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An Attorney's Guide to Beginning the Appellate Process

Created and Presented

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An Attorney's Guide to Beginning the Civil Appellate Process In Pennsylvania

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I. A Brief Overview of the Pennsylvania Judicial System

A. The Courts of Common Pleas

1. The Courts of Common Pleas are the primary trial court system in the Commonwealth, i.e. the vast majority of trials are conducted before these courts.

2. Unless original jurisdiction is specifically granted to another court, the Courts of Common Pleas have unlimited original jurisdiction of all actions and proceedings.¹

3. In some circumstances, the Courts of Common Pleas may share concurrent jurisdiction with other courts, including the Commonwealth Court and the Magisterial Courts.

4. The Courts of Common Pleas also have exclusive jurisdiction of appeals from final orders of the minor judiciary and, unless otherwise provided, appeals from final orders of government agencies, including: determinations of: the Department of Health in connection to birth records; the Department of Transportation; the Workers' Compensation Appeal Board; the Pennsylvania Liquor Control Board; the Department of Revenue; and the Department of Labor and Industry or the Department of Commerce.²

B. The Magisterial Courts

1. Magisterial Courts are considered minor courts of the Commonwealth.

2. Magisterial District Judges are not required to be members of the bar of the Supreme Court.

3. With regard to civil matters, the Magisterial Courts have jurisdiction over actions arising under the Landlord and Tenant Act of 1951, and claims not exceeding \$12,000 (exclusive of interest and costs).³

I. Civil Appeals to the Superior Court

A. Generally

1. The Superior Court has jurisdiction over all orders of the courts of common pleas unless otherwise provided for in Chapter 7 of 42 Pa.C.S.A. Judiciary and Judicial Procedure.⁴

2. Cases not falling within the jurisdiction of the Superior Court will be heard by either the Supreme Court or the Commonwealth Court.

3. The Superior Court hears appeals of all criminal,⁵ domestic relations,⁶ commercial,⁷ and those tort actions not involving a governmental party.

¹ 42 Pa.C.S.A. § 931.

² 42 Pa.C.S.A. § 933.

³ 42 Pa.C.S.A. § 1515.

⁴ 42 Pa.C.S.A. § 742.

⁵ Title 18 of the Pennsylvania Consolidated Statutes.

⁶ Title 23 of the Pennsylvania Consolidated Statutes.

⁷ Title 13 of the Pennsylvania Consolidated Statutes.

4. Appeals may also be taken as of right from certain orders of the Orphans' Court Division.⁸

B. Final Orders and Appeals as of Right

Trial court orders are either "interlocutory" or "final." The distinction is an important one to make and will, in most cases, control whether or not an appeal is appropriate or even allowed.

1. Except as prescribed by Rule 341 of the Rules of Appellate Procedure, an appeal may be taken as of right from any final order of the court of common pleas.⁹

a. A final order is any order that:

- i. Disposes of all claims and of all parties; or
- ii. Is expressly defined as a final order by statute;¹⁰ or
- iii. Is entered as a final order pursuant to Pa.R.A.P. 341 (c).¹¹

b. Whether or not the order is final affects the order's appealability and directly implicates the Superior Court's jurisdiction over the matter.¹²

c. In order to be final and appealable, the order must dispose of all claims and all parties.¹³ Amendments to Rule 341 in 1992 generally eliminated appeals as of right from orders not ending the litigation as to all claims and as to all parties.¹⁴ The Notes to Rule 341 set forth examples of orders which are no longer appealable as final orders.¹⁵ They include:

- i. a decision transferring an equity action to the law side;
- ii. an order denying a defendant leave to amend his answer to plead an affirmative defense;
- iii. a pre-trial order refusing to permit a defendant to introduce evidence of an affirmative defense;
- iv. an order denying a party the right to intervene;
- v. an order denying a petition to amend a complaint;
- vi. an order requiring withdrawal of counsel;
- vii. an order denying class certification in a class action case; and
- viii. an order striking a lis pendens.

⁸ These orders include: (1) an order confirming an account, or authorizing or directing a distribution from an estate or trust; (2) an order determining the validity of a will or trust; (3) an order interpreting a will or a document that forms the basis of a claim against an estate or trust; (4) an order interpreting, modifying, reforming or terminating a trust; (5) an order determining the status of fiduciaries, beneficiaries, or creditors in an estate, trust, or guardianship; (6) an order determining an interest in real or personal property; (7) an order issued after an inheritance tax appeal has been taken to the Orphans' Court...; (8) an order otherwise appealable as provided by Chapter 3 of the Rules of Appellate Procedure. See, Pa.R.A.P. 342.

⁹ Pa.R.A.P. 341 (a).

¹⁰ See e.g., Pa.R.Crim.P. Rule 910.

¹¹ Pa.R.A.P. 341 (b).

¹² *Angelicho v. Myers*, 110 A.3d 1046, 1048 (Pa. Super. Ct. 2015) (citing *Mother's Restaurant Inc. v. Krystkiewicz*, 861 A.2d 327, 331 (Pa. Super. Ct. 2004)).

¹³ Pa.R.A.P. 341 (b) (1).

¹⁴ Notes to Pa.R.A.P. 341.

¹⁵ These orders may be appealable under Rule 312 (interlocutory appeals by permission) or 313 (collateral orders).

d. Accordingly, unless otherwise permitted to appeal under Rule 312 or 313, a party unwillingly dismissed from an action will have to wait until the remaining claims and parties are disposed of before she can proceed to have the trial court's order reviewed.¹⁶

2. Determination of Finality Pursuant to Rule 341 (c).

Rule 341 (c) provides an opportunity for immediate appellate relief to those parties affected by an order which is not otherwise immediately appealable due to lack of finality.

a. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim or when multiple parties are involved, the trial court may enter a final order as to one or more but fewer than all of the claims and parties.¹⁷

b. The Superior Court has held that trial courts should find that an immediate appeal from a non-final order is appropriate in only the most extraordinary circumstances.¹⁸

c. When proceeding pursuant to Rule 341 (c), the trial court must make an express determination that an immediate appeal will facilitate resolution of the entire case.¹⁹

d. An order of finality pursuant to Rule 341 (c) becomes appealable when entered.²⁰

e. A decision not to seek determination of finality will not act as a waiver of the issue and the matter may be raised in a subsequent appeal following entry of a final order disposing of all claims and all parties.²¹

3. How to Proceed under Rule 341 (c).

a. The trial court is unlikely to act on its own to determine that an order is final pursuant to Rule 341 (c).

b. The party seeking the determination will have to make an application to the court for a determination of finality.

i. The specific filing can be titled, "Application for Determination of Finality Pursuant to Pa.R.A.P. 341 (c)."

ii. The Application should also set forth the averments in numbered paragraphs and be accompanied by a brief in support.

iii. Under relief requested, the filing party should ask that the court amend the order in question to include a provision stating that the order is a final order pursuant to Pa.R.A.P. 341 (c) and that an immediate appeal will facilitate the resolution of the entire case.

iv. While these are generally accepted practices, you should always consult your local rules of practice to first determine whether your jurisdiction has established its own procedure for filing an Application for Determination of Finality.

¹⁶ See, *Angelichio v. Myers*, 110 A.3d 1046 (Pa. Super. Ct. 2015) (quashing appeal from trial court's order entering default judgment against appellant).

¹⁷ Pa.R.A.P. 341 (c).

¹⁸ *Bailey v. RAS Auto Body, Inc.*, 85 A.3d 1064, 1069 (Pa. Super. Ct. 2014) (citing *Robert H. McKinney, Jr., Assocs., Inc. v. Albright*, 632 A.2d 937, 939 (Pa. Super. Ct. 1993)).

¹⁹ Pa.R.A.P. 341 (c).

²⁰ Pa.R.A.P. 341 (c).

²¹ Notes to Pa.R.A.P. 341.

c. In ruling on an Application for Determination of Finality, the trial court must consider four factors set forth in the Notes to Rule 341.²² Accordingly, it is important that your Application include an analysis of the required factors. The factors are:

- i. Whether there is a significant relationship between adjudicated and unadjudicated claims;
- ii. Whether there is a possibility that an appeal would be mooted by further developments;
- iii. Whether there is a possibility that the court will consider issues a second time;
- iv. Whether an immediate appeal will enhance prospects of settlement.²³

d. The trial court is required to act on the Application within 30 days of entry of the order.²⁴ The rule does not explicitly state that the Application must be filed within a certain number of days from the entry of the order at issue, but the requirement that the trial court act on an Application within 30 days from the date of that order implies that the Application should be filed shortly (a few days) after the order.

e. During the time an Application is pending the action is stayed.²⁵ If the trial court fails to act on the Application within 30 days of entry of the order, the trial court will no longer be permitted to consider the application and it will be deemed denied.²⁶

4. If the Application is Denied or Deemed Denied.

a. Any denial of an Application is reviewable only for abuse of discretion.²⁷

b. A party dissatisfied with the trial court's denial of the Application may file a petition for review with the Superior Court, but must do so within 30 days from the date on which the order denying the Application is entered or deemed denied.²⁸

5. If the Application is Granted.

If the trial court grants your Application, then you must file your Notice of Appeal with the trial court within 30 days after entry of the order as amended.

C. Interlocutory and Collateral Orders

1. Interlocutory Orders.

a. Interlocutory orders are those orders of the trial courts which do not constitute a final resolution of the whole controversy.²⁹

b. The Rules of Appellate Procedure, Rule 311, recognizes certain interlocutory orders from which an appeal may be taken as of right without regard to the requirements of Rule 341 (finality).

²² *Bailey v. RAS Auto Body, Inc.*, 85 A.3d 1064 1068-69 (Pa. Super. Ct. 2014) (citing *Pullman Power Products of Canada Ltd. v. Basic Engineers, Inc.*, 713 A.2d 1169, 1173-74 (Pa. Super. Ct. 1998)).

²³ Notes to Pa.R.A.P. 341.

²⁴ Pa.R.A.P. 341 (c) (1).

²⁵ Pa.R.A.P. 341 (c) (1).

²⁶ Pa.R.A.P. 341 (c) (2).

²⁷ Pa.R.A.P. 341 (c) (2).

²⁸ Pa.R.A.P. 341 (c) (4).

²⁹ *Black's Law Dictionary* (9th ed.).

c. Those interlocutory orders which are not covered in Rule 311 may still be appealed, but only by permission. We will discuss interlocutory appeals by permission later in this course.³⁰

2. Interlocutory Orders Appealable as of Right.

a. Appeals may be taken as of right from the following types of interlocutory orders:

i. Affecting judgments. An order refusing to open, vacate or strike off a judgment.

ii. Attachments, etc. An order confirming, modifying or dissolving or refusing to confirm, modify or dissolve an attachment, custodianship, receivership or similar matter affecting the possession or control of property, except for order pursuant to certain orders under the Divorce Code.³¹

iii. Injunctions. An order that grants or denies, modifies or refuses to modify, continues or refuses to continue, or dissolves or refuses to dissolve an injunction, with certain limitations.³²

iv. Peremptory judgment in mandamus. An order granting peremptory judgment in mandamus.

v. New trials. An order in a civil action or proceeding awarding a new trial.

vi. Partition. An order directing partition.

vii. Other cases. An order which is made appealable by statute or general rule.

b. Appeals may also be taken as of right from orders sustaining the venue of the matter or jurisdiction over the person or over real or personal property if:

i. The plaintiff, petitioner, or other party benefitting from the order files of record within 10 days after the entry of the order an election that the order shall be deemed final; or

ii. The court states in the order that a substantial issue of venue and jurisdiction is presented.³³

c. An appeal may also be taken as of right from an order changing venue, transferring the matter to another court of coordinate jurisdiction, or declining to proceed in the matter on the basis of forum non conveniens or analogous principles.³⁴

d. Orders overruling preliminary objections in eminent domain cases may also be appealed as of right.³⁵

Practice Tips:

Your failure to appeal certain interlocutory orders which are otherwise appealable as of right will result in waiver of your client's objection to the order. Refer to Pa.R.A.P. 311 (g) to determine whether or not the specific order in your client's matter must be appealed or otherwise be waived.

3. Collateral Orders.

³⁰ Pa.R.A.P. 312.

³¹ See, Pa.R.A.P. 311 (2) for those orders appealable as of right under the Divorce Code.

³² See, Pa.R.A.P. 311 (4) (i)-(ii).

³³ Pa.R.A.P. 311 (b).

³⁴ Pa.R.A.P. 311 (c).

³⁵ Pa.R.A.P. 311 (e).

a. A collateral order is an order (1) separable from and collateral to the main cause of action (2) where the right involved is too important to be denied review and (3) the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.³⁶

b. Case law has made it clear that all three prongs of the rule must be satisfied in order to qualify as a collateral order for the Superior Court's review.³⁷ The collateral order doctrine is a "specialized, practical application of the general rule that only final orders are appealable as of right."³⁸ Absent all three prongs being satisfied, the Superior Court will not have jurisdiction to consider the appeal.³⁹ This doctrine is construed narrowly.⁴⁰

c. Collateral orders appealable as of right include:

- i. An order denying a petition for removal of an executor;⁴¹
- ii. An order denying a petition to permit the payment of death taxes;⁴² and
- iii. An order denying a motion to quash a subpoena where the material sought is privileged.⁴³

d. If the order is collateral, an immediate appeal may be taken as of right simply by filing a notice of appeal.⁴⁴

e. The Superior Court will exercise jurisdiction over only those parts of an order which satisfy the three-prong test.⁴⁵ Only that portion of the order that is collateral is subject to collateral review.⁴⁶

4. Interlocutory Appeals by Permission.

a. Generally, appeals may be taken by permission from certain interlocutory orders of a lower court even though not appealable as of right pursuant to Pa.R.A.P. 311.⁴⁷ However, the order is appealable only if it contains a statement as required by 42 Pa.C.S.A. § 702 (b).

i. Pursuant to 42 Pa.C.S.A. § 702 (b), when the trial court is of the opinion that its interlocutory order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the matter, the trial court shall so state in such order.⁴⁸

ii. The underlined portion is that statement which the trial court must include in its order.

b. If the trial court includes the § 702 (b) statement then you may proceed by petition the Superior Court for permission to appeal.

³⁶ Pa.R.A.P. 313 (b).

³⁷ Spanier v. Freeh, 95 A.2d 342, 345 (Pa. Super. Ct. 2014) (citing Melvin v. Doe, 836 A.2d 42 (Pa. 2003)).

³⁸ Spanier, 95 A.2d at 345 (citation omitted).

³⁹ Id.

⁴⁰ Id.

⁴¹ In Re Estate of Georgianna, 458 A.2d 989 (Pa. Super. Ct. 1983).

⁴² Hankin v. Hankin, 487 A.2d 1363 (Pa. Super. Ct. 1985).

⁴³ Pittsburgh Action Against Rape v. Dept. of Public Welfare, 129 A.3d 1078 (Pa. Commw. Ct. 2015).

⁴⁴ Pa.R.A.P. 313 (b).

⁴⁵ *Rae v. Pennsylvania Funeral Directors Ass'n*, 977 A.2d 1121 (Pa. 2009).

⁴⁶ Rhodes v. USAA Cas. Ins. Co., 21 A.3d 1253, 1259 (Pa. Super. 2011) (citing Rae, 977 A.2d at 1130).

⁴⁷ Pa.R.A.P. 1311; 42 Pa.C.S.A. § 702 (b).

⁴⁸ 42 Pa.C.S.A. § 702 (b).

i. The Petition for Permission to Appeal must be filed within thirty days after the entry of the trial court's order.⁴⁹

ii. The Petition should be filed with prothonotary of the Superior Court with proof of service on all other parties to the matter in the lower court and on the clerk of the lower court, who then files the Petition of record in the lower court.⁵⁰

c. If the trial court does not include the § 702 (b) statement, then you have thirty days from the entry of the order from which you wish to appeal in which to file an application for amendment of the order.

i. Unless the trial court acts on the application within 30 days after it is filed, the trial court shall no longer consider the application and it shall be deemed denied.⁵¹

ii. If the trial court grants the application, then you have thirty days from the date the amended order is entered in which to file your Petition for Permission to Appeal.⁵²

d. Content of the Petition. The Petition does not have to be drafted using numbered paragraphs as you would in a pleading. However, the Petition must contain the following:

i. Statement of the basis for jurisdiction of the Superior Court.

ii. The text of the order in question and the date of its entry in the court below.

iii. A concise statement of the case containing facts necessary to an understanding of the case and controlling questions of law.

iv. The controlling questions of law presented for review, expressed in the terms and circumstances of the case but without unnecessary detail.

v. A concise statement of the reasons why a substantial ground exists for a difference of opinion on the questions and why an immediate appeal may materially advance termination of the matter.

vi. If the trial court issued any opinions relating to the order to be reviewed, then a copy must be appended to the Petition.

vii. Also included in the appendix shall be the texts of the pertinent provisions of the constitutional provisions, statutes, ordinances, regulations or other similar enactments which the case involves.⁵³

e. No supporting brief is necessary, and it is forbidden to file with or append to the Petition any briefs from the court below.⁵⁴

f. A petition for Permission to Appeal does not stay the proceedings in the trial court unless that court enters an order of stay.⁵⁵

g. If the Petition is granted then there is no additional requirement that you file a Notice of Appeal.⁵⁶

Practice Tips:

⁴⁹ Pa.R.A.P. 1311 (b).

⁵⁰ Pa.R.A.P. 1311 (b).

⁵¹ Pa.R.A.P. 1311 (b).

⁵² Pa.R.A.P. 1311 (b).

⁵³ Pa.R.A.P. 1312 (a) (1-7).

⁵⁴ Pa.R.A.P. 1312 (c).

⁵⁵ Pa.R.A.P. 1313.

⁵⁶ Pa.R.A.P. 1322.

There are three categories of non-final orders which can be appealed: (1) orders certified pursuant to Rule 341 (c), (2) orders certified pursuant to Rule 312, and (3) collateral orders. Of the three categories, collateral orders are the only orders which can be appealed directly to the Superior Court. If the order is not collateral and is not final, then you have to proceed pursuant to Rule 341 (c) or Rule 312.

I recommend reading the article written by Owen J. Kelly for the July 2001 issue of the Pennsylvania Bar Association Quarterly which can be accessed at: <http://www.pabar.org/public/committees/APP01/pubs/quartjul01OKArticle.pdf>. I will give a brief summary of Mr. Kelly's advice.

If the order does not dispose of all parties in a multiple party action, or because it does not dispose of all claims in a multiple claim action, counsel should file an application for determination of finality with the trial court pursuant to Rule 341 (c).⁵⁷ If the order is interlocutory for any other reason, counsel should seek permissive appellate review pursuant to Rule 312.⁵⁸

D. Requisites for an Appealable Order

1. Entry on the Docket.

a. In addition to the requirement that an order be either final or otherwise appealable by right or permission, all appealable orders must actually be entered on the docket in the trial court.⁵⁹ No order may be appealed until it is entered on the docket.

b. If you want to appeal an order which has not yet been docketed you must praecipe the clerk of court to prepare, sign, and enter the appropriate order, judgment or final decree in the docket.⁶⁰

c. A praecipe for entry of judgment must include a certificate that a copy of the praecipe has been mailed to each other party which has appeared in the action or to the attorney of record for each other party.⁶¹

d. Appeals filed after an order or judgment is announced but before the order is entered on the docket will be treated as filed after the entry and on the day thereof.⁶² When the appeal is filed before the order is entered, the Superior Court will often direct the appellant to praecipe the trial court to enter the order or judgment. Failure to comply with the Superior Court's directive will cause the appeal to be quashed.

2. Separate Document.

a. Every order shall be set forth on a separate document.⁶³

b. An order is treated as a separate document if it satisfies three criteria: (1) it must be self-contained and separate from the opinion, (2) it must note the relief granted, and (3) it must omit, or at least substantially omit, the trial court's reasons for disposing of the claims.⁶⁴

c. To be independent of the court's opinion, an order must be separately titled and captioned, not paginated consecutively to the opinion or memorandum, not stapled or otherwise attached to the opinion, and must be docketed separately.⁶⁵

⁵⁷ Owen J. Kelly, *A Civil Practitioner's Guide to Permissive Appellate Review of Interlocutory Orders*, Vol. LXXII Pa. Bar Quarterly 98, 99 (No. 3, July 2001).

⁵⁸ *Id.*

⁵⁹ Pa.R.A.P. 301 (a) (1).

⁶⁰ Pa.R.A.P. 301 (d).

⁶¹ Pa.R.C.P. 237.

⁶² Pa.R.A.P. 905 (a) (5).

⁶³ Pa.R.A.P. 301 (b).

⁶⁴ *LeBoon v. Lancaster Jewish Community Center Ass'n.*, 503 F.3d 217, 224 (3d Cir. 2007) (citation omitted).

⁶⁵ *LeBoob*, 503 F.3d at 224 (citation omitted).

d. Where an order is not entered in a separate document as required by Pa.R.A.P. 301 (b), such defect may be waivable and will not affect the Superior Court's exercise of jurisdiction where it is evident that the opinion below was intended to represent the final decision in the case and the docket refers to the decision as an order. Also, the defect may be deemed waived where the appellee fails to object to the taking of the appeal in the absence of a separate judgment.⁶⁶

II. Preserving Issues for Appeal

A. Issues Must be Preserved

1. The most common mistake made by trial attorneys with regard to appeals may be the trial attorney's failure to preserve an issue for appeal. Pa.R.A.P. 302 bars appellants from raising issues on appeal which were not raised in the lower court. Failure to preserve an issue results in its waiver.

2. An "issue" is a disputed point or question on which the parties to the action desire the court to decide.⁶⁷

3. This policy is grounded upon the principle that the trial court must be given the opportunity to correct its errors as early as possible.⁶⁸

4. Examples where the issue is waived:

a. Pedestrian failed to preserve claim of negligence per se by proceeding to trial only on claim of ordinary negligence. These two forms of negligence impose different standards and have a basis under two different theories of law which may lead to different outcomes at trial.⁶⁹

b. Customers of Home Depot waived their argument that store's negligence could be established by *res ipsa loquitur* where the doctrine was never raised before the trial court at any stage of the proceedings.⁷⁰

c. Judgment debtor by confession waived additional assertion raised on appeal that the trial court erred by entering judgment *sua sponte* where debtor's only claim in its Petition to Open/Strike Judgment was that the trial court entered judgment without waiting for the 15-day leave period to lapse.⁷¹

d. Lender waived claim on appeal that his familial relationship with borrower exempted him from application of four-year statute of limitations period governing lender's claim for repayment of loan agreement against borrower's estate, where lender did not raise the claim at trial.⁷²

Practice Tips:

Another opportunity for counsel to waive an issue is in drafting the Concise Statement of Errors Complained of on Appeal. This area of appellate practice is discussed below at Section IV (A) (2).

III. Procedure on Common Orders

A. Summary Judgment

1. If summary judgment is entered against your client and you wish to appeal, follow this checklist before filing your Notice of Appeal:

⁶⁶ *Brandschain v. Lieberman*, 466 A.2d 1035, 1039 n. 1 (Pa. Super. Ct. 1983).

⁶⁷ *Pennsylvania Liquor Control Bd. v. Willow Grove Veterans Home Ass'n, Inc.*, 509 A.2d 958 (Pa. Commw. Ct. 1986).

⁶⁸ *In re F.C. III*, 2 A.3d 1201 (Pa. 2010).

⁶⁹ *McCloud v. McLaughlin*, 837 A.2d 541 (Pa. Super. Ct. 2003).

⁷⁰ *Rivera v. Home Depot*, 832 A.2d 487 (Pa. Super. Ct. 2003).

⁷¹ *Chervenak, Keane & Co., Inc. v. Hotel Rittenhouse Assocs., Inc.*, 477 A.2d 487 (Pa. Super. Ct. 1984).

⁷² *Sovich v. Estate of Sovich*, 55 A.3d 1161 (Pa. Super. Ct. 2012).

- a. Has the trial court entered the order on the court's docket?
- b. Is the trial court's order sufficiently separate from its decision so as to comply with the Separate Document Doctrine?
- c. Does the grant of summary judgment end all claims and put all parties out of court?

2. If the answer is yes to all of the above, then you can proceed to file your Notice of Appeal. The process for doing so is discussed later. If any of the three items have not been done, refer to earlier sections of this lesson for guidance on how to proceed before filing the Notice of Appeal.

Practice Tips:

Remember, filing a motion for reconsideration of the trial court's grant of summary judgment does not toll the 30-day appeal period.⁷³ If you file a Motion for Reconsideration you should also file a Notice of Appeal to preserve your client's appeal in the event the trial court denies your Motion for Reconsideration.

B. Jury or Bench Verdict

1. A party seeking relief following trial by jury or bench may not directly appeal the trial court's decision without first filing a Motion for Post-Trial Relief pursuant to Pa.R.C.P. 227.1.⁷⁴

a. It is critical to keep in mind that Post-Trial Motions must be filed within ten days after verdict, discharge of the jury because of inability to agree, nonsuit in the case of a jury trial or notice of nonsuit or the filing of the decision in the case of a trial without a jury.⁷⁵

b. Although the Superior Court has held that the provisions of Pa.R.C.P. 227.1 are not jurisdictional in nature, the trial attorney is strongly advised to file his or her Post-Trial Motion within the ten day period.⁷⁶ The Superior Court has found an appellant's issues waived in the following cases:

i. A motorist waived his request for a new trial against allegedly negligent driver where motorist did not make timely request for the declaration of mistrial.⁷⁷

ii. An insurer that filed appeal of verdict without filing Post-Trial Motion was not entitled to file such motion nunc pro tunc as no excuse existed for its failure to file.⁷⁸

2. A court's order denying Post-Trial Motions is interlocutory.⁷⁹

a. Accordingly, an appeal to the Superior Court can only lie from judgments entered subsequent to the trial court's disposition of post-verdict motions.⁸⁰

b. It is the order of the trial court disposing of the Motion for Post-Trial Relief which has been reduced to judgment which comprises the final order in a case from which an appeal must be filed within 30 days.⁸¹

c. Remember, you may need to Praecipe the trial court to enter its order on the docket pursuant to Pa.R.A.P. 301.

IV. Transitioning Between the Trial and Appellate Courts

⁷³ In re. Trust Under Deed of Green, 779 A.2d 1152 (Pa. Super. Ct. 2001).

⁷⁴ Motorists Mut. Ins. Co. v. Pinkerton, 830 A.2d 958, 960 (Pa. 2003).

⁷⁵ Pa.R.C.P. 227.1 (c).

⁷⁶ Linder v. City of Chester, 78 A.3d 694, 698 (Pa. Super. Ct. 2013).

⁷⁷ Kaplan v. O'Kane, 835 A.2d 735 (Pa. Super. Ct. 2003).

⁷⁸ Lenhart v. Cigna Companies, 824 A.2d 1193 (Pa. Super. Ct. 2003).

⁷⁹ Fanning v. Davne, 795 A.2d 388 (Pa. Super. Ct. 2002).

⁸⁰ Fanning v. Davne, 795 A.2d 388 (Pa. Super. Ct. 2002).

⁸¹ McCormick v. Northeastern Bank of Pennsylvania, 561 A.2d 328 (Pa. 1989).

A. Notice of Appeal

1. Once the trial court has entered its order on the docket, the trial attorney has to file a Notice of Appeal with the clerk of the trial court within the time allowed by Pa.R.A.P. 903.⁸²

a. The period for filing a Notice of Appeal is generally thirty days.

b. If you are appealing multiple final orders, you should file a Notice of Appeal from each order. The practice of filing one appeal from multiple orders is strongly disapproved and the Superior Court will quash single appeals from multiple orders unless otherwise dictated by compelling circumstances.⁸³

2. Contents of the Notice of Appeal.

The form Notice of Appeal set forth in Pa.R.A.P. 904, as modified for practice, is included in the Appendix to this course. The Notice must contain the following:

a. Caption.

b. Request for Transcript. The appellant shall request all necessary transcripts and make payment or deposit as required.⁸⁴ The Rules allow the appellant to incorporate the transcript request into the Notice of Appeal.⁸⁵ See the supplied Notice of Appeal in the Appendix.

c. The Notice of Appeal must include a statement that the order appealed from has been entered in the docket. The appellant must include and attach a copy of the docket entry showing the entry of the order appealed from.⁸⁶

3. Service. Along with the Notice of Appeal shall be filed a Proof of Service that the appellant has complied with Pa.R.A.P. 906. This Rule requires you to serve all parties to the matter in the trial court, including those previously dismissed, the judge of the lower court, the official court reporter, and the district court administrator or other person designated by the administrator.⁸⁷

4. You are required to file two copies of the Notice of Appeal and Proof of Service with the clerk of the trial court. It is then the clerk's responsibility to immediately transmit to the prothonotary of the Superior Court the Notice of Appeal and Proof of Service.⁸⁸

5. Fees. The trial court and Superior Court each require that a fee be paid when filing the Notice of Appeal. Check with the Superior Court as well as the trial court to determine how much the fees are.

a. You should also determine whether the trial court wants a single check with both fees, or two separate checks and how they should be made payable.

b. The "better practice" recommended by the Rules is to pay the fee for filing the Notice of Appeal in the lower court and the docketing fee in the Superior Court by separate checks payable to the respective clerks or prothonotaries.⁸⁹

B. Concise Statement of Errors

1. After the Notice of Appeal is filed, you should expect the trial court to enter an order pursuant to Pa.R.A.P. 1925 (b) directing you to file a Concise Statement of Errors Complained of on Appeal.

⁸² Pa.R.A.P. 902.

⁸³ M.R. Mikkilneni v. Amwest Surety Ins. Co., 919 A.2d 306 (Pa. Commw. Ct. 2007).

⁸⁴ Pa.R.A.P. 1911.

⁸⁵ Pa.R.A.P. 1911 (d).

⁸⁶ Pa.R.A.P. 904 (d).

⁸⁷ Pa.R.A.P. 906.

⁸⁸ Pa.R.A.P. 905.

⁸⁹ Pa.R.A.P. 905.

a. The purpose of the 1925 (b) Statement is to clarify for the trial court those errors with which you take issue.

b. The trial court must allow you at least twenty-one days from the date of the 1925 (a) order to file the Concise Statement.⁹⁰

2. Concise Statements should be approached carefully and with an awareness that the drafting process presents several opportunities for mistake which will seriously jeopardize your client's rights. Issues not included or not properly raised will be deemed waived.⁹¹

a. Concise Statements must neither be too detailed nor too vague.⁹²

3. Contents of the Concise Statement [Pa.R.A.P. 1925 (b) (4)].

a. Sufficient Detail. The Statement needs to identify each ruling or error that you intend to challenge. This must be done "with sufficient detail to identify all pertinent issues for the judge."⁹³

b. Redundant. The Statement should neither be redundant nor provide lengthy explanations as to any error.⁹⁴ Each error identified is deemed to include every subsidiary issue contained therein which was raised in the trial court.⁹⁵

Practice Tips:

Treading the line between too much and too little detail can be tricky. Do not be discouraged or surprised if you find it difficult to satisfy the trial judge with your Concise Statement. In my practice, I have read Rule 1925 (a) opinions accusing me of vagueness and, alternatively, too much detail. Remember, your appeal is based on the theory that the trial judge, and sometimes the jury, has made a mistake. Thankfully, the issue of waiver based on violation of Rule 1925 (b) (4) is expressly reserved for the Superior Court, and not the trial court.⁹⁶ That being said, the Concise Statement should be approached with thoughtful consideration to ensure that your client's issues are preserved for review. The following are examples of how the Superior Court has judged the sufficiency of Concise Statements.

4. Examples to Avoid.

a. The length of a Concise Statement will not necessarily prove fatal even where it is several pages in length so long as it plainly describes the issues on appeal.⁹⁷

b. Simple declarations of alleged fact do not constitute allegations of errors and do not belong in a Concise Statement.⁹⁸

c. Boilerplate statements such as, "The trial court erred when it failed to assure Mother a fair hearing" is overly vague because it fails to provide any explanation as to how the trial court failed to provide a fair hearing.⁹⁹

⁹⁰ Pa.R.A.P. 1925 (b) (2).

⁹¹ Pa.R.A.P. 1925 (b) (vii).

⁹² Pa.R.A.P. 1925 (b) (4) (i-vii).

⁹³ Pa.R.A.P. 1925 (b) (4) (ii).

⁹⁴ Pa.R.A.P. 1925 (b) (4) (iv).

⁹⁵ Pa.R.A.P. 1925 (b) (4) (v).

⁹⁶ *Com. v. Taylor*, 671 A.2d 235 (Pa. Super. Ct. 1996).

⁹⁷ *Donoughe v. Lincoln Elec. Co.*, 936 A.2d 52 (Pa. Super. Ct. 2007). In this case, the Superior Court makes reference to the Statement being able to fit on one page when stripped of sub-arguments. This is a reference to previous Pa.R.A.P. 2116 which limited the Statement of Errors in an appellate brief to one page. This is no longer the rule. See, Notes to Pa.R.A.P. 2116.

⁹⁸ *Company Image Knitware, Ltd. v. Mothers Work, Inc.*, 909 A.2d 324 n. 5 (Pa. Super. Ct. 2006).

⁹⁹ *In re A.B.*, 63 A.3d 345, 350 (Pa. Super. Ct. 2013).

d. Allegation that trial court erred in failing to suppress statements uttered by the criminal defendant was waived where appellant failed to identify when, where, or to whom the statements were uttered.¹⁰⁰

e. Appellant waived issues on appeal where he alleged that the court erred in allowing the district attorney to ask questions of appellant beyond the scope of direct. The appellant's statement was too vague and failed to identify the specific questions which went beyond the permissible scope.¹⁰¹

f. A drug manufacturer in a products liability case did not waive all of its issues on appeal where the concise statement set forth twenty-nine issues over six pages. The Superior Court reviewed the statement and found that it actually raised far fewer issues, as many were closely related. The Superior Court also found that the appellant had not intentionally subverted the rule.¹⁰²

5. Reading the case law, it is apparent that erring on the side of slightly too much detail in a Concise Statement is safer than risking waiver through too little detail. Use the following checklist when drafting and be sure your Concise Statement answers the following:

a. How did the trial court err? Was it an abuse of discretion or error of law?

b. When did the trial court's error occur?

c. What are the specifics of the court's error? What testimony did it allow or prohibit? By whom? When?

d. How did the trial court's error prejudice or otherwise affect the appellant's underlying case? Did character testimony create undue bias? Was the appellant prevented from asserting facts critical to her defense?

V. When the Appeal is Docketed in the Superior Court

A. Transmission of the Record

1. It is the duty of the lower court to transmit the entire record to the Prothonotary of the Superior Court.¹⁰³

a. The clerk of the lower court numbers the documents in the record and sends a list with the record to the Superior Court.

b. It is then the duty of the parties to review the numbered record and determine if it is complete.

c. The record can be corrected or otherwise modified upon party request to the lower court and opportunity for objection.¹⁰⁴

2. NOTE: the lower court's transmission of the record to the Superior Court does not relieve the appellant of the obligation to prepare and file a Reproduced Record with her brief.¹⁰⁵

B. Docketing Statement

1. Upon the filing of a Notice of Appeal, the Prothonotary of the Superior Court sends a docketing statement form to the appellant which must be completed within ten days.¹⁰⁶

¹⁰⁰ Com. v. Williams, 959 A.2d 1252 (Pa. Super. Ct. 2008).

¹⁰¹ Com. w. Hansley, 24 A.3d 410 (Pa. Super. Ct. 2011).

¹⁰² Dunson v. McNeil-PPC, Inc., 2009 WL 1178651 (Pa. Super. Ct. 2009).

¹⁰³ Pa.R.A.P. 1931 (c).

¹⁰⁴ Pa.R.A.P. 1926 (a).

¹⁰⁵ See, Pa.R.A.P. 2152 for guidance as to what must be included in the Reproduced Record.

¹⁰⁶ Pa.R.A.P. 3517.

2. The purpose of the docketing statement is to enable the Superior Court to “more efficiently and expeditiously administer the scheduling of the argument and submission of cases on appeal.”¹⁰⁷

a. Completing the docketing statement is a simple administrative procedure.

b. You will provide certain jurisdictional information (final order? interlocutory appealable as of right?) as well as the parties and a brief statement of the issues to be raised on appeal. It’s a good idea to refer to your Concise Statement when completing the docketing statement so as to maintain consistency in your positions.

C. Designation of Contents of Reproduced Record

1. Thirty days before filing the opening brief, the appellant is required to file with the Superior Court a Designation of Contents of Reproduced Record.¹⁰⁸

2. The Designation will identify the parts of the record which the appellant intends to reproduce and a brief statement of issues which he or she intends to present for review.¹⁰⁹

3. It is easy to forget to file the Designation of Contents. The attorney is typically concerned primarily with drafting the opening brief and preparing the reproduced record. The Designation, falling thirty days before the major filing deadline for the brief and record, thus falls to the wayside. Make sure you or your staff calendars this date.

VI. Conclusion

A. Once you’ve filed your Designation of Contents of Reproduced Record you have passed the procedural hurdles in the transition from the trial to appellate courts. The next steps are the most time and energy intensive. Drafting an appellate brief and preparing a reproduced record requires careful attention to details that even the most seasoned trial attorney may not be cognizant of when attempting to handle appellate matters.

B. This Course will help you safely transition your client’s matter from the trial to the appellate level. If you do not intend to handle the entire appellate process, including briefing and arguments, then it is strongly encouraged that you locate substitute counsel or co-counsel early in the process, i.e. immediately after filing the Notice of Appeal. When bringing other counsel onboard, use this Course and outline as a guide to make sure that you cover all of your client’s needs until co-counsel can provide assistance.

If you have any questions regarding this Course or the appellate process, please contact me at pfellman@gibperk.com or (610) 565-1708 ext. 24 and I will be happy to help.

¹⁰⁷ Pa.R.A.P. 3517.

¹⁰⁸ Pa.R.A.P. 2154.

¹⁰⁹ Pa.R.A.P. 2154 (a).

APPENDIX

