

Key 1925(b) Appeal To Go Before High Court

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By Asher Hawkins
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While its procedural rules committee considers proposed changes to 1925(b), the Pennsylvania Supreme Court has granted allocatur in a case that could give the justices a chance to take retrospective action on the appellate morass created by confusion over the rule.

Thursday evening, the Board of Governors of the Philadelphia Bar Association was told that the appeal in *Eiser v. Brown & Williamson Tobacco Corp.* might lead to the bright-line decision on Pennsylvania Rule of Appellate Procedure 1925(b) that the state's practitioners have been waiting for.

Eiser stems from a wrongful death action brought by the survivors of a South Philadelphia deli owner who died of lung cancer at age 54 after he smoked the defendants' low-tar cigarette brand.

Following an approximately two-week trial in the summer of 2003 before Philadelphia Common Pleas Judge Gary F. DiVito, a unanimous city jury returned a full defense verdict.

At last week's bar association meeting, *Eiser* plaintiff attorney George Badey of Badey Sloan & DiGenova in Philadelphia told the Board of Governors that the complexity of the litigation had resulted in a nearly 30-point 1925(b) statement that was effectively rejected as prolix by a Superior Court panel.

The panel in *Eiser* - consisting of Judges John L. Musmanno, Susan Peikes Gantman and Senior Judge Patrick R. Tiamalia - concluded in its January unpublished memorandum that the plaintiffs, through their 15-page 1925(b) statement, had "circumvented the meaning and purpose" of the rule.

In support of its holding, the *Eiser* panel cited to the widely read 2004 Superior Court decision in *Kanter v. Epstein*, which Musmanno authored.

The underlying fee dispute between two sets of Philadelphia lawyers in *Kanter* sparked a 100-plus-point appeal that was dismissed by the Superior Court as too lengthy in December 2004.

Late last month, the justices granted the Eiser plaintiffs' petition for allowance of appeal, limited to the issue of whether the plaintiffs had waived their "right to appellate review by raising a quantity of issues sufficient to impair meaningful appellate review."

Badey is asking the Philadelphia Bar Association - which has pushed for clarification-minded amendments to 1925(b) - to file an amicus brief in support of the Eiser plaintiffs' appeal.

The appropriate committees of the bar are set to consider his request.

Peter Greenberg of Schnader Harrison Segal & Lewis in Philadelphia, who is defense counsel of record in Eiser, did not immediately respond to a call seeking comment on the case.

The initial appellate briefs in the matter are to be filed with the Supreme Court by early December.

Thursday's Board of Governors meeting also featured an update from the association's de facto 1925(b) task force, the members of which - in conjunction with representatives from other bar organizations across the state - helped draft the proposed amendments to the rule currently being considered by the high court's appellate court procedural rules committee.

The drafters say the amendments would, among other things, extend the filing deadline for 1925(b) statements, create a more detailed explanation of how long or short such a statement should be and encourage a more lenient enforcement approach by the state's common pleas judges.

[Charles Becker](#) of Reed Smith, who chairs the Philadelphia Bar Association's appellate courts committee and is a member of the 1925(b) task force, told the board that he believes the justices may use Eiser to address the numerous cases that, as Badey noted, won't be impacted by any future changes to the rule.

Becker also said that fellow task member Carl Solano, a Schnader Harrison partner, has been helping appellate court procedural rules committee staff iron out the details of the proposed amendments.

Becker told the board that the task force-recommended changes mark something of a compromise between practitioners and the court system.

"We were advised by the people in the know that there was only so far we could push in this matter," he said.

Solano also addressed the board Thursday. He mentioned that in a recently filed opinion, captioned *Astorino v. New Jersey Transit Corp.*, Superior Court Judge Richard B. Klein cautioned Pennsylvania's trial judges against being too quick to find waiver based on a 1925(b) statement's length and/or vagueness.

Klein and the other members of the Astorino panel - Judge Mary Jane Bowes and Senior Judge John T.J. Kelly Jr. - concluded that although the plaintiffs' eight-page 1925(b) statement could have been shorter, Philadelphia Common Pleas Judge Joseph A. Dych should not have deemed their appellate issues waived under the rule.