeal. It has been stated that since an amicus is not a party, it cannot assume the functions of a party. The amicus has no control over the litigation and no right to institute proceedings; it must, therefore, accept the case before the court with the issues framed by the parties.[184] The appellate rules permit nonparty participation of an *amicus curiae*. Anyone "interested" in a question involved in any matter pending in an appellate court may, without requesting appellate court permission, file an *amicus curiae* brief.[185]

C. *Significance and Effect of Filing an Appeal*

The obvious, paramount objective of an appeal is to secure ap-

180. PA. R. APP. P. 903(b) (time for appeal; cross appeals); *see also* 42 PA. CONS. STAT. ANN. § 5571(f) (Purdon 1981). For timely filing requirements of cross-petition for allowance of appeal in the supreme court see PA. R. APP. P. 1113(b).

181. *See supra* notes 177 and 178; *see also* Pines, *supra* note 1, at 136-137 n. 367.

182. PA. R. APP. P. 2136 (briefs in cases involving cross appeals); *see also* Kremer v. State Ethics Comm'n, 503 Pa. 358, 360, 469 A.2d 593, 594 (1983). For the format of oral argument in cross appeals, see PA. R. APP. P. 2322.

183. *See* PA. R. APP. P. 531(a) (participation by *amicus curiae*).

184. *See* Frank v. Peckich, 257 Pa. Super. 561, 590 n. 15, 391 A.2d 624, 638 n.15 (1978).

185. *See* PA. R. APP. P. 531(a). Oral argument, however, may be presented by *amicus curiae* only upon application or as the appellate court directs. The appellate courts require presentation of extraordinary reasons. See PA. R. APP. P. 531(b).

pellate review of a purportedly erroneous order of the lower court. There may be, in addition, a significant interim benefit for the appellant when a notice of appeal is filed in the trial court. The appellate rules provide that after an appeal is taken, the trial court "may no longer proceed further in the matter."[186] The major effect of an appeal, therefore, is to tie the hands of the lower court from taking further action during the pendency of the appeal. The rule, which has its roots in common law,[187] thus limits the exercise of the lower court's jurisdiction. The cases, therefore, emphasize that when an appeal is filed or when the supreme court grants an application for extraordinary jurisdiction,[188] *the lower court may not proceed further in the matter.* Any improper further action of the lower court during an appeal would be nugatory since the effect of the appeal is to divest the lower court of jurisdiction.[189]

The appellate rules,[190] however, recognize that the lower courts

186. *See* PA. R. APP. P. 1701(a), *infra* note 190; *see also* 42 PA. CONS. STAT. ANN. § 5105(e) (appeal shall operate as a supersedeas).

187. *See* Commonwealth v. Burkett, 352 Pa. Super. 350, 507 A.2d 1266 (1986) (citing Gilbert v. Lebanon Valley St. Co., 303 Pa. 213, 218, 154 A. 302, 304 (1931)); *see also* Corace v. Balint, 418 Pa. 262, 210 A.2d 882 (1965); Kingsley Clothing Mfg. Co. v. Jacobs, 344 Pa. 551, 26 A.2d 315 (1942); Wilson v. Wilson, 297 Pa. Super. 14, 23, 442 A.2d 1189, 1193-94 (1981) (citing statutory predecessor, PA. STAT. ANN. tit. 12, § 1154); Weise v. Goldman, 229 Pa. Super. 187, 323 A.2d 31 (1974). A useful jurisdictional fiction, at least under modern appellate practice, is that once the record of the lower court is actually or constructively lodged in the appellate court, the lower court has no record upon which to take action.

188. *See* Beharry v. Mascara, 92 Pa. Commw. 484, 499 A.2d 1129 (1985).

189. *See, e.g.*, Jones v. Commonwealth, 495 Pa. 490, 497-98, 434 A.2d 1197, 1200-01 (1981) (appeal from suppression order deprived the lower court of jurisdiction to proceed further with trial; trial was automatically stayed pending disposition of appeal); Rosen v. Rosen, 353 Pa. Super. 421, 510 A.2d 732 (1986) (taking of then jurisdictionally proper appeal prevented lower court from proceeding further); Mandia v. Mandia, 341 Pa. Super. 116, 491 A.2d 177 (1985) (procedurally peculiar case in which lower court lacked authority to dismiss exceptions to economic claims while appeal from order of bifurcation was pending); Commonwealth v. Hall, 327 Pa. Super. 390, 476 A.2d 7 (1984) (lower court's instituting trial while defendant's pro se appeal from nonappealable, interlocutory order was improper prior to amendment of PA. R. APP. P. 1701(b)(6)); Appeal of Affected and Aggrieved Residents, 325 Pa. Super. 8, 472 A.2d 619 (1984) (trial court's exercise of jurisdiction over petition for counsel fees during appeal was improper); Leasing Serv. Corp. v. Benson, 317 Pa. Super. 439, 455-56, 464 A.2d 402, 410 (1983) (while appeal from order refusing to strike or open confessed judgment was pending, lower court could not evaluate the merits of appellants' claim to have judgment marked satisfied since appeal was, in effect, challenge to validity and effect of judgment); Commonwealth v. Green, 312 Pa. Super. 265, 458 A.2d 951 (1983) (lower court properly refused to rule on motion to withdraw guilty plea while appeal was pending); Wilson v. Wilson, 297 Pa. Super. 14, 442 A.2d 1189 (1981); Yeager v. Long, 284 Pa. Super. 76, 425 A.2d 426 (1980) (lower court had no power to grant appellee's motion to strike appellant's exceptions after appeal was filed); Commonwealth v. Boris, 280 Pa. Super. 369, 421 A.2d 767 (1980) (trial court could not accept defendant's guilty plea pending appeal).

190. The applicable rule, PA. R. APP. P. 1701, provides, in part as follows:

> (a) *General rule.* Except as otherwise prescribed by these rules, after an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may no longer proceed further in the matter.

may proceed further during appeal in some specifically limited situations. The lower court, for example, may take the following actions during appeal: (1) timely and specifically grant a motion to reconsider the appealed order;[191] (2) preserve the status quo;[192] (3) correct formal errors or omissions in record papers;[193] (4) grant leave to ap-

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(b) *Authority of a trial court or agency after appeal.* After an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may:

(1) Take such action as may be necessary to preserve the status quo, correct formal errors in papers relating to the matter, cause the record to be transcribed, approved, filed and transmitted, grant leave to appeal in forma pauperis, grant supersedeas, and take other action permitted or required by these rules or otherwise ancillary to the appeal or petition for review proceeding.

(2) Enforce any order entered in the matter, unless the effect of the order has been superseded as prescribed in this chapter.

(3) Grant reconsideration of the order which is the subject of the appeal or petition.

(4) Authorize the taking of depositions or the preservation of testimony where required in the interest of justice.

(5) Take any action directed or authorized on application by the appellate court.

(6) Proceed further in any matter in which a nonappealable interlocutory order has been entered, notwithstanding the filing of a notice of appeal or a petition for review of the order.

(c) *Limited to matters in dispute.* Where only a particular item, claim or assessment adjudged in the matter is involved in an appeal, or in a petition for review proceeding relating to a quasijudicial order, the appeal or petition for review proceeding shall operate to prevent the trial court or other government unit from proceeding further with only such item, claim or assessment, unless otherwise ordered by the trial court or other government unit or by the appellate court or a judge thereof as necessary to preserve the rights of the appellant.

191. *See supra* text accompanying notes 104-111; *see also* Commonwealth v. Gordon, 329 Pa. Super. 42, 49-51, 477 A.2d 1342, 1345-46 (1984) (lower court can modify base sentence pending appeal provided that defendant files a timely motion under PA. R. CRIM. P. 1410 to reconsider sentence within ten days and trial court expressly grants reconsideration within thirty days of sentence; preferred practice is for lower court to vacate sentence when timely granting reconsideration); Provident Nat'l Bank v. Rooklin, 250 Pa. Super. 194, 378 A.2d 893 (1977) (citing 42 PA. CONS. STAT. ANN. § 5505) (Purdon 1981)); 42 PA. CONS. STAT. ANN. § 5505 (1981) (lower court's authority to modify its order within 30 days after entry). *See also* Simpson v. Allstate Ins. Co., 350 Pa. Super. 239, 504 A.2d 335 (1986); Livolsi v. Crosby, 344 Pa. Super. 34, 495 A.2d 1384 (1985).

192. *See, e.g* Leasing Serv. Corp. v. Benson, 317 Pa. Super. 439, 464 A.2d 402 (1983) (although lower court was prevented from taking action in other respects, it could order the satisfaction demand nullified in order to preserve the status quo of a pending appeal that challenged the validity of a confessed judgment).

193. *See* PA. R. APP. P. 1701, *supra* note 190; PA. R. APP. P. 1926 (correction or modification of record); *see also* Commonwealth v. Adams, 350 Pa. Super. 506, 504 A.2d 1264 (1986) (en banc) (court may correct clerical error regarding sentence); Metropolitan Edison Co. v. Old Home Manor, 334 Pa. Super. 25, 482 A.2d 1062 (1984) (lower court could modify order pending appeal to reflect pre-award interest since modification was a permissible correction to a formal error in court's papers and computation of interest involved a simple clerical matter); *cf.* Commonwealth v. McDonald, 285 Pa. Super. 534, 428 A.2d 174 (1981) (pending appeal, lower court could proceed to correct omission in record, namely, that petitioner was, in fact, advised that he could participate in the selection of the jury) (citing Commonwealth ex. rel. Tanner v. Claudy, 378 Pa. 412, 106 A.2d 820 (1954); PA. R. APP. P. 1926); *but see* Corabi

peal in forma pauperis;[194] (5) grant supersedeas relief;[195] (6) enforce any order entered in the matter unless the order has been superseded by the appellate rules;[196] (7) decide matters that are "separate and distinct" from matters raised in the pending appeal;[197] (8) provide relief on matters that are "ancillary"[198] to the appeal;[199] and (9) pro-

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v. Curtis Publishing Co., 437 Pa. 143, 150, 262 A.2d 665, 668 (1970) (Rule 1701 does not permit fundamental corrections of record); Schreiber v. Schreiber, 308 Pa. Super. 243, 454 A.2d 112 (1982) (lower court can take steps to reconstruct or correct record, but it cannot "clarify" appealed support order by requiring payment of alimony pendente lite *nunc pro tunc*).

194. *See supra* text accompanying notes 157-167; *see also* PA. R. APP. P. 552 (application to lower court to appeal in forma pauperis).

195. *See* PA. R. APP. P. 1732(a) (application for stay in lower court). For example, in order to prevent enforcement or execution of a judgment involving solely the payment of money, the appellant would have to request the lower court for a stay if he was unable to post security of 120% of the amount under PA. R. APP. P. 1731. As the supreme court pointed out in Young J. Lee v. Commonwealth, 504 Pa. 367, 474 A.2d 266 (1983), a stay, like a supersedeas, is an auxiliary process designed to supersede or hold in abeyance the enforcement of a judgment of an inferior tribunal. *See also* Pennsylvania Pub. Util. Comm'n v. Process Gas Consumers, 502 Pa. 545, 467 A.2d 805 (1983) (criteria for granting stay pending appeal); Conston v. New Amsterdam Casualty Co., 366 Pa. 219, 77 A.2d 603 (1951); Madden v. Madden, 336 Pa. Super. 569, 486 A.2d 410 (1985) (citing *Groner*; PA. R. CIV. P. 1910.24); Groner v. Groner, 328 Pa. Super. 191, 476 A.2d 957 (1984) (improper to place supersedeas on a child support order) (citing Goodin v. Goodin, 240 Ark. 541, 400 S.W.2d 665 (1966)); Shinn v. Stember, 159 Pa. Super. 129, 47 A.2d 294 (1946) (supersedeas acts only in favor of those who comply with necessary procedures).

196. For example, a lower court could proceed to enforce an order by proceeding to garnishment and judgment when the appellants have failed to obtain a supersedeas under PA. R. APP. P. 1731 (automatic supersedeas of orders for payment of money). *See* Rice v. Shuman, 343 Pa. Super. 318, 494 A.2d 866 (1985); *cf.* Laxton v. Laxton, 345 Pa. Super. 450, 498 A.2d 909 (1985) (trial court did not lack jurisdiction to enforce separate order for payment of arrearages notwithstanding appeal from order that froze marital assets and granted divorce). *But see* School Dist. of Pittsburgh v. Rankin, 55 Pa. Commw. 371, 423 A.2d 1087 (1980) (pending appeal to commonwealth court from order approving reassignment plan in school desegregation case, trial court's order directing its plan to be implemented was not permissible action but constituted impermissible attempt "to proceed further in the matter").

197. *See* Litt v. Rolling Hill Hosp., 293 Pa. Super. 97, 100 n.2, 437 A.2d 1008, 1010 n.2 (1981) (purpose of PA. R. APP. P. 1701(c) is to prevent pending appeal from affecting separate disputes between other parties or separate subject matter) (citing Commonwealth v. Baldwin, 282 Pa. Super. 82, 87, 422 A.2d 838, 841 (1980); Commonwealth v. Mazzocone, 8 Pa. D. & C.3d 309 (1978)).

198. "Ancillary" means, for example, aiding, attendant upon, auxiliary, or subordinate. *See* BLACK'S LAW DICTIONARY 78 (5th ed. 1979).

199. *See* PA. R. APP. P. 1701(b)(1); *see also* Fortune/Forsythe v. Fortune, 352 Pa. Super. 547, ____, 508 A.2d 1205, 1209-10 (1986) (trial court had jurisdiction to proceed on husband's petition to vacate support for college aged son while prior appeal from order denying father's motion for modification was pending when petition concerned matters arising subsequent to those in the pending appeal and order denying modification was unaffected by disposition of petition to vacate); Rosenberg v. Holy Redeemer Hosp., 351 Pa. Super. 399, 410-411, 506 A.2d 408, 413-14 (1986) (trial court's denial of supplemental post-summary judgment motions pending appeal was proper since lower court had jurisdiction to clear up matters ancillary to appeal regarding appellant's motion to find hospital in contempt); Laxton v. Laxton, 345 Pa. Super. 450, 498 A.2d 909 (1985) (jurisdiction existed to enforce separate order for payment of arrearages pending appeal); Litt v. Rolling Hill Hosp., 293 Pa. Super. 97, 437 A.2d 1008 (1981); Commonwealth ex rel. Brown v. Brown, 254 Pa. Super. 410, 386 A.2d 15 (1978) (appeal from divorce decree did not divest the trial court of jurisdiction to award or

ceed further in the matter when the appeal concerns a nonappealable interlocutory order,[200] such as, for example, a frivolous double jeopardy appeal.[201]

In most cases, the filing of an appeal will prevent the lower court from proceeding further "in the matter." In those instances, however, in which an appeal does not preclude further action by the lower court or in which the lower court is specifically entitled to take limited action, the practitioner must seek a stay or specific supersedeas relief in the lower or appellate courts[202] in order to hold all related matters in abeyance. For example, an appeal from an order involving solely a money judgment does not automatically operate as a supersedeas.[203] In addition, an appeal generally does not operate as a supersedeas of government agency action.[204] In a criminal case, supersedeas relief may be of crucial importance to a convicted and sentenced defendant.[205]

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terminate support when support involved issues collateral to appeal; award or termination of alimony pendente lite is collateral to an appeal from a divorce decree; lower court, however, was barred from entering any order premised upon the existence of a final divorce decree).

200. PA. R. APP. P. 1701 was amended to specifically address the effect of a jurisdictionally improper appeal in subdivision (b)(6). *See supra* note 190. Prior practice prevented a lower court from taking any further action even when the appeal was jurisdictionally improper. *See, e.g.*, Commonwealth v. Hall, 327 Pa. Super. 390, 476 A.2d 7 (1984) (noting that PA. R. APP. P. 1701(b)(6) was not to be applied retroactively); Aloi v. Aloi, 290 Pa. Super. 125, 434 A.2d 161 (1981); *see also* Commonwealth v. Burkett, 352 Pa. Super. 350, 507 A.2d 1266 (1986) (trial court's commencement of trial pending defendant's improper interlocutory appeal from pretrial order denying his motion to quash; exception under 1701(b)(6) applied).

201. The supreme court recently announced a modification of the procedure as to frivolous pre-trial double jeopardy appeals in Commonwealth v. Brady, ___ Pa. ___, 508 A.2d 286 (1986). If the trial court states on the record that the double jeopardy motion is frivolous, the lower court may proceed further in the matter, notwithstanding the appeal. The supreme court noted as follows:

> The availability of an automatic stay upon filing a Bolden [double jeopardy] appeal encourages the use of frivolous appeals as a means of avoiding prosecution. The trial court should not be powerless to prevent such intentional dilatory tactics . . . . The needless delays engendered by frivolous appeals hinder the administration of justice as well as the public interest.

Id. at ___, 508 A.2d at 291.

202. Generally, supersedeas relief should be first sought in the lower or trial court. *See* PA. R. APP. P. 1702 (stay ancillary to appeal), 1732(a) (application to lower court for stay or injunction pending appeal).

203. *See* PA. R. APP. P. 1731 (automatic supersedeas of orders for payment or money), 1733 (requirements for supersedeas on agreement or application), 1734 (appropriate security for supersedeas), 1735 (effect of supersedeas on execution or distribution), 1736 (exemptions from security), 1737 (objections to security), 1739 (order for sale of perishable property), 1751 (appropriate form of a bond).

204. *See* PA. R. APP. P. 1701 commentary.

205. *See* PA. R. APP. P. 1762 (release in criminal matters), 1764 (other stays in criminal matters); PA. R. CRIM. P. 4010 (bail after finding of guilt). If the lower court denies bail pending appeal, the lower court should file of record a brief statement for its reasons or specify where in the record such reasons can be found so that, upon application in the appellate court, the appellate court will have an adequate basis for review. *See* PA. R. APP. P. 1762(f).

In addition to an awareness of when a specific request for supersedeas relief is required under the rules and facts of one's case, the practitioner will also have to maneuver the definitional but practical hurdles of such terms as "may no longer proceed in the matter," "take other action . . . ancillary to the appeal," "enforce any order entered in the matter," and "limited to matters in dispute."[206] Such terms require one to ascertain the difficult dividing line between permissible lower court action pending appeal and impermissible jurisdictional intrusion into matters that are the subject of pending appellate review. As the commonwealth court once noted, for example, it is often difficult to distinguish the lower court's right to enforce the appealed order from the concommitant restraint that generally precludes the lower court from proceeding further in the matter on appeal.[207]

It should be noted that the appellate rules committee has proposed an amendment to Rule 1701 regarding a lower court's timely granting reconsideration of its appealed order. Rule 1701 would require a party whose notice of appeal has been rendered inoperative by the granting of reconsideration[208] by the trial court to notify the appellate prothonotary so that the appeal can be stricken from the appellate court dockets.[209]

III. Phase Two: Statements by the Appellant and Lower Court

In between the time of the filing of the notice of appeal in the lower court and the transmission of the official lower court record to the appellate court, both the appellant and lower court judge have distinct obligations under the appellate rules. The appellant, if ordered by the lower court to do so, must file what is called a "statement of matters complained of," which hereinafter will be referred to as the appellant's "Rule 1925 statement." Likewise, the lower court judge must file a statement that explains the reasons for his or her actions challenged on appeal. This statement shall be referred to as the "lower court's opinion." Specifically, the relevant appellate rule provides as follows:

> (a) *General rule.* Upon receipt of the notice of appeal the judge who entered the order appealed from, if the reasons for the or-

206. *See* PA. R. APP. P. 1701.

207. *See* School Dist. of Pittsburgh v. Rankin, 55 Pa. Commw. 371, 423 A.2d 1087 (1980).

208. *See supra* notes 108-111.

209. *See* LEGAL INTELLIGENCER, Oct. 17, 1986, 1, 23, *published in* 16 Pa. Bull. 3924, 3929 (1986); *see also supra* note 39.

> der do not already appear of record, shall forthwith file of record at least a brief statement, in the form of an opinion, of the reasons for the order, or for the rulings or other matters complained of, or shall specify in writing the place in the record where such reasons may be found.
>
> (b) *Direction to file statement of matters complained of.* If the lower court is uncertain as to the basis for the appeal, the lower court may by order direct the appellant forthwith to file of record in the lower court and serve on the trial judge a concise statement of the matters complained of on the appeal. A failure to comply with such direction may be considered by the appellate court as a waiver of all objections to the order, ruling or other matter complained of.[210]

A. Appellant's Statement: Appellate Preview

As the rule suggests, the appellant's statement becomes necessary when, in preparation of the lower court's opinion, the lower court judge is uncertain as to what actions the appellant will challenge on appeal. In the course of a trial, for example, there are often numerous record objections and allegations of error, some trivial, others prejudicially momentous. Although the procedural vehicle of post-trial motions helps to identify and refine the issues for an anticipated appeal, the appellant's statement further assists the lower court judge by eliminating the necessity that the trial court judge formally explain[211] reasons for every purported erroneous ruling. In a sense, the appellant's statement operates as an economical preview of coming appellate events. With such a statement, the lower court can then focus on the issues and prepare to file its explanatory opinion.

The second significant function of the appellant's statement is closely related to the first. The appellant's statement, by advising the lower court of specific errors and enabling it to explain its ruling, facilitates more effective appellate review. When the lower court and appellant have complied with the procedural requirements, the appellate court is then at a good vantage point to determine the nature of the appellant's grievances and the correctness of the lower court's rulings and rationales.

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210. PA. R. APP. P. 1925. The predecessor, Supreme Court Rule 56, can be found in *In re* Harrison Square, Inc., 470 Pa. 246, 368 A.2d 285 (1977).

211. *See* Commonwealth v. Crowley, 259 Pa. Super. 204, 211-12, 393 A.2d 789, 792 (1978) (en banc), *on remand*, 281 Pa. Super. 26, 421 A.2d 1129 (1980), *rev'd*, 502 Pa. 393, 466 A.2d 1009 (1983) (Rule 1925 is based on giving the trial court an opportunity to explain its decision, not to correct its errors).

1. Appellant's Failure to Comply with Rule 1925: Sanctions.—The appellant must file a 1925 statement only if directed to do so by the lower court,[212] either specifically by the lower court judge or by local rule of court. If the appellant has failed to comply with the rule and the lower court's directive, the appellate court may later dismiss the appeal, conclude that the briefed issues are waived, or overlook the noncompliance. Appellate assessment of an appellant's compliance with Rule 1925 is equitable and discretionary in nature.[213] Again, *the primary focus is whether appellant's noncompliance defeats effective appellate review*, for example, by placing a handicap on the lower court's preparation of its opinion.[214]

In *Commonwealth v. Johnson*,[215] the superior court identified a need to balance the following considerations: gravity of the case, importance of the issues, and degree of noncompliance. In that case, the superior court concluded that the noncompliance would not result in waiver when the defendant filed a brief in the lower court within a few days of his Rule 1925 deadline, the post-trial motions identified the issues defendant raised on appeal, and the lower court considered and rejected the defendant's arguments with reasons on the record. The supreme court itself has noted that it is improper to find waiver when the appellant's noncompliance did not defeat effective appellate review.[216] Nevertheless, the appellate courts have dismissed cases or found waiver when noncompliance effectively prevented the appellate court from adequately reviewing the appeal.[217]

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212. Commonwealth v. Thomas, 305 Pa. Super. 158, 163 n.8, 451 A.2d 470, 472 n.8 (1982) (noncompliance excused when lower court never directed defendant). Local rules may, however, automatically require the filing of a statement within a specified time.

213. Commonwealth v. Silver, 499 Pa. 228, 452 A.2d 1328 (1982); Commonwealth v. Johnson, 309 Pa. Super. 367, 455 A.2d 654 (1982); Barrick v. Fox, 73 Pa. Commw. 6, 457 A.2d 208 (1983).

214. Commonwealth v. Mueller, 341 Pa. Super. 273, 491 A.2d 258 (1985) (appellate court must assess seriousness of non-compliance in context of entire case); Commonwealth v. Crowley, 259 Pa. Super. 204, 211-12, 393 A.2d 789, 792 (1978) (en banc), *on remand*, 281 Pa. Super. 26, 421 A.2d 1129 (1980), *rev'd*, 502 Pa. 393, 466 A.2d 1009 (1983). *See also supra* note 11 regarding correction of "formal" defects.

215. 309 Pa. Super. 367, 455 A.2d 654 (1982). The case involved a prosecution for murder.

216. *See* Commonwealth v. Silver, 499 Pa. 228, 452 A.2d 1328 (1982).

217. *See* Geyer v. Steinbronn, ___ Pa. Super. ___, 506 A.2d 901 (1986) (waiver); Commonwealth v. Warren, 322 Pa. Super. 410, 481 A.2d 681 (1984) (waiver); Hudock v. Commonwealth, 69 Pa. Commw. 437, 451 A.2d 572 (1982) (waiver); Adams v. Walsh, 295 Pa. Super. 311, 441 A.2d 1248 (1982) (dismissal); Barrick v. Fox, 73 Pa. Commw. 6, 457 A.2d 208 (1983) (waiver); *In re* Harrison Square, Inc., 470 Pa. 246, 368 A.2d 285 (1977). Non-compliance, however, was not fatal in the following cases: Commonwealth v. DeGeorge, 506 Pa. 445, 485 A.2d 1089 (1984); Commonwealth v. Silver, 499 Pa. 228, 452 A.2d 1328 (1982); Commonwealth v. Satchell, 306 Pa. Super. 364, 367, 452 A.2d 768, 770-71 (1982); Commonwealth v. Williams, 269 Pa. Super. 544, 410 A.2d 835 (1979).

2. Procedural Requirements.—An appellant must file a concise 1925 statement if required or directed by the lower court.[218] The statement must be (1) filed in the lower court and (2) served on the trial judge. In a case involving multiple appellants, an individual appellant cannot evade his obligation to provide a 1925 statement by relying on the statements filed by other appellants.[219] It is also important to realize that a comprehensive or sufficient Rule 1925 statement cannot serve as a substitute for post-trial motions, which precede the appeal and are indispensable to preserving issues for appellate review.[220]

B. Lower Court's "Statement"

Effective appellate review requires that an appellate court be adequately informed of the rulings of the lower court with a supporting explanation. Otherwise, an appellate court would have to speculate as to the factual and legal predicates for the lower court's actions. Transcription of testimony and on-the-record colloquies with the lower court are certainly helpful to the appellate court, but such sources of information are inadequate in themselves to assure the ideal objective of effective appellate review of the lower court's actions. Therefore, the appellate rules require the lower court to explain[221] on the record[222] the reasons for its order.

The common, and perhaps preferable, practice is for the lower court to file a sufficiently detailed opinion concerning the essential factual findings and conclusions of law, which explain and support the lower court's order.[223] Counsel for the parties will then be strategically poised to adequately support or challenge the lower court's actions when they prepare their appellate briefs. Nevertheless, it is important to realize that although an "opinion" may be more advan-

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218. *See* Commonwealth v. Thomas, 305 Pa. Super. 158, 451 A.2d 470 (1982).

219. *See In re* Harrison Square, Inc., 470 Pa. 246, 368 A.2d 285 (1977).

220. *See* Commonwealth v. Cargo, 498 Pa. 5, 9 n.7, 444 A.2d 639, 641 n.7 (1982); PA. R. APP. P. 302 (requisite for reviewable issue). *See also* Pines, *supra* note 1 at 76-77, n. 86 and 84 n. 123.

221. The lower court's opinion should explain its decision, not correct any errors. *See* Commonwealth v. Crowley, 259 Pa. Super. 204, 209, 393 A.2d 789, 792-93 (1978). In Commonwealth v. Silver, 499 Pa. 228, 452 A.2d 1328 (1982), the supreme court pointed out that Rule 1925 facilitates appellate review by requiring the trial court to supplement the record with an opinion addressing the merits of the issues to be raised on appeal. *See also* Commonwealth ex rel. Donachy v. Kearney, 294 Pa. Super. 610, 440 A.2d 632 (1982) (stating general rule and remanding for an opinion).

222. *See infra* notes 232-277 regarding the record concept.

223. The commonwealth court has strongly suggested that detailed findings of fact and legal discussion are advisable. *See* Appeal of Mellon Bank, 78 Pa. Commw. 463, 467 A.2d 1201 (1983).

tageous, Rule 1925 does not necessarily require the lower court to prepare an opinion. The lower court's obligation under the rule is satisfied if it files "of record" a brief statement "in the form of an opinion" or if it specifies in writing where in the record the reasons for its order can be found.[224] For example, in an equity case in which the lower court previously made detailed findings of facts and conclusions of law,[225] the abbreviated process may be adequate for purposes of appellate review.

The existence of an opinion or brief statement from the lower court is, therefore, crucial to meaningful appellate review. Since the purpose of the lower court's statement is explanation, the appellate court may decide to remand on appeal to the lower court if the reasons do not adequately appear on the record or in its supplied statement.[226] Moreover, when the lower court has completely failed to satisfy the requirements of the rule, appellate courts will often remand so that the lower court can promptly provide an adequate opinion or statement.[227] Sometimes, because of exigent circumstances, an appellate court may have to rely on an opinion prepared by a lower court judge who did not hear the case.[228]

IV. Phase Three: Transcription and Transmission of the Official Lower Court's Record

If an appealable order is metaphorically the nucleus or basic building block of the appeal, then the original lower court's record is perhaps the appeal's marrow. To consider and act on an appeal, the appellate court needs access not only to the adversarial briefs of counsel but also to the transcribed, official, original, *certified record*

224. *See, e.g.*, Malizia v. Beckley, ___ Pa. Super. ___, ___ n.1, 513 A.2d 417, 417 n.1 (1986), in which the lower court adopted the trial transcript as its statement of reasons in a case involving a default judgment.

225. *See, e.g.*, PA. R. CIV. P. 1517 (equity, the adjudication).

226. *See* Rittel v. Rittel, 335 Pa. Super. 550, 555 n.4, 485 A.2d 30, 33 n.4 (1984) (despite absence of lower court's opinion to explain its support order, lower court's conclusions were implicit in its order; nevertheless, appellate court remands for more complete record); Vision Serv. Plan v. AFSCME, 331 Pa. Super. 217, 219 n.1, 480 A.2d 322, 324 n.1 (1984) (case previously remanded to trial court to prepare supplemental opinion clarifying its reasons); Appeal of Mellon Bank, 78 Pa. Commw. 463, 467 A.2d 1201 (1983) (when rationale of lower court was actually, although minimally, apparent from the record, not necessary to remand for specific findings, since lower court made credibility determination).

227. *See* Commonwealth v. Hicks, 328 Pa. Super. 233, 476 A.2d 978 (1984), *as supplemented*, 342 Pa. Super. 57, 492 A.2d 61 (1985); Commonwealth v. Coda, 283 Pa. Super. 408, 424 A.2d 529 (1981); Mims v. City of Philadelphia, 267 Pa. Super. 129, 406 A.2d 552 (1979); Kaiser v. Meinzer, 265 Pa. Super. 595, 402 A.2d 705 (1979); Commonwealth v. Costlow, 265 Pa. Super. 108, 401 A.2d 824 (1979).

228. *See* Commonwealth v. Mason, 327 Pa. Super. 520, 529 n.4, 476 A.2d 389, 395 n.4 (1984).

of the lower court.[229] Therefore, between the filing of the notice of appeal and the submission of appellate briefs, the lower court and the parties must take the necessary steps to assure the transcription and transmission of an accurate and adequate record for the appellate court's review. Whereas the timely filing of a notice of appeal and existence of an appealable order (properly entered on the lower court's dockets) were critical for jurisdictional purposes, *the requirement of an adequate lower court record in modern appellate practice is fundamental to the effectiveness and scope of appellate review.* The failure to provide the appellate court with an accurate and complete lower court record, moreover, can be just as critical and fatal in consequence as a jurisdictional defect.[230] To appreciate the importance and requirements of transcribing and transmitting the lower court's record, one must first understand the functional importance of the official record concept.[231]

A. The Official Record Concept

The appellate tribunal is basically a forum for "re-view," not fact-finding.[232] The appellate tribunal does not listen to witnesses, does not take testimony, and does not make de novo factual findings. The appellate court's power of review is circumscribed by what occurred in the lower or trial court. Subject to very limited exceptions, such as judicial notice of non-record facts,[233] appellate review is therefore limited to the four corners of the lower court's record or, as

229. This record shall be simply referred to as the *original record.*

230. *See infra* text accompanying note 267. The failure to provide an adequate and accurate record may result either in the appellate court's refusal to consider the relevant issues or dismissal of the appeal because there is an inadequate evidentiary basis for appellate review. *See infra* notes 267-268 and accompanying text.

231. For further general references on the original record concept, see Bergan, *Gross Waste and Deadly Poundage: The Record on Appeal*, 25 N.Y.S.B. BULL. 251 (1953); Horvitz, *Protecting Your Record on/Appeal*, 4 LITIGATION 34 (1978); Rall, *Preparing the Record on Appeal*, 4 LITIGATION 37 (1978); *cf.* Erickson, *The Trial Transcript — An Unnecessary Roadblock to Expeditious Appellate Review*, 11 J. LEGAL REFERENCE 344 (1978).

232. Beyond the scope of this statement are the limited instances in which a legislature has invested the appellate courts with original jurisdiction and fact-finding functions. As to the original jurisdiction of the appellate courts in Pennsylvania, see Pines, *supra* note 1, at 61 n. 10 and 140 n. 378. *See also* PA. R. APP. P. 106 (original jurisdiction matters), 1513(d) (petition for review, evidentiary hearing), 1542 (petition for review, oral argument and evidentiary hearing), 1543 (petition for review, trial by jury), 3734 (record in evidentiary hearing cases), 3102(c) (commonwealth court's evidentiary hearing and election matters). As one author has pointed out, independent investigation at the appellate level for case facts is virtually nonexistent. See T. MARVELL, APPELLATE COURTS AND LAWYERS: INFORMATION GATHERING IN THE ADVERSARY SYSTEM 160, 351-52 n.9 (1978).

233. Judicial (appellate) notice of nonrecord facts is an extensive and mercurial concept. *See* MARVELL, *supra* note 232, at 119-204.

one author states, is circumscribed by tunnel vision.[234] This restraint upon appellate review, which shall be referred to as the "record concept," is predicated on necessity and fairness. Since the appellate court is not in the strategic position to assess the existence or truth of facts never adversarially presented in the lower court, the appellate court has no rational basis to review such facts and must therefore carefully sift and screen for case facts.[235]

Limiting appellate review to the four corners of the record satisfies the legitimate need to assure predictability and orderliness in the appellate process. In addition, requiring appellate review to be based on facts in a record is an economical, rational and expeditious method of assuring the right of appellate review to the maximum extent commensurate with a judiciary's capacity and limited resources. Last, one could argue that the record concept, under the adversarial system of obtaining truth, is certainly important to assure fairness to litigants. Appellate courts simply should not use or rely on facts that the parties did not have a chance to effectively contest.[236]

Thomas Marvell, in his insightful analysis of the appellate process, offered some personal and representative judicial comments on the importance of the official record to the proper presentation of case facts. Noting that "probably nothing throws a cog in the wheel of the appellate process more than when important parts of the record are garbled or missing,"[237] Marvell relates his findings from in-

234. *See* M. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY 140 (1986). For cases generally, see Commonwealth v. Young, 456 Pa. 102, 115, 317 A.2d 258, 264 (1974); Franklin Interiors v. Wall of Fame Management Co., ___ Pa. ___, ___, 511 A.2d 761, 763 (1986) (reversing, 343 Pa. Super. 623, 494 A.2d 489 (1985)); McCaffrey v. Pittsburgh Athletic Ass'n, 448 Pa. 151, 293 A.2d 51 (1972); McCaffrey v. Schwartz, 285 Pa. 561, 132 A. 810 (1926); Hudgins v. Jewel T. Discount Store, 351 Pa. Super. 329, 332, 505 A.2d 1007, 1010 (1986); Commonwealth v. Stanton, 294 Pa. Super. 516, 440 A.2d 585 (1982); Zinman v. Commonwealth, 42 Pa. Commw. 270, 274, 400 A.2d 689, 691 (1979). The superior court, in Commonwealth v. Velez, 329 Pa. Super. 15, 477 A.2d 879 (1984), noted that limited appellate review and the record concept were basic to the American adversarial system. *See also* PA. R. APP. P. 1922(b)(3), *infra* note 254.

235. "Facts" can be a generically broad and misleading term. Thomas Marvell, in analyzing the basis and limits of appellate review, distinguishes the following types of factual information: case facts (facts about the dispute before the court), supporting case facts (facts that pertain to more than the particular dispute being decided, but used by the judges to determine what the case facts are), case facts used as social facts (facts about the particular dispute used as evidence of what a just and workable rule should be for the particular case and for future cases presenting similar issues), and social facts (the polar opposite of "case facts" in that they transcend the immediate case, they pertain not only to the parties, and they are used to create rulings that will be precedent for future dispute resolution). MARVELL, *supra* note 232, at 139-40.

236. *See* MARVELL, *supra* note 232, at 161; *see also* Commonwealth v. Velez, 329 Pa. Super. 15, 477 A.2d 879 (1984).

237. T. MARVELL, *supra* note 232, at 160.

terviews with various jurists:

> Most of the judges interviewed were asked why it is important to decide cases solely on the basis of facts in the record. They usually answered that appellate courts are not set up to find case facts: The record is the only means the judges have of knowing what has occurred; any information they receive outside the record is not subject to the safeguards of cross-examination, and if the attorneys were allowed to introduce new facts upon appeal, there would be never-ending disagreements between counsel that the court could not resolve. For example [as one judge stated]:
>
> Good man, I can't think of anything more fundamental than that. You can't have people coming into court and saying, "Well, that's what the record says, but actually this is what *happened* down below." If you depart from that, you're in grave danger. That's fundamental . . . . How do you *know* what happened? You may have — one fellow says "This is what happened down there," and the other fellow says "Oh, no it didn't." So then you say, "Well, what's the record show?" You've *got* to stand by the record. You'd have judicial *chaos* if you did anything else.[238]

1. The Official Record Concept (Contents and Requirements).—In an appeal, there is only one[239] official lower court record,[240] which consists of (1) the original papers and exhibits filed in the lower court, (2) the transcript of any proceedings, and (3) a certified copy of the docket entries prepared by the clerk of the lower

238. *Id.* at 160-61 (emphasis in original).

239. The official lower court record must be distinguished from the reproduced record. See *infra* text accompanying notes 317-356.

240. Appellate review is limited to the facts of record of that particular case. Generally, in Pennsylvania, a court cannot take judicial notice of different or related cases, if not pleaded or officially made part of the record. *See, e.g.*, Matson v. Housing Authority of Pittsburgh, 326 Pa. Super. 109, 473 A.2d 632 (1984) (appellate court cannot consider non-certified copy of opinion in prior adjudication); Chorba v. Davlisa Enters., Inc., 303 Pa. Super. 497, 500, 450 A.2d 36, 38 (1982); Commonwealth ex rel. Milk Mktg. Bd. v. Sunnybrook Dairies, 32 Pa. Commw. 313, 316 n.4, 379 A.2d 330, 332 n.4 (1977); Callery v. Blythe Township Mun. Auth., 432 Pa. 307, 309, 243 A.2d 385, 386 (1968); Naffah v. City Deposit Bank, 339 Pa. 157, 160, 13 A.2d 63, 64-65 (1940); GOODRICH-AMRAM 2D § 1017(b):11, at 82 (1976); *see also* Matson v. Housing Authority of Pittsburgh, 326 Pa. Super. 109, 473 A.2d 632 (1984) (appellate court cannot consider opinion in another lower court case when the record did not contain a certified copy of that opinion); Leasing Serv. Corp. v. Benson, 317 Pa. Super. 439, 449 n.7, 464 A.2d 402, 407 n.7 (1983) (transcript of deposition of federal court testimony, included in appellant's printed record, not considered when it was not submitted as part of official record in lower court); *but see In re* Philadelphia Co. for Guaranteeing Mortgages, 143 Pa. Super. 407, 17 A.2d 662 (1941) (court may take judicial notice of decrees it has previously made in pending proceedings). Note also that the appellate rules permit inclusion of related proceedings in the reproduced record. *See* PA. R. APP. P. 2153(b).

court.[241] Although appellate cases have recognized that the lower court's opinion[242] technically and definitionally may not be part of the official record as to facts not otherwise appearing in the record,[243] the appellate courts often demand that an adequate and comprehensive opinion or statement of reasons be provided by the lower court when it sends the official lower court record to the appellate court for review.[244] As to the lower court's opinion and the four corners limitation on appellate review, the appellate courts have noted that the lower court's recitation of facts that are not supported by the official transcribed record is not judicially cognizable.[245] In addition, the official court records in other proceedings are considered part of the official record only if they have been specifically and officially incorporated into the record in the lower court.[246]

Just as the lower court must respect the restraints of the record concept, the parties must do likewise. The appellate courts have cautioned counsel not to include any nonrecord facts (that is, facts not plainly contained in the official record) in their briefs or reproduced records.[247] A litigant cannot convert an extrajudicial assertion into a

241. *See* PA. R. APP. P. 1921 (composition of record on appeal).

242. *See supra* text accompanying notes 222-228 as to the requirements of a lower court's opinion.

243. *See, e.g.*, Dunegan v. Apico Inns of Green Tree, Inc., ___ Pa. Super. ___, ___, 514 A.2d 912, 916-17 (1986) (Del Sole, J., dissenting); Hudgins v. Jewel T. Discount Store, 351 Pa. Super. 329, 505 A.2d 1007 (1986) (appellate court could not consider unchallenged nonrecord affidavits referred to by trial court); Commonwealth v. Sinor, 264 Pa. Super. 178, 183-84 n.5, 399 A.2d 724, 727 n.5 (1979) (facts not supported by the record are not cognizable; lower court's "recollection" is not evidence if facts are not part of the record) (citing Commonwealth v. Burdell, 176 Pa. Super. 219, 107 A.2d 739 (1954)); *see also* Commonwealth v. Donaldson, 334 Pa. Super. 473, 483, 483 A.2d 549, 554-55 (1984) (no record evidence that defendant waived his speedy trial right; no waiver will be found from silent record); cf. Leach v. Hough, 352 Pa. Super. 213, 507 A.2d 848 (1986) (lower court's opinion went beyond the facts of record); Commonwealth v. McDonald, 285 Pa. Super. 534, 428 A.2d 174 (1981) (lower court's assertion in opinion that defendant was in fact advised of his jury trial rights accepted).

244. Cases involving appellate remand for preparation or completion of a lower court's opinion, including findings of fact or conclusions of law, include, for example, the following: Delbaugh v. Delbaugh, 337 Pa. Super. 587, 487 A.2d 417 (1985) (custody); Commonwealth v. Hicks, 328 Pa. Super. 233, 476 A.2d 978 (1984) (remand for discussion of issues presented in post trial motions); Mellott v. Mellott, 328 Pa. Super. 200, 476 A.2d 961 (1984) (custody case); Supka v. Monoskey, 314 Pa. Super. 469, 461 A.2d 253 (1983) (custody); Commonwealth v. Coda, 283 Pa. Super. 408, 424 A.2d 529 (1981); Mims v. City of Philadelphia, 267 Pa. Super. 129, 406 A.2d 552 (1979); Kaiser v. Meinzer, 265 Pa. Super. 595, 402 A.2d 705 (1979); Commonwealth v. Costlow, 265 Pa. Super. 108, 401 A.2d 824 (1979). The supreme court disapproved of the practice of *sua sponte* appellate remands to update record evidence in Commonwealth ex rel. Robinson v. Robinson, 505 Pa. 226, 478 A.2d 800 (1984).

245. *See supra* note 243.

246. *See supra* note 240; *but see* Commonwealth v. Forrest, 508 Pa. 382, 498 A.2d 811 (1985) (appellate consideration of lower court opinion's summary of information not offered into evidence); *cf. infra* note 254.

247. *See* Cox v. Commonwealth, 507 Pa. 614, 618 n.5, 493 A.2d 680, 686 n.5 (1985)

record fact by simply inserting it into an appellate document or brief, which is not definitionally a part of the official lower court's record.[248] As one case emphasized, *an attorney should never make a factual allegation in a brief without being able to support it by reference to the official record.*[249] The practitioner is cautioned that in order to assure inclusion of a matter in the official record, the matter or document must be properly filed[250] in the lower court before the official record is sent to the appellate court for review. All records on appeal must contain all the documents filed in the lower court and the docket entries that are essential to appellate review.[251]

Four-corner-review is a restraint that applies not only to the parties and lower court, but also to the appellate courts. For example, on occasion, the supreme court has admonished an appellate court for improperly considering information that was outside the official record.[252] The application of the record concept, however, has proven in practice to sometimes be an erratic one, as one case has noted.[253] There have been occasions, albeit infrequent, when the ap-

(Papadakos, J., dissenting) (dissent admonishes counsel); Commonwealth v. Bowers, 245 Pa. Super. 214, 369 A.2d 370 (1976). Instances in which counsel improperly included nonrecord, unsupported information in their briefs or reproduced record can be found in the following illustrative cases: Commonwealth v. Ball, ___ Pa. Super. ___, 515 A.2d 307 (1986); Hudgins v. Jewel T. Discount Store, 351 Pa. Super. 329, 505 A.2d 1007 (1986); McFarlane v. Hickman, 342 Pa. Super. 240, 248 n.4, 492 A.2d 740, 744 n.4 (1985); Auman v. Juchniewitz, 312 Pa. Super. 98, 458 A.2d 254 (1983); Sirava v. AAA Trucking Co., 306 Pa. Super. 217, 452 A.2d 521 (1982); Society Hill Towers Owners Ass'n. v. Matthew, 306 Pa. Super. 13, 451 A.2d 1366 (1982); Anmuth v. Chagan, 295 Pa. Super. 32, 440 A.2d 1208 (1982); Acker v. Palena, 260 Pa. Super. 214, 393 A.2d 1230 (1978); Cercone v. Cercone, 254 Pa. Super. 381, 386 A.2d 1 (1978); *see also* Ritter v. Ritter, ___ Pa. Super. ___ 518 A.2d 319 (1986) (improper inclusion of non-record material in supplemental reproduced record).

248. As the opinion in Commonwealth v. Rini, 285 Pa. Super. 475, 481, 427 A.2d 1385, 1389-90 (1981) points out, a nonrecord assertion in an appellate brief in the superior court is impermissible because the appellate brief definitionally is not part of the official record. However, as to an appeal from the intermediate to the highest appellate court, the opinion writer reasons that the briefs in the intermediate court are part of the "record" in the higher court.

249. Commonwealth v. Bowers, 245 Pa. Super. 214, 369 A.2d 370 (1976).

250. *See* Burns v. City of Philadelphia, 350 Pa. Super. 615, 504 A.2d 1321 (1986) (addressing the technical meaning of "filing" and requiring that all documents must be properly filed with the lower court prothonotary). Burns noted the repeated problem of incomplete records being transmitted to the superior court. Burns referred to 42 PA. CONS. STAT. ANN. §§ 2702, 2736 (Purdons 1981). When matters are improperly filed in the lower court, the result is usually an incomplete record in the appellate court, oftentimes resulting in an unnecessary and uneconomical remand. *See* Commonwealth v. Cargo, 498 Pa. 5, 6 n.5, 444 A.2d 639, 640 n.5 (1982); *see also* Commonwealth v. Lynch, 304 Pa. Super. 248, 450 A.2d 664 (1982) (citing 42 PA. CONS. STAT. ANN. § 2756 (Purdons 1981), document must be filed with lower court clerk; handing documents to lower court judge is not sufficient or proper).

251. Burns v. City of Philadelphia, 350 Pa. Super. 615, 504 A.2d 1321 (1986); *and see* Gorniak v. Gorniak, 350 Pa. Super. 502, 504 A.2d 1262 (1986) (stenographic notes of testimony required in every trial).

252. *See* Franklin Interiors v. Wall of Fame Management Co., ___ Pa. ___, ___, 511 A.2d 761, 763 (1986) (reversing 343 Pa. Super. 623, 494 A.2d 489 (1985)).

253. *See* Commonwealth v. Rini, 285 Pa. Super. 475, 427 A.2d 1385 (1981).

pellate courts have considered nonrecord information. Nonrecord matters have been considered when, for example, the parties do not challenge the accuracy of the information or the nonrecord fact can be inferentially gleaned from the official transcribed record.[254] The exceptions, however, are rare. For the practitioner, scrupulous compliance with the official record concept is imperative.

2. The Incomplete or Inadequate Record: Responsibilities.—All appeals must include in the original record, for example, all documents filed in the lower court and a certified copy of the docket entries.[255] Essential to appellate review, as the relevant rule suggests,[256] is a transcription of the lower court's proceedings. Sometimes, however, an appellate court will recognize that, in the unanticipated absence of a trial transcript, an "equivalent picture" must be provided.[257] Inasmuch as appellate judges may prefer to rely on the spontaneous drama and amplitude of a transcript rather than an advocate's calculated and filtered representation of historical fact,[258] providing an adequate and complete record is tactically important.

The onus to provide an adequate and complete official record for appellate review is a cooperative one, but primarily, the appellant's.

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254. *See, e.g.*, Modesta v. Southeastern Pa. Transp. Auth., 503 Pa. 437, 445 n.8, 469 A.2d 1019, 1024 n.8 (1983) (supreme court denies motion to strike nonrecord letter when petitioner did not challenge letter's authenticity, there was no evidence of prejudice, and the letter was not ultimately relevant to disposition of appeal); Commonwealth v. Hughes, 477 Pa. 180, 188 n.2, 383 A.2d 882, 886 n.2 (1978) (in context of reviewing propriety of prosecution's opening statement, which was not transcribed, appellate court considers appellant's version of remarks when district attorney did not contest accuracy of version and record disclosed content of the remark); Shrum v. Pennsylvania Elec. Co., 440 Pa. 383, 387, 269 A.2d 502, 506 (1970) (consideration of typewritten nonrecord transcript); Dunegan v. Apico Inns of Green Tree, ___ Pa. Super. ___, 514 A.2d 912 (1986) (appellate majority considers summary judgment issue even though record did not contain such a motion; docket entries did not reflect filing but record was clear that lower court considered and acted upon such a filed motion); Greenleaf v. Robert J. Flood Co., 328 Pa. Super. 345, 348 n.3, 476 A.2d 1363, 1366 n.3 (1984) (no record evidence of entry of judgment overlooked when parties do not challenge underlying fact); Smith v. Mason, 328 Pa. Super. 314, 476 A.2d 1347 (1984) (attorney's uncontested affidavit); Commonwealth v. Wall, 321 Pa. Super. 154, 467 A.2d 1175 (1983) (appellate court assumes that motion to modify sentence was timely filed when record did not indicate when motion was filed but lower court considered it); Himes v. Cameron County Const. Co., 289 Pa. Super. 143, 145 n.1, 432 A.2d 1092, 1094 n.1 (1981) (reliance on nonrecord contract), *aff'd*, 497 Pa. 637, 444 A.2d 98 (1982). Note that PA. R. APP. P. 1922(b)(3) (diminution of transcript) states as follows: "In any case, untranscribed notes or recordings shall not be part of the record on appeal for any purpose." Cf. infra note 270.

255. *See* Burns v. City of Philadelphia, 350 Pa. Super. 615, 504 A.2d 1321 (1986).

256. *See* PA. R. APP. P. 1921 (composition of record on appeal), *supra* note 241; *see also* Commonwealth v. Dixon, 253 Pa. Super. 383, 385 A.2d 391 (1978).

257. *See* Smith v. Mason, 328 Pa. Super. 314, 476 A.2d 1347 (1984); Nemeth v. Nemeth, 306 Pa. Super. 47, 451 A.2d 1384 (1982).

258. *See* T. MARVELL, *supra* note 232, at 170-71, noting that some judges prefer to read the transcript because it gives them "a better feel" for the case.

It is the appellant's duty to request the court reporter to transcribe the notes of testimony, if they are essential to meaningful appellate review.[259] The notice of appeal, for example, must often include the appellant's order for a transcript.[260] In a criminal proceeding, the responsibility for producing the transcript for appellate review lies with the state.[261] The lower court also has a responsibility, after a notice of appeal has been filed, to make sure that the court reporter's duty to transcribe is performed without delay.[262] In addition, of course, the court reporter has a duty to transcribe when requested by the appellant or ordered by the court, regardless of the reporter's right to recover his fees.[263]

3. The Incomplete or Inadequate Record: Remedies.—An incomplete record may handicap appellate review or make meaningful review impossible. Depending upon the circumstances contributing to the record deficiency, an appellate court may resort to the following options when a record is incomplete or inadequate: (1) remand for supplementation or development of the inadequate transmitted record, including transcription of testimony that is missing from the record;[264] (2) grant a new trial if the absence of an opportunity to

259. *See* PA. R. APP. P. 1911(a) (appellant shall order transcript); PA. R. J. A. 5000.5 (requests and order for transcript); PA. R. CIV. P. 227.3 (all post-trial motions shall contain a request designating portions of record to be transcribed); *see also* Gorniak v. Gorniak, 350 Pa. Super. 502, 504 A.2d 1261 (1986) (stenographic notes of testimony required in every trial); Commonwealth v. Rivera, 339 Pa. Super. 242, 246-48, 253, 488 A.2d 642, 644-45, 647-48 (1985) (*en banc*) (Cirillo & Johnson, JJ., dissenting).

260. PA. R. APP. P. 904(c). See *supra* notes 137-139 and infra notes 282-292.

261. *See* Commonwealth v. Dean, 348 Pa. Super. 1, 501 A.2d 269 (1985) (indigent defendant is entitled to a transcript); Commonwealth v. Homsher, 264 Pa. Super. 271, 399 A.2d 772 (1979); Commonwealth v. Dixon, 253 Pa. Super. 383, 385 A.2d 391 (1978) (citing Commonwealth v. Goldsmith, 452 Pa. 22, 304 A.2d 478 (1973)).

262. *See* PA. R. APP. P. 1931(b) (transmission of record; duty of lower court to cause transcription); *see also* Duquesne Pub, Inc. v. Commonwealth, P.L.C.B., 64 Pa. Commw. 566, 441 A.2d 491 (1982) (lower court must order reporter to transcribe without prejudice to his right to recover fee; issue of cost liability should not delay appellate process) (distinguishing Cambria Sav. & Loan Ass'n v. Capozzi, 44 Pa. Commw. 189, 403 A.2d 208 (1979)).

263. *See* Duquesne Pub, Inc. v. Commonwealth, P.L.C.B., 64 Pa. Commw. 566, 441 A.2d 491 (1982); PA. R. APP. P. 1922(a); *see also* PA. R. J. A. 5000.9-.12 (court reporter's duties in transcribing record).

264. *See, e.g.*, Cox v. Commonwealth, 507 Pa. 14, 493 A.2d 680 (1985) (remand to Board to develop sufficient factual record); Maginley v. Robert J. Elliott, Inc., 345 Pa. Super. 582, 498 A.2d 977 (1985); Commonwealth v. Rivera, 339 Pa. Super. 242, 488 A.2d 642 (1985) (*en banc*); Commonwealth v. Coburn, 335 Pa. Super. 536, 485 A.2d 24 (1984); Commonwealth v. Shirey, 333 Pa. Super. 85, 481 A.2d 1314 (1984); Commonwealth v. Velez, 329 Pa. Super. 15, 477 A.2d 879 (1984) (refusing dissent's suggestion to call prothonotary to obtain the missing information regarding sentence); Pittsburgh's Airport Motel v. Airport Asphalt, 322 Pa. Super. 149, 469 A.2d 226 (1983) (remand for lower court's consideration of purported motion); Hatalowich v. Bednarsky, 315 Pa. Super. 303, 461 A.2d 1292 (1983) (citing cases in support of option to remand); Auman v. Juchniewitz, 312 Pa. Super. 98, 458 A.2d 254 (1983); Anmuth v. Chagan, 295 Pa. Super. 32, 440 A.2d 1208 (1982), *on remand*, 336

procure an adequate transcript would result in an abridgement of an appellant's constitutional[265] right of appeal;[266] (3) dismiss the appeal or refuse to consider a proferred issue, since there is no official record evidence in the appellate court to support the appellant;[267] or (4) refuse to remand for supplementation if the absence of record evidence is not critical[268] or if there is an adequate equivalent picture.[269] In such circumstances, an appellate court will often consider proffered nonrecord matters, not on their merits, but in the procedural context of deciding the propriety of a remand.[270]

The appellate rules have attempted to make accommodation for the troublesome situation when an appellate court has inadequate information from the lower court's record. The rules provide as follows:

> *Correction or Modification of the Record*
>
> If any difference arises as to whether the record truly discloses what occurred in the lower court, the difference shall be submitted to and settled by that court after notice to the parties and opportunity for objection, and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the lower court either before or after the record is transmitted to the appellate court, or the appellate court, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary, that a

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Pa. Super. 216, 485 A.2d 769 (1984); Commonwealth v. Rini, 285 Pa. Super. 475, 427 A.2d 1385 (1981).

265. *See* Pines, *supra* note 1, at 57-58.

266. *See, e.g.*, Pawol v. Pawol, 293 Pa. Super. 29, 437 A.2d 974 (1981) (support; new hearing ordered); Mansfield v. Lopez, 288 Pa. Super. 567, 432 A.2d 1016 (1981) (new trial) (citing Mutual Loan & Sav. Ass'n v. National Sur. Co., 253 Pa. 351, 98 A. 600 (1916)); Commonwealth v. Dixon, 253 Pa. Super. 383, 385 A.2d 391 (1978) (new trial).

267. *See, e.g.*, Commonwealth v. Williams, ___ Pa. Super. ___, 516 A.2d 352 (1986) (refusal to consider issue); Commonwealth v. Ball, ___ Pa. Super. ___, 515 A.2d 307 (1986) (refusal to consider issue); Gorniak v. Gorniak, 350 Pa. Super. 502, 504 A.2d 1262 (1986) (dismissal); Rappaport v. Stein, 351 Pa. Super. 370, 374 n.1, 506 A.2d 393, 395 n.1 (1985) (in appropriate case, violation of record rule may result in sanction of dismissal); McAllonis v. Pryor, 301 Pa. Super. 473, 448 A.2d 5 (1982) (appeal dismissed since no sufficient evidentiary record); Acker v. Palena, 260 Pa. Super. 214, 218 n.2, 393 A.2d 1230, 1241 n.2 (1978) (refusal to consider deposition not entered in record).

268. *See, e.g.*, Commonwealth v. Hughes, 477 Pa. 180, 188 n.2, 383 A.2d 882, 886 n.2 (1978) (gap not crucial).

269. *See* Smith v. Mason, 328 Pa. Super. 314, 476 A.2d 1347 (1984); Nemeth v. Nemeth, 306 Pa. Super. 47, 451 A.2d 1384 (1982); *see also* procedure regarding the "agreed statement of record" *infra* text accompanying notes 276 to 277.

270. *See, e.g.*, Commonwealth ex. rel Robinson v. Robinson, 505 Pa. 226, 232 n.3, 478 A.2d 800, 804 n.3 (1984) (material in reproduced record, not contained in original record, should be corrected on remand); Anmuth v. Chagan, 295 Pa. Super. 32, 440 A.2d 1208 (1982).

> supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the appellate court.[271]

It is important to note that the rule also empowers the lower court to take necessary action, before or after an appeal, in order to assure an adequate and accurate record for appellate review.[272]

4. Record When No Transcript is Available.—Although stenographic notes of testimony must be taken in every trial of fact,[273] the procedural posture of a case or unforeseen circumstances may make a transcript unavailable. The appellate rules contain a special provision if "no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable."[274] Basically, the appellant sets forth his version of the proceedings. The appellee then has an opportunity to respond by objecting or proposing amendments. The lower court settles the dispute and the final statement "as settled and approved" is included by the lower court clerk in the record on appeal.[275]

5. The "Agreed Statement of Record" Alternative.—Notwithstanding the importance of the record concept and the beneficial impact of providing an appellate court with the drama and accuracy of an actual record,[276] the parties may elect under the rules to forego complete (and perhaps expensive) transcription. Transcription and transmission of all the notes of testimony may be avoided if the parties can cooperate in preparing and signing an agreed "statement of the case." The statement should show (1) how the issues presented by the appeal arose, (2) how the issues were decided in the lower court and (3) so many of the facts averred and proved (or sought to be proved) that are essential to the issues presented.[277] With the concurrence of the lower court, if the statement conforms to the truth, the statement can be certified to the appellate court.

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271. PA. R. APP. P. 1926.

272. *See* PA. R. APP. P. 1701(b)(1) (lower court's power during appeal to correct record or cause it to be transcribed); *supra* text accompanying notes 186-209; *see also* Commonwealth v. McDonald, 285 Pa. Super. 534, 428 A.2d 174 (1981) (citing Commonwealth v. Claudy, 378 Pa. 429, 106 A.2d 401 (1954)).

273. See Duquesne Pub, Inc. v. Commonwealth, P.L.C.B., 64 Pa. Commw. 566, 441 A.2d 491 (1982).

274. *See* PA. R. APP. P. 1923 (statement in absence of transcript).

275. *Id.*

276. *See supra* note 258.

277. *See* PA. R. APP. P. 1924 (agreed statement of record); *see also* Commonwealth v. Mason, 483 Pa. 409, 397 A.2d 408 (1979).

That statement can then constitute the "record" on appeal.

B. Transcription of the Official Lower Court's Record

Transcription of the lower court's record is important for two different reasons. From a mechanistic point of view, the transcription of the record facilitates prompt transmittal of the record to the appellate court. Once the official record arrives in the appellate court, the appellate prothonotary can then give the briefing schedule to the parties. In addition, from the point of view of strategy, adequate and accurate transcription of the record is indispensable to a party's right to secure meaningful appellate review. For once the record is transcribed and transmitted, the parties are bound by the certified record.[278] The parties cannot later contradict the official written word.

1. Transcription: Notice.—As noted previously, the appellant, when filing the notice of appeal, must contemporaneously serve the official court reporter below with a copy of the notice of appeal.[279] This notice is an important step because the court reporter is responsible under the appellate rules for "lodging" the transcript with the clerk of the trial court and notifying the parties.[280] It should be noted that, even prior to an appeal, local rules may require, subject to appropriate sanctions for noncompliance,[281] notification and pay-

278. *See* Commonwealth v. Stanton, 294 Pa. Super. 516, 440 A.2d 585 (1982); Commonwealth v. Percell, 274 Pa. Super. 152, 159 n.4, 418 A.2d 340, 344 n.4 (1979), *rev'd on other grounds*, 499 Pa. 589, 454 A.2d 542 (1982); Commonwealth v. Raymond, 451 Pa. 500, 304 A.2d 146 (1973).

279. PA. R. APP. P. 906 (service of notice of appeal); *see also supra* note 151.

280. *See* PA. R. APP. P. 1922(a) (transcription of notes of testimony), which states as follows:

> (a) *General rule.* Upon receipt of the order for transcript and any required deposit to secure the payment of transcript fees the official court reporter shall proceed to have his notes transcribed, and not later than 14 days after receipt of such order and any required deposit shall lodge the transcript (with proof of service of notice of such lodgment on all parties to the matter) with the clerk of the trial court. Such notice by the court reporter shall state that if no objections are made to the text of the transcript within five days after such notice, the transcript will become a part of the record. If objections are made the difference shall be submitted to and settled by the trial court. The trial court or the appellate court may on application or upon its own motion shorten the time prescribed in this subdivision.

281. *See, e.g.*, DeFazio v. Labe, 352 Pa. Super. 120, 507 A.2d 410 (1986) (interpreting local rule as requiring automatic dismissal of post-trial motions for noncompliance with transcription rule was an abuse of discretion); Davison v. John W. Harper, Inc., 342 Pa. Super. 560, 493 A.2d 732 (1985); Gutman v. Rissinger, 334 Pa. Super. 259, 482 A.2d 1324 (1984) (noting that failure to properly notify the lower court reporter or untimely payment of fees did not warrant dismissal of post-trial motions).

PA. R. CIV. P. 227.3, requiring that all post-trial motions shall contain a request for transcription, states as follows:

> All post-trial motions shall contain a request designating that portion of the

ment of fees in connection with the transcription of the notes of testimony at the post-trial motion stage in the lower court.

2. "Transcription Order": Duties of Appellant, Court Reporter, and Lower Court.—If the notes of testimony of the trial court's proceeding have not been transcribed at the time of the filing of the notice of appeal, and if such notes are necessary for appellate review of the appeal, then appellant must order a transcript.[282] The "transcript order" must be in writing and delivered to the following: (1) the reporter; (2) the clerk of the trial court in which the proceeding took place; (3) the district court administrator or designee; and (4) the clerk of the appellate court.[283] The transcript order must accompany the notice of appeal.[284] Local rules may require a deposit for transcription.[285] Uniform fees for transcription are governed by special rules of court.[286] In certain circumstances, transcription by a reporter who was not present at the lower court proceeding may be permissible.[287]

After the transcript order is filed and served and the deposit is paid, the reporter's obligation is to begin transcription promptly. It is the lower court's obligation, if necessary, to ultimately decide what portions of the record shall be transcribed and to make sure that the

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record to be transcribed in order to enable the court to dispose of the motion. Within ten days after the filing of the motion, any other party may file an objection requesting that an additional, lesser or different portion of the record be transcribed. If no portion is indicated, the transcription of the record shall be deemed unnecessary to the disposition of the motion. The trial judge shall promptly decide the objection to the portion of the record to be transcribed.

282. *See* PA. R. APP. P. 1911(a) (order for transcript). If there is a cross-appeal, however, the cross-appellant may have an equal duty to order and pay for transcription. *See* PA. R. APP. P. 1911(b) (order for transcript; cross appeals).

283. *See* PA. R. J. A. 5000.5 (requests and orders for transcripts). PA. R. APP. P. 1911(c), specifying the proper form for the transcription order, states as follows:

> (c) Form. The order for transcript may be endorsed on, incorporated into or attached to the notice of appeal or other document and shall be in substantially the following form:
>
> [Caption]
>
> A (notice of appeal) (petition for review) (other appellate paper, as appropriate) having been filed in this matter, the official court reporter is hereby ordered to produce, certify and file the transcript in this matter in conformity with Rule 1922 of the Pennsylvania Rules of Appellate Procedure.
>
> _____
> Signature

284. *See* PA. R. APP. P. 904(c) (content of notice of appeal; order for transcript).

285. *See* PA. R. J. A. 5000.6 (deposit of partial transcript fee).

286. *See* PA. R. J. A. 5000.7 (fees for transcript).

287. *See* PA. R. J. A. 5000.12 (certification of transcript; transcription by another); *see also* Emerick v. Carson, 325 Pa. Super. 308, 472 A.2d 1133 (1984).

court reporter's duties are performed without delay.[288] Transcription, however, often occurs without the need for critical intervention by the lower court. The lower court must order the court reporter to transcribe without prejudice to his or her right to recover the applicable fees, which the court may determine at a hearing in the absence of mutual agreement.[289] The reporter is obligated to have the notes transcribed, the accuracy certified, and the record lodged (with proof of service on all parties) in the trial court within fourteen days after receipt of the transcript order.[290] Sanctions may be imposed on a court reporter for delinquency.[291] In addition, if the appellant fails to comply with his obligation to assure transcription, the appellate court may dismiss the appeal.[292]

3. Assessment of Costs.—Payment for transcription must be initially borne by the appellant. However, there may be circumstances when imposition of the entire cost of transcription upon the appellant may be inappropriate.[293] For example, in cross appeals, the cross appellant may also have a duty to equally pay for and cause the transcript to be filed.[294] It should also be noted that, after a decision in the appeal, costs incurred in the preparation and transmission of the record may be taxed in the lower court as costs of the appeal.[295]

4. Alternatives to Transcription of Complete Record.—There may be times when the transcription of the entire lower court record is not feasible or necessary. In such circumstances, the following options might be considered.

(a) Agreed statement of record.—As noted previously in the

288. *See* Davison v. John W. Harper, Inc., 342 Pa. Super. 560, 565 n.2, 493 A.2d 732, 735 n.2 (1985).

289. *See* Commonwealth v. Morgan, 469 Pa. 35, 38 n.2, 364 A.2d 891, 892 n.2 (1976); Duquesne Pub, Inc. v. Commonwealth, P.L.C.B., 64 Pa. Commw. 566, 441 A.2d 491 (1982) (citing Commonwealth v. Ezell, 212 Pa. 293, 61 A. 930 (1905)).

290. *See* PA. R. APP. P. 1922(a); PA. R. J. A. 5000.9. PA. R. J. A. 5000.11(b) notes that the reporter may refuse to deliver the transcript until any balance is paid. *See also* PA. R. APP. P. 1911 note.

291. *See* PA. R. J. A. 5000.10 (sanctions for delayed transcript).

292. *See* PA. R. APP. P. 1911(d) (order for transcript; effect of failure to comply).

293. *See* Duquesne Pub, Inc. v. Commonwealth, P.L.C.B., 64 Pa. Commw. 566, 441 A.2d 491 (1982); *see also* Cambria Sav. & Loan Ass'n. v. Capozzi, 44 Pa. Commw. 189, 403 A.2d 208 (1979). In criminal cases, it is the state's burden to produce a transcript. *See supra* notes 259-263.

294. *See* PA. R. APP. P. 1911(b) (order for transcript; cross appeals).

295. *See* PA. R. APP. P. 2771 (costs on appeal taxable in the lower court).

context of the traditional record requirement,[296] the parties may opt for a "statement of the case," prepared by the parties and approved by the lower court.

(b) "Diminuted" records.—The transcription of a trial or protracted proceeding may require considerable expense. Rather than requiring a full transcript, the appellant or any party can request the trial court in civil cases to permit an abbreviated or "diminuted" transcription.[297] The request must be made within two days after the transcript order is filed. Importantly, however, any party has the right to require that any specified part of the record be transcribed. Prior caselaw indicates that only material not relevant to the issue submitted for appellate review should be excluded.[298] When the diminution of the lower court record results in glaring inadequacy, an appellate court may remand.[299]

5. Transcription Disputes.—The parties are bound by the transcribed official court record as certified by the court reporter and approved by the lower court.[300] Therefore, all parties must be vigilant in making certain that the transcribed record is accurate, preferably before it is transmitted to the appellate court. The court reporter is required to advise the parties that if no objections are made to the transcription within five days after such notice, the transcript will become an official part of the record.[301] If there are no objections, the record is approved by the trial judge[302] and transmitted by the trial court clerk to the appellate court.[303]

It is incumbent upon counsel to examine the transcribed record within the five-day period. If omissions or errors exist, a party should approach the trial court and request immediate corrective action. The trial court is in the best position to resolve any transcrip-

296. *See* PA. R. APP. P. 1924 (agreed statement of record), discussed *supra* text accompanying notes 229-254 and *infra* 351-352.

297. *See* PA. R. APP. P. 1922(b) (diminution of transcription), which emphasizes that "untranscribed notes or recordings shall not be part of the record on appeal for any purpose."

298. *See* Laughlin v. Mt. Carmel & Locust Gap Transit Co., 241 Pa. 281, 88 A. 441 (1913).

299. *See* Clark v. Commonwealth, 45 Pa. Commw. 38, 404 A.2d 774 (1979); *see also* Snyder's Estate, 279 Pa. 63, 83-84, 123 A. 663, 669 (1927) (abbreviated record must provide appellate court with information essential or relevant to questions presented).

300. The transmitted, transcribed record thus becomes conclusive. *See, e.g., In re* Woodward & Williamson, 274 Pa. 567, 118 A. 552 (1922); Whitney v. Jersey Store, 266 Pa. 537, 109 A. 767 (1920); Edwards v. Gimbel, 187 Pa. 78, 41 A. 39 (1898); Commonwealth v. Stanton, 294 Pa. Super. 516, 440 A.2d 585 (1982).

301. *See* PA. R. APP. P. 1922(a) (transcription of notes of testimony).

302. *See* PA. R. APP. P. 1922(c), 1931(b).

303. *See* PA. R. APP. P. 1931(c) (transmission of record; duty of clerk to transmit).

tion disputes and it has authority under the rules to correct or modify the record.[304] The appellate courts have recognized that objections to the transcript are properly settled in the trial court.[305] When there is a dispute between the stenographer's notes and the judge's recollection, the latter controls.[306] Errors or omissions may also be corrected upon stipulation of the parties.[307]

If the transcribed record has already been transmitted to the appellate court, a party is nevertheless entitled to request the appellate court to remand the record to the trial court for purposes of correction or supplementation. Such requests should be promptly made in order to minimize the time and expense attending what could have been an avoidable remand.[308] Arguably, such a remand would be requested only if the dispute concerns material misstatements or omissions.

C. Transmission of the Official Record: Forty-Day Rule

After (1) the notes of testimony are transcribed and paid for, (2) the lower court has written its statement or opinion under Rule 1925, and (3) any dispute concerning the accuracy or completeness of the record is resolved, rule 1922 specifies that the official record is then ready for lodging, filing and certification by the lower court reporter. The record is then transmitted to the appellate court. *The rules currently specify that the official record must be transmitted to the appellate court within forty days after the filing of the notice of appeal.*[309] The responsibility for assuring timely filing is ultimately upon the lower court.[310] Upon receipt of the official court record, the appellate court prothonotary thereafter (1) files the record in the appellate court, (2) notifies the parties and the Administrative Office, and (3) gives notice to all the parties as to the briefing

304. *See* PA. R. APP. P. 1701(b)(1) (effect of appeal generally; authority of trial court); 1922(a) (transcription of notes of testimony); 1926 (correction or modification of the record); *see also* Commonwealth v. McDonald, 285 Pa. Super. 534, 428 A.2d 174 (1981).

305. Commonwealth v. Wilder, 259 Pa. Super. 479, 393 A.2d 927 (1978).

306. *See* Dental Mfg. Supply Co. v. Southern Ry. Co., 82 Pa. Super. 558 (1924); Commonwealth v. Fitzpatrick, 1 Pa. Super. 518 (1892); *but cf.* Commonwealth v. Sinor, 264 Pa. Super. 178, 399 A.2d 724 (1979).

307. *See* PA. R. APP. P. 1926 (correction or modification of the record); *see also* Schreiber v. Schreiber, 308 Pa. Super. 243, 454 A.2d 112 (1982).

308. *See* Commonwealth v. Hoburn, 335 Pa. Super. 536, 485 A.2d 24 (1984); Commonwealth v. Harbaugh, 253 Pa. Super. 24, 384 A.2d 957 (1978); *see also* Commonwealth v. Fields, 478 Pa. 479, 387 A.2d 83 (1978); Commonwealth v. Hamm, 474 Pa. 487, 378 A.2d 1219 (1977).

309. *See* PA. R. APP. P. 1931(a) (time for transmission).

310. *See* PA. R. APP. P. 1931(b) (transmission, duty of lower court).

schedule.[311]

1. Bulky Materials (Advance Arrangements).—Documents of unusual weight or bulk and all physical exhibits other than documents should not be transmitted by the clerk unless he is directed to do so by a party or by the prothonotary of the appellate court. If a party intends to rely on such bulky materials, advance arrangements should be made with the lower court clerk for transmittal.[312]

2. Lower Court's Retention of Record.—The appellate rules make provisions for temporarily retaining substantial portions of the record in the lower court in order to assist the parties in preparing their appellate papers. The lower court clerk, however, must still cause the record to be filed in the appellate court within the specified time constraints for the purpose of facilitating the briefing process.[313] The appellate court may also permit the docket entries alone to be transmitted in lieu of the entire record.[314] The parties may also stipulate that designated parts of the record shall be retained in the lower court. The designated parts, nevertheless, shall be a part of the record on appeal.[315]

3. Delinquent Transmission: The Delay of Justice.—Perhaps the most culpable factor contributing to delayed appellate review is the tardy transmission of the lower court record. Such delinquency can be especially detrimental when important rights of liberty and property are involved. Delinquency can also have a substantial negative impact on the expeditious administration of appellate justice. Ideally and technically, the lower court record should be transferred from the lower to the appellate courts within forty days after the filing of the notice of appeal. The appellate court prothonotaries are entrusted with the important administrative obligation to monitor appeals and report delinquencies.[316]

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311. *See* PA. R. APP. P. 1934 (filing of the record).

312. *See* PA. R. APP. P. 1931(c) (transmission, duty of clerk).

313. *See* PA. R. APP. P. 1932(a) (temporary retention of record); *see also* Wilson v. Wilson, 297 Pa. Super. 14, 442 A.2d 1189 (1981).

314. *See* PA. R. APP. P. 1932(b) (retention by order of court).

315. *See* PA. R. APP. P. 1932(c) (stipulation of parties that parts of the record be retained in lower court).

316. *See* PA. R. APP. P. 1935 (notices and reports concerning delinquent transmission); *see also* Commonwealth v. Morgan, 469 Pa. 35, 38 n.2, 364 A.2d 891, 892 n.2 (1976).

V. Phase Four: The Reproduced Record

A. Preliminary: Nature, Purpose, and Importance of the Reproduced Record

The filing of the transcribed official record in the appellate court starts the appellate ball rolling, so to speak. The party appealing then is faced with three distinct obligations:

(1) filing in the appellate court a designation statement of the contents of the official record to be reproduced and an identification of the issues to be presented for appellate review, with service on all parties;

(2) serving and filing a *reproduced record* in the appellate court; and

(3) serving and filing an *appellate brief* in the appellate court.

Unless special dispensation is obtained by court order or special rule, an appellant must file with the brief booklet-type copies of selected portions of the official record that will be relevant to the appellate court's review. This booklet, the "reproduced record," is what its name implies: a reproduction of the original record. Other jurisdictions refer to this document as the brief's "appendix." While the appellate court receives only one original court record, it receives multiple copies of the reproduced record. Essentially, the reproduced record represents an anthology or reader's digest-type selection of the lower court's proceedings.

There are approximately sixteen specific rules[317] governing the preparation and filing of the reproduced record. Compliance with the rules for the reproduced record is mandatory. Failure to comply with the applicable rules may result in sanctions, including dismissal.[318]

The reproduced record is functionally important because it enables an appellate panel of judges (usually three, sometimes seven or nine) to overcome the limitations attending the multiple and simultaneous review of only one original record. Therefore, with a reproduced record, more efficient and economical appellate review is promoted. The reproduced record, however, is not intended to be a

317. *See* PA. R. APP. P. 2151-2156, 2171-2176, 2186-2189.

318. *See* PA. R. APP. P. 2188 (consequence of failure to file briefs and reproduced record); *see also* Rappaport v. Stein, ___ Pa. Super. ___, ___ n.1, 506 A.2d 393, 395 n.1 (1986); Pennsylvania Human Relations Comm'n v. Graybill, 482 Pa. 143, 147 n.3, 393 A.2d 420, 422 n.3 (1978); Shirk v. Caterbone, 201 Pa. Super. 544, 193 A.2d 664 (1963); Ginsburg v. Custer Frazer Corp., 409 Pa. 116, 185 A.2d 793 (1962); *In re* Roberts, 309 Pa. 389, 164 A. 57 (1932).

duplication of the entire official record. Only what is necessary for intelligent appellate review should be included in the reproduced record. Therefore, selectivity rather than indiscriminate assemblage is advisable.[319] Regardless of what is or is not included in the reproduced record, the appellate court is always free to rely on the official transmitted record.[320]

B. Procedural Requirements

1. Who Must File a Reproduced Record and When.—As a general rule,[321] the appellant must file the reproduced record with the brief.[322] A reproduced record containing materials pertinent to the appeal must be filed in all cases unless (1) the court dispenses by rule with such requirement; (2) a party has been granted leave to proceed *in forma pauperis*,[323] (3) the case is an original hearing before the court,[324] or (4) the court grants an appellant's application to be excused from reproducing the record.[325] Such application must be made within fourteen days after taking the appeal.[326]

2. Preparation of the Reproduced Record: The "Designation Statements" of Issues and Reproduction.—Preliminary designation of the contents of the official record to be reproduced and identification of issues for review are important steps in the appellate process. Generally, after the official record has been transmitted to the appellate court and appellant has received a notice of the briefing schedule from the appellate court prothonotary, appellant will be given a period of time to review the record. During this time, counsel must make a decision as to (1) the issues that will be presented[327] and (2)

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319. *Cf.* Shapiro v. Malarkey, 278 Pa. 78, 122 A. 34 (1923); *see also infra* note 331.

320. *See* PA. R. APP. P. 2152(c) (effect of reproduction of record).

321. For the special procedure for the "large record" exception, see *infra* text accompanying notes 354-356.

322. PA. R. APP. P. 2186(a) (time for serving and filing reproduced record).

323. *See supra* text accompanying notes 154-167 (in forma pauperis status).

324. *See supra* notes 6 and 232. The commentary herein is restricted to appellate review.

325. PA. R. APP. P. 2151(a) (consideration of matters on original record); PA. R. APP. P. 123 (applications for relief).

326. PA. R. APP. P. 123, 2151(a).

327. The appellant may have already advised the lower court and parties of the appellate issues when he filed the "statement of matters complained of" under Pa. R. App. P. 1925. See *supra* text accompanying notes 211-220. In such a case, appellant is arguably restricted to those issues. If appellant was not requested or compelled to file such a statement, then this designation statement will help to inform the parties of the issues that will be raised on appeal. Whether an appellant can file a designation of issues statement, which substantially departs from a prior Rule 1925 statement, is not addressed by the rules. Orderly appellate review would seem to prohibit such a practice.

the portions of the record that will be reproduced for inclusion in the reproduced record. Appellant then advises the other parties of his or her decision by filing in the appellate court a "designation statement" as to the issues and portions of the record selected.[328] The general rule[329] is that appellant must serve and file the designation statement thirty days before the date fixed for filing appellant's brief.

After the appellant has submitted the designation statement, the appellee is given an opportunity to advise appellant of those additional portions of the record that the appellee may want reproduced for appellate review. If so, the appellee must file a counter- or supplemental designation statement within ten days after receipt of appellant's designation statements.[330] For example, the appellee may feel that material testimony favorable to its side was omitted in appellant's designation statement; the counter-statement would designate the additional material for inclusion. The appellee's response, however, should not vexatiously demand the inclusion of irrelevant material not essential to effective appellate review.[331] Upon such request, the appellant must thereafter include the parts of the record designated by the appellee. If, however, the parties cannot agree on the contents of the reproduced record, the appellee may prepare to file a *supplemental reproduced record*.[332]

3. Reproduced Record Timetable.—After the designation statements are filed, appellant's obligation is to prepare the briefs and reproduced record for filing. The general rule (that is, when the record is not a "large" one[333] or when the court has not ordered otherwise) is that the reproduced record must be filed at the same time that the appellant's brief must be served.[334] This is usually forty days after the lodging of the official lower court record in the appellate court.

4. Contents of Reproduced Record.—The reproduced record,

328. *See* PA. R. APP. P. 2154 (designation of contents of reproduced record).

329. Again, there is an exception for "large records." *See* PA. R. APP. P. 2154(b); *infra* text accompanying notes 354-356.

330. *See* PA. R. APP. P. 2154(a) (designation of contents of reproduced record).

331. PA. R. APP. P. 2154(a) cautions against "unnecessary designation."

332. *See infra* text accompanying note 350 regarding the supplemental reproduced record.

333. *See infra* text accompanying note 354-356.

334. *See* PA. R. APP. P. 2186(a)(1) (time for serving reproduced record), 2185(a) (time for serving briefs).

which is subject to the constraints of the official record concept,[335] must contain the following: (1) relevant docket entries; (2) relevant portions of the pleadings, charge, or findings; and (3) other portions of the record that the parties wish to bring to the court's attention.[336] The "relevant docket entries" must be set forth chronologically, in a single column. They consist of the information needed to reveal clearly the following: the character of the proceedings; the pleadings or papers upon which the case was tried; the trial or hearing; the order to be reviewed; all subsequent proceedings of relevance; and all other matters relevant to the questions involved.[337]

5. Form.—Reproduced records may be produced by conventional typographical printing or by a duplicating or copying process that produces a clear black image on white paper. In the latter case, they should be firmly bound at the left margin.[338] If the brief and reproduced record total more than 100 pages, the reproduced record must be printed separately.[339] Pages are numbered separately and continuously, regardless of the number of volumes, by arabic figures followed by a small "a" (for example, "1a," "2a," "3a," and so forth). The table of contents is numbered in roman numerals (for example, i, ii, iii, and so forth).[340]

6. Table of Contents.—The rule[341] is specific in this regard. It must contain a reference to all reproduced exhibits and the location of each type of testimony of witnesses (for example, direct, cross), identified individually by name. When the reproduced record comprises more than one volume, only one table of contents is required. That table of contents must indicate in which volume each part of the record will be found. Pagination is continuous.

7. Original Pagination.—The rule[342] prescribes that original

335. *See supra* text accompanying notes 229-254 and infra notes 351-352.

336. *See* PA. R. APP. P. 2152(a); *see also* Sanker v. Pennsylvania Ry. Co., 205 Pa. 609. 615-16, 55 A. 833, 835 (1903) (lower court opinion must be included). Under present rules, the lower court's opinion must be attached to appellant's brief. PA. R. APP. P. 2111 (brief of the appellant).

337. *See* PA. R. APP. P. 2153(a), which prohibits inclusion of docket entries that are not relevant or do not amplify. Cf. North Mountain Water Supply Co. v. Troxell, 223 Pa. 315, 72 A. 621 (1909).

338. PA. R. APP. P. 2171 (method of reproduction). See proposed amendment to Rule 2171(b), *supra* notes 39 and 143.

339. *Id.*

340. PA. R. APP. P. 2173, 2174(c).

341. *See* PA. R. APP. P. 2174(a) (table of contents).

342. *See* PA. R. APP. P. 2176(a) (notes of testimony, indication of original pagination).

pagination regarding material contained in the notes of testimony must be clearly indicated. This is important if, for example, a judge wishes to examine the original record.

8. Sequence of Materials.—The arrangement of the reproduced record material should begin with the relevant docket entries, followed by the other parts of the record presented chronologically.[343] *The lower court's opinion, it should be noted, is included in the appellant's brief.*

9. Exhibits.—These may be contained in a separate volume.[344]

10. Covers.[345]—If the reproduced record is prepared separately, the cover must contain the following: (1) the name of the appellate court; (2) the docket number of the case in the appellate court; (3) the caption of the case identifying the parties in the same fashion as listed in the lower court at the time the appeal was taken; (4) an identification of the document (for example, "Brief for Appellant and Reproduced Record," or "Brief for Appellee and Supplemental Reproduced Record," or simply "Reproduced Record"); (5) a designation of the order appealed from and the court from which the appeal was taken, including the lower court's docket number; and (6) the names, addresses, and telephone numbers of counsel. The covers must be light enough to permit any writing in ink to be easily read.

11. Filing Copies and Service.[346]—The reproduced record must be timely filed in the appellate court with the appellant's brief. Counsel should consult the specific rules and amendments for procedural requirements on service and copies to be filed. Current practice specifies, in the supreme court, the filing of twenty-five copies of the reproduced record; in the superior and commonwealth courts, fifteen copies are required. As to service, two copies of the reproduced record must be provided to each party represented on appeal.

12. Costs.—The general rule is that the cost of reproducing the record, including those parts of the record designated by the appellee or appellees, must be paid by the appellant. Of course, the parties may agree otherwise. If the appellant believes that appellee's

343. *See* PA. R. APP. P. 2175 (sequence of material in reproduced record).
344. *See* PA. R. APP. P. 2176(d) (exhibits).
345. *See* PA. R. APP. P. 2172 (covers).
346. *See* PA. R. APP. P. 2187 (number of copies to be served and filed).

designation of record parts to be reproduced is unnecessary, appellant should notify the appellee and request payment for those additional parts to be reproduced. If payment is not provided within ten days of a written demand, appellant can refuse to reproduce those designated parts of the record considered to be unnecessary.[347]

Upon final disposition of the appeal, the cost of reproducing the record shall be taxed as costs.[348] It is important to note that if a party has reproduced the record unnecessarily, an objecting party must file an application in the appellate court within ten days after the filing of the last paperbook. The appellate court can thereafter impose costs in its order disposing of the appeal.[349]

C. The Supplemental Reproduced Record[350]

Preferably, the reproduced record should be a single document. The reproduced record should be a cooperative venture among all the parties to act reasonably in including only those portions of the original record that are relevant to the issues presented and essential to meaningful appellate review. The reproduced record should not be used as a strategic ploy to unfairly bias the picture presented to the appellate court, especially since that court has direct access to the complete, original record. Good faith is certainly implied in the task of preparing a reproduced record.

Nevertheless, there may be "exceptional circumstances," as the rules themselves acknowledge, when the parties honestly disagree on how much to include in the reproduced record. If the parties cannot agree on the contents of the reproduced record, the appellee can prepare and file a separate "Supplemental Reproduced Record" setting forth the portions of the record designated by the appellee. The commentary, however, cautions that separate reproduced records make a record less intelligible. Therefore, separate preparation is not favored. The appellate court may suppress a supplemental reproduced record that has been prepared without good cause.

D. The Original Record Limitation

Since an appellate court's review is limited to the four corners

347. *See* PA. R. APP. P. 2155(a) (allocation of cost of reproduced record).

348. *See* PA. R. APP. P. 2741-2771 (costs).

349. *See* PA. R. APP. P. 2155(b) (allocation by court); *see also* Baehr v. Commonwealth, 487 Pa. 233, 409 A.2d 326 (1981); Commonwealth, Dept. of Transp. v. DePaul, 32 Pa. Commw. 211, 378 A.2d 1032 (1977).

350. *See* PA. R. APP. P. 2156 (supplemental reproduced record) and commentary.

of the official lower court record,[351] the parties can never use a back door approach by including unofficial, nonrecord matters in the reproduced record.[352] Such inclusion is highly improper.

E. Special: Death Penalty Cases[353]

In all cases involving the death penalty, eight copies of the entire record must be reproduced and filed with the prothonotary of the supreme court, which has jurisdiction in such appeals. The supreme court, however, may permit a lesser number to be filed. Depending upon appellant's financial status, either the appellant or county in which the prosecution was commenced must bear the costs.

F. The "Large Record" Exception[354]

Sometimes the original record will be of such considerable volume that the regular briefing schedule presents difficulty in the selection of appellate issues and portions of the record to be reproduced. In such circumstances, time and expense are important considerations. The appellate rules have responded to this type of situation by providing for a "large record" exception under which reproduction of the record is deferred. The rules, however, do not define a "large record." The exception enables a party to prepare an "advance form" or "page proof" nondefinitive brief. The brief need not be filed, but must be served on the other parties when the regular brief would ordinarily have been due, that is, generally forty days after the lower court record is lodged in the appellate court. The "advance form brief" is nondefinitive only in the sense that it will refer to pages of the original record. Substantial changes in the advance form brief, it should be noted, are not permitted. Moreover, this exception is a very limited one and cannot be used to circumvent the regular briefing schedule in appeals not covered by the large record

351. *See supra* text accompanying notes 232-277.

352. Although the general rule is that an appellate court will not take judicial notice of other proceedings, see *supra* note 240 and Pa. R. App. P. 2153(b), which permits the inclusion of related proceedings in the reproduced record if the appellate issue "grows out of some other proceeding." If such material is included, the following should be presented at the beginning of the reproduced record: (1) relevant docket entries, opinions, and directions of both the lower and appellate courts relating to the original case; and (2) issues framed (or ordered to be framed) and relevant pleadings. *See, e.g.*, Steel v. Levy, 282 Pa. 338, 127 A. 766 (1925), which is cited in the commentary to Rule 2153.

353. *See* PA. R. APP. P. 2189 (reproduced record in death penalty cases); *see also* 42 PA. CONS. STAT. ANN.]] 9711 (Purdons 1982) (supreme court prothonotary must send copy of the lower court record to the governor).

354. *See generally* PA. R. APP. P. 2154(b) (designation of contents of reproduced records; large records).

exception.

Basically, the "large record" procedure involves the following five stages:

1. "Notice of Intent" to Proceed under Rule 2154(b).—Thirty days before the date on which appellant's brief would ordinarily be due, appellant must file a notice of intent to proceed on a "large record" basis with the appellate court.

2. "Designation Statement" and "Advance Form" Brief.—The prothonotary will notify the parties when the lower court record was filed and when briefs are due. Appellant's brief is generally due forty days after the filing of the lower court record. On this date, appellant must (1) serve the other parties with two copies of his advance form brief, (2) serve the other parties with a statement identifying the parts of the record that will be reproduced, and (3) file the designation statement and proofs of service in the appellate court. Filing of the advance form brief is not necessary. In large record situations, a designation statement of the issues is unnecessary.

3. Appellee's Proof Brief and Designation Statement.—Thirty days after the date that appellant must serve his advance form brief (or in other words, generally seventy days after the lodging of the lower court record in the appellate court), appellee must serve his proof brief. If appellee wishes to add to appellant's designation statement, he must also serve and file an appellee's designation statement.

4. Reproduced Record.—This must be served and filed fifty-one days after appellant's proof brief and designation statement were served.[355]

5. Parties Definitive Briefs.—Definitive briefs are due fourteen days after the filing of the reproduced record.[356]

VI. Phase Five: The Briefs

A. Preliminary Comments

Designating the briefing stage as the fifth phase in the appellate

355. *See* PA. R. APP. P. 2186(a)(2) (time for serving and filing supplemental reproduced record); *see supra* text accompanying note 346 concerning generally the number of copies to be filed under PA. R. APP. P. 2187.

356. *See* PA. R. APP. P. 2185(c) (definitive copies; time for serving and filing).

process is potentially misleading. Since the reproduced record and appellant's brief must be simultaneously prepared and filed after the lower court's record is transmitted to the appellate court, the preparation of appellant's brief does not necessarily represent a separate and distinct phase. Nevertheless, the briefing stage has been separately represented herein as temporally subsequent to the reproduced record for three reasons. First, after the transmission of the record to the appellate court, appellant has the distinct, important duty to decide what parts of the original record to include in the parties' cooperative reproduced record. Second, appellant's decision in creating the reproduced record requires a written commitment (the "designation statement" of issues and parts of the record)[357] that must be filed well in advance of the filing of the brief. Third, because of this procedural commitment and the time-consuming task of assembling a mutually agreeable reproduced record, the appellant must often make the necessary arrangements for reproduction with the printer well before the brief is even written. Thus, for purposes of analytical and functional convenience, the reproduced record has received separate and advance treatment from the brief. This separate treatment, however, should not be interpreted as allocating preference or precedence to these two important documents.

1. Nature and Purpose of the Brief.—The briefing stage represents the first major transition from conception and procedure to action and confutative advocacy. Next to the original record, the parties' briefs are the most critical documents in the appellate process. The word "brief" is a deceptively simple and perhaps silly word. Nevertheless, that term of art represents the culminating point in the appellate process for the written word. Essentially, a party's brief is a written document that addresses the relevant record facts, procedure, and substantive law for the partisan purpose of persuading the decision-maker to grant or deny relief by affirming or reversing the lower court's order.

For many practitioners, the brief is as important as or even more critical than oral argument before the appellate panel. This view is understandable. Unlike oral argument, the brief possesses a quality of permanency. The embodiment of an assertion or argument in written form is like a sustained echo that either supports or haunts its creator. The irretrievability of the written word, subject to continual, meticulous scrutiny unconstrained by time or place, demands

357. *See supra* text accompanying notes 327-332.

utmost care and attention from the practitioner. In addition, oral argument is basically constrained by the legal parameters set out in the brief.

2. Strategic Caveats Concerning Procedural Compliance and Sanctions.—The adage that "it's not necessarily what you say but how you say it" has arguable relevance to the appellate process. The procedural packaging of a brief can be as consequentially significant as the brief's contents. In attempting to anticipate and calculate the unpredictable interaction of idiosyncratic fact and *stare decisis* in the pursuit of a liberty or property interest, the practitioner must be alert to procedural hurdles and pitfalls that may sabotage appellate review of the merits of a case. The purpose of this section is to outline basic procedural requirements that will help to secure an audience for the advocate's written word; no attempt is made to offer technical advice as to effective appellate advocacy in creating or presenting the written word.[358]

The appellate rules caution litigants that noncompliance with the rules for filing the written documents may result in an abortive appeal. The prefatory rule to the specific briefing requirements states as follows:

> *Conformance with Requirements.*
>
> Briefs and reproduced records shall conform in all material respects with the requirements of these rules as nearly as the circumstances of the particular case will admit, otherwise they may be suppressed, and, if the defects are in the brief or reproduced record of the appellant and are substantial, the appeal or other matter may be quashed or dismissed.[359]

The appellate cases indicate that the failure to comply with the procedural rules can result in a number of drastic sanctions, including dismissal of the appeal, refusal of the appellate court to consider issues on their merits, or suppression of a brief.[360] At times, however,

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358. For such advice, see, for example, W. STATSKY & R. WERNET, JR., CASE ANALYSIS AND FUNDAMENTALS OF LEGAL WRITING (2nd ed. 1984) [hereinafter STATSKY & WERNET]. *See also* Godbold, *Twenty Pages and Twenty Minutes — Effective Advocacy on Appeal*, 30 SW. L.J. 801 (1976); Samuelson, *Good Legal Writing: Of Orwell and Window Panes*, 46 U. PITT. L. REV. 149 (1984); Tate, *The Art of Brief Writing: What a Judge Wants to Read*, 4 LITIGATION 11 (1978).

359. PA. R. APP. P. 2101, 2188 (consequence of failure to file briefs and reproduced record), *supra* notes 11 and 318; *see also* Ellsworth v. Bradford Dist., 52 Pa. Super. 603 (1913).

360. There are a number of appellate cases applying various sanctions depending upon the gravity of counsel's noncompliance with the rules. *See, e.g.*, Commonwealth v. Unger, 494

an appellate court has sternly cautioned against but excused noncompliance.[361] For purposes of introductory emphasis, the practitioner should observe the following guidelines as essential:

* Observe the factual limitations of the official record. Never assert or include nonrecord information.

* Be sure to specifically identify preliminarily each properly pre-

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Pa. 592, 595 n.1, 432 A.2d 146, 147 n.1 (1980) (inadequate statement of questions resulted in waiver); *In re* Estate of Smith, 492 Pa. 178, 181 n.2, 423 A.2d 331, 332 n.2 (1980) (failure to refer to record and general allusions to location of alleged error in record were inadequacies compelling conclusion that issues had no merit); Commonwealth v. Colbert, 476 Pa. 531, 534-35 n.1, 383 A.2d 490, 491 n.1 (1978) (issues not included in discussion portion of brief waived); Commonwealth v. Drew, ___ Pa. Super. ___, 510 A.2d 1244 (1986) (total noncompliance with rules governing brief's form and contents compelled quashing); Commonwealth v. Stoppie, 337 Pa. Super. 235, 486 A.2d 994 (1984) (warning that procedural violations would have justified quash); Commonwealth v. Gillespie, 333 Pa. Super. 576, 580-81, 482 A.2d 1023, 1024-25 (1984) (court refuses to consider merits of issues because questions in brief defined no specific issue for review and argument consisted of twenty numbered paragraphs amounting to bald assertions); Commonwealth v. Jones, 329 Pa. Super. 20, 477 A.2d 882 (1984) (garbled statement of questions and argument devoid of any substance, without citations or references, required appeal to be quashed); Commonwealth v. Duden, 326 Pa. Super. 73, 80, 473 A.2d 614, 618 (1984) (appellant's tacking on of ineffectiveness claims without presenting them in statement of questions resulted in waiver); Commonwealth v. Sanford, 299 Pa. Super. 64, 445 A.2d 149 (1982) (substantial defects in brief, including general rambling argument and nonspecific statement of issues, required appeal to be quashed); Commonwealth v. Harper, 292 Pa. Super. 192, 196 n.3, 436 A.2d 1217, 1219 n.3 (1981) (appellate court will not consider issues not addressed in briefs); Commonwealth v. Rozanski, 289 Pa. Super. 531, 433 A.2d 1382 (1981) (defendant waived objections to prosecutor's statements when defendant failed to cite to the record indicating where error occurred or how objection was preserved); Commonwealth v. Wyant, 254 Pa. Super. 464, 386 A.2d 43 (1978) (appeal quashed when brief set forth no issues for consideration, statement of case contained no condensed recitation of facts, and brief contained no summary of argument); Eisenberg v. Commonwealth, 86 Pa. Commw. 358, 362-63, 485 A.2d 511, 513-14 (1984) (in interests of judicial economy, appellate court invokes sanctions and refuses to consider issue not raised specifically or by implication in statement of questions presented); Wicker v. Civil Serv. Comm'n, 74 Pa. Commw. 548, 460 A.2d 407 (1983) (failure to posit statement of questions mandates appellate court's refusal to consider; when appellate court's ability to review is substantially impaired, court can quash brief or dismiss appeal); *In re* Appeal of Elias, 70 Pa. Commw. 404, 453 A.2d 372 (1982) (appellate court need not consider due process arguments not specifically identified as questions involved); cf. Appeal of Radio Broadcasting Co., 55 Pa. Commw. 147, 423 A.2d 444 (1980) (appellate court may suppress brief for failure to conform to rules of court, but there is no authority for suppressing appellee's brief).

361. *See, e.g.*, Big Knob Volunteer Fire Co. v. Lowe & Moyer Garage, 338 Pa. Super. 257, 260 n.1, 487 A.2d 953, 955 n.1 (1985) (noncompliance not so egregious as to justify suppression or dismissal); Fannin v. Cratty, 331 Pa. Super. 326, 337 n.8, 480 A.2d 1056, 1061 n.8 (1984) (noncompliance with statement of questions overlooked when issue was raised below and addressed by lower court); Commonwealth v. Bell, 328 Pa. Super. 35, 476 A.2d 439 (1984) (flagrant violation regarding statement of questions overlooked and issues addressed); Commonwealth v. Colon, 317 Pa. Super. 412, 464 A.2d 388 (1983) (substantial defects overlooked when appellate court can formulate precise issues preserved for appeal); McDaniel v. Southeastern Pa. Transp. Auth., 253 Pa. Super. 51, 53 n.3, 384 A.2d 971, 972 n.3 (1978) (counsel warned about factual misstatements in brief and potential sanction of suppression); cf. Commonwealth v. Tracy, 266 Pa. Super. 357, 404 A.2d 1328 (1979) (en banc) (remand for appointment of new counsel following submission of inadequate appellate briefs).

served[362] question presented for appellate review.

* Be specific in arguing the facts and points of law that are relevant to meaningful appellate review. Do not handicap the appellate court with excessive factual or legal generalities.

* Cite specifically to the lower court record to identify such matters as when an issue was presented, how it was resolved, or where evidence substantiating a fact can be found.[363]

* Timely file and serve the brief.

B. Briefs: Timetables

1. Appellant's Brief.—Generally, appellant's brief must be timely served and filed within forty days after the filing of the official lower court record in the appellate court or within such time specially specified by the appellate court.[364] The appellate prothonotary usually notifies the parties when the record was filed and when briefs are due.[365] The limited exception to this timetable occurs when appellant is proceeding on a "large record" basis.[366] The filing of a motion for continuance or extension does not operate as a suspension of appellant's briefing obligations.[367]

2. Appellee's Brief.—Appellee must file his brief within thirty days after service of appellant's brief.[368]

3. Reply Briefs: Submitted Cases and Cross Appeals.—Generally, a reply brief is permitted only if leave of court is obtained. If, however, the case is presented on a "submitted" basis

362. *See* PA. R. APP. P. 302 (requisites for reviewable issue), 1972(5) (dismissal for failure to preserve issues); PA. R. CRIM. P. 1123 (post-verdict motions); PA. R. CIV. P. 227 (exceptions), 227.1 (post-trial relief); *see also* Reilly by Reilly v. Southeastern Pa. Transp. Auth., 507 Pa. 204, 214-15, 489 A.2d 1291, 1296 (1985); Tagnani v. Lew, 493 Pa. 371, 426 A.2d 595 (1981); Commonwealth v. Gravely, 486 Pa. 194, 404 A.2d 1296 (1979); Dilliplaine v. Lehigh Valley Trust Co., 457 Pa. 255, 322 A.2d 114 (1974); Commonwealth v. Holmes, 315 Pa. Super. 256, 461 A.2d 1268 (1983); Carnicelli v. Bartram, 289 Pa. Super. 424, 433 A.2d 878 (1981).

363. *See* PA. R. APP. P. 2117(c) (statement of the case), 2119(c) (argument). Commonwealth v. Dozier, 294 Pa. Super. 249, 255 n.2, 439 A.2d 1185, 1188 n.2 (1982) notes that the better practice is to include specific references to the record of alleged errors and objections in both the Argument and Statement of Case sections of the brief.

364. *See* PA. R. APP. P. 2185(a) (time for serving and filing briefs).

365. *See* PA. R. APP. P. 1934 (filing of the record).

366. *See* PA. R. APP. P. 2185(a), (c); *see also* supra text accompanying notes 354-356.

367. *See* PA. R. APP. P. 1972 (dispositions on motion) and commentary.

368. *See* PA. R. APP. P. 2185(a) (time for serving and filing briefs.

(that is, without oral argument), appellant may file a reply brief.[369] Appellant is also permitted to file a reply brief in answer to the brief of the appellee on a cross appeal.[370] Likewise, in "submitted cases" without oral argument, appellee may file a reply brief to appellant's reply brief if the appellee has cross-appealed.[371] A reply brief, if permitted, must be filed within fourteen days of the preceding brief.[372] In all other situations, a party must request leave of court to file a reply brief.

C. Appellant's Briefs: Procedural Requirements

1. Length.—The substantive portions of appellant's brief cannot exceed fifty pages of conventional typographical printing or seventy pages of reproduction by any other duplicating process. Reply briefs, if permitted, must be limited to twenty-five pages conventional typographical or thirty-five pages by any other process.[373]

2. Contents and Arrangement.—The rules are precise as to the contents and sequential arrangement of briefs. Generally, appellant's brief must contain the following material, separately and distinctly identifiable in the following order:[374]

(a) The cover.[375]—The cover, which must be light enough to permit writing in ink to be discernible, must contain the following information: (1) name of the appellate court; (2) the appellate court docket number; (3) the caption of the case in the appellate court; (4) the title of the document (for example "Brief for Appellant," "Reply Brief of Appellant," "Brief for Appellant and Reproduced Record"); (5) a designation of the order appealed from (such as "Appeal from the Order of . . ."), including the lower court's docket number; and (6) the names, telephone numbers and addresses of counsel.

(b) Table of contents.[376]—The table should be placed either on

369. *See* PA. R. APP. P. 2113 (reply brief).
370. *See* PA. R. APP. P. 2136 (briefs in cases involving cross appeals).
371. *See* PA. R. APP. P. 2113 (reply brief).
372. *See* PA. R. APP. P. 2185(a) (time for serving and filing briefs).
373. *See* PA. R. APP. P. 2135 (length of briefs). These limits are exclusive of pages containing the table of contents, tables of citations, and any addendum containing opinions. *See also* Frisk v. The News Co., ___ Pa. Super. ___, ___ n.1, ___ A.2d ___, ___ n.1 (1986) (excessive length excused); Commonwealth v. Sirbaugh, 347 Pa. Super. 154, 500 A.2d 453 (1985) (expressing disapproval of excessive length of brief).
374. *See generally* PA. R. APP. P. 2111(a) (brief of the appellant).
375. *See generally* PA. R. APP. P. 2172 (covers).
376. *See* PA. R. APP. P. 2174(a), (c) (table of contents and citations), 2173 (numbering of pages).

the inside of the front cover or on the first and immediately succeeding pages, which should be numbered in roman numerals.

(c) Table of citations.[377]—This table follows the Table of Contents and should be arranged alphabetically. The pages, if numbered, should also be in roman numerals.

(d) Statement of appellate court's jurisdiction.[378]—An appellate court cannot decide an appeal unless it has jurisdiction, which may be based on statute or rule of court. The appellant, therefore, must include a precise citation to the authority conferring appellate jurisdiction.

(e) Order in question.[379]—The appellant must set forth the lower court's appealed order verbatim. In exceptional circumstances, if the appeal lies from the trial court's failure to act,[380] the appellant must so state and refer to the proper authority requiring action.

(f) Statement of question(s) involved.[381]—This rule, sometimes referred to as the "statement of issues presented" or "questions for review" is imperative because noncompliance can be fatal.

A recent text on the skills and technique of legal writing suggests that the statement of question or questions involved on appeal provides the first major opportunity for advocacy in the appellate brief. The statement of issues, the authors add:

> . . . is very much a tool of persuasion. The writer's statement of the issues will generally be the first thing that the judge will

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377. *See* PA. R. APP. P. 2174(b), (c), 2173.

378. *See* PA. R. APP. P. 2114 (statement of jurisdiction); *see also* Pines, *supra* note 1, at 75-139.

379. *See* PA. R. APP. P. 2115 (order or other determination in question). One of the immediate, beneficial consequences of this requirement is that the appellate court is often able to determine preliminarily and quickly whether the appellate court has, in fact, jurisdiction over the appeal and the general substance of the appealed order.

380. *See* PA. R. APP. P. 2115(b); *cf.* PA. R. APP. P. 301(e) (emergency appeals).

381. *See* PA. R. APP. P. 2116 (statement of questions involved). As a noted scholar has observed, parties in a conflict-solving legal process are the sovereign shapers of factual issues and must assume responsibility in the formulation of the legal issues. Judicial intervention in issue formulation may be viewed as both unwise and unfair in the adversarial process. "Whenever [the judge] expands the scope of the legal issues, potentially dispositive elements enter the case independent of party contest and the side disfavored by the adjudicator's pet theory may believe that the decision-maker has unfairly aided the adversary." M. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY 114 (1986). The author notes that such interference may undermine the integrity of the conflict-solving process. *See also* New Jersey v. T.L.O., 468 U.S. 1214, 1215-16 (1984) (". . . the adversary process functions more effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review").

> turn to in reading the brief. The manner in which the issues are phrased can have a significant impact upon his or her perspective in reading and evaluating the remaining portions of the brief.[382]

The appellate rules are precise in delineating the proper manner in which to present the questions for review. The appellate rules emphatically state as follows:

> (a) General rule. The statement of the questions involved must state the question or questions in the briefest and most general terms, without names, dates, amounts or particulars of any kind. It should not ordinarily exceed 15 lines, must never exceed one page, and must always be on a separate page, without any other matter appearing thereon. *This rule is to be considered in the highest degree mandatory, admitting of no exception; ordinarily no point will be considered which is not set forth in the statement of questions involved or suggested thereby.* Whenever possible each question must be followed immediately by an answer stating simply whether it was affirmed, negatived, qualified or not answered by the court or government unit below. If a qualified answer was given to the question, appellant shall indicate, most briefly, the nature of the qualification, or if the question was not answered and the record shows the reason for such failure, the reason shall be stated briefly in each instance without quoting the court or government unit below.[383]

One can perhaps appreciate the importance and stability of these specific requirements by looking back at the historical pronouncements of the superior and supreme courts in the early part of the twentieth century. In 1902, before criticizing two defective statements of questions, the superior court observed as follows:

> The object of such a statement is to give the court, at a glance, a comprehensive view of the case, so as to be able to follow intelligently the oral arguments which are valuable only as they present the points of law arising from the questions of fact which are fairly raised by the entire record.[384]

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382. *See* STATSKY AND WERNET, *supra* note 358, at 310-11. The persuasive impact of the statement of issues or questions presented, however, may be compromised given the Rule 2116(a)'s emphasis on generality and brevity.

383. PA. R. APP. P. 2116 (emphasis supplied). The same requirements were expressed by the supreme court in Seaman v. Tamaqua Nat'l Bank, 297 Pa. 294, 297-98, 147 A. 56, 57 (1929).

384. *See* Swisher v. Sipps, 19 Pa. Super. 43, 47-48 (1902); *see also* Commonwealth v. Cauffiel, 298 Pa. 319, 148 A. 311 (1929) (citing cases); Creaken v. Bromley Bros., 214 Pa. 15, 63 A. 195 (1906); Seaman v. Tamaqua Nat'l Bank, 297 Pa. 294, 147 A. 56 (1929).

The critical aspect of this part of the brief is evident by those appellate cases that have either dismissed appeals because of woefully deficient statements of questions or have refused to address issues that were not specifically identified in the "Statement of Questions" portion of the appellant's brief.[385] Occasionally, the appellate courts will overlook a violation of this rule, depending upon the circumstances of the case.[386] Nevertheless, the practitioner is cautioned that all questions sought to be reviewed must be separately and specifically identified by the "Statement of Questions."[387] The appellant may be precluded from presenting argument on questions and issues not properly identified.[388]

It is also important for the practitioner to realize that *selectivity of issues* is tactically preferable to indiscriminate assemblage of multitudinous issues. Too many issues in an appellate brief may be counterproductive because the sheer volume of such issues may diminish their importance and unduly jeopardize the quality of appellate attention. Addressing the special responsibilities of the appellate advocate, former Chief Justice Burger gave the following words of caution:

> Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. Justice Jackson, after observing appellate advocates for many years, stated:
>
> "One of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the sugges-

385. *See* Commonwealth v. Gillespie, 33 Pa. Super. 576, 482 A.2d 1023 (1984); Commonwealth v. Sanford, 299 Pa. Super. 64, 445 A.2d 149 (1982); Commonwealth v. Wyant, 254 Pa. Super. 464, 386 A.2d 43 (1978); Eisenberg v. Commonwealth, 86 Pa. Commw. 358, 485 A.2d 511 (1984); Wicker v. Civil Serv. Comm'n, 74 Pa. Commw. 548, 460 A.2d 407 (1983); *In re* Appeal of Elias, 70 Pa. Commw. 404, 453 A.2d 372 (1982).

386. *See* Fannin v. Cratty, 331 Pa. Super. 326, 480 A.2d 1056 (1984); Commonwealth v. Bell, 328 Pa. Super. 35, 476 A.2d 439 (1984). For a particularly troublesome case involving technical noncompliance with respect to a grave constitutional issue, see the majority, concurring, and dissenting opinions in Batson v. Kentucky, No. 84-6263 (U.S. Apr. 30, 1986). In another significant constitutional case, the Supreme Court openly declined to adopt the petitioner's formulation of issues. See Katz v. United States, 389 U.S. 347 (1967).

387. For an example of Statements and Counter-Statements of Questions, see DeFazio v. Labe, ___ Pa. Super. ___, ___ n.3, 507 A.2d 410, 412 n.3 (1986); Hodge v. Hodge, 337 Pa. Super. 151, 163 n.5, 486 A.2d 951, 957 n.5 (1984) (Wickersham, J., concurring and dissenting).

388. *See* Swaney v. George, 309 Pa. 385, 145 A. 338 (1932); Henning v. Keiper, 37 Pa. Super. 488, 495 (1908).

> tion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one . . . [E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one."[389]

(g) Statement of the case.[390]—Three specific constraints are imposed on the appellant in selecting the information to present in the "Statement of the Case." These restraints are relevance, substantiation, and balance.

The "Statement of the Case," often referred to as the "Statement of Facts," must contain five essential types of information. The "Statement" must include (1) a statement of the form of the action, followed by a brief procedural history of the case; (2) a brief statement of any prior determination of any court and, if reported, where such determinations can be found; (3) names of the judges whose determinations are to be reviewed; (4) a "closely condensed chronological statement, in narrative form, of all the facts which are necessary to be known in order to determine the points in controversy,"[391] substantiated by appropriate references to the record; and (5) a brief statement of the order under review. The statement of the case cannot contain any argument[392] or nonrecord facts.[393]

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389. Jones v. Barnes, 463 U.S. 745, 751-52 (1983) (quoting Jackson, *Advocacy Before the United States Supreme Court*, 25 TEMP. L. Q. 115, 119 (1951)); *see also* United States v. Hart, 693 F.2d 286, 287 n.1 (3d Cir. 1982), in which Judge Higginbotham states as follows:

> Because of the inordinate number of meritless objections pressed on appeal, spotting the one bona fide issue was like finding a needle in a haystack. One of our colleagues has recently cautioned on the danger of "loquaciousness":
>
> > With a decade and a half of federal appellate court experience behind me, I can say that even when we reverse a trial court it is rare that a brief successfully demonstrates that the trial court committed more than one or two reversible errors. I have said in open court that when I read an appellant's brief that contains ten or twelve points, a presumption arises that there is no merit to any of them. I do not say that it is an irrebuttable presumption, but it is a presumption nevertheless that reduces the effectiveness of appellate advocacy. Appellate advocacy is measured by effectiveness, not loquaciousness.
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> Aldisert, *The Appellate Bar: Professional Competence and Professional Responsibility — A View From the Jaundiced Eye of One Appellate Judge*, 11 CAP. U. L. REV. 445, 458 (1982).

See also Commonwealth v. Sirbaugh, ___ Pa. Super. ___, 500 A.2d 453 (1985); Commonwealth v. Bell, 328 Pa. Super. 35, 41-43, 476 A.2d 439, 443 (1984).

390. *See* PA. R. APP. P. 2117(a) (statement of the case).

391. *Id.* (emphasis supplied).

392. *See* PA. R. APP. P. 2117(b).

393. *See, e.g.*, Daniels Co. v. Nevling, 385 Pa. 276, 122 A.2d 814 (1956); First Nat'l Bank v. Bosler, 297 Pa. 7, 146 A. 145 (1929); Solomon v. Corlette, 20 Pa. Commw. 361, 340 A.2d 920 (1975); *see also supra* text accompanying notes 232-277 regarding the original, official record concept.

Many practitioners recognize that the statement of the case is often strategically important as to the fourth type of information, the closely condensed chronological statement of facts. Justice Jackson of the United States Supreme Court once remarked as follows:

> It may sound paradoxical, but most contentions of law are won or lost on the facts. The facts often incline a judge to one side or the other. A large part of the time of conference is given to discussion of the facts, to determine under what rule of law they fall. Dissents are not usually rooted in disagreement as to a rule of law but as to whether the facts warrant its application.[394]

The advocate's winnowing of record facts is not only strategically important but also functionally necessary. Thomas Marvell's analysis of the appellate process points out that

> A dispute brought to the courts is likely to involve an extremely large number of fact details, but only a tiny portion is relevant to a trial court decision and even fewer to an appellate decision. The work load and efficiency of appellate courts depend greatly on the ability of counsel to condense and winnow the facts, a process that takes place all during the history of a particular litigation. The great bulk is done before the appellate level; the lawyers select the facts they think will help their sides at trial, and the trial judge further limits the facts by applying the rules of evidence and, in general, trying to retain only facts that make a difference under the law and that help him or the jury decide the case . . . .
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> Appellate judges, then, are overloaded with factual information; they do not have time to read the record in each case they hear, and they must rely on others — on counsel, colleagues, and the court staff — to condense it.[395]

The condensation of facts is an important and difficult task subject to two essential attributes — relevance and balance. The appel-

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394. Jackson, *Advocacy Before the United States Supreme Court*, 37 CORNELL L.Q. 1, 6 (1951). STATSKY & WERNET, *supra* note 358, at 316, offers the following advice:

> The facts in the brief must be based upon the record below. You should attempt to describe them in a clear, concise, and easy-to-read fashion. Avoid tedious and unnecessary inventories of the transcripts and exhibits, and attempt to translate the evidence and findings into a vivid narrative which will hold the reader's interest and attention . . . . [B]e selective and critical about the portions of the record you choose to incorporate into your statement of facts. Unnecessry detail will only make the facts difficult to read and comprehend. Above all, be accurate . . . . False or misleading statements of fact, or omission of an important but adverse fact, may well cause the court to question the accuracy and reliability of your entire brief.

395. T. MARVELL, *supra* note 232, at 167-68.

late rule not only requires a concise presentation of all relevant facts, but also "a balanced presentation of the history of the proceedings and the respective contention of the parties."[396] In this regard, Thomas Marvell's following comment may help to underscore the importance of a balanced presentation, which, as he notes, represents a limited attempt to temporarily suspend the adversarial process:

> In the judges' writings on appellate advocacy, the great majority who discussed the presentation of facts cautioned against bias or excess argumentation, particularly in the briefs. For example, Judge Tuttle said, "Nothing more quickly generates in the minds of the judges complete confidence in the lawyer's advocacy than an accurate, well-documented statement of facts — facts that hurt as well as facts that help his cause."[397]

Furthermore, since the appellate courts seek to assure that their time and energy are not needlessly wasted in reviewing issues that were not properly preserved,[398] the appellant must specifically substantiate, that is, identify how, where, and when the proferred issues were presented and disposed of in the court below.[399] Thus, the appellant's

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396. *See* PA. R. APP. P. 2117(b).

397. T. MARVELL, *supra* note 232, at 169 (quoting Tuttle, Book Review, 33 MISS. L.J. 147 (1961)); *see also supra* note 394. Nevertheless, Thomas Marvel notes that judges will often resort to reading the record themselves rather than relying on counsel's condensation of the facts. The conflict resolving aspect of the adversarial system is thus, to some extent, compromised. T. MARVELL, *supra* note 232, at 170.

398. *See supra* note 362.

399. PA. R. APP. P. 2117(c) provides as follows:

> (c) *Statement of place of raising or preservation of issues.*
>
> Where under the applicable law an issue is not reviewable on appeal unless raised or preserved below, the statement of the case shall also specify:
>
> (1) The stage of the proceedings in the court of first instance, and in any appellate court below, at which, and the manner in which, the questions sought to be reviewed were raised.
>
> (2) The method of raising them (e.g., by a pleading, by a request to charge and exceptions, etc.).
>
> (3) The way in which they were passed upon by the court.
>
> (4) Such pertinent quotations of specific portions of the record, or summary thereof, *with specific reference* to the places in the record where the matter appears (e.g., ruling or exception thereto, etc.) as will show that the question was timely and properly raised below so as to preserve the question on appeal.
>
> Where the portions of the record relied upon under this subdivision are voluminous, they shall be included in an appendix to the brief, which may, if more convenient, be separately presented (emphasis supplied).

See also Commonwealth v. Dozier, 294 Pa. Super. 249, 255 n.2, 439 A.2d 1185, 1188 n.2 (1982) (better practice is to include specific references to errors and objections in the record in both the argument and statement of the case sections of the brief); Commonwealth v. Rozanski, 289 Pa. Super. 531, 545-46, 433 A.2d 1382, 1390 (1981) (defendant waived objections to alleged errors when he failed to advise appellate court where such errors and objections occurred in the record).

duty of substantiation in the "Statement of the Case" is two-fold: substantiation of essential record facts and substantiation of procedural preservation.

(h) Summary of argument.[400]—The attorney should, with clarity and brevity, summarize the arguments presented. The summary should (1) not be a mere repetition of the statement of questions presented, (2) not exceed one page, and (3) never exceed two pages. As the commentary notes, the summary of argument assists the appellate court in following oral argument.

(i) The argument.[401]—The persistent preoccupation with procedural propriety can easily cause one to lose sight of the focal point of the appeal, the appellant's argument. The appellant's argument is really what the appeal is all about. The appellant's argument is the climactic point in the appeal when the appellant has the opportunity to address the appellate audience by exposing grievances and exhorting. The argument section of the brief, as one author explained:

> is the core of the appellate brief. It is in this component that the parties present and analyze what they believe to be the controlling authorities on each issue presented in the brief and urge that the court adopt their analysis and conclusions on those questions. The argument constitutes the bulk of the brief and . . . is also the most highly structured. The text of the argument is broken down into major sections, with each section representing the party's analysis and discussion on a separate issue in the brief. Each section begins with an identifying label called a *point heading*. The point heading represents the party's assertion of the conclusion which it wants the court to adopt on that issue.[402]

Consistent with this approach, the appellate rules state that the argument should be divided into as many sections as there are questions addressed, each with a distinctive heading.[403] The argument should contain a discussion and citation of authorities.[404]

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400. *See* PA. R. APP. P. 2118 (summary of argument).
401. *See* PA. R. APP. P. 2119 (argument).
402. STATSKY AND WERNET, *supra* note 358, at 318 (emphasis in original).
403. PA. R. APP. P. 2119(a) (argument).
404. *See, e.g.*, Duggan v. Baltimore & O. R. Co., 159 Pa. 248, 256, 289 A. 182, 185-86 (1893) (relevant and material Pennsylvania cases receive precedence). For cases on the precedential effect of opinions, see Mt. Lebanon v. County Bd. of Elections, 470 Pa. 317, 368 A.2d 648 (1977); Commonwealth v. Mason, 456 Pa. 602, 322 A.2d 357 (1974); Commonwealth v. Silverman, 442 Pa. 211, 275 A.2d 308 (1971); Commonwealth v. Brown, 328 Pa. Super. 207, 476 A.2d 965 (1984).

The "Argument" portion is also subject to the constraints of substantiation that were relevant to the "Statement of the Case."[405] If reference is made to the pleadings or record, the argument must contain information concerning the precise location of such material in the record. Likewise, the appellant must provide essential references to indicate that the issues were properly preserved. In this regard, appellant may simply rely on the prior references contained in the "Statement of the Case"[406] or refer specifically to the record.

It is important for the practitioner to note that issues not adequately developed and discussed in the brief will not be considered by the appellate court.[407]

(j) Conclusion.—The conclusion should concisely state the specific relief sought.[408]

(k) Opinions and pleadings.—The final section of appellant's brief should include any opinion of the lower court that is pertinent to the issues and orders under review.[409] If an opinion has been reported, the appropriate citation must be given.[410]

D. Appellee's Brief

The appellee's brief only needs to contain (1) a summary of argument and (2) a complete argument.[411] The previous procedural specifications governing these two sections are equally applicable to the appellee.[412] The appellee, however, may add a "Counterstatement of the Questions Involved" and a "Counterstatement of the Case."[413] The prior requirements of specificity, substantiation, and relevance are arguably applicable to the appellee. If the appellee does not present such counterstatements, the appellate court will as-

405. PA. R. APP. P. 2119(e) (argument; place of preservation of issues); *see also supra* note 399.

406. PA. R. APP. P. 2119(e) states that the appellant can "cross reference to the page or pages of the statement of the case which set forth the information relating thereto." *See also infra* text accompanying notes 419-421.

407. *See, e.g.*, Cosner v. United Penn Bank, ___ Pa. Super. ___, 517 A.2d 1337 (1986); Commonwealth v. Sanford, 299 Pa. Super. 64, 445 A.2d 149 (1982); Commonwealth v. Harper, 292 Pa. Super. 192, 436 A.2d 192 (1981).

408. PA. R. APP. P. 2111(a)(7) (brief of the appellant).

409. *See* PA. R. APP. P. 2111(a)(8), (b) (brief of the appellant).

410. *See also* PA. R. APP. P. 2133 (citations in opinions below).

411. *See* PA. R. APP. P. 2112 (brief of the appellee).

412. *See* PA. R. APP. P. 2118 (summary of argument), 2119 (argument); *see also supra* text accompanying notes 400-407.

413. *See, e.g.*, Green v. Green, 255 Pa. 224, 231-32, 99 A. 801, 803-04 (1916); Hodge v. Hodge, 337 Pa. Super. 151, 486 A.2d 951 (1984).

sume that the appellee is satisfied with appellant's recitation of the unchallenged statements.

If the appellant has waived issues, either by not specifically or properly raising them in the lower court or by failing to properly preserve them in his brief, the appellee should clearly address such issue preservation in his brief.[414] The appellate court will then be in a better position to focus its attention on the merits of the remaining issues that are amenable to appellate resolution.

E. Briefs in the Supreme Court[415]

On a further appeal to the supreme court from the superior or commonwealth court, the parties may utilize the same briefs (with a new cover) or prepare new briefs. The appellant should set forth the following: the order allowing the appeal; the opinion and dissenting opinions, if any, of the appellate court below, including information regarding whether such opinions were reported; and any additional argument. The appellee may also submit the prior or new brief and provide additional argument.

F. Briefs by Amicus Curiae

Although the lack of aggrievement and party status may prevent one from filing a notice of appeal, anyone "interested" in the questions involved in an appeal may participate by filing an amicus curiae brief.[416] If an amicus curiae is adopting appellant's position, for example, to reverse, then the amicus brief must be filed in the same manner and number as required by the rules for an appellant's brief. The same procedure applies if the amicus is adopting an appellee's position to affirm. If the amicus does not support the position of any party, the amicus must file its brief in the same manner as applicable to the appellant.[417]

G. Briefs: Style

1. Reference to Parties.[418]—The parties preferably should not

414. *See* PA. R. APP. P. 302 (requisites for reviewable issue), 1972 (motion to dismiss for failure to preserve issues for review); *see also supra* note 362.

415. *See* PA. R. APP. P. 2139 (briefs on appeals from the superior or commonwealth courts).

416. *See* PA. R. APP. P. 531 (participation by amicus curiae); supra notes 183-185; *see also* Drislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1963); Pines, *supra* note 1, at 68.

417. *See* PA. R. APP. P. 531(a) (participation by amicus curiae).

418. *See* PA. R. APP. P. 2131 (references in briefs to parties).

be referred to as "appellant" and "appellee." Such references should be kept to a minimum. The parties should use the actual or descriptive names of the parties or the designations used by the court below (for example, "the employee," "the injured person").

2. References to the Record.[419]—References to the unreproduced original record should be to the pleading or document and the page (for example, "Motion for Summary Judgment, p.2," "Notes of Testimony, 9/11/86, pp. 24-26" or "Trial Transcript pp. 279-280"). As was indicated previously, references to the record are important to secure meaningful appellate review of the issues and noncompliance can be fatal.[420]

3. References to the Reproduced Record.—References should be to the pages in the reproduced record where the designated material appears (for example, "R.26a").[421]

4. Citations.[422]—Citations of authorities must set forth the principle for which they are cited. Reference to the Pennsylvania statutes may be in the following form: "1 Pa. C.S. § 1928 (rule of strict and liberal construction)." Quotations must be identified by a page reference. Opinions must, if applicable, include citations from the National Reporter System (for example, "____ A.2d ____") and to the official appellate court reports (for example, "____ Pa. ____"), including dates.

H. Sanctions: Untimely Filing[423]

If the appellant fails to timely file his brief, his appeal may be dismissed. Appellee's tardy filing of his brief precludes that party from oral argument.

VII. Summary and Appellate Checklist

The filing of briefs, of course, does not represent the termination

419. *See* PA. R. APP. P. 2132(b) (reference in briefs to the unreproduced record); *see also* Hodge v. Hodge, 337 Pa. Super. 151, 486 A.2d 951 (1984).

420. *See supra* note 399.

421. *See* PA. R. APP. P. 2132(a) (references in briefs to the record).

422. *See* PA. R. APP. P. 2119(b) (argument; citation of authorities).

423. *See* PA. R. APP. P. 2188 (consequence of failure to file briefs and reproduced record); *see also supra* notes 333-334 regarding timely filing of reproduced record; *but see* Peterson v. Philadelphia Suburban Transp. Co., 435 Pa. 232, 255 A.2d 577 (1969) (noting, in context of excused illness, that the requirement of timely filing is not only based on courtesy, but also it is important to appellate review); Appeal of Riley, 77 Pa. Commw. 191, 192-93 n.2, 466 A. 2d 236, 238 n.2 (1983) (untimely filing excused).

of the appellate process. Significant events, both before and after an appellate decision, may occur. Once the briefs are filed, for example, the parties must ordinarily prepare for those compact, pressure-filled moments when the appellate court entertains the oration phase of appellate advocacy.[424] As a general rule, however, after the argument of the case or submission[425] of the case to the appellate court without oral argument, the parties cannot submit any further briefs or memoranda without authorization of the court.[426] An orderly and fair decision-making process recognizably requires that there be some definitive point when the parties' informational input must terminate so that the deliberative stage can begin.

In the absence of a further appeal as of right to a higher appellate tribunal[427] and after an appellate decision, the parties nevertheless have two limited options for further review: (1) reargument or reconsideration before the same appellate tribunal or an en banc court[428] and (2) review by the supreme court upon the granting of an application for allowance of appeal (commonly referred to as allocatur).[429] Such further review is fundamentally a rare occurrence. Generally, one who seeks such extraordinary review must file a timely application[430] and demonstrate compelling, special or important reasons.[431] The commentary to the relevant procedural rule on rearguments, for example, indicates that a compelling reason may exist where a panel decision is inconsistent with another decision, the

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424. *See* PA. R. APP. P. 2311 to 2323. Oral argument is not a matter of right. *See* PA. R. APP. P. 2315(a). As for sanctions, if an appellant is not ready for oral argument, the court may dismiss the case. See PA. R. APP. P. 2314. There is no specific sanction for an unprepared appellee.

425. *See* PA. R. APP. P. 2311. The parties may agree to submit an appeal without oral argument. Also, as a general rule, post conviction hearing cases are submitted on briefs without oral argument.

426. *See* PA. R. APP. P. 2501. There is an exception, however, when an authority relied upon has been undermined or significantly affected during the post-argument phase. See PA. R. APP. P. 2501(b).

427. *See*, for example, PA. R. APP. P. 1101, regarding appeals as of right from the commonwealth court, and 42 PA. CONS. STAT. ANN. § 723 (Purdon 1981).

428. *See generally* PA. R. APP. P. 2541 to 2547 (reargument) and 3103 (court en banc). *See also* Internal Operating Procedures of the Commonwealth Court of Pennsylvania, Rule 291, and Internal Operating Procedures of the Superior Court of Pennsylvania, V(10 and 11).

429. See PA. R. APP. P. 1111 to 1123. See also 42 PA. CONS. STAT. ANN. § 724 (Purdon 1981), cited in Pines, *supra* note 1 at 141-142.

430. A petition for reargument/reconsideration must be filed within 14 days after the entry of the appellate court's judgment or order. A petition for allowance of appeal must be filed in the supreme court within 30 days of the entry of the lower appellate court's order sought to be reviewed. *See* PA. R. APP. P. 2542 (reargument) and 1113(a) (petition for allowance of appeal).

431. *See* PA. R. APP. P. 1114 (petition for allowance of appeal) and 2543 (reargument). *See also* Internal Operating Procedures of the Superior Court of Pennsylvania, *supra* note 428.

appellate court overlooked or misapprehended a material fact of record or directly relevant authority, or the appellate court relied on directly relevant authority which has been reversed, modified or overruled.[432]

The preceding discussion and analysis should have suggested the complexity and importance of the precise rules that attempt to ensure a rational and orderly process governing the informational input of an appeal prior to the climactic decision of the appellate court. A summarization of the appellate stages discussed would be a feckless venture. One can truly appreciate and understand the significance of the procedural precepts by reviewing this commentary, reading the rules with caution, and applying the knowledge gained into practice. Nevertheless, a capsulization of the major appellate stages and their governing considerations may assist the practitioner or student. The following "Appellate Checklist" is thus offered as a retrospective review or recapitulation of the pivotal considerations that the parties should have addressed in preparing their legal and factual scenarios for the appellate court's review.

FILING THE NOTICE OF APPEAL

1. *Timely filing*: Was the notice of appeal timely filed in the lower court within the requisite time period measured from the lower court's date of entry of the appealed order?[433] Was the requisite time to appeal tolled by an express and timely grant of reconsideration by the lower court?[434]

2. *Appellate Jurisdiction*: Was the lower court's order jurisdictionally appealable as a final order or an interlocutory order made appealable by statute or rule of court?[435] Is there a need to secure the formal entry of a judgment on the lower court's docket?[436]

3. *Entry of Order*: Was the lower court's order formally and properly entered on the docket of the lower court with notice to the parties?[437]

4. *Accurate notice of appeal*: Did the notice(s) of appeal accurately describe the parties and the precise order(s) to be reviewed by

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432. *See* the official note to PA. R. APP. P. 2543 (considerations governing allowance of reargument).

433. *See* PA. R. APP. P. 108 (date of entry of orders). *See also supra* sections II(A)(1, 4 and 5).

434. *See supra* sections II(A)(4)(c and d).

435. *See* Pines, *supra* note 1 at 75-139; *see also supra* section II(A)(2).

436. *See supra* section II(A)(2).

437. *See* PA. R. APP. P. 108, PA. R. CIV. P. 236, and PA. R. CRIM. P. 9024. *See also supra* section II(A)(1).

the appellate court?[438]

5. *Separated document*: If there is more than one order to be reviewed, has a separate notice of appeal been filed for each appealable order?[439]

6. *Standing, aggrievement*: Is the person appealing an aggrieved party with standing to appeal the adverse order?[440]

7. *Designation of appellate forum*: Did the notice of appeal designate the proper appellate forum for the appeal (otherwise, a transfer to the appropriate appellate forum may be necessary)?[441]

8. *Procedural requirements*: Have contemporaneous procedural requirements (e.g., filing fees, filing of a transcription order, proof of service, copy of docket entries) and service of interested individuals (parties, lower court judge, court reporter, district court administrator) been satisfied?[442]

9. *Cross-appeal*: If the opposing party (the appellee) wishes to separately challenge a separately appealable adverse order, has a separate cross appeal been timely filed in the lower court?[443]

10. *Exceptional circumstances to obtain appellate participation*: If a timely appeal has not been filed, are there grounds (a) for an aggrieved party to seek an appeal out of time (that is, *nunc pro tunc*)[444] or (b) for an interested non-party to participate as an amicus curiae?[445]

INTERIM STATEMENTS BEFORE TRANSMISSION OF OFFICIAL RECORD

1. *Appellant's statement*: If appellant has been directed by the lower court judge or by rule of court, has appellant filed a concise "statement of matters complained of" in the lower court for the purpose of identifying the issues and errors to be raised on appeal and addressed in the lower court's opinion? If the appellant has failed to comply, is effective appellate review defeated, thereby precluding appellate consideration of issues not previously identified?[446]

2. *Lower court's statement*: Has the lower court prepared and filed a brief statement, in the form of an opinion, explaining its rea-

438. *See supra* section II(A)(3).
439. *See supra* section II(A)(1).
440. *See* Pines, *supra* note 1 at 62-75.
441. *See supra* section II(A)(5).
442. *See supra* sections II(A)(6 and 7).
443. *See supra* section II(B).
444. *See supra* section II(A)(4)(d).
445. *See supra* section II(B)(2).
446. *See supra* section III(A).

sons for rulings on the matters to be raised in the appeal, or specified where in the record such reasons can be found? Is the lower court's statement or opinion adequate for appellate review of the issues raised on appeal?[447]

TRANSCRIPTION AND TRANSMISSION OF OFFICIAL RECORD TO THE APPELLATE COURT

1. *Transcription*: Have the lower court, court stenographer, and the parties taken the necessary steps to secure the timely[448] transcription and filing of the official lower court record (as defined by Rule 1921) so that the appeal can proceed expeditiously to the briefing and argument stages in the appellate court?[449] If necessary, was a "transcript order" filed, served, and deposit paid?[450]

2. *Transmission*: Has an adequate, complete, and certified record been timely transmitted from the lower court to the appellate court WITHOUT inclusion of any matter that was not filed or not formally made part of the official record?[451]

3. *Adequacy of transmitted record*: If the official record from the lower court is technically incomplete, does it nevertheless provide an "equivalent picture" or an "agreed statement" of what occurred in the court below sufficient for appellate review purposes? Is there a need for supplementation, correction, or modification of the official record? Or is the transmitted official record so inexcusably inadequate as to warrant an appellate court to dismiss the appeal or conclude that the issues are waived?[452]

4. *Accuracy of record*: If there is a transcription dispute as to a material fact, was the lower court properly notified and given an opportunity to resolve the dispute? If not, are there adequate grounds to seek an appellate remand to expeditiously resolve the dispute?[453]

REPRODUCED RECORD

1. *Designation*: After the transmittal of the official record to the

447. *See supra* section III(B).

448. *See* PA. R. APP. P. 1922(a) (transcription of notes of testimony).

449. *See supra* section IV(B).

450. *See supra* section IV(B)(2). See also PA. R. APP. P. 904(c) and 1911 (order for transcript.

451. *See* PA. R. APP. P. 1931(c) (transmission of the record); and *supra* section IV(A) and (C).

452. *See supra* sections IV(A)(2 to 5) and (B)(4). *See also* PA. R. APP. P. 1911(d) (order for transcript), 1923 (statement in absence of transcript), 1924 (agreed statement of record), 1926 (correction or modification of record), 1972 (disposition on motion) and 105 (waiver and modification of rules).

453. *See* PA. R. APP. P. 1922 (transcription of notes of testimony), 1926 (correction or modification of record) and *supra* section IV(B)(5).

appellate court, have the parties, in preparation for the filing of the reproduced record, (a) selected and designated those portions of the official record to be reproduced in the booklet accompanying appellant's brief and (b) identified those issues which will be presented in the briefs for appellate review? Has appellant filed the "designation statement" in the appellate court? If desirable, has the appellee filed a counter or supplemental designation statement?[454]

2. *Contents*: Does the reproduced record contain the necessary subject matter (e.g., docket entries and relevant portions of the pleadings, charge or findings) WITHOUT the inclusion of any non-record, unfiled information?[455]

3. *Procedural*: Has the reproduced record been timely filed with service on the parties?[456]

4. *Special supplementation*: If the parties have disagreed on the contents of the reproduced record, should the appellee have considered the advisability of preparing and filing a supplemental reproduced record?[457]

5. *Costs*: If there is inclusion of unnecessary material in the reproduced record, would a timely application to the appellate court for taxation of costs be advisable?[458]

BRIEFS

1. *Appellant*: Does appellant's brief conform to the critical procedural requirements and limitations (e.g., exclusion of non-record information or assertions, selective and specific identification of issues/questions presented for appellate review, specific identification and substantiation of where/how/when appellate issues were preserved in the lower court, specific argumentation of facts and law concerning those issues previously identified for appellate review, and adherence to typographical and sequential arrangement and length specifications)?[459]

Has appellant's brief, along with the reproduced record, been timely

454. *See supra* section V(B)(2).
455. *See* PA. R. APP. P. 2151-2156 (reproduced record) and supra section V(B) and (D) generally.
456. *See supra* section V(B)(11).
457. *See supra* section V(C).
458. *See supra* section V(B)(12).
459. *See supra* section VI(A), (B)(1), and (C).

filed, with service on the parties?[460]

2. *Appellee*: Does appellee's brief contain the minimal requirements of a summary of argument and argument? Did appellee's position strategically require an additional counter-statement of questions involved or a counter-statement of the case?[461]

3. *Reply*: Were the parties entitled to file reply briefs (e.g., when the case is "submitted" without oral argument[462] or when the appellee has filed a cross-appeal)?[463]

4. *Sanctions*: If a party has failed to comply with essential procedural requirements (e.g., timely filing, inclusion of only record information, identification and preservation of issues), are sanctions (e.g., dismissal, waiver, preclusion of oral argument) appropriate?[464]

460. *See supra* section VI(B).

461. *See supra* section VI(D).

462. *See* PA. R. APP. P. 2311 (submission on briefs).

463. *See supra* section VI(B)(3).

464. See PA. R. APP. P. 123 (applications for relief), 301 (requisites for an appealable order), 302 (requisites for reviewable issue), 903 (time for appeal), 1921 (composition of record on appeal), 1972 (disposition on motion), 2101 (conformance with requirements), 2185 (time for filing and serving briefs) and *supra* section VI(H).