

Appellate Court Procedural Rules Committee

The Appellate Court Procedural Rules Committee proposes to amend the Official Note to Pa.R.A.P. 121 and Pa.R.A.P.s 903, 1113 and 1512. These amendments are being submitted to the bench and bar for comments and suggestions prior to its submission to the Supreme Court.

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

All communications in reference to the proposed amendment should be sent no later than February 11, 2011 to:

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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 Maureen Lally-Green,
Chair

EXPLANATORY COMMENT

This Recommendation proposes to amend the Official Note to Pa.R.A.P. 121 and Pa.R.A.P.s 903, 1113 and 1512 to make it clear that subdivision 121(e) **does** apply to calculating the deadline for filing cross appeals, cross petitions for allowance of appeal and additional petitions for review.

This Recommendation arises from an issue identified in *Malt Beverages Distribution Association v. PLCB*, No. 54 MM 2009, 2009 Pa. LEXIS 1613 (Pa. Aug. 6, 2009), where the Supreme Court entered a *per curiam* order denying a party's petition to file a cross-petition for allowance of appeal *nunc pro tunc*. In a dissent, Justice Todd wrote that the issue before the Court was the timeliness of the cross-petition. A group of parties filed a petition for allowance of appeal, and cross petitioner did not file its cross-petition until 17 days later. Pa.R.A.P. 1113(b) requires that cross-petitions be filed within 14 days after the first petition for allowance of appeal was "filed." Cross petitioner argued that Pa.R.A.P. 121(e) allowed it an additional three days in addition to the 14 described in the rule.

The official comment to Rule 121 includes the following:

Subdivision (e)-Subdivision (e) of the rule does not apply to the filing of a notice of appeal, a petition for allowance of appeal, a petition for permission to appeal, or a petition for reconsideration or re-argument, since under these rules the time for filing such papers runs from the entry and service of the related order, nor to the filing of a petition for review, which is governed by similar considerations. However, these rules permit the filing of such notice and petitions (except a petition for reconsideration or re-argument) in the local county (generally in the county court house; otherwise in a post office), thus eliminating a major problem under the prior practice.

Justice Todd wrote that the interplay between Rule 121, its comment and Rule 1113 creates an ambiguity. She wrote that the comment does not expressly exclude cross-petitions for allowance of appeal, and the rationale for the exclusion (that each enumerated sort of filing is triggered by a court order rather than a filing by another party) is inapplicable.

Justice Todd also cited *Coney Island II, Inc. v. Pottsville Area School District*, 497 Pa. 373, 441 A.2d 747 (1982). In that case, the Court considered the timeliness of a cross-appeal under Pa.R.A.P. 903(b). Although Rule 903(b) uses the same language as Rule 1113(b) (*i.e.* a cross-appeal must be filed "within 14 days of the date on which the first notice of appeal was filed, or within

the time otherwise prescribed by this rule, whichever period last expires”), the Court held that the three-day extension in Rule 121(e) applied.

Coney Island II does not discuss the fact that Rule 121(e) refers to “service” and Rule 903(b) (like Rule 1113(b)) refers to “filed.” Rule 1512(a)(2), which relates to additional petitions for review, also uses the “filed” terminology.

The Committee believes that it is confusing to apply *Coney Island II*'s holding narrowly to cross-appeals and that the three day extension provided in Rule 121(e) should be available to an aggrieved party filing a cross-petition for allowance of appeal or a cross-petition for review.

In order to obviate any potential ambiguity engendered by the interplay of Rules 903(b), 1113(b) and 1512(a)(2) and *Coney Island II*, the committee recommends simply amending those rules to make the triggering event the service rather than the filing of the notice of appeal, the petition for allowance of appeal or the petition for review. The additional time permitted by Rule 121(e) would then unambiguously be permitted in calculating the time for cross-appeals, cross-petitions for allowance of appeal and additional petitions for review. Because Rule 121(b) requires service at the time of filing, the amendment should have no material effect on practice.

Rule 121. Filing and Service.

(a) *Filing.*—Papers required or permitted to be filed in an appellate court shall be filed with the prothonotary. Filing may be accomplished by mail addressed to the prothonotary, but except as otherwise provided by these rules, filing shall not be timely unless the papers are received by the prothonotary within the time fixed for filing. If an application under these rules requests relief which may be granted by a single judge, a judge in extraordinary circumstances may permit the application and any related papers to be filed with that judge. In that event the judge shall note thereon the date of filing and shall thereafter transmit such papers to the clerk.

A pro se filing submitted by a prisoner incarcerated in a correctional facility is deemed filed as of the date it is delivered to the prison authorities for purposes of mailing or placed in the institutional mailbox, as evidenced by a properly executed prisoner cash slip or other reasonably verifiable evidence of the date that the prisoner deposited the pro se filing with the prison authorities.

(b) *Service of all papers required.*—Copies of all papers filed by any party and not required by these rules to be served by the prothonotary shall, concurrently with their filing, be served by a party or person acting on behalf of that party or person on all other parties to the matter. Service on a party represented by counsel shall be made on counsel.

(c) *Manner of service.*—Service may be:

(1) by personal service, which includes delivery of the copy to a clerk or other responsible person at the office of the person served, but does not include inter-office mail;

(2) by first class, express, or priority United States Postal Service mail;

(3) by commercial carrier with delivery intended to be at least as expeditious as first class mail if the carrier can verify the date of delivery to it;

(4) by facsimile or e-mail with the agreement of the party being served as stated in the certificate of service.

Service by mail is complete on mailing.

(d) *Proof of service.*—Papers presented for filing shall contain an acknowledgement of service by the person served, or proof of service certified by the person who made service. Acknowledgement or proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgement or proof of service but shall require such to be filed promptly thereafter.

(e) *Additional time after service by mail and commercial carrier.*—Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon

that party (other than an order of a court or other government unit) and the paper is served by United States mail or by commercial carrier, three days shall be added to the prescribed period.

Official Note

Subdivision (a)—The term “related papers” in Subdivision (a) of this rule includes any appeal papers required under Rule 1702 (stay ancillary to appeal) as a prerequisite to an application for a stay or similar relief.

In 2008, the term “paperbooks” was replaced with “briefs and reproduced records” throughout these rules. The reference to the deemed filing date for paperbooks when first class mail was used that was formerly found in subdivision (a) is now found in Pa.R.A.P. 2185 regarding filing briefs and in Pa.R.A.P. 2186 regarding filing reproduced records.

As to pro se filings by persons incarcerated in correctional facilities, see *Commonwealth v. Jones*, 549 Pa. 58, 700 A.2d 423 (1997); *Smith v. Pa. Bd. of Prob. & Parole*, 546 Pa. 115, 683 A.2d 278 (1996); *Commonwealth v. Johnson*, 860 A.2d 146 (Pa. Super. 2004).

Subdivision (c)—An acknowledgement of service may be executed by an individual other than the person served, e.g., by a clerk or other responsible person.

Subdivision (d)—With respect to appearances by new counsel following the initial docketing of appearances pursuant to Subdivision (d) of this rule, please note the requirements of Rule 120.

Subdivision (e)—Subdivision (e) of the rule does not apply to the filing of a notice of appeal, a petition for allowance of appeal, a petition for permission to appeal, or a petition for reconsideration or re-argument, since under these rules the time for filing such papers runs from the entry and service of the related order, nor to the filing of a petition for review, which is governed by similar considerations. However, these rules permit the filing of such notice and petitions (except a petition for reconsideration or re-argument) in the local county (generally in the county court house; otherwise in a post office), thus eliminating a major problem under the prior practice. **The amendments to Rules 903(b), 1113(b) and 1512(a)(2) clarified that subdivision (e) does apply to calculating the deadline for filing cross-appeals, cross-petitions for allowance of appeal and additional petitions for review.**

Rule 903. Time for Appeal.

(a) *General rule.* Except as otherwise prescribed by this rule, the notice of appeal required by Rule 902 (manner of taking appeal) shall be filed within 30 days after the entry of the order from which the appeal is taken.

(b) *Cross appeals.* Except as otherwise prescribed in Subdivision (c) of this rule, if a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was **[filed] served**, or within the time otherwise prescribed by this rule, whichever period last expires.

(c) *Special provisions.* Notwithstanding any other provision of this rule:

(1) An appeal from any of the following orders shall be taken within ten days after the entry of the order from which the appeal is taken:

(i) An order changing venue or venire in a criminal proceeding. See Rule 311(a)(3) (change of criminal venue or venire).

(ii) An order in any matter arising under the Pennsylvania Election Code.

(iii) An order in any matter arising under the Local Government Unit Debt Act or any similar statute relating to the authorization of public debt.

(2) Where an election has been filed under Rule 311(b) (order sustaining venue or personal or *in rem* jurisdiction), the notice of appeal shall be filed within 30 days after the filing of the election.

(3) In a criminal case in which no post-sentence motion has been filed, the notice of appeal shall be filed within 30 days of the imposition of the judgement of sentence in open court.

Official Note

42 Pa.C.S. § 5571(a) (appeals generally) provides that the time for filing an appeal, a petition for allowance of appeal, a petition for permission to appeal or a petition for review or a quasi-judicial order, in the Supreme Court, the Superior Court or the Commonwealth Court shall be governed by general rules and that no other provision of 42 Pa.C.S. Ch. 55D shall be applicable to such matters. In order to prevent inadvertent legislative creation of nonuniform appeal times, 42 Pa.C.S. § 1722(c) (time limitations) expressly authorizes the suspension by general rule of nonuniform statutory appeal times. See also 42 Pa.C.S. § 5501(a) (scope of chapter), which makes Chapter 55 (limitation of time) of the Judicial Code subordinate to any other statute prescribing a different time in the case of an action or proceeding, but which does not so provide in the case of an appeal.

Thus, on both a statutory and constitutional basis, this rule supersedes all inconsistent statutory provisions prescribing times for appeal.

As to subdivision (b), compare 42 Pa.C.S. § 5571(f) (cross appeal

A party filing a cross appeal pursuant to Subdivision (b) should identify it as a cross appeal in the notice of appeal to assure that the prothonotary will process the cross appeal with the initial appeal. See also Rule 511 (cross appeals), Rule 2113 (Reply Brief), Rule 2136 (Briefs in Cases of Cross Appeals), Rule 2185 (Time for Serving and Filing of Briefs) and Rule 2322 Cross and Separate Appeals).

In Re Petition of the Board of School Directors of the Hampton Township School District, 688 A.2d 279 (Pa. Cmwlth. 1997), the Commonwealth Court panel held that Rule 903(b) does not extend the appeal period for any other party to file an appeal unless the party is “adverse.” Under the 2002 amendment to Rule 511, the requirement that a party be adverse in order to file a cross appeal is eliminated. Once a notice of appeal is filed by one party, any other party may file a cross appeal within fourteen days. s).

Rule of Appellate Procedure 107 incorporates by reference the rules of construction of the Statutory Construction Act of 1972, 1 Pa.C.S. § 1901 through 1991. See 1 Pa.C.S. § 1908 relating to computation of time for the rule of construction relating to (1) the exclusion of the first day and inclusion of the last day of a time period and (2) the omission of the last day of a time period which falls on Saturday, Sunday or legal holiday.

See Pa.R.A.P. 108 and Explanatory Comment—2007 thereto, Pa.R.A.P. 301(a)(1) and (2), and Pa.R.Crim.P. 462, 720, and 721 governing criminal appeals.

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Rule 1113. Time for Petitioning for Allowance of Appeal.

(a) *General rule.*—Except as otherwise prescribed by this rule, a petition for allowance of appeal shall be filed with the Prothonotary of the Supreme Court within 30 days after the entry of the order of the Superior Court or the Commonwealth Court sought to be reviewed.

(1) If a timely application or reargument is filed in the Superior Court or Commonwealth Court by any party, the time for filing a petition for allowance of appeal for all parties shall run from the entry of the order denying reargument or from the entry of the decision on reargument, whether or not that decision amounts to a reaffirmation of the prior decision.

(2) Unless the Superior Court or the Commonwealth Court acts on the application for reargument within 60 days after it is filed the court shall no longer consider the application, it shall be deemed to have been denied and the prothonotary of the appellate court shall forthwith enter an order denying the application and shall immediately give written notice in person or by first class mail of entry of the order denying the application to each party who has appeared in the appellate court. A petition for allowance of appeal filed before the disposition of such an application for reargument shall have no effect. A new petition for allowance of appeal must be filed within the prescribed time measured

from the entry of the order denying or otherwise disposing of such an application for reargument.

(3) In a children's fast track appeal, unless the Superior Court acts on the application for reargument within 45 days after it is filed the court shall no longer consider the application, it shall be deemed to have been denied and the Prothonotary of the Superior Court shall forthwith enter an order denying the application and shall immediately give written notice in person or by first class mail of entry of the order denying the application to each party who has appeared in the appellate court. A petition for allowance of appeal filed before the disposition of such an application for reargument shall have no effect. A new petition for allowance of appeal must be filed within the prescribed time measured from the entry of the order denying or otherwise disposing of such an application for reargument.

(b) *Cross petitions.*—Except as otherwise prescribed in Subdivision (c) of this rule, if a timely petition for allowance of appeal is filed by a party, any other party may file a petition for allowance of appeal within 14 days of the date on which the first petition for allowance of appeal was **[filed] served**, or within the time otherwise prescribed by this rule, whichever period last expires.

(c) *Special provisions.*—Notwithstanding any other provision of this rule, a petition for allowance of appeal from an order in any matter arising under any of the following shall be filed within ten days after the entry of the order sought to be reviewed:

(1) Pennsylvania Election Code.

(2) Local Government Unit Debt Act or any similar statute relating to the authorization of public debt.

Official Note

See note to Rule 903 (time for appeal).

A party filing a cross petition for allowance of appeal pursuant to Subdivision (b) should identify it as a cross petition to assure that the prothonotary will process the cross petition with the initial petition. See also Rule 511 (cross appeals), Rule 2136 (Briefs in Cases Involving Cross Appeals) and Rule 2322 (Cross and Separate Appeals).

Rule 1512. Time for Petitioning for Review.

(a) Appeals authorized by law. —Except as otherwise prescribed by Subdivision (b) of this rule:

(1)

(2) If a timely petition for review of such an order is filed by a party, any other party may file a petition for review within 14 days of the date on which the first petition for review was **filedserved**, or within the time otherwise prescribed by Subdivision (a)(10 of this rule, whichever period last expires.

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Official Note

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