

Appellate Court Procedural Rules Committee

The Appellate Court Procedural Rules Committee is proposing a new rule, Rule of Appellate Procedure 912. The proposed rule is being submitted to the bench and bar for comments and suggestions prior to its submission to the Supreme Court.

All communications in reference to the proposed amendment should be sent no later than July 3, 2009 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

The Appellate Court Procedural Rules Committee, in conjunction with the Criminal Procedural Rules Committee, proposes that the Supreme Court enact Pa.R.A.P. 912 to codify the procedure to be followed when a failure to file a document required for an appeal to proceed jeopardizes an appeal on a first Petition filed under the Post-Conviction Relief Act.¹ Both Committees designated members to work as a joint subcommittee to prepare this Recommendation.

As the Supreme Court recognized in *Commonwealth v. Bennett*, 539 Pa. 382, 930 A.2d 1264 (2007), the Superior Court currently follows a practice such as that set forth in the proposed rule. In large part, the new rule would formalize the current practice, which was developed by the Superior Court in response to the Supreme Court's opinion in *Commonwealth v. Robinson*, 575 Pa. 500, 837 A.2d 1157 (2002). Pursuant to this informal procedure, when counsel abandons his or her client in cases on appeal following the denial of a first PCRA petition, as for example when an attorney fails to file an appellate brief, the Superior Court will retain jurisdiction while remanding the case to the PCRA court for a determination as to whether the attorney's failure constituted an abandonment of the client on appeal. If so, either current or replacement counsel may be permitted to file the necessary document *nunc pro tunc*. Under the proposed new rule, if the PCRA court finds that appellate counsel was *per se* ineffective – but only upon that finding – the court *must* replace counsel, and the Superior Court *must* allow the document in question to be filed *nunc pro tunc*. In this way, the proposed rule reduces the discretion of informal practice, but it provides greater consistency.

¹ A petitioner has a Commonwealth-created right to counsel on a first Post-Conviction Relief Act Petition, but not on subsequent ones.

RULE 912. ABANDONMENT OF APPELLANT DURING AN APPEAL OF THE DISPOSITION OF A FIRST POST-CONVICTION RELIEF ACT PETITION

(a) If counsel for an appellant who is appealing the merits of a denial of a first Post-Conviction Relief Act Petition fails to file a document that is required by Rule or Order of the Court for the appeal to proceed, the appellate court shall not quash or dismiss the appeal for failure to file until the following steps have been taken:

(1) The appellate court shall order the Post-Conviction Relief Act court to investigate whether the appellant has abandoned the appeal voluntarily, and if not, whether appellant's counsel has been *per se* ineffective by failing to file that document.

(2) A copy of the appellate court's order shall be served on the appellant, appellant's counsel, and the attorney for the Commonwealth.

(3) Notwithstanding the provisions of Pa.R.A.P. 1701, at the conclusion of its investigation, if the Post-Conviction Relief Act court concludes that appellant's counsel abandoned the appeal through *per se* ineffectiveness by failing to file that document, the Post-Conviction Relief Act court shall replace counsel. The Post-Conviction Relief Act court also may sanction counsel.

(4) The Post-Conviction Relief Act court shall report its findings in writing to the appellate court within sixty days of the date of the appellate court order. A copy of the report shall be served on the appellant, appellant's counsel, and the attorney for the Commonwealth.

(b) When the Post-Conviction Relief Act court finds, pursuant to paragraph (1), that the appellant's counsel was *per se* ineffective for failing to file the document that was required by Rule or Order of the Court for the appeal to proceed, the appellate court shall permit the filing *nunc pro tunc* of that document.

(c) The appellate court will retain jurisdiction during the proceedings in the Post-Conviction Relief Act court.

NOTE

This rule was adopted in 2009 to formalize the informal procedure adopted by the Superior Court in response to *Commonwealth v. Robinson*, 575 Pa. 500, 837 A.2d 1157 (2002). Pursuant to this informal procedure, when counsel abandons his or her client in cases on appeal following the denial of a first PCRA petition, as for example when the attorney fails to file an appellate brief, the Superior Court will retain jurisdiction and instead of dismissing the appeal will remand the case to the Post-Conviction Relief Act court for a determination whether the attorney abandoned the client and with instructions for the judge to take appropriate action. See *Commonwealth v. Bennett*, 539 Pa. 382, 930 A.2d 1264 (2007) at fn. 12.

"Post-Conviction Relief Act court," as used in this rule, refers to the judge of the Court of Common Pleas handling the Post-Conviction Relief Act proceedings at the time of the

appeal.

Appeals of orders that are ancillary to the appeal on the merits – including, but not limited to bail denials – may not be remanded under Rule 912.