

Appellate Court Procedural Rules Committee

The Appellate Court Procedural Rules Committee proposes to recommend amendments to Pa.R.A.P. 311 and 341, and the notes of Pa.R.A.P. 311 and 904. This proposal is being submitted for public comments, suggestions and concerns prior to submission to the Supreme Court.

Proposed new material is underlined and in bold face type and deleted material is bracketed and in bold face type.

All communications in reference to the proposed amendment should be sent no later than **February 14, 2014** to:

Appellate Court Procedural Rules Committee

Pennsylvania Judicial Center
601 Commonwealth Ave., Suite 6200
P.O. Box 62635
Harrisburg, Pennsylvania 17106-2635
or Fax to
(717) 231-9551
or E-Mail to
appellaterules@pacourts.us

An Explanatory Comment precedes the proposed amendment and has been inserted by this Committee for the convenience of the bench and bar. It will not constitute part of the rule nor will it be officially adopted or promulgated.

By the Appellate Court Procedural Rules Committee

Honorable Renée Cohn Jubelirer
Chair

EXPLANATORY COMMENT

INTERLOCUTORY APPEALS FROM ORDERS MADE APPEALABLE BY STATUTE OR GENERAL RULE

Under the current Pennsylvania Rules of Appellate Procedure, provision is made for orders that the General Assembly has determined are immediately appealable by statute. Under current Pa.R.A.P. 311(a)(8), an interlocutory order is appealable as of right if a statute creates the right to an immediate appeal. However, a party is not required to take an immediate appeal of such orders and may defer the appeal until a final order ending the case as to all claims and parties is entered pursuant to Pa.R.A.P. 341(b)(1). In addition, Pa.R.A.P. 341(b)(2) provides that an order is appealable as a final order, if the General assembly expressly defines it as a final order in a statute.

Some confusion has arisen as to whether certain orders appealable by statute are appealable under Pa.R.A.P. 311(a)(8) or Pa.R.A.P. 341(b)(2) or both. Both rules concern non-case ending orders for which the right to appeal is based upon a statute, but the distinction between the two rules can be subtle and occasionally overlapping. This confusion can lead to waiver of the right to appeal, because non-case ending orders that are appealable under Pa.R.A.P. 341(b)(2) must be appealed immediately and cannot be appealed at the end of the case, while non-case ending orders appealable under Pa.R.A.P. 311(a)(8) may be appealed either immediately or at the end of the case.

The Committee has determined that if an order is immediately appealable by statute and it is a true final order that ends a case as to all claims and all parties as defined in Pa.R.A.P. 341(b)(1), there is no need for (b)(2). Such orders are final orders under Pa.R.A.P. 341(b)(1) and the General Assembly's designation of such orders as final is redundant. Accordingly, the Committee recommends that the Supreme Court delete Pa.R.A.P. 341 (b)(2).

If the General Assembly determines that an interlocutory order is appealable as of right, then the right to appeal should be under Pa.R.A.P. 311, regardless of whether the General Assembly describes the order as "final" or as "appealable." Therefore, the Committee further recommends that the Supreme Court amend Pa.R.A.P. 311(a)(8) to clarify that there is an immediate right to appeal any non-case ending order that is appealable by statute or general rule.

The Committee has also specifically addressed the result of failure to take an immediate appeal from an interlocutory order refusing to compel arbitration. Such orders are immediately appealable under 42 Pa.C.S. § 7320(a)(1). The failure to take an immediate appeal from such orders should result in waiver. By requiring either an

immediate appeal or waiver, the possibility of an unnecessary trial of a case that belongs in arbitration will be avoided. See Pa.R.A.P. 311(g)(iv). All other orders that fall under Pa.R.A.P. 311(a)(8) may be appealed at the conclusion of the case if an appeal is not filed immediately after the order is entered.

The effect of rescinding Pa.R.A.P. 341(b)(2) and effectively merging that provision into Pa.R.A.P. 311(a)(8) also eliminates the waiver issue that sometimes arises with non-case ending orders that grant or deny a declaratory judgment.

CERTIFICATION BY THE COMMONWEALTH THAT AN ORDER WILL TERMINATE OR SUBSTANTIALLY HANDICAP THE PROSECUTION

Rule 311(d) was adopted in the wake of *Commonwealth v. Dugger*, 486 A.2d 382 (Pa. 1985), a case that dealt with the way in which the Commonwealth could secure review of suppression orders, despite the fact that such orders were interlocutory. As the case law has developed, 311(d) has been used for review of other orders as well, including those resolving motions *in limine* and recusal motions. Because the procedure is now set forth by rule(s) and case law construing the rule, and because it applies to more than suppression orders, the rule and the *Dugger* case are not coextensive. Indeed, in *Commonwealth v. Dixon*, 407 A.2d 468 (Pa. 2006), the Supreme Court observed that the rule had superseded *Dugger*. Accordingly, a recommendation to align the references in the rules with case law follows.

Rule 311. Interlocutory Appeals as of Right

* * * * *

(a) *General rule.* An appeal may be taken as of right and without reference to Pa.R.A.P. 341(c) from:

* * * * *

(4) 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 unless the order was entered:

(i) **Pursuant to [Section 3323(f) or 3505(a) of the Divorce Code,]**
23 Pa.C.S. §§ 3323(f), 3505(a); or

* * * * *

(8) Other cases. An order **[which is made appealable by statute or general rule] that is made final or appealable by statute or general rule, even though the order does not dispose of all claims of all parties.**

* * * * *

(d) *Commonwealth [A]ppeals in [C]riminal [C]ases.* In a criminal case, under the circumstances provided by law, the Commonwealth may take an appeal as of right from an order that does not end the entire case where the Commonwealth certifies in the notice of appeal that the order will terminate or substantially handicap the prosecution.

(e) *Orders [O]verruling [P]reliminary [O]bjections in [E]minent [D]omain [C]ases.* An appeal may be taken as of right from an order overruling preliminary objections to a declaration of taking and an order overruling preliminary objections to a petition for appointment of a board of viewers.

(f) *Administrative [R]emand.*

* * * * *

(g) *Waiver of objections.*

(1) **[Where an interlocutory order is immediately appealable under this rule, failure to appeal:] Failure to file an appeal from an interlocutory order shall not constitute a waiver of the objection to the order and the objection may be raised on any subsequent appeal from a final order in the case, except in the following instances:**

(i) **[Under Subdivisions (a), (b)(2) or (f) of this rule shall not constitute a waiver of the objection to the order and the objection may be raised on any subsequent appeal in the matter from a determination on the merits.]**
RESCINDED

(ii) **Failure to file an appeal from an interlocutory order** **[Under Subdivisions] under paragraphs** (b)(1) or (c) of this rule shall constitute a waiver of all objections to jurisdiction over the person or over the property involved or to venue, etc. and the question of jurisdiction or venue shall not be considered on any subsequent **[appellate review of the matter] appeal from a final order in the case.**

(iii) **Failure to file an appeal from an interlocutory order** **[Under Subdivision] under paragraph** (e) of this rule shall constitute a waiver of all objections to such orders and any objection may not be raised on any subsequent appeal **[in the matter from a determination on the merits] from a final order in the case.**

(iv) **Failure to file an appeal from an interlocutory order refusing to compel arbitration, appealable under 42 Pa.C.S. § 7320(a)(1) and paragraph (a)(8) of this rule, shall constitute a waiver of all objections to such order, and that issue may not be raised on any subsequent appeal from a final order in the case.**

(2) Where no election that an interlocutory order shall be deemed final is filed under **[Subdivision] paragraph** (b)(1) of this rule, the objection may be raised on any subsequent appeal **[in the matter from a determination on the merits] from a final order in the case.**

(h) Further proceedings in the trial lower court. **[Rule] Pa.R.A.P. 1701(a) [(effect of appeal generally)]** shall not be applicable to a matter in which an interlocutory order is appealed under **[Subdivision]subparagraphs** (a)(2) or (a)(4) of this rule.

Official Note:

* * * * *

Subp[P]aragraph (a)(3) [(Change of criminal venue or venire)]—[Under prior practice, either a defendant or the Commonwealth could appeal an order changing venue. See former Pa.R.Crim.P.311(a) (Third sentence) before amendment of June 29, 1977, 471 Pa. XLIV. An order refusing to change venue is not appealable. Commonwealth v. Swanson, 424 Pa. 192, 225 A.2d 231 (1967). This rule makes no change in existing practice.]

Change of venire is authorized by 42 Pa.C.S. § 8702 (impaneling jury from another county). Pa.R.Crim.P. **[312]584** (motion for change of venue or change of venire) treats changes of venue and venire the same. Thus an order changing **venue or** venire is appealable by the defendant or the Commonwealth, while an order refusing to change **venue or** venire is not.

* * * * *

Paragraph [Subdivision] (d) [(Commonwealth appeals in criminal matters)]—In paragraph [subdivision] (d), the [1992 amendment permits appeals by the] Commonwealth **has a right to take an appeal from an interlocutory order provided that it certifies in the notice of appeal that the order terminates or substantially handicaps the prosecution.** [from certain interlocutory orders that were previously treated as final orders under the pre-1992 version of Rule 341(c). See, e.g.,] See Pa.R.A.P. 904(e); Commonwealth v. White, 910 A.2d 648, 654-55 (Pa. 2006); see also Commonwealth v. Malinkowski, 671 A.2d 674, 678 (Pa. 1996). This rule supersedes Commonwealth v. Dugger, [506 Pa. 537,] 486 A.2d 382 (Pa. 1985). Commonwealth v. Dixon, 907 A.2d 468, 471 n.8 (Pa. 2006). [; Commonwealth v. Deans, 530 Pa. 514, 610 A.2d 32 (1992); and Commonwealth v. Cohen, 529 Pa. 552, 605 A.2d 1212 (1992). The 1996 amendment to Rule 904(e) requires that the Commonwealth assert in the notice of appeal that the trial court's order will terminate or substantially handicap the prosecution.]

* * * * *

Paragraph (g)(waiver of objections) – The amendment adding subparagraph (g)(1)(iv) provides that failure to file an appeal from an interlocutory order refusing to compel arbitration, appealable under 42 Pa.C.S. § 7320(a)(1) and subparagraph (a)(8) of this rule, shall constitute a waiver of all objections to such order, and that issue may not be raised on appeal from a subsequent order. This amendment abrogates subparagraph (g)(1)(i), which had previously provided that failure to under old paragraphs (a), (b)(2) or (f) shall not constitute a waiver of the objection to the order. The amendment to subparagraph (g)(1)(iv) accordingly supersedes the Superior Court's holding in *Cooke v. Equitable Life Assurance Soc'y of the U.S.*, 723 A.2d 723, 726 (Pa. Super. 1999).

* * * * *

Rule 341. Final Orders; Generally.

(a) General Rule.—Except as prescribed in **[subdivision] paragraph** (d), and (e) of this rule, an appeal may be taken as of right from any final order of an administrative agency or lower court.

(b) Definition of Final Order.—A final order is any order that:

(1) disposes of all claims and of all parties; or

(2) **[is expressly defined as a final order by statute; or] RESCINDED**

(3) is entered as a final order pursuant to **[subsection] paragraph** (c) of this rule.

* * * * *

Official Note:

Related Constitutional and Statutory Provisions—....

Criminal Law Proceedings—Discretionary Aspects of Sentencing—....

Criminal Law Proceedings—Commonwealth Appeals—....

Final Orders—Pre-and Post-1992 Practice—....

* * * * *

[Final Orders in Declaratory Judgment Matters—In an action taken pursuant to the Declaratory Judgments Act, 42 Pa.C.S. § § 7531—7541, orders based on a pre-trial motion or petition are considered “final” within the meaning of this Rule, under subdivision (b)(2), if they affirmatively or negatively declare the rights and duties of the parties. *Nationwide Mut. Ins. Co. v. Wickett*, 563 Pa. 595, 604, 763 A.2d 813, 818 (2000). Thus, an order in a declaratory judgment action sustaining a demurrer and dismissing some, but not all, defendants is considered a final order under subdivision (b)(2) because it is expressly defined as such by statute. Importantly, however, when a court enters an order in a declaratory judgment action that overrules preliminary objections in the nature of a demurrer, the order is not “final” under subdivision (b)(2), because such order merely allows the case to go forward without declaring the rights and duties of the parties. *Safe Harbor Water Power Corp. v. Fajt*, 583 Pa. 234, 876 A.2d 954 (2005).

In order to preserve issues for appeal after a trial in a declaratory judgment action, an aggrieved party must file post-trial motions as required by Pa.R.C.P. No. 227.1. *Motorists Mutual v. Pinkerton*, 574 Pa. 333, 830 A.2d 958 (2003); *Chalkey v. Roush*, 569 Pa. 462, 805 A.2d 491 (2002).

Orders Appealable Under Other Rules—Orders which are separable from and collateral to the main cause of action where the right involved is too important to be denied review, and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost, previously appealable as final orders under Rule 341, are now appealable under Rule 313. See *Pugar v. Greco*, 483 Pa. 68, 73, 394 A.2d 542, 545 (1978) (quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949)).

The following is a partial list of orders that are no longer appealable as final orders pursuant to Rule 341 but which, in an appropriate case, might fall under Rules 312 (Interlocutory Appeals by Permission) or 313 (Collateral Orders) of this Chapter.

- (1) a decision transferring an equity action to the law side;
- (2) an order denying a defendant leave to amend his answer to plead an affirmative defense;
- (3) a pre-trial order refusing to permit a defendant to introduce evidence of an affirmative defense;
- (4) an order denying a party the right to intervene;
- (5) an order denying a petition to amend a complaint;
- (6) an order requiring the withdrawal of counsel;
- (7) an order denying class certification in a class action case; and
- (8) an order striking a *lis pendens*.

The dismissal of preliminary objections to a petition for appointment of a board of viewers and the dismissal of preliminary objections to a declaration of taking, formerly appealable as final orders under Rule 341, are now appealable as interlocutory appeals as of right under Rule 311.]

Rescission of Subdivision (b)(2) -- Subdivision (b)(2) previously provided that an order deemed final by statute is a “final order” that must be appealed within 30 days. This was true even when the order did not end the case as to all claims or all parties. Following the 2013 rescission of (b)(2), such orders are only appealable under Pa.R.A.P. 341 if they meet the criteria for a final order under (b)(1). One of the further effects of the rescission of Subdivision (b)(2) is to change the basis for appealability of orders that do not end the case but grant or deny a declaratory judgment. See *Nationwide Mut. Ins. Co. v. Wickett*, 563 Pa. 595 , 763 A.2d 813 (2000) and *Pa. Bankers Ass’n v. Pa. Dept. of Banking*, 597 Pa. 1, 940 A.2d 790 (2008). The effect of the rescission is to eliminate waiver for failure to take an immediate appeal from such an order. A party aggrieved by a non-case ending order granting or denying a declaratory judgment, where the order satisfies the criteria for “finality” under *Pa. Bankers Ass’n* may elect to

proceed under Pa.R.A.P 311(a)(8) or wait until the end of the case and proceed under Subdivision (b)(2) of this rule.

Sub[division]paragraph (c)—Determination of Finality—....

*** * * * ***

Rule 904. Content of the Notice of Appeal

* * * * *

(c) *Request for transcript.*—The request for transcript contemplated by **[Rule] Pa.R.A.P. 1911 [(request for transcript)]** or a statement signed by counsel that there is either no verbatim record of the proceedings or the complete transcript has been lodged of record, shall accompany the notice of appeal, but the absence of or defect in the request for transcript shall not affect the validity of the appeal.

(d) *Docket entry.*—The notice of appeal shall include a statement that the order appealed from has been entered **[in] on** the docket. A copy of the docket entry showing the entry of the order appealed from shall be attached to the notice of appeal.

(e) *Content in criminal cases.*—When the Commonwealth takes an appeal pursuant to **[Rule] Pa.R.A.P. 311(d)**, the notice of appeal shall include a certification by counsel that the order will terminate or substantially handicap the prosecution.

(f) *Content in children’s fast track appeals.*—In a children’s fast track appeal the notice of appeal shall include a statement advising the appellate court that the appeal is a children’s fast track appeal.

Official Note:

* * * * *

With respect to **[subdivision] paragraph (e)**, in *Commonwealth v. Dugger*, **[506 Pa.537,] 486 A.2d 382 (Pa. 1985)**, the Supreme Court held that the Commonwealth’s certification that an order will terminate or substantially handicap the prosecution is not subject to review as a prerequisite to the Superior Court’s review of the merits of the appeal. **The principle in *Dugger* has been incorporated in and superseded by Pa.R.A.P. 311(d). *Commonwealth v. Dixon*, 907 A.2d 468, 471 n.8 (Pa. 2006).** Thus, the need for a detailed analysis of the effect of the order, formerly necessarily a part of the Commonwealth’s appellate brief, was eliminated. See also *Commonwealth v. Deans*, **[530 Pa. 514,] 610 A.2d 32 (Pa. 1992)**; *Commonwealth v. Cohen*, **[529 Pa. 552,] 605 A.2d 1212 (Pa. 1992) [(allowing appeals by the Commonwealth from adverse rulings on motions in limine). Accordingly, the 1997 amendments added subdivision (e) as a requirement when the Commonwealth takes an appeal pursuant to Rule 311(d)].**

* * * * *