

The Lifecycle of an Appeal

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Trial court proceedings did not go the way you had hoped...

So what's next?

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Initiating an Appeal

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Appeals as of Right v. Interlocutory Appeals

- First question: "Are you appealing the final judgment/order of the trial court matter?"
- A final judgment/order "decides and disposes of the *whole* merits of the case leaving nothing for the further judgment of the court." *Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 460 (Tenn 1995).
- If it's a final order, you'll most likely pursue an appeal as of right.
- If it's not a final order, you'll pursue an interlocutory appeal.

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Appeals as of Right

- Appeals as of right do not require permission from the trial or intermediate appellate court as a prerequisite for taking an appeal.
- Tenn. R. App. P. 3 governs appeals as of right.
 - Rule 3(a): Appeals in civil actions
 - Rule 3(b): Appeals by the defendant in criminal actions
 - Rule 3(c): Appeals by the State in criminal actions

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Rule 3(a): Civil Appeals

- "In civil actions every final judgment entered by a trial court from which an appeal lies to the Supreme Court of Court of Appeals is appealable as of right."
- Appeal as of right must be from the final order adjudicating all the claims presented for all the parties involved.
- If an order adjudicates only some of the claims or involves fewer than all the parties, the party seeking an appeal must pursue permission for an interlocutory appeal.

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Rule 3(b): Criminal Appeals by the Defendant

- Criminal defendants have an appeal as of right from any judgment of conviction that resulted from:
 - A trial following a not guilty plea;
 - A guilty/nolo contendere plea if the defendant reserved the right to appeal a certified question pursuant to Tenn. R. Crim. P. 37. Such appeals are limited to the scope of the certified question.
- Criminal defendants may also appeal from a guilty plea if they seek review of their sentence and there was no plea agreement concerning their sentence.

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Rule 3(b): Criminal Appeals by the Defendant

- Criminal defendants also have right to appeal in collateral proceedings:
 - An order denying or revoking probation;
 - An order denying a motion for reduction of sentence pursuant to Tenn. R. Crim. P. 35;
 - An order denying a motion to withdraw a guilty plea pursuant to Tenn. R. Crim. P. 32(f);
 - An order or judgment entered pursuant to a Tenn. R. Crim. P. 36 (governing motions to correct clerical errors in the judgment);
 - An order or judgment entered pursuant to Tenn. R. Crim. P. 36.1 (governing motions to correct illegal sentences);
 - A final judgment in criminal contempt, habeas corpus, extradition, or post-conviction proceedings; and
 - A final order on a request for expunction.

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Rule 3(c): Criminal Appeals by the State

- The State has limited rights of appeal in criminal actions.
- The State may only appeal from:
 - An order which has the substantive effect of dismissing an indictment, information, or complaint;
 - An order setting aside a guilty verdict and entering a judgment of acquittal;
 - An order arresting judgment;
 - An order granting or refusing to revoke probation; and
 - An order remanding a child to juvenile court.

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Rule 3(c): Criminal Appeals by the State

- The State also has a right of appeal from final orders in certain collateral proceedings:
 - Habeas corpus proceedings;
 - Extradition proceedings;
 - Post-conviction proceedings;
 - Modification of a sentence under Tenn. R. Crim. P. 35(d);
 - Rule 36 and Rule 36.1 proceedings; and
 - Expunction proceedings

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Statutory Rights of Appeal

- Rule 3 is not the only authority granting parties a right of appeal from the trial court.
 - E.g.: Both the State and the defendant have statutory rights to appeal certain sentencing decisions in criminal cases. *See* Tenn. Code Ann. §§ 40-35-401 and -402.
- Check statutes governing the action involved in your case to see if there is a right of appeal not encompassed in the plain text of Rule 3.

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How to Initiate an Appeal as of Right

- Appellant files a notice of appeal in the appropriate intermediate appellate court.
- The notice of appeal shall:
 - Specify the party or parties taking the appeal and name each party in the caption;
 - Designate the judgment from which appeal is sought (usually by stating the date of the judgment); and
 - Name the court to which the appeal is taken.
- Once one valid notice of appeal is filed, any party may cross-appeal without filing their own notice of appeal. Tenn. R. App. P. 3(h).

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Time to Initiate Appeal as of Right

- Notice of appeal must be filed within 30 days after the date of entry of the judgment appealed from. Tenn. R. App. P. 4(a).
- For civil cases, the 30-day time to file the notice of appeal is jurisdictional.
- For criminal cases, the 30-day time limit may be waived “in the interest of justice.”
- Certain post-judgment motions will toll the time to file a notice of appeal. Once those motions are ruled upon, notice of appeal is due within 30 days of that ruling.

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Special Service Rules for Notices of Appeal

- Service must be made no later than 7 days after filing the notice of appeal.
- Civil cases: Appellant must serve a copy of the notice of appeal on counsel of record for each party (or on the party if the person is pro se).
- Criminal cases:
 - If defendant is the appellant, notice of appeal must be served on both the District Attorney General in the county where the judgment was entered and the Attorney General.
 - If the State is the appellant, the notice of appeal must be served on **both** the defendant and the defendant's counsel of record.

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Effect of Filing a Notice of Appeal

- Generally, filing a notice of appeal divests the trial court of jurisdiction over the case.
- But the trial court retains jurisdiction to rule on certain timely-filed post-judgment motions.
 - List of motions enumerated in Tenn. R. App. P. 4(b) and (c)
- If notice of appeal is prematurely filed, it will be deemed timely filed once the trial court resolves the relevant post-judgment motion.

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Appeal by Permission/Interlocutory Appeals

- In some situations, the parties must seek permission from the trial and/or appellate court to pursue an appeal.
 - All interlocutory appeals are appeals by permission.
- Some common avenues for appeal by permission to intermediate appellate court:
 - Tenn. R. App. P. 9
 - Tenn. R. App. P. 10
 - Petition for writ of certiorari
 - Tenn. Sup. Ct. R. 28 appeal from motion to reopen post-conviction proceedings

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Tenn. R. App. P. 9 Interlocutory Appeals

- Most common procedure for appeals by permission.
- Applies only to interlocutory appeals.
- Requires permission from both the trial court and the appellate court.
- If an appellate issue is otherwise properly preserved in the trial court, failure to seek an interlocutory appeal does not limit the scope of review during any appeal as of right.
- Grant of a Rule 9 interlocutory appeal **does not** automatically stay the trial court proceedings. Trial court or appellate court must separately order a stay.

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Tenn. R. App. P. 9 Interlocutory Appeals

- Courts consider non-exclusive list of factors when determining whether to grant permission to appeal:
 - The need to prevent irreparable injury, giving consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of the judgment will be ineffective;
 - The need to prevent needless, expensive, and protracted litigation, giving consideration to whether the challenged order would be a basis for reversal upon entry of a final judgment, the probability of reversal, and whether an interlocutory appeal will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed;
 - The need to develop a uniform body of law, giving consideration to the existence of inconsistent order of other courts and whether the question presented by the challenged order will not otherwise be reviewable upon entry of a final judgment.

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Tenn. R. App. P. 9 Application Procedure

- Procedure in the trial court:
 1. Appellant files a motion seeking permission to appeal within 30 days of entry of the order appealed from.
 2. Trial court enters written order granting or denying the motion. The order shall:
 - State the specific issue(s) certified for appeal;
 - Specify the legal criteria that makes the order appealable;
 - Identify the factors supporting the trial court's holding that the criteria are satisfied;
 - Identify any other factors leaving the trial court to grant the appeal.

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Tenn. R. App. P. 9 Application Procedure

- Procedure in the appellate court if trial court grants motion:
 1. Within 10 days of trial court's order granting permission to appeal, appellant must file an application for permission to appeal in the intermediate appellate court. The application must include:
 - A statement of the questions presented for review;
 - Statement of the facts necessary to understand what appeal by permission lies;
 - Statement of reasons supporting intermediate appeal; and
 - Copies of the order appealed from, the trial court's order granting permission to appeal, and any other parts of the record necessary for adjudicating the application.
 2. Appellee may file a response in opposition within 10 days of the application.
 3. If appellate court grants the application, trial court clerk must file the record on appeal within 30 days.
- If appellate court denies the application, appellant may seek Tennessee Supreme Court review by filing a Tenn. R. App. P. 11 application **within 30 days** of denial.

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Tenn. R. App. P. 10 Extraordinary Appeals

- Interlocutory appeal is sought by application directly to the intermediate appellate court, bypassing the trial court.
- Grounds for appeal:
 - If the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review; or
 - If necessary for complete determination of the action on appeal as otherwise provided in the Rules of Appellate Procedure.
- Appellate court may issue whatever order is necessary to implement review under Rule 10.

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Tenn. R. App. P. 10 Application

- Application is filed directly with the intermediate appellate court.
- Application shall contain:
 1. A statement of the question presented for review;
 2. A statement of facts necessary to understanding why an extraordinary appeal lies;
 3. A statement of the reasons supporting an extraordinary appeal; and
 4. The relief sought.
- Application must also include an appendix with copies of any orders, opinions, and portions of the record relevant for determination of the application.

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Tenn. R. App. P. 10 Procedure

- Opposing party may not answer the application unless ordered to do so by the court.
- If application is granted, trial court clerk must file the appellate record within 30 days of order granting appeal.
- If application is denied, appellant may file an application for permission to appeal in the Supreme Court within 30 days of denial.
- Appellate court sets the briefing schedule.

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Petitions for Writ of Certiorari

- Governed by Tenn. Code Ann. § 27-8-101
- Most often used when the trial court “has exceeded the jurisdiction conferred, or is acting illegally” and when “there is no other plain, speedy, or adequate remedy.”
- Writ is available to correct:
 1. Fundamentally illegal rulings;
 2. Proceedings inconsistent with essential legal requirements;
 3. Decisions beyond the lower tribunal's authority; and
 4. Plain and palpable abuses of discretion.
- Writ is not available if there is an avenue to appeal in the Rules of Appellate Procedure.

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Tenn. Sup. Ct. R. 28 Appeals

- Appeals from the denial of motions to reopen post-conviction proceedings must follow the procedure laid out in Tenn. Sup. Ct. R. 28, § 10.
- Petitioner must file application for permission to appeal within 30 days of the denial of the motion to reopen.
- The State has 30 days to respond to the application.
- Court of Criminal Appeals reviews the denial of a motion to reopen for an abuse of discretion.
- If the Court of Criminal Appeals denies the application, petitioner has 60 days to file a Rule 11 application in the Tennessee Supreme Court.

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Preparing the Record

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Mechanics of Preparing the Record

- Tenn. R. App. P. 24 governs the content and preparation of the record.
- Appellant bears the burden of preparing the record for appeal.
- Record should include:
 - Copies of all papers filed in the trial court (exception items excluded by Rule 24);
 - Originals of any exhibits filed in the trial court;
 - Transcript or statement of the evidence;
 - Any requests for instructions submitted to the trial judge, whether acted upon or not;
 - Any other matters designated by a part and "properly includable in the record."

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Mechanics of Preparing the Record

- Record does not include:
 - Subpoenas or summons for any witness;
 - Papers related to discovery (e.g. depositions, interrogatories and answers, examination reports, etc.);
 - Juror lists;
 - Trial briefs;
 - Minutes of opening and closing court.

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What is “properly includable in the record”?

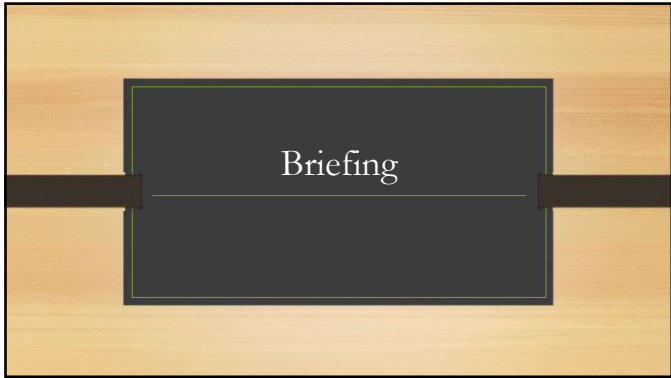
- Any document that was filed with the trial court during the proceedings from which the appeal is taken. Tenn. R. App. P. 24(g).
- Parties may not add or subtract documents from the record after the fact “except insofar as may be necessary to convey a fair, accurate and complete account of what transpired in the trial court with respect to those issues that are the bases of appeal.”
- If you discover “properly includable” documents are missing from the record, you can file a motion to supplement the record with the appellate court.

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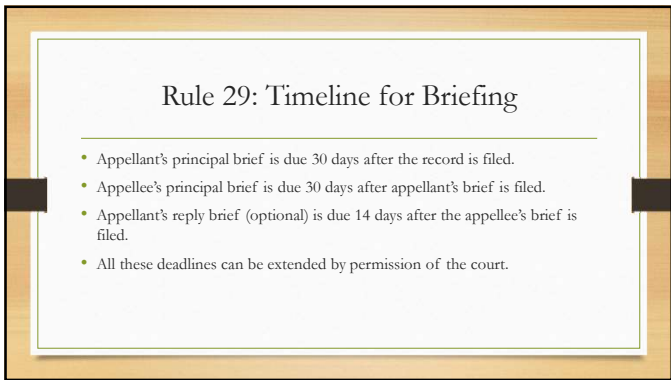
Record Timeline

- Appellant files in the trial court a description of the parts of the record that should be transmitted to the appellate court within 15 days of filing the notice of appeal.
- Transcripts shall be filed with the trial court within 60 days of filing the notice of appeal. Appellee shall file any objections to the transcript within 15 days.
 - If there is no transcript, appellant shall file in the trial court a notice that no transcript is to be filed within 15 days of filing the notice of appeal.
- Trial court approves the transcripts after they are filed and time for objection has expired.
- After transcripts are approved, trial court clerk transmits the record to the appellate court within 45 days.

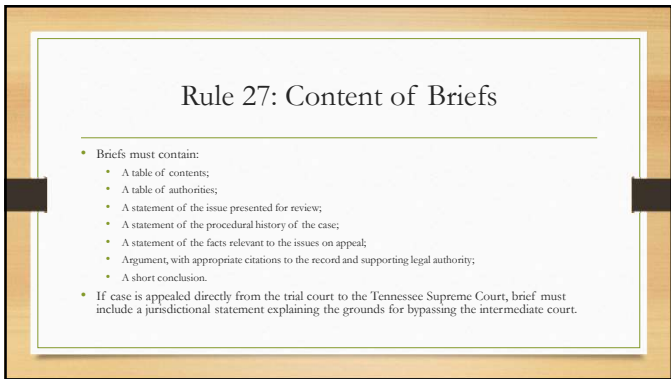
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Rule 31: Amicus Briefs

- Amicus briefs may only be filed by leave of the court or at the request of the appellate court.
- Amicus brief shall follow the form prescribed for brief of the appellee.
- Amicus brief shall be filed no later than 7 days after the brief of the party the amicus is supporting.
- If amicus is not supporting either party, amicus brief must be filed no later than 7 days after appellant's brief is filed.

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Rule 28: Optional Appendix to Brief

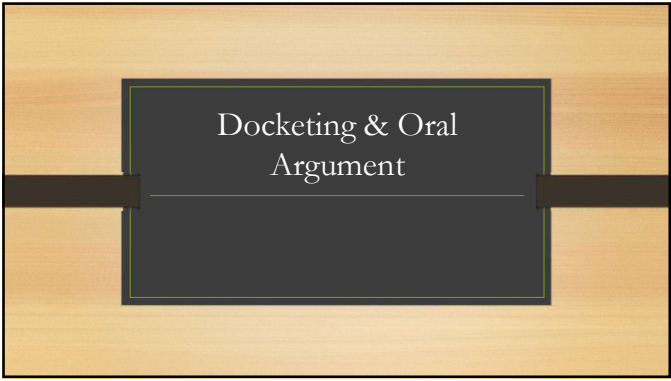
- Parties may include an optional appendix to briefs.
- Appendix can include copies of documents or photos included in the record.
- Appendix cannot contain items or documents that are not included in the record.
- Parties do not need to attach copies of unpublished opinions cited in the brief.

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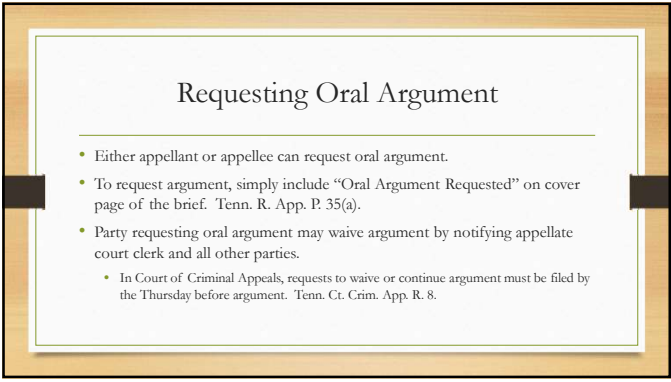
Rule 30: Formatting of Briefs

- Word limits for briefs:
 - Principal briefs and Rule 11 applications to appeal to the Tennessee Supreme Court: 15,000 words
 - Reply briefs, Answers to Rule 11 applications, Supplemental briefs to Rule 11 applications: 5,000 words
 - Amicus briefs: 7,500 words
- Briefs must contain a certificate of compliance including the word count of the brief.

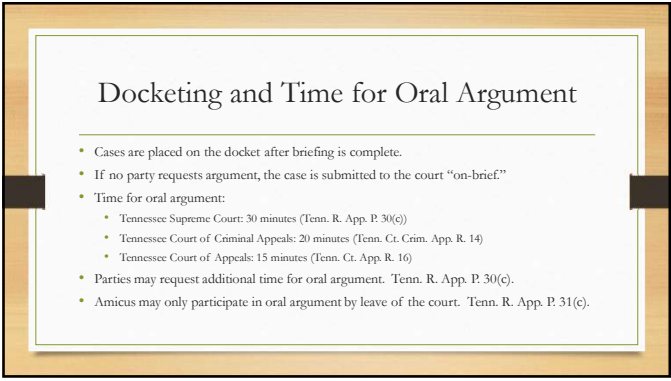
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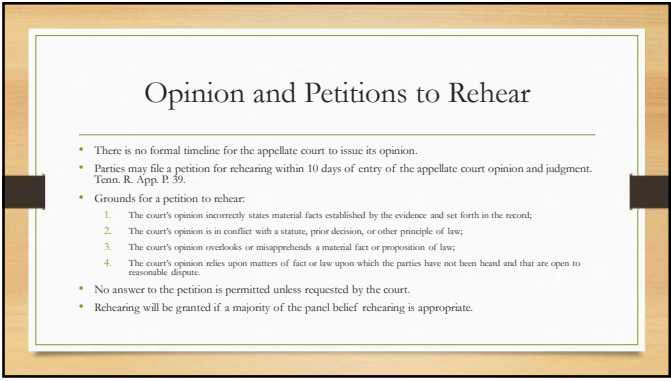
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Court of Criminal Appeals “Rule 20” Opinions

- The Court of Criminal Appeals may affirm a conviction by memorandum opinion under Tenn. Ct. Crim. App. R. 20.
- All judges on the panel must agree that the opinion would have no precedential value.
- Memorandum opinions may not be cited or relied upon in any unrelated case unless to establish a split of authority.
- Rule 20 opinions are clearly designated “Memorandum Opinion” on the cover page.

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Application to the Tennessee Supreme Court

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Rule 11 Applications

- The party who lost in the intermediate appellate court may file an application for permission to appeal to the Tennessee Supreme Court. Tenn. R. App. P. 11.
- Rule 11 applications must be filed within 60 days after entry of the intermediate court judgment or ruling on the petition for rehearing.
- Note: Other appellate court rules may require a shorter timeline for Rule 11 applications (e.g. appeal from denial of a Rule 9 application).
- Opposing party may file an answer within 15 days after filing of the application.

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Factors Considered When Reviewing Rule 11 Applications

1. The need to secure uniformity of decision;
2. The need to secure settlement of important questions of law;
3. The need to secure settlement of questions of public interest; and
4. The need for the exercise of the Supreme Court's supervisory authority.

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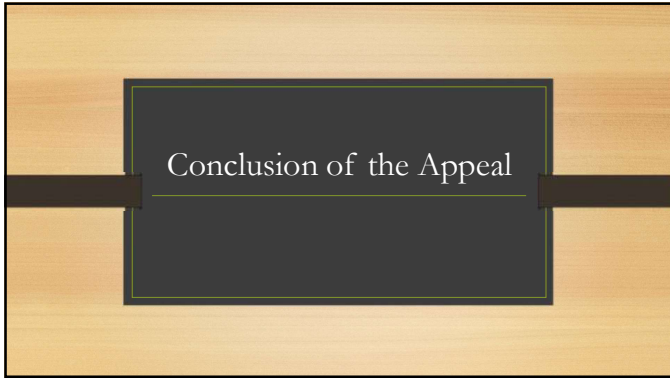
Tennessee Supreme Court Briefing and Argument

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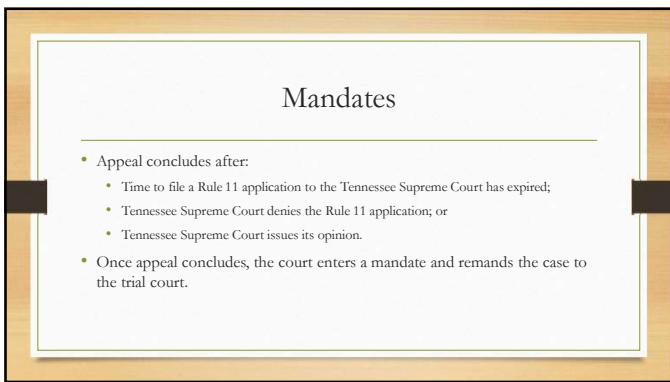
Timeline & Argument

- The same briefing timeline applies in the Tennessee Supreme Court.
- Parties are granted 30 minutes for argument.

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Rule 36: Preservation and Waiver

- All issues presented for review must be properly preserved.
- Steps necessary to preserve issue:
 - Contemporaneous objection in the trial court;
 - Legal ground for objection must match the issue raised on appeal;
 - Some criminal issues must be raised in a motion for new trial filed in the trial court.
- Issues not properly preserved for review are waived.
- Issues may also be waived due to inadequate briefing.
- Waived issues may be reviewed for plain error.

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Review of Factual Findings

- The trial court's factual findings are binding on the appellate court. Tenn. R. App. 36(a).
- Appellate court may only review the factual findings if the record preponderates against them.
- Examples of factual findings:
 - Resolution of factual disputes
 - Credibility findings

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De Novo Review

- De novo standard "universally applies to issues involving only questions of law." *Fields v. State*, 40 S.W.3d 450 (Tenn. 2001).
- Trial court's conclusions of law are entitled to no deference or presumption of correctness.
- Examples of application:
 - Questions of statutory interpretation;
 - Facial constitutional challenges;
 - Application of legal doctrines to a trial court's factual findings

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Abuse-of-Discretion

- Abuse-of-discretion standard applies to a trial court's discretionary decisions.
- Standard conveys two notions:
 1. The trial court has the authority to choose among several legally permissible, sometimes conflicting, answers; and
 2. The appellate court will not interfere with a trial court's decision simply because it would have chosen an alternative option.

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Abuse of Discretion

- A trial court abuses its discretion when it applies an incorrect legal standard, reaches an illogical or unreasonable decision, or bases its decision on a clearly erroneous assessment of the evidence. *State v. Mangrum*, 403 S.W.3d 152, 166 (Tenn. 2013).
 - Appellate courts' review considers:
 1. Whether the factual basis of the decision is supported by sufficient evidence;
 2. Whether the trial court has correctly identified and properly applied the applicable legal principles; and
 3. Whether the trial court's decision is within the range of acceptable alternatives.
- Gooding v. Gooding*, 477 S.W.3d 774, 780 (Tenn. Ct. App. 2015).

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Abuse of Discretion

- Examples of application:
 - Admission/exclusion of evidence;
 - Most sentencing determinations;
 - Admission to or denial of bail;
 - Decisions concerning parenting plans

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Plain Error Review

- Appellate courts may review waived issues for "plain error."
- Relief is granted "sparingly" and only applies to "especially egregious error that strikes at the fairness, integrity, or public reputation of judicial proceedings." *State v. Addison*, 899 S.W.2d 626, 639-40 (Tenn. Crim. App. 1984).
- Plain error review is primarily used in criminal cases.

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Plain Error Review

- The defendant bears the burden of establishing plain error.
- Must show all five factors:
 1. The record clearly establishes what occurred in the trial court;
 2. A clear and unequivocal rule of law was breached;
 3. A substantial right of the accused was adversely affected;
 4. The accused did not waive the issue for tactical reasons; and
 5. Consideration of the issue is necessary to do substantial justice.
- Additionally, error must have been of such great magnitude that it probably changed the outcome of trial.

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Plain Error Review

- Plain error review applies in the civil context through Tenn. R. App. P. 36(b):
 - "When necessary to do substantial justice, an appellate court may consider an error that has affected a substantial right of a party at any time, even though the error was not raised in the motion for new trial or assigned as an error on appeal."
- Review is not warranted unless:
 - Consideration of the error is necessary to do substantial justice and
 - The error affected the substantial rights of a party.
- Relief is not warranted unless, considering the record as a whole, the error more likely than not affected the judgment or would result in prejudice to the judicial process.

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