SUPREME COURT OF PENNSYLVANIA
APPELLATE COURT PROCEDURAL RULES COMMITTEE

NOTICE OF PROPOSED RULEMAKING

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

The Appellate Court Procedural Rules Committee is considering proposing to the Supreme Court of Pennsylvania the amendment of Pa.R.A.P. 1116 governing the answer to the petition for allowance of appeal 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 **October 2, 2020.** 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 the Official Note to Pa.R.A.P. 1116

The Appellate Court Procedural Rules Committee is considering proposing the amendment of the Official Note to Pennsylvania Rule of Appellate Procedure 1116 to encourage the early identification of waiver in discretionary appeals before the Supreme Court. The Committee 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(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).

Preliminarily, waiver may occur at multiple stages in a proceeding. Often, waiver results at the trial court level through a lack of preservation. *See, e.g.*, Pa.R.E. 103 (Rulings on Evidence); Pa.R.C.P. No. 227.1 (Post-Trial Relief); Pa.R.Crim.P. 607 (Challenges to the Weight of Evidence). Waiver may also result after an appeal has been taken. *See, e.g*., Pa.R.A.P. 1925(b)(4)(vii); Pa.R.A.P. 2116(a).

To assist the appellate courts in detecting waiver, the Rules of Appellate Procedure require the appellant to identify where and how issues raised on appeal were preserved before the trial court. *See, e.g.*, Pa.R.A.P. 2117, 2119. When the lack of preservation is patent, the Rules are intended to identify the presence of waiver to winnow those issues from review. However, waiver may also result from imperfect issue preservation or inadequate advocacy. Latent waiver, as opposed to patent waiver, is more difficult to discern and may be subject to reasonable dispute. *See, e.g., Commonwealth v. Gonzalez*, 608 A.2d 528, 531 (Pa. Super. 1992) (claim on appeal is waived where appellant neither cites supportive precedent nor gives any reference to record evidence which substantiates argument); Pa.R.A.P. 2119(a).

Regarding petitions for allowance of appeal, a respondent could raise the issue of waiver in an answer to a petition for allowance of appeal. *See* Pa.R.A.P. 1116(a). The

Committee considered a requirement that waiver be identified by answer in every matter. To lend perspective, in 2018, there were 1,973 petitions for allowance of appeal filed with the Supreme Court, but appeals were allowed in only 96 cases. This represents a 95.1% attrition rate based entirely on the merits. The additional workload of raising waiver by answer in every matter did not appear to be warranted given this rate of denial on the merits. Instead, it seemed more efficient that efforts be focused on identifying waiver in the appeals granted review.

Additionally, the Committee believed that the decision whether to file an answer pursuant to Pa.R.A.P. 1116(a) should be left to the discretion of the respondent. When latent waiver might exist, an answer, together with attendant word limitations, may not be an adequate vehicle to present and analyze an assertion of waiver. Similarly, the Rules of Appellate Procedure do not provide a mechanism for a petitioner to file a reply to an answer that suggests waiver. Moreover, the merits of a petition for allowance of appeal may only concern waiver found by the intermediate appellate court, which would obviate the need for an answer to raise waiver.

The Committee next considered a requirement that an answer identifying waiver be filed only after the Court has identified a petition for allowance containing a potentially meritorious issue. Such a practice would be similar to that in the United States Supreme Court, which, as a practical matter, grants petitions for writ of certiorari only after ordering a response from the party opposing the petition. *See* Stephen M. Shapiro *et al*., Supreme Court Practice Ch. 6.37(k) (11th ed. 2019) ("[I]f the respondent has not filed a response, or has affirmatively waived the right to file, and if the Court believes that the petition may have some merit, the respondent will typically be asked to file a response."). The Committee did not favor this approach because it 1) places a burden on the Court to order the party or parties to file an answer; 2) lengthens the review process; 3) potentially identifies meritorious issues that may nonetheless be denied review; and 4) implicates the preceding concern that an answer may not be an adequate vehicle to analyze a possible waiver claim.

The Committee further considered a requirement that a respondent raise waiver after a petition for allowance of appeal has been granted, but before argument. This approach would allow the Court to address waiver before the merits of the appeal. Additionally, the timing may be more appropriate where waiver is not patent because the record would have been transmitted to the Court. *See* Pa.R.A.P. 1122 (requiring transmission of record after an appeal is allowed).

The Rules of Appellate Procedure already provide a mechanism to raise the issue of waiver via application and seek dismissal of an appeal. *See* Pa.R.A.P. 1972(a)(5). Further, this procedure would provide the Court with the flexibility to set a separate briefing schedule to decide the application prior to consideration of the merits or to defer

consideration. Moreover, the appellant is permitted to file an answer to the application. *See* Pa.R.A.P. 123(b).

The Committee believed that filing such an application pursuant to Pa.R.A.P. 1972(a)(5) should remain discretionary for respondent rather than be mandated. Requiring an application may have the unintended consequence of foreclosing earlier identification of patent waiver in an answer to a petition for allowance of appeal. Further, a party may wish to defer raising waiver until merits briefing if a finding of waiver would result in only one of several issues being dismissed on appeal, *i.e.*, incomplete relief.

Concerning the possible consequence for belatedly raising waiver, *i.e.,* "waiving waiver," such an approach seemed counter-intuitive to long established issue preservation practice. *See, e.g., Dilliplaine v. Lehigh Valley Trust*, 322 A.2d 114, 116-17 (Pa. 1974); Pa.R.A.P. 302. Relatedly, the operation of "waiving waiver" may also arguably impede the Court's authority to find waiver *sua sponte*. *See Wirth v. Commonwealth*, 95 A.3d 822, 836-37 (Pa. 2014); *Commonwealth v. Hill*, 16 A.3d 484, 494 (Pa. 2011).

Undoubtedly, delaying the issue of waiver until consideration of the merits can cause the unnecessary expenditure of time and resources if waiver would operate to dismiss an entire appeal. To encourage parties to identify waiver earlier in the appellate process, the Committee proposes to amend 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. Through this amendment, the Committee seeks to alleviate the inefficiencies discussed in the concurring opinion in *Bishop* without altering longstanding principles of petition for allowance of appeal practice.

All comments, concerns, and suggestions concerning this proposal are welcome.

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**)**. 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 **[(],**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.