

## Another Consideration of Rule 1925(b) and Waiver

Pennsylvania Rule of Appellate Procedure 1925 provides the procedural mechanism for an appellant to inform a trial judge of the court's alleged errors by filing a concise statement of errors complained of on appeal, the so-called 1925(b) Statement.

The appellant's obligation to file a 1925(b) Statement is triggered by an order from the trial judge pursuant to Rule 1925(b), should he or she "desire[] clarification of the errors complained of on appeal." Entry of an order is entirely discretionary; however, the contents are not. Pursuant to Rule 1925(b)(3), the order must state: (i) the number of days (at least 21) to file the statement and serve the trial judge; (ii) that the statement shall be filed; (iii) and also served on the trial judge; and (iv) that failure to comply with all of the foregoing will result in a waiver.

Under case law, whether a waiver has occurred is subject to a bright-line rule. But what if the trial judge does not fully comply with the requirements of Rule 1925? Moreover, what if appellant fails to comply with the service requirement because of misadvice given by the prothonotary to appellant's counsel when he sought to serve the judge? What if appellant's counsel attempts to serve the judge's copy by attempting to leave it with the prothonotary, who refuses to accept it? Does this constitute "service upon the judge" for purposes of complying with the service requirement under Rule 1925(b)(1) or has there been a waiver? The Pennsylvania Supreme Court recently considered these questions in *Berg v. Nationwide Mutual Ins. Co.*—A.3d —, 2010 W.L. 4159820 (Pa.).

In *Berg*, the trial judge entered an order "that the Appellants shall file with the Court, and a copy with the trial judge, a Concise Statement of Errors Complained of upon Appeal pursuant to Pa.R.A.P. 1925(b) within twenty-one (21) days of the issuance of this Order." The order did not comply with Rule 1925(b)(3) because it instructed appellant to "file" a copy with the trial judge instead of "serving" him and it did not state that failure to comply would result in a waiver. Approximately one week before this court-ordered deadline, appellants' counsel personally appeared at the prothonotary to file his clients' 1925(b) Statement. In a statement later made to and accepted by the Supreme Court (although outside the record), appellants' counsel asserts that he wanted to serve a date-stamped copy of the 1925(b) Statement at the chambers of the trial judge. But, as strange as this seems, he states that he did not know the precise location of the judge's chambers, being that the judge was a senior judge and had no permanent assignment of chambers or courtroom. Appellants' counsel states that, as a result, he asked for the location of judge's chambers, but the prothonotary declined to tell him. Instead, according to appellants' counsel, the prothonotary advised him that the judge "always wants 'the original'" and that he, the prothonotary, would deliver the original to the judge within 10 minutes. Appellants' counsel also states that the prothonotary refused to accept the date-stamped copy that appellants' counsel had intended to serve the judge.

Thereafter, the trial judge filed a Statement in Lieu of Memorandum Opinion in which he concluded that appellants had waived all issues raised in their 1925(b) Statement because service of it had not been made upon him. The Superior Court affirmed, based upon the trial court's reasoning. The Supreme Court reversed and remanded, but the court lacked a majority that would agree on the proper rationale for that action.

Justice Debra M. Todd wrote the opinion announcing the judgment of the court (OAJC), in which only Justice Seamus P. McCaffery joined. In it, they apply

Pa.R.C.P. 126's doctrine of substantial compliance and find that appellants' counsel had "substantially complied" with "the instruction to file a document with a trial judge" (although such an instruction is an "oddity") when he presented a copy of the 1925(b) Statement for the trial judge to the prothonotary. Therefore, the filing of the original, together with a copy for the trial judge, should have avoided a finding of waiver.

The court distinguished case law in which a waiver was found where no attempt had been made to serve the trial judge "despite the court's express instructions to do so." The OAJC notes that the trial judge's failure to use the language required by Rule 1925(b)(3) in his order "resulted in a situation where Appellants were faced with contradictory instructions ... to file their 1925(b) Statement with the court and with the trial judge, while the specific language of Rule 1925(b)(1) required Appellants to file [the original] of record and concurrently serve the trial judge with a copy of their 1925(b) Statement."

Chief Justice Ronald D. Castille concurred because he would find that delivery of the judge's copy to the prothonotary "should be adequate" because "the prothonotary functions as a clerk or other responsible person at the judge's office for purposes of making personal service on him or her, as Rule 1925(b)(1) requires." He does not join with the OAJC's reasoning that the substantial compliance doctrine applies here "in light of our specific pronouncements regarding the bright-line nature of the Rule," that is, where waiver can only be avoided by full compliance with this rule.

Justice J. Michael Eakin concurred as well. But he views Pa.R.A.P. 121(a), which requires that all filings in appellate courts "shall be filed with the prothonotary," as authority for the proposition that filing in the trial court prothonotary is service upon the trial judge for Rule 1925(b) purposes.

Justice Max Baer dissents because, in his view, an order cannot trump a rule. Therefore, under such circumstances, "the

## Avoiding Liability



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careful practitioner either should comply with both, or if that is not clearly possible, comply with the rule and seek clarification from the issuing judge of the order." He notes that, upon the prothonotary's refusal to assist counsel to effect valid service on the judge, appellants still had an option — they still had a week before the service deadline to make valid service by an alternate means under the rule by mailing a copy by certified mail addressed to the judge at the courthouse address. Therefore, he found waiver because appellants failed to use this alternate means of serving the judge.

Justice Thomas G. Saylor concurred and dissented. He joined with the OAJC in recognizing the application of the substantial compliance doctrine here. But instead of accepting the statement of counsel with respect to the circumstances surrounding his service of the 1925(b) Statement upon the trial judge, he would "remand the case for a hearing to develop a factual record and appropriate findings."

What is the moral to this story (other than the obvious one that the practitioner should not take legal advice from the prothonotary)? Where there is an order that conflicts with a rule, if there is a threat of waiver if the rule is not complied with, comply with the rule's literal requirements and also comply with the order, if possible. If it is not possible to comply with both, seek clarification from the trial judge.