

## **APPELLATE COURT PROCEDURAL RULES COMMITTEE ADOPTION REPORT**

### **Amendment of Pa.R.A.P. 2113, 2135, 2136, 2185, and 2322**

On July 18, 2024, the Supreme Court of Pennsylvania adopted amendments to Pennsylvania Rules of Appellate Procedure 2113, 2135, 2136, 2185, and 2322. The Appellate Court Procedural Rules Committee has prepared this Adoption Report describing the rulemaking process. An Adoption Report should not be confused with Comments to the rules. See Pa.R.J.A. 103, cmt. The statements contained herein are those of the Committee, not the Court.

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-appeals. Preliminarily, the Committee acknowledged that the Superior Court and the Commonwealth Court have different practices for the administrative management of cross-appeals. 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 practitioners 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 contained two components. First, subdivision (a) governs how the parties are designated in cross-appeals. 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 proposed retaining Pennsylvania’s existing approach to the designation of parties in a cross-appeal with the following changes to subdivision (a):

- 1) Restate the subdivision in shorter sentences so that each part contained a single procedural step, in appropriate sequence, and to reflect current practice.
- 2) Remove the second sentence of the subdivision 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 the subdivision was 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) was intended to improve legibility and reflect current practice.

As a result, the Committee proposed the following substantial changes to subdivision (b):

- 1) Restate the subdivision in shorter sentences so that each part contained a single procedural step, in appropriate sequence.
- 2) Add the current commentary relating to the order of briefs to 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, was instructive to practitioners and proposed making it part of the rule.
- 3) Restate the requirements for the content of briefs in subdivision (b) by referencing Pa.R.A.P. 2111, 2112, and 2113. Those rules govern the scope of the appellant's opening brief, the 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 was intended to provide clearer direction for practitioners filing briefs in a cross-appeal.

The Committee published the proposal for comment, see 53 Pa.B. 2725 (May 20, 2023), and received responses supporting the proposal; the respondents also suggested modifications to the proposal.

A respondent suggested that the wording in proposed Pa.R.A.P. 2136(b)(2) be clarified as to how the content is presented in the second brief filed in a cross-appeal so that the response to the merits of the appeal is presented first followed by the arguments supporting the cross-appeal. The respondent also suggested that a clarification to Pa.R.A.P. 2136(b)(4) was necessary to remove any interpretation that the rule required the filing of a reply brief in a cross-appeal when the intention of that provision was to cross-reference the requirements of Pa.R.A.P. 2113 should any reply brief be filed in a cross-appeal. The Committee accepted these suggestions and modified the rule text. In addition, the Committee also identified similar wording in Pa.R.A.P. 2136(b)(3) relating to

the filing of a reply brief and made the same modification as the change to Pa.R.A.P. 2136(b)(4).

Another respondent supported the proposal, but suggested that Pa.R.A.P. 2136(a), governing the designation of parties in a cross-appeal, be modified in favor of the federal approach. As noted above, in developing the proposal, the Committee evaluated the differences between the Pennsylvania designation procedure and the federal court designation procedure, and concluded that there was no significant advantage to the federal approach over Pennsylvania's existing procedure. Accordingly, the Committee declined to incorporate this suggestion into the proposal.

The amendments become effective on January 1, 2025.

The following commentary from Pa.R.A.P. 2113 has been removed by this rulemaking:

**Comment:**

\* \* \*

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.