

**SUPREME COURT OF PENNSYLVANIA
APPELLATE COURT PROCEDURAL RULES COMMITTEE**

NOTICE OF PROPOSED RULEMAKING

Proposed Amendment of Pa.R.A.P. 1115 and 1116

The Appellate Court Procedural Rules Committee is considering proposing to the Supreme Court of Pennsylvania the amendment of Pa.R.A.P. 1115 and 1116 governing petitions for allowance of appeal and answers thereto for the reasons set forth in the accompanying explanatory report. Pursuant to Pa.R.J.A. No. 103(a)(1), the proposal is being published in the *Pennsylvania Bulletin* for comments, suggestions, or objections prior to submission to the Supreme Court.

Any reports, notes, or comments in the proposal have been inserted by the Committee for the convenience of those using the rules. They will neither constitute a part of the rules nor will be officially adopted by the Supreme Court.

Additions to the text of the proposal are bolded and underlined; deletions to the text are bolded and bracketed.

The Committee invites all interested persons to submit comments, suggestions, or objections in writing to:

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All communications in reference to the proposal should be received by **September 10, 2021**. E-mail is the preferred method for submitting comments, suggestions, or objections; any e-mailed submission need not be reproduced and resubmitted via mail. The Committee will acknowledge receipt of all submissions.

By the Appellate Court Procedural Rules Committee,

Patricia A. McCullough
Chair

**SUPREME COURT OF PENNSYLVANIA
APPELLATE COURT PROCEDURAL RULES COMMITTEE**

PUBLICATION REPORT

Proposed Amendment of Pa.R.A.P. 1115 and 1116

The Appellate Court Procedural Rules Committee is considering proposing the amendment of Pennsylvania Rules of Appellate Procedure 1115 and 1116 to facilitate the early identification of waiver in discretionary appeals before the Supreme Court. The Committee initially undertook review of this issue based, in part, upon a suggestion that:

Any appellee that intends to assert a waiver defense with respect to any issue presented for review in a petition for allowance of appeal, see Rule 1115[(a)](3), should be required to file an answer to said petition notifying this Court of its intention to assert such a defense. An appellee failing to comply with this requirement would then be precluded from asserting the defense in any subsequent filings with this Court in the case then at bar. Where an appellee provides the notice as required, it would remain within this Court's discretion to grant allocatur and decide the issue on its substantive merits.

Commonwealth v. Bishop, 217 A.3d 833, 844 (Pa. 2019) (J. Donohue concurring).

To encourage parties to identify waiver earlier in the appellate process, the Committee previously proposed the amendment of the Official Note to Pa.R.A.P. 1116 to suggest raising waiver in opposition to a petition for allowance of appeal and through an application pursuant to Pa.R.A.P. 1972. See 50 Pa.B 4383 (August 29, 2020). In response, the Committee received a suggestion for an additional measure to facilitate the early identification of waiver issues whereby petitioners would designate within the petition for allowance of appeal the place in the record where an issue has been preserved.

The Committee agreed with this suggestion, concluding that it would assist in the earlier identification of unpreserved issues and it did not represent an undue burden on petitioners because preservation would likely have already been identified in the intermediate appellate court brief pursuant to Pa.R.A.P. 2117(c). Moreover, placing this requirement in petitions for allowance of appeal merely shifts an existing burden to an earlier stage in the appellate process.

Accordingly, the Committee proposes amendment of Pa.R.A.P. 1115 to insert in paragraph (a) a requirement that a petition for allowance of appeal contain a statement indicating where the issue was previously raised or preserved, if the issue is required to

be raised or preserved for appellate review. The operative language contained in Pa.R.A.P. 2117(c) was used for the proposed requirement, inserted as new paragraph (a)(3), together with reference to that rule's requirements for specification.

Readers should note that the proposed requirement of Pa.R.A.P. 1115(a)(3) is not intended to eliminate the existing requirement that an appellant's merits brief to the Supreme Court also comply with Pa.R.A.P. 2117(c). A granted petition for allowance of appeal under this procedure is not intended preclude the Court from finding waiver in review of the merits.

This proposed amendment is being consolidated with the previously proposed amendment of Pa.R.A.P. 1116. All comments, concerns, and suggestions concerning this proposal are welcome.

Rule 1115. Content of the Petition for Allowance of Appeal.

(a) *General rule.*—The petition for allowance of appeal need not be set forth in numbered paragraphs in the manner of a pleading, and shall contain the following (which shall, insofar as practicable, be set forth in the order stated):

(1) A reference to the official and unofficial reports of the opinions delivered in the courts below, if any, and if reported. Any such opinions shall be appended as provided in **[item 6 of paragraph (a) of this rule] subdivision (a)(7)**.

(2) The text of the order in question, or the portions thereof sought to be reviewed, and the date of its entry in the appellate court below. If the order is voluminous, it may, if more convenient, be appended to the petition.

(3) Where under the applicable law an issue is not reviewable on appeal unless raised or preserved below, the petition shall contain a statement of place of raising or preservation of issues, as required in Pa.R.A.P. 2117(c).

[(3)](4) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of questions presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition, or fairly comprised therein, will ordinarily be considered by the court in the event an appeal is allowed.

[(4)](5) A concise statement of the case containing the facts material to a consideration of the questions presented.

[(5)](6) A concise statement of the reasons relied upon for allowance of an appeal. See Pa.R.A.P. 1114.

[(6)](7) There shall be appended to the petition a copy of any opinions delivered relating to the order sought to be reviewed, as well as all opinions of government units, trial courts, or intermediate appellate courts in the case, and, if reference thereto is necessary to ascertain the grounds of the order, opinions in companion cases. If an application for reargument was filed in the Superior Court or Commonwealth Court, there also shall be appended to the petition a copy of any order granting or denying the application for reargument. If whatever is required by this paragraph to be appended to the petition is voluminous, it may, if more convenient, be separately presented.

[(7)](8) There shall be appended to the petition the verbatim texts of the pertinent provisions of constitutional provisions, statutes, ordinances,

regulations, or other similar enactments which the case involves, and the citation to the volume and page where they are published, including the official edition, if any.

[(8)](9) The certificate of compliance required by Pa.R.A.P. 127.

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Rule 1116. Answer to the Petition for Allowance of Appeal.

(a) *General rule.*—Except as otherwise prescribed by this rule, within 14 days after service of a petition for allowance of appeal an adverse party may file an answer. The answer shall be deemed filed on the date of mailing if first class, express, or priority United States Postal Service mail is utilized. The answer need not be set forth in numbered paragraphs in the manner of a pleading, shall set forth any procedural, substantive or other argument or ground why the order involved should not be reviewed by the Supreme Court, and shall comply with Pa.R.A.P. 1115(a)[.7](8). No separate motion to dismiss a petition for allowance of appeal will be received. A party entitled to file an answer under this rule who does not intend to do so shall, within the time fixed by these rules for filing an answer, file a letter stating that an answer to the petition for allowance of appeal will not be filed. The failure to file an answer will not be construed as concurrence in the request for allowance of appeal.

(b) *Children’s fast track appeals.*—In a children’s fast track appeal, within 10 days after service of a petition for allowance of appeal, an adverse party may file an answer.

(c) *Length.*—An answer to a petition for allowance of appeal shall not exceed 9,000 words. An answer that does not exceed 20 pages when produced by a word processor or typewriter shall be deemed to meet the 9,000 word limit. In all other cases, the attorney or the unrepresented filing party shall include a certification that the answer complies with the word count limit. The certificate may be based on the word count of the word processing system used to prepare the answer.

(d) *Supplementary matter.*—The cover of the answer, pages containing the table of contents, table of citations, proof of service, signature block, and anything appended to the answer shall not count against the word count limitations of this rule.

(e) *Certificate of compliance with Case Records Public Access Policy of the Unified Judicial System of Pennsylvania.*—An answer to a petition for allowance of appeal shall contain the certificate of compliance required by Pa.R.A.P. 127.

Official Note:

This rule and Pa.R.A.P. 1115 contemplate that the petition and answer will address themselves to the heart of the issue, such as whether the Supreme Court ought to exercise its discretion to allow an appeal, without the need to comply with the formalistic pattern of numbered averments in the petition and correspondingly numbered admissions and denials in the response. While such a formalistic format is appropriate when factual issues are being framed in a trial court [(1), as in the petition for review under Chapter 15)], such a format interferes with the clear narrative exposition necessary to outline succinctly the case for the Supreme Court in the allocatur context.

Parties are strongly encouraged to raise any waiver-based or procedural objection to a petition for allowance of appeal in an answer to the petition. In addition, parties are reminded that they may raise waiver-based, procedural, and jurisdictional objections after the grant of a petition for allowance of appeal, but before merits briefing, through a dispositive motion filed under Pa.R.A.P. 1972.