Fall 1978

The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure

John Sobieski

TENNESSEE LAW REVIEW

Volume 46 Fall 1978 Number 1

THE PROCEDURAL DETAILS OF THE PROPOSED TENNESSEE RULES OF APPELLATE PROCEDURE

JOHN L. SOBIESKI, JR.*

* B.S., Loyola University (Chicago); J.D., University of Michigan; Associate Professor of Law, University of Tennessee; Reporter, Tennessee Supreme Court Advisory Commission on Civil Rules.

Although the author served as Reporter to the Tennessee Supreme Court Advisory Commission on Civil Rules in the preparation of the proposed appellate rules, the views expressed in this article are personal and enjoy no other status.

I. INTRODUCTION

An earlier article set forth the theoretical foundations of the proposed Tennessee Rules of Appellate Procedure,[1] which if approved by the General Assembly will govern procedure in proceedings before the Tennessee Supreme Court, Court of Appeals, and Court of Criminal Appeals.[2] Only incidental attention was given in that article to the procedural details of the rules. In part, this deemphasis on matters of detail is attributable to the under-

1. Sobieski, *The Theoretical Foundations of the Proposed Tennessee Rules of Appellate Procedure*, 45 TENN. L. REV. 161 (1978). The proposed appellate rules, official forms, and amendments to the Tennessee Rules of Civil Procedure are set forth in an appendix to the cited article. *Id.* at 271-349. Although there have been some changes in the proposed rules since publication of the earlier article concerning them, most of the changes are highly technical. The more substantive changes are indicated in this article.

2. PROPOSED TENN. R. APP. P. 1. The Advisory Commission comment to rule 1 notes that none of the rules affects the allocation of subject-matter jurisdiction among the appellate courts. That comment also states that "[n]othing in these rules . . . is intended to affect substantive rights, and all the rules must be construed consistently with the constitutions of the United States and the state of Tennessee."

lying spirit of the proposed rules, which views procedure not as a battle of "bright or dull wits . . . on witless technicalities"[3] but as a practical means to an end. As stated in proposed rule 1, "[t]hese rules shall be construed to secure the just, speedy, and inexpensive determination of every proceeding on its merits." A number of other rules reflect this same spirit.[4] Most notably, under rule 2 the appellate courts may suspend for good cause the requirements or provisions of any of the rules and may order proceedings in accordance with their discretion, subject to the limitation that the time for seeking appellate review in certain circumstances may not be lengthened.[5] In addition, numerous other rules simplify current law by eliminating technicalities of little or no contemporary utility—technicalities that have survived from "blind imitation of the past."[6] In short, the proposed rules both simplify current practice and insist upon strict conformity with procedural details only insofar as necessity requires.

The procedural details of the proposed rules, however, are matters of significant and legitimate concern and are the focal point of this discussion. While it would be gratifying if the appellate courts and the attorneys who regularly practice before them found this discussion useful, it is intended principally for the benefit of those who are only occasionally involved in the appellate process. This is not an exhaustive treatment of the procedural details of the proposed rules, but all those matters of detail ordinarily involved in seeking appellate review are discussed.[7]

---

3. R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 15 (1970).

4. *See* Sobieski, *supra* note 1, at 169-70.

5. *See* text accompanying note 592 *infra*. The Advisory Commission comment to rule 2 notes that conferring power on the appellate courts to suspend the requirements or provisions of the proposed rules in a particular case is the result of two principal considerations.

> These rules, as do most rules of law, necessarily speak in somewhat general terms. Otherwise, the rules would be overburdened with qualifications, exceptions, specifications, and provisos. In addition, no draftsman or body of draftsmen can possibly foresee all the situations life may churn up. This rule, therefore, permits the necessary individualization of the law in particular cases, and provides the source of authority for the courts to formulate law in situations not currently foreseeable.

See Sobieski, *supra* note 1, at 174-79.

6. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

7. The conclusion of this article contains checklists of steps to be taken

Like the rules themselves, the discussion is arranged insofar as possible in a chronological fashion, providing a step-by-step description of the evolution of the appellate process from initiation until final disposition—and a little bit beyond as well.[8]

II. Initiation of an Appeal

A. *Appeal as of Right*

The proposed appellate rules characterize virtually all plenary appellate proceedings as "appeals"[9] and establish two types of appeals: appeals as of right and appeals by permission. An appeal as of right, as defined in rule 3(d), "is an appeal that does not require permission of the trial or appellate court as a prerequisite to taking an appeal." In civil actions every final judgment is appealable as of right,[10] and rules 3(b) and 3(c) delineate the circumstances in which the defendant and the state may appeal as a matter of right in criminal actions.[11]

An appeal as of right is initiated by filing, generally within thirty days after the date of entry of the judgment appealed from, a notice of appeal with the clerk of the trial court.[12] The thirty-

---

on an appeal as of right from the trial court, an interlocutory appeal by permission from the trial court, and an appeal by permission to the supreme court from a final decision of an intermediate appellate court. *See* text accompanying notes 616-50 *infra*.

8. *See* text accompanying notes 550-53 *infra*.

9. Direct review of administrative proceedings by the court of appeals is not referred to in proposed rule 12 as an "appeal" but as a "review proceeding." The Advisory Commission comment to that rule notes that rule 12 was formulated so as not to conflict with the terminology of the Tennessee Uniform Administrative Procedures Act. *See* Tenn. Code Ann. §§ 4-507 to 527 (Cum. Supp. 1977). In most respects, however, a review proceeding under rule 12 is substantially the same as an appeal as of right. *See* text accompanying notes 112-19 *infra*.

10. Proposed Tenn. R. App. P. 3(a). As discussed in subsequent sections of this article, the proposed rules also establish a number of summary appellate proceedings available as a matter of right. *See* text accompanying notes 149-56, 171-80 & 574 *infra*.

11. For a discussion of when an appeal may be taken as of right, see Sobieski, *supra* note 1, at 216-17, 227-31.

12. Proposed Tenn. R. App. P. 3(e), 4(a). *See also* ABA Commission on Standards of Judicial Administration, Standards Relating to Appellate Courts § 3.13(a)-.13(b) (1977) [hereinafter cited as Appellate Court Standards].

day period applies uniformly to all appeals.[13] The Advisory Commission comment to rule 4 notes that "[t]hirty days is sufficient time particularly in light of the fact that a party is required to do nothing to initiate the appellate process except file and serve notice of appeal." If an expedited decision on any matter is desirable, "notice of appeal may be filed and served immediately upon entry of the judgment appealed from, and an expedited schedule of appellate review may be established as permitted by rule 2."[14]

The notice of appeal required by rule 3(e) specifies the party taking the appeal, the judgment from which relief is sought, and the court to which the appeal is taken.[15] Neither the issues presented for review nor the argument in support of the issues need be set forth in the notice of appeal.[16] Moreover, under the current revision of proposed rule 3(f), "[a]n appeal shall not be dismissed for informality of form or title of the notice of appeal." Similarly, cases appealed to the wrong appellate court are not dismissed but are transferred to the proper court.[17] Official form 1 sets forth a sample notice of appeal, and under proposed rule 48 the official forms "are sufficient under the rules and are intended to indicate the simplicity and brevity of statement that the rules contemplate."

While notice of appeal generally must be filed within thirty days after entry of the judgment appealed from,[18] certain specified timely motions in the trial court terminate the running of the time within which notice of appeal must be filed.[19] As stated in

13. PROPOSED TENN. R. APP. P. 4(a), Advisory Comm'n comment. The comment to rule 4(a) also states that "[s]tatutes prescribing some other time period for an appeal are in conflict with these rules and of no further force or effect." *See* TENN. CODE ANN. § 16-116 (Cum. Supp. 1977).

14. PROPOSED TENN. R. APP. P. 4(a), Advisory Comm'n comment. *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.52(a).

15. PROPOSED TENN. R. APP. P. 4(f).

16. *See* text accompanying notes 387-407 *infra*. These matters need not be set forth until the later briefwriting stage of the appeal.

17. PROPOSED TENN. R. APP. P. 17. This provision is in accord with existing law. *See* TENN. CODE ANN. §§ 16-408, -450 (Cum. Supp. 1977). *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.13(b).

18. PROPOSED TENN. R. APP. P. 4(a). Unlike FED. R. APP. P. 4(b), the proposed Tennessee rules do not establish a shorter time for filing notice of appeal in criminal cases. *But cf.* APPELLATE COURT STANDARDS, *supra* note 12, § 3.70 ("Procedure in criminal cases should expedite appeals . . . .").

19. Under current law, the pendency of any motion or other matter

the Advisory Commission comment to rule 4, "it would be undesirable to proceed with the appeal while the trial court has before it a motion the granting of which would vacate or alter the judgment appealed from, and which might affect either the availability of or the decision whether to seek appellate review." Accordingly, in civil actions, running of the time for filing notice of appeal is terminated for all parties if a timely motion is made under Tennessee Rule of Civil Procedure 50.02 for judgment in accordance with a motion for a directed verdict, under rule 52.02 to amend or make additional findings of fact (whether or not an alteration of the judgment would be required if the motion is granted), under rule 59.03 to alter or amend the judgment, and under rule 59.01 for a new trial.[20] In criminal actions, running of the time for filing notice of appeal is terminated by a timely motion under Tennessee Rule of Criminal Procedure 29(c) for a judgment of acquittal, under rule 33(a) for a new trial, under rule 34 for arrest of judgment, or a petition under rule 32(f)(1) for a suspended sentence.[21] These motions terminate the running of the time within which notice of appeal must be filed only if they are made within the time specified in the Tennessee Rules of Civil and Criminal Procedure, and only these motions have the indicated effect. The full time for filing notice of appeal commences to run and is computed from entry of an order disposing of the designated motions. Since the granting of a new trial is an interlocutory order, however, an appeal of right lies only after entry of judgment after the second trial, although an interlocutory appeal by permission may be sought from the order granting the new trial pursuant to proposed rule 9 or rule 10.

"having the effect of suspending [a] final judgment or action" is excluded from the time within which the bill of exceptions must be filed. TENN. CODE ANN. § 27-111 (Cum. Supp. 1977). *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.13(a)(1).

20. PROPOSED TENN. R. APP. P. 4(b). This provision is based on a proposed amendment to the Federal Rules of Appellate Procedure. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE 5 (1977) [hereinafter cited as PROPOSED FEDERAL AMENDMENTS].

21. PROPOSED TENN. R. APP. P. 4(c). The earlier published versions of proposed appellate rule 4(c) did not include among the motions that terminate the time for filing notice of appeal a motion under criminal rule 29(c) for a judgment of acquittal.

In some cases notice of appeal may be filed prematurely. For example, notice may be filed immediately after the announcement of a decision or order, but judgment may not be entered thereon until sometime later.[22] Alternatively, notice may be filed after entry of judgment but prior to the filing of a later timely motion in the trial court for a new trial or judgment notwithstanding the verdict or other similar motion. Proposed rule 4(d) provides that "a notice of appeal filed before the entry of the judgment shall be treated as filed after such entry and on the day thereof."[23] If, therefore, an appellant does file his notice of appeal after announcement of a decision but prior to formal entry of judgment, the notice is "treated as filed after such entry and on the day thereof," thereby preserving appellant's opportunity to obtain appellate review even if no subsequent notice of appeal is filed within thirty days after formal entry of judgment. The date of entry of judgment in effect becomes the date of filing notice of appeal for the purpose of determining the timeliness of subsequent steps in the appellate process, which are measured with reference to the filing date of the notice of appeal.[24]

Proposed rule 4(b) establishes a different rule for those civil actions in which notice of appeal is filed prior to making a timely motion that under rule 4(b) would terminate the running of time within which notice of appeal must be filed.[25] Under the current revision of rule 4(b), "[a] notice of appeal filed before the filing of any of the [enumerated] motions shall have no effect."[26] The party making one of the enumerated motions after notice of appeal is filed is to move in the trial court for an order dismissing the appeal, and a copy of the order of dismissal is to be filed by

22. TENN. R. CIV. P. 58.02 provides that "[t]he filing with the clerk of a judgment, signed by the judge, constitutes the entry of such judgment, and, unless the court otherwise directs, no judgment shall be effective for any purpose until the entry of same." As suggested in the text, there may be a gap between the time the court announces a decision or order and the time judgment is entered as required by TENN. R. CIV. P. 58.02.

23. A similar provision is found in FED. R. APP. P. 4(b), which governs appeals in criminal cases. A proposed amendment to the Federal Rules of Appellate Procedure would extend federal rule 4(b) to appeals in civil cases. *See* PROPOSED FEDERAL AMENDMENTS, *supra* note 20, at 4.

24. *See, e.g.*, PROPOSED TENN. R. APP. P. 24(a)-(d).

25. *See* text accompanying note 20 *supra*.

26. *See* Sobieski, *supra* note 1, at 192 n.173.

the moving party with the clerk of the trial court.[27] After entry of an order disposing of the motion, a new notice of appeal must be filed within the prescribed thirty days after entry of the order; the appeal cannot be sustained on the basis of a notice of appeal filed prior to the making of one of the enumerated motions. The timeliness of subsequent steps in the appellate process is measured with reference to the date the new notice of appeal is filed.[28]

Nothing in the proposed rules permits the extension of time for filing notice of appeal beyond the specified thirty-day period.[29] On the contrary, while rule 2 generally permits the appellate courts to suspend for good cause the requirements or provisions of any of the rules, that rule expressly exempts extension of time for filing notice of appeal.[30] According to the Advisory Commission comment to rule 2, "[s]ince filing a notice of appeal is an essential step necessary to a valid appeal of right, this step should not be waivable inasmuch as the rights of parties remain uncertain during the time available for filing a notice of appeal." On the other hand, an otherwise untimely appeal in a civil action may be taken by first securing relief from the judgment under Tennessee Rule of Civil Procedure 60.02, which permits the trial court to grant relief from its final judgments or orders. For example, in *Jerkins v. McKinney*[31] appellant first learned of entry of an order denying his new-trial motion more than thirty days after entry. The Tennessee Supreme Court held that "the failure of the clerk to provide counsel with a copy of the order overruling the motion for a new trial, or to notify them of its existence, as to counsel, constituted excusable neglect justifying relief under rule 60.02(1)."[32] Moreover, the court also held that reentry of

27. PROPOSED TENN. R. APP. P. 4(b).

28. *Id.*, Advisory Comm'n comment.

29. FED. R. APP. P. 4(a) and 4(b) permit a thirty-day extension for filing notice of appeal upon a showing of excusable neglect. A proposed amendment to the federal rules would change this standard to one of good cause if an extension is sought within the time otherwise prescribed for filing notice of appeal; extensions sought after the prescribed period would have to satisfy the excusable neglect standard. *See* PROPOSED FEDERAL AMENDMENTS, *supra* note 20, at 5-6. *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.13(a)(3). For a discussion of why a similar provision was not incorporated into the proposed Tennessee rules, see Sobieski, *supra* note 1, at 183 n.121.

30. *See* text accompanying note 592 *infra*.

31. 533 S.W.2d 275 (Tenn. 1976).

32. *Id.* at 281.

judgment on the rule 60 motion started anew the running of the time for seeking appellate review.[33] Relief would also seem appropriate under rule 60 if appellant utilizes the mails for filing his notice of appeal, as he may under proposed appellate rule 20(a), and the notice is lost or misdelivered through no fault of his own. Similarly, relief from failure to file notice of appeal in timely fashion would seem appropriate in those circumstances that traditionally have given rise to equitable relief from a judgment.[34] In a criminal action, permission to prosecute an untimely appeal may be sought under the Post-Conviction Procedure Act.[35]

In addition to filing notice of appeal with the clerk of the trial court, the appellant in civil actions must serve a copy of the notice of appeal on counsel of record of each party (or, if a party is not represented by counsel, on the party) and on the clerk of the appellate court designated in the notice of appeal.[36] Since the clerk of the appellate court dockets the appeal immediately upon receipt of the notice of appeal and is required to serve notice on all parties of the docketing of the appeal,[37] the copy of the notice of appeal served on the clerk of the appellate court must be accompanied by a list of the names and addresses of the parties or counsel upon whom service is required. Service by the appellant is to be made not later than seven days after filing notice of appeal, and proof of service must be filed with the clerk of the

33. *Id.* To guard against relief from an otherwise untimely appeal, the second sentence of proposed appellate rule 4(a) permits any party to serve notice of entry of an appealable judgment. The Advisory Commission comment to that rule states:

> By giving notice under this subdivision of the entry of an appealable judgment, the party in whose favor the judgment was entered may be able effectively to thwart resort to Tennessee Rule of Civil Procedure 60.02 in an attempt to extend the time for appealing beyond the 30 days specified in this rule on the grounds of mistake, inadvertence, surprise or excusable neglect.

34. *See* RESTATEMENT OF JUDGMENTS §§ 112-130 (1942).

35. TENN. CODE ANN. § 40-3820 (1975).

36. PROPOSED TENN. R. APP. P. 5(a). Under FED. R. APP. P. 3(d), the clerk of the district court, not the appellant, bears the responsibility for serving the notice of appeal. Service of the notice of appeal on the clerk of the appellate court advises that court of the pendency of the appeal and permits it to assume supervision of the appeal. *See* APPELLATE COURT STANDARDS, *supra* note 12, § 3.50.

37. PROPOSED TENN. R. APP. P. 5(c).

trial court within seven days after service.[38] Unless proof of service is filed, the clerk of the trial court will not assemble and complete the record on appeal as otherwise required by proposed rule 25(a), and the appeal may be dismissed pursuant to rule 26(b).[39] The appellant is to note on each copy of the notice of appeal served the date on which notice of appeal was filed[40] so that those served may ascertain if the appeal is timely. As indicated earlier, under rule 20(a), filing may be accomplished by mail addressed to the clerk, and "[t]he day of mailing, which may be evidenced by a postmark affixed in and by a United States Post Office, shall be deemed the day of filing if first class mail is utilized."[41]

Because appeals in criminal cases are handled by the attorney general, the defendant in a criminal appeal in which he is the appellant must serve a copy of the notice of appeal not only on the district attorney general of the county in which judgment was entered but also on the state attorney general at his Nashville office. If the defendant is the appellant but the action was prosecuted by a governmental entity other than the state for violation of an ordinance, a copy of the notice of appeal is served on the chief legal officer of the entity or, if his name and address does not appear of record, on the chief administrative officer of the entity at his official address. If the state or other prosecuting entity is the appellant, a copy of the notice of appeal is served on both the defendant and his counsel.[42] According to the Advisory Commission comment to rule 5, "[s]ervice on both the appellee and his counsel is required only in criminal appeals in which the state or other prosecuting entity is the appellant." In all other respects—time for service, proof of service, and the like—service of the notice of appeal in criminal appeals is the same as in civil appeals.[43]

The importance of the filing and service requirements of the proposed rules is emphasized by the Advisory Commission comment to rule 3(e), which states that "[c]ompliance with the provisions of this subdivision is of the utmost importance, since

38. *Id.* R. 5(a).
39. *See* text accompanying notes 261-68 *infra*.
40. PROPOSED TENN. R. APP. P. 5(a).
41. *See* text accompanying notes 580-82 *infra*.
42. PROPOSED TENN. R. APP. P. 5(b).
43. *Id.*

failure of an appellant to file and serve notice of appeal affects its validity." On the other hand, even untimely filing of notice of appeal may be excused in some circumstances,[44] and noncompliance with the less significant service requirement is also excusable. Unlike the filing requirement, noncompliance with the service requirement may be excused for good cause under proposed appellate rule 2. As urged in the prior article on the theoretical foundations of the rules, "[t]he limited purpose served by the notice of appeal also suggests that failure to serve a copy of the notice of appeal as required by rule 5 should be inexcusable only if some prejudice beyond the mere absence of notice of the appeal is suffered thereby."[45] Prudent counsel, however, will ensure that notice of appeal is filed and served in timely fashion. It seems highly unlikely the appellee will not receive notice of an appeal if the appellant complies with the service requirement of the rules and if the clerk of the appellate court notifies the parties of the docketing of the appeal. If, however, the appellee receives no notice of an appeal, he should be so notified, if necessary on the appellate court's own motion, and should be given a meaningful opportunity to be heard.

According to proposed rule 3(e), "[f]ailure of an appellant to take any step other than the timely filing and service of a notice of appeal does not affect the validity of the appeal but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal."[46] One purpose of this provision, as noted in the Advisory Commission comment, is to eliminate "highly technical procedural barriers that traditionally have been prerequisites to an appeal or affected the scope of appellate review." Rule 3(e) expressly abolishes as prerequisites to an appeal motions for a new trial or in arrest of judgment as well as the prayer for an appeal and entry of an order permitting an appeal. That rule also provides that an appeal as of right may be taken without "the making of any other similar motion

44. *See* text accompanying notes 31-35 *supra*.

45. Sobieski, *supra* note 1, at 191.

46. FED. R. APP. P. 3(a) provides that only failure to file a timely notice of appeal affects the validity of the appeal since service of the notice is the responsibility of the clerk of the district court. *See* note 36 *supra*. *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.13(b).

or compliance with any procedure."[47] Moreover, if an appellant does move for a new trial prior to an appeal, rule 3(e) states that the scope of appellate review of questions of law and fact is wholly unaffected.[48] Otherwise, a party would in effect be penalized for making a new-trial motion.

The Advisory Commission comment to rule 3(e) notes that elimination of the motion for a new trial as a prerequisite to an appeal in jury cases "does not mean that relief may be granted on appeal with respect to issues not presented to the trial court." This idea also finds expression in proposed rule 36(a), which provides that relief need not be granted to a party "who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Thus, as stated in the Advisory Commission comment to rule 3(e), "[f]ailure to present an issue to the trial court . . . will typically not merit appellate relief." For example, since the inadequacy[49] or excessiveness[50] of a verdict can first be raised in the trial court by way of a new-trial motion, a new-trial motion raising one or the other of these issues should be made to ensure the availability of appellate relief.[51] Similarly, a new-trial motion should be made if appellant seeks to challenge the sufficiency of the evidence since the scope of review by the trial court of a jury verdict is broader than that of the appellate court reviewing the same case.[52] Errors concerning the instructions also must be raised in the trial court and, depending upon the error, a new-trial motion may be the appropriate vehicle for doing so.[53] In some circumstances, the new-trial

47. PROPOSED TENN. R. APP. P. 3(e). *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.13(b), Commentary at 34.

48. PROPOSED TENN. R. APP. P. 3(e) provides: "The scope of appellate review of questions of law and fact shall not be limited by making or failing to make a motion for a new trial."

49. *See* TENN. CODE ANN. § 20-1330 (Cum. Supp. 1977).

50. *See id.* § 27-118 (1955).

51. This is in accord with existing law on additur. *See, e.g.*, Loftis v. Finch, 491 S.W.2d 370 (Tenn. Ct. App. 1972). On the other hand, remittitur may be "first suggested or required" in the court of appeals. TENN. CODE ANN. § 27-119 (1955).

52. *See, e.g.*, Dykes v. Meighan Constr. Co., 205 Tenn. 175, 326 S.W.2d 135 (1959); Rupe v. Durbin Durco, Inc., 557 S.W.2d 742 (Tenn. Ct. App. 1976).

53. *See, e.g.*, Henry County Bd. of Educ. v. Burton, 538 S.W.2d 394 (Tenn. 1976) (doctrine of waiver applicable to errors concerning jury instruc-

motion serves as the means by which evidence necessary for appellate review is included in the record.[54] However, any errors at the trial to which objection is duly made may be raised on appeal although there has not been a motion for a new trial or other posttrial motion raising the objection a second time; once is enough.[55]

While no step other than timely filing and service of a notice of appeal affects the appeal's validity, an appellant who fails to file a bond for costs on appeal[56] or who fails to cause timely completion or transmission of the record[57] or who fails timely to file his brief[58] invites the appellate court, in the language of proposed rule 3(e), to take "such action as the appellate court deems appropriate, which may include dismissal of the appeal." Under proposed rule 2 the appellate courts have the discretionary authority to suspend the requirements or provisions of virtually all the rules,[59] but the burden rests on the party failing to comply with the rules to demonstrate good cause for relief from his noncompliance. Good cause would almost always seem to be present if noncompliance with the rules is no fault of the appellant but is instead due to the inadvertence of those over whom the appellant has no control.[60]

For reasons explored at length elsewhere, parties other than

---

tions). During the course of its opinion in Rule v. Empire Gas Corp., 563 S.W.2d 551 (Tenn. 1978), the Tennessee Supreme Court noted that TENN. R. CIV. P. 51.02 permits a party to allege error in his motion for a new trial based upon either the inaccuracy of the charge as given or the failure to give a requested instruction. However, the supreme court also held that the failure of the trial court to instruct the jury on an aspect of the case on which an instruction is desired cannot be raised initially in a new-trial motion but must be raised prior to submission of the case to the jury for its verdict.

54. *See* Sobieski, *supra* note 1, at 186.

55. Essentially the same principle lies behind TENN. R. CIV. P. 46, which renders formal exceptions to rulings or orders of the trial court unnecessary.

56. *See* text accompanying notes 120-31 *infra*.

57. *See* text accompanying notes 261-68 & 282-84 *infra*.

58. *See* text accompanying notes 372-86 *infra*.

59. However, rule 2 does not permit extension of the time for filing notice of appeal, an application for permission to appeal to the supreme court from a final decision of an intermediate appellate court, or a petition for review of an administrative agency order. *See* text accompanying note 592 *infra*.

60. *See, e.g.*, General Elec. Supply Co. v. Arlen Realty & Dev. Corp., 546 S.W.2d 210, 214 (Tenn. 1977).

the initial appellant do not need to file their own notices of appeal to obtain appellate review and relief.[61] Once the appellant takes his appeal, the appellate court has the power to modify the judgment in favor of any nonappealing party even if that party has not participated at all in the appeal.[62] However, only rarely is it appropriate to grant relief to a party not participating in the appeal,[63] and relief that a party has no desire to obtain generally should not be given.

In cases with more than a single plaintiff and a single defendant, proposed rule 16(a) permits two or more persons to proceed as a single appellant and file a joint notice of appeal, a joint brief, and the like, if their interests make joinder practicable. Alternatively, parties may take separate appeals and their appeals may thereafter be consolidated under rule 16(b), which permits consolidation whenever common questions of law or fact are involved in separate appeals.[64]

Proposed rule 19(a) establishes the procedure to be followed when a party dies before or after notice of appeal is filed and the claim sought to be enforced is not extinguished by death.[65] If a party entitled to appeal dies before notice of appeal is filed, the notice may be filed and served by his personal representative or, if he has no personal representative, by his counsel of record within the prescribed time.[66] If a party entitled to appeal dies

61. *See* Sobieski, *supra* note 1, at 187-92. *See also* 9 MOORE'S FEDERAL PRACTICE ¶ 204.11[5] (2d ed. 1975); 15 C. WRIGHT, A. MILLER, & F. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3904 (1976); Comment, *Appeal and Error: Review of Errors at the Instance of a Party Who Has Not Appealed,* 20 CALIF. L. REV. 70 (1932); Note, *Federal Jurisdiction and Procedure—Review of Errors at the Instance of a Non-Appealing Party,* 51 HARV. L. REV. 1058 (1938).

62. *But see, e.g.*, TENN. CODE ANN. § 27-310 (1955) (on appeal judgment remains in full force and effect against parties who do not appeal).

63. *See* 15 C. WRIGHT, A. MILLER, & F. COOPER, *supra* note 61, § 3904, at 418-19.

64. Proposed appellate rule 16(b) permits consolidation on the appellate court's own motion, on motion of a party, or by stipulation of the parties to the several appeals.

65. Revivor on appeal is currently governed by TENN. CODE ANN. §§ 20-601 to 623 (1955 & Cum. Supp. 1977); TENN. SUP. CT. R. 22-23; TENN. CT. APP. R. 25-27.

66. The Advisory Commission comment to rule 19(a) states that permitting an attorney of record to take an appeal on behalf of successors in interest if the deceased has no personal representative is designed to negate the argu-

after notice of appeal is filed or while a proceeding is otherwise pending in the appellate court, the appellate court may order substitution of the proper parties. If a party against whom an appeal may be taken dies after entry of judgment in the trial court but before notice of appeal is filed, an appellant may proceed as if death had not occurred. After notice of appeal is filed, substitution is effected in the appellate court.[67] Substitution in all cases[68] is by way of motion, which may be made by any party or by the successor or representative of the deceased party.[69] An order for substitution may be entered at any time, but the failure to enter an order does not affect the substitution.[70] Substitution for other causes is effected in the same manner.[71]

B. Appeal by Permission

The second type of appeal established by the proposed rules is the appeal by permission. As its name implies, an appeal by permission, unlike an appeal as of right, is available only if permission to appeal is granted by the trial or appellate court. Most appeals of interlocutory orders of the trial court must be sought under proposed rule 9, and an appeal is available only if both the trial and appellate courts grant permission to appeal. In certain narrowly defined circumstances, an interlocutory appeal may also be sought under rule 10, which, unlike rule 9, requires the permission of only the appellate court and also permits review by the supreme court of interlocutory orders of the intermediate appellate courts.[72] In addition to the plenary interlocutory review available by permission under rules 9 and 10, certain types of

---

ment that "if a party entitled to appeal dies before notice of appeal is filed, the appeal can be taken only by his legal representative and must be taken within the time ordinarily prescribed."

67. PROPOSED TENN. R. APP. P. 19(a).

68. *Id.* R. 19(b).

69. *Id.* R. 19(a). The Advisory Commission comment to that rule notes that the procedure described for substitution on appeal is similar to TENN. R. CIV. P. 25 on substitution of parties in civil actions in the trial court.

70. PROPOSED TENN. R. APP. P. 19(d).

71. *Id.* R. 19(b). Proposed rule 19(b) lists as other possible reasons for substitution marriage, bankruptcy, assignment, "or any reason other than death." *See also* text accompanying notes 575-79 *infra*.

72. For a discussion of the circumstances in which an appeal by permission lies under proposed rules 9 and 10, see Sobieski, *supra* note 1, at 223-27.

interlocutory orders are summarily reviewable as of right under other rules.[73] Final decisions of the intermediate appellate courts may be appealed under rule 11 if permission to appeal is granted by the supreme court. Appeals by permission under rules 9, 10, and 11 are available to both the state and defendant in criminal actions.[74]

An interlocutory appeal by permission under rule 9 is sought first by requesting the trial court to enter an order granting permission to appeal.[75] If the trial court believes that an appeal should be allowed, it must state in writing the legal criteria specified in rule 9(a) making the order appealable, the factors leading the trial court to the opinion those criteria are satisfied, and any other factors leading the trial court to exercise its discretion in favor of permitting an appeal.[76] Because an appeal by permission under rule 9 also requires the permission of the appellate court,[77] an application for permission to appeal must be filed with the clerk of the appellate court. The application must be filed within ten days after the date of entry of the order in the trial court granting permission to appeal or the making of the prescribed statement by the trial court, whichever is later.[78] The application sets forth a statement of the facts sufficient to permit the appellate court to understand why an appeal by permission should be granted and a statement of the reasons supporting an immediate appeal. The application for permission to appeal must also be accompanied by a copy of the order appealed from, the trial court's written statement of reasons, and any other parts of the record necessary for an informed determination by the appellate court of whether the application for permission to appeal should be granted. The statement of reasons that must be included in the application may simply incorporate by reference the trial court's written statement of reasons for granting its permission

73. The clearest example is summary review of release orders made prior to trial. *See* text accompanying notes 171-80 *infra*. Summary review is also available of stay orders in civil actions, *see* text accompanying notes 149-56 *infra*, and the denial or withdrawal of permission by the trial court to proceed on appeal as a poor person. *See* text accompanying note 574 *infra*.

74. PROPOSED TENN. R. APP. P. 9(g), 10(e), 11(g).

75. *Id.* R. 9(a).

76. *Id.* R. 9(b).

77. *Id.* R. 9(a).

78. *Id.* R. 9(c).

for an interlocutory appeal.[79] Because the application is passed upon by the full court (or section of the court if it sits in sections) instead of a single judge of the court,[80] a sufficient number of copies of the application must be filed to provide the clerk and each judge of the appellate court with one copy.[81] If the application for permission to appeal is filed with an intermediate appellate court, copies are required only for each judge of the section of the appellate court that will pass upon the application.[82] A copy of the application must be served on all other parties.[83] An answer in opposition to the application may be filed within seven days after service of the application and may be accompanied by any additional parts of the record deemed appropriate for consideration by the appellate court. The appellate court considers the application and answer without oral argument unless it orders otherwise.[84] Neither filing of the application nor granting of permission to appeal automatically stays proceedings in the trial court, but the trial or appellate court may order otherwise.[85] Rule 9 provides further that the time for filing a bond for costs and the time within which the record is to be prepared is measured from entry of the order by the appellate court granting permission to appeal. The appeal is also docketed upon entry of the order permitting the appeal.[86] The Advisory Commission comment notes that if permission to appeal is granted, "[t]here is no need to file a notice of appeal."

An appeal by permission under rule 10, which requires only the permission of the appellate court,[87] also is sought by preparation of an application, although the application is designated as an application for extraordinary appeal.[88] In most other respects, the application required by rule 10 is substantially the same as the application required by rule 9. The application for extraordinary appeal must state the facts necessary to an understanding

79. *Id.* R. 9(d).
80. *See* text accompanying notes 607-10 *infra*.
81. PROPOSED TENN. R. APP. P. 9(c).
82. *Id.* R. 20(f); *see* text accompanying notes 590-91 *infra*.
83. PROPOSED TENN. R. APP. P. 9(c).
84. *Id.* R. 9(d).
85. *Id.* R. 9(f).
86. *Id.* R. 9(e).
87. *Id.* R. 10(a).
88. *Id.* R. 10(b).

of why an extraordinary appeal lies, the reasons supporting an extraordinary appeal, and the precise relief sought. The application is accompanied by a copy of any order or opinion or parts of the record necessary for determination of the application, and may be supported by affidavits or other relevant documents.[89] The application must be served and filed in the same manner as an application under rule 9.[90] The appellate court may deny permission for an extraordinary appeal on the basis of the application alone. Otherwise, the appellate court enters an order fixing the time within which an answer to the application may be filed by the other parties. The order is served on the parties by the clerk of the appellate court and, if the application has not previously been served, is accompanied by a copy of the application.[91] If the appellate court grants an extraordinary appeal, subsequent proceedings are had as determined appropriate by the appellate court.[92]

While rules 9 and 10 are concerned with appeals by permission from interlocutory orders, proposed rule 11 addresses those situations in which the supreme court is asked to exercise its discretionary power of review of final decisions of the intermediate appellate courts.[93] However, the procedure for asking the supreme court to exercise its discretionary power to permit a successive appeal is essentially the same as the procedure for seeking permission for interlocutory review. An application for permission to appeal must be filed with the clerk of the supreme court within thirty days after entry of the judgment of the intermediate appellate court or within fifteen days after denial of a petition for rehearing or entry of the judgment on rehearing.[94] The time within which the application must be filed cannot be lengthened[95] and is shorter than the forty-five days (which may be extended

89. *Id.* R. 10(c).

90. *Id.* R. 10(b).

91. *Id.* R. 10(d).

92. *Id.*

93. The current procedure is set forth in TENN. CODE ANN. § 16-452 (1955); *id.* §§ 27-819 to 823 (Cum. Supp. 1977); TENN. SUP. CT. R. 11-13. *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.14.

94. PROPOSED TENN. R. APP. P. 11(b). Petitioning for rehearing in the intermediate appellate court is not a prerequisite for seeking review in the supreme court.

95. *Id.* R. 2, 21(b); *see* text accompanying note 592 *infra*.

an additional forty-five days) currently permitted for seeking certiorari.[96] The application itself must contain (1) a statement of the date judgment was entered in the intermediate appellate court and whether a petition for rehearing was filed, and if so, the date of the denial of the petition or entry of the judgment on rehearing; (2) the questions presented for review; (3) the facts relevant to the questions presented, although the facts need not be restated in the application if they are correctly stated in the opinion of the intermediate appellate court; and (4) the reasons, including appropriate authorities, supporting review by the supreme court. A copy of the opinion of the intermediate appellate court must be appended to the application.[97] Six copies of the application must be filed, and it must be served on all other parties,[98] who have fifteen days after service to file an answer in opposition. The answer sets forth the reasons the application should not be granted and any other matter considered necessary for correction of the application. The filing and service requirements for the answer are the same as for the initial application for permission to appeal.[99] An application will be granted only if two members of the supreme court consider it appropriate to grant permission to appeal,[100] and if permission is granted the thirty-day period within which appellant must file and serve his brief[101] is measured from the date on which permission to appeal was granted.[102]

The Advisory Commission comment to rule 11 emphasizes the limited purpose served by the application for permission to appeal:

> [T]he application for permission to appeal filed in the Supreme Court serves the purpose of demonstrating to that court that the case is an appropriate one for the exercise of the court's discretion in favor of permitting an appeal. The application is not designed to serve the office of arguing the merits of the decision of the intermediate appellate court.

---

96. TENN. CODE ANN. § 16-452 (Cum. Supp. 1977); *id.* § 27-820 (1955).
97. PROPOSED TENN. R. APP. P. 11(b).
98. *Id.* R. 11(c).
99. *Id.* R. 11(d).
100. *Id.* R. 11(e).
101. *Id.* R. 29(a); *see* text accompanying notes 372-75 *infra*.
102. PROPOSED TENN. R. APP. P. 11(f).

The character of the reasons that typically will be considered sufficient to merit review by the supreme court are specified in rule 11(a) and include the need to secure uniformity of decision, the need to secure settlement of important questions of law, the need to secure settlement of questions of public interest, and the need for the exercise of the supreme court's supervisory authority.[103] Consistent with its limited purpose, the application for permission to appeal should demonstrate, therefore, that the question presented for review falls within the categories set forth in rule 11(a), not that the question presented was wrongly decided by the intermediate appellate court.[104]

The terminology used to describe the procedure for seeking review under rule 11 differs from current terminology, which describes as petitioning for certiorari the procedure for seeking review by the supreme court of final decisions of the intermediate appellate courts.[105] Renaming familiar procedures is not inherently desirable, but certiorari is an ambiguous word used to describe distinguishable procedures capable of a more functional description.[106] Consistent with the underlying spirit of the proposed rules, however, the fact that a document in which review is sought under rule 11 is mislabelled should not prevent consideration of the propriety of granting review.

If permission to appeal is granted under rules 9, 10, or 11, any

103. For a fuller discussion of proposed rule 11(a), see Sobieski, *supra* note 1, at 231-35.

104. Given the limited purpose served by the application for permission to appeal, it is also necessary for the parties to prepare briefs addressed to the supreme court demonstrating why the intermediate appellate court wrongly decided the case. The Advisory Commission expressly rejected a provision that would have permitted the appellant to allow his application for permission to appeal to stand as his brief and the appellee to allow his answer in opposition to the application to stand as his brief. Similarly, nothing in proposed rule 11 permits the parties to stand on their briefs filed in the intermediate appellate court. *Cf.* TENN. SUP. CT. R. 12 (assignments of error in the supreme court must be redrafted expressly directed to error in the judgment or decree of the intermediate appellate court, showing specifically where the opinion of that court is erroneous). *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.14.

105. *See* TENN. CODE ANN. § 16-452 (Cum. Supp. 1977); *id.* § 27-819 (1955); TENN. SUP. CT. R. 11.

106. *Compare, e.g.*, TENN. CODE ANN. § 27-801 (1955) *with id.* § 16-452 (Cum. Supp. 1977) *and id.* § 27-819 (1955). *See also* Conners v. City of Knoxville, 136 Tenn. 428, 189 S.W. 870 (1916).

question of law may be brought up for review and relief by any party, even if that question has not been set forth in an application seeking permission to appeal.[107] The fact that a question is brought up for review and relief does not mean that the appellate court must pass upon the question or that it must grant the requested relief.[108] Particularly in the context of interlocutory appeals in which the record has not been fully developed, consideration of issues beyond those set forth in the application is infrequently appropriate.[109] In cases reaching the supreme court through the intermediate appellate courts, the Advisory Commission comment to rule 13(a) states that

> [o]rdinarily . . . the Supreme Court will refuse to consider an issue not presented to the intermediate appellate court because, as stated in rule 36, the party raising the issue has failed to take action reasonably available to nullify the error presented by the issue. However, if the issue were presented but not dealt with by the intermediate appellate court, the Supreme Court may decide the issue and grant appropriate relief.

In the second situation described in the Commission comment, the supreme court, although having the power to decide an issue presented to but not passed upon by the intermediate appellate court,[110] may refrain from exercising that power and instead remand the case to the intermediate appellate court for its consideration of the pretermitted issue.[111]

C. Direct Review by the Court of Appeals of Administrative Proceedings

In addition to appeals as of right and by permission, the only

---

107. PROPOSED TENN. R. APP. P. 13(a); *cf.* TENN. CODE ANN. § 27-823 (1955) (respondent not required to file separate petition for certiorari to save points of law or fact for review by supreme court); TENN. SUP. CT. R. 13 (respondent not required to file separate petition for certiorari to save points of law or fact for review by supreme court).

108. *See* Sobieski, *supra* note 1, at 194.

109. *See* Cumberland Capital Corp. v. Patty, 556 S.W.2d 516, 543 (Tenn. 1977) (Harbison, J., dissenting); Tennessee Dep't of Mental Health & Mental Retardation v. Hughes, 531 S.W.2d 299, 300-01 (Tenn. 1975). *See also* 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 3937, at 269-71 (1977).

110. This power is also recognized in TENN. CODE ANN. § 27-823 (1955) and TENN. SUP. CT. R. 13.

111. *See, e.g.*, Rule v. Empire Gas Corp., 563 S.W.2d 551 (Tenn. 1978).

remaining type of plenary appellate proceeding established by the proposed rules is designed to cover the rare situation in which judicial review lies directly from an administrative agency to the court of appeals. Generally judicial review of administrative proceedings as an initial matter takes place in the trial court,[112] but in at least one situation review is had initially in the court of appeals.[113] Proposed rule 12 establishes the procedure to be followed in this unusual situation; but the rule, as noted in the Advisory Commission comment, "does not itself create a right of review."

While the situation covered by rule 12 is a rare one, the procedure established for seeking review is substantially similar to the procedure established for taking an appeal as of right. Review is instituted by filing a petition for review with the clerk of the court of appeals. The petition specifies the party seeking review and designates the respondent and the order to be reviewed. The administrative agency whose order is being reviewed and all other parties of record must be named as respondents.[114] Official form 2 is a sample petition for review. The petition filed with the court of appeals must be accompanied by petitioner's or his counsel's address and a list of the names and addresses of all other parties of record,[115] who must be served with a copy of the petition in the same manner as provided in rule 5(a) for service of a notice of appeal in civil actions. Proof of service also must be filed as provided in rule 5(a).[116] The clerk of the court of appeals dockets the proceeding and serves notice of the docketing as he does in an appeal as of right.[117] Insofar as appropriate, the other rules of appellate procedure apply to proceedings under rule 12,[118] although the record on review and the time for filing briefs receive explicit consideration in rules 12(d), (e), and (f).[119]

112. *See, e.g.*, TENN. CODE ANN. § 4-523 (Cum. Supp. 1977).

113. *See id.* § 7-147(4) (1973) (in cases of death or injury, Tennessee National Guardsmen or their beneficiaries may appeal decisions of the Board of Claims to the court of appeals).

114. PROPOSED TENN. R. APP. P. 12(a).

115. *Id.*

116. *Id.* R. 12(b).

117. *Id.* R. 12(a).

118. *Id.* R. 12(h).

119. *See* text accompanying notes 361-72 *infra*.

III. Security and Stay Pending Appeal

A. *Security for Costs in Civil Actions*

Proposed rule 6, consistent with current Tennessee law,[120] provides that in civil actions the initiation of an appeal as of right must be accompanied by a bond for costs to secure payment of the appellee's recoverable costs on appeal in the event the appellant's appeal is unsuccessful.[121] The bond is to be filed in the trial court with the notice of appeal and unless the trial court fixes a different amount, shall be in the sum or value of $500. The bond must have sufficient surety and must be conditioned to secure the payment of costs if the appeal is dismissed or the judgment is either affirmed or modified. If a bond in the sum or value of $500 is given, no approval of the bond is required. After the filing of the bond, any objections to the form of the bond, sufficiency of the surety, or sufficiency of the amount of the bond may be raised by the appellee on motion for determination by the trial court.[122] The last sentence of proposed appellate rule 6 makes the provisions of proposed new Tennessee Rule of Civil Procedure 65A applicable to a bond for costs given under proposed appellate rule 6. Under rule 65A, security may be given in any form deemed sufficient by the trial court to secure the other party. Each surety, whose address must be shown on the bond,[123] submits himself to the jurisdiction of the trial court and agrees that his liability may be enforced on motion "without the necessity of an independent action."[124] When an interlocutory appeal is taken under appellate rule 9, a bond for costs as required by rule 6 must be filed within ten days after entry of an order by the appellate court granting permission to appeal.[125]

Proposed appellate rule 6 recognizes three exceptions to its requirement of a bond for costs on appeal. First, a bond for costs

120. *See* Tenn. Code Ann. §§ 27-312, -315 to 316 (1955).

121. *See* 9 Moore's Federal Practice ¶ 207.02 (2d ed. 1975).

122. Proposed Tenn. R. App. P. 6; *cf.* Tenn. Code Ann. § 27-317 (1955) (trial court has authority to determine sufficiency of appeal bond). Under Fed. R. App. P. 7, objections to the form of the bond or the sufficiency of the surety are determined by the clerk of the district court rather than by the court itself.

123. Tenn. R. Civ. P. 65.05(1), which deals with injunction bonds, contains the identical provision.

124. Proposed Tenn. R. Civ. P. 65A.

125. Proposed Tenn. R. App. P. 9(e).

is not required if the appellant is exempted from such a requirement by the appellate rules. The only exemption set forth in the appellate rules is that for poor persons, who, under proposed appellate rule 18(b), "may proceed . . . without prepayment of fees or costs . . . or the giving of security therefor."[126] Second, a bond for costs is not required if the appellant is exempted by the Tennessee Rules of Civil Procedure. According to the Advisory Commission comment to appellate rule 6, this exception refers to proposed new rule 62.06 of the Tennessee Rules of Civil Procedure, which exempts the state and any county or municipal corporation within the state from any requirement of security.[127] Finally, no bond for costs is required if the appellant has filed a bond for a stay that includes security for the payment of costs on appeal as provided in proposed new Tennessee Rule of Civil Procedure 62.05.[128]

While proposed appellate rule 6 is consistent with current law insofar as it requires a bond for costs, it differs from current law in at least two notable respects. Although the filing of a bond for costs is mandatory, the Advisory Commission comment to rule 6 emphasizes that "the failure to file security contemporaneously [with the filing of notice of appeal] is not in and of itself fatal to the validity of the appeal."[129] As previously noted, no step other than timely filing and service of a notice of appeal affects its validity.[130] The Advisory Commission comment also notes, however, that "[t]he failure to file security may be remedied on motion of the appellee, and may ultimately include dismissal of the appeal." Rarely if ever will the failure to file a bond for costs justify dismissal as long as the appellant stands ready to correct his oversight.[131] Proposed appellate rule 6 also differs from current

126. *See* text accompanying notes 562-74 *infra*.

127. *See* text accompanying notes 140-44 *infra*.

128. *See* text accompanying notes 140-41 *infra*. An appeal bond is not required by statute in that rare situation in which the court of appeals directly reviews determinations by the Board of Claims. TENN. CODE ANN. § 7-147(4) (1973). Proposed appellate rule 6, on the other hand, does not expressly exempt such actions from its requirement of a bond for costs.

129. *But see, e.g.*, Strain v. Roddy, 171 Tenn. 181, 101 S.W.2d 475 (1937); Bray v. Blue-Ridge Lumber Co., 3 Tenn. App. 417 (1925); TENN. CODE ANN. § 27-318 (1955).

130. *See* text accompanying notes 46-48 *supra*.

131. *See also* 9 MOORE'S FEDERAL PRACTICE ¶ 207.02 (2d ed. 1975); 16 C.

law with regard to the costs that are secured by the bond. Those costs are specified in proposed appellate rule 40(c) and include "the cost of preparing and transmitting the record, the cost of a transcript of the evidence or proceedings, the cost of producing briefs and the record, the premiums paid for bonds to preserve rights pending appeal, and any other fees of the appellate court or clerk." As noted in the Advisory Commission comment to rule 40(c), many of these items are not currently recoverable as costs.

B. Security for the Judgment and Stays in Civil Actions

The security for costs required by proposed appellate rule 6 should not be confused with the security required to obtain a stay of execution of the judgment of the trial court.[132] Under proposed new rule 62 of the Tennessee Rules of Civil Procedure, the initiation of an appeal does not by itself stay execution of the judgment of the trial court.[133] Generally speaking, a stay may be obtained only by giving a bond in an amount sufficient to secure payment of the judgment in full, interest, and damages for delay as well as costs on appeal.[134] Unlike the bond for costs on appeal, a bond staying execution is not mandatory. The only consequence of not filing a bond for a stay is that the judgment may be executed notwithstanding the pendency of an appeal. The appellant, however, does not lose his right to an appeal merely because the judgment has been executed,[135] although in some circumstances a problem of mootness might arise if a stay is not obtained.[136]

WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, *supra* note 109, § 3953, at 378. Even under existing law the failure to file an appeal bond within the time specified in TENN. CODE ANN. §§ 27-312, -317 to 318 (1955) is not fatal to appellate review by way of a writ of error. *See, e.g.*, Ward v. North Am. Rayon Corp., 211 Tenn. 535, 538-39, 366 S.W.2d 134, 135-36 (1963); Chambers v. Holland, 524 S.W.2d 941, 943-44 (Tenn. Ct. App. 1975).

132. Stays of mandates of the appellate court are discussed in a subsequent section of this article. *See* text accompanying notes 548-52 *infra*.

133. For a discussion of the problems involved in determining whether a stay of execution should be permitted and, if so, whether security should be required, see Sobieski, *supra* note 1, at 235-41.

134. PROPOSED TENN. R. CIV. P. 62.04 to .05.

135. *See, e.g.*, Peabody v. Fox Coal & Coke Co., 54 S.W. 128 (Tenn. Ch. App. 1899); Gaines v. Fagala, 42 S.W. 462 (Tenn. Ch. App. 1897).

136. This problem is most likely to arise if the trial court refuses to enjoin an impending sale of property. *See* 9 MOORE'S FEDERAL PRACTICE ¶ 208.03, at

While the initiation of an appeal does not itself stay execution, proposed rule 62.01 provides that generally "no execution shall issue upon a judgment, nor shall proceedings be taken for its enforcement until the expiration of 30 days after its entry." Unless otherwise ordered by the trial court, this automatic stay provision is inapplicable in injunction and receivership actions and in actions that remove a public officer[137] or that award, change, or otherwise affect the custody of a minor child. In accordance with existing law, the automatic stay provision is also inapplicable "if the party against whom judgment is entered is about fraudulently to dispose of, conceal or remove his property, thereby endangering satisfaction of the judgment."[138]

In addition to the thirty-day automatic stay provided in rule 62.01, proposed new rule 62.02 provides that a judgment is further stayed pending and for thirty days after entry of an order on timely motion:

> (1) granting or denying a motion under Rule 50.02 for judgment in accordance with a motion for a directed verdict; (2) granting or denying a motion under Rule 52.02 to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59.03 to alter or amend the judgment; and (4) denying a motion under Rule 59.01 for a new trial.

Under proposed appellate rule 4(b), these same motions also terminate the running of the time for filing a notice of appeal, which need not be filed until and within thirty days after entry of the enumerated orders.[139] These motions, therefore, have an identical effect on the time after which execution may issue and within which notice of appeal must be filed.

To obtain a stay beyond the automatic stay provisions of rules 62.01 and 62.02, the appellant generally must file a bond. The bond may be given at or after the time of filing notice of

---

1408 (2d ed. 1975); *cf.* TENN. CODE ANN. § 27-612 (1955) (reversal of judgment or decree by writ of error after execution by sale of property does not affect interest of any purchaser at execution sale).

137. *See* TENN. CODE ANN. §§ 8-2701 to 2726 (1973).

138. PROPOSED TENN. R. CIV. P. 62.01; *see* TENN. CODE ANN. § 26-116 (1955); TENN. R. CIV. P. 62.08.

139. *See* text accompanying notes 18-21 *supra*.

appeal, but the stay becomes effective only when the bond is approved by the trial court.[140] The conditions of the bond are specified in proposed new rule 62.05.

> A bond shall have sufficient surety and: (1) if an appeal is from a judgment directing the payment of money, the bond shall be conditioned to secure the payment of the judgment in full, interest, damages for delay, and costs on appeal; (2) if an appeal is from a judgment ordering the assignment, sale, delivery or possession of personal or real property, the bond shall be conditioned to secure obedience of the judgment and payment for the use, occupancy, detention, and damage or waste of the property from the time of appeal until delivery of possession of the property, and costs on appeal. If the appellant places personal property in the custody of an officer designated by the court, such fact shall be considered by the court in fixing the amount of the bond.

The premium paid for a bond staying execution is a recoverable cost on appeal.[141] Since the purpose of the bonding requirement is to protect the appellee, it would ordinarily be waivable by him, and it may be to the appellee's advantage to do so to reduce the costs recoverable against him if it appears likely the appellant will prevail on his appeal.

Rule 62 recognizes certain exceptions to its general requirement that an appellant may obtain a stay only by giving a bond securing payment of the judgment in full, plus interest, damages for delay, and costs on appeal. Persons financially unable to give any security or the full amount of security required by rule 62.05 may make a motion to obtain a stay without providing any security or to have the amount of security reduced. Since execution may issue, unless stayed, thirty days after entry of judgment, the appellant should move as promptly as possible. The motion must be accompanied by an itemized and verified statement of the appellant's financial condition unless that information has previously been presented to the trial court. If the motion is granted, the appellant may obtain a stay by giving such security as the court deems appropriate in light of the appellant's financial condition. If the motion is denied, the trial court must state in writ-

140. PROPOSED TENN. R. CIV. P. 62.04.
141. PROPOSED TENN. R. APP. P. 40(c).

ing the reasons for its denial,[142] and review of the denial is available under proposed appellate rule 7.[143] In cases in which the appellant is the state, any county or municipal corporation within the state, or an officer or agency acting in their behalf, the judgment is stayed automatically and no bond or other security is required from the appellant.[144]

In order to permit the trial court to consider the circumstances of the individual case, proposed new rule 62.07 provides that "[n]othing in this Rule shall be construed to limit the power of the court in exceptional cases to stay proceedings on any other terms or conditions as the court deems proper." This portion of rule 62 empowers the trial court to stay execution without requiring any security "in exceptional cases" in addition to the case in which the appellant is financially unable to provide any security. Similarly, proposed rule 62.08 empowers the appellate court "to stay proceedings or to suspend relief or grant whatever additional or modified relief is deemed appropriate during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of any judgment that may subsequently be entered."

Two other aspects of the trial court's power receive explicit consideration in proposed new rule 62. If the trial court in an action involving multiple claims or multiple parties grants permission to take an interlocutory appeal on fewer than all the claims or to fewer than all the parties, the court "may enter a judgment and stay enforcement of that judgment until the entering of a subsequent judgment and may prescribe such terms as

142. PROPOSED TENN. R. CIV. P. 62.05. Rule 62.05 was amended slightly after its latest publication. The first two sentences were not altered, but the remaining portions of that rule now read:

> A party may obtain a stay without giving any security or without giving the full amount of the security required by this Rule upon motion and, if not previously presented, upon presentation of an itemized and verified statement of his financial condition. If the motion is granted, the party may obtain a stay by giving such security as the court deems proper based upon the party's financial condition. If leave to obtain a stay without giving any or the full amount of the security required by this Rule is denied, the court shall state in writing the reasons for the denial.

143. *See* text accompanying notes 149-60 *infra*.

144. PROPOSED TENN. R. CIV. P. 62.06.

to bond or otherwise as it deems proper to secure the party in whose favor the judgment is entered."[145] If a bond is required, it may be given at or after permission to appeal is granted, and the stay is effective when the bond is approved by the trial court.[146] In addition, even after an appeal is taken, the trial court, in actions granting continuing relief, may "suspend relief or grant whatever additional or modified relief is deemed appropriate during the pendency of the appeal and upon such terms as to bond or otherwise as it deems proper to secure the other party."[147] The actions falling within the scope of this power are injunction and receivership actions, actions that remove a public officer or that award, change or otherwise affect the custody of a minor child, and actions for alimony or child support.[148]

While proposed new rule 62 specifies the procedure that must be followed in the trial court to obtain a stay pending appeal in civil actions, it must be read together with proposed appellate rule 7 to achieve a comprehensive understanding of the procedure to be followed for seeking a stay or injunction pending appeal. According to the first sentence of appellate rule 7(a), application for a stay pending appeal or for approval of a bond staying execution or for an order suspending, granting, or modifying continuing relief pending appeal "must ordinarily be made in the first instance in the trial court." If, however, application to the trial court for the relief sought is not practicable[149] or if the trial court has denied the relief sought or if the trial court has failed to afford the relief the applicant requested, then relief may be sought in the appellate court to which the appeal has been taken.[150]

An application for relief in the appellate court is made by way of motion. The motion must set forth the circumstances that entitle the appellant to relief from the appellate court. Thus the

145. *Id.* R. 62.09.

146. *Id.*

147. *Id.* R. 62.03.

148. *Id.* R. 62.01, .03.

149. *See* 9 MOORE'S FEDERAL PRACTICE ¶ 208.07, at 1424 (2d ed. 1975): "[A] showing of impracticability would normally require a showing that the [trial] judge is unavailable, or that relief to be effective must be immediate and that in the nature of what occurred in the [trial] court relief from it is improbable."

150. PROPOSED TENN. R. APP. P. 7(a).

motion must demonstrate that the appellant has unsuccessfully sought the requested relief in the trial court or, alternatively, that seeking relief in the trial court is not practicable. The motion must also set forth the reasons, if any, given by the trial court for its action and the reasons for the relief requested from the appellate court.[151] The facts relied upon must be set forth "and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof."[152] The motion must be accompanied by such parts of the record as are relevant and is to be filed with the clerk of the appellate court or a judge thereof.[153] Proposed appellate rule 20 on service[154] and rule 22 on motions[155] apply to motions made under appellate rule 7.

Unlike rule 22(a), which provides that generally a showing in opposition to a motion may be made within five days after service of the motion, rule 7(a) requires that only reasonable notice of the motion be given to all parties. Reasonable notice may be shorter than the five days generally provided for making a showing in opposition to a motion.[156] As noted in the Advisory Commission comment to rule 22(a), "the need for expeditious action would make it undesirable to delay disposition of [a] motion [under rule 7] for the 5 days otherwise specified . . . ." If there is no need for expeditious action, of course, the other parties should be given the full five days within which to make any showing in opposition to the appellant's rule 7 motion.

Like all other motions, a motion filed under rule 7 may be granted or denied by a single judge of the appellate court.[157] This procedure stands in marked contrast to the grant or denial of an application for permission to appeal under rules 9, 10, or 11, which requires consideration by the court instead of a single judge.[158] The action of a single judge on a rule 7 motion, however, may be reviewed by the court.[159]

---

151. *Id.*
152. *Id.*
153. *Id.*
154. *See* text accompanying notes 585-89 *infra.*
155. *See* text accompanying notes 596-615 *infra.*
156. PROPOSED TENN. R. APP. P. 22(a), Advisory Comm'n comment.
157. *Id.* R. 22(c).
158. *See* text accompanying notes 607-10 *infra.*
159. PROPOSED TENN. R. APP. P. 22(c).

Proposed appellate rule 7(b) provides that relief available under rule 7(a) "may be conditioned on the filing of a bond in the trial court as provided in Tennessee Rules of Civil Procedure 62 and 65A." Therefore, while the appellate court may impose the requirement of a bond as well as set its amount, the bond itself is filed in the trial court, which also decides questions concerning liability on the bond in the same manner it would if it had itself required the bond. As one commentator has noted concerning the similar provision in the Federal Rules of Appellate Procedure, "[t]his is the more convenient procedure. The amount of damages sustained by reason of a stay or injunction not infrequently depends upon evidence, and the [trial] court is in a better position to hear evidence and make findings of fact."[160]

C. Release in Criminal Cases

Proposed new Tennessee Rule of Civil Procedure 62 and proposed appellate rule 7 are concerned with the procedure for obtaining a stay only in civil actions. Release of a defendant in criminal actions, including release on appeal after conviction, is governed by the recently enacted Release from Custody and Bail Reform Act of 1977[161] and to a much lesser extent by the Tennessee Rules of Criminal Procedure.[162] Under the Bail Reform Act, all persons charged with an offense are entitled to bail before trial, except for those charged with an offense punishable by death "where the proof is evident or the presumption great."[163] Generally an accused is to be released from custody on his personal recognizance or upon the execution of an unsecured appearance bond pending trial unless the magistrate determines that release on such condition will not reasonably assure the future appearance of the accused.[164] In the latter event, the magistrate is directed to impose the least onerous conditions reasonably likely to assure the defendant's appearance. The conditions that may be imposed include (1) release of the defendant into the care

160. 9 MOORE'S FEDERAL PRACTICE ¶ 208.09, at 1427 (2d ed. 1975); *see* 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, *supra* note 109, § 3954, at 382-83.

161. 1978 Tenn. Pub. Acts ch. 506, §§ 1-48.

162. TENN. R. CRIM. P. 32(c).

163. 1978 Tenn. Pub. Acts ch. 506, § 2.

164. *Id.* § 15.

of some qualified person or organization; (2) placing the defendant under the supervision of an available probation officer or other appropriate public officer; (3) imposition of reasonable restrictions on the activities, movements, associations, and residences of the defendant; and (4) any other reasonable restrictions designed to assure the defendant's appearance, including the deposit of a bail bond.[165] A defendant released before trial is to continue on release during trial on the same terms and conditions as were imposed prior to trial unless the court determines other terms and conditions (or termination of release) are necessary to assure his presence during trial.[166] Subject to one exception,[167] after conviction the trial court may order that the original bail or conditions of release remain in effect pending appeal; it may deny release; or it may increase or reduce bail or alter the conditions of release.[168] The court of criminal appeals and supreme court may also grant the defendant bail or increase or reduce bail.[169] Any change in bail or other conditions of release requires a written motion, and in granting or denying such a motion the court must state in writing the reasons for its action.[170]

In accordance with the Bail Reform Act, a revised version of proposed appellate rule 8(a)[171] provides that "[b]efore or after

---

165. *Id.* § 16.

166. *Id.* § 42.

167. Bail is unavailable pending appeal upon a conviction under TENN. CODE ANN. § 52-1432(a)(1) (Cum. Supp. 1977) for the manufacture, delivery, sale, or possession with intent to manufacture, deliver, or sell a controlled substance, or for the sale or possession with intent to sell a prescription for a controlled substance. 1978 Tenn. Pub. Acts ch. 506, § 13.

168. 1978 Tenn. Pub. Acts ch. 506, § 43. This provision of the Bail Reform Act must be construed in light of TENN. CODE ANN. § 40-3406 (Cum. Supp. 1977), *as amended by* 1978 Tenn. Pub. Acts ch. 578, § 1. The amendment to the Code provides that bail is generally available as a matter of right if a person is convicted of a felony, the punishment for which is imprisonment for less than one year. The amendment is inapplicable, however, if there are other felony charges pending against the defendant. Bail is also available as a matter of right pending appeal in misdemeanor cases. TENN. CODE ANN. § 40-3408 (1975).

169. 1978 Tenn. Pub. Acts ch. 506, § 13.

170. *Id.* § 44.

171. Proposed rule 8(a) was amended substantially after its latest publication and now provides:

> Before or after conviction the prosecution or defendant may obtain review of an order entered by a trial court from which an appeal lies to

conviction the prosecution or defendant may obtain review of an order entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals granting, denying, setting or altering conditions of defendant's release."[172] As a prerequisite to review before conviction, a written motion for the relief sought on review must first be made in the trial court. After conviction and after the case is pending on appeal, a written motion may be filed either in the trial court in which judgment was entered or in the appellate court to which the appeal has been taken.[173] Proposed rule 8(a) reiterates the requirement of the Bail Reform Act that whenever the trial court enters an order that grants or denies a motion for change in bail or other conditions of release, it must state in writing the reason for the action taken.

---

the Supreme Court or Court of Criminal Appeals granting, denying, setting or altering conditions of defendant's release. Before conviction, as a prerequisite to review, a written motion for the relief sought on review shall first be presented to the trial court. After conviction and after the action is pending on appeal, a written motion may be made either in the trial court in which judgment was entered or in the appellate court to which the appeal has been taken. On entry of an order granting or denying a motion for a change in bail or other conditions of release, the trial court shall state in writing the reasons for the action taken.

Review may be had at any time before an appeal of any conviction by filing a motion for review in the Court of Criminal Appeals or, if an appeal is pending, by filing a motion for review in the appellate court to which the appeal has been taken. The motion for review shall be accompanied by a copy of the motion filed in the trial court, and any answer in opposition thereto, and the trial court's written statement of reasons, and shall state: (1) the court that entered the order, (2) the date of the order, (3) the crime or crimes charged or of which defendant was convicted, (4) the amount of bail or other conditions of release, (5) the arguments supporting the motion, and (6) the relief sought. Review shall be had without briefs after reasonable notice to the other parties, who shall be served with a copy of the motion. The other parties may promptly file an answer. The court, on its own motion or on motion of any party, may order preparation of a transcript of all proceedings had in the trial court on the question of release. No oral argument shall be permitted except when ordered on the court's own motion. Review shall be completed promptly.

172. If the release order is entered by a court from which an appeal lies to a court inferior to the supreme court or court of criminal appeals, review is sought "in the next higher court upon writ of certiorari." 1978 Tenn. Pub. Acts ch. 506, § 45.

173. PROPOSED TENN. R. APP. P. 8(a).

Review of the action of the trial court is obtained by filing a motion for review. Before appeal, review is sought in the court of criminal appeals; after an appeal is pending, review is sought in the appellate court to which the appeal has been taken, which generally will be the court of criminal appeals but in some circumstances may be the supreme court. The motion for review must be accompanied by a copy of the motion filed in the trial court, any answer in opposition thereto, and the trial court's required written statement of reasons.[174] The motion itself must state "(1) the court that entered the order, (2) the date of the order, (3) the crime or crimes charged or of which defendant was convicted, (4) the amount of bail or other conditions of release, (5) the arguments supporting the motion, and (6) the relief sought."[175] Review is had without briefs and after reasonable notice to the other parties, who must be served with a copy of the motion for review and who may promptly file an answer in opposition to the motion. The appellate court on its own motion or on motion of any party may order preparation of a transcript of all proceedings in the trial court on the question of release. Unless ordered by the appellate court on its own motion, no oral argument is permitted.[176] According to the last sentence of rule 8(a), "[r]eview shall be completed promptly."

As noted in the Advisory Commission comment to rule 8(a), "[t]he purpose of this subdivision is to ensure the expeditious review of release orders. It permits review on an informal record without the necessity of briefs and on reasonable notice." In light of the purpose of rule 8(a), reasonable notice typically will be less than the five days otherwise permitted by rule 22(a) within which to make a showing in opposition to a motion.[177] Since review of the release decision of the trial court is by way of motion, the motion for review may be granted or denied by a single judge of the appellate court.[178] This procedure differs from the Bail Reform Act, which provides that an order amending or overturning the order of the trial court may be entered only by joint order of two or more judges of the court of criminal appeals.[179] This difference,

174. *Id.*
175. *Id.*
176. *Id.*
177. *See* text accompanying notes 598-603 *infra*.
178. PROPOSED TENN. R. APP. P. 22(c).
179. 1978 Tenn. Pub. Acts ch. 506, § 45.

however, is not as great as it appears since the action of a single judge under the proposed appellate rules may be reviewed by the court.[180] The proposed rule, therefore, imposes a lesser initial burden on the appellate court but at the same time provides a check on the action of a single judge deemed necessary by the Bail Reform Act.

The defendant's liberty interest, which provides a partial explanation for the expeditious review contemplated by rule 8(a), also accounts for the provisions of proposed appellate rule 8(b). Certain orders and judgments of the trial court in criminal actions are appealable as of right by the state,[181] and the state may also seek permission to appeal in criminal actions under proposed rules 9, 10, and 11.[182] Rule 8(b) provides that during the pendency of an appeal by the state or an application for permission to appeal by the state, "[a] defendant shall not be held in jail or to bail . . . unless there are compelling reasons for his continued detention or being held to bail." This language quite obviously envisions that it will only rarely be appropriate to confine a defendant or hold him to bail during the pendency of an appeal or application for permission to appeal by the state.

IV. The Record on Appeal

After an appeal has been initiated, the bond for costs on appeal in civil actions filed, and the judgment or order of the trial court either stayed or allowed to remain in effect, the next step in the appellate process involves preparation of the record on appeal.[183] As stated in the Advisory Commission comment to rule 24, one of the principal purposes of the proposed appellate rules concerning the record on appeal "is to abolish the current distinction between the bill of exceptions and the technical record." Professor Edson Sunderland has pointed out that the distinction between the bill of exceptions and the technical record merely provides an obstacle that "confuse[s] and delay[s] the litigant

180. Proposed Tenn. R. App. P. 22(c).

181. *Id.* R. 3(c).

182. *Id.* R. 9(g), 10(e), 11(g).

183. For a discussion of the genesis of the current law and the purposes of the proposed appellate rules concerning the record on appeal, see Sobieski, *supra* note 1, at 242-51. *See generally* Appellate Court Standards, *supra* note 12, § 3.13(d).

and divert[s] his attention and that of the [appellate] court from the really meritorious questions which are of primary concern."[184] The Advisory Commission comment to rule 24 notes that a further purpose of the proposed rules is "to provide a method of preparation of the record that is both inexpensive and simple, and will convey an accurate account of what transpired in the trial court."

A. Preparation of the Record on Appeal

Proposed rule 24(a) defines the content of the record on appeal. According to that rule the record on appeal consists, first, of copies, certified by the clerk of the trial court, of all papers filed in the trial court. However, certain papers filed in the trial court are typically not necessary in most appeals, and these are not included unless a party otherwise so designates in writing.[185] The excluded papers include

> (1) subpoenas or summonses for any witness or for any defendant when there is an appearance for such defendant; (2) all papers relating to discovery including depositions, interrogatories and answers thereto, reports of physical or mental examinations, requests to admit, and all notices, motions or orders relating thereto; and (3) any list from which jurors are selected.[186]

Thus, if on file, the record on appeal includes copies of the pleadings; motions, supporting papers, and answers in opposition (except those relating to discovery); all orders of the trial court; tendered instructions; the verdict or any findings of fact and conclusions of law or opinion of the trial court; the judgment; and the notice of appeal.

While copies of all papers filed in the trial court, except those routinely excluded, are part of the record on appeal, rule 24(a)

---

184. Sunderland, *A Simplified System of Appellate Procedure*, 17 TENN. L. REV. 651, 659 (1943). As intimated in the text, the "record on appeal" as that term is used in the proposed rules is not synonymous with the "technical record." The "record" referred to in the proposed rules is the equivalent of the "transcript of the record" as that term is currently employed. *See* note 197 *infra*.

185. PROPOSED TENN. R. APP. P. 24(a).

186. *Cf.* TENN. SUP. CT. R. 5 (notice to take depositions, captions of depositions, affidavits, reports of receivers, and any list of talesmen routinely excluded from transcript); TENN. CT. APP. R. 6 (notice to take depositions and reports of receivers routinely excluded from transcript).

must be construed in light of rule 24(g), which provides that nothing may be included in the record that does not convey a fair, accurate, and complete account of what transpired in the trial court. One purpose of rule 24(g) is to set forth the accepted rule that only those papers presented to the trial court are considered a part of the record.[187] As stated in the Advisory Commission comment to rule 24(g), a party may not "augment the record by evidence entered ex parte."

That portion of proposed rule 24(a) concerning the papers on file in the trial court that are included in the record on appeal differs from the corresponding Federal Rule of Appellate Procedure[188] in two notable respects. Under the federal rules the original (not certified copies) of all papers filed in the district court are included in the record on appeal.[189] In addition, all papers filed in the district court are included in the record; there is no provision in the federal rules comparable to that found in proposed Tennessee rule 24(a) routinely excluding certain papers typically not needed on appeal.

The federal rule has certain advantages. Because the original papers are included in the record, it relieves the clerk of the district court of the burden of copying the papers filed in the district court, thereby facilitating more expeditious preparation of the record, and it lessens the expense of preparing the record by eliminating the cost of copying the papers filed in the district court.[190] Moreover, by forwarding all papers to the appellate court, the federal rule relieves the clerk of the additional burden of determining which papers are properly included in the record.

The Advisory Commission that formulated the proposed Tennessee rules concluded, however, that certified copies (instead of the originals) of all papers filed in the trial court should be included in the record to ensure the availability of those papers if the record sent to the appellate court is lost or destroyed. In addition, the Commission thought retention of the papers in the trial court would permit more convenient access to the information contained therein if, for example, there is a title search in an

187. *See* Sobieski, *supra* note 1, at 200-01. *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.11.

188. FED. R. APP. P. 10(a).

189. *See* 9 MOORE'S FEDERAL PRACTICE ¶¶ 210.02, .04[1] (2d ed. 1975).

190. *Id.* ¶ 210.02.

appealed case involving land. Finally, while recognizing that some burden would be placed on the clerk of the trial court in deciding whether particular papers are to be included in the record, the Commission determined this conceivable disadvantage was outweighed by the advantages gained in reducing the record by eliminating those papers rarely important on appeal. The cost of producing the record is less, and the appellate court is not burdened with unnecessary papers. Besides, if any party desires to have an excluded paper included in the record, he need merely so designate in writing.[191]

In addition to copies of papers filed in the trial court, the record on appeal also includes the original of any exhibits filed in the trial court. Three aspects of this rule are noteworthy. First, unlike other papers filed in the trial court, the original, not copies, of documentary exhibits are sent to the appellate court. Similarly, the original of any nondocumentary exhibits are included in the record. The appellate court, therefore, will be in as good a position as the trier of fact to assess the probative value of any exhibits.[192] Second, the original of only those exhibits filed in the trial court are included in the record. Rule 24(a) thereby alerts counsel "to the necessity for placing exhibits relevant to an appeal in the custody of the clerk of the [trial] court so that they can be transmitted to the court of appeals."[193] If an exhibit is not filed in the trial court, it will not be included in the record transmitted to the appellate court, although an exhibit filed after transmission of the record may be included in a supplemental record and transmitted to the appellate court as provided in proposed rule 24(e).[194] Third, rule 24(a) provides that "[a]ny paper relating to discovery and offered in evidence for any purpose shall be clearly identified and treated as an exhibit." Thus, while papers relating to discovery filed in the trial court are not generally included in the record, those discovery papers "offered in evi-

191. PROPOSED TENN. R. APP. P. 24(a).

192. The scope of appellate review of factual determinations is set forth in proposed appellate rules 13(d) and 13(e). For a discussion of those rules, see Sobieski, *supra* note 1, at 203-16.

193. 9 MOORE'S FEDERAL PRACTICE ¶ 210.04[2], at 1614 (2d ed. 1975); *see* 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, *supra* note 109, § 3956, at 386.

194. *See also* 9 MOORE'S FEDERAL PRACTICE ¶ 210.04[2], at 1614 (2d ed. 1975).

dence for any purpose," including discovery papers offered for impeachment purposes, are included in the record as exhibits as long as they are identified as such and on file in the trial court. Documentary exhibits of unusual bulk or weight and physical exhibits are subject to a special rule[195] concerning their transmission to the appellate court.[196]

The third item included in the record, besides copies of papers filed in the trial court and the original of any exhibits, is the transcript or statement of the evidence or proceedings.[197] The method of preparing the transcript or statement is discussed in a subsequent section of this article.[198] For present purposes it is sufficient to note that the transcript or statement must, in the language of rule 24(a), "clearly indicate and identify any exhibits offered in evidence and whether received or rejected." The purpose of this requirement is to ensure that the transcript or statement clearly indicates that an exhibit contained in the record was offered into evidence.[199] The exhibit itself may be included in the transcript or statement, or the exhibit may be filed separately with the clerk of the trial court.[200] "No paper," according to rule 24(a), "need be included in the record more than once."[201]

Finally, the record on appeal contains "any other matter designated by a party and properly includable in the record."[202] The matters properly includable in the record are specified in rule 24(g) as those that "may be necessary to convey a fair, accurate and complete account of what transpired in the trial court." Min-

195. PROPOSED TENN. R. APP. P. 25(d).

196. *See* text accompanying notes 285-91 *infra*.

197. Under existing law, the term "transcript" refers to the technical record plus the bill of exceptions. The proposed appellate rules, by contrast, use the term "transcript" to refer to what under current terminology is referred to as the "bill of exceptions." Rule 24(h) expressly abolishes bills of exception in order to promote the purpose of treating the record on appeal as an integrated whole and not as two separate parts, one part consisting of the technical record and the other part consisting of the bill of exceptions.

198. *See* text accompanying notes 209-46 *infra*.

199. *See also* 9 MOORE'S FEDERAL PRACTICE ¶ 210.04[2], at 1614 (2d ed. 1975).

200. PROPOSED TENN. R. APP. P. 25(a).

201. *Cf.* TENN. SUP. CT. R. 5 (no paper will be copied in the transcript more than one time).

202. PROPOSED TENN. R. APP. P. 24(a).

ute[203] or docket[204] entries, for example, might be properly designated for inclusion in the record on appeal. On the other hand, the Advisory Commission comment to rule 24(g) cautions that

> the ability to designate additional parts to be included in the record extends only insofar as it is necessary to convey a fair, accurate and complete account of what transpired in the trial court. The ability to designate additional parts under [rule 24(a)] does not permit a party to augment the record by evidence entered ex parte.[205]

In summary, then, the record on appeal as defined in proposed rule 24(a) consists of (1) copies of all papers filed in the trial court, except those typically unnecessary on appeal; (2) the original of any exhibits filed in the trial court, including any paper relating to discovery and offered in evidence for any purpose; (3) the transcript or statement of the evidence or proceedings, which must clearly indicate and identify any exhibits offered in evidence and whether they were received or rejected; and (4) any other matter designated for inclusion in the record and properly includable.

The second paragraph of rule 24(a) establishes the procedure to be followed if the appellant concludes that a full record is not necessary for his appeal[206] and the appellee is unwilling to stipulate that parts of the record be retained in the trial court.[207] Only inclusion of less than the entire transcript of the evidence typically will result in substantial enough savings to justify preparation of less than a full record. The procedure to be followed if less than the entire transcript is to be included in the record is set out in rule 24(b). Thus, it is unlikely that rule 24(a) will be frequently utilized. The procedure for preparation of less than a full record, however, is identical in all material respects to the procedure for preparation of less than the entire transcript, which is but a part

---

203. *See* TENN. CODE ANN. § 16-106 (Cum. Supp. 1977).

204. *See id.* § 18-105.

205. *See also* 9 MOORE'S FEDERAL PRACTICE ¶ 210.04[1], at 1612-13 (2d ed. 1975); 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, *supra* note 109, § 3956, at 386.

206. *Cf.* TENN. CODE ANN. §§ 27-323 to 325 (1955) (designation of parts to be included in transcript); TENN. SUP. CT. R. 1 (abridgement of the record); TENN. CT. APP. R. 5(b) (abridgement of the bill of exceptions).

207. *See* text accompanying notes 328-32 *infra*.

of the record on appeal.[208] The ensuing discussion concerning preparation of less than the entire transcript, therefore, is equally illuminating of the procedure to be followed if it is desirable to include only a portion of the other matters that are normally included in the record on appeal.

Before discussing the substance of rule 24(b), two points made in the Advisory Commission comment to that rule should be emphasized. To have as exact a record as possible of what transpired in the trial court and to avoid the inaccuracies that inevitably attend preparation of a narrative record,[209] rule 24(b) requires a verbatim transcript of the evidence or proceedings "[i]f a stenographic report or other contemporaneously recorded, substantially verbatim recital of the evidence or proceedings is available . . . ."[210] On the other hand, rule 24(b) does not require that a stenographic report be made of all the evidence or proceedings in the trial court.[211] If a stenographic report or its equivalent is not available, rule 24(c) establishes the procedure to be followed for generating a narrative record.[212]

Unless the entire transcript is to be included in the record on appeal, rule 24(b) requires the appellant, within fifteen days after filing his notice of appeal, to file with the clerk of the trial court and serve on the appellee a description of the parts of the transcript he intends to include in the record.[213] According to the first

208. *See* text accompanying notes 185-205 *supra*.

209. *See* Griswold & Mitchell, *The Narrative Record in Federal Equity Appeals*, 42 HARV. L. REV. 483, 504 (1929); Parker, *Improving Appellate Methods*, 25 N.Y.U. L. REV. 1, 5 (1950); Stone, *The Record on Appeal in Civil Cases*, 23 VA. L. REV. 766, 790 (1937).

210. *But see* TENN. SUP. CT. R. 2A (audio-video reproduction of the evidence may be filed as the bill of exceptions in any appellate proceeding in any criminal case). *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.13(d), Commentary at 36-37. While nothing in the proposed rules dispenses with the requirement of preparation of a transcript, nothing forbids inclusion of an audio-video or other reproduction in the record in addition to the transcript. *See also id.* § 3.13(d).

211. *See* Sobieski, *supra* note 1, at 248.

212. *See* text accompanying notes 235-40 *infra*.

213. *Cf.* TENN. SUP. CT. R. 2 (abridgement of bill of exceptions); TENN. CT. APP. R. 5(6)-(7) (abridgement of bill of exceptions). Proposed rule 24(a) provides that the declaration and description of the parts of the record to be included on appeal may be filed and served with the declaration and description of the parts of the transcript to be included in the record.

sentence of rule 24(b), the appellant must designate "such part of the evidence or proceedings as is necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal." This language is designed to make clear that the appellant may not order only those portions of the transcript that favor his arguments. Instead, the appellant must order all portions of the transcript, whether favorable or unfavorable, that are relevant to the issues he intends to present for review.[214] On the other hand, appellant must make certain that he orders enough of the transcript so that any matters upon which he relies for relief clearly appear since generally speaking an appellate court will reverse the judgment below only if the record affirmatively reveals the occurrence of error justifying appellate relief.[215]

To permit the appellee to determine whether the parts of the transcript appellant intends to order are adequate for the appeal, the appellant must also serve on the appellee "a short and plain declaration of the issues he intends to present on appeal."[216] If the appellee deems a transcript of other parts of the evidence or proceedings to be necessary, he must, within fifteen days after service of the appellant's description and declaration, file with the clerk of the trial court and serve on the appellant a designation of additional parts to be included. The appellant must either have the additional parts prepared at his own expense or apply to the trial court for an order requiring the appellee to do so.[217] This portion of proposed Tennessee rule 24(b) differs from the corresponding Federal Rule of Appellate Procedure,[218] which places on the appellee the burden of ordering the additional parts at his own expense or of applying to the district court for an order requiring the appellant to do so.

It should be stressed that the declaration of issues that must accompany the appellant's description of the parts of the transcript he intends to present on appeal is not the equivalent of

214. *See also* 9 MOORE'S FEDERAL PRACTICE ¶ 210.05[1], at 1620-22 (2d ed. 1975).

215. *See, e.g.*, TENN. SUP. CT. R. 14; TENN. CT. APP. R. 12. *But see* Fischer v. Cromwell Co., 556 S.W.2d 749 (Tenn. 1977).

216. PROPOSED TENN. R. APP. P. 24(b).

217. *Id.*

218. FED. R. APP. P. 10(b).

assignments of error.[219] Assignments of error are expressly abolished by proposed appellate rule 3(h).[220] The appellant's declaration need merely advise the appellee of the issues the appellant intends to present on appeal so that the appellee can determine whether the parts of the transcript the appellant intends to order are adequate. If the appellant misleads the appellee, the latter may seek modification of the record under proposed rule 24(e). But the appellant cannot shift to the appellee his burden of ordering such parts of the transcript as are necessary to convey a fair, accurate, and complete account of what transpired with respect to those issues that are the bases of his appeal and that must clearly appear in the record to entitle the appellant to relief on appeal.[221]

If the entire transcript is included in the record on appeal, the appellant is not required to serve on the appellee a description of the parts of the transcript he intends to include in the record or a declaration of the issues he intends to present on appeal. Inclusion of the entire transcript also ensures that any errors occurring during the proceedings below will appear in the record, unless the transcript needs to be modified or corrected to conform to the truth. In most cases, therefore, it will be more convenient and prudent, although somewhat more expensive, for the appellant to include the entire transcript in the record. All that the appellant needs to do is order the entire transcript from the reporter promptly so that it can be filed in timely fashion.

Whether the entire transcript or only parts thereof are included in the record, the transcript must be filed with the clerk of the trial court within ninety days after filing the notice of appeal.[222] The time for filing the transcript in interlocutory appeals under rule 9 is measured from the date of entry of the order

219. *See also* 9 MOORE'S FEDERAL PRACTICE ¶ 210.05[2], at 1624-25 (2d ed. 1975). The required form for assignments of error is set forth in TENN. SUP. CT. R. 14 and TENN. CT. APP. R. 12. Assignments of error are not necessary in criminal cases. *See* TENN. CODE ANN. § 40-3409 (1975); TENN. SUP. CT. R. 17(1).

220. *See* Sobieski, *supra* note 1, at 250.

221. *See also* 9 MOORE'S FEDERAL PRACTICE ¶ 210.05[2], at 1625-26 (2d ed. 1975).

222. PROPOSED TENN. R. APP. P. 24(b). *But cf.* APPELLATE COURT STANDARDS, *supra* note 12, § 3.52(b)(1) (record should be completed within thirty days after it is ordered).

by the appellate court granting permission to appeal.[223] Under current law, the bill of exceptions must be filed within thirty days after entry of judgment unless an extension is sought within this thirty-day period. Because an extension cannot exceed an additional sixty days, the maximum period of time for filing the bill of exceptions is ninety days after entry of judgment.[224] In criminal cases, however, the supreme court and court of criminal appeals may for good cause permit the bill of exceptions to be filed "at any time."[225] One important difference between current law and proposed rule 24(b) is that the time for filing the transcript under the rule is measured from the date of filing the notice of appeal.[226] Generally, the notice of appeal must be filed any time within thirty days after the date of entry of the judgment appealed from.[227] As a result, the proposed rule gives the appellant more time within which to file the transcript than current law gives for filing the bill of exceptions. If, for example, the notice of appeal is filed thirty days after entry of judgment, the appellant will have a total of 120 days (thirty days for filing notice of appeal plus ninety days for filing the transcript) after entry of judgment within which to file the transcript. If notice is filed the day judgment is entered, there will be no difference between the proposed

223. PROPOSED TENN. R. APP. P. 9(e).

224. TENN. CODE ANN. § 27-111 (Cum. Supp. 1977). The bill of exceptions does not have to be signed by the trial court within the specified time. *See* Arnold v. Carter, 555 S.W.2d 721 (Tenn. 1977). But if a bill of exceptions is not timely filed, it will not be considered by the appellate court. *See, e.g.*, Lindsey v. Fowler, 516 S.W.2d 88 (Tenn. 1974).

225. TENN. CODE ANN. § 27-111 (Cum. Supp. 1977).

226. Under the Federal Rules of Appellate Procedure, there is no time specified within which the transcript must be filed, but the transcript must be ordered within ten days after filing notice of appeal, FED. R. APP. P. 10(b), and the record on appeal must be transmitted to the court of appeals within forty days after filing of notice of appeal unless the time is shortened or extended. *Id.* R. 11(a). For cause shown an extension of time for transmitting the record may be sought in the district court within the time originally prescribed; and, if an extension is granted, it cannot exceed ninety days from filing of notice of appeal. *Id.* R. 11(d). The court of appeals may permit the record to be transmitted and filed after expiration of the time otherwise allowed or fixed. *Id.* The proposed amendments to the Federal Rules of Appellate Procedure would alter these provisions in several significant respects. *See* PROPOSED FEDERAL AMENDMENTS, *supra* note 20, at 10-15.

227. PROPOSED TENN. R. APP. P. 4(a).

rule and current law, at least with respect to the time within which the transcript must be filed. Another important difference between current law and rule 24(b) is that under the rule the appellant in all cases has ninety days after filing notice of appeal within which to file the transcript.[228] The appellant, therefore, is spared the burden currently imposed of moving for an extension within thirty days after entry of judgment, a requirement that at times has been overlooked and has proven fatal to an appellant who relies upon error appearing only in the bill of exceptions.[229] Finally, while nothing in the proposed rules prevents the appellant from seeking an extension of the time within which to file the transcript, an extension must be sought in the appellate court and requires a showing of good cause in both civil and criminal cases.[230] To be in a position to show good cause for an extension based on the reporter's inability to prepare the transcript within the specified time, the appellant should be able to demonstrate that the transcript was ordered promptly after filing notice of appeal.[231] Indeed, at least in cases in which the entire transcript is to be included in the record on appeal, the transcript should be ordered the same day notice of appeal is filed. Otherwise, the appellant invites the appellate court to take any action it deems appropriate, "which may include dismissal of the appeal."[232]

The transcript filed with the clerk of the trial court must be certified by the appellant, his counsel, or the reporter as an accurate account of the proceedings. Simultaneously with filing the

228. An expedited schedule of appellate review, however, may be established under proposed appellate rule 2.

229. *See, e.g.*, State v. Williams, 547 S.W.2d 895 (Tenn. 1976); Thomas v. State, 206 Tenn. 633, 337 S.W.2d 1 (1960).

230. The only proposed rule under which an extension may be sought is proposed rule 2, which empowers the appellate courts, not the trial courts, for good cause to suspend the requirements or provisions of any of the proposed rules except the time for initiating appellate review under proposed rules 4, 11, and 12.

231. A proposed amendment to FED. R. APP. P. 10(a) would require the appellant to file with the clerk of the district court, within ten days after filing notice of appeal, a copy of a written order directed to the reporter ordering a transcript of such parts of the proceedings not already on file as the appellant deems necessary. *See* PROPOSED FEDERAL AMENDMENTS, *supra* note 20, at 10. The Advisory Commission rejected a suggestion that a comparable provision be incorporated into the proposed Tennessee Rules of Appellate Procedure.

232. PROPOSED TENN. R. APP. P. 3(e).

transcript, the appellant must serve notice of the filing on the appellee. Proof of service must also be filed with the clerk of the trial court at the same time the transcript is filed. The appellee then has fifteen days after service of notice of the filing of the transcript within which to raise any objections to the transcript as filed. If no objection is made within that time, the transcript as filed is included by the clerk of the trial court in the record on appeal.[233] The procedure for settling any differences concerning the transcript is discussed below.[234]

For any number of reasons, a stenographic report or transcript may be unavailable. The reporter may not have been present, the reporter may have failed to record a portion of the proceedings, the reporter may have moved or died, or the report of the proceedings may have been lost or destroyed or may otherwise be inadequate to permit transcription. Whenever for any reason a transcript of the evidence or proceedings or some part thereof cannot be prepared, proposed rule 24(c) provides that "the appellant shall prepare a statement of the evidence or proceedings from the best available means, including his recollection." The importance of this method of preparing a statement of the evidence or proceedings is underscored by the recent decision of the Tennessee Supreme Court in *Trice v. Moyers*.[235] There, the supreme court held that a party is not entitled to a new trial simply on the ground that a stenographic report is unavailable. Instead, he must at least make an effort to generate a summary of the evidence that would be adequate for appellate review. Only if a transcript or summary cannot be obtained "by any practical or feasible means . . . and [only if] the respondent and his counsel were without fault in that regard" should the trial court order a new trial.[236]

The method of initially preparing a statement of the evidence or proceedings is up to the appellant, although rule 24(c) requires him to prepare the statement from "the best available means, including his recollection." Thus, if the statement can be prepared from a source superior to the appellant's recollection, it should be; but the appellant's recollection suffices if it is the best

233. *Id.* R. 24(b).

234. *See* text accompanying notes 247-52 *infra*.

235. 561 S.W.2d 153 (Tenn. 1978).

236. *Id.* at 156.

means available for preparing the statement. Thereafter, the method of preparing a statement of the evidence or proceedings under proposed rule 24(c) is substantially the same as the procedure set forth in rule 24(b) for preparation of a transcript. The statement prepared by the appellant, certified by him or his counsel as an accurate account, must be filed with the clerk of the trial court within ninety days after filing the notice of appeal[237] or after entry of the order by the appellate court granting permission to appeal under rule 9.[238] Simultaneously with filing the statement, the appellant must serve notice of the filing on the appellee and file proof of service on the appellee with the clerk of the trial court. The statement must be accompanied by a short and plain declaration of the issues the appellant intends to present on appeal. If no objection is made by the appellee within fifteen days after service of the appellant's declaration of issues and notice of filing of the statement, the statement as filed is included by the clerk of the trial court in the record on appeal.[239] The procedure for settling any differences regarding the statement is discussed below.[240]

Proposed rule 24 establishes one final method of preparing the record on appeal that deserves mention. Under rule 24(a) the record on appeal generally consists of copies of all papers filed in the trial court, the original of any exhibits, a transcript or statement of the evidence or proceedings prepared in accordance with rule 24(b) or 24(c), and any other matter designated by a party and properly includable in the record.[241] If less than this full record is considered sufficient, the second paragraph of rule 24(a) permits the appellant to initiate a procedure for preparation of an abridged record.[242] A second method of preparing less than the full record as defined in rule 24(a) is set forth in rule 24(d). Under rule 24(d), within ninety days after filing the notice of appeal or entry of the order by the appellate court granting permission to appeal under rule 9,[243] the parties may prepare and sign an agreed

237. PROPOSED TENN. R. APP. P. 24(c).
238. *Id.* R. 9(e).
239. *Id.* R. 24(c).
240. *See* text accompanying notes 247-52 *infra*.
241. *See* text accompanying notes 185-205 *supra*.
242. *See* text accompanying notes 206-21 *supra*.
243. PROPOSED TENN. R. APP. P. 9(e).

statement of the case. The agreed statement sets forth how the issues presented by the appeal arose and were settled by the trial court and only as much of the evidence or proceedings as is necessary to convey a fair, accurate, and complete account of what transpired with respect to those issues that are the bases of appeal. The agreed statement filed with and transmitted by the clerk of the trial court constitutes the record on appeal.[244] If the experience under a comparable provision of the Federal Rules of Appellate Procedure[245] is an accurate predictor, it is likely that rule 24(d) will be used only rarely.[246] Still, it may be of some value if preparation of the record as defined by rule 24(a) is unduly expensive and the parties agree on the dispositive matters that need to be presented to the appellate court.

Because the record on appeal is the only official account of what transpired below[247] and because in any given case the record may fall short of giving a fair, accurate, and complete account of the proceedings in the trial court, proposed rule 24(e) permits correction or modification of the record to make it conform to the truth. The record may not be impeached by the unilateral assertions of counsel in his brief or argument; if the record needs to be corrected to conform to the truth, correction must be sought under rule 24(e).

Rule 24(e) recognizes that the record may need to be corrected because some matter properly includable is omitted or because some matter is improperly included in the record or because the record contains an incorrect statement.[248] Since the

---

244. *Id.* R. 24(d).

245. FED. R. APP. P. 10(d).

246. *See* 9 MOORE'S FEDERAL PRACTICE ¶ 210.07, at 1635 (2d ed. 1975); Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 SW. L.J. 801, 806 (1976).

247. *See, e.g.*, Rector v. Griffith, 563 S.W.2d 899, 901 (Tenn. 1978).

248. *Cf.* TENN. CODE ANN. § 27-329 (1955) (remand for correction of record); TENN. SUP. CT. R. 9 (suggestion of diminution of record). If, for example, some matter properly includable in the record is omitted from an agreed statement prepared under rule 24(d), the omission may be corrected under rule 24(e). The parties, therefore, need not be deterred from proceeding under rule 24(d) because of a concern that some matter vital to decision may be inadvertently omitted. Any omission, however, should be corrected promptly.

The Advisory Commission comment to rule 24(e) notes that if it is necessary to inform the appellate court of facts that have arisen after judgment in the trial court, resort should be made to rule 14 of the proposed rules. *See* text accompa-

appellate court does not have any firsthand knowledge of what transpired in the trial court, rule 24(e) in effect provides that generally all disputes concerning what actually occurred in the trial court must be submitted to and settled by that court and not the appellate court regardless of whether the record has been transmitted to the appellate court. As stated in rule 24(e), "[a]bsent extraordinary circumstances, the determination of the trial court [of what actually occurred in that court] is conclusive." If necessary, a supplemental record may be certified and transmitted.[249] On the other hand, the trial court is not empowered to exclude from the record matters that occurred or to include matters that did not occur. This limitation on the power of the trial court finds expression in rule 24(g), which provides that nothing in rule 24 "shall be construed as empowering . . . any court to add to or subtract from the record except insofar as may be necessary to convey a fair, accurate and complete account of what transpired in the trial court."

Rule 24(e) also empowers the appellate court to remedy any omissions, improper inclusions, and misstatements. Since copies of all papers filed in the trial court, subject to certain exceptions not here relevant, are included in the record on appeal,[250] the appellate court will be fully informed concerning what occurred in the trial court with regard to correction or modification of the record. As previously noted, however, most matters concerning the accuracy of the record should initially be presented to the trial court, which may correct or modify the record before or after its transmission to the appellate court. Moreover, while the appellate court has the power to correct the record and direct that a supplemental record be prepared and transmitted, it may be understandably reluctant to do so if the matter is raised for the first time after the appeal has been fully briefed and argued and if preparation of a supplemental record would interfere with the expeditious disposition of the appeal.

The procedure to be followed in correcting or modifying the record is specified in the last sentence of rule 24(e): "Correction

nying notes 352-59 *infra*. The purpose of rule 24(e) is the limited one of ensuring that the record accurately reflects what transpired in the trial court rather than adding to it other matters not presented to the trial court.

249. PROPOSED TENN. R. APP. P. 24(e).

250. *See* text accompanying notes 185-87 *supra*.

or modification may be ordered pursuant to stipulation or on motion of the parties or on the court's own motion." Ordinarily, the record will be corrected by stipulation or on motion of one of the parties. If correction of the record necessitates adding material erroneously omitted, a fair construction of rule 24(e), particularly in light of rule 24(c), would seem to require that the party moving to add material to the record serve on the other party, together with his motion, his version of what transpired. Also, whenever a party moves to correct a matter misstated in the record, his motion under rule 24(e) should be accompanied either by his statement of what occurred or by a transcript if one is available. Rule 22(a) on the content of motions would seem to require as much, since under that rule a motion must state the order or other relief requested. The other parties in their answers in opposition to the motion should then specify their objections or amendments to the moving party's statement or any objections or amendments they have to any transcript filed with the motion for correction or modification. If correction of the record requires matters to be stricken from the record, a motion to exclude the matters would seem appropriate. Finally, if the trial or appellate court intends to correct or modify the record on its own motion, the parties should be given notice and an opportunity to be heard before the court corrects or modifies the record.

Unless the record needs to be corrected or modified, rule 24(f) provides that "it is not necessary for the record on appeal . . . to be approved by the trial court." Even records that are corrected or modified under rule 24(e) do not necessarily need to be approved by the trial judge who presided at the proceedings if he is unavailable. Any other judge or chancellor of the court in which the proceedings were held may approve the record or grant whatever other relief is appropriate, including ordering a new trial.[251] As the opinion in *Trice v. Moyers*[252] demonstrates, the requirements for obtaining a new trial are strict and such relief should not be routinely granted. The Advisory Commission comment to rule 24(f) similarly states that "[i]f . . . a transcript of the proceedings is available, only rarely would it be necessary to order a new trial."

---

251. PROPOSED TENN. R. APP. P. 24(f).

252. 561 S.W.2d 153 (Tenn. 1978); *see* text accompanying notes 235-36 *supra*.

The proposed elimination of any requirement that the record be approved by the trial court has generated a substantial amount of controversy, most notably among members of the trial bench. Unlike the situation in many other states, under current Tennessee law official court reporters are provided only in criminal proceedings.[253] If official reporters were provided in civil actions as well, there would probably be little support for retention of a requirement that the trial court approve the record on appeal. But even without official reporters, it seems unlikely any untoward problems will arise in the great majority of cases in which a stenographic report is available and the parties agree that the transcript and other portions of the record are accurate. As a practical matter, under current practice if all the attorneys on both sides agree that the bill of exceptions correctly states the proceedings and the evidence, the rule requiring the trial court to approve the bill[254] "is ordinarily only a waste of the time, the energy . . . or whatever else is needed to get the paper to the judge, as his signature follows in such a case as a matter of course."[255] Current practice, therefore, seems consistent with the objective noted in the Advisory Commission comment to rule 24(f) of permitting preparation of the record "without judicial supervision, unless the parties are unable to agree concerning the content of the record." Moreover, the requirement that the trial court approve the bill of exceptions, a requirement that originated long before the development of modern techniques of copying and of creating a verbatim record of what transpired in the trial court,[256] has at times resulted in undeniable miscarriages of justice.[257] Elimination of any requirement that the trial court ap-

253. *See* Trice v. Moyers, 561 S.W.2d 153, 155 (Tenn. 1978); TENN. CODE ANN. §§ 40-2029 to 2041 (1975).

254. *See* TENN. CODE ANN. § 27-109 (Cum. Supp. 1977).

255. Wicker, *A Comparison of Appellate Procedure in Tennessee and in the Federal Courts*, 17 TENN. L. REV. 668, 677 (1943).

256. The requirement in Tennessee that the trial court sign the bill of exceptions can easily be traced back to the midnineteenth century and probably well antedates that.

257. *See, e.g.*, Tennessee Cent. Ry. v. Tedder, 170 Tenn. 639, 98 S.W.2d 307 (1936), *noted in* Wicker, *supra* note 255, at 677-79. Until 1972, as illustrated in *Tedder*, the trial court had to approve the bill of exceptions within the time

prove the record, therefore, is consistent with current practice and designed to eliminate the injustices that have been sanctioned in the past.

To promote the previously mentioned purpose of treating the record as an integrated whole and not as two separate parts, one part consisting of the technical record and the other part consisting of the bill of exceptions,[258] rule 24(h) expressly abolishes bills of exception, including wayside bills of exception. As stated in the Advisory Commission comment to rule 24(h), "[a]ll the information properly includable in the record . . . is available to the appellate court." However, even though wayside bills are expressly abolished, rule 24(h) provides further that a transcript or statement of the evidence may be prepared prior to entry of an appealable judgment or order if it is deemed desirable. Unlike current law, preparation of a transcript or statement prior to the entry of an appealable order or judgment is permissive, not mandatory.[259] According to the Advisory Commission comment, "[i]t would only be in unusual cases that it would be necessary to resort to this subdivision if a stenographic report of the proceedings was made." If, however, it is deemed desirable to prepare a transcript or statement of the evidence for inclusion in the record prior to entry of an appealable judgment or order, the party preparing the transcript or statement must serve on all other parties notice of the filing simultaneously with the filing itself. The party preparing the transcript or statement must also serve a short and plain declaration of the issues he may present on appeal. Proof of service must be filed with the clerk along with the filing of the transcript or statement. If no objection is made

provided for its filing. This requirement has been eliminated by a 1972 amendment to the Tennessee Code, which requires only that the trial court sign the bill as soon as practicable after it is filed. TENN. CODE ANN. § 27-111 (Cum. Supp. 1977), *construed in* Arnold v. Carter, 555 S.W.2d 721 (Tenn. 1977).

258. *See* text accompanying note 184 *supra*.

259. A wayside bill of exceptions is necessary, for example, to preserve a record of the first trial if a new trial is granted. *See, e.g.*, Overturf v. State, 547 S.W.2d 912 (Tenn. 1977). Like a bill of exceptions, a wayside bill must be filed within thirty days (or an extension of sixty additional days sought within the original thirty-day period) from the entry of the order or action of the court that occasioned its filing. TENN. CODE ANN. § 27-111 (Cum. Supp. 1977); *see* Comment, *The Bill of Exceptions in Tennessee*, 25 TENN. L. REV. 246, 258-60 (1958).

within fifteen days after service of the declaration of issues and notice of the filing, the transcript or statement is considered a fair, accurate, and complete account of what transpired with respect to the declared issues. Any differences regarding the transcript or statement are settled in the same manner as any differences are settled with regard to the record prepared upon entry of an appealable judgment or order.[260]

B. Completion, Transmission, and Filing of the Record on Appeal

After the transcript or statement or agreed statement prepared in accordance with rule 24 is filed with the clerk of the trial court, the record on appeal is completed and transmitted to the appellate court as provided in rule 25. Unless the time for completion of the record is shortened or extended as provided in rule 25(e) or proof of service of the notice of appeal has not been filed, the clerk of the trial court is to assemble, number, and complete the record on appeal within thirty days after filing of the transcript, statement, or agreed statement.[261] This is slightly less time than the forty days currently permitted within which the clerk must complete and transmit the record.[262] Of course, nothing prevents the clerk from completing the record before expiration of the thirty-day period. For failure to complete the record on time, the clerk may forfeit his entire cost of preparing and transmitting the record or such part thereof as appropriate.[263] The responsibility for ensuring timely completion of the record, however, is not the clerk's alone. To remind the parties of their responsibilities under the proposed rules, rule 25(a) also provides that after filing notice of appeal the parties must comply with rule 24 and take any other action necessary to enable the clerk to complete the record. Thus, if the entire transcript is to be included, this portion

260. PROPOSED TENN. R. APP. P. 24(h); *see* text accompanying notes 247-50 *supra*.

261. PROPOSED TENN. R. APP. P. 25(a).

262. *See* TENN. CODE ANN. § 27-322 (Cum. Supp. 1977); TENN. SUP. CT. R. 6; TENN. CT. APP. R. 7.

263. PROPOSED TENN. R. APP. P. 40(g); *cf.* TENN. SUP. CT. R. 7 (disallowance of trial clerk's costs for not filing transcript in time, manner, and form prescribed); TENN. CT. APP. R. 7 (disallowance of trial clerk's fees for not filing transcript on time).

of rule 25(a) is designed to remind the appellant to order the transcript from the reporter, to file it within ninety days after filing of notice of appeal, and to notify the appellee of its filing.[264] If less than the entire transcript is to be included, the appellant is reminded to serve on the appellee his description of the parts of the transcript to be included and his declaration of the issues he intends to present on appeal.[265] If any exhibits are to be included in the record, both parties are reminded that they must be filed with the clerk of the trial court, either as part of the transcript or statement or separately, to be included in the record on appeal.[266] Rule 25(a) also reminds the appellant to file proof of service of the notice of appeal. Unless proof of service is filed, the clerk of the trial court will not complete the record and as a result the appeal itself may be, although it does not necessarily have to be, dismissed as provided in rule 26(b).[267] By directing the clerk not to complete the record unless proof of service of the notice of appeal is filed, rule 25(a) seeks to ensure that the appellee has been notified of the appeal. Only rarely, however, will the appellee, even if not previously notified of the appeal, be able to demonstrate some prejudice beyond the mere absence of notice of the appeal justifying dismissal of the appeal.[268]

As part of his obligation to complete the record, the clerk of the trial court is directed by rule 25(a) to number the pages of the documents comprising the record and to prepare a list of the documents correspondingly identified with reasonable definiteness. Numbering the pages of the documents comprising the record is designed to permit intelligible references to the record in the briefs as required in rule 27 on the content of briefs.[269] The list of documents comprising the record is transmitted with the record to the appellate court and permits that court to ascertain whether it has the full record before it.[270] Rule 25(a) also directs the clerk of the trial court to bind together in chronological order all papers filed in the trial court, thereby facilitating the appel-

264. *See* text accompanying notes 222-32 *supra*.
265. *See* text accompanying notes 213-21 *supra*.
266. *See* text accompanying notes 193-94 *supra*.
267. *See* text accompanying notes 342-51 *infra*.
268. *See* text accompanying notes 44-45 *supra*.
269. *See* text accompanying notes 411-13 *infra*.
270. PROPOSED TENN. R. APP. P. 25(a).

late court's understanding of the sequence of events as they unfolded in the trial court.[271] Finally, by virtue of the last sentence of rule 25(a), the clerk of the trial court is directed to notify the appellant if he is unable to complete the record in timely fashion. An appellant so notified has cause as required by rule 25(e) for obtaining an extension of time for completing the record.[272] Moreover, under 26(b) an appeal may not be dismissed because of the errors or omissions of the clerk of the trial court.[273]

To serve the convenience of parties who may be far removed from the office of the clerk of the appellate court but who need to consult the record in preparing their briefs and other appellate papers, rule 25(b) provides that the clerk of the trial court shall defer transmission of the record to the appellate court.[274] To ensure against unnecessary delay in preparation of the record and to permit the clerk of the appellate court to keep an accurate account of the timeliness of subsequent steps in the appellate process,[275] rule 25(b) also provides that upon completion of the record the clerk of the trial court must forward to the clerk of the appellate court a certificate reciting that the record, including the transcript or statement of the evidence or proceedings, is complete for purposes of the appeal. The certificate may not be forwarded until the record on appeal is complete; if the record can-

271. *Cf.* TENN. SUP. CT. R. 4 (transcript to contain process, pleadings, rules, orders, decrees, judgments, and all steps in the order they occurred); TENN. CT. APP. R 5(4) (transcript to contain process, pleadings, rules, orders, decrees, judgments, and all steps in the order of sequence in the progress of the case).

272. PROPOSED TENN. R. APP. P. 25(a).

273. *See* text accompanying note 60 *supra.*

274. Under current Tennessee law, the record is routinely forwarded to the appellate court when completed. *See* TENN. CODE ANN. § 27-322 (Cum. Supp. 1977); TENN. SUP. CT. R. 6; TENN. CT. APP. R. 7. FED. R. APP. P. 11(b) similarly requires the record to be transmitted to the court of appeals within forty days after filing notice of appeal. Federal rule 11(c), however, permits temporary retention of the record in the district court for use in preparing appellate papers on stipulation of the parties or on motion of any party. Also, federal rule 11(e) permits the court of appeals by rule or order to provide that the record be retained permanently in the district court, subject to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted. PROPOSED TENN. R. APP. P. 25(b) is similar to federal rule 11(c) but differs in that the record is routinely retained in the trial court to facilitate more convenient preparation of appellate papers.

275. *See* PROPOSED TENN. R. APP. P. 25(b), Advisory Comm'n comment.

not be completed within the time specified in rule 25(a), an extension must be sought as provided in rule 25(e). When the clerk of the trial court forwards the certificate to the clerk of the appellate court, he must mail a copy of the certificate to counsel of record of each party or, if a party is not represented by counsel, to the party himself.[276] It is important that the clerk mail a copy of the certificate to the parties because the time for filing and serving the appellant's brief is measured from the date on which the record is completed.[277] The actual record itself is transmitted to the appellate court after receipt by the appellant of the appellee's brief,[278] as is discussed more fully below.[279]

Proposed rule 25(c) specifies the duty of the clerk of the trial court to make the record available to the parties so that they may prepare their briefs or other appellate papers.[280] Under that rule any party to an appeal may request the clerk of the trial court to transmit the record to him. The clerk is required to comply with the request, without the necessity of an order from the trial court, by sending the record to the party charges collect or by personal delivery of the record to him. The party is responsible for the safekeeping of the record and must return it to the trial court clerk by personal delivery or prepaid express or mail not later than the day upon which his brief is to be filed. The clerk must keep a written account of requests for and the return of the record on appeal.[281] Under rule 26(c) the clerk of the appellate court is to make the record available to the parties in the same manner as that prescribed in rule 25(c).

Because the record is retained in the trial court, rule 25(d) imposes a duty on the appellant to request in writing that the clerk of the trial court transmit the record to the clerk of the appellate court. The requirement of a written request is designed to provide clear evidence of the appellant's compliance with rule 25(d). The appellant's written request for transmission of the record must be made within twenty-one days after receipt of the

276. *Id.* R. 25(b).

277. *Id.* R. 29(a); *see* text accompanying notes 372-75 *infra*.

278. PROPOSED TENN. R. APP. P. 25(d).

279. *See* text accompanying notes 282-91 *infra*.

280. *Cf.* TENN. SUP. CT. R. 8 (transcript available to counsel); TENN. CT. APP. R. 8 (transcript available to counsel).

281. PROPOSED TENN. R. APP. P. 25(c).

brief of the appellee.[282] If the appellant fails to request the clerk of the trial court to transmit the record in timely fashion, any appellee may move to dismiss the appeal.[283] Only infrequently will granting such a motion be appropriate, however, since retention of the record in the trial court serves the appellee's convenience as well, and he should therefore bear some responsibility for ensuring that the record is timely transmitted to the appellate court. Moreover, it is unlikely that the appellee will suffer any prejudice if the record is retained in the trial court beyond the time set forth in rule 25(d) for its transmittal.[284]

The clerk of the trial court is under a duty to transmit the record to the clerk of the appellate court when requested to do so by the appellant. The record forwarded to the clerk of the appellate court is accompanied by the list identifying the documents comprising the record that must be prepared by the trial court clerk under rule 25(a). Because of considerations of difficulty, inconvenience, and expense, documents of unusual bulk or weight and physical exhibits other than documents are not automatically transmitted by the clerk of the trial court.[285] As stated with regard to a comparable provision in the Federal Rules of Appellate Procedure:[286]

> The purpose of [this provision] is very obviously the prevention of unnecessary transmission of materials which can be transmitted at all only with difficulty, inconvenience, and expense. If documents of unusual bulk or weight and physical exhibits other than documents are actually necessary for the determination of the issues presented by the appeal, they must, of course, be sent to the court of appeals regardless of difficulty or expense. But if they are not necessary they should not be automatically sent off to the court of appeals . . . .[287]

Although the clerk of the trial court initially determines whether

---

282. *Id.* R. 25(d).

283. *Id.* R. 26(b).

284. The only possible prejudice that suggests itself is that the appeal may not be called for argument or otherwise submitted to the appellate court for decision as soon as it otherwise would have been. If delay in consideration of the case by the appellate court causes no prejudice, dismissal of the appeal would be inappropriate.

285. PROPOSED TENN. R. APP. P. 25(d).

286. FED. R. APP. P. 11(b).

287. 9 MOORE'S FEDERAL PRACTICE ¶ 211.08, at 1815 (2d ed. 1975).

certain materials are unusually bulky or heavy or are physical exhibits other than documents, the clerk must notify the parties if any documents or physical exhibits are not to be transmitted. Any party or the clerk of the appellate court may at any time direct the clerk of the trial court to transmit any such omitted documents or physical exhibits.[288] Whether or not transmitted, all such documents are papers or exhibits on file in the trial court and are by definition part of the record on appeal.[289] As a result, these documents may be transmitted to the appellate court without entry of an order by the trial or appellate court and without preparation of a supplemental record.[290] If a party does request transmission, he must make advance arrangement with the clerks of the trial and appellate courts for the documents' or exhibits' transportation and receipt.[291]

Under the second paragraph of rule 25(d), transmission of the record is effected when the clerk of the trial court mails or otherwise forwards the record to the clerk of the appellate court.[292] The trial court must indicate by endorsement on the face of the record or otherwise the date upon which the record is transmitted to the appellate court.[293] These provisions of proposed rule 25(d) are not as significant as the comparable provisions of the Federal Rules of Appellate Procedure,[294] at least from the parties' perspec-

288. PROPOSED TENN. R. APP. P. 25(d).

289. *See* text accompanying notes 185-96 *supra*.

290. *See* text accompanying notes 247-50 *supra*.

291. PROPOSED TENN. R. APP. P. 25(d).

292. *Cf.* TENN. CODE ANN. § 27-322 (Cum. Supp. 1977) (certificate of postmaster that transcript deposited in the post office within the prescribed time presumptive evidence of timely transmission).

293. PROPOSED TENN. R. APP. P. 25(d).

294. FED. R. APP. P. 11(b). The proposed amendments to the Federal Rules of Appellate Procedure delete this provision from rule 11(b). *See* PROPOSED FEDERAL AMENDMENTS, *supra* note 20, at 13. One purpose behind federal rule 11(b) was to eliminate the disparity that arose under the former federal rule regarding the time within which the clerk of the district court had to transmit the record to the appellate court. Under the former rule the record had to be filed in the court of appeals forty days after notice of appeal was filed. Because the time required for the record to reach the court of appeals from the district court varied depending upon the proximity of those courts to one another, the result was that the time within which the record had to be transmitted varied. Now that the record needs to be transmitted rather than filed within forty days after filing notice of appeal and transmittal is measured from the date the

tive.[295] Under the federal rules the record generally must be transmitted to the court of appeals within forty days after the filing of notice of appeal.[296] An appeal may be dismissed if the record is not transmitted in timely fashion,[297] and the clerk of the court of appeals is required to file the record only if it is timely transmitted.[298] The proposed Tennessee Rules of Appellate Procedure, on the other hand, do not specify any fixed time after the date of filing the notice of appeal within which the record must be transmitted,[299] and the appellate court clerk files the record in all cases upon its receipt following transmittal.[300] Still, the provisions of rule 25(d) specifying how transmittal is effected and requiring the clerk of the trial court to endorse the date on which the record is transmitted serve the valuable purposes of establishing a uniform method of determining when the record was transmitted and of providing further evidence that the appellant requested transmission of the record in timely fashion.

If the record on appeal cannot be completed on time, proposed rule 25(e) authorizes the trial court on motion "for cause shown" to extend the time for completing the record.[301] Ordinarily, there will be only two reasons that the record cannot be completed within the thirty-day period after filing of the transcript,

---

district court clerk forwards the record, the time within which the record must be transmitted is uniform in all federal courts. *See* 9 MOORE'S FEDERAL PRACTICE ¶ 211.02 (2d ed. 1975).

295. Since the clerk of the trial court may forfeit his costs in preparing and transmitting the record if he fails to transmit it on time, these provisions of rule 25(d) are uniquely valuable to him. *See* PROPOSED TENN. R. APP. P. 40(g).

296. FED. R. APP. P. 11(a).

297. *Id.* R. 12(c). This rule is also deleted under the proposed amendments to the federal appellate rules. *See* PROPOSED FEDERAL AMENDMENTS, *supra* note 20, at 16.

298. FED. R. APP. P. 12(b). This portion of rule 12(b) is also deleted by the proposed amendments to the federal appellate rules. *See* PROPOSED FEDERAL AMENDMENTS, *supra* note 20, at 16.

299. Proposed Tennessee appellate rule 25(d) requires transmittal of the record only after receipt by the appellant of the brief of the appellee. The date the appellant will receive the appellee's brief will vary from case to case. *See* text accompanying notes 376-77 *infra*.

300. PROPOSED TENN. R. APP. P. 26(a); *see* text accompanying notes 341-42 *infra*.

301. Nothing in proposed rule 25(e) expressly authorizes the trial court to act on its own motion. If the clerk cannot complete the record on time, he must advise the appellant, who then has good cause for an extension.

statement, or agreed statement prepared under rule 24. One is that the appellant has failed to file proof of service of the notice of appeal.[302] The other reason is that the clerk of the trial court is unable to make the required copies of the original papers filed in the trial court[303] and to otherwise assemble, number, and complete the record within the time allowed for completing the record.[304] Rule 25(a) provides that if the clerk is unable to discharge his responsibilities, an appellant has cause for an extension under rule 25(e). This is consistent with the general notion that the appellant should not be penalized if noncompliance with the rules is not his fault.[305] On the other hand, failure to file proof of service of the notice of appeal may be the fault of the appellant,[306] and the requirement that cause be shown indicates that the appellant is not entitled to an extension as a matter of course. Yet, the only effect of a delay in completion of the record is that the appellant gains some additional time for serving and filing his brief. This time period is measured from the date on which the record is completed.[307] Perhaps the most desirable solution is to extend the time for completing the record but also to abridge the time within which the appellant must file and serve his brief.[308] This solution seems consistent with the spirit of rule 3(e), which provides that failure of an appellant to take any step other than the timely filing and service of a notice of appeal does not affect its validity but is ground only for such action as is appropriate.

There are two restrictions contained in rule 25(e) on the trial court's authority to extend the time for completing the record. A request for an extension must be filed within the time originally prescribed or within an extension previously granted. In addition, the trial court may not extend the time more than sixty days after

302. Under proposed rule 25(a), the clerk is not required to complete the record if proof of service of the notice of appeal has not been filed.

303. *See* text accompanying notes 185-91 *supra*.

304. *See* text accompanying notes 261-73 *supra*.

305. *See* text accompanying note 60 *supra*.

306. The fact that proof of service of the notice of appeal is not on file with the trial court may reflect nothing other than that proof of service was lost in the mails or misdelivered through no fault of the appellant. In such a case, dismissal of the appeal under rule 25(e) would be inappropriate.

307. PROPOSED TENN. R. APP. P. 29(a); *see* text accompanying notes 372-75 *infra*.

308. *See* 9 MOORE'S FEDERAL PRACTICE ¶¶ 211.10[2], 212.05 (2d ed. 1975).

the date of the filing of the transcript, statement, or agreed statement prepared in accordance with rule 24.[309] Since the time ordinarily allowed for completion of the record is thirty days,[310] the trial court may grant only a thirty-day extension.

If the trial court is without authority to grant an extension of time for completing the record or has denied an extension, the appellate court on motion for cause shown may also extend the time for completing the record.[311] This power of the appellate court is more extensive than that of the trial court since the appellate court "may permit the record to be completed after expiration of the time fixed or allowed therefor."[312] Like all other motions, the motion under this portion of rule 25(e) must state the grounds on which it is based;[313] and if a request for an extension has been denied by the trial court, the motion must indicate the denial and set forth the reasons for the denial if any were given.[314] The remarks made previously concerning the circumstances justifying an extension of time by the trial court are equally applicable to the appellate court.[315] Since an extension is sought by motion, it may be acted upon by a single judge of the appellate court, but his action may be reviewed by the court.[316] Moreover, since the appellant's motion for an extension will probably be accompanied by a motion by the appellee under rule 26(b) to dismiss the appeal, the court will generally consider the matter since a single judge may not dismiss an appeal.[317]

The final sentence of rule 25(e) permits the trial or appellate court for cause shown to require the record to be completed and transmitted at any time within the time otherwise fixed or allowed. Since the clerk of the trial court is generally allowed only thirty days after filing of the transcript or statement or agreed statement prepared under rule 24 to complete the record,[318] utilization of this provision will not result in significant savings of

309. PROPOSED TENN. R. APP. P. 25(e).
310. *Id.* R. 25(a).
311. *Id.* R. 25(e).
312. *Id.*
313. *Id.* R. 22(a); *see* text accompanying notes 598-99 *infra.*
314. PROPOSED TENN. R. APP. P. 25(e).
315. *See* text accompanying notes 301-08 *supra.*
316. PROPOSED TENN. R. APP. P. 22(c).
317. *Id.*
318. *Id.* R. 25(a).

time, although if an agreed statement is filed under rule 24(d),[319] the rule does permit the appellee to obtain an order that in effect will require the appellant to proceed immediately with his brief-writing. If an expedited appeal is desired, a party should proceed under rule 2, which empowers the appellate courts to suspend the requirements or provisions of virtually any of the proposed rules.[320] Under that rule the appellate court may also reduce the time for preparing the transcript or statement prepared under rule 24[321] and the time for filing and serving briefs[322] and is also empowered to alter the sequence of oral argument or submission of the case[323] and enter judgment prior to completion of a written opinion.[324] Such steps will result in far greater reduction of the overall time for deciding a matter on appeal than will result from reduction of the time for completion and transmission of the record.[325]

Transmission of the record to the appellate court generally causes no inconvenience in the trial court when an appeal is taken after entry of a final judgment that disposes of the entire action. However, when an appeal is taken from an interlocutory order of the trial court, proceedings may continue in the trial court. Under proposed rule 9(f), for example, an application for permission to appeal or even the grant thereof does not stay proceedings in the trial court unless the trial or appellate court so orders. If a stay is not ordered and proceedings continue in the trial court, it may be inconvenient to transmit the record to the appellate court. Since the record on appeal consists of copies (rather than the originals) of papers filed in the trial court,[326] this difficulty will arise only in connection with any exhibits filed in the trial court

319. *See* text accompanying notes 241-46 *supra*.

320. The appellate courts, however, may not extend the time for initiating appellate review under rules 4, 11, and 12.

321. *See* PROPOSED TENN. R. APP. P. 24(b)-(c).

322. *See id.* R. 29(a).

323. *See id.* R. 34.

324. *See id.* R. 38.

325. Preparation of the record and preparation of a written opinion are probably the two most time-consuming phases of the traditional American appellate process. *See* APPELLATE COURT STANDARDS, *supra* note 12, § 3.13, Commentary at 36; P. CARRINGTON, D. MEADOR, & M. ROSENBERG, JUSTICE ON APPEAL 32 (1976).

326. *See* text accompanying notes 185-91 *supra*.

and the transcript or statement of the evidence or proceedings. To alleviate any inconvenience that transmission of these parts of the record would cause in the trial court, proposed rule 25(f) provides that the trial court may enter an order directing that specified portions of the record be retained in that court pending the appeal. If the trial court enters such an order, the clerk of the trial court is directed to retain the specified portions of the record, subject to a request for transmission by the appellate court. The record on appeal consists of a certified copy of the order of the trial court, together with such parts of the original record as the trial court allows to be transmitted, and certified copies of any retained parts.[327]

The parties themselves may also stipulate, pursuant to proposed rule 25(g), that designated parts of the record shall be retained in the trial court unless thereafter the appellate court orders or any party requests their transmittal. Because the retained parts are considered a part of the record on appeal for all purposes,[328] however, the parties need not fear that such a stipulation will affect the scope of review. As has been noted with regard to a comparable provision in the Federal Rules of Appellate Procedure:[329]

> The reason for encouraging parties to stipulate against transmission is to avoid the expense, labor, and general inconvenience attendant upon the transmission of voluminous records in those cases in which the entire record is unnecessary. When the [trial] court record is of moderate size, it is more convenient, both for the parties and for the clerks, to transmit the entire record, even if particular papers are unnecessary. But when the questions involved in an appeal require the consideration of a relatively small part of a large record . . . it is an imposition on the clerks of both courts to oblige transmission of the entire record. [This rule] permits the parties to avoid that imposition without any risk of prejudicing themselves.[330]

The record on appeal may also be reduced pursuant to the second paragraph of rule 24(a).[331] If the parties are able to agree on the

327. PROPOSED TENN. R. APP. P. 25(f).
328. *Id.* R. 25(g).
329. FED. R. APP. P. 11(f).
330. 9 MOORE'S FEDERAL PRACTICE ¶ 211.13, at 1827-28 (2d ed. 1975).
331. *See* text accompanying notes 206-21 *supra*.

parts of the record that should be retained in the trial court, however, proceeding under rule 25(g) avoids the necessity of complying with the more elaborate procedure set forth in rule 24(a).[332]

Just as there are some circumstances in which it is desirable to retain the record in the trial court beyond the time within which the record on appeal is generally transmitted to the appellate court, there are also some circumstances in which it is desirable to transmit the record to the appellate court prior to the time the record is normally transmitted. For example, the appellate court may need to study parts of the record in connection with a motion under proposed appellate rule 7 for a stay of a judgment or order of the trial court pending an appeal in civil actions,[333] a motion under rule 8 for release in criminal cases,[334] an application for permission to appeal under rule 9,[335] an application for an extraordinary appeal on original application in the appellate court under rule 10,[336] a motion to dismiss the appeal, or various other matters. Since the record on appeal typically will not be transmitted until after the appellate court must pass on these matters,[337] proposed rule 25(h) permits a party to require the transmission of those parts of the record necessary to the disposition of a motion or application for an order appropriately granted by the appellate court prior to the time the record would otherwise be transmitted.

Upon receipt of the record on appeal following its transmittal, the clerk of the appellate court files the record and notifies all parties of the filing.[338] Docketing of the appeal will have already taken place since the clerk of the appellate court dockets the appeal immediately upon receipt by him of a copy of the

---

332. *See* text accompanying notes 241-46 *supra*.

333. *See* text accompanying notes 132-60 *supra*.

334. *See* text accompanying notes 161-82 *supra*.

335. *See* text accompanying notes 75-86 *supra*.

336. *See* text accompanying notes 87-92 *supra*.

337. *See* text accompanying notes 274-79 *supra*.

338. PROPOSED TENN. R. APP. P. 26(a). Filing of the record (and therefore notice of the date of filing) is of greater significance under the Federal Rules of Appellate Procedure because the time within which the appellant must serve and file his brief is measured with reference to the date on which the record is filed. *See* FED. R. APP. P. 31(a).

notice of appeal[339] or entry of an order by the appellate court granting permission to appeal.[340]

Unlike the comparable Federal Rule of Appellate Procedure,[341] the proposed Tennessee rule requires the clerk of the appellate court to file the record in all cases upon receipt following transmittal,[342] not just upon receipt following timely transmittal as provided in the federal rule. If, however, the appellant has failed to cause timely completion or transmission of the record, the appellee may file a motion seeking dismissal of the appeal under rule 26(b). The motion, which must be served on the appellant,[343] is to be accompanied by a certificate of the trial court clerk showing the date and substance of the judgment or order from which the appeal was taken, the date on which the notice of appeal was filed, and the expiration date of any order extending the time for completing the record.[344] In cases in which an appeal by permission is granted under rule 9, the motion should set forth the date of entry of the order by the appellate court granting permission to appeal since the time fixed for preparation of the record runs from entry of that order.[345] The appellant is given fourteen days in which to respond after service of the appellee's motion to dismiss. Instead of granting the motion, or at any time on its own motion, the appellate court may order completion and transmission of the record.[346] Unlike most other motions, a motion to dismiss may not be granted by a single judge of the appellate court.[347]

Rule 26(b) expressly provides that a motion to dismiss should not be granted if the failure to complete or transmit the record in timely fashion is due to the errors or omissions of the clerk of

339. PROPOSED TENN. R. APP. P. 5(c). Under proposed rule 5(c) an appeal is docketed under the title given to the action in the trial court, with the appellant identified as such. If the title to the action in the trial court does not contain the name of the appellant, his name, identifying him as the appellant, is added to the title.

340. *Id.* R. 9(e).

341. FED. R. APP. P. 12(b).

342. PROPOSED TENN. R. APP. P. 26(a).

343. *See id.* R. 20(b).

344. *Id.* R. 26(b).

345. *Id.* R. 9(e).

346. *Id.* R. 26(b).

347. *Id.* R. 22(c).

the trial court.[348] As noted previously, failure to complete the record in timely fashion will more often than not be attributable to the clerk of the trial court,[349] and untimely transmission of the record is unlikely to prejudice the appellee, who is also benefited by retention of the record in the trial court pending preparation of the briefs.[350] Dismissal under rule 26(b), therefore, would appear to be appropriate only if the appellant has abandoned his appeal but has not taken a voluntary dismissal, as he may under proposed rule 15.[351]

C. *Keeping the Record on Appeal Up-to-Date*

Even if all steps in the process of preparing, completing, transmitting, and filing the record on appeal are completed in timely fashion, it is occasionally necessary to bring the record up-to-date so that the appellate court is aware of facts occurring after judgment that affect the positions of the parties or the subject matter of the action.[352] Accordingly, proposed rule 14(a) empowers the appellate court, in its discretion, to consider "those facts [that occurred after judgment] capable of ready demonstration, affecting the positions of the parties or the subject matter of the action such as mootness, bankruptcy, divorce, death, other judgments or proceedings, relief from the judgment requested or granted in the trial court, and other similar matters." This is not an exclusive listing of those events that an appellate court may consider, but the Advisory Commission comment to rule 14 cautions that "[t]his rule is not intended to permit a retrial in the appellate court." The limited type of matters appropriately considered under rule 14(a) is also emphasized in the last sentence of that rule, which provides: "Nothing in this rule shall be construed as a substitute for or limitation on relief from the judgment available under the Tennessee Rules of Civil Procedure or the Post-Conviction Procedure Act." If, for example, a party uncovers evidence during the pendency of an appeal that the judgment

348. *See* text accompanying note 60 *supra*.

349. *See* text accompanying notes 301-05 *supra*.

350. *See* text accompanying notes 282-84 *supra*.

351. *See also* 9 MOORE'S FEDERAL PRACTICE ¶¶ 211.10[2], 212.05 (2d ed. 1975).

352. *See* Sobieski, *supra* note 1, at 200-02.

was obtained fraudulently, relief from the judgment should be sought in the trial court, not the appellate court, under Tennessee Rule of Civil Procedure 60.02(2). The fact that relief from the judgment is being sought in the trial court, however, may appropriately be brought to the attention of the appellate court pursuant to proposed appellate rule 14. The appellate court may then grant whatever relief, if any, it deems appropriate, such as staying its consideration of the appeal or remanding the case to the trial court.[353]

Consideration of postjudgment facts by the appellate court is sought by way of a motion,[354] which must be served on all other parties.[355] The appellate court may grant or deny the motion in whole or in part and subject to whatever conditions the court deems proper.[356] If the appellate court grants the motion or acts on its own motion, the court is empowered to direct that the facts be presented in such manner and pursuant to such reasonable notice and opportunity to be heard as it deems fair.[357] Since appellate courts are ill-equipped to receive lengthy testimony, postjudgment facts will typically be presented in properly authenticated documents, public records, or affidavits or other sworn statements, any or all of which may accompany the motion.[358] Of course, nothing in rule 14 prevents the appellate court in appropriate circumstances from remanding an action to the trial court for preparation of a supplemental record.[359]

D. The Record on Direct Appellate Review of Administrative Proceeedings

The record on direct appellate review of administrative pro-

353. For a discussion of the relationship between district court action under FED. R. CIV. P. 60 and appellate review, see 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2873 (1973 & Supp. 1978); 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, *supra* note 109, § 3938, at 281-83.

354. PROPOSED TENN. R. APP. P. 14(b).

355. *Id.* R. 20(b).

356. *Id.* R. 14(b).

357. *Id.* R. 14(c).

358. *Id.* R. 22(a).

359. Under proposed appellate rule 36(a), the appellate courts are empowered to grant any relief deemed appropriate, including the giving of any judgment and making of any order.

ceedings[360] is given separate treatment in proposed rules 12(d) and 12(e). The entire record before the administrative agency is the record on review.[361] This provision eliminates any distinction between the record before the agency and the record on review and to this extent differs from rule 24, which requires preparation of a record on appeal separate from the record in the trial court.[362] The agency and the petitioner, however, may stipulate to omit portions of the record,[363] and rule 12(d) encourages them to do so since a party unreasonably refusing to stipulate may be taxed for the additional cost.[364] The parties need not fear that such a stipulation will affect the scope of review because omitted portions of the record are to be transmitted to the court of appeals on the request of the agency itself, the petitioner, or any other party. Such a request must be served on all other parties. The court of appeals on its own motion may also order that omitted portions of the record be transmitted to it.[365] If anything in the record is misstated, the parties may correct the misstatement by stipulation at any time, or the court of appeals may order that the misstatement be corrected and, if necessary, that a supplemental record be prepared and filed.[366]

Under rule 12(e) the burden of filing the record in timely fashion is placed on the agency and not on the appellant, who, under the rules governing the record on appeal, bears the primary responsibility for preparing and ensuring timely completion and transmission of the record.[367] The agency must file the record within forty-five days after service of the petition for review unless an extension is granted by the court of appeals. An extension is sought by motion and must be made within the forty-five day period or within an extension previously granted. If an extension is sought thereafter, the motion must be made within thirty days after the forty-five day period (or an extension) and requires a

360. *See* text accompanying notes 112-19 *supra*.

361. PROPOSED TENN. R. APP. P. 12(d).

362. The record is separate in the sense that copies of the original papers filed in the trial court, and not the originals themselves, are transmitted to the appellate court. *See* text accompanying notes 185-91 *supra*.

363. PROPOSED TENN. R. APP. P. 12(d).

364. *Id.*

365. *Id.*

366. *Id.*

367. *See id.* R. 24-26.

showing of reasonable excuse for failing to file the motion for an extension earlier.[368] The date of filing of the record is important because the time for filing briefs begins to run from that date.[369] To make the parties aware of when the record is filed, the clerk of the court of appeals must give notice to all parties of the date on which the record is filed.[370]

In all other respects, a review proceeding under rule 12 is governed by the other proposed rules insofar as appropriate, except for rules 24 through 26 concerning the record on appeal. As used in any applicable rule, the term "appellant" includes a petitioner and the term "appellee" includes a respondent in proceedings to review agency orders under rule 12.[371]

V. BRIEFS

A. Filing and Service of Briefs

After the record on appeal is completed or in proceedings under rule 12 to review agency orders after the record is filed, the attention of the appellant will be directed toward preparation of his brief. Under proposed rule 29(a) the appellant has thirty days from the date on which the record is completed to file and serve his brief.[372] This differs from the Federal Rules of Appellate Procedure, which measure the time for filing the appellant's brief from the date the record is filed in the court of appeals.[373] Like the federal rules, the thirty-day period commences to run from the date the record is filed in proceedings under rule 12 to review agency orders.[374] Since the record may be completed or filed at different times in particular cases, the start of the thirty-day period will depend on the precise date the record is completed or filed. The thirty days allowed by rule 29(a) is slightly more than the twenty-five days after the date of the filing of the transcript

368. *Id.* R. 12(e).
369. *Id.* R. 12(f).
370. *Id.* R. 12(e).
371. *Id.* R. 12(h).
372. In cases appealed to the supreme court from an intermediate appellate court, the thirty-day period commences to run from the date on which permission to appeal is granted. *Id.* R. 11(f).
373. FED. R. APP. P. 31(a).
374. PROPOSED TENN. R. APP. P. 12(f).

of the record that the appellant is given under current law in civil cases within which to file his assignments of error and supporting brief.[375]

The appellee also has thirty days from the date of service of the appellant's brief to serve and file his brief.[376] The start of the thirty-day period within which the appellee must file and serve his brief will therefore also vary from case to case depending upon when he is served with the appellant's brief. If the appellant serves his brief substantially before expiration of thirty days after the record is completed, the appellee still has thirty days to file and serve his brief, but the overall amount of time devoted to the briefing phase of the appeal will be reduced. The thirty days within which the appellee must file and serve his brief under rule 29(a) is substantially more than the fifteen days currently allowed in civil cases.[377]

Rule 27(c) also permits the appellant and the appellee to file reply briefs, and under rule 29(a) such briefs must be served and filed within fourteen days after service of the preceding brief. Thus, the appellant's reply brief must be filed and served within fourteen days after service of the appellee's principal brief, and the appellee's reply brief must be filed and served within fourteen days after service of the appellant's reply brief.

Under rule 29(b), a sufficient number of copies of each brief must be filed with the clerk of the appellate court to provide the clerk and each judge of the appellate court with one copy. Thus, six copies of the brief need to be filed in the supreme court, and only four copies will generally need to be filed in the intermediate

375. *See* TENN. SUP. CT. R. 14; TENN. CT. APP. R. 12. In criminal cases the appellant's brief must be filed within 30 days after filing of the transcript. TENN. SUP. CT. R. 17; TENN. CRIM. APP. R. 3. The proposed appellate rules, therefore, would not change the time for filing the appellant's brief in criminal appeals. *But cf.* APPELLATE COURT STANDARDS, *supra* note 12, § 3.52(b)(2) (appellant's brief should be filed within 20 days after record is filed in criminal cases).

376. PROPOSED TENN. R. APP. P. 29(a).

377. TENN. SUP. CT. R. 16; TENN. CT. APP. R. 14. In the court of criminal appeals, the appellee has 30 days within which to file his brief. TENN. CRIM. APP. R. 3. *But cf.* APPELLATE COURT STANDARDS, *supra* note 12, § 3.52(b)(2) (appellee's brief should be filed within 20 days after appellant's brief is filed). In all the appellate courts, the time for filing the appellee's brief is measured with reference to the filing of the brief of the appellant rather than with reference to service of the appellant's brief, as is the case under the proposed appellate rules.

appellate courts.[378] One copy of the brief must also be served on each party;[379] but if one counsel appears for several parties, he is entitled to only one copy of the brief.[380] If more than one counsel appears for a party, service of one copy of the brief on one counsel is sufficient.[381] In all cases the appellate court may order that a greater or lesser number of copies be filed and served.[382]

Nothing in the proposed rules prohibits the parties from seeking an extension of the time within which to file and serve their respective briefs; but if the appellant's or the appellee's brief is not filed in timely fashion, rule 29(c) specifies the consequences that may ensue. If the appellant fails to file his brief within the thirty-day period specified in rule 29(a) or within the time as extended, any appellee may file a motion in the appellate court to dismiss the appeal. The appellant has fourteen days after service of the motion within which to respond. The appellate court is not required to grant the motion, but may at any time—even after the time for filing and service has expired—order service and filing of the appellant's brief.[383] However, seemingly harsh dismissals have been ordered for failure of an appellant to file his assignments of error and supporting brief on time,[384] and such action sounds a warning that cannot safely be ignored. If the appellee fails to file his brief on time, any appellant may file a motion in the appellate court to have the appeal decided on the record and appellant's brief.[385] Also, under rule 35(a), an appellee who has not filed his brief will not be heard on oral argument. The appellee has fourteen days after service of the appellant's motion within which to respond. Here too, the appellate court is not required to grant the appellant's motion

378. *See* PROPOSED TENN. R. APP. P. 20(f), which provides: "Whenever these rules require copies for each judge of the appellate court and the appellate court sits in sections, copies are required only for each judge of the section."

379. *Id.* R. 29(b).

380. *Id.* R. 20(d).

381. *Id.* In cases in which the validity of a state statute or an administrative rule or regulation is drawn in question on appeal and the state or an officer or agency of the state is not a party, a copy of the brief must also be served on the attorney general. *Id.* R. 32(a); *see* text accompanying notes 465-69 *infra*.

382. PROPOSED TENN. R. APP. P. 29(b).

383. *Id.* R. 29(c).

384. *See, e.g.*, Hamby v. Millsaps, 544 S.W.2d 360 (Tenn. 1976).

385. PROPOSED TENN. R. APP. P. 29(c).

and may at any time order that the appellee's brief be filed and served.[386]

B. *Content and Form of Briefs*

Rule 27 governs the content of briefs and is largely self-explanatory. As noted in the Advisory Commission comment:

> This rule works a change in the form of briefs as they exist under current Tennessee practice. Since assignments of errors are abolished, the machinery associated with them is also abolished. Briefs will be oriented toward a statement of the issues presented in a case and the arguments in support thereof.[387]

All briefs filed in any appeal are governed by rule 27, but if briefs are required under rule 10(d) in an extraordinary appeal, less elaborate briefs may be appropriate.[388] No briefs other than the brief of the appellant, the brief of the appellee, and a reply brief by the appellant and the appellee are expressly permitted.

The brief of the appellant must contain under appropriate headings and in the following order:[389]

(1) A table of contents. This table must include references to the pages in the brief on which the succeeding portions of the brief may be found.

(2) A table of authorities. This table should include alphabetically arranged cases, statutes, and other authorities cited, with references to the pages in the brief where they are cited.

(3) A jurisdictional statement in cases appealed to the supreme court directly from the trial court indicating briefly the jurisdictional grounds for the appeal to the supreme court.[390] While some cases are appealable directly to the supreme court from the trial court,[391] such cases are sufficiently unusual to justify this requirement. If a case appealed to the supreme court should have been appealed to an intermediate appellate court, the case should be transferred to the proper court as provided in rule 17.[392]

---

386. *Id.*

387. *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.31.

388. *See* text accompanying notes 87-92 *supra.*

389. PROPOSED TENN. R. APP. P. 27(a).

390. *Cf.* TENN. SUP. CT. R. 13A (statement to be filed on direct appeals to the supreme court).

391. *See* Sobieski, *supra* note 1, at 182 n.114.

392. *Cf.* TENN. CODE ANN. § 16-408 (Cum. Supp. 1977) (transfer of cases

(4) A statement of the issues presented for review. This statement should be carefully drawn since "[s]ome judges may read this statement first and acquire a lasting impression of the nature and importance of the appeal."[393] In addition, under rule 13(b) generally, review will extend only to those issues presented for review.[394]

(5) A statement of the case, indicating briefly the nature of the case, the course of proceedings, and its disposition in the court below. The purpose of this section is simply to advise the appellate court of the procedural posture of the case so that the court will be aware at the outset of the scope of its review.

(6) A statement of the facts, setting forth the facts relevant to the issues presented for review with appropriate references to the record. It is vitally important to set forth the facts accurately since sensitivity to the factual similarities and dissimilarities between the case now presented and earlier cases lies at the heart of the common-law method of adjudication.[395] There is no more certain way to lose the respect of an appellate court than by an inaccurate statement of the facts. Referring to the exact place in the record where the relevant facts may be found not only helps to ensure the accuracy of the statement of facts but also keeps the appellate court from having to search the record for error, which it may understandably be unwilling to do.[396] If reference is made to evidence, the admissibility of which is in controversy, rule 27(g) also requires that reference be made to the pages in the record at which the evidence was identified, offered, and received or rejected.[397]

---

between supreme court and court of appeals); *id.* § 16-450 (transfer of cases between supreme court and court of criminal appeals).

393. 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, *supra* note 109, § 3974, at 421.

394. *See* Sobieski, *supra* note 1, at 194-200; *cf.* TENN. SUP. CT. R. 15(2) (errors not assigned generally treated as waived); TENN. CT. APP. R. 13(4) (errors not assigned generally treated as waived).

395. *See* Jones, *Our Uncommon Common Law*, 42 TENN. L. REV. 443 (1975).

396. *Cf.* TENN. SUP. CT. R. 14(2)-(3) (reference must be made to place in record where error appears); TENN. CT. APP. R. 12(2)-(4) (reference must be made to place in record where error appears).

397. *Cf.* TENN. SUP. CT. R. 14(3) (reference must be made to place in record where erroneous ruling on evidence occurred); TENN. CT. APP. R. 12(2)

(7) An argument, which may be preceded by a summary of argument, setting forth the contentions of the appellant with respect to the issues presented and the reasons therefor, including the reasons that the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on. The importance of referring the appellate court to the place in the record where the matter forming the basis of the appellant's argument may be found has already been noted.[398] "[F]ailure properly to call the matter [in the record that forms the basis of the appellant's argument] to the attention of the court may result in a decision that the appellant has not met the burden of demonstrating error."[399] But in addition to demonstrating error, it is also vitally important that the appellant include the reasons that the error requires appellate relief. "All too frequently counsel set forth arguments in their briefs that error was or was not committed, but then fail to argue whether the alleged error was or was not harmless."[400] The standard for determining whether error is harmless or prejudicial is set forth in proposed rule 36(b), which provides: "A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process." The genesis of rule 36(b) and its intended scope of operation are discussed in the earlier article on the proposed appellate rules.[401]

(8) A short conclusion, stating the precise relief sought. The appellant will invariably be seeking reversal or modification of the judgment below, but he should also indicate the substance of any direction he seeks the appellate court to give to the trial or intermediate appellate court. "If the appellant seeks, for example, a reversal with direction to dismiss the complaint or a remand for a determination of certain matters, that relief should be specified in the conclusion."[402]

(reference must be made to place in record where erroneous ruling on evidence occurred).

398. *See* text accompanying notes 395-96 *supra*.

399. 9 MOORE'S FEDERAL PRACTICE ¶ 228.02[4], at 3757 (2d ed. 1975).

400. R. TRAYNOR, *supra* note 3, at 26.

401. *See* Sobieski, *supra* note 1, at 251-61.

402. 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, *supra* note 109, § 3974, at 422.

The brief of the appellee and all other parties must conform to the requirements specified for the appellant's brief, except that a jurisdictional statement, a statement of the issues presented for review, a statement of the case, and a statement of facts need not be included unless the presentation by the appellant is deemed unsatisfactory.[403] If, however, the appellee considers it desirable to reformulate these matters (as he oftentimes will, at least with respect to the issues presented for review and the statement of facts) he may do so. If the appellee is also requesting relief from the judgment, as he may under rule 13(a) without filing a cross-appeal or separate appeal,[404] his brief must also contain the issues and arguments involved in his request for relief as well as his response to the brief of the appellant.[405] The arguments the appellee may raise in response to the appellant's argument is an aspect of the broader question of the scope of review, a question explored at length in the earlier article on the proposed appellate rules.[406]

Under rule 27(c) the appellant may file a brief in reply to the appellee's brief. If the appellee's brief also requests relief from the judgment, then the appellee may file a reply brief with respect to the appellant's response to the issues presented by the appellee's request for relief.[407] In short, the purpose of reply briefs is to give to the party initially presenting an issue for review and relief not only the first but also the last word. New issues may not appropriately be raised in reply briefs, which may include only a response to arguments raised for the first time in the preceding brief. No briefs beyond the reply briefs are expressly permitted by rule 27.

Occasionally, new cases, legislation, and other authorities will come to the attention of a party after his brief has been filed or after oral argument but before decision. The method of bringing such matters to the attention of the appellate court (so that it will have the latest authorities before it in deciding a case) is set forth in proposed rule 27(d). Under that rule, when pertinent and significant authorities come to the attention of a party after he has filed his brief or after oral argument but before decision,

403. PROPOSED TENN. R. APP. P. 27(b).
404. *See* Sobieski, *supra* note 1, at 188-92.
405. PROPOSED TENN. R. APP. P. 27(b).
406. *See* Sobieski, *supra* note 1, at 187-216.
407. PROPOSED TENN. R. APP. P. 27(c).

he may promptly advise the clerk of the court by letter, with extra copies to the clerk for each judge of the appellate court. A copy of the letter must also be served on all the other parties. The letter should simply set forth the citation and refer either to the page of the brief or the point argued orally to which the citation pertains. The letter should also without argument state the reasons for the supplemental citation. Any response to the letter must be made promptly and must be "similarly limited."[408] If the appellate court considers it desirable to obtain a full explanation from the parties concerning the significance of the supplemental authority, it would certainly seem free to order preparation of supplemental briefs.[409]

If determination of the issues presented for review requires consideration of a constitutional provision, statute, rule, regulation, or other similar matter, rule 27(e) provides that they must be reproduced in pertinent part in the brief or in an addendum to the brief or supplied to the court in pamphlet form.

The parties may be referred to in the briefs as they were designated in the trial court or other proceeding under review (for example, "plaintiff" and "defendant") or by using the actual names of the parties or descriptive terms (for example, "the insured person," or "the employee").[410] Whatever reference is utilized, it should be used consistently throughout the brief to promote clarity.

Except in cases in which the parties choose to prepare an appendix to their briefs,[411] references in briefs to the record shall be made to the appropriate pages of the record.[412] As the Advisory Commission comment notes, this requirement "envisions that the clerk of the trial court will have numbered the pages of the record consecutively from start to finish as provided in rule 25(a) of these rules." Intelligible abbreviations (for example, "R. 7") may be used. If reference is made to evidence, the admissibility of which is in controversy, reference must be made to the pages

408. *Id.* R. 27(d).

409. In some courts, new cases, legislation, or other authorities not available at the time of briefing or hearing are usually presented by way of a supplemental brief. *See, e.g.*, U.S. SUP. CT. R. 41(5); ILL. SUP. CT. R. 341(h).

410. PROPOSED TENN. R. APP. P. 27(f).

411. *See* text accompanying notes 427-47 *infra*.

412. PROPOSED TENN. R. APP. P. 27(g).

in the record at which the evidence was identified, offered, and received or rejected.[413]

The proper form of citation for authorities frequently cited is specified in rule 27(h).[414] Citation of cases must be by title, to the page of the volume at which the case begins, and to the pages upon which the pertinent matter appears in at least one of the reporters cited. Using only "*supra*" or "*infra*" is not sufficient; the page of the brief at which the complete citation can be found must be included. Alternatively, the full citation must be repeated. Tennessee cases may be cited to either the official reports or the South Western Reporter or both.[415] Because of the general unavailability of the official reports of other states, cases from other jurisdictions must be cited to the National Reporter System but may also be cited to both the official state reports and National Reporter System. If only the National Reporter System citation is used, the court rendering the decision must also be indicated. All citations to cases must include the year of decision. Textbooks must be cited to the section, if any, and page upon which the pertinent matter appears, and the citation must also include the year of publication and edition if the edition cited is not the first edition. Statutory citations must generally be made to the Tennessee Code Annotated, Official Edition, but citations to the session laws of Tennessee may be made when appropriate. Citation of a supplement to the Tennessee Code Annotated must be indicated and must include the year of publication of the supplement.[416] If other matters in addition to those explicitly treated in rule 27(h) are cited (for example, unreported decisions), the form of citation should be complete enough to permit easy identification of the source.

The length of briefs is specified in rule 27(i). According to that rule, arguments in principal briefs shall not exceed fifty pages, and arguments in reply briefs must not exceed twenty-five pages. The same page limitations apply whether the brief is

413. *Id.*

414. The proper form of citation is currently governed by TENN. SUP. CT. R. 18 and TENN. CT. APP. R. 13(2).

415. This provision of proposed rule 27(h) differs from rule 13(2) of the court of appeals, which requires citation to both the official and unofficial reports.

416. PROPOSED TENN. R. APP. P. 27(h).

printed or typewritten.[417] These page limitations may be altered in particular cases,[418] but parties should avoid burdening the appellate court with needlessly lengthy briefs. The Advisory Commission comment to rule 27 emphasizes that the page limitations relate to the argument section of the briefs; the full brief may exceed the specified limitations. That comment also emphasizes that the cost of reproducing briefs cannot be recovered at rates higher than those charged for photocopying. Briefs may be commercially printed only at the respective party's own expense.[419]

To eliminate needless repetition without infringing upon the right of every party to be heard, rule 27(j) provides that "[i]n cases involving multiple parties, including cases consolidated for purposes of the appeal, any number of parties may join in a single brief, and any party may adopt by reference any part of the brief of another party." This same provision applies to reply briefs.[420] In cases in which an argument would otherwise exceed the page limitations specified in rule 27(i), this rule should be particularly helpful.

The technical requirements of the form of briefs, as well as all other papers filed in the appellate court, are specified in rule 30.[421] Briefs should be produced on opaque, unglazed white paper by any printing, duplicating, or copying process that produces a clear black image. Original typewritten pages may be used, but carbon copies are not acceptable except on behalf of parties allowed to proceed as poor persons as specified in proposed appellate rule 18.[422] All printed matter should be on paper 6⅛ by 9¼

417. According to the Advisory Committee on the federal appellate rules, investigation has disclosed that the number of words on the printed page is little if any greater than the number on a page typed in standard elite type. *See* PROPOSED FEDERAL AMENDMENTS, *supra* note 20, at 19.

418. PROPOSED TENN. R. APP. P. 27(i).

419. *See id.* R. 40(f).

420. *Id.* R. 27(j).

421. The form of papers specified in proposed rule 30 is substantially the same as the form required under current law. *See* TENN. SUP. CT. R. 3; TENN. CT. APP. R. 4.

422. It has been observed that "[e]ven in proceedings in forma pauperis . . . the modern duplicating and copying processes have become so common and inexpensive that carbon copies of documents are seldom submitted by appointed counsel for the indigent. The indigents who proceed pro se are more likely to use the carbon copy option." 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, *supra* note 109, § 3978, at 446.

inches in type not smaller than 11-point, and the text of the printed matter cannot exceed 4¼ by 7¼ inches. If not printed, copies should be on paper 8½ by 11 inches, double spaced, except for quoted matter, which may be single spaced. The text of non-printed papers should be in type not smaller than standard elite typewriting and not exceeding 6½ by 9½ inches. Briefs and other papers should be numbered on the bottom and fastened on the left.[423]

One of the principal purposes of permitting the use of any process that produces a clean, readable page is to minimize the cost of producing briefs and other papers.[424] Rule 30 should be construed together with rule 40(f), which provides that "[t]he cost of producing briefs and other appellate papers shall be taxable at rates not higher than those generally charged for photocopying in the area where the clerk's office is located." While briefs may be commercially printed, the parties must bear the additional expense. Whatever the method of production used, however, the parties (or clerk of the trial court with respect to the record on appeal) should ensure that the appellate court is presented with a clear, readable copy.

The front covers of briefs must contain (1) the number of the case in the appellate court and the name of that court; (2) the title of the case as it appeared in the trial court, except that the status of each party in the appellate court must also be indicated (for example, "plaintiff-appellant," "defendant-appellee"); (3) the nature of the proceeding in the appellate court (for example, "Interlocutory Appeal by Permission") and the name of the court, agency, or board below; (4) the title of the document (for example, "Brief of the Appellant"); and (5) the name and address of counsel or, if unrepresented by counsel, the party filing the brief.[425]

If available, the colors of the covers must be blue for the brief of the appellant, red for the brief of the appellee, gray for reply briefs, and green for briefs of amicus curiae.[426] Obviously, a brief

423. PROPOSED TENN. R. APP. P. 30(a).

424. *See* APPELLATE COURT STANDARDS, *supra* note 12, § 3.13(e), Commentary at 38; Willcox, Karlen, & Roemer, *Justice Lost—By What Appellate Papers Cost*, 33 N.Y.U. L. REV. 934 (1958).

425. PROPOSED TENN. R. APP. P. 30(b).

426. *Id.* R. 30(c).

should not be rejected because its cover does not conform to this essentially permissive color scheme.

C. *Optional Appendix to Briefs*

Discussion of proposed rule 28, which regulates preparation of an appendix to the briefs, has been intentionally deferred until after a comprehensive discussion of the content and form of the briefs because preparation of an appendix is not required but is an option afforded to the parties.[427] It is a costly option, both because of the time spent and reproduction costs incurred in its preparation[428] and because the cost of preparing an appendix is not a recoverable cost on appeal.[429]

While the record on appeal will be available to the appellate court, the purpose of an appendix is to present only the essentials of an appeal to the appellate court by eliminating testimony and other purely formal parts of the record not material to a decision on appeal.[430] An appellate court may have "neither the time nor the will to search through . . . the record in search of errors to substantiate appellant's claims."[431] On the other hand, the record transmitted to the appellate court can be drastically reduced by utilizing the option afforded in rule 24(a) of designating less than a full record on appeal[432] or by stipulating under rule 25(g) that parts of the record be retained in the trial court.[433] "Moreover," as noted in the Advisory Commission comment to rule 28, "insofar as it is considered advantageous to refer the appellate court to particular portions of the record, the parties can quote verbatim from the record in their briefs."[434] Thus, while it is vi-

427. *Id.* R. 28(a).

428. *See* C. WRIGHT, THE LAW OF FEDERAL COURTS § 104, at 525 (3d ed. 1976); Joiner, *Lawyer Attitudes Toward Law and Procedural Reform*, 50 JUDICATURE 23, 25 (1966).

429. Proposed appellate rule 40(c) lists the recoverable costs on appeal. The costs of preparing and producing an appendix are not included in rule 40(c).

430. *See* PROPOSED TENN. R. APP. P. 28, Advisory Comm'n comment; Sobieski, *supra* note 1, at 245-47.

431. 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, *supra* note 109, § 3976, at 437.

432. *See* text accompanying notes 206-21 *supra*.

433. *See* text accompanying notes 328-32 *supra*.

434. *See* PROPOSED TENN. R. APP. P. 27(a)(7). The advantage of quoting the record verbatim in a brief is that each judge of the court is thereby provided

tally important for a party to call to the appellate court's attention particular portions of the record essential to appellate review or upon which a party particularly relies, preparation of an appendix is only one means of doing so, and the parties are not required to prepare an appendix if they think that some other method is equally effective.[435]

If the appellant decides to prepare an appendix, it must contain (1) any relevant portions of the pleadings, charge, findings, or opinion; (2) the judgment, order, or decision in question; and (3) any other parts of the record the appellant deems essential for the judges to read to determine the issues presented. All parts of the record that must be studied to determine the issues presented for review must be reproduced; it is not sufficient for the appellant to reproduce only those parts of the record that support his argument. If, in the judgment of the appellee, the parts of the record reproduced by the appellant are inadequate for determination of the issues presented for review, the appellee may reproduce in an appendix to his brief other parts of the record he deems essential for the judges to read. The parties are encouraged, however, to agree on the content of the appendix. The fact that parts of the record are not included in the appendix does not prevent the parties from relying on such parts.[436] Moreover, the parties are reminded that the entire record is always available to the appellate court for reference and examination and that, if the appendix is to achieve its desired objective, parts of the record that do not need to be read by the judges in determining the issues presented should not be reproduced.[437]

---

a copy of those portions of the record on which a party particularly relies. Even if the record transmitted to the appellate court is substantially reduced under proposed rules 24(a) or 25(g), only the judge assigned to write the court's opinion may read the record, but the entire court may read the briefs.

435. In addition to the method of preparing the appendix discussed in the text, the Advisory Commission considered two other approaches to preparation of the appendix. One would have required preparation of a single appendix after the principal briefs had been written; the other would have required preparation of a single appendix prior to preparation of the appellant's brief. For a discussion of the advantages and disadvantages of these various methods of preparing an appendix, see Cohn, *The Proposed Federal Rules of Appellate Procedure*, 54 GEO. L.J. 431, 459-63 (1966).

436. PROPOSED TENN. R. APP. P. 28(a).

437. *Id.* R. 28(b).

The appendix begins with a list identifying the parts of the record that it contains in the order the parts are included therein.[438] The pages in the appendix must be numbered consecutively at the bottom,[439] and the list at the beginning of the appendix must refer to the pages of the appendix at which each part begins. The parts of the record reproduced in the appendix are then set out in chronological fashion. When matter contained in a transcript of the evidence or proceedings is included in the appendix, the page of the transcript at which the matter may be found is indicated in brackets immediately before the matter included. Omissions in the text of papers or the transcript must be indicated by asterisks. Immaterial formal matters such as captions, subscriptions, and acknowledgements are to be omitted. A question and an answer may be contained in a single paragraph.[440] If exhibits are designated for inclusion in the appendix, they may be contained in a separate volume or volumes suitably indexed.[441]

While references in the briefs to the record are generally made to the pages of the record involved,[442] references to parts of the record reproduced in an appendix must be to the pages of the appendix at which those parts appear.[443] The appendix itself must be served and filed with a party's brief.[444] The same number of copies of the appendix and the same service requirements that apply to a brief[445] also apply to the appendix[446] and any separate volumes containing exhibits.[447]

D. Amicus Curiae Briefs

In certain cases, particularly those in which resolution of the issues presented for review would have an impact not confined to the parties,[448] an appellate court may receive helpful if not

438. *Id.* R. 28(d).
439. *Id.* R. 28(a).
440. *Id.* R. 28(d).
441. *Id.* R. 28(e).
442. *Id.* R. 27(g).
443. *Id.* R. 28(c).
444. *Id.* R. 28(a).
445. *See* text accompanying notes 378-82 *supra.*
446. PROPOSED TENN. R. APP. P. 28(a).
447. *Id.* R. 28(e).
448. To the extent that every decision, even in disputes between private parties about private rights, has a stare decisis impact, resolution of any issue

essential assistance from briefs by nonparties.[449] As noted by the American Bar Association Commission on Standards of Judicial Administration:

> With increasing frequency appellate courts must resolve issues that have implications of broad public significance. Very often they involve the activities of government agencies or affect interests of persons who are not parties to litigation. In such cases, although the resolution of the immediate controversy properly should be grounded on the submission of the immediate parties, the basis and scope of the decision ought to reflect adequate consideration of its wider implications. Hence, presentation of briefs by those who may be affected is often helpful and sometimes essential. It is especially important that this be done in cases affecting government agencies, for their duties and authority fundamentally depend on interpretation of the law applicable to their activities. Similar considerations may indicate the desirability of briefs *amicus curiae* in cases involving issues of unusual or specialized technical complexity, such as those governed by intricate statutory provisions. Briefs by persons appearing as *amicus curiae* can improve the court's perspective of a case and lessen its dependence on its internal resources for research and deliberation.[450]

The participation of an amicus curiae, as the ABA Commission concedes, may make the immediate parties' own presentations more difficult, and the parties therefore should be given an adequate opportunity to become acquainted with and respond to an

---

presented for review has an impact not confined to the parties. But there is also a good deal of contemporary litigation that does not arise out of disputes between private parties about private rights; instead, the object of the litigation is to vindicate constitutional or statutory policies. *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). The decision of the Tennessee Supreme Court in Cumberland Capital Corp. v. Patty, 556 S.W.2d 516 (Tenn. 1977), and the recent decision of the chancery court in Davidson County concerning prisons in Tennessee are but two local examples. Trigg v. Blanton, No. A-6047 (Tenn. Ch. Ct., Davidson County, filed Sept. 22, 1975).

449. It has also been suggested that appellate courts "should remain free to consult sources of knowledge and wisdom by voice and ear as well as by eye, and on the particular as well as the general." K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 324 (1960).

450. APPELLATE COURT STANDARDS, *supra* note 12, § 3.33, Commentary at 52-53.

amicus curiae brief. However, the resistance of the parties should not deter an appellate court from obtaining needed or helpful assistance. "While the parties have a right to present the case as they see it, they must also recognize that the law to be established in their case may have effects far beyond their immediate concerns."[451]

Recognizing the important role an amicus curiae brief can serve, proposed rule 31(a) permits an amicus brief to be filed by leave granted on motion or at the request of the appellate court.[452] Unlike the comparable Federal Rule of Appellate Procedure,[453] rule 31 does not permit the filing of an amicus brief by the consent of all of the parties because, according to the Advisory Commission comment to that rule, "generally such consent is so rarely granted as to make the provision meaningless." Like all other motions, a motion for leave to file an amicus brief must be served on all parties,[454] who may file a written opposition to the motion.[455] The motion must identify the interest of the applicant and must state how an amicus curiae brief will assist the appellate court.[456] This requirement reflects the Advisory Commission's belief that "most amicus briefs are in fact a type of adversary intervention rather than objective assistance to the court. . . . However, if the court requests an amicus brief, it may obtain the outside objective assistance that an amicus in theory renders."[457]

A motion for leave to file an amicus brief may be accompanied by the brief itself although the motion may also be filed without the amicus brief.[458] The preparation of an amicus brief prior to the granting of leave by the appellate court may result in the needless expenditure of time, money, and effort if leave is denied. But by accompanying the motion for leave to file with the brief itself the appellate court will receive a more vivid impression of how the brief may assist it. Indeed, the party seeking leave to

451. *Id.* at 53.

452. *See also id.* § 3.33(b); Note, *The Amicus Curiae*, 55 Nw. U.L. REV. 469 (1960).

453. FED. R. APP. P. 29.

454. PROPOSED TENN. R. APP. P. 20(b).

455. *Id.* R. 22(b).

456. *Id.* R. 31(a).

457. *Id.*, Advisory Comm'n comment.

458. *Id.* R. 31(a).

file an amicus may subtly influence the court even if leave is denied. Moreover, if the brief accompanies the motion the appellate court may grant leave to file the amicus brief without fear of delaying disposition of the appeal. In any event, a party should file his motion sufficiently in advance of the due date of the brief of the party he is supporting so that the filing schedule for the parties' briefs will not be disrupted. Otherwise the party opposing the amicus curiae may not be able to respond within the time normally allotted to him for filing his brief.[459] In all cases, however, the time and conditions for the filing of an amicus brief are fixed by the appellate court.[460]

The form of an amicus brief must follow the form prescribed for the brief of an appellee.[461] It is therefore unnecessary for an amicus brief to contain a jurisdictional statement, a statement of the issues presented for review, a statement of the case, or a statement of the facts if these matters are satisfactorily presented in the appellant's brief.[462] Even though the appellate court permits the filing of an amicus brief, an amicus is not technically a party to the appeal, and he is therefore not bound by the judgment in terms of its res judicata effect nor is he in a position to seek further review of an adverse judgment.[463] Similarly, an amicus curiae may participate in oral argument only by leave of court granted on motion or at the request of the appellate court.[464] The request for leave to argue orally may accompany the motion for leave to file the brief.

Because of the special effect the resolution of certain issues

459. FED. R. APP. P. 29 generally requires any amicus brief to be filed within the time allowed the party whose position on affirmance or dismissal the amicus brief will support. "The reason for requiring that the amicus brief be filed within the period allowed for the supported party's brief is to permit the opposing party to respond to both briefs within his normal time allotted." 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, *supra* note 109, § 3796, at 436.

460. PROPOSED TENN. R. APP. P. 31(b).

461. *Id.*

462. *Id.* R. 27(b).

463. *See* 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, *supra* note 109, § 3976, at 436; Note, *supra* note 452, at 469-70. *See also* Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721 (1968).

464. PROPOSED TENN. R. APP. P. 31(c).

may have on the activities of state government,[465] rule 32 is in effect a special amicus curiae rule. Under that rule, any party raising a question on appeal concerning the validity of a state statute or an administrative rule or regulation must serve a copy of his brief on the attorney general unless the state or an officer or agency is already a party to the appeal.[466] Proof that service has been made on the attorney general must be filed with the brief of the party raising the question.[467] The attorney general is entitled to file a brief in his own behalf within the time for the filing of a responsive brief by a party. Unlike other amicus curiae, regardless of whether he files a brief the attorney general is also entitled to be heard orally.[468] In the absence of the specified notice, the appellate court will not dispose of the appeal until notice and opportunity to respond has been given to the attorney general.[469]

VI. HEARING OF APPEALS

A. *Sequence of Oral Argument or Submission of Cases*

After the briefwriting phase of the appellate process is concluded, the appeal is ready for consideration by the appellate court.[470] As noted previously, appeals are docketed by the clerk

---

465. *See* APPELLATE COURT STANDARDS, *supra* note 12, § 3.33(b)(1).

466. PROPOSED TENN. R. APP. P. 32(a). The attorney general is also entitled to be served at the trial level. *See* TENN. CODE ANN. § 23-1107 (1955); TENN. R. CIV. P. 24.04. Proposed appellate rule 32(a), therefore, will be of value principally in those rare cases in which the validity of a statute, rule, or regulation is raised for the first time on appeal.

467. PROPOSED TENN. R. APP. P. 32(b).

468. *Id.* R. 32(c).

469. *Id.* R. 32(d).

470. Under rule 33 of the proposed appellate rules, the appellate courts may direct counsel for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such matters as may aid in the disposition of the proceeding by the court. Although designated as a "prehearing conference," the conference may be convened at any stage of the proceedings in which the court concludes that a conference would be of value. *Id.* R. 33, Advisory Comm'n comment. Any matters agreed upon or admitted by counsel are to be set forth in an order of the appellate court, which controls the subsequent proceeding unless modified. Modification should be freely granted to permit determination of the proceeding on its merits if no prejudice results. *Id.* R. 33. The Advisory Commission comment to rule 33 states that "[t]he provisions of this rule for a pretrial conference were considered to

of the appellate court upon his receipt of the notice of appeal[471] or upon entry of an order by the appellate court granting permission to appeal,[472] and under proposed rule 34 cases in the appellate court are to be numbered in the order in which they are docketed. Unlike current practice,[473] rule 34 provides that all cases are to be called for argument or submitted without argument in the order in which they appear on the docket unless the court orders otherwise. In the supreme court all civil cases will be heard together as will all criminal cases.[474] According to the Advisory Commission comment to rule 34, "[n]othing in this rule alters those statutory enactments requiring certain appeals to be heard on an expedited basis."[475]

B. Conduct of Oral Argument

The right of the parties to be heard orally as well as through their written briefs is unaffected by the proposed appellate rules.[476] Proposed rule 35(a) does substantially change existing Tennessee practice in civil appeals, however, by requiring any party who desires oral argument so to request by stating at the bottom of the cover page of his brief that oral argument is requested.[477] If the proposed rules are adopted, civil appeals will no longer be automatically scheduled for oral argument; oral argument must be requested. However, the Advisory Commission

---

be a potentially valuable tool to the appellate court for simplifying complex appeals in a manner similar to the pretrial conference used at the trial level." *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.53; 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, *supra* note 109, § 3979; Kaufman, *The Pre-Argument Conference: An Appellate Procedural Reform*, 74 COLUM. L. REV. 1094 (1974).

471. PROPOSED TENN. R. APP. P. 5(c).

472. *Id.* R. 9(e).

473. *See* TENN. SUP. CT. R. 19-20; TENN. CT. APP. R. 10-11. The county-by-county rule generally followed in calling cases is inapplicable in criminal cases appealed to the supreme court. *See* TENN. SUP. CT. R. 17(5). *See also* TENN. CRIM. APP. R. 5.

474. PROPOSED TENN. R. APP. P. 34.

475. *See, e.g.*, TENN. CODE ANN. § 8-2725 (1973) (actions to remove public officers have precedence on appeal over all civil and criminal cases).

476. *See* Sobieski, *supra* note 1, at 251 n.501.

477. This is the rule currently followed in the court of criminal appeals although that court also requires that oral argument be requested on the last page of the brief. *See* TENN. CRIM. APP. R. 6.

comment to rule 35 notes that "[i]f a party inadvertently fails to request oral argument, the appellate court may relieve him of his omission."

Once any party to an appeal requests oral argument, it is unnecessary for any other party to request to be heard orally unless the party who requested oral argument thereafter notifies the clerk of the appellate court and all other parties that he has decided to waive argument. In that event, any other party who has not previously requested oral argument may request it by notifying the clerk and all other parties.[478] If no party requests oral argument, the clerk of the appellate court, after the briefs from all parties are filed, will submit the case for decision on the record and briefs.[479] The appellate court, however, may direct that a case be argued even if no party has requested oral argument.[480]

The clerk of the appellate court must give the parties advance notice of the time and place a case is to be argued and the amount of time for oral argument. A request for postponement of argument must be made reasonably in advance of the date fixed for hearing.[481]

Each side requesting the same relief is allowed thirty minutes for argument unless the appellate court orders otherwise.[482] According to the Advisory Commission comment to rule 35, the term "side" is used to indicate opposing interests rather than individual parties. If multiple appellants or appellees have a common interest, they are considered a single side for the purpose of the time allowed for oral argument.[483] If any party, including counsel for multiple parties who constitute a single side, thinks that additional time is necessary for adequate presentation of the case, he may request additional time by motion filed reasonably in advance of the date fixed for hearing.[484] "It is in the spirit of

478. PROPOSED TENN. R. APP. P. 35(a).

479. *Id.* R. 35(h). This practice is currently followed in the court of criminal appeals. *See* TENN. CRIM. APP. R. 6.

480. PROPOSED TENN. R. APP. P. 35(h).

481. *Id.* R. 35(b).

482. *Id.* R. 35(c). Under current law, the supreme court allows one hour for argument, TENN. SUP. CT. R. 29; the court of appeals allows thirty minutes, TENN. CT. APP. R. 17; and the court of criminal appeals allows twenty minutes. TENN. CRIM. APP. R. 10.

483. PROPOSED TENN. R. APP. P. 35, Advisory Comm'n comment.

484. *Id.* R. 35(c).

this rule," the Advisory Commission comment to rule 35 states, "that the appellate court grant additional time if there is a reasonable basis for the requested additional time." On the other hand, a party is not obligated to use all of his allotted time, and the court may terminate argument whenever in its judgment further argument is unnecessary.[485]

The appellant is entitled to open the argument and conclude it with a rebuttal,[486] but his total time generally cannot exceed the allotted thirty minutes. Parties will not be permitted to read at length from the record, briefs, or authorities cited.[487] As a purely practical matter, reading is ineffective advocacy and should be avoided for that reason alone.[488]

If there are multiple parties or multiple counsel on the same side, no more than two counsel or parties will be heard from each side requesting the same relief except by leave of the appellate court. Leave will be granted if parties on the same side have diverse interests. Divided arguments, however, are not favored,[489] and rule 35(f) admonishes that care be taken to avoid duplication of arguments.

If a party fails to appear for oral argument, the appellate court will hear argument on behalf of the parties present if they wish to be heard. If no party appears for argument, the case is decided on the record and briefs unless the appellate court orders otherwise.[490]

Occasionally, particularly in criminal cases, the party who requested oral argument will fail to appear without giving notice to the other parties that he has decided to waive argument. This can be both costly and inconvenient to the other parties who may have been quite satisfied to dispense with oral argument and to

---

485. *Id.*

486. *Id.* R. 35(d); *cf.* TENN. CT. APP. R. 17 (counsel for appellant opens and, if desired, concludes argument).

487. PROPOSED TENN. R. APP. P. 35(d); *cf.* TENN. SUP. CT. R. 30 (reading of authorities relied upon not generally allowed); TENN. CT. APP. R. 18 (reading of books and reports of opinions not generally allowed).

488. *See* Schaefer, *Appellate Advocacy,* 23 TENN. L. REV. 471, 473 (1954).

489. PROPOSED TENN. R. APP. P. 35(f). The supreme court currently permits only one counsel to be heard for each side. TENN. SUP. CT. R. 29. The court of appeals permits two counsel for each side to be heard orally. TENN. CT. APP. R. 17.

490. PROPOSED TENN. R. APP. P. 35(g).

have the case decided on the record and briefs. To discourage nonappearance by the party requesting argument in the absence of notice of waiver, rule 35(g) provides that the court may assess against him the reasonable cost incurred by the party who does appear for argument. Moreover, in its discretion, the court may include a reasonable attorney's fee as a part of such costs.[491]

VII. Disposition of Appeals

While oral argument marks the transition into the decisional phase of the appellate process, it is only the beginning of that process. After oral argument the members of the appellate court will confer among themselves concerning the appropriate disposition of the case in light of the applicable law. An opinion will be prepared by one of the judges and circulated among the other members of the court until agreement is reached.[492] The form of the opinion and whether it should be published are topics of intense contemporary concern and have been discussed at length in the previous article on the proposed appellate rules.[493]

A. Entry of Judgment

Once the appellate court has prepared its opinion it will forward the opinion to the clerk of the appellate court. Upon receipt of the opinion, rule 38 provides that the clerk must prepare and enter judgment unless the appellate court orders otherwise.[494] Entry of the judgment is defined as the notation of the judgment in the docket,[495] and rule 38 states that the entry of judgment is not to be delayed pending computation of costs. On the same day that he enters judgment the clerk must mail to the parties a copy

491. *Id.*

492. *See* Appellate Court Standards, *supra* note 12, § 3.36.

493. *See* Sobieski, *supra* note 1, at 262-68.

494. The court of appeals currently places the initial burden of preparing the judgment on the parties, and the supreme court also routinely permits the parties to suggest the proper content of the judgment. *See* Tenn. Sup. Ct. R. 33; Tenn. Ct. App. R. 19. Under proposed rule 38 the clerk will routinely prepare the judgment, but the appellate court may order the parties to agree upon the content of the judgment or to submit their respective suggestions for settlement by the court.

495. Proposed Tenn. R. App. P. 38.

of the opinion, judgment, and notice of the date of entry of the judgment.[496]

It is vitally important that the clerk notify the parties immediately upon entry of the judgment as provided in rule 38 because the date upon which judgment is entered is significant in a number of respects. The time within which a petition for rehearing must be filed is measured from the date of entry of judgment,[497] as is the time for filing an application for permission to appeal from an intermediate appellate court to the supreme court.[498] The mandate of the appellate court also issues within a specified period of time after entry of the judgment.[499] The parties must, therefore, have notice of the entry of the judgment so that they may accurately calculate the time within which they must take any further steps. In most cases the judgment will be entered by the clerk the same day he receives the appellate court's opinion, but if there is a difference between the date of the opinion and the date of entry of the judgment, the date of entry of the judgment controls the time for petitioning for a rehearing, the time for filing an application for permission to appeal from the intermediate appellate court to the supreme court, and the issuance of the appellate court's mandate.

It is also important for the clerk to mail a copy of the opinion together with the judgment and notice of the date judgment was entered. If a petition for rehearing is filed, it must make reference to the particular portions of the opinion upon which the petition is predicated.[500] Similarly, a copy of the opinion of the intermediate appellate court must be appended to an application filed in the supreme court for permission to appeal.[501] Hence, while notice of the date of entry of judgment is important so a party may take any further steps in timely fashion, receipt of the opinion of the court is important so he can comply with the rules specifying how these steps are to be taken.

496. *Id.*; *cf.* TENN. CODE ANN. §§ 27-121 to 122 (1955) (opinions furnished to counsel and trial court).

497. PROPOSED TENN. R. APP. P. 39(b).

498. *Id.* R. 11(b).

499. *Id.* R. 42(a).

500. *Id.* R. 39(b).

501. *Id.* R. 11(b).

B. *Rehearing in the Appellate Court*

One further step that the losing party may take is to petition the appellate court for a rehearing, that is, a reargument and resubmission of briefs before judgment is finally entered. It has been observed that "[p]robably few applications in our procedural system are so often made and so seldom granted as petitions for rehearing."[502] Nonetheless, rehearing is a valuable device for the correction of appellate errors; and even when rehearing is formally denied, an appellate court may review its original decision and perhaps even write a more or less extensive opinion amounting to a reconsideration of the merits.[503]

"The basic postulate of rehearing must be that a court which is final must also be careful; it must admit of the possibility that error may occur and that original decisions may not always be the best possible decisions."[504] This understanding of the essential purpose of rehearing is reflected in proposed rule 39(a), which provides:

> In determining whether to grant a rehearing, the following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons that will be considered: (1) the court's decision incorrectly states the material facts established by the evidence and set forth in the record; (2) the court's decision is in conflict with a statute, prior decision, or other principle of law; (3) the court's decision overlooks or misapprehends a material fact or proposition of law; and (4) the court's decision relies upon matters of fact or law upon which the parties have not been heard and that are open to reasonable dispute.[505]

---

502. Louisell & Degnan, *Rehearing in American Appellate Courts*, 44 CALIF. L. REV. 627, 627 (1956).

503. *Id.* at 630.

504. *Id.* at 632.

505. *See also id.* at 632-41. Current supreme court rule 32 does not specify the grounds upon which rehearing will be granted, but it does provide that rehearing will not be granted if no new argument is made, no new authority adduced, or no material fact pointed out as overlooked. The court of appeals' rule permits rehearing en banc if its judgment or decree is in conflict with a prior decision of another section of the court that has not been reversed by the supreme court. TENN. CT. APP. R. 23. Nothing in the proposed appellate rules governs en banc rehearings in the intermediate appellate courts, and the desirability of such rehearings is certainly questionable. *See* APPELLATE COURT STANDARDS, *supra* note 12, § 3.01, Commentary at 10-12.

Rule 39(a) also restates the generally accepted proposition that rehearing will not be granted to permit reargument of matters fully argued.[506] Rehearing should not be granted to consider for the first time issues not presented for review in the briefs or on oral argument.[507] However, the grounds specified for rehearing do not have to be such that they will change the appellate court's mandate or the practical result of the decision. "[W]hatever the consequences of error to the parties, the precedent role of the decision sometimes seems sufficiently important to justify limited use of rehearing to amend or clarify unfortunate statements which may result in confusing or even misleading indications of what the law may be."[508] To further this purpose of rehearing to keep the law straight, rule 39(a) permits rehearing not only on petition of a party but also on the appellate court's own motion or on petition of an amicus curiae.

The form and content of the petition for rehearing are governed by rule 39(b). The petition must set forth the reasons the appellate court should reconsider in light of the grounds specified in rule 39(a) or any other grounds deemed appropriate for a rehearing.[509]

---

506. *Cf.* TENN. SUP. CT. R. 32 (rehearing unavailable if no new argument or authority presented).

507. *See* Louisell & Degnan, *supra* note 502, at 635:

> There is general agreement that rehearing will not be granted merely for the purpose of again debating matters on which the court has once deliberated and spoken—on this rules, cases, and justices speak with one voice. Nor is there much disposition to grant a petition which raises for the first time a question of law or a legal theory which was not raised on the first argument, especially when that question has not been raised in the trial court and appears for the first time in the petition. The latter principle is really a corollary of the common appellate rule which bars consideration, except under exceptional circumstances, of matters not raised in the trial court. The simultaneous preclusion from rehearing of certain matters which have been previously raised, on the one hand, and matters which have not been previously raised, on the other, superficially suggests an impasse based on inconsistency in the philosophy of rehearing. Actually, however, there are sound policy reasons for excluding both types—the former because they have had their day in court, the latter because the parties did not see fit seasonably to bring them to court. And there is left as the legitimate subject of rehearing matters seasonably presented by the parties but neglected by the appellate court itself in the first decision.

508. *Id.* at 636.

509. PROPOSED TENN. R. APP. P. 39(b).

> The ideal petition must be aimed not at the reason or reasons why the court was wrong in its original decision but at establishing reasons for the court to *reconsider* rather than grounds to *change* . . . . If [petitioner] is unable to state grounds other than that the court was wrong in its original decision, the prospect that his petition will be granted with consequent opportunity for full reargument on the merits is remote, and he does not even have assurance that the petition will receive more than perfunctory attention.
>
> . . . .
>
> . . . [The petition] should not be expected to also serve the role of persuading the court how the conflict or error should be resolved. That is the object of resubmission. The object of the petition is only to show that the petitioner is entitled to a rehearing, not that he is entitled to a different decision on the merits.[510]

In addition to specifying why the appellate court should reconsider, the petition must contain references to the particular portions of the opinion, record, or briefs relied on.[511] The underlying facts related to the merits need not be restated except insofar as necessary to establish that rehearing is appropriate. To limit the petition to its intended purpose and to frustrate attempts to set forth in the petition arguments directed toward how the court should dispose of the case on rehearing, rule 39(b) limits the length of the petition to no more than fifteen pages and requires the petition to be filed within ten days after entry of judgment.[512] Both these requirements may be modified by the appellate court or a judge thereof, but motions for extending the time to file petitions for rehearing will be granted only in "extreme and unavoidable circumstances."[513] Unlike the practice followed in the Supreme Court of the United States,[514] there is no requirement that a certificate of good faith by petitioning counsel accompany the petition, but obviously the absence of this requirement should

510. Louisell & Degnan, *supra* note 502, at 644, 658.

511. PROPOSED TENN. R. APP. P. 39(b).

512. The ten-day period for petitioning for rehearing is consistent with existing law in the supreme court and court of appeals. *See* TENN. SUP. CT. R. 32; TENN. CT. APP. R. 22. In the court of criminal appeals, a petition for rehearing must be filed within 15 days from the entry of judgment. TENN. CODE ANN. § 16-451 (Cum. Supp. 1977).

513. PROPOSED TENN. R. APP. P. 39(b).

514. *See* U.S. SUP. CT. R. 58(1).

not be interpreted as an invitation to file frivolous petitions or petitions interposed only for delay.

A sufficient number of copies of the petition must be filed with the clerk of the appellate court to provide the clerk and each judge of the appellate court with one copy. The petition must also be served on all other parties.[515] Since petitions for rehearing are seldom granted, however, no answer to the petition is permitted unless requested by the court.[516] The opposing party is reassured by rule 39(d) that the original result will not be changed unless he is afforded an opportunity to be heard. As stated in that rule, "no action will be taken except to grant or deny rehearing."[517] No oral argument is permitted on the petition to rehear unless ordered by the appellate court on its own motion, not on the motion of the parties.[518]

The mere filing of the petition for rehearing automatically stays the mandate of the appellate court until disposition of the petition unless the appellate court orders otherwise.[519] Similarly, the time for filing an application for permission to appeal from the intermediate appellate court to the supreme court is affected by the filing of a petition to rehear. While normally such an application must be filed within thirty days after entry of the judgment of the intermediate appellate court, if a petition for rehearing is filed, the application must be filed within fifteen days after the denial of the petition or the date of entry of the judgment on rehearing.[520]

---

515. PROPOSED TENN. R. APP. P. 39(c).

516. *Id.* R. 39(d).

517. *See* Louisell & Degnan, *supra* note 502, at 650 n.98:

> [A]t least enough formality should be observed to guarantee the party originally prevailing an opportunity to be heard in opposition. If the practicing profession is assured that its victories will not be vacated without that opportunity, it will have much less inclination to prepare and file opposition or resistance to petitions for rehearing. And courts would not then be as often faced with petitions to rehear petitions to rehear. The benefits of procedural regularity here seem to outweigh the slight economy gained by out of hand vacation of the original opinion, no matter how firmly the court is convinced that new briefs or new argument could not dissuade them from their revised view.

518. PROPOSED TENN. R. APP. P. 39(d).

519. *Id.* R. 42(a).

520. *Id.* R. 11(b).

Rule 39 does not specify how petitions for rehearing are to be processed within the appellate court, except insofar as rule 39(e) provides that rehearing will be granted only if a majority of the members of the appellate court are satisfied that rehearing is appropriate. In view of the practical difficulties associated with initial assignment of a petition to rehear to a judge who wrote the opinion or one who dissented from it,[521] each member of the court should give the petition his independent consideration. If a petition for rehearing is granted, the appellate court, after studying the particular circumstances of the case,[522] must make an appropriate order regarding reargument or resubmission of briefs. Since the case will already have been fully briefed and argued and since the issues considered on rehearing will be narrower and more sharply focused, it is to be expected that generally less time will be allowed for briefs on rehearing than is allowed for their initial submission.[523]

Finally, to preclude repeated petitions for rehearing, rule 39(f) provides that if an intermediate appellate court has granted a petition for rehearing and entered judgment on rehearing, no further petition for rehearing shall be filed in that court.[524] While nothing in that rule expressly prohibits a second petition by the unsuccessful petitioner, such a petition will almost inevitably be futile; and there is nothing in rule 11(b) to suggest that a second petition for rehearing will in any way stop the running of the fifteen days provided for filing an application for permission to appeal with the supreme court. Consistent with the current supreme court rule,[525] no second petition for rehearing may be filed in that court except on motion and leave granted by the court or a judge thereof.[526] Here too, it is extraordinarily unlikely the court

521. *See* Louisell & Degnan, *supra* note 502, at 649-51.

522. PROPOSED TENN. R. APP. P. 39(e).

523. *See* Louisell & Degnan, *supra* note 502, at 660.

524. Current rule 22 of the court of appeals provides that no second petition for rehearing shall be filed except upon special leave obtained from the court or a judge thereof. Similarly, in the court of criminal appeals no party may file more than one petition to rehear unless permitted by a judge of that court. TENN. CODE ANN. § 16-451 (Cum. Supp. 1977). Proposed rule 39(f), therefore, is more restrictive than current law insofar as it completely prohibits further petitions for rehearing once a petition has been granted and judgment entered on rehearing.

525. TENN. SUP. CT. R. 32.

526. PROPOSED TENN. R. APP. P. 39(f).

will entertain a second petition after denying the first, particularly if the supreme court has already issued its mandate.

C. Costs; Interest on Judgments

To gain a fuller understanding of the issuance of mandates from the appellate court, attention must first be devoted to the awarding of costs on appeal and interest on judgments. The allowance of costs is governed by rule 40(a), which, according to the Advisory Commission comment, embraces the general rule that "except as otherwise provided by a statute or these rules, costs are to be adjudged in favor of the prevailing party."[527] Rule 40(a) simply elaborates on the general rule by providing that generally (1) if an appeal is dismissed or a judgment is affirmed, costs shall be awarded against the appellant, and (2) if a judgment is reversed, costs shall be taxed against the appellee. If the judgment is affirmed or reversed in part or is vacated, making the "prevailing party" harder to identify,[528] costs are allowed only as ordered by the appellate court. In those cases in which the appeal is dismissed, the parties may agree upon a different allocation of costs. This agreement typically requires each party to bear his own costs. In all cases the appellate court has the discretion not to award costs in favor of the prevailing party;[529] but if the judgment or opinion of the appellate court says nothing at all about costs, they will be awarded as a matter of course as provided in rule 40(a).

In cases involving the state of Tennessee, its officers, or agencies, rule 40(b) provides that costs are awarded as they are in all other cases.[530] As noted in the Advisory Commission comment to

527. *Cf.* TENN. CODE ANN. § 20-1601 (1955) (successful party entitled to recover costs); TENN. R. CIV. P. 54.04 (costs allowed as a matter of course to prevailing party).

528. *See* Annot., 66 A.L.R.3d 1115 (1975).

529. PROPOSED TENN. R. APP. P. 40(a); *cf.* TENN. CODE ANN. § 16-1620 (1955) (costs awarded in discretion of court if case not covered by existing law); TENN. R. CIV. P. 54.04 (costs awarded in discretion of court).

530. *But see* TENN. R. CIV. P. 54.04 (costs awarded against state, its officers, and agencies only as permitted by law). *See also* TENN. CONST. art. 1, § 17; TENN. CODE ANN. §§ 8-4203, 20-1702, 3-3301 to 3331 (Cum. Supp. 1977); Comment, *Sovereign Immunity and the Tennessee Governmental Tort Liability Act*, 41 TENN. L. REV. 885 (1974).

rule 40(b), "[t]he effect of this subdivision is to place the state of Tennessee on the same footing as a private party with respect to the award of costs."

The costs recoverable on appeal under the proposed rules "include the cost of preparing and transmitting the record, the cost of a transcript of the evidence or proceedings, the cost of producing briefs and the record, the premiums paid for bonds to preserve rights pending appeal, and any other fees of the appellate court or clerk."[531] The cost of preparing an appendix to the briefs is not recoverable. As noted in the Advisory Commission comment to rule 40(c), "[m]any of the costs made recoverable by this subdivision are not currently taxable as costs. This subdivision makes costs taxable based on the principle that all items of cost expended in the prosecution of a proceeding should be recoverable by the successful party."

To recover his costs on appeal, the prevailing party must file an itemized and verified bill of his recoverable costs not included in the bill of costs of the clerk of the trial court.[532] It would seem that the verified bill of costs may appropriately take the form of an affidavit by the party or his counsel attesting to his costs incurred on appeal. The bill must be filed with the clerk of the appellate court with proof of service within fifteen days after entry of judgment although the appellate court may extend the time for filing the bill or permit the bill to be filed after the fifteen-day period. Objections to the bill of costs must be filed within ten days after service of the bill on the party against whom costs are to be taxed unless the time is extended by the appellate court.[533]

The clerk of the appellate court prepares and certifies an itemized statement of costs taxed for insertion in the mandate. On motion, however, the action of the clerk may be reviewed by the appellate court;[534] and at least in cases in which objections

531. PROPOSED TENN. R. APP. P. 40(c). Damages in the form of all of the appellee's expenses including reasonable attorney's fees are also recoverable on frivolous appeals. *See* TENN. CODE ANN. § 27-124 (Cum. Supp. 1977), *construed in* Davis v. Gulf Ins. Group, 546 S.W.2d 583 (Tenn. 1977).

532. PROPOSED TENN. R. APP. P. 40(d). *See also* TENN. CODE ANN. § 20-1641 (1955) (trial court clerk to make out bill of costs to accompany record).

533. PROPOSED TENN. R. APP. P. 40(d).

534. *Id.* R. 40(e).

have been filed, it may be sensible for the clerk to refer the matter to the court before preparing the statement of costs for inclusion in the mandate. Issuance of the mandate is not delayed for the taxing of costs,[535] and if the mandate has been issued before final determination of the costs, the statement of costs or any amendment thereto shall be added to the mandate at any time on request of the clerk of the appellate court.[536]

To minimize the costs of appeal, rule 40(f) provides that the cost of producing briefs and other appellate papers shall be taxable at a rate not higher than those generally charged for photocopying in the area where the clerk's office is located. The additional expense of commercially printed appellate papers must be borne by the respective parties. In reviewing the bill of costs of the clerk of the trial court, the clerk of the appellate court is directed, as he is under current law,[537] to disallow costs not authorized by law and costs forfeited for failure to comply with the appellate rules.[538] According to rule 40(g), for failure to complete and transmit the record on appeal in the time and manner provided in the rules, the clerk of the trial court forfeits his entire cost of preparing and transmitting the record or such portion thereof as appropriate.

Interest on judgments is governed by proposed rule 41, which, as noted in the Advisory Commission comment, "does not modify any existing law providing for interest before judgment, nor does it affect the rate of interest."[539] If a money judgment in a civil case is affirmed or the appeal is dismissed, whatever interest is allowed by law shall be payable from the date judgment was entered in the trial court.[540] This provision of rule 41 governs even if the mandate of the appellate court does not expressly mention

535. *Id.* R. 42(a).

536. *Id.* R. 40(e).

537. TENN. SUP. CT. R. 34; TENN. CT. APP. R. 28.

538. PROPOSED TENN. R. APP. P. 40(f).

539. The current rate of interest on judgments is eight percent per year. TENN. CODE ANN. § 47-14-101 (Cum. Supp. 1977).

540. The Tennessee Supreme Court's decision holding that the rate of interest is calculated from the date a new trial motion is overruled and not from the date of entry of the original judgment, *see* Monday Trucking Co. v. Millsaps, 197 Tenn. 295, 271 S.W.2d 857 (1954), *noted in* 23 TENN. L. REV. 1044 (1955), has been set aside by statute. *See* TENN. CODE ANN. § 47-14-110 (Cum. Supp. 1977).

interest, and its practical effect is to make interest payable just as if no appeal had been taken. If a judgment is reversed or modified with a direction that a money judgment be entered, the mandate should specify if interest is to be allowed and from what date.[541]

> Thus, where [an appellate court] reverses a judgment notwithstanding the verdict and directs entry of a money judgment on the verdict, the mandate should specify whether interest is to run from the date of entry of the appellate judgment or from the date on which the judgment would have been entered in the [trial court] but for the erroneous ruling corrected on the appeal.[542]

If the mandate fails to contain the required direction, that oversight would seem correctable on a motion to have the mandate recalled for a determination of the question.[543]

D. Issuance, Stay, and Recall of Mandates

The mandate, or procedendo, consists of copies, certified by the clerk of the appellate court, of the judgment, statement of costs, any order concerning costs or instructions on the computation or payment of interest, and a copy of the opinion of the appellate court. The mandate is transmitted by the clerk of the appellate court to the clerk of the trial court,[544] who must file the mandate promptly upon receiving it.[545] If the appellate court dismisses the appeal or affirms the judgment, execution may then issue and other proceedings may be conducted in the trial court as if no appeal had been taken.[546] If the appellate court remands the case for a new trial or hearing, the case is reinstated in the trial court and the subsequent proceedings are conducted after at

---

541. PROPOSED TENN. R. APP. P. 41.

542. 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, *supra* note 109, § 3984, at 463. For a general discussion of the problems that may arise in calculating interest on a judgment, see D. DOBBS, THE LAW OF REMEDIES § 3.5, at 174-78 (1973).

543. *See* PROPOSED TENN. R. APP. P. 42(d).

544. *Id.* R. 42(a); *cf.* TENN. CODE ANN. § 27-331 (1955) (certification of decrees of appellate court to trial court).

545. PROPOSED TENN. R. APP. P. 43(a).

546. *Id.* R. 43(b).

least ten days' notice to the parties.[547]

The mandate is issued with notice to the parties thirty-one days after entry of judgment unless the court directs otherwise. If a petition for rehearing is timely filed, the mandate is automatically stayed until disposition of the petition. If the petition is denied, the mandate issues sixteen days after entry of the order denying the petition unless the court orders otherwise. Issuance of the mandate is not delayed pending computation of costs.[548]

The time provided for issuance of the mandate should be considered in light of the time provided for filing an application for permission to appeal the final decision of the intermediate appellate court in the supreme court. Under rule 11(b), such an application must be filed within thirty days after entry of the judgment of the intermediate appellate court or, if a petition for rehearing is filed, within fifteen days after the denial of the petition or entry of the judgment on rehearing. The mandate of an intermediate appellate court, therefore, will issue only after the losing party has had the full time provided for seeking further review in the supreme court. If a timely application for permission to appeal is filed in the supreme court, the intermediate appellate court's mandate is also stayed automatically until final disposition of the application in the supreme court. If the application is denied, the mandate of the intermediate appellate court issues immediately upon the filing of the order denying the application.[549]

In cases in which still further review may be sought in the Supreme Court of the United States, the appellate court whose decision is sought to be reviewed or a judge thereof or the Supreme Court of Tennessee or a judge thereof may stay the man-

547. *Id.* R. 43(c).

548. *Id.* R. 42(a).

549. *Id.* R. 42(b); *cf.* TENN. CODE ANN. § 16-411 (1955) (judgments of court of appeals may be executed only after certiorari petition has been disposed of by the supreme court or time for filing for certiorari has expired). Judgments of the court of criminal appeals may be executed 30 days after entry, *id.* § 16-451 (Cum. Supp. 1977), while petitions for certiorari from the supreme court need not be filed until 45 days (which may be extended an additional 45 days) after entry of judgment by the court of criminal appeals. *Id.* § 16-452. Proposed appellate rule 42(b) would coordinate the time for issuance of the mandate of the court of criminal appeals to the time for seeking further review in the state supreme court, as is currently done in civil cases.

date.[550] Stay is not automatic, however, and requires a motion, which must comply with the provisions of rule 22 on motions.[551] Particularly in criminal cases, it may be expected that the mandate will be issued and bail revoked even if a petition for certiorari is to be filed in the United States Supreme Court unless the defendant can demonstrate that a substantial question will be presented to the Supreme Court.[552]

Finally, proposed rule 42(d) provides that the power to stay a mandate includes the power to recall a mandate. This power, however, is likely and appropriately to be exercised only sparingly since "[f]ree amendment of mandates would threaten the ordinary rules of appealability if proceedings have continued after appellate decision, and would jeopardize the more profound interests in repose if proceedings had apparently been terminated by the appellate decision."[553]

VIII. Practice on Appeal

At various points throughout this discussion it has been necessary for the sake of completeness to refer to a variety of unrelated matters that are grouped in the proposed appellate rules under the convenient heading of "practice on appeal." In some instances, the earlier discussion has been ample enough to render any further discussion needlessly repetitious. However, to complete this discussion of the procedural details of the proposed appellate rules, this section is devoted to a comprehensive discussion of voluntary dismissals; appeals by poor persons; substitution, addition, and dropping of parties; filing and service of papers; computation and extension of time; and motions.

A. Voluntary Dismissal

Proposed rule 15 regulates the voluntary dismissal of an appeal, and under subdivision (a) of that rule an appeal may be dismissed by the trial court any time before the record on appeal has been filed with the clerk of the appellate court. This provision

550. Proposed Tenn. R. App. P. 42(c).

551. *See* text accompanying notes 598-99 *infra*.

552. *See* Tenn. Crim. App. R. 11.

553. 16 C. Wright, A. Miller, F. Cooper, & E. Gressman, *supra* note 109, § 3938, at 276. *See also* Louisell & Degnan, *supra* note 502, at 660-61.

differs from the corresponding Federal Rule of Appellate Procedure under which the docketing of the appeal terminates the district court's power to dismiss.[554] Moreover, since the record is retained in the trial court pending completion of the principal briefs of the parties,[555] most voluntary dismissals will probably occur in the trial court. An appeal may be dismissed on a written stipulation signed by all the parties or on motion and notice by the appellant.[556] Because the appellant is the party who will move for a voluntary dismissal[557] or the party who will generally seek a stipulation of dismissal, the appellant (or his counsel) must file a copy of any order of dismissal by the trial court with the clerk of the appellate court.[558] Filing the dismissal in the appellate court is necessary to keep that court's docket current and should not be overlooked.

After the record has been filed with the clerk of the appellate court, an order of dismissal must be sought in the appellate court. If the parties sign and file with the clerk of the appellate court an agreement that the appeal be dismissed specifying the terms of payment of costs and fees, if any, due in connection with the appeal, the clerk of the appellate court shall enter the dismissal. An appeal may also be dismissed in the appellate court on motion upon such terms as may be agreed upon by the parties or fixed by the court.[559] If the appeal were frivolous or taken solely for delay, such terms may include the expenses incurred by the appellee as a result of the appeal.[560] A copy of the dismissal is to be filed by the clerk of the appellate court with the clerk of the trial court to permit execution and other proceedings to be conducted as if no appeal had been taken.[561]

B. Appeals by Poor Persons

The procedure to be followed to appeal as a poor person is

554. FED. R. APP. P. 42(a).
555. *See* text accompanying notes 274-79 & 282-84 *supra*.
556. PROPOSED TENN. R. APP. P. 15(a).
557. *See id.*, Advisory Comm'n comment.
558. *Id.* R. 15(a).
559. *Id.* R. 15(b).
560. *See* TENN. CODE ANN. § 27-124 (Cum. Supp. 1977), *construed in* Davis v. Gulf Ins. Group, 546 S.W.2d 583 (Tenn. 1977).
561. PROPOSED TENN. R. APP. P. 15(b).

set forth in proposed rule 18.[562] If a party did not proceed in the trial court as a poor person, which includes one who is financially unable to obtain adequate defense in a criminal case,[563] the first step to proceed on appeal as a poor person is to make a motion in the trial court seeking leave so to proceed.[564] The motion need not be accompanied by a statement of the issues the party intends to present on appeal as required by the Federal Rules of Appellate Procedure.[565] While proposed rule 18 does not specify any particular time within which the motion must be made,[566] the motion does not extend the time for filing notice of appeal nor does it revive the right to appeal if the time for filing notice of appeal has expired. In civil cases, the motion will usually be in writing[567] and must conform to the other requirements of the Tennessee Rules of Civil Procedure.[568] In criminal cases, rule 37(c) of the Tennessee Rules of Criminal Procedure requires the trial court after overruling a motion for a new trial or in arrest of judgment, whichever is later, to determine for the record whether the defendant is indigent. If he is, the trial court must also advise him of his right to proceed on appeal with court-appointed counsel and a record on appeal furnishable at state expense.[569] An oral request at that point by the defendant so to proceed on appeal will effectively make the motion in the trial court[570] as required

562. Authority for and the procedure to be followed in taking an appeal as a poor person is found in TENN. CODE ANN. §§ 27-312, -317 to 318 (1955). Authority to proceed on appeal in a criminal case with appointed counsel is found in *id.* § 40-2018 (1975). A poor person may also obtain a transcript in criminal appeals without payment of the reporter's fee pursuant to *id.* § 40-2040. For a collection of cases on determination of indigency of an accused for purposes of appeal, see Annot., 66 A.L.R.3d 954 (1975).

563. PROPOSED TENN. R. APP. P. 18(a).

564. *Id.* R. 18(b).

565. FED. R. APP. P. 24(a).

566. *But see* TENN. CODE ANN. §§ 27-312, -317 to 318 (1955).

567. *See* TENN. R. CIV. P. 7.02(1).

568. *See id.* R. 6.04, 7.02.

569. TENN. R. CRIM. P. 37(c); *see* PROPOSED TENN. R. APP. P. 18(d). *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.20; ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 2-31 (1975); Boskey, *The Right to Counsel in Appellate Proceedings*, 45 MINN. L. REV. 783 (1961).

570. TENN. R. CRIM. P. 47. The duties of counsel on appeal in criminal cases are treated in TENN. CRIM. APP. R. 1; TENN. R. CRIM. P. 37(e). *See also* State v. Williams, 529 S.W.2d 714 (Tenn. 1975); Hutchins v. State, 504 S.W.2d 758 (Tenn. 1974); Moultrie v. State, 542 S.W.2d 835 (Tenn. Crim. App. 1976).

by proposed appellate rule 18(b).

In either a civil or a criminal case, if the trial court grants leave to proceed on appeal as a poor person, the party may proceed without further application in the appellate court and without prepayment of fees or costs in either court or the giving of security therefor.[571] Upon denial of a motion to proceed on appeal as a poor person, the trial court must state in writing the reasons for the denial.[572]

If a party has proceeded in the trial court as a poor person, he may so proceed on appeal without any further authorization unless the trial court finds otherwise. Such a finding may apparently be made before or after notice of appeal has been filed. The trial court must state in writing the reasons for its finding.[573]

If leave to proceed on appeal as a poor person is denied or if the trial court finds that the party is not entitled so to proceed, the clerk of the trial court must forthwith serve notice of the denial or finding. Within thirty days after service of notice of the action by the trial court, a motion for leave to proceed as a poor person may be filed in the appellate court. The motion must be accompanied by copies of all papers filed in the trial court seeking leave to proceed as a poor person and by a copy of the statement of reasons given by the trial court for its action.[574] As emphasized in the Advisory Commission comment to rule 18, "[r]eview in the appellate court is by way of motion, rather than by way of an appeal. This simple and expeditious procedure seems clearly preferable to an appeal."

C. Substitution, Addition, and Dropping of Parties

The procedure to be followed if a party dies before or after notice of appeal is filed has already been discussed in connection with initiation of an appeal as of right, and substitution for other causes is effected in the same manner as outlined there.[575] It is necessary here only to note a few additional matters. Under rule

571. Carbon copies of appellate papers may also be filed on behalf of parties allowed to proceed as poor persons. PROPOSED TENN. R. APP. P. 30(a).

572. *Id.* R. 18(b).

573. *Id.* R. 18(a).

574. *Id.* R. 18(c).

575. *See* text accompanying notes 65-71 *supra.*

19(c) if a public officer in his official capacity is a party to an appeal and during its pendency he dies, resigns, or otherwise ceases to hold office, the action does not abate, and his successor is automatically substituted as a party. Proceedings thereafter are in the name of the substituted party, but any misnomer not causing harmful error is disregarded.[576] Rule 19(c) also provides that a public officer who is a party in his official capacity may be described as a party by his official title rather than by name. The appellate court, however, may require that his name be added.[577] All these provisions are derived from Tennessee Rule of Civil Procedure 25.04.

Parties may also be added or dropped by order of the appellate court on its own motion or on motion of a party and on such terms as are just.[578] This provision also finds a parallel in Tennessee Rule of Civil Procedure 21 and is designed in part to permit intervention at the appellate level.[579]

D. Filing and Service of Papers

The general requirements for the filing and service of all appellate papers—briefs, applications, petitions, motions, and the like—are specified in proposed appellate rule 20. All papers required or permitted to be filed in the appellate court are to be filed with the clerk of that court. Filing may be accomplished in person or by mail addressed to the clerk. If filing is accomplished by mail, the day of mailing, which is evidenced by a postmark affixed in and by a United States Post Office, shall be deemed the day of filing if first class mail is utilized.[580] This provision differs from the Federal Rules of Appellate Procedure under which filing of all papers, except briefs and appendices, is not timely unless the papers are received by the clerk within the time fixed for filing.[581] The advantage of measuring the date of filing

576. PROPOSED TENN. R. APP. P. 19(c).

577. *Id.*

578. *Id.* R. 19(e).

579. Intervention at the appellate level is rare but has been permitted in a few federal cases. *See* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1916, at 583-84 (1972).

580. PROPOSED TENN. R. APP. P. 20(a). *See also* 7 WIGMORE ON EVIDENCE § 2152 (3d ed. 1940).

581. FED. R. APP. P. 25(a).

from the postmark date is that it affords all parties, and not merely those conveniently located near the office of the clerk of the appellate court, the maximum time required or permitted for the preparation of papers.[582]

Rule 20(a) also provides that if a motion requests relief that may be granted by a single judge—and all motions may be except those to dismiss an appeal[583]—the judge may permit the motion to be filed with him. In that event the judge must note on the motion the date of filing and must transmit it to the clerk of the appellate court.[584]

Copies of all papers filed by any party must be served at or before the time for filing by a party or person acting for him on all other parties to the appeal or proceeding.[585] The Advisory Commission comment to rule 20 emphasizes that service must be made on all parties and not merely adverse parties:

> In view of the simplicity of service by mail, and the difficulty in some circumstances determining who is an "adverse" party, there seems to be no good reason why a party who files a paper should not be required to serve all other parties to the proceeding in the appellate court.

Service on a party represented by counsel is to be made on counsel.[586] If one counsel appears for several parties, he is entitled to only one copy of any paper served upon him by any other party. If more than one counsel appears for a party, service upon one of them is sufficient.[587]

Service may be either personal or by mail. Personal service includes delivery of the copy to the clerk or other responsible person at the office of counsel or, if a party is not represented by counsel, by leaving the copy at his residence with some member of the family of the age of ten years or upwards. Service by mail is complete on mailing.[588]

---

582. One conceivable disadvantage is the uncertainty of the mails and the difficult question of fact that arises if a party claims an appellate paper, such as the notice of appeal, was lost in the mail.

583. PROPOSED TENN. R. APP. P. 22(c).

584. *Id.* R. 20(a).

585. *Id.* R. 20(b).

586. *Id.* R. 20(c).

587. *Id.* R. 20(d).

588. *Id.* R. 20(c).

Papers presented to the clerk of the appellate court for filing must contain proof of service. Proof of service may be in the form of an acknowledgement of service by the person served or, alternatively, in the form of a statement of the date and manner of service and the names of the persons served, certified by the person who made service. Proof of service may appear either on the paper served or be separately affixed thereto.[589]

Rule 20(e) permits the clerk to file papers without acknowledgment or proof of service, but he must require that proof of service be filed promptly thereafter. In all cases, however, it is better practice to submit proof of service upon filing.

The last section of rule 20 provides that whenever copies must be filed for each judge of the appellate court and that court sits in sections, copies are required only for each judge of the section.[590] As a result, generally only four copies of such papers must be filed with the clerk of the intermediate appellate courts: one for the clerk and one for each judge of the section.[591]

E. Computation and Extension of Time

The method of computing time under the proposed appellate rules is governed by rule 20(a), which is identical in all material respects with Tennessee Rule of Civil Procedure 6.01 and Tennessee Rule of Criminal Procedure 45. Under all those rules (1) the day of the act, event, or default from or after which the designated period of time begins to run is not to be included in the computation, but (2) the last day of the period is to be included unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or a legal holiday. If the period of time prescribed or allowed is less than seven days, however, intermediate Saturdays, Sundays, and legal holidays are to be excluded from the computation. As stated in the comment to civil trial rule 6.01, "[w]hen the time allowed is so short, the party limited by the time should not be further handicapped by losing one or more days because normal business operations are suspended by Saturday, Sunday, or legal holiday observances." An illustration of the

589. *Id.* R. 20(e).
590. *Id.* R. 20(f).
591. *Id.*, Advisory Comm'n comment.

intended operation of rule 6.01 is set forth in the comment to that rule and is equally illuminating of the intended operation of appellate rule 21(a).

Rule 21(b) provides that for good cause shown the appellate court may enlarge the time prescribed either by the rules or by the court's own order for doing any act. The appellate court may also permit an act to be done after expiration of the applicable period of time. However, the appellate court is expressly enjoined from extending the time for filing notice of appeal or an application for permission to appeal seeking review by the supreme court of a final decision of the intermediate appellate court or a petition for review of an administrative agency order.[592] Rule 2 contains the same limitation on the power of the appellate courts to suspend the requirements or provisions of the proposed appellate rules in a particular case.

Under rule 21(c) the period of time provided for the doing of any act or the taking of any proceeding is wholly unaffected by the continued existence or expiration of a term of court. Nor does the continued existence or expiration of a term of court affect the power of a court to do any act or take any proceeding.[593] As noted in the comment to the identical provisions of Tennessee Rule of Civil Procedure 6.03:

> The time within which an act is required to be done or a proceeding taken is fixed to allow the parties a reasonable time in which to act. To allow this reasonable time to be affected or limited by the continuance or expiration of a term of court is to introduce a variable which may make the time allowed in a particular case unreasonable and thus work a hardship upon a party. Accordingly, this rule eliminates court terms as a factor in computing allowable time periods.

The last subdivision of proposed appellate rule 21 provides, in language identical in all material respects to Tennessee Rule of Civil Procedure 6.05 and Tennessee Rule of Criminal Procedure 45(d), that whenever a party is required or permitted to do an act or take some proceeding within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the pre-

592. *Id.* R. 21(b).
593. *Id.* R. 21(c).

scribed period.[594] As has been noted with regard to the identical provision of the Federal Rules of Civil Procedure, "[t]he three additional days allowed when service has been made by mail should be added to the original period, rather than treated as a separate period, and the total treated as a single period for purposes of computation."[595]

F. Motions

The final aspect of practice on appeal to be discussed in this concluding section is motions, which are governed by proposed rule 22. Motions may be made for a variety of purposes. Some may seek to dismiss or otherwise finally dispose of an appeal.[596] Most motions, however, "are subordinate to, and in aid of, the main purpose of an appeal, which is to brief and argue the case and to induce the court to dispose of the merits."[597]

Rule 22(a) provides that, unless another form is elsewhere prescribed in the proposed rules, an application for an order, unless made during a hearing, shall be made by filing a written motion for such order or relief with proof of service on all other parties.[598] The motion must contain or be accompanied by any matter required by a specific provision of the proposed appellate rules governing such a motion and the papers, if any, upon which it is based. The motion must also state the grounds on which it is based and the order or other relief requested. A memorandum of law must accompany the motion, and if the motion is based on matters not of record, affidavits or other supporting evidence must accompany the motion. Any showing in opposition to the motion must be served and filed within five days after service of the motion, but the court may shorten or extend the time for

---

594. *Id.* R. 21(d).

595. 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1171, at 646 (1969).

596. *See, e.g.*, PROPOSED TENN. R. APP. P. 26(b), 29(c). *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.13(f).

597. 16 C. WRIGHT, A. MILLER, F. COOPER, & E. GRESSMAN, *supra* note 109, § 3973, at 417; *see* PROPOSED TENN. R. APP. P. 1 ("These rules shall be construed to secure the just, speedy, and inexpensive determination of every proceeding on its merits.").

598. *Cf.* TENN. SUP. CT. R. 26 (all motions must be reduced to writing); TENN. CT. APP. R. 21 (all motions must be reduced to writing).

responding to any motion.[599]

Unlike the comparable rule of the Federal Rules of Appellate Procedure,[600] proposed rule 22(b) provides that "[e]xcept for motions for which necessity requires otherwise or for motions that may be acted upon after reasonable notice as elsewhere prescribed in these [proposed] rules, motions shall be disposed of only after service and opposition thereto has been filed or the time for filing has expired."[601] Nothing prevents the moving party from obtaining a waiver from the other parties of their right to be heard in opposition. The moving party may then indicate in his motion that the other parties have no objection to the grant of the requested relief, and the court may act without waiting for a showing in opposition. Motions that may be acted upon after reasonable notice include motions under rule 7 for a stay or injunction pending appeal[602] and motions under rule 8 for release in criminal cases.[603] As noted in the Advisory Commission comment to rule 22, reasonable notice may be less than the five days' notice otherwise specified in rule 22(a) for making a showing in opposition, and the need for expeditious action on motions filed under rule 7 or 8 makes it undesirable to delay disposition automatically for five days.

On request of a party or on its own motion, the appellate court may place any motion on the calendar for hearing or may otherwise dispose of the motion. When a motion is placed on the calendar for hearing, the clerk of the appellate court must notify each party of the date and time designated for the hearing.[604] Except for motions the granting of which will affect the outcome, such as motions for summary affirmance or dismissal, it is unlikely that oral argument will be ordered for most motions.[605] Pursuant to rule or order of the court, motions for specified types of procedural orders may be disposed of by the clerk of

599. PROPOSED TENN. R. APP. P. 22(a).

600. FED. R. APP. P. 27(b).

601. *Cf.* TENN. SUP. CT. R. 26 (no motion will be considered except on reasonable notice to opposing counsel); TENN. CT. APP. R. 21 (motion must show reasonable notice has been given adversary counsel before being presented to the court).

602. *See* text accompanying note 156 *supra*.

603. *See* text accompanying note 177 *supra*.

604. PROPOSED TENN. R. APP. P. 22(b).

605. *Cf.* TENN. SUP. CT. R. 27 (motions will be disposed of only on briefs).

the appellate court.[606] This delegation should normally be limited to routine and unopposed motions that do not immediately affect the outcome of the appeal.

Under rule 22(c) a single judge of the appellate court may entertain and may grant or deny any request for relief that may be sought by motion under the proposed rules. However, a single judge may not dismiss or otherwise finally dispose of an appeal or other proceeding.[607] According to the Advisory Commission comment to rule 22(c), "[f]inal disposition of an appeal means the termination of an appeal, whether by decision, dismissal, or otherwise." Similarly, a single judge may not act upon a request that takes some form other than a motion. For example, some of the rules previously discussed require preparation of an application or petition.[608] Since the relief requested under those rules may not properly be sought by motion, a single judge may not grant the relief:

> It would, therefore, be inappropriate for a single judge to grant a request for permission to appeal, since permission is requested by the filing of an application, not by a motion. On the other hand, a single appellate judge may grant a stay or injunction under rule 7 pending disposition of an application for permission to appeal by the full court.[609]

In all cases in which a single judge may appropriately grant or deny a motion, his action, on motion, may be reviewed by the court.[610]

The form of all motions must comply with the same form previously discussed in connection with briefs.[611] Motions and papers other than briefs must also contain a caption setting forth (1) the number of the case in the appellate court and the name

606. PROPOSED TENN. R. APP. P. 22(b). *See also* APPELLATE COURT STANDARDS, *supra* note 12, § 3.01(d), Commentary at 12.

607. PROPOSED TENN. R. APP. P. 22(c).

608. *See, e.g., id.* R. 9(c) (application for interlocutory appeal by permission from the trial court); *id.* R. 10(b) (application for extraordinary appeal by permission on original application in the appellate court); *id.* R. 11(a) (application for appeal by permission from intermediate appellate court to supreme court); *id.* R. 39(a) (petition for rehearing).

609. *Id.* R. 22(c), Advisory Comm'n comment.

610. *Id.* R. 22(c).

611. *See id.* R. 22(d); text accompanying notes 421-23 *supra*.

of that court, (2) the title of the case as it appeared in the trial court, and (3) a brief descriptive title indicating the purpose of the paper.[612] Two copies of the motion shall be filed, but the court may require that additional copies be furnished.[613]

Rule 22 on motions should be construed in light of rules 23 and 37(a). Rule 37(a) provides that the denial of any motion or application or petition must be accompanied by a statement of reasons, either orally or in writing.[614] Under rule 23 the clerk of the appellate court immediately upon entry of an order shall serve by mail notice of its entry on each party to the proceeding together with a copy of any written reasons respecting the order. The clerk must also make a note in the docket of the mailing.[615] According to the Advisory Commission comment, the purpose of rule 23 "is to keep the parties up-to-date with regard to the disposition of the appeal or other proceeding before the appellate court."

IX. CONCLUSION

Instead of a concluding textual summary of the preceding discussion, what follows is intended to serve as a checklist of steps ordinarily necessary in three kinds of appeals: (1) an appeal as of right from the trial court, (2) an interlocutory appeal by permission from the trial court, and (3) an appeal by permission to the supreme court from a final decision of the intermediate appellate court. These kinds of appeals are singled out for treatment because they are by far the most common types of appeals that would be prosecuted under the proposed appellate rules if they are approved by the legislature. To be of greatest usefulness to the respective parties, the checklists are divided between the steps to be taken by the appellant and those to be taken by the appellee. The footnotes indicate the relevant proposed rules and portions of this article that should be consulted for a more detailed discussion of the various steps outlined below. There is of

612. PROPOSED TENN. R. APP. P. 30(d).

613. *Id.* R. 22(d).

614. Only a statement of reasons, not an opinion, is required. The form of the statement lies in the discretion of the appellate court. *But see* APPELLATE COURT STANDARDS, *supra* note 12, § 3.10(c), Commentary at 17-18; *id.* § 3.12(d), Commentary at 29-30.

615. PROPOSED TENN. R. APP. P. 23.

course no guarantee that what follows will become law, but what follows does accurately set forth the current recommendation of the Tennessee Supreme Court's Advisory Commission of what the law should be.

CHECKLISTS OF STEPS ON APPEAL

1. Checklist of Steps on an Appeal as of Right from the Trial Courts

A. Steps by the Appellant in an Appeal as of Right

(1) File a notice of appeal with the clerk of the trial court within thirty days after the date of entry of the judgment appealed from.[616]

(2) Simultaneously with filing item (1), file a bond for costs on appeal in civil actions.[617] This step may be omitted as noted in step (3).

(3) File a bond for stay, if such is desired, and secure approval thereof by the trial court.[618] If a bond for stay includes security for the payment of costs on appeal, step (2) may be omitted.

(4) Within seven days after filing item (1), serve a copy thereof on the other parties and the clerk of the appellate court to which the appeal has been taken. Note on each copy served the date on which item (1) was filed, and include with the copy filed with the clerk of the appellate court a list of the parties upon whom service is required.[619]

(5) Within seven days after service, file proof of service of item (4) with the clerk of the trial court.[620]

(6) Order the entire transcript of the evidence or proceedings; or within fifteen days after filing item (1), serve on the appellee both a description of the parts of the transcript to be included in the record and a short and

616. *See id.* R. 3(e)-(f), 4; text accompanying notes 12-35 *supra.*

617. *See* PROPOSED TENN. R. APP. P. 6; text accompanying notes 120-31 *supra.*

618. *See* PROPOSED TENN. R. CIV. P. 62, 65A; text accompanying notes 132-60 *supra.*

619. *See* PROPOSED TENN. R. APP. 5(a)-(b); text accompanying notes 36-43 *supra.*

620. *See* PROPOSED TENN. R. APP. P. 5(a)-(b).

plain declaration of the issues to be presented on appeal.[621]

(7) File exhibits not on file with the clerk of the trial court for inclusion in the record or with the reporter for inclusion in the transcript.[622]

(8) File the transcript of the evidence or proceedings with the clerk of the trial court within ninety days after filing item (1).[623]

(9) Simultaneously with filing item (8), file notice of the filing on the appellee and file proof of service of notice with the clerk of the trial court.[624]

(10) Within thirty days after the record is completed by the clerk of the trial court, prepare and file in the appellate court copies of a brief.[625] If oral argument is desired, state on the bottom of the cover page of the brief "Oral Argument Requested."[626] File four copies if the appeal is in an intermediate appellate court. File six copies if the appeal is in the supreme court. Serve one copy of the brief on counsel for each appellee and file proof of service with the clerk of the appellate court.[627]

(11) Within fourteen days after receipt of the brief of the appellee, prepare, file, and serve a reply brief as provided in step (10).[628]

(12) Within twenty-one days after receipt of the brief of the appellee, request in writing that the clerk of the trial court transmit the record to the clerk of the appellate court.[629]

---

621. *See id.* R. 24(b); text accompanying notes 209-21 *supra.*

622. *See* PROPOSED TENN. R. APP. P. 25(a); text accompanying notes 192-201 *supra.*

623. *See* PROPOSED TENN. R. APP. P. 24(b); text accompanying notes 222-34 *supra.*

624. *See* PROPOSED TENN. R. APP. P. 24(b).

625. *See id.* R. 27, 29-30; text accompanying notes 372-75, 378-402, & 410-26 *supra.*

626. *See* PROPOSED TENN. R. APP. P. 35(a); text accompanying notes 476-77 *supra.*

627. *See* PROPOSED TENN. R. APP. P. 29; text accompanying notes 378-82 & 589 *supra.*

628. *See* PROPOSED TENN. R. APP. P. 27(c); text accompanying notes 407 & 625-27 *supra.*

629. *See* PROPOSED TENN. R. APP. P. 25(d); text accompanying notes 282-84 *supra.*

B. Steps by the Appellee in an Appeal as of Right

(1) Within fifteen days after service of the appellant's declaration of issues and description of parts of the transcript to be included in the record, serve on the appellant and file with the clerk of the trial court a designation of any additional parts to be included.[630]

(2) File exhibits not on file with the clerk of the trial court for inclusion in the record or with the reporter for inclusion in the transcript.[631]

(3) Within fifteen days after service of notice of the filing of the transcript, serve on the appellant and file with the clerk of the trial court any objections to the transcript as filed with the clerk of the trial court.[632]

(4) Within thirty days after receipt of the brief of the appellant, prepare, file, and serve a brief as provided in appellant's step (10).[633]

(5) Within fourteen days after receipt of the reply brief of the appellant, prepare, file, and serve a reply brief as provided in appellant's step (10).[634]

2. Checklist of Steps on an Interlocutory Appeal by Permission from the Trial Court

A. Steps by the Appellant in an Appeal by Permission

(1) Request permission to appeal from the trial court and, if such is desired, a stay of further proceedings in the trial court.[635]

(2) Within ten days after entry of an order by the trial court granting permission to appeal or preparation by the trial court of a written statement of its reasons for

630. *See* PROPOSED TENN. R. APP. P. 24(b); text accompanying notes 216-18 *supra*.

631. *See* PROPOSED TENN. R. APP. P. 25(a); text accompanying notes 192-201 *supra*.

632. *See* PROPOSED TENN. R. APP. P. 24(b).

633. *See id.* R. 27(b); text accompanying notes 625-27 *supra*.

634. *See* PROPOSED TENN. R. APP. P. 27(c); text accompanying notes 407 & 625-27 *supra*.

635. *See* PROPOSED TENN. R. APP. P. 9(a), (f).

permitting an appeal, whichever is later, prepare and file with the clerk of the appellate court an application for permission to appeal setting forth the facts necessary to an understanding of why an appeal by permission lies and the reasons supporting an immediate appeal. Attach to the application the order appealed from, the trial court's statement or reasons for permitting an appeal, and any parts of the record necessary for a determination of the application by the appellate court. File four copies of the application if the appeal is to an intermediate appellate court. File six copies if the appeal is to the supreme court.[636]

(3) Serve a copy of the application on each of the other parties and file proof of service with the clerk of the appellate court.[637]

(4) If permission to appeal is granted, file a bond for costs on appeal in civil actions within ten days after entry of the order by the appellate court granting permission to appeal.[638]

(5) If permission to appeal is granted, steps 1(A)(6) through (9) must be taken within the indicated times measured from the date of entry of the order by the appellate court granting permission to appeal.[639]

(6) If permission to appeal is granted, steps 1(A)(10) through (12) must be taken.[640]

B. Steps by the Appellee in an Appeal by Permission

(1) Within seven days after service of the appellant's application for permission to appeal, prepare and file with the clerk of the appellate court an answer in opposition. File four copies of the answer if the application is to an intermediate appellate court. File six copies if

636. *See id.* R. 9(c)-(d); text accompanying notes 77-82 *supra.*

637. *See* PROPOSED TENN. R. APP. P. 9(c); text accompanying notes 585-89 *supra.*

638. *See* PROPOSED TENN. R. APP. P. 9(e).

639. *See* text accompanying notes 621-24 *supra.*

640. *See* text accompanying notes 625-29 *supra.*

the application is to the supreme court.[641]

(2) Serve a copy of the answer on each of the other parties and file proof of service with the clerk of the appellate court.[642]

(3) If permission to appeal is granted, steps 1(B)(1) through (5) becomes applicable.[643]

3. Checklist of Steps on an Appeal by Permission to the Supreme Court from a Final Decision of an Intermediate Appellate Court

A. Steps by the Appellant on an Appeal to the Supreme Court from an Intermediate Appellate Court

(1) Within thirty days after entry of judgment by the intermediate appellate court or, if a petition for rehearing is filed, within fifteen days after denial of the petition or entry of judgment on rehearing, prepare and file with the clerk of the supreme court six copies of an application for permission to appeal setting forth (a) the date on which judgment was entered and whether a petition for rehearing was filed, and if so, the date of denial of the petition or entry of judgment on rehearing; (b) the questions presented for review; (c) the facts relevant to the questions presented, but facts correctly stated in the opinion of the intermediate appellate court need not be repeated; and (d) the reasons and authorities supporting review by the supreme court. Attach to the application a copy of the opinion of the intermediate appellate court.[644]

(2) Serve a copy of the application on each of the other parties and file proof of service with the clerk of the supreme court.[645]

---

641. *See* PROPOSED TENN. R. APP. P. 9(d); text accompanying notes 590-91 *supra*.

642. *See* PROPOSED TENN. R. APP. P. 9(d); text accompanying notes 585-89 *supra*.

643. *See* text accompanying notes 630-34 *supra*.

644. *See* PROPOSED TENN. R. APP. P. 11(a)-(c); text accompanying notes 93-98 *supra*.

645. *See* PROPOSED TENN. R. APP. P. 11(c); text accompanying notes 585-89 *supra*.

(3) If permission to appeal is granted, step 1(A)(10) must be taken within the indicated time measured from the date of entry of the order by the supreme court granting permission to appeal.[646] Step 1(A)(11) may also be taken.[647]

B. Steps by the Appellee on an Appeal to the Supreme Court from an Intermediate Appellate Court

(1) Within fifteen days after service of the appellant's application for permission to appeal, prepare and file with the clerk of the supreme court six copies of an answer in opposition setting forth why the application should not be granted and any other matters necessary for correction of the application.[648]

(2) Serve a copy of the answer on each of the other parties and file proof of service with the clerk of the supreme court.[649]

(3) If permission to appeal is granted, steps 1(B)(4) and (5) become applicable.[650]

---

646. *See* PROPOSED TENN. R. APP. P. 11(f); text accompanying notes 625-27 *supra*.

647. *See* text accompanying note 628 *supra*.

648. *See* PROPOSED TENN. R. APP. P. 11(d).

649. *See id;* text accompanying notes 585-89 *supra*.

650. *See* text accompanying notes 633-34 *supra*.