Appellate Court Procedural Rules Committee

The Appellate Court Procedural Rules Committee proposes to amend Pennsylvania Rules of Appellate Procedure 120, 121, 907, 1112, 1311, and 3304. The amendment is being submitted to the bench and bar for comments and suggestions prior to its submission to the Supreme Court.

Proposed new material is underlined while deleted material is bracketed.

All communications in reference to the proposed amendment should be sent no later than **February 24, 2014** to:

Dean R. Phillips, Chief 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

An Explanatory Comment precedes the proposed amendment and has been inserted by this Committee for the convenience of the bench and bar. It will not constitute part of the rule nor will it be officially adopted or promulgated.

By the Appellate Court Procedural Rules Committee

Honorable Renee Cohn Jubelirer,

Chair

EXPLANATORY COMMENT

The Appellate Court Procedural Rules Committee proposes to amend Rules of Appellate Procedure 120, 121, 907, 1112, 1311, and 3304 to clarify several procedural points relative to the representation of parties – and particularly criminal defendants and Post-Conviction Relief Act ("PCRA") petitioners – on appeal. Some of the principles apply more broadly, however.

Pa.R.Crim.P. 576(A)(4) and Pa.R.A.P. 3304 proscribe hybrid representation, but the appellate rule is included in a chapter governing the Business of the Supreme Court, which by its terms does not apply to matters in the intermediate appellate courts. Hybrid representation is prohibited in the intermediate appellate courts, just as it is in the Supreme Court, however. *See Commonwealth v. Ellis*, 534 Pa. 176, 626 A.2d 1137, 1139 (1993); *Commonwealth v. Cooper*, 611 Pa. 437, 447 n.9, 27 A.3d 994, 1000 n.9 (2011). To make it clear that the prohibition against hybrid representation applies to all appellate courts, the Committee proposes to move the text of current Pa.R.A.P. 3304 into a new paragraph of Pa.R.A.P. 121, and to move the current discussion of *pro se* representation from Pa.R.A.P. 121(a) to Pa.R.A.P. 121(f).

In addition, the Committee recommends revising the language in Pa.R.A.P. 907, 1112, and 1311 and their notes to avoid any confusion about when an attorney has an obligation to continue to represent a party on appeal. Currently, Pa.R.A.P. 907, 1112, and 1311 provide attorneys with an option to praecipe for withdrawal within thirty days after the docketing of an appeal or the filing of a petition for allowance of appeal or for permission to take an interlocutory appeal. Counsel appointed at the trial level who are

obligated to continue the representation through appeal, *see, e.g.*, Pa.R.Crim.P. 120(A)(4) and 122(B)(2), cannot withdraw by just filing a praecipe in an appellate court, however. Instead, counsel must file a motion to withdraw in the appellate court which can either grant or deny the motion or refer it to the trial court to grant or deny. The clarifying language in the notes of those rules (that "counsel may nonetheless be subject to trial court supervision pursuant to Pa.R.Crim.P. 904") is overly narrow and non-specific. Pa.R.Crim.P. 904 discusses representation only on PCRA, even though counsel appointed to represent a criminal defendant is likewise required to continue the representation through direct appeal, and even though there are other proceedings (such as delinquency and dependency), in which counsel are similarly appointed through appeal. Moreover, the note fails to state that an attorney that has been appointed cannot withdraw by praecipe. And, although appellate courts frequently request that trial courts assist with issues arising during appeal concerning representation, the trial court does not as a general matter retain supervision over counsel while a case is on appeal. The proposed recommendation that follows addresses these concerns.

Rule 120. Entry of Appearance.

[(a) Filing.] 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 Rules 907(b), 1112(f), 1311(d), or 1514(d). New counsel appearing for a party after docketing pursuant to Rule 907(b), 1112(f), 1311(d), or 1514(d) shall file an entry of appearance simultaneous**ly** 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 the attorney shall file a certificate of service pursuant to **[Subdivision] paragraph** (d) of Rule 121 and **to** Rule 122. Where new counsel enters an appearance on behalf of a party currently represented by counsel and there is no simultaneous withdrawal of appearance, new counsel shall serve the party that new counsel represents and all other counsel of record and file a certificate of service.

Official Note:

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Rule 121. Filing and Service.

(a) *Filing*.—Papers required or permitted to be filed in an appellate court shall be filed with the prothonotary. Filing may be accomplished by mail addressed to the prothonotary, but except as otherwise provided by these rules, filing shall not be timely unless the papers are received by the prothonotary within the time fixed for filing. If an application under these rules requests relief which may be granted by a single judge, a judge in extraordinary circumstances may permit the application and any related papers to be filed with that judge. In that event the judge shall note thereon the date of filing and shall thereafter transmit such papers to the clerk.

[A pro se filing submitted by a prisoner incarcerated in a correctional facility is deemed filed as of the date it is delivered to the prison authorities for purposes of mailing or placed in the institutional mailbox, as evidenced by a properly executed prisoner cash slip or other reasonably verifiable evidence of the date that the prisoner deposited the pro se filing with the prison authorities.]

(b) Service of all papers required.

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(c) Manner of service.

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(d) Proof of service.

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(e) Additional time after service by mail and commercial carrier.

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(f) *Pro se and hybrid representation*.—A *pro se* filing submitted by a prisoner incarcerated in a correctional facility is deemed filed as of the date it is delivered to the prison authorities for purposes of mailing or placed in the institutional mailbox, as evidenced by a properly executed prisoner cash slip or other reasonably verifiable evidence of the date that the prisoner deposited the *pro se* filing with the prison authorities.

Where a litigant is represented by an attorney before the court but submits for filing *pro se* a petition, motion, brief or any other type of pleading in the matter, it shall not be docketed but shall instead be notated on the docket and forwarded to counsel of record; except that in the Superior Court a timely request to proceed *pro se* or for replacement counsel will be docketed as well as provided to counsel of record and will be referred to the trial court for a determination whether the appellant shall proceed *pro se*.

Official Note:

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***Paragraph (f)*—As to *pro se* filings by persons incarcerated in correctional facilities, *see Commonwealth v. Jones*, 549 Pa. 58, 700 A.2d 423 (1997); *Smith v. Pa. Bd. of Prob. & Parole*, 546 Pa. 115, 683 A.2d 278 (1996); *Commonwealth v. Johnson*, 860 A.2d 146 (Pa. Super. 2004). The rule on hybrid representation is premised on *Commonwealth v. Ellis*, 534 Pa. 176, 626 A.2d 1137 (1993) and is to be distinguished from litigants who are proceeding *pro se*. *See Commonwealth v. Jette*, 611 Pa. 166, 23 A.3d 1032, 1044 (2011) ("Therefore, we reiterate that the proper response to any pro se pleading is to refer the pleading to counsel, and to take no further action on the pro se pleading unless counsel forwards a motion. Moreover, once the brief has been filed, any right to insist upon self-representation has expired."). The right to proceed *pro se* at the trial level is grounded in the federal constitution, but it is triggered only when a timely and unequivocal request is made in the trial court. *Commonwealth v. El*, 602 Pa. 126, 135, 977 A.2d 1158, 1163 (2009). A court has discretion in responding to a conditional or untimely request in the trial court. *Id*. at 139, 977 A.2d at 1165 (after meaningful trial proceedings have begun, a request to proceed *pro se* is subject to the trial court's sound discretion); *Commonwealth v. Brooks*, 66 A.3d 352 (Pa.**

Super. 2013) (evaluating the trial court's decision to deny a conditional request to proceed *pro se* as an abuse of discretion). There is no comparable federal constitutional right to proceed *pro se* on appeal. *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000). At the least, an appellant's request to proceed *pro se* on appeal must precede the filing of a counseled brief. *Jette*, 611 Pa. at 186, 23 A.3d at 1044.

Rule 907. Docketing of Appeal.

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(b) Entry of appearance. Upon the docketing of the appeal the prothonotary of the appellate court shall note on the record as counsel for the appellant the name of counsel, if any, set forth in or endorsed upon the notice of appeal, and, as counsel for other parties, counsel, if any, named in the proof of service. **Unless that party is entitled by law to be represented by counsel on appeal, t[T]**he prothonotary of the appellate court shall upon praecipe of **[any such]** counsel **[for other parties]**, filed within 30 days after **[filing]** **the docketing** of the notice of appeal, strike off or correct the record of appearances. Thereafter**, and at any time if a party is entitled by law to be represented by counsel on appeal,** a counsel's appearance for a party may not be withdrawn without leave of court**,** unless another lawyer has entered or simultaneously enters an appearance for the party.

Official Note:

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[With regard to subdivision (b) and withdrawal of appearance without leave of the appellate court, counsel may nonetheless be subject to trial court supervision pursuant to Pa.R.Crim.P. 904 (Appointment of counsel: forma pauperis).] **A party may be entitled to the representation of counsel on appeal by statute, by rule, or by case law. For example, the Rules of Criminal Procedure provide that counsel appointed in the trial court is to continue representation through direct appeal (Pa.R.Crim.P. 120(A)(4) and Pa.R.Crim.P. 122(B)(2)) and when appointed in a post-conviction proceeding (Pa.R.Crim.P. 904(F)(2) and Pa.R.Crim.P. 904(H)(2)(b)). The same is true when counsel enters an appearance on behalf of a juvenile in a delinquency matter or on behalf of a child or other party in a dependency matter. Pa.R.J.C.P. 150(B), 151, Pa.R.J.C.P. 1150(B), 1151(B), (E). Because the rule specifies that withdrawal by a simple praecipe is available only to parties other than an appellant, it would be rare for counsel in such cases to consider withdrawing by praecipe, but the 2014 amendment to the**

rule avoids any possibility of confusion by clarifying that withdrawal by praecipe is available only in matters that do not otherwise require court permission to withdraw in addition to being available only to parties other than the appellant.

If a party is entitled to representation on appeal, the appellate court will presume that counsel that represented the party in the trial court will also represent the party on appeal, and counsel will be entered on the appellate court docket. In order to withdraw in such cases, either (1) new counsel must enter an appearance in the appellate court prior to or at the time of withdrawal; (2) counsel must provide the appellate court with an order of the trial court authorizing withdrawal; or (3) counsel must petition the appellate court to withdraw as counsel. Counsel for parties entitled to representation on appeal are cautioned that if any critical filing in the appellate process is omitted because of an omission by counsel, and if the party ordinarily would lose appeal rights because of that omission, counsel may be subject to discipline.

Rule 1112. Appeals by Allowance.

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(f) Entry of appearance. Upon the filing of the petition for allowance of appeal the Prothonotary of the Supreme Court shall note on the record as counsel for the petitioner the name of his or her counsel, if any, set forth in or endorsed upon the petition for allowance of appeal, and, as counsel for other parties, counsel, if any, named in the proof of service. **Unless that party is entitled by law to be represented by counsel on appeal, t[T]**he Prothonotary shall upon praecipe of any such counsel for other parties, filed at any time within 30 days after filing of the petition, strike off or correct the record of appearance. **If entry of appearance in the trial court extends through appeals [Thereafter, a]** counsel's appearance for a party may not be withdrawn without leave of court**. Appearance cannot be withdrawn without leave of court for counsel who have not filed a praecipe to correct appearance within the first 30 days after the appeal is docketed,** unless another lawyer has entered or simultaneously enters an appearance for the party.

Official Note:

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[With regard to Subdivision (f) and withdrawal of appearance without leave of the appellate court, counsel may nonetheless be subject to trial court supervision pursuant to Pa.R.Crim.P. 904 (Entry of Appearance and Appointment of Counsel; In Forma Pauperis).] The Rules of Criminal Procedure provide that

counsel appointed in the trial court is to continue representation through direct appeal (Pa.R.Crim.P. 120(A)(4) and Pa.R.Crim.P. 122(B)(2)) and when appointed in a post-conviction proceeding (Pa.R.Crim.P. 904(F)(2) and Pa.R.Crim.P. 904(H)(2)(b)). The same is true when counsel enters an appearance on behalf of a juvenile in a delinquency matter or on behalf of a child or other party in a dependency matter. Pa.R.J.C.P. 150(B), 151, Pa.R.J.C.P. 1150(B), 1151(B), (E). Because the rule specifies that withdrawal by a simple praecipe is available only to parties other than an appellant, it would be rare for counsel in such cases to consider withdrawing by praecipe, but the 2014 amendment to the rule avoids any possibility of confusion by clarifying that withdrawal by praecipe is available only in matters that do not otherwise require court permission to withdraw in addition to being available only to parties other than the appellant.

Rule 1311. Interlocutory Appeals by Permission.

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(d) Entry of appearance. Upon the filing of the petition for permission to appeal the prothonotary of the appellate court shall note on the record as counsel for the petitioner the name of counsel, if any, set forth in or endorsed upon the petition for permission to appeal, and, as counsel for other parties, counsel, if any, named in the proof of service. **Unless that party is entitled by law to be represented by counsel on appeal, t[T]**he prothonotary shall upon praecipe of any such counsel for other parties, filed at any time within 30 days after filing of the petition, strike off or correct the record of appearance. **If entry of appearance in the trial court extends through appeals [Thereafter a]** counsel's appearance for a party may not be withdrawn without leave of court**[,].** **The court must also grant permission to withdraw for any other counsel who have not filed a praecipe to correct appearance within the first 30 days after the appeal is docketed,** unless another lawyer has entered or simultaneously enters an appearance for the party.

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[With regard to subdivision (d) and withdrawal of appearance without leave of the appellate court, counsel may nonetheless be subject to trial court supervision pursuant to Pa.R.Crim.P. 904 (Entry of Appearance and Appointment of Counsel; In Forma Pauperis).] **The Rules of Criminal Procedure provide that counsel appointed in the trial court is to continue representation through direct appeal (Pa.R.Crim.P. 120(A)(4) and Pa.R.Crim.P. 122(B)(2)) and when appointed in a post-conviction proceeding (Pa.R.Crim.P. 904(F)(2) and Pa.R.Crim.P.**

904(H)(2)(b)). The same is true when counsel enters an appearance in a delinquency matter or on behalf of a child in a dependency matter. Pa.R.J.C.P. 150(B), 151, Pa.R.J.C.P. 1150(B), 1151(B), (E). Because the rule specifies that withdrawal by a simple praecipe is available only to parties other than an appellant, it would be rare for counsel in such cases to consider withdrawing by praecipe, but the 2014 amendment to the rule avoids any possibility of confusion by clarifying that withdrawal by praecipe is available only in matters that do not otherwise require court permission to withdraw in addition to being available only to parties other than the appellant.

[Rule 3304. Hybrid Representation.

Where a litigant is represented by an attorney before the Court and the litigant submits for filing a petition, motion, brief or any other type of pleading in the manner, it shall not be docketed but forwarded to counsel of record.
Official Note: The present rule is premised on *Commonwealth v. Ellis*, 534 A.2d 176, 626 A.2d 1137 (1993) and is to be distinguished from litigants who are pro se in litigation.]