The Legal Intelligencer



---

# Signs From the High Court of a More Sensible Use of Appellate Rule 1925

Howard J. Bashman
09-14-2009
**Upon Further Review**

If, like me, you were recently away on vacation, you may have missed news of two interesting developments involving the Pennsylvania Supreme Court and Pennsylvania Rule of Appellate Procedure 1925.

When a decision is appealed from a Pennsylvania state trial court to one of Pennsylvania's intermediate appellate courts, Pennsylvania Rule of Appellate Procedure 1925 requires the trial judge to issue an opinion explaining the basis for his or her ruling if no such explanation yet exists in the record. Rule 1925 also permits the trial judge to direct counsel for the party taking the appeal to identify — for the trial judge's benefit, in drafting a post-appeal opinion — the issues that the appellant intends to raise on appeal.

A large body of case law had developed around Rule 1925 as originally drafted because trial judges had maintained, and appellate courts had often agreed, that appellate review should be deemed forfeited if the appealing party's Rule 1925 statement was either too detailed or too vague, or was improperly filed, never filed or filed too late. A comprehensive set of amendments to Rule 1925 took effect in 2007 addressed at remedying many of these flaws in Rule 1925 as originally drafted.

The 2007 amendments told lawyers not to make their Rule 1925 statements too detailed or too vague, and the amendments also instructed trial judges to include specific instructions in their order directing that a Rule 1925 statement be filed concerning the deadline for filing and where and how the statement must be filed and served. But, as a recent decision and a separate order granting review by the Pennsylvania Supreme Court demonstrate, no amount of amendments can anticipate every conceivable manner in which lawyers and judges may foul-up even the most rudimentary of tasks.

On Aug. 19, Pennsylvania's highest court granted review of a case captioned *Berg v. Nationwide Mutual Insurance Co* . In *Berg* , the trial judge's order directing counsel for appellant to file a Rule 1925 statement of errors complained of on appeal omitted mandatory information specifying that the

statement must be both filed with the trial court's clerk's office and also separately served on the trial judge. The lawyer for the appellant, however, independently recognized a need to serve the Rule 1925 statement on the trial judge. Indeed, that lawyer went to the trial court's headquarters and personally filed the Rule 1925 statement and then asked where the judge's office was located so that the lawyer could personally drop off a copy of the 1925 statement at the judge's office, *The Legal* has previously reported.

Unfortunately, because the trial judge was a senior judge, that judge did not have a full-time office at the courthouse, and thus the clerk's office told the lawyer that he could simply depend on the clerk's office to get a copy of the Rule 1925 statement to the judge, which the clerk's office promised to do. The trial judge, unfortunately, apparently did not share the clerk's office's friendly spirit of assistance, as the trial judge ultimately recommended to the state Superior Court that the appellant's appeal should be dismissed because of appellant's counsel's failure to serve the Rule 1925 statement on the trial judge as the rule required.

Even more shockingly, the Superior Court agreed that the appeal had to be dismissed because the attorney for appellant, despite having timely filed the Rule 1925 statement, failed to serve the statement on the trial judge. Now, fortunately, sanity may prevail as the Pennsylvania Supreme Court has agreed to review this case.

The *Berg* case appears to present an instance where two aspects of Rule 1925, each intended for the purpose of convenience, were violated. The portion of the rule requiring the trial judge to expressly direct in the order requiring a Rule 1925 statement that the statement not merely be filed with the clerk's office but also be served on the trial judge by the applicable deadline was overlooked or ignored by the trial judge. This portion of the rule, which the trial judge failed to follow, is for the convenience of the lawyer, because it specifies that the rule's most important requirements be spelled out in the text of the order, so that the lawyer does not have to consult Rule 1925 itself to determine all that he is required to do.

Similarly, when the lawyer failed to serve a copy of the appellant's Rule 1925 statement on the trial judge, the lawyer violated an aspect of the rule that was intended for the convenience of the trial judge. Here, the lawyer could have satisfied that service requirement simply by placing a copy of the Rule 1925 statement in the mail to the trial judge. The rule imposes no personal service requirement, and thus any inability to find the judge's office in the courthouse, because no such office existed, is not a valid excuse.

Although two wrongs may not make a right, the facts that give rise to the *Berg* case are rather ironic, in that the trial court's order omitted the required mention of a need to serve the Rule 1925 statement on the trial judge, the lawyer then failed to serve the statement on the trial judge (despite the lawyer's independent knowledge of that requirement), and ultimately the appeal was dismissed as a result of the lawyer's failure to serve his otherwise timely filed Rule 1925 statement on the trial judge.

In my view, the Supreme Court should rule in *Berg* that an appellant's failure to serve a timely filed Rule 1925 statement on the trial judge is not grounds for rejecting an appeal, especially where the trial judge's Rule 1925 order omitted the required notice of the need to serve the statement on the trial judge, and where the lawyer nevertheless made a good faith effort to personally serve the statement on the trial judge's unfortunately nonexistent office.

Two days after the state Supreme Court issued its order granting review in *Berg* , that court issued its ruling in a case captioned *Tucker v. R.M. Tours* . The *Tucker* case also involved Rule 1925. In *Tucker* , after the trial court ordered counsel for appellant to file a Rule 1925 statement, appellant's counsel filed a 16-page Rule 1925 statement that the trial court found to be "unworkable" because the statement raised an improperly large number of lengthy issues.

Shortly thereafter, the trial court on its own motion ordered appellant to file an amended Rule 1925 statement that was more concise. Counsel for appellant then did file an amended Rule 1925 statement, but it was eight pages long and did not sufficiently cure the problems that had plagued the original Rule 1925 statement. On appeal, the Superior Court agreed that both Rule 1925 statements were defective and that the appellant had therefore waived its right to appeal.

However, in *Tucker* , the Superior Court also proceeded to hold that trial courts do not have the inherent power to request an amended Rule 1925 statement where the appellant's original Rule 1925 statement is too lengthy or too terse, too detailed or too vague. The state Supreme Court granted review in *Tucker* to examine that specific holding: whether a trial court that has received a timely but substantively deficient statement of errors complained of on appeal may request a second statement that lacks those deficiencies.

In answer to that question the Supreme Court unanimously said "yes," a trial court may order clarification of a timely filed Rule 1925 statement where the original statement lacked the necessary clarity and conciseness. In my view, Pennsylvania's highest court reached the right result in *Tucker* , which just so happens to be a result that encourages the resolution of appeals on their merits. Moreover, in the aftermath of *Tucker* , appellate courts may be more willing to enforce dismissals of appeals for failure to comply with Rule 1925's requirements of clarity and conciseness if the trial court has given counsel for appellant a second chance to satisfy the rule.

The Pennsylvania Supreme Court's recent ruling in *Tucker* , and its decision to review the *Berg* case, are both positive signs that Rule 1925 will continue to be construed sensibly and not to create a procedural trap for the unwary or careless. •

**Howard J. Bashman** *operates his own appellate litigation boutique in Willow Grove, Pa., and can be reached by telephone at 215-830-1458 and via e-mail at hjb@hjbashman.com. You can access his appellate blog at http://howappealing.law.com/.*