

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

NOTICE OF PROPOSED RULEMAKING

**Proposed Amendment of Pa.R.A.P. 120 and 121 with
Correlative Amendment of Pa.R.A.P. 102, 907(b), 1112(f),
1311(d), 1514(d), and 1602(d) (omitted)**

The Appellate Court Procedural Rules Committee is considering proposing to the Supreme Court of Pennsylvania the amendment of Pa.R.A.P. 120 and 121 with Correlative Amendment of Pa.R.A.P. 102, 907(b), 1112(f), 1311(d), 1514(d), and 1602(d) (omitted) 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 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 **May 28, 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

PUBLICATION REPORT

The Appellate Court Procedural Rules Committee is considering proposing the amendment of Pennsylvania Rule of Appellate Procedure 120 to rescind and replace the current text governing the entry of appearance, together with the correlative amendment of Pennsylvania Rule of Appellate Procedure 121.

Presently, Pa.R.A.P. 120 requires counsel to file and serve an entry of appearance prior to or simultaneously with the filing of any papers signed by counsel in the appellate court. This requirement is excused if counsel has previously been noted on the docket as counsel pursuant to Pa.R.A.P. 907(b), 1112(f), 1311(d), 1514(d), or 1602(d). The rules also permit the original counsel of record to withdraw by *praecipe* if substitute counsel enters an appearance for the party.

The replacement text would consolidate and codify procedures for the entry of appearance and withdrawal of appearance in the appellate court. Specifically, paragraph (a) retains the operative provisions of the current rule and sets them forth separately. Paragraph (a)(1) sets forth the general requirement of an entry of appearance subject to the exception of when counsel has been previous counsel of record. Paragraph (a)(2) addresses when counsel has not been previous counsel of record and contains the required contents of an entry of appearance. Paragraph (a)(3) is new and clarifies that counsel for *amicus curiae* must also enter an appearance.

Paragraphs (b) and (c) contain procedures for the withdrawal of counsel. The applicability of either paragraph would depend on whether the party for whom counsel represents is entitled by law to be represented by counsel. When such an entitlement exists, counsel is to proceed pursuant to paragraph (b); otherwise, counsel may proceed pursuant to paragraph (c).

Paragraph (b)(1) requires the permission of the court to withdraw in all circumstances when a party is entitled by law to be represented by counsel. Paragraph (b)(2) is intended to address the procedure for filing a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967) and *Commonwealth v. Santiago*, 978 A.2d 349 (Pa. 2009) when the party has a constitutional right to counsel. Paragraph (b)(3) is intended to address the procedure for filing a brief pursuant to *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988) and *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988) when the party has a statutory or rule-based right to counsel. Notably, paragraph (b)(3)(ii) requires “a brief prepared pursuant to Pa.R.A.P. 2111,” which is intended to preclude the varied use of informal “letter briefs.” Paragraphs (b)(2)(ii) and (b)(3)(ii) standardize the form of filings pursuant to *Anders/Santiago* and *Turner/Finley*. The commentary accompanying the rule text refers readers to the substantive requirements for withdrawal as counsel pursuant to *Anders/Santiago* and *Turner/Finley*.

Paragraph (b)(4) sets forth the procedural requirements counsel must follow when seeking to withdraw pursuant to paragraph (b)(2) or (b)(3). This includes counsel informing the party of the party's right to proceed *pro se* or retain private counsel. This paragraph is intended to codify procedural requirements found in case law, including *Commonwealth v. Muzzy*, 141 A.3d 509, 512 (Pa. Super. 2016) (party possesses a right to proceed *pro se* upon counsel's filing of an application and brief to withdraw). A 60-day deadline for action by the party is contained in paragraph (b)(4). Any other party is provided 14 days in paragraph (b)(5) to reply to the party's response permitted by paragraph (b)(4). These deadlines are intended to establish a point in time in which the appellate court may proceed with disposition of the application to withdraw.

Paragraph (b)(6) addresses other grounds for withdrawal of counsel, that require permission of the court. An application to withdraw pursuant to paragraph (b)(6) also requires service on the party whom counsel represents in addition to all other parties. Because the reasons for withdrawal on other grounds may vary, this catch-all paragraph is non-specific as to further steps after the filing of an application with the appellate court. For example, some circumstances may require remand to the trial court, *e.g.*, irreconcilable conflict, and others may be addressed by the appellate court, *e.g.*, other counsel remain to represent the party.

In a change from prior practice, paragraph (b) permits withdrawal of counsel through substitution only with permission of the court, rather than by *praecipe*. The Committee believes this change is necessary to ensure that substitute counsel will assume representation of the party for all relevant appellate purposes and to minimize delays or disruptions of scheduling. Corollary amendments to Pa.R.A.P. 102 (defining "counsel of record"), 907(b), 1112(f), 1311(d), 1514(d), and 1602(d) will be required to reflect this change, if adopted.

Paragraph (c) governs the withdrawal procedures when counsel seeking to withdraw represents a party that is not entitled by law to be represented by counsel. Whether withdrawal of counsel may proceed by *praecipe* pursuant to paragraph (c)(1) or counsel is required to obtain permission of the court pursuant to paragraph (c)(2) depends upon the length of time following the docketing of the initiating action. The 30-day window in paragraphs (c)(1) and (c)(2) is derived from Pa.R.A.P. 907(b), 1112(f), 1311(d), 1514(d), and 1602(d). Unlike paragraph (b)(6), if a party is not entitled by law to be represented by counsel, then counsel may withdraw via *praecipe* pursuant to paragraph (c)(3) when substitute counsel has entered an appearance.

The Committee also proposes a definition of "substitute counsel" in paragraph (d) to ensure that counsel, who has entered an appearance for a limited purpose, is not considered "substitute counsel."

Pa.R.A.P. 121(g) generally prohibits hybrid representation, but permits a party to file a *pro se* response to an application by counsel to withdraw as counsel of record. The Committee proposes revising the Official Note to Pa.R.A.P. 121(g) to add a reference to Pa.R.A.P. 120(b)(4). This commentary was not intended to suggest that a party's opportunity to respond is limited to only merit-based reasons in Pa.R.A.P. 120(b)(4); a party may also respond when counsel seeks to withdraw on other grounds, as permitted in Pa.R.A.P. 120(b)(5).

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

Rule 120. Entry and Withdrawal of Appearance.

[Any counsel filing papers required or permitted to be filed in an appellate court must enter an appearance with the prothonotary of the appellate court unless that counsel has been previously noted on the docket as counsel pursuant to Pa.R.A.P. 907(b), 1112(f), 1311(d), 1514(d), or 1602(d). New counsel appearing for a party after docketing pursuant to Pa.R.A.P. 907(b), 1112(f), 1311(d), 1514(d), or 1602(d) shall file an entry of appearance simultaneously with or prior to the filing of any papers signed by new counsel. The entry of appearance shall specifically designate each party the attorney represents, and whether the attorney is entering an appearance as substitute or additional counsel. The attorney shall file a certificate of service pursuant to paragraph (d) of Pa.R.A.P. 121 and to Pa.R.A.P. 122. If an attorney enters an appearance as substitute counsel for a party, the original counsel of record for that party may withdraw by *praecipe*, without filing an application for permission to withdraw.

Official Note: For admission *pro hac vice*, see Pa.B.A.R. 301.]

(This is entirely new text.)

(a) *Entry of appearance.*

(1) *Previous counsel of record.*—Unless counsel has been noted on the docket as counsel of record pursuant to Pa.R.A.P. 907(b), 1112(f), 1311(d), 1514(d), or 1602(d), any counsel filing documents required or permitted to be filed in an appellate court shall file an entry of appearance by *praecipe* with the appellate court pursuant to paragraph (a)(2).

(2) *Counsel.*—After filing pursuant to Pa.R.A.P. 907(b), 1112(f), 1311(d), 1514(d), or 1602(d), any counsel appearing for a party shall file an entry of appearance by *praecipe* with or prior to the filing of any papers signed as new counsel. The entry of appearance shall:

(i) designate each party new counsel represents; and

(ii) indicate whether counsel is new counsel, additional counsel, or substitute counsel.

(3) *Counsel for amicus curiae.*—Counsel for amicus curiae shall enter an appearance by *praecipe*.

(b) *Withdrawal of appearance when party is entitled by law to be represented by counsel.*

(1) If counsel represents a party who is entitled by law to be represented by counsel, counsel may withdraw his or her appearance only with permission of court.

(2) Counsel seeking permission of court to withdraw from representation when a party has a constitutional right to counsel and counsel believes all issues that could be raised on appeal are frivolous shall file:

- (i) an application seeking withdrawal with the appellate court;
and
- (ii) a brief prepared pursuant to Pa.R.A.P. 2111.

(3) Counsel seeking permission of court to withdraw from representation when a party has a rule-based or statutory right to counsel and counsel believes all issues sought to be raised by the party on appeal are without merit shall file:

- (i) an application seeking withdrawal with the appellate court;
and
- (ii) a brief prepared pursuant to Pa.R.A.P. 2111.

(4) Counsel seeking permission of court to withdraw pursuant to paragraph (b)(2) or (b)(3) shall serve a copy of the application and brief on the party, accompanied by a letter informing the party that, within 60 days of service of the application and brief, the party has the right to:

- (i) self-representation and to address the matters raised in the application or brief; and
- (ii) self-representation and to bring any additional points to the court's attention; or
- (iii) retain private counsel for representation.

(5) Within 14 days after service of the party's response pursuant to paragraph (b)(4), any other party may file a reply to the party's response.

(6) *Other grounds for withdrawal.*—Counsel may withdraw from representation on appeal on any other basis only with permission of court through an application for relief filed in the appellate court, together with proof of service upon all parties, including the client.

(c) *Withdrawal of appearance when party is not entitled by law to be represented by counsel.*

(1) Within 30 days following the filing pursuant to Pa.R.A.P. 907(b), 1112(f), 1311(d), 1514(d), or 1602(d), counsel for a party not entitled by law to be represented by counsel may withdraw his or her appearance by *praecipe* filed with the appellate court prothonotary, together with proof of service upon all parties, including the party represented by counsel.

(2) After 30 days following the docketing pursuant to Pa.R.A.P. 907(b), 1112(f), 1311(d), 1514(d), or 1602(d), counsel for a party not entitled by law to be represented by counsel may withdraw his or her appearance only with permission of court through an application for relief filed in the appellate court, unless substitute counsel has entered an appearance for the party or other counsel remains to represent the party.

(3) If substitute counsel for a party has entered an appearance or other counsel remains to represent a party, the previous counsel of record for that party may withdraw his or her appearance by *praecipe* filed with the appellate court prothonotary, together with proof of service upon all parties, including the party represented by counsel.

(d) *Substitute counsel.* As used in this rule, “substitute counsel” shall mean counsel who has entered an appearance to assume representation of the party for all relevant appellate purposes.

Official Note:

For admission *pro hac vice*, see Pa.B.A.R. 301.

See also Pa.R.A.P. 121(b) for requirement of service on all other parties; Pa.R.A.P. 123 for requirements of application for relief.

Entry of appearance immediately prior to oral argument may result in recusal or postponement if a conflict exists.

The procedures to withdraw as counsel depend on the entitlement of appellant to the right to counsel and grounds for seeking withdraw. For the substance of the brief filed pursuant to paragraph (b)(2), see *Anders v. California*, 386 U.S. 738 (1967); *Commonwealth v. Santiago*, 978 A.2d 349 (Pa. 2009). For the substance of the brief filed pursuant to paragraph (b)(3), see *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988); *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988).

Briefs required by paragraph (b)(2)(ii) or (b)(3)(ii) should comply with the content requirements of Pa.R.A.P. 2111 notwithstanding that such briefs are not advocating on behalf of an appellant.

For an appellant seeking to respond to counsel's letter in paragraph (b)(3), see Pa.R.A.P. 121(g) (Hybrid Representation).

"Other grounds for withdrawal" pursuant to paragraph (b)(6) include, but are not limited to, an appellant's unilateral intent to proceed *pro se*, an irreconcilable breakdown in the counsel-client relationship, substitute counsel has entered an appearance, or other counsel remain to represent the party.

New or substitute counsel is subject to all existing deadlines. Counsel seeking to withdraw in any case has a responsibility to continue to meet all deadlines and to comply with all applicable law, rules, and orders of the trial and appellate court until the appellate court has granted the application to withdraw.

Rule 121. Filing and Service.

(g) *Hybrid representation.*—Where there is counsel of record, a party may file only the following documents *pro se*: (i) a notice of appeal; (ii) a request to change or remove counsel; (iii) a response to an **an [motion] application** to withdraw that has been filed by counsel of record; (iv) a complaint that existing counsel has abandoned the party; or (v) an application to file a petition for allowance of appeal *nunc pro tunc*. Any other document that a party attempts to file *pro se* will be noted on the docket but not accepted for filing. This rule is not intended to provide an independent basis for jurisdiction where it does not otherwise exist.

Official Note:

Paragraph (a)—The term “related papers” in paragraph (a) of this rule includes any appeal papers required by Pa.R.A.P. 1702 (stay ancillary to appeal) as a prerequisite to an application for a stay or similar relief.

Paragraph (g)—The rule on hybrid representation is premised on *Commonwealth v. Ellis*, 626 A.2d 1137, 1139-40 (Pa. 1993). See 210 Pa. Code § 65.24. If a *pro se* notice of appeal is filed, it will satisfy the timeliness requirement for the filing of a notice of appeal. Counsel of record will, however, be obligated to prosecute that appeal. There are four other instances in which *pro se* documents will be accepted by an appellate court for filing: a request by the party to change or remove counsel; a response to counsel’s request to withdraw; a complaint that existing counsel has abandoned the party; and a *pro se* petition for *nunc pro tunc* permission to file a petition for allowance of appeal under Pa.R.A.P. 1113(d). For a **response to counsel’s application to withdraw, see Pa.R.A.P. 120(b)(4)**. All other documents will be noted on the docket as received by the appellate court prothonotary’s office but will not be accepted for filing; instead, the *pro se* document will be forwarded to counsel of record with, if the court desires, direction for counsel to respond.