

Appellate Court Procedural Rules Committee

The Appellate Court Procedural Rules Committee proposes to amend Pennsylvania Rules of Appellate Procedure 1921, 1931 and 1952. The amendments are being submitted to the bench and bar for comments and suggestions prior to its submission to the Supreme Court.

Proposed new material is underlined and in bold faced type and deleted material is bracketed and in bold faced type.

All communications in reference to the proposed amendment should be sent no later than **May 31, 2012** to:

Dean R. Phillips, Counsel
D. Alicia Hickok, Deputy Counsel
Scot Withers, Deputy Counsel
Appellate Court Procedural Rules Committee
Pennsylvania Judicial Center
601 Commonwealth Ave., Suite 6200
P.O. Box 62635
Harrisburg, Pennsylvania 17106-2635
or Fax to
(717) 231-9551
or E-Mail to
appellaterules@pacourts.us

By the Appellate Court Procedural Rules Committee

Honorable Renée Cohn Jubelirer
Chair

EXPLANATORY COMMENT

In May of 2010, the Appellate Court Procedural Rules Committee published proposed amendments to Rule 1931 to provide that the list of documents in the record on appeal prepared by the clerk or prothonotary be sufficiently specific “to allow the parties on appeal to identify each document and to determine whether the record on appeal is complete.” The Committee had also proposed to amend subdivision (d) of Rule 1931 to provide that a party can rely on the content of the list without having to physically examine the record.

These proposed amendments were to further assist a party raising an issue to meet its burden to make sure that a full and complete record is forwarded to the appellate court. In 2004, the Supreme Court partially addressed this problem by adopting subdivision (d) to Rule 1931, adding a requirement that the clerk or prothonotary send the appellant the list of record documents. Experience has shown this was only a partial solution. First, in many cases the list is not sufficiently specific for the parties to determine what is or is not included. Second, in many cases, the clerk or prothonotary did not actually transmit all items on the list to the appellate court.

Following publication and review of comments, the Committee now proposes to recommend further amendments to Rule 1931 and a proposed amendment to the Note to Rule 1921. These additional amendments are to clarify the obligations of the parties and the appellate courts with respect to the record on appeal while providing for “safe harbor” from waiver where parties rely on the contents of the list of record documents prepared by the prothonotary or clerk. More specifically, in lieu of the published proposed amendment to subdivision (d) of Rule 1931 the Committee instead proposes a subdivision (f) to Rule 1931 to provide:

(f) *Inconsistency between list of record documents and documents actually transmitted – If the clerk of the lower court fails to transmit to the appellate court all of the documents identified in the list of record documents, such failure shall be deemed a breakdown in judicial procedure. Any omission shall be corrected promptly pursuant to Rule 1926 and shall not be the basis for any penalty against a party.*

Taken together, the proposed amendments are intended to improve the likelihood that a full and complete record will be transmitted from the trial court to the appellate court, and will decrease the prospects of waiver resulting from the inadvertent omission of a document from the certified record.

The Committee also proposes to add subdivision (c) to Rule 1952 to require government units other than courts to notify counsel of the content of the record

on appeal. This is an extension of the requirement in Rule 1931 that trial courts give such notice.

Rule 1921. Composition of Record on Appeal.

The original papers and exhibits filed in the lower court, **[hard] paper** copies of legal papers filed with the prothonotary by means of electronic filing, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the lower court shall constitute the record on appeal in all cases.

Official Note: **[The rule is intended as a codification of present practice.]** An appellate court may consider only the facts which have been duly certified in the record on appeal. *Commonwealth v. Young*, 456 Pa. 102, 115, 317 A.2d 258, 264 (1974). **All involved in the appellate process have a duty to take steps necessary to assure that the appellate court has a complete record on appeal, so that the appellate court has the materials necessary to review the issues raised on appeal. Ultimate responsibility for a complete record rests with the party raising an issue that requires appellate court access to record materials. See, e.g., Commonwealth v. Williams, 552 Pa. 451, 715 A.2d 1101 (1998). Rule 1931 (c) and (f) afford a “safe harbor” from waiver of issues based on an incomplete record. Parties may rely on the list of documents transmitted to the appellate court and served on the parties. If the list shows that the record transmitted is incomplete, the parties have an obligation to supplement the record pursuant to Rule 1926 (correction or modification of the record) or other mechanisms in Chapter 19. If the list shows that the record transmitted is complete, but it is not, the omission shall not be a basis for the appellate court to find waiver. Further, if the appellate court determines that something in the original record or otherwise presented to the trial court is necessary to decide the case and is not included in the certified record, the appellate court may, upon notice to the parties, inquire to the trial court *sua sponte* and supplement the certified record following receipt of the missing item. See Rule 1926 (correction or modification of the record).**

[Explanatory Comment—2008

Pa.R.C.P. No. 205.4(a)(1) authorizes a court by local rule to permit or require electronic filing of legal papers with the prothonotary. Therefore, the amendment to Rule 1921 provides that where such electronic filing is utilized, hard copies of legal papers electronically filed shall become part of the record on appeal.]

Rule 1931. Transmission of the Record.

(a) *Time for transmission.*

(1) *General rule*—Except as otherwise prescribed by this rule, the record on appeal, including the transcript and exhibits necessary for the determination of the appeal, shall be transmitted to the appellate court within 60 days after the filing of the notice of appeal. If an appeal has been allowed or if permission to appeal has been granted, the record shall be transmitted as provided by Rule 1122 (allowance of appeal and transmission of record) or by Rule 1322 (permission to appeal and transmission of record), as the case may be. The appellate court may shorten or extend the time prescribed by this subdivision for a class or classes of cases.

(2) *Children's fast track appeals.*—In a children's fast track appeal, the record on appeal, including the transcript and exhibits necessary for the determination of the appeal, shall be transmitted to the appellate court within 30 days after the filing of the notice of appeal. If an appeal has been allowed or if permission to appeal has been granted, the record shall be transmitted as provided by Rule 1122 (allowance of appeal and transmission of record) or by Rule 1322 (permission to appeal and transmission of record), as the case may be.

(b) *Duty of lower court.*—After a notice of appeal has been filed the judge who entered the order appealed from shall comply with Rule 1925 (opinion in support of order), shall cause the official court reporter to comply with Rule 1922 (transcription of notes of testimony) or shall otherwise settle a statement of the evidence or proceedings as prescribed by this chapter, and shall take any other action necessary to enable the clerk to assemble and transmit the record as prescribed by this rule.

(c) *Duty of clerk to transmit the record.*—When the record is complete for purposes of the appeal, the clerk of the lower court shall transmit it to the prothonotary of the appellate court. The clerk of the lower court shall number the documents comprising the record and shall transmit with the record a list of the documents correspondingly numbered and identified with **[reasonable definiteness.] sufficient specificity to allow the parties on appeal to identify each document and to determine whether the record on appeal is complete.** Documents of unusual bulk or weight and physical exhibits other than documents shall not be transmitted by the clerk unless he or she is directed to do so by a party or by the prothonotary of the appellate court. A party must make advance arrangements with the clerk for the transportation and receipt of exhibits of unusual bulk or weight. Transmission of the record is effected when the clerk of the lower court mails or otherwise forwards the record to the prothonotary of the appellate court. The clerk of the lower court shall indicate, by endorsement on

the face of the record or otherwise, the date upon which the record is transmitted to the appellate court.

(d) *Service of the list of record documents.*—The clerk of the lower court shall, at the time of the transmittal of the record to the appellate court, mail a copy of the list of record documents to all counsel of record, or if unrepresented by counsel, to the parties at the address they have provided to the clerk. The clerk shall note on the docket the giving of such notice.

(e) *Multiple appeals.*—Where more than one appeal is taken from the same order, it shall be sufficient to transmit a single record, without duplication.

(f) *Inconsistency between list of record documents and documents actually transmitted.*—If the clerk of the lower court fails to transmit to the appellate court all of the documents identified in the list of record documents, such failure shall be deemed a breakdown in judicial procedure. Any omission shall be corrected promptly pursuant to Rule 1926 (correction or modification of the record) and shall not be the basis for any penalty against a party.

Official Note: [Former Supreme Court Rule 22 required the record to be returned forthwith. See also former Superior Court Rule 50 and former Commonwealth Court Rules 22 and 23.]

Rule 1926 (correction or modification of the record) provides the means to resolve any disagreement between the parties as to what should be included in the record on appeal. The court may, however, sua sponte take appropriate action to supplement or correct the certified record. Appellate courts often exercise discretion to avoid harsh enforcement of precedent that found waiver where missing items are not included in the record on appeal, but where the missing items are in the reproduced record and there is no dispute that the reproduced record is an accurate representation of the trial court record or when a record has been supplemented after an inquiry by the appellate court. See 20A Pennsylvania Appellate Practice Section 1921:2 (2011-12) (collecting cases). These cases represent a liberal construction of Chapter 19 of the Rules of Appellate Procedure as permitted under Rule 105(a). However, there are numerous cases to the contrary which while they may be subject to criticism are still good law.

[Explanatory Comment—2007

The 2007 amendment expands the time period for the trial court to transmit the certified record, including any opinions drafted pursuant to Pa.R.A.P.

1925(a), from forty to sixty days. The appellate court retains the ability to establish a shorter (or longer) period of time for the transmittal of the record in any class or classes of cases.]

Rule 1952. Filing of Record in Response to Petition for Review.

(a) *Time and notice.*—Where under the applicable law the question raised by a petition for review may be determined in whole or in part upon the record before the government unit, the government unit shall file the record with the prothonotary of the court named in the petition for review within 40 days after service upon it of the petition. The court may shorten or extend the time prescribed in this subdivision. The prothonotary shall give notice to all parties of the date on which the record is filed.

(b) *Certificate of record.*—The government unit shall certify the contents of the record **and a list of all documents, transcripts of testimony, exhibits and other material comprising the record.** The government unit shall (1) arrange the documents to be certified in chronological order, (2) number them, and (3) affix to the right or bottom edge of the first page of each document a tab showing the number of that document. These shall be bound and shall contain a table of contents identifying each document in the record. The certificate shall be made by the head, chairman, deputy or secretary of the government unit. The government unit may file the entire record or such parts thereof as the parties may designate by stipulation filed with the government unit. The original papers in the government unit or certified copies thereof may be filed. Instead of filing the record or designated parts thereof, the government unit may file a certified list of all documents, transcripts of testimony, exhibits and other material comprising the record, or a **certified** list of such parts thereof as the parties may designate, adequately describing each, and the filing of the certified list shall constitute filing of the record. The parties may stipulate that neither the record nor a certified list be filed with the court. The stipulation shall be filed with the prothonotary of the court and the date of its filing shall be deemed the date on which the record is filed. If a certified list is filed, or if the parties designate only parts of the record for filing or stipulate that neither the record nor a certified list be filed, the government unit shall retain the record or parts thereof. Upon request of the court or the request of a party, the record or any part thereof thus retained shall be transmitted to the court notwithstanding any prior stipulation. All parts of the record retained by the government unit shall be a part of the record on review for all purposes.

(c) Notice to counsel of contents of certified record.—**At the time of transmission of the record to the appellate court, the government unit shall send a copy of the list of the contents of the certified record to all counsel of record, or if unrepresented by counsel, to the parties at the address they have provided to the government unit.**

Official Note: **[Based in part upon former Commonwealth Court Rules 22, 23 and 32A (second sentence). The time within which the record must be certified has been increased from 20 days to 40 days to conform to Rule**

1931 (transmission of the record).] The addition of subdivision (c) in 2012 requires government units other than courts to notify counsel of the content of the certified record. This is an extension of the requirement in Rule 1931(transmission of the record) that trial courts give such notice.