Court to Mull How Sr. Judge Must Be Served Under Rule 1925

The Legal Intelligencer
By Amaris Elliott-Engel
September 01, 2009

Should appellate rights be quashed when a lawyer has filed a timely statement explaining the reasons for his or her appeal but has failed to personally serve the trial judge?

The state Supreme Court will take up the question of whether the loss of appellate rights is justified by the failure to personally serve a trial judge a statement of matters complained of on appeal. The court granted allocatur on the issue in *Berg v. Nationwide Mutual Insurance Co. Inc.* Aug. 19.

Appellate attorneys not involved with the case said they hope the Supreme Court will find that not every rule violation should result in the waiver of appellate rights.

In the case on appeal, counsel for petitioners Daniel and Sheryl Berg, Benjamin J. Mayerson of Mayerson Schreiber McDevitt in Spring City, Chester County, personally filed copies of statements of errors with the Berks County Prothonotary Jan. 17, 2008, less than an hour before the close of the day, according to the Bergs' petition for allowance of appeal. One copy was a time-stamped copy for the trial judge.

Mayerson asked where Berks Common Pleas Senior Judge Albert A. Stallone's chambers were so he could deliver the statement to the judge, the petition said. Stallone, however, does not have permanent chambers because of his senior status, and the prothonotary's office "refused to specify a location for the trial judge's chambers," the petition said. Instead, the prothonotary's staff told Mayerson that the judge would only want the original version of the statement of errors, and the statement would be delivered to the judge within 10 minutes.

According to Stallone's March 14, 2008, statement in lieu of memorandum opinion, Mayerson served a copy of the statement on opposing counsel and filed an original copy with the prothonotary, but Mayerson did not serve the judge a copy of the statement.

The judge said the Bergs' appellate rights should be deemed waived because of a failure to comply with Pennsylvania Rule of Appellate Procedure 1925 by not personally serving him the Bergs' statement.

Under Pennsylvania Rule of Appellate Procedure 1925(a), trial judges must write opinions explaining their decisions that are appealed by litigants. They may order appellants to write statements spelling out their appellate arguments. Litigants' 1925(b) statements are supposed to help trial judges write their explanatory opinions to appellate judges.

"It is not enough for the appellant to simply file the original concise statement with the prothonotary and expect the trial judge to find it; rather, the appellant's failure to serve the copy of the concise statement upon the trial judge, results in the waiver on appeal of any issues raised in that concise statement," Stallone wrote.

The Superior Court panel of former Superior Court Judge Maureen Lally-Green, Judge John M. Cleland and Senior Judge Patrick R. Tamilia agreed with Stallone in an unpublished opinion from Nov. 12, 2008, that there is a bright-line rule regarding compliance with Rule 1925(b) — violations will result in appeals being deemed waived.

The panel said that Stallone's order was "emphatic" that the Bergs, not the prothonotary, should serve the trial judge and that Rule 1925(b), which was amended in 2007, requires that a statement of errors complained on appeal must be served on the judge and also filed with the court prothonotary.

The Supreme Court also granted allocatur on the question of whether all of the Bergs' appellate issues should be waived for failing to personally serve the trial judge their 1925(b) statement when the trial judge's order failed to include the appellate rule's exact mandated language.

Carl A. Solano, of Schnader Harrison Segal & Lewis and a member of the firm's appellate practice group, said he hopes the Supreme Court finds that waiver is not appropriate when no harm is done by failing to comply with a technicality of the 1925(b) rule.

"I don't think it is fair to penalize his client with a waiver ruling when in fact the material got to the courthouse on time," Solano said. "Unfortunately, though, the rule is pretty explicit: You have to not only file, you also must serve it."

Solano said he also is concerned that 1925(b) can provide an incentive to some judges to try to find waiver.

Robert Byer, head of Duane Morris' trial practice group's appellate division and a former Commonwealth Court judge, asked what the difference is if the trial judge got the original statement from the prothonotary's office but wasn't personally served the statement.

RELATED HEADLINES

Better Late Than Never? Not Exactly, Panel Rules in Rule 1925(b) Case

MOST VIEWED ON THE LEGAL INTELLIGENCER

Judicial Conduct Complaint Was Filed Against Conahan in 2006
September 09, 2009

Ex-Luzerne County Judges Indicted For Racketeering
September 10, 2009

Drinker Biddle Makes Offers to Two-Thirds of Summer Class
September 09, 2009

Three Decisions That Employers And Employees Cannot Afford to Ignore
September 09, 2009

Malpractice Suit Tugs K&L Gates Into Long-Running Case

September 11, 2009

" *Berg* is a case that typifies just about everything that is wrong with 1925(b) in terms of the hypertechnical way most trial judges and most appellate judges try to use this as a waiver trap," Byer said. "It almost looks like the trial judge was just lying in wait."

Byer added that he was "shocked the Superior Court agreed with such nonsense and there were three good judges on the panel."

Howard J. Bashman, who runs an appellate boutique practice in Willow Grove, Pa., and is an appellate columnist for *The Legal* , said this case highlights a conflict between two aspects of the rule designed for the convenience of trial judges and the convenience of lawyers handling appeals.

The trial judge may have failed to comply with the part of the rule that mandates trial judges lay out the requirements of 1925(b) in their orders so lawyers don't have to look up the rule themselves, Bashman said. And the lawyer failed to personally serve the trial judge with the statement so the trial judge wouldn't have to obtain the statement from elsewhere in the courthouse, Bashman said.

This case appears to be a case where both the trial judge and the lawyer made a mistake, he said.

Bashman said that the Supreme Court should send the signal that it is important for lawyers to follow 1925(b) and serve trial judges in person but that a failure to personally serve judges shouldn't result in the waiver of appellate rights.

Solano, Byer and Bashman all said Mayerson could have solved his alleged problem in the prothonotary's office by mailing the statement to the trial judge because the rule allows for service on judges through the mail.

Mayerson said in an interview he should have mailed the statement when the prothonotary's office wouldn't give him the judge's location to personally serve the judge. But he said he actually was trying to be more thorough by driving to Berks County and personally serving the statement to the judge.

Mayerson argued that he fell into a waiver trap, and that waiver should be limited to situations where litigants fail to file their 1925(b) statements or other much more serious violations.

Nationwide's counsel, Michael Nelson of Nelson Levine de Luca & Horst in Blue Bell, Pa., could not be reached immediately for comment for this article. Nationwide's response to the Bergs' petition for allowance of appeal also could not be obtained immediately before publication.

In the underlying case, the Bergs sued Nationwide in an equity action over an automobile liability policy and a repair service program Nationwide offered to its policyholders. •

More Related Headlines >