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Date/Time of Request:	Tuesday, March 10, 2009 11:47 Eastern
Client Identifier:	MA
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West's Delaware Code Annotated [Currentness](#)

Delaware Rules of Court

▣ Rules of the Supreme Court

▣ [Part IV](#). Other Proceedings

→ **RULE 41. CERTIFICATION OF QUESTIONS OF LAW**

(a) Who may certify.

(i) *Delaware courts.* Other Delaware courts may, on motion or sua sponte, certify to this Court for decision a question or questions of law arising in any case before it prior to the entry of final judgment if there is an important and urgent reason for an immediate determination of such question or questions by this Court and the certifying court has not decided the question or questions in the case.

(ii) *Other entities.* The Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court, the United States Securities and Exchange Commission, or the Highest Appellate Court of any other State may, on motion or sua sponte, certify to this Court for decision a question or questions of law arising in any matter before it prior to the entry of final judgment or decision if there is an important and urgent reason for an immediate determination of such question or questions by this Court and the certifying court or entity has not decided the question or questions in the matter.

(b) Requirements for Accepting a Certification. Certification will be accepted in the exercise of the discretion of the Court only where there exist important and urgent reasons for an immediate determination by this Court of the questions certified. A certification will not be accepted if facts material to the issue certified are in dispute. A certificate shall state with particularity the important and urgent reasons for an immediate determination by this Court of the question certified. Without limiting the Court's discretion to hear proceedings on certification, the following illustrate reasons for accepting certification:

(i) *Original question of law.* The question of law is of first instance in this State;

(ii) *Conflicting decisions.* The decisions of the trial courts are conflicting upon the question of law;

(iii) *Unsettled question.* The question of law relates to the constitutionality, construction or application of a statute of this State which has not been, but should be, settled by the Court.

(c) Procedure for certification. The procedure for certification shall be as follows:

(i) *Certification by trial court.* A judge of the certifying court shall sign and file with the clerk of that court a

certification substantially in the form set forth in Official Form K;

(ii) *Filing by trial court.* The clerk of that court shall, within 5 days of the filing of such certification, file with the Clerk of this Court 6 certified copies of the certification and 6 true and correct copies of such of the following papers as may have been filed below:

(A) Petition. Any Petition for Certification;

(B) Response. Any response to the Petition for Certification; and

(C) Stipulation of facts. Any stipulation of facts with respect to the Certification;

(iii) *Clerk of the Supreme Court.* Upon the receipt of such copies, the Clerk of this Court shall forthwith docket the proceeding on certification in the same manner as other cases are docketed, shall deliver to each of the Justices 1 copy of the certification and any accompanying papers and shall send written notice to the parties of the filing of such proceeding;

(iv) *Action Upon Certification.* After docketing and unless otherwise ordered, this Court shall thereupon and without further argument determine whether to accept or refuse the certification. If refused, a certified copy of the order shall be sent to the certifying court and a copy thereof sent to each counsel. If accepted, the proceeding on certification shall be considered to have been duly instituted, and the Clerk shall send written notice thereof to the parties. The certification as filed shall constitute the record;

(v) *Procedure Upon Acceptance.* From the date of acceptance of certification further proceedings shall be governed by these Rules. Briefs shall be filed in the order recommended by the certifying court in the certification, unless the Court, at the time of approving the certification, shall designate a different order. In any event, insofar as time for filing is concerned, the party or parties required to file the first brief shall be considered the appellant and the other party or parties shall be considered appellee. The caption for papers filed in this Court after acceptance of certification by this Court shall reflect such relationship among the parties.

CREDIT(S)

Amended effective May 15, 2007.

COMMITTEE COMMENTARY

Reference: Former Rule 20. See [Del. Const., art. IV, § 11\(9\)](#).

1984 COMMENTARY

The 1984 amendment implements the amendment of [Article IV, § 11, subsection \(9\) of the Delaware Constitution](#) enacted June 30, 1983 permitting the Supreme Court to accept questions of law certified to

the Court by the United States District Court for the District of Delaware.

Sup.Ct.Rules, Rule 41, DE R S CT Rule 41
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Delaware Rules of Court

▣ Rules of the Supreme Court

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→ **RULE 42. INTERLOCUTORY APPEALS**

(a) Exercise of Jurisdiction. The Court's jurisdiction to hear and determine appeals in civil cases from interlocutory orders of a trial court, including a trial court acting as an intermediate appellate court in the review of a ruling, decision or order of a court or an administrative agency, shall be exercised in accordance with this rule as to certification and acceptance of interlocutory appeals. All time periods under this rule should be calculated pursuant to [Supreme Court Rule 11](#).

(b) Criteria to Be Applied in Determining Certification and Acceptance of Interlocutory Appeals. No interlocutory appeal will be certified by the trial court or accepted by this Court unless the order of the trial court determines a substantial issue, establishes a legal right and meets 1 or more of the following criteria:

(i) *Same as Certified Question.* Any of the criteria applicable to proceedings for certification of questions of law set forth in [Rule 41](#); or

(ii) *Controverted Jurisdiction.* The interlocutory order has sustained the controverted jurisdiction of the trial court; or

(iii) *Substantial Issue.* An order of the trial court has reversed or set aside a prior decision of the court, a jury, or an administrative agency from which an appeal was taken to the trial court which had determined a substantial issue and established a legal right, and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice; or

(iv) *Prior Judgment Opened.* The interlocutory order has vacated or opened a judgment of the trial court; or

(v) *Case Dispositive Issue.* A review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice.

(c) Procedure for Certification of Interlocutory Appeals in the Trial Court. An application for certification of an interlocutory appeal shall be made in the first instance to the trial court in accordance with the following procedures:

(i) *Application.* Such application shall be served and filed within 10 days of the entry of the order from which

the appeal is sought or such longer time as the trial court, in its discretion, may order for good cause shown.

(ii) *Response.* An opposing party shall have 10 days (or such shorter time as the trial court shall in its discretion order, upon notice for good cause shown or upon the trial court's order sua sponte) after such service within which to serve and file a written response or, if the trial court so directs, present an oral response in lieu of a written response;

(iii) *Action by Trial Court.* Within 10 days after filing of the response or, if there is none, within 20 days after filing the application, the trial court shall enter an order certifying or refusing to certify the interlocutory appeal;

(iv) *Form of Order.* Such order shall be substantially in the form set forth in Official Form L, setting forth the basis for the certification and indicating which of the criteria set forth in paragraph (b) of this rule is applicable;

(v) *Service on Trial Court.* A copy of the application and response referred to in subparagraphs (i) and (ii) of this paragraph shall, concurrently with service and filing, be delivered by the party serving and filing it to the judge of the trial court whose order is sought to be reviewed.

(d) Procedure for Acceptance of Interlocutory Appeals in the Supreme Court. No interlocutory order shall be reviewed by this Court unless the appeal therefrom has been accepted by this Court in accordance with the following procedure:

(i) *Time to File.* The notice of appeal may be filed at any time after the filing of the application for certification in the trial court, except that it shall be the obligation of appellant to serve and file in this Court a notice of appeal of an interlocutory order within 30 days after the entry of the order from which the appeal is sought to be taken;

(ii) *Form of Filing.* The notice of appeal and any cross-appeal shall comply with this rule, [Rules 6](#) and [7](#) of this Court and with such version of Official Form M as shall be applicable to the situation;

(iii) *Supplemental Notice.* If the notice of appeal is filed before action has been taken by the trial court on the application for certification, appellant shall file a supplementary notice of appeal within 10 days after the expiration of the time periods set forth in paragraph (c) of this rule.

(iv) *Contents of Notice.* The notice of appeal and the supplementary notice of appeal, if any, shall include a true and correct copy of such of the following papers as shall have been filed below except that the supplementary notice of appeal shall not contain any papers previously attached to the notice of appeal:

(A) Application. The application for certification and attachments thereto; the Court discourages unnecessary attachments to the application for certification;

(B) Order on Review. The interlocutory order from which the appeal is sought to be taken together with any opinion of the trial court with respect thereto;

(C) Response. The written response, if any, to the application for certification, or the transcript, if and when available, of an oral response in lieu of a written response;

(D) Action by Trial Court. The order, if any, of the trial court certifying or refusing to certify the interlocutory appeal and any opinion with respect thereto; and

(E) No Action by Trial Court. If no order has been entered by the trial court on the application for certification within 30 days of the entry of the interlocutory order, a separate certificate of appellant's counsel so stating shall be attached.

(v) *Action by This Court.* Unless otherwise ordered, this Court shall thereupon and without further argument determine in its discretion whether to accept or refuse the interlocutory appeal. In exercising that discretion, this Court may consider all relevant factors, including the decision of the trial court whether to certify the interlocutory appeal.

(vi) *Proceedings After Acceptance.* From the date of the acceptance of the interlocutory appeal, further proceedings shall be governed by these Rules, except:

(A) Trial Record Not Transmitted. The record shall not, in the first instance, be transmitted to the Clerk of this Court. Instead, the respective appendices of the parties, or a joint appendix if one is agreed upon, shall contain such record materials as each party believes relevant to the determination of the issue on appeal. The Court may, at its option, thereafter direct the clerk of the trial court to transmit all of the record, or such portions as the Court deems relevant to consideration of the interlocutory appeal.

(B) Brief Schedule. The time schedule for the filing of the briefs and appendices, pursuant to [Rule 15](#), shall commence upon the third day following the acceptance of the interlocutory appeal, if no transcript is ordered. In the event a transcript is designated to be prepared pursuant to [Rule 9\(e\)](#), the brief schedule shall commence upon this Court's receipt of the court reporter's final transcript log entry.

(C) Preparation of transcript. The time schedule for the preparation and filing of the transcript, if designated pursuant to [Rule 9\(e\)](#), shall commence upon the third day following the acceptance of the interlocutory appeal.

(vii) *Proceedings After Refusal.* If the appeal is refused, a certified copy of the order shall be sent to the trial court and a copy thereof to each counsel.

(e) Continuation of Other Proceedings in the Trial Court. The pendency of proceedings under this rule shall not operate as an automatic stay. Applications for stays shall be processed in the same manner as stays pending

appeal under [Rule 32](#).

(f) Failure to Seek or Obtain Review of Interlocutory Order. The failure to seek review of or the refusal of the Court to accept an appeal from an interlocutory order under this rule shall not bar a party from seeking review of such interlocutory order on appeal from the final order, judgment or decree.

CREDIT(S)

[Amended effective April 1, 1998; amended effective April 1, 1999.]

COMMITTEE COMMENTARY

There is no comparable prior rule relating to interlocutory appeals. The rule is an innovation. It borrows the certification concept of new Rule 41 and it specifically incorporates part of former Rule 20 on certification. See, former Rule 20(2)(d). Under the rule, application for an interlocutory appeal must be made in the first instance to the trial court; however, there is provision for review in the event that the trial court declines to certify the interlocutory appeal or fails to act within the requisite time period. It is necessary that application be made to the trial court within 10 days of the entry of the order, and in all events the notice of appeal of the interlocutory order must be filed in the Supreme Court within 30 days of the entry of the interlocutory order. This provision is intended to comply with [10 Del.Code, § 144](#).

The purpose of the rule is to get at the dilemma posed by interlocutory appeals. On the one hand, they can serve a very salutary purpose in the administration of justice by advancing the termination of litigation and saving time below if a threshold question can be resolved. On the other hand, interlocutory appeals have caused unnecessary delay and there is substantial danger of abuse of a right to file interlocutory appeals. The existence of the right to file interlocutory appeals is consistent with ABA Standard 3.12(b) which encourages interlocutory review but only at the discretion of the reviewing court where it determines that resolution of the questions of law on which the order is based will materially advance the litigation, protect a party from irreparable injury or clarify an issue of general importance in the administration of justice. The criteria applicable to the discretion of the trial court, and ultimately the Supreme Court, in deciding whether or not to accept an appeal of an interlocutory order are substantially in compliance with this standard.

Sup.Ct.Rules, Rule 42, DE R S CT Rule 42

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→ **RULE 43. EXTRAORDINARY WRITS**

(a) Scope of Rule. This rule governs the exercise of the Court's original jurisdiction over proceedings involving writs of certiorari, mandamus, prohibition, quo warranto or other extraordinary writs.

(b) Procedure.

(i) *Commencement and Contents.* A proceeding involving an extraordinary writ shall be commenced by serving all other parties to the proceeding below and by filing with the Clerk of the Court 6 copies of a complaint substantially in the form prescribed by Official Form N. If the complaint relates to a current proceeding in a trial court, the Clerk of the Court shall forthwith forward a duplicate of the complaint to the clerk of such court for filing therein. All other parties to the action in the trial court shall be deemed respondents, notwithstanding the fact that the relief sought is not specifically directed to them. If the complaint is directed to a trial judge, or to a court as an entity, the caption of the complaint shall not bear the name of the judge or court. In the body of the complaint the name of the judge or court shall be set forth with particularity. The complaint shall be captioned only in the name of complainant.

(ii) *Answer Requested.* An answer is requested to be filed within 20 days of the filing of the complaint with the Court. The answer may include any affirmative defense or motion seeking the dismissal or denial of the complaint, and unless the Court otherwise directs, no further submissions of the parties shall be accepted. If the complaint is directed against a judge who does not desire to appear or participate in the proceeding, the judge may so advise the Clerk by letter. The Clerk shall notify all other parties to the proceeding. The complaint shall not be taken as admitted whether or not such a letter is submitted.

(iii) *Brief Schedule.* In the event that the Court requires briefing on the matter, it shall so notify the parties and the matter shall be briefed in accordance with the rules applicable to appeals. The opening brief of complainant shall be due within 30 days after service of the answer, unless the answer includes a motion or affirmative defense to dismiss or deny the complaint, in which event the opening brief shall be due within 30 days after the Court has determined that the complaint shall not be dismissed. In all other respects, the matter shall be briefed in accordance with the rules applicable to appeals.

(iv) *Stay Not Automatic.* The filing of a complaint for an extraordinary writ shall not operate as an automatic stay. Applications for stays shall be processed in the same manner as stays pending appeals under [Rule 32](#).

(v) *Fact Finding Hearing.* The Court may order an issue of fact to be tried before a special master or order testimony to be taken by a commissioner at such time and place and in such manner as the Court shall direct.

(vi) *Superior Court Action Required.* A complaint shall not be filed under this rule for a writ to be issued to the Court of Common Pleas, a Justice of the Peace Court, or the Municipal Court of the City of Wilmington or to a judge thereof, unless a petition for such writ shall have been first presented to and denied by the Superior Court. When a writ is sought under this rule following such denial, a copy of the opinion, if any, shall be served and filed with the complaint.

(vii) *No further submissions.* Upon receipt of the writ, no further submissions by the petitioner will be accepted without leave of the Court.

CREDIT(S)

[Amended effective Oct. 15, 1999; January 1, 2002.]

COMMITTEE COMMENTARY

Reference: Former Rules 16, 17 and 18. The rule is designed to consolidate and make uniform the procedure for all extraordinary writs, including certiorari, mandamus, prohibition and quo warranto.

Sup.Ct.Rules, Rule 43, DE R S CT Rule 43
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→ **RULE 44. ADVISORY OPINIONS UPON REQUEST FROM THE GOVERNOR OR FROM THE GENERAL ASSEMBLY**

(a) Request for an Opinion. A request from the Governor or from the General Assembly shall be regarded as confidential for a period of 5 days after receipt thereof, or until the request becomes public information, whichever first occurs.

(b) Briefing and Oral Argument. The request shall be docketed with the Clerk of the Court and, after designation of counsel, shall be processed through briefing and argument in the same manner as an appeal or as an original proceeding in the Supreme Court. Correspondence between the Governor, or the Speaker of the House and the President Pro Tempore of the Senate, as the case may be, and the Justices about the request shall be included in the docket which is public information.

(c) Delivery and Publication. After the opinions are prepared, they shall be hand-delivered to the Governor or to the Speaker of the House and the President Pro Tempore of the Senate, as the case may be, and shall be regarded as confidential for a period of 5 days thereafter, or until the Governor or the Speaker of the House and the President Pro Tempore of the Senate, as the case may be, has released them, whichever first occurs.

COMMITTEE COMMENTARY

The statutory authority for advisory opinions upon request from the Governor is [10 Del.C., § 141](#). Opinions may only be given upon subjects specified in the statute and none other, [Opinion of the Justices, 305 A.2d 608 \(Del.Supr.1973\)](#), and they may be only given to the Governor, [Opinion of the Justices, 358 A.2d 701 \(Del.Supr.1976\)](#). The nature of this advisory function is nonjudicial and is not an adjudication as the Justices do not sit as a Court. [Opinion of the Justices, 320 A.2d 735 \(Del.Supr.1974\)](#). Advisory opinions by their very nature do not have the binding effect of a judgment regularly entered by the Court. [State ex rel. Satterthwaite v. Highfield, 34 Del. 272, 152 A. 45 \(Supr.1930\)](#).

1983 COMMENTARY

The rule amendment implements recent legislation amending [§ 141 of title 10](#) to permit the General Assembly as well as the Governor to request advisory opinions of the Supreme Court.

Sup.Ct.Rules, Rule 44, DE R S CT Rule 44

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