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Rule 1925 of the Rules of Appellate Procedure

Judge Mary Jane Bowes
Superior Court of Pennsylvania

Rule 1925 in Civil and Criminal Appeals

I. The purpose of Rule 1925

A. Appellate courts want trial court opinions that cover all of the questions they must decide.

1. "Rule 1925 is . . . a crucial component of appellate process." ***Commonwealth v. McBride***, 957 A.2d 752, 758 (Pa.Super. 2008). With so many issues requiring us to determine whether the trial court abused its discretion, we need a trial court opinion, explaining its reasoning, to facilitate "meaningful and effective appellate review." ***Id***. Accordingly, Rule 1925(a) requires a trial court, upon receipt of a notice of appeal, either to "file of record at least a brief opinion of the reasons for the order" or ruling giving rise to the appeal, or to "specify in writing the place in the record where such reasons may be found."

B. Rule 1925(b) is a tool for narrowing the issues that the trial court must address in its opinion.

1. Sometimes the trial court knows exactly what the appeal is about (e.g., a Commonwealth appeal from the grant of a suppression motion), and can just write the opinion without any additional information from the appellant.

2. More often, there are myriad issues that the appellant could complain about. Rather than address in its opinion all the potential issues that could arise from the denial of a continuance to overruled objections to the denial of post-trial motions, Rule 1925(b) is available "to aid trial judges in identifying and focusing upon those issues that the parties plan to raise on appeal." ***Commonwealth v. McBride***, 957 A.2d 752, 758 (Pa.Super. 2008).

C. The Rule is <u>not</u> a vehicle for raising claims of error in the first instance.

1. The general rule is that "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a).

a. The requirement that issues be raised in the trial court in the first instance is not a pointless hoop-jumping exercise or "a trap to defeat appellate review." ***Ryan v. Johnson***, 564 A.2d 1237, 1239 (Pa. 1989).

b. "The issue preservation requirement ensures that the trial court that initially hears a dispute has had an opportunity to consider the issue, which in turn advances the orderly and efficient use of our judicial resources, and provides fairness to the parties." ***Commonwealth v. Eisenberg***, 98 A.3d 1268, 1274 (Pa. 2014).

2. Once an appeal has been filed, the trial court has lost jurisdiction to correct its errors. ***Commonwealth v. Monjaras-Amaya***, 163 A.3d 466, 469 (Pa.Super. 2017).

3. Therefore, waiver applies even if trial court chooses to address in its opinion an issue raised for the first time in a 1925(b) statement. ***Commonwealth v. Melendez-Rodriguez***, 856 A.2d 1278, 1288 (Pa.Super. 2004) (*en banc*).

D. Waiver is the mechanism for enforcing compliance with the Rule.

1. A Rule 1925(b) order is not precatory: there are serious consequences for failure to comply. As is discussed more fully below, all issues not raised, and all issues improperly raised, in a concise statement are waived. Pa.R.A.P. 1925(b)(4)(vii).

a. Of course there are caveats and exceptions, which will be addressed below.

II. Mechanics of the Rule

A. The Judge orders the filing of a concise statement.

1. An appellant's duties under the Rule normally are imposed by the trial court's ordering the filing of a concise statement.

a. However, unprompted concise statements trigger the same waiver rules as statements filed in response to a court order.

i. When a party has filed a statement of errors complained of on appeal voluntarily, a trial court has no reason to issue a 1925(b), as it is already aware of

the appellant's complaints. If the enforcement rules did not apply to such gratuitously-filed statements, this Court "would, in effect, be allowing appellant to circumvent the requirements of the Rule." ***Commonwealth v. Snyder***, 870 A.2d 336, 341 (Pa. Super. 2005) (finding issues waived for failure to raise them in a statement filed contemporaneously with the notice of appeal). Thus, there is no advantage to filing a concise statement along with the notice of appeal in a criminal case.

b. In appeals designated Family Fast Track, the Rule 1925(b) statement shall be filed concurrent with the notice of appeal. ***See*** Pa.R.C.P. 1925(a)(2)(i).

i. Although failure to comply with the concurrent filing provision of Rule 1925(a)(2)(i) generally would not result in waiver, the failure to comply with a trial court order or Superior Court order directing you to file a Rule 1925(b), statement **will** result in waiver. ***Compare In re Adoption of N.N.H.***, 197 A.3d 777, 781 (Pa.Super. 2018), ***with J.P. v. S.P.***, 991 A.2d 904 (Pa.Super. 2010).

2. The Rule specifies that the judge must include the following in the order "directing the filing and service of a Statement."

a. The order must state the number of days after the date of entry of the judge's order within which the appellant must file and serve the Statement. Pa.R.A.P. 1925(b)(3)(i).

i. The judge has to allow at least 21 days. Pa.R.A.P. 1925(b)(2).

ii. The appellant can request an extension "for good cause shown," such as delay in production of transcripts. Pa.R.A.P. 1925(b)(2). "[A] court may not deny an appellant's **timely** motion for enlargement of time to file a Rule 1925(b) statement without providing justification for its finding that good cause has not been shown." ***Commonwealth v. Hopfer***, 965 A.2d 270, 275 (Pa.Super. 2009) (emphasis added). However, the request for an extension should be made in writing, filed of record,

before the deadline for filing a statement established by the trial court's 1925(b) order. ***Commonwealth v. Gravely***, 970 A.2d 1137, 1145 (Pa. 2009).

b. The order must indicate that the Statement shall be filed of record. Pa.R.A.P. 1925(b)(3)(ii).

c. The order must provide that the Statement also shall be served on the judge. Pa.R.A.P. 1925(b)(3)(iii).

d. The order must state that any issue not properly included in the Statement timely filed and served will be deemed waived. Pa.R.A.P. 1925(b)(3)(iv).

e. The trial judge "shall not require the citation to authorities." Pa.R.A.P. 1925(b)(4)(ii). Nor may the judge "require appellant or appellee to file a brief, memorandum of law, or response as part of or in conjunction with the Statement." Pa.R.A.P. 1925(b)(4)(iii).

3. As discussed more fully below, the order must be properly entered and served pursuant to Pa.R.Crim.P. 114 to be enforceable.

B. Drafting the concise statement.

1. The requirements of a proper statement are specified in paragraph (b)(4) of the Rule.

a. "The Statement shall set forth only those rulings or errors that the appellant intends to challenge." Pa.R.A.P. 1925(b)(4)(i).

i. You need to state the issues in the 1925(b) statement itself rather incorporate other documents by reference. For example, in ***Commonwealth v. Smith***, 955 A.2d 391 (Pa.Super. 2008), the Commonwealth filed a statement that provided "As stated in the Commonwealth's motion for reconsideration, did the lower court err in dismissing all charges against the defendant?" ***Id***. at 393. Although we declined to find waiver, this Court noted that we did "not condone" the Commonwealth's tactic, and reiterated that the "statement should include a

concise statement of each issue to be raised on appeal." ***Id***. at 393 n.5.

b. "The Statement shall concisely identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge." Pa.R.A.P. 1925(b)(4)(ii). However, "The Statement should not be redundant or provide lengthy explanations as to any error." Pa.R.A.P. 1925(b)(4)(iv).

c. "Each error identified in the Statement will be deemed to include every subsidiary issue contained therein which was raised in the trial court." Pa.R.A.P. 1925(b)(4)(v). But "this provision does not in any way limit the obligation of a criminal appellant to delineate clearly the scope of claimed constitutional errors on appeal." ***Id***.

d. Although not necessary, the appellant "may choose to include pertinent authorities in the Statement." Pa.R.A.P. 1925(b)(4)(ii).

2. From this we see that **a well-crafted statement balances conciseness with sufficient detail** to alert the trial court to exactly what issues it must address in its opinion.

a. As discussed below, going to one extreme (so concise as to be vague) or the other (so voluminous that it is overwhelming) can result in waiver.

3. If counsel intends to file a petition to withdraw and an ***Anders*** brief in the Superior Court, he or she need not state claims of error.

a. Instead, "counsel may file of record and serve on the judge a statement of intent to file an ***Anders/McClendon*** brief in lieu of filing a Statement." Pa.R.A.P. 1925(c)(4).

i. Counsel is not required to file a statement of intent in the trial court in order to seek to withdraw in the Superior Court. A trial court opinion that addresses the issues is helpful in determining whether the appeal is wholly frivolous. Hence, we will not discourage counsel from filing a 1925(b) statement that includes

the issues of arguable merit that will be briefed in the Superior Court.

b. If the Superior Court ultimately disagrees with counsel, and concludes "that there are arguably meritorious issues for review," we can remand "for the filing of a Statement, a supplemental opinion pursuant to Rule 1925(a), or both." Pa.R.A.P. 1925(c)(4). "Upon remand, the trial court may, but is not required to, replace appellant's counsel." ***Id***.

C. The appellant must both file the statement with the clerk of courts/prothonotary and serve it on the trial judge.

1. Mailing the statement to the trial judge but not filing is insufficient. ***Commonwealth v. Butler***, 812 A.2d 631, 634 (Pa. 2002).

2. Filing the statement but not serving the trial judge may result in waiver. ***Forest Highlands Cmty. Ass'n v. Hammer***, 879 A.2d 223, 229 (Pa.Super. 2005).

3. A *pro se* statement filed by a represented defendant is a legal nullity. ***Commonwealth v. Ali***, 10 A.3d 282, 293 (Pa. 2010). Therefore, counsel in such instances cannot not rely upon her client's statement, but should timely comply with the order by filing a statement herself.

III. Enforcement of the Rule.

A. Usually, failure to file a timely concise statement will result in waiver.

1. The Rule itself expressly states: "Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived." Pa.R.A.P. 1925(b)(4)(vii).

a. Note: when advocating for or against application of Rule 1925 waiver in the Superior Court, decisions in civil and criminal cases are equally applicable. ***Commonwealth v. Levanduski***, 907 A.2d 3, 29 n.8 (Pa.Super. 2006) (*en banc*).

i. Exception: as discussed below, remand, rather than waiver, may result from noncompliance in cases of *per*

se ineffective assistance of counsel. Pa.R.A.P. 1925(c).

2. If it is unclear whether a statement was filed and served, or was timely filed and served, the Superior Court may remand for a factual determination on the issue. Pa.R.A.P. 1925(c)(1).

3. Failure to comply with Rule 1925 may not be penalized if the order directing the appellant to file a statement was deficient or was not entered properly. As the Court stated, "The requirement that defendants be given notice of the need to file a Rule 1925(b) statement is not a mere technicality. If we are to find that defendants waived their constitutional rights, we must be sure that the clerk of the court did his or her job to advise the defendants that it was necessary to act." ***Commonwealth v. Davis***, 867 A.2d 585, 588 (Pa.Super. 2005) (*en banc*).

   a. No waiver where the docket did not indicate notice of the 1925 order was provided to the parties. ***Commonwealth v. Williams***, 959 A.2d 1252, 1256 (Pa.Super. 2008); ***Commonwealth v. Davis***, 867 A.2d 585, 588 (Pa. Super. 2005) (*en banc*).

   b. No waiver where the docket did not state the date when notice of the order was provided as required by Pa.R.Crim.P. 114(C)(2)(c). ***Commonwealth v. Chester***, 163 A.3d 470, 472 (Pa.Super. 2017).

   c. No waiver where the appellant presented two copies of the statement to the prothonotary, rather than filing one and serving one on the judge, where the order instructed the appellant to "file" a copy of the statement with the court and the trial judge. ***Berg v. Nationwide Mut. Ins. Co.***, 6 A.3d 1002, 1008 (Pa. 2010) (plurality).

   d. No waiver for *pro se* defendant's failure to file a statement where it was served upon his former attorney by hand delivery rather than sent to his prison address by mail as is required by Pa.R.Crim.P. 114(B)(a)(v). ***Commonwealth v. Hart***, 911 A.2d 939, 940 (Pa.Super. 2006).

4. Of course, some issues may be raised for the first time on appeal, and thus are not waived by the failure to comply with a 1925(b) order. ***See, e.g., Commonwealth v. Edrington***, 780 A.2d 721,

723 (Pa.Super. 2001) (addressing Commonwealth's challenge to the legality of the defendants sentence although the Commonwealth failed to file a court-ordered 1925(b) statement).

5. In sum, obviously, the best practice is to comply with the order even if it is defective. However, there are arguments to be made to avoid waiver if mistakes are made.

B. Statements that are too vague or unnecessarily voluminous may result in waiver.

1. The Note to the rule explains that "conciseness and vagueness are very case-specific inquiries." When waiver is found based upon vagueness or prolixity, it is not due to "the number of issues raised but [rather,] the paucity of useful information contained in the Statement."

   a. "The more carefully the appellant frames the Statement, the more likely it will be that the judge will be able to articulate the rationale underlying the decision and provide a basis for counsel to determine the advisability of appealing that issue. Thus, counsel should . . . articulate specific rulings with which the appellant takes issue and why."

2. **Vague statements**: "An appellant's concise statement must properly specify the error to be addressed on appeal. In other words, the Rule 1925(b) statement must be specific enough for the trial court to identify and address the issue an appellant wishes to raise on appeal. A concise statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no concise statement at all." ***Commonwealth v. Hansley***, 24 A.3d 410, 415 (Pa.Super. 2011) (internal quotations makes and citations omitted).

   a. This often comes up in criminal cases in the context of challenges to the sufficiency of the evidence.

      i. The general rule is that, "If Appellant wants to preserve a claim that the evidence was insufficient, then the 1925(b) statement needs to specify the element or elements upon which the evidence was insufficient. This Court can then analyze the element or elements on appeal. Where a 1925(b) statement does not specify the allegedly unproven elements, . . .

the sufficiency issue is waived on appeal." ***Commonwealth v. Tyack***, 128 A.3d 254, 260 (Pa.Super. 2015).

ii. The determining factor in deciding whether waiver applies is whether the trial court was on notice what issues it needed to address in its opinion. Below are some examples of waiver analysis when the appellant's statement merely claimed that the evidence was insufficient without detailing specific elements.

A. No waiver: ***Commonwealth v. Laboy***, 936 A.2d 1058, 1060 (Pa. 2007) ("[W]e agree with Appellant that the Superior Court should have afforded the requested sufficiency review. In the present, relatively straightforward drug case, the evidentiary presentation spans a mere thirty pages of transcript. It may be possible in more complex criminal matters that the common pleas court may require a more detailed statement to address the basis for a sufficiency challenge. Here, however, the common pleas court readily apprehended Appellant's claim and addressed it in substantial detail.").

B. Waiver: ***Commonwealth v. Gibbs***, 981 A.2d 274, 281 (Pa.Super. 2009) (finding waiver where appellant, who was convicted of PWID, possession, conspiracy, possession of paraphernalia, and three counts of receiveing stolen property, "not only failed to specify which elements he was challenging in his 1925 statement, he also failed to specify which convictions he was challenging").

C. No waiver: ***Commonwealth v. Richard***, 150 A.3d 504, 518 (Pa.Super. 2016) ("Appellant averred that the evidence of what he said to his daughter on the telephone was insufficient to sustain his Terroristic Threats and Intimidation of Witnesses or Victims convictions. Although Appellant did not specify the allegedly unproven

element or elements of his convictions in his Rule 1925(b) statement, we find this statement was sufficient to preserve a challenge to the sufficiency of the evidence to sustain his convictions, and we turn to a consideration of whether this issue is meritorious.")

D. Waiver: ***Commonweatlh v. Williams***, 959 A.2d 1252, 1258 n.9 (Pa.Super. 2008) (holding sufficiency challenge was not preserved where appellant was convicted of murder, robbery, possessing instruments of crime, and firearms violations, and failed to specify which elements he was challenging or why the evidence was insufficient).

E. No waiver: ***Commonwealth v. McCurdy***, 943 A.2d 299, 301 (Pa.Super. 2008) ("The trial court recognized that the statement was necessarily vague since counsel had not participated at trial and had not yet had the opportunity to review that proceeding, and it declined to find waiver. While we are aware of the case law providing that vague statements do not preserve issues on appeal, counsel in this case could not have been more specific. We therefore decline to find the issue waived." (citation omitted)).

iii. Another type of sufficiency claim that is sometimes viewed as vague is the evidence was insufficient because it was too conflicting or contradictory. However, while such arguments usually are made in a weight-of-the-evidence challenge, this Court has recognized such a claim as a viable attack on the sufficiency of the evidence. ***See***, ***e.g.***, ***Commonwealth v. Bennett***, 303 A.2d 220, 220 (Pa.Super. 1973) (*en banc*) (holding evidence was insufficient to support conviction where the testimony of the Commonwealth's witness "was so inconsistent and contradictory as to be insufficient to support a finding of [the defendant's] guilt").

3. **Overwhelmingly prolix statements.** The Rule provides that the statement should not be redundant or include lengthy

explanations. "Where non-redundant, non-frivolous issues are set forth in an appropriately concise manner, the number of errors raised will not alone be grounds for finding waiver." Pa.R.A.P. 1925(b)(4)(iv).

a. Some cases are complex and have a voluminous record, such that a "concise" statement may be several pages long and include many clams. When the claims are stated in good faith and are not unnecessarily prolix, waiver will not result. ***See, e.g., Maya v. Johnson & Johnson***, 97 A.3d 1203, 1211 n.4 (Pa.Super. 2014) (declining trial court invitation to find waiver as a result of an 11-page 23-paragraph 1925(b) statement).

b. However, waiver can result if a filing is voluminous, in bad faith, in an attempt to overwhelm the trial court.

   i. ***Mahonski v. Engel***, 145 A.3d 175, 182 (Pa.Super. 2016) (holding, where the appellant stated 87 claims of error, that included "flippant remarks demonstrating disrespect of the judicial process" and the trial court refused to address the "overly vague, redundant, and prolix" claims of error, that the record supported the trial court's finding that the "voluminous 1925(b) statements failed to set forth non-redundant, nonfrivolous issues in an appropriately concise matter").

   ii. ***Kanter v. Epstein***, 866 A.2d 394, 401 (Pa.Super. 2004) ("The Defendants' failure to set forth the issues that they sought to raise on appeal in a concise manner impeded the trial court's ability to prepare an opinion addressing the issues that the Defendants sought to raise before this Court, thereby frustrating this Court's ability to engage in a meaningful and effective appellate review process. By raising an outrageous number of issues [104], the Defendants have deliberately circumvented the meaning and purpose of Rule 1925(b) and have thereby effectively precluded appellate review of the issues they now seek to raise.").

C. *Per se* ineffective assistance of counsel exception to waiver in criminal cases

1. A failure to file and serve a timely 1925(b) statement "is a failure to perfect the appeal, it is presumptively prejudicial and 'clear' ineffectiveness." Pa.R.A.P. 1925, *Note*. While direct appeal rights may be restored through the PCRA when they are lost based upon ineffective assistance, "the more effective way to resolve such per se ineffectiveness is to remand for the filing of a Statement and opinion." ***Id***.

2. Accordingly, subsection (c)(3) of the Rule provides: "If an appellant in a criminal case was ordered to file a Statement and failed to do so, such that the appellate court is convinced that counsel has been per se ineffective, the appellate court shall remand for the filing of a Statement *nunc pro tunc* and for the preparation and filing of an opinion by the judge." Pa.R.A.P. 1925(c)(3).

    a. "An appellant must be able to identify *per se* ineffectiveness to secure a remand under this section, and any appellant who is able to demonstrate *per se* ineffectiveness is entitled to a remand." Pa.R.A.P. 1925, *Note*

    b. This subsection "does **not** apply when waiver occurs due to the **improper** filing of a Statement. In such circumstances, relief may occur only through the post-conviction relief process and only upon demonstration by the appellant that, but for the deficiency of counsel, it was reasonably probable that the appeal would have been successful." Pa.R.A.P. 1925, *Note* (emphasis added).

        i. Hence, if waiver applies to some, but not all, issues, for example because the statement was vague or an argued issue was not raised in the statement, this remand procedure is not applicable to correct the error. If relief is to be had, it will be through the PCRA.

    c. The subsection (c)(3) remand procedure applies in PCRA appeals although "The PCRA system is not part of the criminal proceeding itself, but is, in fact, civil in nature." ***Commonwealth v. Haag***, 809 A.2d 271, 284 (Pa. 2002). ***See Commonwealth v. Presley***, 193 A.3d 436 (Pa. Super.

2018) (holding that PCRA cases, governed by the Rules of Criminal Procedure, should also be treated as criminal for purposes of the Rules of Appellate Procedure).

3. Given subsection (c)(3), a trial court facing non-compliance with a Rule 1925(b) order should take the following actions:

> when a trial court orders the appellant in a criminal case to file a Rule 1925(b) statement and the appellant files it untimely, the trial court's Rule 1925(a) opinion should note the *per se* ineffectiveness of counsel, appoint new counsel if it deems it necessary, and address the issues raised on appeal. Similarly, where. . . counsel fails to file a Rule 1925(b) statement before the trial court files a Rule 1925(a) opinion, the opinion should note the ineffectiveness of counsel, permit counsel to file a statement *nunc pro tunc* and address the issues raised in a subsequent Rule 1925(a) opinion. The trial court may appoint new counsel if original counsel fails to comply with the order because a failure to comply with the order would prohibit appellate review.

Commonwealth v. Thompson, 39 A.3d 335, 341 n.11 (Pa.Super. 2012) (citations omitted).

C. Remand to avoid waiver in civil cases

1. "Upon application of the appellant and for good cause shown, an appellate court may remand in a civil case for the filing *nunc pro tunc* of a Statement or for amendment or supplementation of a timely filed and served Statement and for a concurrent supplemental opinion." Pa.R.A.P. 1925(c)(2).

i. The appellant must apply for the remand and demonstrate good cause. ***Greater Erie Indus. Dev. Corp. v. Presque Isle Downs, Inc.***, 88 A.3d 222, 227 n.7 (Pa.Super. 2014) (*en banc*) (citing standards for granting *nunc pro tunc* status).

IV. Conclusion

Rule 1925 serves an important purpose for the appellate court. It is not mere bureaucratic red tape or a waiver trap. As explained in the Note to the Rule, the filing of the 1925(b) statement "is only the first step in framing the issues to be raised on appeal, and the requirements of Pa.R.A.P. 2116 (statement of questions involved) are even more stringent." Pa.R.A.P. 1925, *Note*. "The more carefully the appellant frames the Statement, the more likely it will be that the judge will be able to articulate the rationale underlying the decision and provide a basis for counsel to determine the advisability of appealing that issue." ***Id***. The Rule exists so that trial courts can give the Superior court the information it needs to effectively resolve claims of error on appeal. If you keep that purpose in mind when drafting your statements, your appeals are far more likely to rise or fall on their merits.

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**This document does not constitute legal advice,
nor does it replace independent research by counsel.**

Drafting Statement of Matters Complained of on Appeal When the Trial Court has Offered no Reason for its Decision

By Jeffrey P. Lewis

Pa.R.A.P. 1925(b) requires that when ordered by the trial court, an appellant must file a statement of matters complained of on appeal. Failure to comply with this order in a timely manner results in a waiver of all appellate issues. Under case law, waiver also occurs where the statements are so vague and so broad that they fail to identify the specific questions raised. To determine the statement's sufficiency, the appellate court must examine the entire record to determine whether the trial court has provided the basis for its ruling. Moreover, any matter not raised will also be deemed waived.

All that sounds simple enough, but what happens when the trial court has not explained the reasoning for its holding? Must the appellant guess at the court's reasoning and submit a statement of matters that are expressly conditioned upon the premise that the trial court had engaged in "wrongful" reasoning? This becomes particularly troublesome when the court could have embraced one or more of many arguments that each justifies the result independently. A Superior Court panel has recently revisited this issue and created concern because the majority and minority of the panel could not agree on what the appellant should have done under the circumstances of that case.

In *Hess v. Fox Rothschild, L.L.P.*, 925 A.2d 798, (Pa. Super. Ct. 2007), the trial court had sustained preliminary objections with respect to all three counts of the amended complaint. As a result, it dismissed the amended complaint with prejudice. The defendant had asserted two entirely independent bases for the relief sought: 1. that the plaintiffs lacked standing to raise their claims and 2. that the facts pled fail to support the elements of any cause of action. The trial court issued no opinion, nor did it make any statement from the bench. As a result, plaintiffs, in their view, could not determine the court's reasoning. Upon appeal, the trial court ordered plaintiffs (now the appellants) to file a Rule 1925(b) statement. Appellants timely filed a statement wherein they allege merely that the trial court "erred in sustaining preliminary objections to [Appellants'] complaint ... [and] in dismissing [Appellants'] Complaint." Appellees moved the appellate court to quash the appeal on the basis of waiver, contending that appellants' statement was equivalent to no statement at all because it was "so vague and uninformative." The trial court filed an opinion in which it echoed appellants' view.

In a 2-1 decision, the majority finds no waiver and as a consequence refuses to quash the appeal.

In an opinion written by Judge McCaffery, and joined by Judge Stevens, the court greatly relies upon *Ryan v. Johnson*, 522 Pa. 555, 564 A.2d 1237 (1989). There, the Supreme Court holds that a waiver does not occur if "the reasons for a trial court's ruling are vague or not discernable from the record" and the appellant so correctly states in her Rule 1925(b) statement. In the Supreme Court's view, the trial court cannot expect the appellant to file a Rule 1925(b) statement that is not vague when the trial court has "given absolutely no indication of the reasons for its decision." According to the majority in *Hess*, the trial court's failure to explain its reasoning excuses appellants for their failure to provide a more precise Rule 1925(b) statement. The court did not consider the two additional statements that appellants filed without leave of the trial court, because they were untimely.

The dissent written by Judge Stevens, however, finds that the Rule 1925(b) statement filed by the appellants in a timely manner was inadequate, and therefore appellants have waived all their issues. He notes that appellants had failed to use the magic words in their first Rule 1925(b) statement that had been used by appellant in *Ryan*, to wit, that "the reasons for a trial court's ruling are vague or not discernable from the record." Also, he finds that appellants adequately identify the issues in the "Statement of Questions Involved" section of its appellate brief, notwithstanding that the trial court had offered no additional information as to its reasoning. In this author's view, appellant's "Statement of Questions Involved" constitutes only an educated guess as to the trial court's reasoning based upon the issues presented.

The dissent further distinguishes this case from *Ryan* on the basis that the trial court there had provided even less detail on the basis for its decision than did the court here. In *Ryan,* the court had merely dismissed plaintiff's motion to strike/open judgment. In contrast, the trial court here specifically had sustained the preliminary objections to the first three counts of the amended complaint and dismissed the remaining preliminary objections as moot. By this means, the trial court had informed that it had focused its analysis on the first three preliminary objections. But in the majority's view, such little additional information than what had been provided by the trial court in *Ryan* still does not sufficiently inform the appellant of the basis for the ruling.

What lesson does *Hess* teach? If one cannot discern the trial court's reasoning, handle the issues as suggested by both *Ryan* and *Hess*. Say so in the statement, as was done in *Ryan,* and then state educated guesses as did appellants in *Hess* in their brief, but in a timely manner. If the appellate court

agrees that the trial court has not sufficiently stated its basis, as did the *Ryan* court and the majority in *Hess*, waiver is avoided by use of the "magic" language suggested by *Ryan*. If not, waiver might at least be avoided if educated guesses as to the reasoning of the trial court are stated in the statement of matters complained of on appeal.

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Violating Rule 1925 Conciseness Is Unwise, but Not a Waiver

Home Perspectives Violating Rule 1925 Conciseness Is Unwise, but Not a Waiver

Authors: James M. Beck

Aside from the rare legal all-star, in position to pick and choose cases, the rest of us inevitably have to confront losing. After all, it has been said that only lawyers who are not trusted with hard cases never lose. Losing at trial often means having to take appeals, and that means dealing with preservation of issues and with Pennsylvania Rule of Appellate Procedure 1925.

At this point, if not before, it is a good idea to bring an appellate specialist, or at least a colleague not personally involved in the case, on board. Particularly in long, complex trials, competent trial counsel will have preserved a large number of instances where the court has done, or allowed opposing counsel to do, things that seem both prejudicial and erroneous. With trial counsel's legal and emotional investment the unsuccessful courtroom venture, trial counsel may be unwilling—or, for strategic reasons, unable—to let go of numerous unfavorable rulings and contested issues.

A fresh set of eyes can be essential to cutting back such a trial-level thicket to the three or four best issues for appeal. A party appealing a plethora of issues runs a severe risk of having them all discounted. The appellate courts of Pennsylvania have repeatedly warned practitioners, as the court did in Kenis v. Perini, 452 Pa. Super. 634, 639 n.3, 682 A.2d 845, 847 n.3 (1996):

"When ... an appellant's brief contains 10 or 12 points, a presumption arises that there is no merit to any of them. I do not say that it is an irrebuttable presumption, but it is a presumption that reduces the effectiveness of appellate advocacy. Appellate advocacy is measured by effectiveness, not loquaciousness."

Rule 1925, which obligates trial judges to prepare opinions addressing issues raised on appeal, provides that an appellant's "statement of issues complained of on appeal" should be "concise." The drafters of Rule 1925 were serious about conciseness, reiterating this requirement in 1925(b)(4), when they said that "the statement shall concisely identify each ruling or error that the appellant intends to challenge."

Concise, however, does not mean devoid of all substantive content. It is not enough in a Rule 1925 statement to state only that "the court erred" in doing something, without at least articulating which of the various points counsel may have argue is being pursued.

The appellant filed that sort of statement in Lineberger v. Wyeth, 894 A.2d 141, 149 (Pa. Super. 2006), and was rewarded with a waiver finding. The court held the point was "so vague the trial court suggested appellant had failed to preserve any issue for appellate review ... [and] we agree." Rule 1925, in short, requires counsel both to do their homework and still be concise.

However, for the reasons touched upon above, the opposite problem of overpreservation is more common and has generated more comment from the bench. Rule 1925(b)(4) was itself amended in 2007 to provide: "The statement should not be redundant or provide lengthy explanations as to any error. Where nonredundant, nonfrivolous issues are set forth in an appropriately concise manner, the number of errors raised will not alone be grounds for finding waiver."

This amendment was undertaken in large part to overturn court decisions that punished the inclusion of too many issues under Rule 1925 with waiver of all issues. The amendment occurred in tandem with the Supreme Court's disapprobation of that same precedent in Eiser v. Brown & Williamson Tobacco, 595 Pa. 366, 938 A.2d 417 (2007). In Eiser, the plaintiffs in a weeks-long cigarette products liability trial preserved 24 issues in a 15-page Rule 1925 statement. Both the trial court and the Superior Court held that this extensive preservation was simply too long and enforced blanket waiver findings. The Supreme Court reversed. "Complicated" cases, the court observed, can "involve multiple issues worthy of arguing on appeal."

It was error, particularly in a complex case, to impose blanket waiver solely due to the number of issues raised under Rule 1925. "Litigants who come to the courts of this commonwealth, and attorneys who practice before these courts, must be able to preserve issues for appeal and move forward with the appellate process without fear of waiver," the court held in Eiser. The court therefore "encouraged lower courts to recognize" that a "party may, in good faith, believe that a large number of issues are worthy of pursuing on appeal," even though that can be poor appellate practice. "Given the timeframe in which [counsel] had to file his Rule 1925(b) statement and the number of rulings made both before and during trial, it seems eminently reasonable, and certainly not outrageous, that counsel included a large number of issues."

The court in Eiser expressly limited prior authority allowing blanket waiver to simple cases—specifically Kanter v. Epstein, 866 A.2d 394 (Pa. Super. 2004)—and rejected the appellees' allegations of bad faith. Instead, the court followed the opposite presumption—"that an attorney licensed to practice law in this commonwealth, who acts as an officer of the court system, has acted in good faith upon signing a document filed with the court."

While it is almost always preferable appellate advocacy to cull the number of issues on appeal as soon as possible, the rules provide no sanction for a party that selects which issues to appeal only after observing how the trial court dealt with them in its Rule 1925 opinion.

As the court held in Eiser:

"The decision to raise these issues within the mandates of the Rules of Appellate Procedure is one entrusted to counsel. To be sure, counsel could have elected to focus on the few issues he decided were most likely to result in reversal as a matter of strategy. Other attorneys may have more judiciously narrowed the issues ... [but] it was reasonable for appellants' attorney to err on the side of caution. Although a shorter Rule 1925(b) statement may have proved more effective, counsel's decision not to file one did not, itself, provide a basis to find waiver."

Ultimately, the warnings from appellate courts mentioned above about the questionable wisdom of raising numerous appellate issues appear to have prevailed in Eiser. The case was remanded

and on the subsequent appeal on the merits the jury's verdict was affirmed in an unpublished memorandum opinion in Eiser v. Brown & Williamson Tobacco, 11 A.3d 1023 (Pa. Super. 2010). So while numerous issues may be raised consistently with Rule 1925, that remains a bad idea.

For years it appeared that waiver as punishment for raising too many appellate issues under Rule 1925 was a dead letter in Pennsylvania. Since Eiser, only one appellate decision has allowed a blanket waiver finding—against a pro se litigant who filed a Rule 1925 statement that was not only "lengthy," but also an "incoherent, confusing, redundant, defamatory rant," in Jiricko v. Geico Insurance, 947 A.2d 206, 213 (Pa. Super. 2008). With pro se litigants, a court may ultimately have no choice.

However, the history of waiver of appellate issues under Rule 1925 bears repeating as a result of the relatively recent decision in Maya v. Benefit Risk Management, 2012 Phila. Ct. Com. Pl. Lexis 449 (Pa. C.P. Philadelphia Co. Dec. 31, 2012).

Maya appears to be as complicated a case as the Pennsylvania Supreme Court confronted in Eiser. It was also a products liability case. Maya involved serious injuries from Stevens-Johnson syndrome and toxic epidermal necrolysis—the same condition recently involved in the landmark U.S. Supreme Court decision in Mutual Pharmaceutical v. Bartlett, 133 S. Ct. 2466 (2013).

Like Eiser, the litigation in Maya had continued for years. It involved, among other things, issues of first impression in Pennsylvania concerning products liability litigation involving over-the-counter drugs. The trial alone produced "46 days of testimony," according to the opinion, and resulted in a multimillion-dollar verdict.

Despite a paucity of appellate authority after Eiser allowing the sort of blanket waiver sanction disapproved in that case, the court in Maya took the blanket waiver approach, urging that a represented defendant in a major piece of litigation should be punished with such waiver for preserving too many issues. While Eiser held that an appellant's preservation of 24 issues in a 15-page Rule 1925 statement was permissible in a large case, Maya imposed waiver where the would-be appellant's statement was "11 pages outlining 23 numbered paragraphs/issues." Even allowing for "sub-issues," it is not readily apparent that any bounds of legalistic propriety were transgressed in Maya. Perhaps there was more going on in Maya than meets the eye, but if there were, it would have been helpful for the opinion at least to distinguish Eiser on some basis. Somewhat surprisingly, the court's ruling in Maya that the appeal be quashed on waiver grounds does not come to grips with, or even mention, the otherwise controlling Eiser precedent. In complex cases, the rule cannot be that the sheer number of errors effectively insulates the court allegedly making them from review.

An alternative to blanket waiver does exist for a court bedeviled by what it views as an improper and onerous Rule 1925 statement. Instead of waiver, the proper remedy under Rule 1925 for a statement of appellate issues that a trial court finds improper and unworkable as the basis for an opinion is to order the party to file an amended statement. This alternative was recognized by the Pennsylvania Supreme Court in Tucker v. R.M. Tours, 602 Pa. 147, 153-54, 977 A.2d 1170,

1174 (2009), as the correct course for a court to follow in dealing with a "nonconcise" statement under Rule 1925:

"The trial court's sua sponte order directing appellants to file a second Rule 1925(b) statement was merely enforcing its initial Rule 1925 order. ... When confronted with a nonconcise Rule 1925(b) statement, a trial court has the discretion to sua sponte direct an appellant to file a second [such] statement."

As Maya and Eiser both demonstrate, the stakes can be very high in appellate practice. In such situations, counsel may well be tempted to preserve more error points than could ever actually be adjudicated on appeal. Should that occur, the more prudent course for both the court and counsel is to follow the Tucker alternative and order the filing of a more manageable Rule 1925 statement.

Rule 1925. Opinion in Support of Order.

(a) *Opinion in support of order.*

(1) *General rule.*—Except as otherwise prescribed by this rule, upon receipt of the notice of appeal, the judge who entered the order giving rise to the notice of appeal, if the reasons for the order do not already appear of record, shall forthwith file of record at least a brief opinion of the reasons for the order, or for the rulings or other errors complained of, or shall specify in writing the place in the record where such reasons may be found.

If the case appealed involves a ruling issued by a judge who was not the judge entering the order giving rise to the notice of appeal, the judge entering the order giving rise to the notice of appeal may request that the judge who made the earlier ruling provide an opinion to be filed in accordance with the standards above to explain the reasons for that ruling.

(2) *Children's fast track appeals.*—In a children's fast track appeal:

(i) The concise statement of errors complained of on appeal shall be filed and served with the notice of appeal required by Rule 905. *See* Pa.R.A.P. 905(a)(2).

(ii) Upon receipt of the notice of appeal and the concise statement of errors complained of on appeal required by Rule 905(a)(2), the judge who entered the order giving rise to the notice of appeal, if the reasons for the order do not already appear of record, shall within 30 days file of record at least a brief opinion of the reasons for the order, or for the rulings or other errors complained of, which may, but need not, refer to the transcript of the proceedings.

(3) *Appeals arising under the Pennsylvania Code of Military Justice.*—In an appeal arising under the Pennsylvania Code of Military Justice, the concise statement of errors complained of on appeal shall be filed and served with the notice of appeal. *See* Pa.R.A.P. 4004(b).

(b) *Direction to file statement of errors complained of on appeal; instructions to the appellant and the trial court.*—If the judge entering the order giving rise to the notice of appeal ("judge") desires clarification of the errors complained of on appeal, the judge may enter an order directing the appellant to file of record in the trial court and serve on the judge a concise statement of the errors complained of on appeal ("Statement").

(1) *Filing and service.*—Appellant shall file of record the Statement and concurrently shall serve the judge. Filing of record and service on the judge shall be in person or by mail as provided in Pa.R.A.P. 121(a) and shall be complete on mailing if appellant obtains a United States Postal Service Form 3817, Certificate of Mailing, or other similar United States Postal Service form from which the date of deposit can be verified in compliance with the requirements set forth in Pa.R.A.P. 1112(c). Service on parties shall be concurrent

with filing and shall be by any means of service specified under Pa.R.A.P. 121(c).

(2) *Time for filing and service.*—The judge shall allow the appellant at least 21 days from the date of the order's entry on the docket for the filing and service of the Statement. Upon application of the appellant and for good cause shown, the judge may enlarge the time period initially specified or permit an amended or supplemental Statement to be filed. Good cause includes, but is not limited to, delay in the production of a transcript necessary to develop the Statement so long as the delay is not attributable to a lack of diligence in ordering or paying for such transcript by the party or counsel on appeal. In extraordinary circumstances, the judge may allow for the filing of a Statement or amended or supplemental Statement *nunc pro tunc*.

(3) *Contents of order.*—The judge's order directing the filing and service of a Statement shall specify:

(i) the number of days after the date of entry of the judge's order within which the appellant must file and serve the Statement;

(ii) that the Statement shall be filed of record;

(iii) that the Statement shall be served on the judge pursuant to paragraph (b)(1);

(iv) that any issue not properly included in the Statement timely filed and served pursuant to subdivision (b) shall be deemed waived.

(4) *Requirements; waiver.*

(i) The Statement shall set forth only those rulings or errors that the appellant intends to challenge.

(ii) The Statement shall concisely identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge. The judge shall not require the citation to authorities; however, appellant may choose to include pertinent authorities in the Statement.

(iii) The judge shall not require appellant or appellee to file a brief, memorandum of law, or response as part of or in conjunction with the Statement.

(iv) The Statement should not be redundant or provide lengthy explanations as to any error. Where non-redundant, non-frivolous issues are set forth in an appropriately concise manner, the number of errors raised will not alone be grounds for finding waiver.

(v) Each error identified in the Statement will be deemed to include every subsidiary issue contained therein which was raised in the trial court; this provision does not in any way limit the obligation of a criminal appellant to delineate clearly the scope of claimed constitutional errors on appeal.

(vi) If the appellant in a civil case cannot readily discern the basis for the judge's decision, the appellant shall preface the Statement with an explanation as to why the Statement has identified the errors in only general terms. In such a case, the generality of the

Statement will not be grounds for finding waiver.

(vii) Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived.

(c) *Remand.*

(1) An appellate court may remand in either a civil or criminal case for a determination as to whether a Statement had been filed and/or served or timely filed and/or served.

(2) Upon application of the appellant and for good cause shown, an appellate court may remand in a civil case for the filing nunc pro tunc of a Statement or for amendment or supplementation of a timely filed and served Statement and for a concurrent supplemental opinion.

(3) If an appellant in a criminal case was ordered to file a Statement and failed to do so, such that the appellate court is convinced that counsel has been per se ineffective, the appellate court shall remand for the filing of a Statement nunc pro tunc and for the preparation and filing of an opinion by the judge.

(4) In a criminal case, counsel may file of record and serve on the judge a statement of intent to file an *Anders/McClendon* brief in lieu of filing a Statement. If, upon review of the *Anders/McClendon* brief, the appellate court believes that there are arguably meritorious issues for review, those issues will not be waived; instead, the appellate court may remand for the filing of a Statement, a supplemental opinion pursuant to Rule 1925(a), or both. Upon remand, the trial court may, but is not required to, replace appellant's counsel.

(d) *Opinions in matters on petition for allowance of appeal.*—Upon receipt of notice of the filing of a petition for allowance of appeal under Rule 1112(c) (appeals by allowance), the appellate court below which entered the order sought to be reviewed, if the reasons for the order do not already appear of record, shall forthwith file of record at least a brief statement, in the form of an opinion, of the reasons for the order.

Official Note

Subdivision (a) The 2007 amendments clarify that a judge whose order gave rise to the notice of appeal may ask a prior judge who made a ruling in question for the reasons for that judge's decision. In such cases, more than one judge may issue separate Rule 1925(a) opinions for a single case. It may be particularly important for a judge to author a separate opinion if credibility was at issue in the pretrial ruling in question. See, e.g., *Commonwealth v. Yogel*, 307 Pa. Super. 241, 243-44, 453 A.2d 15, 16 (1982). At the same time, the basis for some pre-trial rulings will be clear from the order and/or opinion issued by the judge at the time the ruling was made, and there will then be no reason to seek a separate opinion from that judge under this rule. See, e.g., Pa.R.Crim.P. 581(I). Likewise, there will be times when the prior judge may explain the ruling to the judge whose order has given rise to the notice of appeal in sufficient detail that there will be only one opinion under Rule 1925(a), even though there are multiple rulings at issue. The time period for transmission of the record is specified in Pa.R.A.P. 1931, and that rule was concurrently amended to expand the time period for the preparation of the opinion and transmission of the record.

Subdivision (b) This subdivision permits the judge whose order gave rise to the notice of appeal ("judge") to ask for a statement of errors complained of on appeal ("Statement") if the record is inadequate and the judge needs to clarify the errors complained of. The term "errors" is meant to encourage appellants to use the Statement as an opportunity to winnow the issues, recognizing that they will ultimately need to be refined to a statement that will comply with the requirements of Pa.R.A.P. 2116. Nonetheless, the term "errors" is intended in this context to be expansive, and it encompasses all of the reasons the trial court should not have reached its decision or judgment, including, for example, those that may not have been decisions of the judge, such as challenges to jurisdiction.

Paragraph (b)(1) This paragraph maintains the requirement that the Statement be both filed of record in the trial court and served on the judge. Service on the judge may be accomplished by mail or by personal service. The date of mailing will be considered the date of filing and of service upon the judge only if counsel obtains a United States Postal Service form from which the date of mailing can be verified, as specified in Pa.R.A.P. 1112(c). Counsel is advised to retain date-stamped copies of the postal forms (or pleadings if served by hand), in case questions arise later as to whether the Statement was timely filed or served on the judge.

Paragraph (b)(2) This paragraph extends the time period for drafting the Statement from 14 days to at least 21 days, with the trial court permitted to enlarge the time period or to allow the filing of an amended or supplemental Statement upon good cause shown. In *Commonwealth v. Mitchell*, 588 Pa. 19, 41, 902 A.2d 430, 444 (2006), the Court expressly observed that a Statement filed "after several extensions of time" was timely. An enlargement of time upon timely application might be warranted if, for example, there was a serious delay in the transcription of the notes of testimony or in the delivery of the order to appellate counsel. A trial court should enlarge the time or allow for an amended or supplemental Statement when new counsel is retained or appointed. A supplemental Statement may also be appropriate when the ruling challenged was so non-specific—e.g., "Motion Denied"—that counsel could not be sufficiently definite in the initial Statement.

In general, nunc pro tunc relief is allowed only when there has been a breakdown in the process constituting extraordinary circumstances. See, e.g., *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 577 Pa. 231, 248-49, 843 A.2d 1223, 1234 (2004) ("We have held that fraud or the wrongful or negligent act of a court official may be a proper reason for holding that a statutory appeal period does not run and that the wrong may be corrected by means of a petition filed nunc pro tunc.") Courts have also allowed nunc pro tunc relief when "non-negligent circumstances, either as they relate to appellant or his counsel" occasion delay. *McKeown v. Bailey*, 731 A.2d 628, 630 (Pa. Super. 1999). However, even when there is a breakdown in the process, the appellant must attempt to remedy it within a "very short duration" of time. Id.; *Amicone v. Rok*, 839 A.2d 1109, 1113 (Pa. Super. 2003) (recognizing a breakdown in process, but finding the delay too long to justify nunc pro tunc relief).

Paragraph (b)(3) This paragraph specifies what the judge must advise appellants when ordering a Statement.

Paragraph (b)(4) This paragraph sets forth the parameters for the Statement and explains what constitutes waiver. It should help counsel to comply with the concise-yet-sufficiently-

detailed requirement and avoid waiver under either *Lineberger v. Wyeth*, 894 A.2d 141, 148-49 (Pa. Super. 2006) or *Kanter v. Epstein*, 866 A.2d 394, 400-03 (Pa. Super. 2004), allowance of appeal denied, 584 Pa. 678, 880 A.2d 1239 (2005), cert. denied sub nom. *Spector Gadon & Rosen, P.C. v. Kanter*, 546 U.S. 1092 (2006). The paragraph explains that the Statement should be sufficiently specific to allow the judge to draft the opinion required under 1925(a), and it provides that the number of issues alone will not constitute waiver—so long as the issues set forth are non-redundant and non-frivolous. It allows appellants to rely on the fact that subsidiary issues will be deemed included if the overarching issue is identified and if all of the issues have been properly preserved in the trial court. This provision has been taken from the United States Supreme Court rules. See Sup. Ct. R. 14(1). This paragraph does not in any way excuse the responsibility of an appellant who is raising claims of constitutional error to raise those claims with the requisite degree of specificity. This paragraph also allows—but does not require—an appellant to state the authority upon which the appellant challenges the ruling in question, but it expressly recognizes that a Statement is not a brief and that an appellant shall not file a brief with the Statement. This paragraph also recognizes that there may be times that a civil appellant cannot be specific in the Statement because of the non-specificity of the ruling complained of on appeal. In such instances, civil appellants may seek leave to file a supplemental Statement to clarify their position in response to the judge's more specific Rule 1925(a) opinion.

Subdivision (c) The appellate courts have the right under the Judicial Code to "affirm, modify, vacate, set aside or reverse any order brought before it for review, and may remand the matter and direct the entry of such appropriate order, or require such further proceedings to be had as may be just under the circumstances." 42 Pa.C.S. § 706. The following additions to the rule are based upon this statutory authorization.

Paragraph (c)(1) This paragraph applies to both civil and criminal cases and allows an appellate court to seek additional information—whether by supplementation of the record or additional briefing—if it is not apparent whether an initial or supplemental Statement was filed and/or served or timely filed and/or served.

Paragraph (c)(2) This paragraph allows an appellate court to remand a civil case to allow an initial, amended, or supplemental Statement and/or a supplemental opinion. See also 42 Pa.C.S. § 706.

Paragraph (c)(3) This paragraph allows an appellate court to remand in criminal cases only when the appellant has completely failed to respond to an order to file a Statement. It is thus narrower than (c)(2), above. Prior to these amendments of this rule, the appeal was quashed if no timely Statement was filed or served; however, because the failure to file and serve a timely Statement is a failure to perfect the appeal, it is presumptively prejudicial and "clear" ineffectiveness. See, e.g., *Commonwealth v. Halley*, 582 Pa. 164, 172, 870 A.2d 795, 801 (2005); *Commonwealth v. West*, 883 A.2d 654, 657 (Pa. Super. 2005). Direct appeal rights have typically been restored through a post-conviction relief process, but when the ineffectiveness is apparent and per se, the court in *West* recognized that the more effective way to resolve such per se ineffectiveness is to remand for the filing of a Statement and opinion. See *West*, 883 A.2d at 657. The procedure set forth in *West* is codified in paragraph (c)(3). As the *West* court recognized, this rationale does not apply when waiver occurs due to the improper filing of a Statement. In such circumstances, relief may occur only through the post-conviction relief process and only upon demonstration by the

appellant that, but for the deficiency of counsel, it was reasonably probable that the appeal would have been successful. An appellant must be able to identify per se ineffectiveness to secure a remand under this section, and any appellant who is able to demonstrate per se ineffectiveness is entitled to a remand. Accordingly, this paragraph does not raise the concerns addressed in *Johnson v. Mississippi*, 486 U.S. 578, 588-89 (1988) (observing that where a rule has not been consistently or regularly applied, it is not—under federal law—an adequate and independent state ground for affirming petitioner's conviction).

Paragraph (c)(4) This paragraph clarifies the special expectations and duties of a criminal lawyer. Even lawyers seeking to withdraw pursuant to the procedures set forth in *Anders v. California*, 386 U.S. 738 (1967) and *Commonwealth v. McClendon*, 495 Pa. 467, 434 A.2d 1185 (1981) are obligated to comply with all rules, including the filing of a Statement. See *Commonwealth v. Myers*, 897 A.2d 493, 494-96 (Pa. Super. 2006); *Commonwealth v. Ladamus*, 896 A.2d 592, 594 (Pa. Super. 2006). However, because a lawyer will not file an *Anders/McClendon* brief without concluding that there are no non-frivolous issues to raise on appeal, this amendment allows a lawyer to file, in lieu of a Statement, a representation that no errors have been raised because the lawyer is (or intends to be) seeking to withdraw under *Anders/McClendon*. At that point, the appellate court will reverse or remand for a supplemental Statement and/or opinion if it finds potentially non-frivolous issues during its constitutionally required review of the record.

Subdivision (d) was formerly (c). The text has not been revised, except to update the reference to Pa.R.A.P. 1112(c).

The 2007 amendments attempt to address the concerns of the bar raised by cases in which courts found waiver: (a) because the Statement was too vague; or (b) because the Statement was so repetitive and voluminous that it did not enable the judge to focus on the issues likely to be raised on appeal. See, e.g., *Lineberger v. Wyeth*, 894 A.2d 141, 148-49 (Pa. Super. 2006); *Kanter v. Epstein*, 866 A.2d 394, 400-03 (Pa. Super. 2004), allowance of appeal denied, 584 Pa. 678, 880 A.2d 1239 (2005), cert. denied sub nom. *Spector Gadon & Rosen, P.C. v. Kanter*, 546 U.S. 1092 (2006). Courts have also cautioned, however, "against being too quick to find waiver, claiming that Rule 1925(b) statements are either too vague or not specific enough." *Astorino v. New Jersey Transit Corp.*, 912 A.2d 308, 309 (Pa. Super. 2006).

While conciseness and vagueness are very case-specific inquiries, certain observations may be helpful. First, the Statement is only the first step in framing the issues to be raised on appeal, and the requirements of Pa.R.A.P. 2116 are even more stringent. Thus, the Statement should be viewed as an initial winnowing. Second, when appellate courts have been critical of sparse or vague Statements, they have not criticized the number of issues raised but the paucity of useful information contained in the Statement. Neither the number of issues raised nor the length of the Statement alone is enough to find that a Statement is vague or non-concise enough to constitute waiver. See *Astorino v. New Jersey Transit Corp.*, 912 A.2d 308, 309 (Pa. Super. 2006). The more carefully the appellant frames the Statement, the more likely it will be that the judge will be able to articulate the rationale underlying the decision and provide a basis for counsel to determine the advisability of appealing that issue. Thus, counsel should begin the winnowing process when preparing the Statement and should articulate specific rulings with which the appellant takes issue and why. Nothing in the rule requires an appellant to articulate the arguments within a

Statement. It is enough for an appellant—except where constitutional error must be raised with greater specificity—to have identified the rulings and issues that comprise the putative trial court errors.

Source

The provisions of this Rule 1925 amended May 16, 1979, effective September 30, 1979, 9 Pa.B. 1740; amended December 30, 1987, effective January 16, 1988 and shall govern all matters thereafter commence and, insofar as just and practicable, matters then pending, 18 Pa.B. 245; amended May 10, 2007, effective 60 days after adoption, 37 Pa.B. 2405; amended January 13, 2009, effective as to all appeals filed 60 days or more after adoption, 39 Pa.B. 1094; amended November 15, 2013, effective in 30 days, 43 Pa.B. 7071; amended March 18, 2014, effective April 18, 2014, 44 Pa.B. 2053. Immediately preceding text appears at serial pages (369567) to (369572).
