

# THE COURTS

## Title 210—APPELLATE PROCEDURE

### PART I. RULES OF APPELLATE PROCEDURE

[210 PA. CODE CH. 17]

#### Proposed Amendment to the Official Note to Pa.R.A.P. 1701; Recommendation No. 30

The Appellate Court Rules Committee proposes to amend the Official Note to Rule 1701 of the Pennsylvania Rules of Appellate Procedure. The amendment is being submitted to the bench and bar for comments and suggestions prior to its submission to the Supreme Court.

All communications in reference to the proposed amendment should be sent not later than May 30, 1996 to Dean R. Phillips, Esquire, Counsel, Appellate Court Rules Committee, Exton Office Court, 300-F North Pottstown Pike, Exton, PA 19341.

The Explanatory Comment which appears in connection with the proposed amendments has been inserted by the Committee for the convenience of the bench and bar. It will not constitute part of the rules nor will it be officially adopted or promulgated by the Court.

ROBERT L. BYER,  
*Chair*

#### Annex A

### TITLE 210. APPELLATE PROCEDURE

#### PART I. RULES OF APPELLATE PROCEDURE

#### ARTICLE II. APPELLATE PROCEDURE

#### CHAPTER 17. EFFECT OF APPEALS; SUPERSEDEAS AND STAYS

#### IN GENERAL

#### Rule 1701. Effect of Appeal Generally.

\* \* \* \* \*

**Official note:** The following statutory provisions relate to supersedeas generally:

\* \* \* \* \*

[ Rule 5102 of these rules saves the provisions of the last sentence of Section 423 of the Public Welfare Code (62 P. S. § 423), which provides that an appeal operates as a supersedeas in certain public assistance matters and Section 9 of the Pennsylvania Human Relations Act (43 P. S. § 959), which provides that an appeal from an order of the Commission operates as a supersedeas. ]

Subdivision (b)(3) is intended to handle the troublesome question of the effect of application for reconsideration on the appeal process. The rule (1) permits the trial court or other government unit to grant reconsideration if action is taken during the applicable appeal period, which is not intended to include the appeal period for cross appeals, or, during any shorter applicable reconsideration period under the practice below, and (2) eliminates the possibility that the power to grant reconsideration could be foreclosed by the taking of a "snap" appeal. The better procedure under this rule will be for a party seeking reconsideration to file an application for reconsideration below and a notice of appeal, etc. If the application lacks

merit the trial court or other government unit may deny the application by the entry of an order to that effect or by inaction. The prior appeal paper will remain in effect, and appeal will have been taken without the necessity to watch the calendar for the running of the appeal period. If the trial court or other government unit fails to enter an order "expressly granting reconsideration" (an order that "all proceedings shall stay" will not suffice) within the time prescribed by these rules for seeking review, Subdivision (a) becomes applicable and the power of the trial court or other government unit to act on the application for reconsideration is lost.

**Subdivision (b)(3) provides that: "(W)here a timely order of reconsideration is entered under this paragraph, the time for filing a notice of appeal or petition for review begins to run anew after entry of the decision on reconsideration." Pursuant to Pa.R.C.P. 1930.2, effective July 1, 1994, where reconsideration from a domestic relations order has been timely granted, a reconsidered decision or an order directing additional testimony must be entered within 120 days of the entry of the order granting reconsideration or the motion shall be deemed denied. See Pa.R.C.P. 1930.2(c), (d) and (e). The date from which the appeal period will be measured following a reconsidered decision in a domestic relations matter is governed by Pa.R.C.P. 1930.2(d) and (e).**

Under the 1996 amendments to the Rules of Criminal Procedure governing post-sentence practice, see Pa.Rs.Crim.P. 1410 and 1411, reconsideration of a decision on a defendant's post-sentence motion or on a Commonwealth motion to modify sentence must take place within the time limits set by those rules, and the judge may not vacate sentence or "grant reconsideration" pursuant to subdivision (b)(3) in order to extend the time limits for disposition of those motions. The amendments to Pa.R.Crim.P. 1410 and new Pa.Crim.P. 1411 resolve questions raised about the interplay between this subdivision and post-trial criminal practice. See, e.g., *Commonwealth v. Corson*, 444 A.2d 170 (Pa. Super, 1982).

[ Subdivision (b)(4) is based on the act of March 26, 1827 (P. L. 131, No. 61) (9 Sm.L. 308, Ch. 5936) (28 P. S. §§ 2 and 3), which is suspended absolutely by these rules.

Subdivision (c) is based on the last sentence of act of May 19, 1897 (P. L. 67, No. 53), § 176 (12 P. S. § 1154), which is suspended absolutely by these rules, and makes no change in substance.

See Pa.R.Crim.P. 1410 regarding motion to modify sentence and comment thereto containing an alert that the sentencing court is likely to have only thirty days from the imposition of sentence within which to act to modify the sentence. ]

#### Explanatory Comment

New paragraph seven of the proposed note regarding 1701(b)(3) addresses the unique practice on reconsideration for matters pursuant to Pa.R.C.P. 1930.2.

New paragraph eight of the proposed note addresses the proposed 1996 amendment to Pa.R. Crim.P. 1410 (Post Sentence Procedures; Appeal) and proposed new

Pa.R. Crim.P. 1411 (Procedures for Commonwealth Challenges to Sentence; Sentencing Appeals) and explains that the trial judge may not vacate sentence or grant reconsideration pursuant subparagraph (b)(3) in order to extend that absolute time limits in present Rule 1410 and the proposed absolute time limits in Rule 1411.

Paragraph six of the old note referring to section 423 of the Public Welfare Code, 62 P.S. § 423 is deleted as obsolete.

Paragraphs eight and nine of the old note are deleted as obsolete. The statutes cited were repealed by the Judiciary Repealer Act, 42 P.S. § 20002(a)[107], [820].

Paragraph ten of the old note is deleted. This is a moot reference to the former Pa.R.Crim.P. 1410 (motion to modify sentences) rescinded March 22, 1993, effective as to cases in which determination of guilt occurs on or after January 1, 1994.

[Pa.B. Doc. No. 96-474. Filed for public inspection March 29, 1996, 9:00 a.m.]

# Title 234—RULES OF CRIMINAL PROCEDURE

## PART I. GENERAL

### [234 PA. CODE CH. 1400]

#### Proposed New Pa.R.Crim.P. 1411; Proposed Amendments to Pa.R.Crim.P. 1410

#### Introduction

The Criminal Procedural Rules Committee is planning to recommend that the Supreme Court of Pennsylvania adopt PA.R.Crim.P. 1411 (Procedures for Commonwealth Challenges to Sentence; Sentencing Appeals) and amend Rule 1410 (Post-Sentence Motion; Appeal). The proposed amendments provide procedures for Commonwealth sentencing challenges and also make it clear that judges may not vacate sentence in order to extend the time for consideration of a post-sentence motion or a Commonwealth motion to modify sentence. A correlative revision to the Note to Pa.R.A.P. 1701 appears in the Appellate Court Rules Committee Recommendation 30, published simultaneously with this proposal.

The following explanatory Report highlights the issues considered in formulating this proposal. As such, the Report should not be confused with the official Committee *Comments* to the rules. Also note that the Supreme Court does not adopt the Committee's *Comments* or the contents of our explanatory *Reports*.

We request that interested persons submit suggestions, comments, or objections concerning this proposal to the Committee through counsel Anne T. Panfil, Chief Staff Counsel, Criminal Procedural Rules Committee, P. O. Box 1325, Doylestown, PA 18901, no later than May 30, 1996.

By the Criminal Procedural Rules Committee

FRANCIS BARRY MCCARTHY,  
Chair

## Annex A

### TITLE 234. RULES OF CRIMINAL PROCEDURE

#### PART I. GENERAL

#### CHAPTER 1400. SENTENCING

#### Rule 1410. Post-Sentence Procedures; Appeal.

##### A. *Timing.*

\* \* \* \* \*

(3) If the defendant does not file a post-sentence motion, **the defendant's** notice of appeal shall be filed within 30 days of imposition of sentence, **except as provided in paragraph A(4).**

**(4) If the Commonwealth files a motion to modify sentence pursuant to Rule 1411, the defendant's notice of appeal shall be filed within 30 days of the entry of the order disposing of the Commonwealth's motion.**

##### B. *Optional Post-Sentence Motion.*

\* \* \* \* \*

##### (3) *Time Limits for Decision on Motion.*

**The judge shall not vacate sentence pending decision on the post-sentence motion, but shall decide the motion as provided in this paragraph.**

\* \* \* \* \*

**Official Note:** Previous Rule 1410, adopted May 22, 1978, effective as to cases in which sentence is imposed on or after July 1, 1978; rescinded March 22, 1993, effective as to cases in which the determination of guilt occurs on or after January 1, 1994, and replaced by present Rule 1410. Present Rule 1410 adopted March 22, 1993, and amended December 17, 1993, effective as to cases in which the determination of guilt occurs on or after January 1, 1994; amended September 13, 1995, effective January 1, 1996. The January 1, 1996 effective date extended to April 1, 1996; **amended** \_\_\_\_\_, **effective** \_\_\_\_\_.

#### Comment

This rule is derived from previous Rules 321, 1123, and 1410. *See also* Rules 1122, 1124, and 1125.

\* \* \* \* \*

##### *Timing*

\* \* \* \* \*

When a defendant files a timely post-sentence motion, the 30-day period for the defendant's direct appeal on all matters in that case—including all issues related to any informations and any charges consolidated against the defendant for trial—is triggered by the trial judge's decision on the post-sentence motion or the denial of the motion by operation of law. The appeal period runs from the entry of the order. As to the date of entry of orders, see Pa.R.A.P. 108. No direct appeal may be taken by a defendant while his or her post-sentence motion is pending. *See* subsection A(2). If no timely post-sentence motion is filed, the **defendant's** appeal period runs from the date sentence is imposed. *See* subsection A(3). **Under subsection A(4), however, when the defendant has not filed a post-sentence motion but the Commonwealth files a motion to modify sentence under Rule 1411, it is the entry of the order disposing of the Commonwealth's motion that commences the 30-day period during which the defendant's notice of appeal must be filed. See Rule 1411(B)(2)(b).**

All references to appeals in this rule relate to the defendant's right to appeal. The rule does not address or alter the Commonwealth's right to appeal. **For Commonwealth challenges to sentences, see Rule 1411.**

\* \* \* \* \*

*Disposition*

Under subsection B(3), once the defendant makes a timely written post-sentence motion, the judge retains jurisdiction for the duration of the disposition period. **[It is not necessary for the judge to vacate the sentence imposed.]** The judge may not vacate the order imposing sentence pending decision on the post-sentence motion. This is so whether or not the Commonwealth files a motion to modify sentence. See Rule 1411(B)(2)(a).

\* \* \* \* \*

If the trial judge **[grants reconsideration on the post-sentence motion pursuant to 42 Pa.C.S. § 5505 or Pa.R.A.P. 1701, the]** decides the motion within the limits of this rule, the judge may reconsider that decision, but the judge may not vacate the sentence pending reconsideration, Rule 1410B(3). The reconsideration period may not be used to extend the timing requirements set forth in section B(3) for decision on the post-sentence motion: the time limits imposed by subsections B(3)(a) and B(3)(b) continue to run from the date the post-sentence motion was originally filed. The trial judge's reconsideration must therefore be resolved within the 120-day decision period of subsection B(3)(a) or the 30-day extension period of subsection B(3)(b), whichever applies. If a decision on the reconsideration is not reached within the appropriate period, the post-sentence motion, including any issues raised for reconsideration, will be denied pursuant to subsection B(3)(c).

\* \* \* \* \*

*Miscellaneous*

\* \* \* \* \*

Issues **[raised]** properly preserved at the sentencing proceeding need not, but may **[ , ]** be raised again in a motion to modify sentence in order to preserve them for appeal. In deciding whether to move to modify sentence, counsel **[should]** must carefully consider whether the record created at the sentencing proceeding is adequate for appellate review of the issues, **or the issues may be waived.** See *Commonwealth v. Jarvis*, 663 A.2d 790 (Pa. Super. 1995). See also Rule 1405.C(4). As a general rule, the motion to modify sentence under subsection B(1)(a)(v) gives the sentencing judge the earliest opportunity to modify the sentence. This procedure does not affect the court's inherent powers to correct an illegal sentence or obvious and patent mistakes in its orders at any time before appeal or upon remand by the appellate court. See, e.g., *Commonwealth v. Jones*, 554 A.2d 50 (Pa. 1989) (sentencing court can, sua sponte, correct an illegal sentence even after the defendant has begun serving the original sentence) and *Commonwealth v. Cole*, 263 A.2d 339 (Pa. 1970) (inherent power of the court to correct obvious and patent mistakes).

Once a sentence has been modified or reimposed pursuant to a motion to modify sentence **[however,]** under subsection B(1)(a)(v) or Rule 1411 (Commonwealth Challenges to Sentence; Sentencing Appeals), a party wishing to challenge the decision on the motion

does not have to file an additional motion to modify sentence in order to preserve **[the issue(s)]** an issue for appeal, as long as the issue was properly preserved at the time sentence was modified or reimposed.

Commonwealth challenges to sentences are governed by Rule 1411. If the defendant files a post-sentence motion, the time limits for decision on the defendant's motion govern the time limits for disposition of the Commonwealth motion to modify sentence, regardless of which motion is filed first. See the Comment to Rule 1411(B)(2)(a). If the defendant elects to file an appeal and the Commonwealth files a motion to modify sentence, decision on the Commonwealth's motion triggers the defendant's 30-day appeal period. See Rule 1410A(4).

Given that the Commonwealth has 10 days to file a motion to modify sentence under Rule 1411(B)(1), it is possible that the defendant might elect to file a notice of appeal under paragraph Rule 1410A(3) followed by the Commonwealth's filing a timely motion to modify sentence. When this occurs, the defendant's notice of appeal is rendered premature, because the entry of the order disposing of the Commonwealth's motion to modify sentence then becomes the triggering device for the defendant's notice of appeal. In this situation, counsel for the defendant should be aware that Pa.R.A.P. 905(a) addresses this problem. In response to an extensive history of appeals which were quashed because of the premature filing of the notice of appeal, the last sentence of Pa.R.A.P. 905(a) was drafted to create a legal fiction which treats a premature notice of appeal as filed after the entry of the appealable order. For a discussion of this provision, see *Darlington, McKeon, Schuckers, and Brown, Pennsylvania Appellate Practice, 2d., § 905.3.*

\* \* \* \* \*

**Rule 1411. Procedures for Commonwealth Challenges to Sentence; Sentencing Appeals.**

(A) *Commonwealth Challenges to Sentence*

(1) The Commonwealth may challenge a sentence by filing a motion to modify sentence, by filing an appeal, or by filing a motion to modify sentence followed by an appeal.

(2) Sentencing issues raised by the Commonwealth at the sentencing proceeding shall be deemed preserved for appeal whether or not the Commonwealth elects to file a motion to modify sentence on those issues.

(B) *Timing*

(1) *Motion for Modification of Sentence.* A Commonwealth motion for modification of sentence shall be filed no later than 10 days after imposition of sentence.

(2) *Appeal of Sentence.*

(a) *Appeal Directly from Order Imposing Sentence.*

(i) If the defendant has filed a post-sentence motion, and the Commonwealth elects to challenge the sentence by filing an appeal directly from the order imposing sentence, notice of the Commonwealth's appeal shall be filed within 30 days of the entry of the order disposing of the defendant's post-sentence motion pursuant to Rule 1410B(3).

(ii) If the defendant has not filed a post-sentence motion, the Commonwealth's notice of appeal shall be filed within 30 days of the entry of the order imposing sentence.

(b) *Appeal following Disposition of Commonwealth Motion to Modify Sentence.*

(i) If the defendant has filed a post-sentence motion, the Commonwealth's notice of appeal shall be filed within 30 days of the entry of the orders disposing of the Commonwealth's and the defendant's motions pursuant to subparagraph (C)(1).

(ii) If the defendant has not filed a post-sentence motion, the Commonwealth's notice of appeal shall be filed within 30 days of the entry of the order disposing of the Commonwealth's motion pursuant to subparagraph (C)(2).

(C) *Trial Court Action; Disposition*

If the attorney for the Commonwealth files a timely motion for modification of sentence pursuant to paragraph (A)(1), the judge shall dispose of the motion as provided in this paragraph.

(1) If the defendant has filed a post-sentence motion, the judge shall not vacate sentence but shall decide the Commonwealth's motion and the defendant's post-sentence motion simultaneously. The Rule 1410B(3) time limits for deciding the defendant's post-sentence motion, including the automatic denial provisions, shall apply to the disposition of the Commonwealth's motion. The starting date for disposition of both motions shall be the date on which the defendant filed the post-sentence motion.

(2) If the defendant has not filed a post-sentence motion, the judge shall not vacate sentence but shall decide the Commonwealth's motion within 120 days of the filing of the motion. If the judge fails to decide the Commonwealth's motion within 120 days, the motion shall be deemed denied by operation of law.

(D) *Entry of Order by Clerk of Courts*

(1) When the Commonwealth's motion for modification of sentence is denied by operation of law, the clerk of courts shall forthwith:

(a) enter an order on behalf of the court denying the Commonwealth's motion for modification of sentence by operation of law, and

(b) furnish a copy of the order, by mail or personal delivery, to the attorney for the Commonwealth, the defendant, and defense counsel.

(2) An order entered by the clerk of courts pursuant to this paragraph shall not be subject to reconsideration.

**Official Note:** Adopted \_\_\_\_\_, effective \_\_\_\_\_.

**Comment**

New Rule 1411 was promulgated to clarify the procedures for Commonwealth challenges to sentences in light of the new post-sentence procedures adopted in 1993. See Pa.R.Crim.P. 1410. This rule does not address any other type of Commonwealth challenge or Commonwealth appeals generally.

Historically, the Commonwealth has been required to raise a discretionary sentencing issue at the sentencing hearing or in a post-trial motion to modify sentence in order to preserve the issue for appellate review. *Commonwealth v. Eyster*, 585 A.2d 1027 (Pa. Super. 1991) (en banc), *appeal denied* 602 A.2d 857 (Pa. 1992). Challenges to the legality of a sentence, however, are not waived if Commonwealth fails to timely file a motion for modification. See *Commonwealth v. Smith*, 598 A.2d 268 (Pa. 1991).

Under new Rule 1411, the Commonwealth's motion for modification of sentence is optional, as long as any discretionary sentencing issue is properly preserved at the time sentence was imposed. Before forgoing trial court review and proceeding with a direct appeal, the attorney for the Commonwealth must therefore be sure that the record created at the sentencing proceeding is adequate for appellate review of the issue, or the issue may be waived. See *Commonwealth v. Jarvis*, 663 A.2d 790 (Pa. Super. 1995), at n.1.

As a general rule, a motion for modification of sentence gives the sentencing judge the earliest opportunity to modify the sentence. This procedure does not affect the court's inherent powers to correct an illegal sentence or obvious and patent mistakes in its orders at any time before appeal or upon remand by the appellate court. See, e.g., *Commonwealth v. Jones*, 554 A.2d 50 (Pa. 1989) (sentencing court can, *sua sponte*, correct an illegal sentence even after the defendant has begun serving the original sentence) and *Commonwealth v. Cole*, 263 A.2d 339 (Pa. 1970) (inherent power of the court to correct obvious and patent mistakes).

Once a sentence has been modified or reimposed pursuant to a motion to modify sentence under this rule or Rule 1410B(1)(a)(v), a party wishing to challenge the decision on the motion does not have to file an additional motion to modify sentence in order to preserve an issue for appeal, as long as the issue was properly preserved at the time the sentence was modified or reimposed.

*Trial Court Action*

Paragraph (C) sets forth the procedures for trial court action on the Commonwealth's motion for modification. Key to the timing of the judge's decision on the Commonwealth's motion is whether the defendant files a post-sentence motion.

*Rule 1410 Motion Filed*

Under paragraph (C)(1), if the defendant has filed a post-sentence motion, the judge is not permitted to vacate sentence and must decide the defendant's post-sentence motion and the Commonwealth's motion simultaneously. The date on which the defendant's post-sentence motion is filed, see Rule 1410A(1), triggers the time limits within which the judge must also dispose of the Commonwealth's motion, regardless of which motion is filed first. If the judge fails to decide the Commonwealth's motion within these time limits, the motion is deemed denied by operation of law. See Pa.R.Crim.P. 1410B(3).

*Rule 1410 Motion Not Filed*

When the defendant has not filed a post-sentence motion, the disposition of the Commonwealth's motion is governed by paragraph (C)(2). The judge may not vacate sentence, but has 120 days to decide the Commonwealth's motion or the motion is deemed denied by operation of law. If the judge decides the motion within the 120-day limit and then agrees to reconsider, the reconsideration must be resolved within the original 120-day time limit. The judge may not vacate sentence in order to reconsider the motion or otherwise use the reconsideration period to extend the 120-day time limit. It follows that even if the defendant has filed a notice of appeal, the procedural exceptions provided in Pa.R.A.P. 1701(b)(3) do not apply to challenges to sentences. See also the Rule 1410 *Comment* under "Disposition."

*Entry of Order by Clerk of Courts*

Under paragraph (D)(1), when a Commonwealth motion to modify sentence has been denied by operation of law,

the clerk of courts must enter an order on behalf of the court and furnish copies to the attorney for the Commonwealth, the defendant, and defense counsel. The clerk of courts' order is ministerial and not subject to reconsideration. See subparagraph (D)(2). The clerk of courts must also comply with the notice and docketing requirements of Rule 9024.

#### *Appeal of Sentence*

Paragraph (B)(2) contains the timing requirements for Commonwealth notices of appeal.

#### *No Commonwealth Motion to Modify Sentence Filed*

Paragraph (B)(2)(a) covers the time for filing a notice of appeal when the Commonwealth has elected *not* to file a motion to modify sentence with the trial judge. The time for filing the Commonwealth's notice of appeal under this paragraph depends on whether the defendant has filed a post-sentence motion. When the defendant files a post-sentence motion, paragraph (B)(2)(a)(i) provides that the entry of the order disposing of the defendant's post-sentence motion triggers the 30-day period during which the Commonwealth's notice of appeal must be filed. If no post-sentence motion is filed, it is the entry of the order imposing sentence that triggers the Commonwealth's 30-day appeal period. See Rule 1411(B)(2)(a)(ii).

Given that a defendant has 10 days to file a post-sentence motion under Rule 1410A(1), it is possible that the Commonwealth might file a notice of appeal under paragraph (B)(2)(a)(ii) *followed by* the defendant's filing a timely post-sentence motion. When this occurs, the Commonwealth's notice of appeal is rendered premature, because the entry of the order disposing of the defendant's post-sentence motion then becomes the triggering device for the Commonwealth's notice of appeal. In this situation, counsel for the Commonwealth should be aware that Pa.R.A.P. 905(a) addresses this problem. In response to an extensive history of appeals which were quashed because of the premature filing of the notice of appeal, the last sentence of Pa.R.A.P. 905(a) was drafted to create a legal fiction which treats a premature notice of appeal as filed after the entry of the appealable order. For a discussion of this provision, see Darlington, McKeon, Schuckers, and Brown, *Pennsylvania Appellate Practice*, 2d., § 905.3.

#### *Commonwealth Motion to Modify Sentence Filed*

Paragraph (B)(2)(b) covers the time for filing the notice of appeal when the Commonwealth has elected to file a motion to modify sentence with the trial judge. As in paragraph (B)(2)(a), the time for notice depends on whether the defendant files a post-sentence motion. If the defendant has filed a post-sentence motion, the disposition of the Commonwealth's and the defendant's motion is simultaneous. See Rule 1411(C)(1). If the defendant does not file a post-sentence motion, the 30-day appeal period begins to run from the entry of the order disposing of the Commonwealth's motion pursuant to the time limits of paragraph (C)(2).

### REPORT

*New Pa.R.Crim.P. 1411;  
Amendments to Pa.R.Crim.P. 1410*

*Commonwealth Challenges to Sentences;*

*Preservation of Sentencing Issues; Vacation of Sentence*

#### A. Overview

When the Court adopted new Rule 1410 (Post-Sentence Motion; Appeals) in 1993, the Court rescinded former Rule 1410 (Motion to Modify Sentence), a rule which

historically has applied to both the Commonwealth and defendants. New Rule 1410, however, does not address Commonwealth sentencing challenges or the Commonwealth's right to appeal. See the "Timing" section of the Rule 1410 *Comment*. In short, the Rules of Criminal Procedure are silent on what procedures the Commonwealth should follow, and the Committee has received numerous inquiries from judges and prosecutors asking whether the time limits of present Rule 1410 apply to Commonwealth sentencing challenges. A separate but related problem brought to our attention is that some judges appear to be unaware that the absolute time limits for disposition of the post-sentence motion under Rule 1410 may not be extended by granting reconsideration pursuant to Pa.R.A.P. 1701(b)(3) or vacating sentence by any other means. See the "Disposition" section of the Rule 1410 *Comment*.

To address these two problematic areas, the Committee is proposing (1) a new Rule 1411 to provide procedures for Commonwealth sentencing challenges, with correlative amendments to Rule 1410, and (2) amendments to Rule 1410 to expressly prohibit a judge from vacating sentence during the rule's dispositional period.

#### 1. Proposed New Rule 1411

New Pa.R.Crim.P. 1411 (Procedures for Commonwealth Challenges to Sentence; Sentencing Appeals) provides detailed procedures for Commonwealth sentencing challenges, particularly as to the timing of Commonwealth appeals of sentencing issues. Rule 1411 makes it clear that, as to sentencing challenges, the Commonwealth has the same options that the defendant does under present Rule 1410, see *Commonwealth v. Jarvis*, 663 A.2d 790 (Pa. Super. 1995), and sets forth the Commonwealth's time for appeal relative to whether the defendant files a post-sentence motion. The rule sets specific time limits for the judge's disposition of the Commonwealth's motion to modify sentence which must be met or the Commonwealth's motion will be denied by operation of law. The judge may not vacate sentence pending disposition of the motion or pending reconsideration of that disposition.

#### 2. Amendments to Rule 1410 (Post-Sentence Motion; Appeals)

In addition to clarifying amendments to paragraph A, Timing, necessitated by the interplay between proposed new Rule 1411 and Rule 1410, the proposed amendments to Rule 1410 make it clear that the judge may not vacate sentence pending disposition of the post-sentence motion or pending reconsideration of that disposition. The *Comment* to Rule 1410 has been revised to address all of the changes discussed above. In addition, the "Miscellaneous" section of the Rule 1410 *Comment* has been revised to make it clear that in order to preserve sentencing issues for appeal, they must be raised with the sentencing judge either at the time of sentencing, or in a post-sentence motion. See *Commonwealth v. Jarvis*, 663 A.2d 790 (Pa. Super. 1995).

#### 3. Relationship of Criminal Rule Proposal to Proposed Revisions to Note to Pa.R.A.P. 1701(b)(3).

The Note to Rule of Appellate Procedure 1701 contains an out-of-date cross-reference to former Rule 1410. At the Committee's request, the Appellate Court Rules Committee has agreed to propose that this portion of the Note be deleted, and a new paragraph added to explain that the procedures permitted by Pa.R.A.P. 1701(b)(3) do not apply to post-trial criminal practice under Rules 1410 and 1411: a judge may not vacate sentence or "grant reconsideration" in order to extend the absolute time limits of the post-sentence procedures provided in these two rules.

## B. Annotations on Proposed Rule Changes

Note: Section B is a departure from our standard format for the explanatory *Report*. The proposed changes are discussed in individual annotations. The annotations appear as separate paragraphs, in bold and italics.

### I. New Rule 1411

Rule 1411. Procedures for Commonwealth Challenges to Sentence; Sentencing Appeals.

#### (A) Commonwealth Challenges to Sentence

***Because there is considerable confusion among prosecutors and judges concerning the applicability of former Rule 1410 or present Rule 1410 to Commonwealth sentencing challenges, the Committee agreed that the rule changes should make it clear that the Commonwealth has the same options as to sentencing challenges that the defendant does under present Rule 1410, options analyzed at length in the Comment to this Rule and in the "Miscellaneous" section of the Comment to Rule 1410.***

(1) The Commonwealth may challenge a sentence by filing a motion to modify sentence, by filing an appeal, or by filing a motion to modify sentence followed by an appeal.

(2) Sentencing issues raised by the Commonwealth at the sentencing proceeding shall be deemed preserved for appeal whether or not the Commonwealth elects to file a motion to modify sentence on those issues.

#### (B) Timing

***The timing provisions of this rule, especially the provision for appeal of sentence in paragraph (B)(2), contain considerable detail. The intent here is to provide the attorney with a clear map of the procedures in order to avert the loss of a Commonwealth sentencing challenge for failure to file a timely appeal.***

(1) Motion for Modification of Sentence. A Commonwealth motion for modification of sentence shall be filed no later than 10 days after imposition of sentence.

#### (2) Appeal of Sentence.

##### (a) Appeal Directly from Order Imposing Sentence.

***Under this section, the Commonwealth has preserved the sentencing challenge at the sentencing hearing, and seeks review of the sentence at the appellate level only. The triggering event for the Commonwealth's 30-day appeal period is defined by whether the defendant files a post-sentence motion.***

***The phrase "direct appeal" is not used here because the Committee felt it was a term of art that might create confusion in a timing context. Under paragraph (B)(2)(a), if the Commonwealth preserves a sentencing issue at the sentencing hearing and wants to forgo post-sentence trial court review, the Commonwealth files the appeal "directly from" the order imposing sentence, rather than filing a "direct appeal."***

(i) If the defendant has filed a post-sentence motion, and the Commonwealth elects to challenge the sentence by filing an appeal directly from the order imposing sentence, notice of the Commonwealth's appeal shall be filed within 30 days of the entry of the order disposing of the defendant's post-sentence motion pursuant to Rule 1410B(3).

(ii) If the defendant has not filed a post-sentence motion, the Commonwealth's notice of appeal shall be filed within 30 days of the entry of the order imposing sentence.

(b) Appeal following Disposition of Commonwealth Motion to Modify Sentence.

***Under this section, the Commonwealth has filed a motion to modify sentence no later than 10 days after imposition of sentence, paragraph (B)(1), and the disposition of the motion will trigger the Commonwealth's 30-day appeal period. The time limits for the judge's disposition, however, depend on whether the defendant has filed a post-sentence motion.***

(i) If the defendant has filed a post-sentence motion, the Commonwealth's notice of appeal shall be filed within 30 days of the entry of the orders disposing of the Commonwealth's and the defendant's motions pursuant to subparagraph (C)(1).

***(C)(1) requires the judge to decide a Commonwealth motion to modify simultaneously with the defendant's post-sentence motion.***

(ii) If the defendant has not filed a post-sentence motion, the Commonwealth's notice of appeal shall be filed within 30 days of the entry of the order disposing of the Commonwealth's motion pursuant to subparagraph (C)(2).

#### (C) Trial Court Action; Disposition

If the attorney for the Commonwealth files a timely motion for modification of sentence pursuant to paragraph (A)(1), the judge shall dispose of the motion as provided in this paragraph.

***The judge is expressly prohibited from vacating sentence pending disposition of the motion, including any reconsideration of a disposition. Similar language has been included in Rule 1410 as part of this proposal. See Rule 1410B(3) and the first paragraph of the "Disposition" section of the Rule 1410 Comment.***

(1) If the defendant has filed a post-sentence motion, the judge shall not vacate sentence but shall decide the Commonwealth's motion and the defendant's post-sentence motion simultaneously. The Rule 1410B(3) time limits for deciding the defendant's post-sentence motion, including the automatic denial provisions, shall apply to the disposition of the Commonwealth's motion. The starting date for disposition of both motions shall be the date on which the defendant filed the post-sentence motion.

***The Rule 1410B(3) time period for disposition of the Commonwealth's motion to modify sentence is triggered by the date on which the defendant files a post-sentence motion pursuant to Rule 1410A(1). Once this time period begins to run, it becomes the disposition period for the Commonwealth's motion to modify sentence, regardless of which motion is filed first. If the judge grants the defendant the 30-day extension permitted under Rule 1410B(2)(b), the total disposition period, as extended, applies to the simultaneous disposition of the Commonwealth's motion to modify sentence. If the judge fails to decide the Commonwealth's motion by the expiration of the disposition period, the Commonwealth's motion is deemed denied by operation of law, and the clerk of courts must enter an order pursuant to paragraph D, below.***

(2) If the defendant has not filed a post-sentence motion, the judge shall not vacate sentence but shall decide the Commonwealth's motion within 120 days of the filing of the motion. If the judge fails to decide the Commonwealth's motion within 120 days, the motion shall be deemed denied by operation of law.

**Although the Committee considered several approaches to this provision, we concluded that when a defendant has not filed a post-sentence motion, a 120-day period allowed more than enough time for the resolution of a Commonwealth motion. Unlike Rule 1410B(3)(b), however, no 30-day extension of this disposition period is permitted.**

(D) Entry of Order by Clerk of Courts

**This section is a simplified version of its counterpart in Rule 1410. The order denying a Commonwealth motion to modify sentence by operation of law does not trigger the defendant's 30-day appeal period and therefore the order need not set forth the defendant's appeal rights. Compare Rule 1410B(4).**

(1) When the Commonwealth's motion for modification of sentence is denied by operation of law, the clerk of courts shall forthwith:

(a) enter an order on behalf of the court denying the Commonwealth's motion for modification of sentence by operation of law, and

(b) furnish a copy of the order, by mail or personal delivery, to the attorney for the Commonwealth, the defendant, and defense counsel.

(2) An order entered by the clerk of courts pursuant to this paragraph shall not be subject to reconsideration.

Note: Adopted \_\_\_\_\_, effective \_\_\_\_\_.

Comment:

**Annotation note: Those paragraphs which are self-explanatory have not been annotated.**

**Although the Supreme Court approves, but does not adopt, the Committee's official Comments to the rules, the Comments are part of the proposal and intended to be instructive. The Committee therefore welcomes suggestions from the bench and bar about the Comments.**

New Rule 1411 was promulgated to clarify the procedures for Commonwealth challenges to sentences in light of the new post-sentence procedures adopted in 1993. See Pa.R.Crim.P. 1410. This rule does not address any other type of Commonwealth challenge or Commonwealth appeals generally.

**The next several paragraphs, tailored for Commonwealth challenges, derive from similar language in the Rule 1410 Comment, as revised. They are intended to make it clear that, unless a discretionary sentencing issue is raised at the sentencing hearing, it must be raised in a motion to modify sentence.**

Historically, the Commonwealth has been required to raise a discretionary sentencing issue at the sentencing hearing or in a post-trial motion to modify sentence in order to preserve the issue for appellate review. *Commonwealth v. Eyster*, 585 A.2d 1027 (Pa. Super. 1991) (en banc), appeal denied 602 A.2d 857 (Pa. 1992). Challenges to the legality of a sentence, however, are not waived if the Commonwealth fails to timely file a motion for

modification. See *Commonwealth v. Smith*, 598 A.2d 268 (Pa. 1991).

Under new Rule 1411, the Commonwealth's motion for modification of sentence is optional, as long as any discretionary sentencing issue is properly preserved at the time sentence was imposed. Before forgoing trial court review and proceeding with a direct appeal, the attorney for the Commonwealth must therefore be sure that the record created at the sentencing proceeding is adequate for appellate review of the issue, or the issue may be waived. See *Commonwealth v. Jarvis*, 663 A.2d 790 (Pa. Super. 1995), at n.1.

**The Committee agreed that we should provide citations for the well-established propositions in the following paragraph.**

As a general rule, a motion for modification of sentence gives the sentencing judge the earliest opportunity to modify the sentence. This procedure does not affect the court's inherent powers to correct an illegal sentence or obvious and patent mistakes in its orders at any time before appeal or upon remand by the appellate court. See, e.g., *Commonwealth v. Jones*, 554 A.2d 50 (Pa. 1989) (sentencing court can, sua sponte, correct an illegal sentence even after the defendant has begun serving the original sentence) and *Commonwealth v. Cole*, 263 A.2d 339 (Pa. 1970) (inherent power of the court to correct obvious and patent mistakes).

Once a sentence has been modified or reimposed pursuant to a motion to modify sentence under this rule or Rule 1410B(1)(a)(v), a party wishing to challenge the decision on the motion does not have to file an additional motion to modify sentence in order to preserve an issue for appeal, as long as the issue was properly preserved at the time the sentence was modified or reimposed.

Trial Court Action

Paragraph (C) sets forth the procedures for trial court action on the Commonwealth's motion for modification. Key to the timing of the judge's decision on the Commonwealth's motion is whether the defendant files a post-sentence motion.

Rule 1410 Motion Filed

Under paragraph (C)(1), if the defendant has filed a post-sentence motion, the judge is not permitted to vacate sentence and must decide the defendant's post-sentence motion and the Commonwealth's motion simultaneously. The date on which the defendant's post-sentence motion is filed, see Rule 1410A(1), triggers the time limits within which the judge must also dispose of the Commonwealth's motion, regardless of which motion is filed first. If the judge fails to decide the Commonwealth's motion within these time limits, the motion is deemed denied by operation of law. See Pa.R.Crim.P. 1410B(3).

Rule 1410 Motion Not Filed

**The purpose of the following paragraph is to make it clear that any reconsideration must take place within the 120-day time limit, and that the procedural exceptions provided in Pa.R.A.P. 1701(b)(3) do not apply to Rule 1411 sentencing challenges.**

When the defendant has not filed a post-sentence motion, the disposition of the Commonwealth's motion is governed by paragraph (C)(2). The judge may not vacate sentence, but has 120 days to decide the Commonwealth's motion or the motion is deemed denied by operation of law. If the judge decides the motion within the 120-day

limit and then agrees to reconsider, the reconsideration must be resolved within the original 120-day time limit. The judge may not vacate sentence in order to reconsider the motion or otherwise use the reconsideration period to extend the 120-day time limit. It follows that even if the defendant has filed a notice of appeal, the procedural exceptions provided in Pa.R.A.P. 1701(b)(3) do not apply to challenges to sentences. See also the Rule 1410 *Comment* under "Disposition."

#### Entry of Order by Clerk of Courts

Under paragraph (D)(1), when a Commonwealth motion to modify sentence has been denied by operation of law, the clerk of courts must enter an order on behalf of the court and furnish copies to the attorney for the Commonwealth, the defendant, and defense counsel. The clerk of courts' order is ministerial and not subject to reconsideration. See subparagraph (D)(2). The clerk of courts must also comply with the notice and docketing requirements of Rule 9024.

#### Appeal of Sentence

Paragraph (B)(2) contains the timing requirements for Commonwealth notices of appeal.

#### No Commonwealth Motion to Modify Sentence Filed

Paragraph (B)(2)(a) covers the time for filing a notice of appeal when the Commonwealth has elected not to file a motion to modify sentence with the trial judge. The time for filing the Commonwealth's notice of appeal under this paragraph depends on whether the defendant has filed a post-sentence motion. When the defendant files a post-sentence motion, paragraph (B)(2)(a)(i) provides that the entry of the order disposing of the defendant's post-sentence motion triggers the 30-day period during which the Commonwealth's notice of appeal must be filed. If no post-sentence motion is filed, it is the entry of the order imposing sentence that triggers the Commonwealth's 30-day appeal period. See Rule 1411(B)(2)(a)(ii).

***The following paragraph was included because the Committee anticipates that the situation in question—the Commonwealth files an appeal and then the defendant files a post-sentence motion—may arise fairly frequently.***

Given that a defendant has 10 days to file a post-sentence motion under Rule 1410A(1), it is possible that the Commonwealth might file a notice of appeal under paragraph (B)(2)(a)(ii) followed by the defendant's filing a timely post-sentence motion. When this occurs, the Commonwealth's notice of appeal is rendered premature, because the entry of the order disposing of the defendant's post-sentence motion then becomes the triggering device for the Commonwealth's notice of appeal. In this situation, counsel for the Commonwealth should be aware that Pa.R.A.P. 905(a) addresses this problem. In response to an extensive history of appeals which were quashed because of the premature filing of the notice of appeal, the last sentence of Pa.R.A.P. 905(a) was drafted to create a legal fiction which treats a premature notice of appeal as filed after the entry of the appealable order. For a discussion of this provision, see Darlington, McKeon, Schuckers, and Brown, Pennsylvania Appellate Practice, 2d., § 905.3.

#### Commonwealth Motion to Modify Sentence Filed

Paragraph (B)(2)(b) covers the time for filing the notice of appeal when the Commonwealth has elected to file a motion to modify sentence with the trial judge. As in

paragraph (B)(2)(a), the time for notice depends on whether the defendant files a post-sentence motion. If the defendant has filed a post-sentence motion, the disposition of the Commonwealth's and the defendant's motion is simultaneous. See Rule 1411(C)(1). If the defendant does not file a post-sentence motion, the 30-day appeal period begins to run from the entry of the order disposing of the Commonwealth's motion pursuant to the time limits of paragraph (C)(2).

#### 2A. Changes to the Text of Rule 1410

***Note: Because of the length of Rule 1410, only those portions of the rule and Comment necessary to explain the changes are included. Asterisks indicate omitted text.***

Rule 1410. Post-Sentence Procedures; Appeal.

##### A. Timing.

(1) Except as provided in Section D, a written post-sentence motion shall be filed no later than 10 days after imposition of sentence.

(2) If the defendant files a timely post-sentence motion, the notice of appeal shall be filed within 30 days of the entry of the order deciding the motion, or, if the judge fails to decide the motion, within 30 days of the entry of the order denying the motion by operation of law.

***Under paragraph A(3), when a defendant chooses to appeal from the order imposing sentence, rather than to file a post-sentence motion, the time for appeal is 30 days from the imposition of sentence, unless the Commonwealth has filed a motion to modify sentence, in which event it is the disposition of the Commonwealth's motion which triggers the defendant's appeal period. See paragraph A(4).***

(3) If the defendant does not file a post-sentence motion, the defendant's notice of appeal shall be filed within 30 days of imposition of sentence, *except as provided in paragraph A(4).*

(4) *If the Commonwealth files a motion to modify sentence pursuant to Rule 1411, the defendant's notice of appeal shall be filed within 30 days of the entry of the order disposing of the Commonwealth's motion.*

***The "Miscellaneous" section of the Comment discusses how the defendant should proceed under paragraph A(4) in the event that the defendant files a premature notice of appeal, i.e., before the Commonwealth files a motion to modify sentence.***

\* \* \* \* \*

***Rule 1410B(3) would be amended to state that the judge "shall not vacate sentence pending decision on the post-sentence motion . . ." Although this was the original intent of Rule 1410, the Committee agreed that the rule must be explicit on the issue in order to remove any confusion generated by Pa.R.A.P. 1701.***

##### B(3) Time Limits for Decision on Motion.

*The judge shall not vacate sentence pending decision on the post-sentence motion, but shall decide the motion as provided in this paragraph.*

(a) Except as provided in subsection (3)(b), the judge shall decide the post-sentence motion, including any supplemental motion, within 120 days of the filing of the motion. If the judge fails to decide the motion within 120 days, or to grant an extension as provided in subsection



(3)(b), the motion shall be deemed denied by operation of law.

(b) Upon motion of the defendant within the 120-day disposition period, for good cause shown, the judge may grant one 30-day extension for decision on the motion. If the judge fails to decide the motion within the 30-day extension period, the motion shall be deemed denied by operation of law.

***Proposed new Rule 1411(C)(2) does not permit a similar extension of the 120-day disposition period for a Commonwealth motion to modify sentence. However, if the defendant has filed a post-sentence motion and the judge grants the defendant an extension pursuant to paragraph B(3)(b) above, the total disposition period, as extended, would apply to the simultaneous disposition of the Commonwealth's motion to modify sentence. See Rule 1411(C)(1).***

(c) When a post-sentence motion is denied by operation of law, the clerk of courts shall forthwith enter an order on behalf of the court, and shall forthwith furnish a copy of the order by mail or personal delivery to the attorney for the Commonwealth, the defendant(s), and defense counsel that the post-sentence motion is deemed denied. This order is not subject to reconsideration.

***The Rule 1410B(3) time period for disposition of the defendant's post-sentence motion is triggered by the date on which the defendant files a post-sentence motion pursuant to Rule 1410A(1). Once this time period begins to run, it applies to any timely filed Commonwealth motion to modify sentence, regardless of which motion is filed first. See proposed Rule 1411(C)(1). If the judge fails to decide either motion within this period, the motion is deemed denied by operation of law. If the judge has failed to decide the defendant's post-sentence motion, the clerk of courts must enter an order pursuant to paragraph B(3)(c), above. If the judge has failed to decide the Commonwealth's motion to modify sentence, the clerk must enter an order pursuant to Rule 1411(D). If the judge fails to decide both motions, the clerk of courts must enter two orders on behalf of the court.***

(4) Contents of Order.

An order denying a post-sentence motion, whether signed by the judge or entered by the clerk of courts, shall include notice to the defendant of the following:

- (a) the right to appeal and the time limits within which the appeal must be filed;
- (b) the right to assistance of counsel in the preparation of the appeal;
- (c) the rights, if the defendant is indigent, to appeal in forma pauperis and to proceed with assigned counsel as provided in Rule 316; and
- (d) the qualified right to bail under Rule 4010.B.

\* \* \* \* \*

2B. Rule 1410 Comment Revisions

*The "Timing" section has been revised to explain the addition of paragraph A(4) and to cross-reference new Rule 1411.*

*Timing*

Section A contains the timing requirements for filing the optional post-sentence motion and taking an appeal.

Under subsection A(1), the post-sentence motion must be filed within 10 days of imposition of sentence.

When a defendant files a timely post-sentence motion, the 30-day period for the defendant's direct appeal on all matters in that case—including all issues related to any informations and any charges consolidated against the defendant for trial—is triggered by the trial judge's decision on the post-sentence motion or the denial of the motion by operation of law. The appeal period runs from the entry of the order. As to the date of entry of orders, see Pa.R.A.P. 108. No direct appeal may be taken by a defendant while his or her post-sentence motion is pending. See subsection A(2).

If no timely post-sentence motion is filed, *the defendant's* appeal period runs from the date sentence is imposed. See subsection A(3). *Under subsection A(4), however, when the defendant has not filed a post-sentence motion but the Commonwealth files a motion to modify sentence under Rule 1411, it is the entry of the order disposing of the Commonwealth's motion that commences the 30-day period during which the defendant's notice of appeal must be filed. See Rule 1411(B)(2)(b).*

All references to appeals in this rule relate to the defendant's right to appeal. The rule does not address or alter the Commonwealth's right to appeal. *For Commonwealth challenges to sentences, see Rule 1411.*

***The "Disposition" section has been revised to underscore the now-express prohibition against vacating sentence pending disposition of the post-sentence motion. This Comment revision also explains that a sentence may not be vacated during any reconsideration of the judge's decision on the post-sentence motion.***

*Disposition*

Under subsection B(3), once the defendant makes a timely written post-sentence motion, the judge retains jurisdiction for the duration of the disposition period. *The judge may not vacate the order imposing sentence pending decision on the post-sentence motion. This is so whether or not the Commonwealth files a motion to modify sentence. See Rule 1411(B)(2)(a), [It is not necessary for the judge to vacate the sentence imposed.]*

Subsection B(3)(b) permits one 30-day extension of the 120-day time limit, for good cause shown, upon motion of the defendant. In most cases, an extension would be requested and granted when new counsel has entered the case. Only the defendant or counsel may request such an extension. The judge may not, sua sponte, extend the time for decision: a congested court calendar or other judicial delay does not constitute "good cause" under this rule.

The possibility of an extension is not intended to suggest that 120 days are required for decision in most cases. The time limits for disposition of the post-sentence motion are the outer limits. Easily resolvable issues, such as a modification of sentence or a guilty plea challenge, should ordinarily be decided in a much shorter period of time.

If the trial judge *decides the motion within the time limits of this rule, the judge may reconsider that decision, but [grants reconsideration on the post-sentence motion pursuant to 42 Pa.C.S. § 5505 or Pa.R.A.P. 1701,] the judge may not vacate the sentence pending reconsideration, Rule 1410B(3).* [the] *The reconsideration period may not be used to extend the timing requirements set forth in section B(3) for decision on the post-sentence*

motion: the time limits imposed by subsections B(3)(a) and B(3)(b) continue to run from the date the post-sentence motion was originally filed. The trial judge's reconsideration must therefore be resolved within the 120-day decision period of subsection B(3)(a) or the 30-day extension period of subsection B(3)(b), whichever applies. If a decision on the reconsideration is not reached within the appropriate period, the post-sentence motion, including any issues raised for reconsideration, will be denied pursuant to subsection B(3)(c).

\* \* \* \* \*

*Miscellaneous*

Correspondence with the Committee has noted that Rule 1410 does not clearly indicate under what circumstances a defendant may raise a discretionary sentencing issue on appeal if no post-sentence motion has been filed. (Rule 1410B(1)(c) only addresses issues raised "before or during trial.") The "Miscellaneous" section of the Rule 1410 *Comment* has therefore been revised to make it clear that in order to forgo a post-sentence motion on a discretionary sentencing issue, the issue must be preserved on the record at the sentencing proceeding, citing *Commonwealth v. Jarvis*, 663 A.2d 790 (Pa. Super. 1995).

\* \* \* \* \*

Issues [raised] properly preserved at the sentencing proceeding need not, but may[,] be raised again in a motion to modify sentence in order to preserve them for appeal. In deciding whether to move to modify sentence, counsel [should] must carefully consider whether the record created at the sentencing proceeding is adequate for appellate review of the issues, or the issues may be waived. See *Commonwealth v. Jarvis*, 663 A.2d 790 (Pa. Super. 1995). See also Rule 1405.C(4). As a general rule, the motion to modify sentence under subsection B(1)(a)(v) gives the sentencing judge the earliest opportunity to modify the sentence. This procedure does not affect the court's inherent powers to correct an illegal sentence or obvious and patent mistakes in its orders at any time before appeal or upon remand by the appellate court. See, e.g., *Commonwealth v. Jones*, 554 A.2d 50 (Pa. 1989) (sentencing court can, sua sponte, correct an illegal sentence even after the defendant has begun serving the original sentence) and *Commonwealth v. Cole*, 263 A.2d 339 (Pa. 1970) (inherent power of the court to correct obvious and patent mistakes).

**The qualifier at the end of the following paragraph is a logical extension of the holding in *Commonwealth v. Jarvis*, supra.**

Once a sentence has been modified or reimposed pursuant to a motion to modify sentence under subsection B(1)(a)(v) or Rule 1411 (*Commonwealth Challenges to Sentence; Sentencing Appeals*), [however,] a party wishing to challenge the decision on the motion does not have to file an additional motion to modify sentence in order to preserve an [the] issue[(s)] for appeal, as long as the issue was properly preserved at the time sentence was modified or reimposed.

**The "Miscellaneous" section has also been revised to include a paragraph explaining the Rule 1411 procedures and their impact on the timing of a defendant's notice of appeal. The second paragraph of the revision discusses the treatment of premature appeals in Pa.R.A.P. 905(a).**

*Commonwealth challenges to sentences are governed by Rule 1411. If the defendant files a post-sentence motion,*

*the time limits for decision on the defendant's motion govern the time limits for disposition of the Commonwealth motion to modify sentence, regardless of which motion is filed first. See the Comment to Rule 1411(B)(2)(a). If the defendant elects to file an appeal and the Commonwealth files a motion to modify sentence, decision on the Commonwealth's motion triggers the defendant's 30-day appeal period. See Rule 1410A(4).*

*Given that the Commonwealth has 10 days to file a motion to modify sentence under Rule 1411(B)(1), it is possible that the defendant might elect to file a notice of appeal under Rule 1410A(3) followed by the Commonwealth's filing a timely motion to modify sentence. When this occurs, the defendant's notice of appeal is rendered premature, because the entry of the order disposing of the Commonwealth's motion to modify sentence then becomes the triggering device for the defendant's notice of appeal. In this situation, counsel for the defendant should be aware that Pa.R.A.P. 905(a) addresses this problem. In response to an extensive history of appeals which were quashed because of the premature filing of the notice of appeal, the last sentence of PA.R.A.P. 905(a) was drafted to create a legal fiction which treats a premature notice of appeal as filed after the entry of the appealable order. For a discussion of this provision, see Darlington, McKeon, Schuckers, and Brown, *Pennsylvania Appellate Practice*, 2d., § 905.3.*

\* \* \* \* \*

[Pa.B. Doc. No. 96-475. Filed for public inspection March 29, 1996, 9:00 a.m.]

# Title 25—LOCAL COURT RULES

## FAYETTE COUNTY

### Amended Local Rule 1301: Compulsory Arbitration: Cases Covered; No. 427 of 1996, G. D.

#### Order

And Now, this 11th day of March, 1996, it is hereby ordered that the above-stated Local Rule be amended as follows. This amendment shall be effective 30 days after the publication in the *Pennsylvania Bulletin*.

The Prothonotary of Fayette County is *Ordered* and *Directed* to do the following:

- (1) File seven (7) certified copies of this Order and Amended Rule with the Administrative Office of Pennsylvania Courts.
- (2) File two (2) certified copies of this Order and Amended Rule with the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.
- (3) File one (1) certified copy of this Order and Amended Rule with the Pennsylvania Civil Rules Committee.
- (4) Forward one (1) copy for publication in the *Fayette Legal Journal*.
- (5) Forward one (1) to the Fayette County Law Library.
- (6) Keep continuously available for public inspection copies of this Order and Amended Rule.

It is further *Ordered* that said rule as it existed prior to the amendment is hereby repealed and annulled on the effective date of said rule as amended, but no right acquired thereunder shall be disturbed.

*By the Court*

WILLIAM J. FRANKS,  
*President Judge*

**Rule 1301. Compulsory Arbitration: Cases Covered.**

(a) Any civil action where the amount in controversy is Twenty-five Thousand (\$25,000) Dollars or less and title to real estate is not involved, shall be submitted to compulsory arbitration pursuant to Section 7361 of the Judicial Code, 42 Pa.C.S. Section 7361, and Rules 1301 to 1314 of the Pennsylvania Rules of Civil Procedure, as well as these rules.

(b) The amount in controversy in any action shall be deemed to exceed Twenty-five Thousand (\$25,000) Dollars if any count in the complaint or counter-claim demands an amount in excess of Twenty-five Thousand (\$25,000) Dollars.

(c) Notwithstanding the amount demanded, if the Court determines that the amount in controversy does not exceed twenty-five thousand (\$25,000) dollars for the purposes of these rules, the Court shall order the matter to arbitration.

(d) If separate actions are consolidated for trial and the amount in controversy in any of these actions exceeds twenty-five thousand (\$25,000) dollars, arbitration shall not apply.

(e) If the same transaction or occurrence, or series of transactions or occurrences, give rise to more than one cause of action and separate actions have been commenced, all such actions shall be consolidated for arbitration and heard together. Before proceeding with any hearing, the board of arbitration shall inquire of the parties whether any other action has been commenced.

[Pa.B. Doc. No. 96-476. Filed for public inspection March 29, 1996, 9:00 a.m.]

**MERCER COUNTY**

**Revision of the Local Rules of the Court of  
Common Pleas; No. L1018.1**

**Order**

*And Now*, this 4th day of March, 1996, *It Is Hereby Ordered and Decreed* that Local Rule L1018.1 concerning Civil Actions is hereby revised and shall become effective thirty (30) days after publication in the *Pennsylvania Bulletin* and shall apply to all civil actions filed after that date.

The revision of L1018.1 is as follows:

**NOTICE TO DEFEND**

The organization to be named in The Notice To Defend from whom legal help can be obtained is: Mercer County Lawyers Referral Service, c/o Mercer County Bar Association, P. O. Box 1302, Hermitage, PA 16148, telephone: (412) 342-3111.

*It Is Also Ordered and Directed* that the Prothonotary of Mercer County, in accordance with Pa.R.C.P. No. 239, shall file seven (7) certified copies of this Rule with the Administrative Office of Pennsylvania Courts, furnish two (2) certified copies to the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin* and file one (1) certified copy with the Civil Procedures Rules Committee.

*It Is Further Ordered* that this local Rule shall be kept continuously available for public inspection and copying in the Office of the Prothonotary of Mercer County. Upon request and payment of reasonable costs of reproduction and mailing, the Prothonotary shall furnish to any person a copy of any local rule.

*By the Court*

FRANCIS J. FORNELLI,  
*President Judge*

[Pa.B. Doc. No. 96-477. Filed for public inspection March 29, 1996, 9:00 a.m.]