

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

**NOTICE OF PROPOSED RULEMAKING**

**Proposed Amendment of Pa.R.A.P. 2136  
with Corollary Amendments of Pa.R.A.P. 2113, 2135, 2185, and 2322**

The Appellate Court Procedural Rules Committee is considering proposing to the Supreme Court of Pennsylvania the amendment of Pa.R.A.P. 2113, 2135, 2136, 2185, and 2322 governing briefs in cross-appeals for the reasons set forth in the accompanying explanatory report. Pursuant to Pa.R.J.A. 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 report accompanying this proposal was prepared by the Committee to indicate the rationale for the proposed rulemaking. It will neither constitute a part of the rules nor be 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 **June 23, 2023**. 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,

J. Andrew Crompton  
Chair

## **Rule 2113. Reply Brief.**

- (a) **General [rule.--] Rule.** In accordance with Pa.R.A.P. 2185(a) (time for serving and filing briefs), the appellant may file a brief in reply to matters raised by appellee's brief or in any *amicus curiae* brief and not previously addressed in appellant's brief. If the appellee has cross appealed, the appellee may file a similarly limited reply brief. A reply brief shall contain the certificates of compliance required by Pa.R.A.P. 127 and Pa.R.A.P. 2135(d).
- (b) **Response to [draft or plan.--] Draft or Plan.** A reply brief may be filed as prescribed in Pa.R.A.P. 2134 (drafts or plans).
- (c) **Other [briefs.--] Briefs.** No further briefs may be filed except with leave of court.

**[Note:] Comment:** An appellant now has a general right to file a reply brief. The scope of the reply brief is limited, however, in that such brief may only address matters raised by appellee and not previously addressed in appellant's brief. No subsequent brief may be filed unless authorized by the court.

The length of a reply brief is set by Pa.R.A.P. 2135 (length of briefs). The due date for a reply brief is found in Pa.R.A.P. 2185(a) (service and filing of briefs).

Where there **[are cross appeals, the deemed or] is a cross-appeal, the designated appellee may file a similarly limited reply brief addressing issues in the [cross appeal] cross-appeal.** See *also* Pa.R.A.P. 2136 (briefs in cases involving **[cross appeals] cross-appeals.**

**[The 2011 amendment to paragraph (a) authorized an appellant to address in a reply brief matters raised in *amicus curiae* briefs. Before the 2011 amendment, the rule permitted the appellant to address in its reply brief only matters raised in the appellee's brief. The 2011 amendment did not change the requirement that the reply brief must not address matters previously addressed in the appellant's principal brief.]**

### **[EXPLANATORY COMMENT—2002**

**See Comment following Pa.R.A.P., Rule 511.]**

## Rule 2135. Length of Briefs.

- (a) **General Rule.** Unless otherwise ordered by an appellate court:
- (1) A principal brief shall not exceed 14,000 words and a reply brief shall not exceed 7,000 words, except as stated in **[subparagraphs (a)(2)-(4)] subdivisions (a)(2)-(a)(4)**. A party shall file a certificate of compliance with the word count limit if the principal brief is longer than 30 pages or the reply brief is longer than 15 pages when prepared on a word processor or typewriter.
  - (2) **[In cross appeals under Pa.R.A.P. 2136, the first brief of the deemed or designated appellee and the second brief of the deemed or] In cross-appeals, the brief of the designated appellee required by Pa.R.A.P. 2136(b)(2) and the brief of the appellant required by Pa.R.A.P. 2136 (b)(3)** shall not exceed 16,500 words. A party shall file a certificate of compliance if the brief is longer than 35 pages when produced on a word processor or typewriter.
  - (3) In capital direct appeals, the principal brief shall not exceed 17,500 words and a reply brief shall not exceed 8,500 words. A party shall file a certificate of compliance if the principal brief is longer than 38 pages or the reply brief is longer than 19 pages when prepared on a word processor or typewriter.
  - (4) In the first Capital Post-Conviction Relief Act appeal, the principal brief shall not exceed 22,500 words and a reply brief shall not exceed 11,250 words. A party shall file a certificate of compliance if the principal brief is longer than 49 pages or the reply brief is longer than 24 pages when prepared on a word processor or typewriter.
- (b) **Supplementary [matter.] Matters.** Supplementary matters, such as, the cover of the brief and pages containing the table of contents, tables of citations, proof of service, and any addendum containing opinions, signature blocks or any other similar supplementary matter provided for by these rules shall not count against the word count limitations set forth in **[paragraph (a) of this rule] subdivision (a)**.

- (c) **Size and [physical characteristics.] Other Physical Characteristics.** Size and other physical characteristics of briefs shall comply with Pa.R.A.P. 124.
- (d) **[Certification of compliance.] Certificate of Compliance.** Any brief in excess of the stated page limits shall include a certification that the brief complies with the word count limits. The certificate may be based on the word count of the word processing system used to prepare the brief.

**[Note: A principal brief is any party's initial brief and, in the case of a cross appeal, the appellant's second brief, which responds to the initial brief in the cross appeal.]**

**Comment: A principal brief is any party's initial brief. In a cross-appeal, the designated appellant's brief required by Pa.R.A.P. 2136(b)(3) is the principal brief.**

See **[the note to]** Pa.R.A.P. 2136. Reply briefs permitted by Pa.R.A.P. 2113 and any subsequent brief permitted by leave of court are subject to the word count limit or page limit set by this rule.

A party filing a certificate of compliance under this rule may rely on the word count of the word processing system used to prepare the brief.

**[It is important to note that each] Each** appellate court has the option of reducing the word count for a brief, either by general rule, see Chapter 33 (Business of the Supreme Court), Chapter 35 (Business of the Superior Court), and Chapter 37 (Business of the Commonwealth Court), or by order in a particular case.

**Rule 2136. Briefs in Cases Involving [Cross Appeals] Cross-Appeals.**

- [(a) Designation of parties in cross appeals. If a cross appeal is filed, the plaintiff or moving party in the court or other government unit below shall be deemed the appellant for the purposes of this chapter and Chapter 23 (sessions and argument), unless the parties otherwise agree or the appellate court otherwise orders. Where the identity of the appellant for the purposes of this chapter and Chapter 23 is not readily apparent, the prothonotary of the appellate court shall designate the appellant for the purposes of those two chapters when giving notice under Rule 1934 (filing of the record).**
  
- (b) Order of briefs. The deemed or designated appellant shall file its principal brief on the merits of its appeal in accordance with the briefing schedule. The deemed or designated appellee shall then file a brief that addresses the arguments advanced in the appellant's brief and the merits of the cross appeal. Thereafter, the appellant shall file its second brief, which shall reply to issues raised in the appellee's brief and not previously addressed in appellant's principal brief and respond to the issues raised by appellee regarding the cross appeal. The appellee may then file a reply brief limited to issues raised by the appellant that were not previously addressed by the appellee in its principal brief on the merits of the cross appeal.**

**Official Note:**

**For cross appeals, Rule 2136 provides both a method for determining which party shall file the first brief and a description of the subsequent briefs. Either party may initiate the process described in Subdivision (a) by notifying the prothonotary by letter that the prothonotary must designate the appellant, that is the party to file the first brief, or that the parties have agreed which party shall be the appellant.**

**With regard to the briefing process, when there are cross appeals, there may be up to four briefs: (1) the deemed or designated appellant's principal brief on the merits of the appeal; (2) the deemed or designated appellee's brief responding to appellant's arguments and presenting the merits of the cross appeal; (3) the appellant's second brief replying in support of the appeal and responding to the issues raised in the cross appeal; and (4) appellee's second brief in support of the cross appeal.**

**Thus, the deemed or designated appellee's first brief (Brief No. 2 as described above) functions as both a response to the arguments advanced by the**

appellant in the first appeal and the primary brief on the merits of the cross appeal. Similarly, the deemed or designated appellant's second brief (Brief No. 3 as described above) serves the dual purposes of responding to the merits of the arguments in the cross appeal and replying to arguments raised in opposition to the first appeal. See generally Rule 2111 (brief of the appellant), Rule 2112 (brief of the appellee), and Rule 2113(a) (regarding reply briefs).

Rule 2135 (length of briefs) establishes the length of the various briefs. Only appellee's second brief is considered a reply brief subject to the lesser page limits. There is no provision for a longer principal brief on the merits in cross appeal situations.

Rule 2185(a) (time for serving and filing briefs) provides that appellant's second brief shall be served within 30 days after service of the preceding brief. Appellee's second brief is due 14 days later.

Rule 2322 (cross and separate appeals) addresses oral argument in cross appeals.]

(This is entirely new text.)

- (a) **Designation of the Parties in Cross-Appeals.** If a cross-appeal is filed, for the purposes of this chapter (briefs and reproduced record) and Chapter 23 (sessions and argument), the plaintiff or moving party in the trial court or other government unit shall be designated the appellant and any remaining party shall be designated the appellee, unless other designations are made by:
  - (1) order of the appellate court; or
  - (2) agreement of the parties, who shall promptly notify the prothonotary of the appellate court of the parties' designations.
  
- (b) **Scope and Sequence of Briefs.** In accordance with the briefing schedule, the scope and sequence of briefs shall be as follows:
  - (1) **First Brief – Designated Appellant's Brief on the Merits of the Appeal.** The designated appellant shall file a brief addressing the merits of the appeal in accordance with Pa.R.A.P. 2111.
  - (2) **Second Brief – Designated Appellee's Brief on the Merits of the Cross-Appeal and Response to Appeal.** The designated appellee shall file a brief on the merits of the cross-appeal in accordance with

Pa.R.A.P. 2111. In the same brief, the designated appellee shall respond to the designated appellant's arguments in the designated appellant's brief on the merits of the appeal in accordance with Pa.R.A.P. 2112.

- (3) **Third Brief – Designated Appellant's Response to Cross-Appeal and Reply Brief in Support of Appeal.** The designated appellant shall file a response to the designated appellee's arguments in the designated appellee's brief on the merits of the cross-appeal in accordance with Pa.R.A.P. 2112. In the same brief, the designated appellant shall file any reply in support of the appeal in accordance with Pa.R.A.P. 2113.
- (4) **Fourth Brief – Designated Appellee's Reply Brief.** The designated appellee shall file any reply to the designated appellant's response in accordance with Pa.R.A.P. 2113.

**Comment:** Pa.R.A.P. 2136 provides both a method for determining which party shall file the first brief and the sequence for filing those briefs. Subdivision (a) specifies that the party initiating the action in either the trial court or other government unit is the designated appellant unless the appellate court otherwise orders or the parties otherwise agree.

If the parties have agreed to a designation of appellant and appellee, they shall inform the prothonotary of the appellate court of the agreed-upon designations at the earliest opportunity. An agreement of the parties to designate a different appellant or appellee does not toll the time for filing a party brief. Following an agreement to designate a different appellant or appellee, each party maintains the obligation to file briefs pursuant to the schedule set by the appellate court.

Subdivision (b) addresses the sequence of briefs. A designated appellant may file up to two briefs, as described in subdivisions (b)(1) and (b)(3). A designated appellee may file up to two briefs, as described in subdivisions (b)(2) and (b)(4).

See Pa.R.A.P. 2111, 2112, and 2113 for the scope and content of briefs filed pursuant to subdivision (b).

Pa.R.A.P. 2135 (length of briefs) establishes the length of the various briefs. Only the brief filed by the designated appellee pursuant to subdivision (b)(4) is considered a reply brief subject to lower page and word limitations. All other briefs are subject to usual page and word limitations.

Pa.R.A.P. 2185(a) (time for serving and filing briefs) provides that the brief by the designated appellant pursuant to subdivision (b)(3) shall be served within 30 days after service of the brief filed by the designated appellee pursuant to subdivision (b)(2). The designated appellee's brief filed pursuant to subdivision (b)(4) is due 14 days following the filing of the designated appellant's brief pursuant to subdivision (b)(3).

Pa.R.A.P. 2322 (cross-appeals and separate appeals) addresses oral argument in cross-appeals.



## Rule 2185. Service and Filing of Briefs.

### (a) Time for [serving and filing briefs.] Serving and Filing Briefs.

- (1) **General [rule.--] Rule.** Except as otherwise provided by this rule, the appellant shall serve and file appellant's brief not later than the date fixed pursuant to **[Subdivision] subdivision (b) [of this rule,]** or within 40 days after the date on which the record is filed, if no other date is so fixed. The appellee shall serve and file appellee's brief within 30 days after service of appellant's brief and reproduced record if proceeding under **[Rule] Pa.R.A.P. 2154(a)** (general rule). A party may serve and file a reply brief permitted by these rules within 14 days after service of the preceding brief but, except for good cause shown, a reply brief must be served and filed so as to be received at least three days before argument. **[In cross appeals, the second brief of the deemed or designated appellant shall be served and filed within 30 days of service of the deemed or designated appellee's first brief.] In cross-appeals, the brief of the designated appellant required by Pa.R.A.P. 2136(b)(3) shall be served and filed within 30 days of service of the brief of the designated appellee required by Pa.R.A.P. 2136(b)(2).** Except as prescribed by **[Rule] Pa.R.A.P. 2187(b)** (advance text of briefs), each brief shall be filed not later than the last day fixed by or pursuant to this rule for its service. Briefs shall be deemed filed on the date of mailing if first class, express, or priority United States Postal Service mail is utilized.
- (2) **Children's [fast track appeals.] Fast Track Appeals.**
  - (i) In a children's fast track appeal, the appellant shall serve and file appellant's brief within 30 days after the date on which the record is filed, if no other date is so fixed. The appellee shall serve and file appellee's brief within 21 days after service of appellant's brief and reproduced record. A party may serve and file a reply brief permitted by these rules within **[7] seven** days after service of the preceding brief but, except for good cause shown, a reply brief must be served and filed so as to be received at least **[3] three** days before argument. **[In cross appeals, the second brief of the deemed or designated appellant shall be served and filed within 21 days of service of the deemed or designated appellee's first brief.] In cross-appeals, the brief of the designated**

**appellant required by Pa.R.A.P. 2136(b)(3) shall be served and filed within 21 days of service of the brief of the designated appellee required by Pa.R.A.P. 2136(b)(2).**

Briefs shall be deemed filed on the date of mailing if first class, express, or priority United States Postal Service mail is utilized.

(ii) In a children's fast track appeal, the provisions of **[Subdivisions] subdivisions** (b) and (c) **[of this Rule]** shall not apply.

(3) **Multiple [briefs for appellants or appellees.--] Briefs for Appellants or Appellees.** If the time for filing a brief is established by reference to service of a preceding brief and more than one such preceding brief is filed, the deadline for filing the subsequent brief shall be calculated from the date on which the last timely filed preceding brief is served. If no such preceding brief is filed, the deadline for a subsequent brief shall be calculated from the date on which the preceding brief should have been filed.

(b) **Notice of [deferred briefing schedule.--] Deferred Briefing Schedule.** When the record is filed, the prothonotary of the appellate court shall estimate the date on which the matter will be argued before or submitted to the court, having regard for the nature of the case and the status of the calendar of the court. If the prothonotary determines that the matter will probably not be reached by the court for argument or submission within 30 days after the latest date on which the last brief could be filed under the usual briefing schedule established by these rules, the prothonotary shall fix a specific calendar date as the last date for the filing of the brief of the appellant in the matter, and shall give notice thereof as required by these rules. The date so fixed by the prothonotary shall be such that the latest date on which the last brief in the matter could be filed under these rules will fall approximately 30 days before the probable date of argument or submission of the matter.

(c) **Definitive [copies.--] Copies.** If the record is being reproduced pursuant to **[Rule] Pa.R.A.P. 2154(b)** (large records) the brief served pursuant to **[Subdivision] subdivision** (a) **[of this rule]** may be typewritten or page proof copies of the brief, with appropriate references to pages of the parts of the original record involved. Within 14 days after the reproduced record is filed, each party who served briefs in advance form under this subdivision shall serve and file definitive copies of **[his or her] the party's** brief or briefs

containing references to the pages of the reproduced record in place of or in addition to the initial references to the pages of the parts of the original record involved (see **[Rule] Pa.R.A.P.** 2132 (references in briefs to the record)). No other changes may be made in the briefs as initially served, except that typographical errors may be corrected.

**[Official Note: The 2002 amendment] Comment: Pa.R.A.P. 2185(a)** recognizes that in **[cross appeals] cross-appeals** the **[deemed or]** designated appellant's second brief is more extensive than a reply brief and, therefore may require more than 14 days to prepare. See **[Rule] Pa.R.A.P.** 2136 (briefs in cases involving cross appeals).

**[The addition of paragraph] Subdivision (a)(3) [clarified] clarifies** practice in an appeal in which there is more than one appellant or appellee and all appellants or all appellees do not file their briefs on the same date. For example, if there are two appellants and one files early or one is granted an extension of time to file, the two briefs for appellants will not be filed or served on the same date. **[Without paragraph (a)(3), it was not] Subdivision (a)(3)** makes clear when the appellee's 30-day period to file its brief **[began] begins**. The same issue can arise with respect to the appellant's time for filing its reply brief when there are two or more appellees. **[New paragraph (a)(3) clarified] Subdivision (a)(3) clarifies** the point by starting the period on the date on which the latest, timely filed preceding brief is served.

#### **[EXPLANATORY COMMENT—1979]**

The principal criticism of the new Appellate Rules has been the provisions for deferred preparation of the reproduced record, and the resulting procedure for the filing of advance copies of briefs (since the page citations to the reproduced record pages are not then available) followed by the later preparation and filing of definitive briefs with citations to the reproduced record pages. It has been argued that in the typical state court appeal the record is quite small, with the result that the pre-1976 practice of reproducing the record in conjunction with the preparation of appellant's definitive brief is entirely appropriate and would ordinarily be followed if the rules did not imply a preference for the deferred method. The Committee has been persuaded by these comments, and the rules have been redrafted to imply that the deferred method is a secondary method particularly appropriate for longer records.

Also, the number of briefs to be filed under the in forma pauperis procedure has been increased from ten to 15 in the Commonwealth and Superior Courts.]

#### **[EXPLANATORY COMMENT—2002]**

See Comment following Pa.R.A.P., Rule 511.]

**Rule 2322. [Cross] Cross-Appeals and Separate Appeals.**

- (a) **Cross-Appeals.** A [cross or separate appeal] **cross-appeal** shall be argued with the initial appeal at a single argument, unless the court otherwise directs. **[If a case involves a cross appeal, the plaintiff or moving party in the action below shall be deemed the appellant for the purposes of these rules unless the parties otherwise agree or the court otherwise directs. If two or more parties support the same argument, care shall be taken to avoid duplication of argument.]**
- (b) **Separate Appeals.** **A separate appeal shall be argued with the initial appeal at a single argument, unless the court otherwise directs. If two or more parties support the same argument, care shall be taken to avoid duplication of argument.** Where two or more appeals[, not being cross-appeals,] are heard together, each appellant shall open the argument on [his] **each appellant's** appeal, each appellee shall reply thereto[, and (if permitted by the court by way of rebuttal)]. **If permitted by the court in rebuttal,** not more than two appellants will be heard in conclusion.

**[Note: Based in part on former Supreme Court Rule 31 and former Superior Court Rule 23. See Rule] Comment: See Pa.R.A.P. 2136 (briefs in [case involving cross appeals] cross-appeals) for inclusion of the designation of the appellant and the appellee for purposes of this chapter in notice given by the appellate prothonotary under [Rule] Pa.R.A.P. 1934 (filing of the record).**

**[EXPLANATORY COMMENT—1979**

**The appellate prothonotary is directed to designate the party who shall file the first brief in cases involving cross appeals where the identity of the “moving party” below is not readily apparent.]**

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

**PUBLICATION REPORT**

**Proposed Amendment of Pa.R.A.P. 2136  
with Corollary Amendments of Pa.R.A.P. 2113, 2135, 2185, and 2322**

The Appellate Court Procedural Rules Committee is considering proposing to the Supreme Court the amendment of Pennsylvania Rule of Appellate Procedure 2136 governing the designation of parties and the sequence and order of briefs in cross-appals. Corollary amendments of Pa.R.A.P. 2113, 2135, 2185, and 2322 are also proposed.

The Committee received a request to amend Pa.R.A.P. 2136 to clarify for practitioners the order and sequence of filing briefs in cross-appals. Preliminarily, the Committee acknowledged that the Superior Court and the Commonwealth Court have different practices for the administrative management of cross-appals. The Commonwealth Court most often designates the appellant and the appellee via court order followed by a briefing schedule that instructs which party is to file a specific brief. The Superior Court, on the other hand, has administratively designated each brief as a “Step 1 brief,” “Step 2 brief,” etc. to guide attorneys as to who must file which brief and when. Given the disparity in practice, the Committee agreed to consider amendments to the rule.

At the outset of its review, the Committee observed that current Pa.R.A.P. 2136 contains two components. First, subdivision (a) governs how the parties are designated in cross-appals. It provides that the plaintiff in the lower court is the appellant on appeal unless the parties agree or the court orders otherwise. The Committee examined Pennsylvania’s designation procedure, including how it differs from the designation procedure in Fed.R.App.P. 28.1. Under the federal approach, the first to file is the presumptive appellant. The Committee weighed the relative merits of each approach and concluded that the federal approach does not provide any marked benefit to the courts or practitioners over Pennsylvania’s existing practice.

The Committee therefore proposes retaining Pennsylvania’s existing approach to designation of parties in a cross-appeal with the following changes to subdivision (a) as follows:

- 1) Restate the subdivision (a) in shorter sentences so that each part contains single procedural steps, in appropriate sequence, and reflecting current practice.

- 2) Remove the second sentence of current subdivision (a) authorizing the appellate court prothonotary to designate the appellant when the appellant's identity is not readily apparent when giving notice under Pa.R.A.P. 1934 (notice of filing of the record) and Pa.R.A.P. 2185 (notice of deferred briefing schedule). This part of current subdivision (a) is redundant given that the appellate courts already have authority to designate the parties by order.

Second, subdivision (b) provides for the order of briefs and the contents of each brief. Typically, the sequence of briefs is set forth in an appellate court's briefing schedule. However, to benefit the appellate courts and practitioners alike, the proposed amendment to subdivision (b) is intended to improve legibility and reflect current practice.

As a result, the Committee proposes substantial changes to the text of subdivision (b) as follows:

- 1) Restate this subdivision in shorter sentences so that each part contains single procedural steps, in appropriate sequence.
- 2) Add the current commentary relating to the order of briefs into the rule text. The Committee observed that the current Comment to Pa.R.A.P. 2136, which discusses the order of briefs in a numerical sequence, is instructive to practitioners and proposes making it part of the rule.
- 3) Restate the requirements for the content of briefs in subdivision (b) by reference to Pa.R.A.P. 2111, 2112, and 2113. Those rules govern the scope of an appellant's opening brief, an appellee's responsive brief, and the appellant's reply brief. Referencing Pa.R.A.P. 2111, 2112, and 2113 in relation to the contents of briefs is intended to provide clearer direction for practitioners filing briefs in a cross-appeal.

Questions may arise whether the phrasing "shall file any reply ... in accordance with Pa.R.A.P. 2113" in Pa.R.A.P.(b)(3) and (b)(4) suggests to practitioners that the filing of a reply brief would be mandated by Pa.R.A.P. 2136(b). This is not the intent of the proposed amendment. Nor can the language be fairly understood to impose such a requirement, especially when it is read together with Pa.R.A.P. 2113. Subdivisions (b)(3) and (b)(4), if amended as proposed, would mandate compliance with Pa.R.A.P. 2113. In turn, Pa.R.A.P. 2113 plainly states that the filing of a reply brief is not mandatory. The relevant language is as follows: "[T]he appellant may file a brief in reply to matters raised by appellee's brief or in any amicus curiae brief and not previously addressed in appellant's brief. If the appellee has cross appealed, the appellee may file a similarly limited reply brief."

\* \* \*

Accordingly, the Committee invites all comments, objections, concerns, and suggestions regarding this proposed rulemaking.