

THE COURTS

Title 210—APPELLATE PROCEDURE

PART I. RULES OF APPELLATE PROCEDURE

[210 PA. CODE CH. 17]

Amendment to Note to Pa.R.A.P. 1701; No. 109;
Doc. No. 1

Order

Per Curiam:

And Now, this 22nd day of August, 1997, the amendment to the Note to Rule 1701 of the Pennsylvania Rules of Appellate Procedure is adopted as follows.

This order shall be processed in accordance with Pa.R.J.A. 103(b) and shall become effective on January 1, 1998.

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.

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(d) ***

Official Note: The following statutory provisions relate to supersedeas generally:

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Generally an appeal does not operate as a supersedeas of government agency action.

[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.R.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.]

[Pa.B. Doc. No. 97-1443. Filed for public inspection September 5, 1997, 9:00 a.m.]

Title 231—RULES OF CIVIL PROCEDURE

PART I. GENERAL

[231 PA. CODE CH. 1940]

Proposed Rules 1940.1—1940.10 Governing Voluntary Mediation in Divorce and Custody Actions; Recommendation 47

The Domestic Relations Procedural Rules Committee proposes the following Rules of Civil Procedure relating to mediation of divorce and custody actions. The Committee solicits comments and suggestions from all interested persons prior to submission of the proposed rules to the Supreme Court.

Comments relating to the proposed rules must be received no later than November 14, 1997 and must be directed to Sophia P. Paul, Esquire, Counsel, Domestic Relations Procedural Rules Committee, 429 Forbes Avenue, Suite 300, Pittsburgh, Pennsylvania 15219, FAX (412) 565-2336, email: spaul@supreme.court.state.pa.us.

These rules are entirely new. The explanatory comments which appear in connection with the proposed rules have been inserted by the Committee for the convenience of those reviewing the proposed rules. They will not constitute part of the rules nor will they be officially adopted or promulgated by the Court.

Annex A

TITLE 231. RULES OF CIVIL PROCEDURE

PART I. GENERAL

CHAPTER 1940. VOLUNTARY MEDIATION IN DIVORCE AND CUSTODY ACTIONS

Explanatory Comment

Introduction

In recent years, the use of mediation as an alternative to litigation of domestic relations cases has received widespread attention from legislators, judges, attorneys and mental health professionals. As two noted mediation experts observed in relation to child custody and visitation cases: "[c]ourts are ill-equipped to mandate particular visitation schedules and custodial arrangements, the wisdom of which depend on the situations of the parents and children rather than on legal rules." Nancy G. Rogers and Craig A. McEwen, *Mediation Law Policy Practice* 230 (1989). Many share this frustration with the adversarial system and a growing body of research suggests that mediation may be the more satisfactory and desirable means of conflict resolution in these cases. Mediation offers more flexibility in terms of both the subject matter that may be discussed during mediation and the range of solutions available to the parties. Effective mediation also assists the parties in shaping their own framework for future discussion and resolution of conflicts that arise following separation and divorce.

In 1996, the Pennsylvania legislature amended the Divorce Code, Act No. 20-1996, § 2, 23 Pa.C.S. §§ 3901—3904, to encourage local courts to establish voluntary mediation programs for divorce and custody cases. Pursuant to § 3904 of the Code, which directs the Supreme Court to develop model rules to implement these programs, the Domestic Relations Committee proposes the following Rules of Civil Procedure. These rules cover domestic violence screening, minimum mediator qualifica-

tions, the role of counsel in mediation, confidentiality, and the evaluation and monitoring of mediation programs—all of which are areas in which statewide uniformity of practice and procedure is essential to successful mediation in Pennsylvania. These proposed Rules are intended to apply only to court-connected mediation and not to private mediation. In accordance with 23 Pa.C.S. § 3904, these rules will not affect existing mediation programs established pursuant to local rule.

Rule 1940.1. Mediation Authorized.

A court may elect to establish a mediation program for actions in divorce or custody as provided in these Rules.

Rule 1940.2. Definitions.

(a) "Mediation" is the confidential process by which a neutral mediator, selected by the parties or appointed by the court, assists the parties in attempting to reach a mutually acceptable agreement on issues arising in an action for divorce or custody. The role of the mediator is to assist the parties in identifying the issues, reducing misunderstanding, clarifying priorities, exploring areas of compromise and finding points of agreement. An agreement reached by the parties must be based on the voluntary decisions of the parties and not the decision of the mediator. The agreement can resolve all or only some of the disputed issues. Parties and their representatives are required to mediate in good faith, but are not compelled to reach an agreement. While mediation is an alternative means of conflict resolution, it is not a substitute for the benefit of legal advice.

(b) "Orientation session" is an initial meeting between parties and a mediator to educate the parties on the mediation process so that they can make an informed choice about continued participation in that process. This meeting may be mandated by the court and may be structured as either a group or individual session. The meeting is confidential at the point, if any, that mediation commences during the orientation session.

Explanatory Comment

These definitions track the legislative distinction between the initial orientation session, which the court may order the parties to attend, and actual mediation of the issues in dispute by the parties, which may be ordered only upon the parties' agreement. See 23 P. S. § 3901(b). The primary purpose of the orientation session is to educate the parties on the availability, the process and the benefits of mediation so that the parties can make an informed decision about whether they wish to proceed further with mediation. If, however, the parties agree to mediation and begin to mediate actual issues at this initial session, they may do so and the session then becomes confidential within the meaning of Rule 1940.7.

Rule 1940.3. Order for Orientation Session and Mediation; Selection of Mediator.

(a) Except as provided in (b), the court may order the parties to attend an orientation session at any time upon motion by a party, stipulation of the parties, or the court's own initiative.

(b) The court may not order an orientation session if a party or a party's child is or has been the subject of abuse either during the pendency of the action or within 24 months preceding the filing of the action.

Official Note: See also Rule 1940.6 requiring termination of mediation when the mediator finds that the proceeding is "inappropriate" for mediation; this rule reflects the mediator's continuing ethical obligation dur-

ing the mediation to screen for abuse and to terminate the mediation in the event he or she determines that the abuse renders the case unsuitable for mediation.

(c) Following the orientation session and with the consent of the parties, the court may order the parties to mediation. The mediation may address any issues agreed to by the parties unless limited by court order.

Explanatory Comment

Proposed Rule 1940.3 prescribes the circumstances under which a case may be referred to mediation. It prohibits the referral of any case involving past or present domestic abuse because of the substantial imbalance of negotiating power that exists between the parties. The parties themselves, of course, may always agree to mediation. Although each court may devise its own procedures for screening these cases, screening must occur prior to referral of a case to the orientation session. See 23 P. S. § 3904(b). The most widely-used screening mechanism is the Tolman model developed by Dr. Richard Tolman, Ph.D. of the University of Illinois. This model consists of a series of questions asked of the parties which are specifically designed to elicit the information needed to determine whether abuse has occurred and if the case is appropriate for mediation.

Rule 1940.4. Minimum Qualifications of the Mediator.

(a) A mediator must have at least the following qualifications:

(1) a bachelor's degree and practical experience in law, psychiatry, psychology, counseling, family therapy or any comparable behavioral or social science field;

(2) successful completion of basic training in a divorce and custody mediation program approved by the Academy of Family Mediators;

(3) mediation professional liability insurance; and

(4) additional mediation training consisting of a minimum of 4 mediated cases totaling 10 hours under the supervision of a mediator who has complied with subsections (1) through (3) above and is approved by the court to supervise other mediators.

(b) The mediator shall comply with the ethical standards and continuing educational requirements of the Academy of Family Mediators.

Explanatory Comment

Mediator qualifications are a key component of a successful mediation program. This proposed Rule sets forth the minimum qualifications that a mediator must have in order to participate in court-connected mediation. Courts may impose additional, more stringent qualifications. In addition to a bachelor's degree and practical experience, a mediator must have basic training in a program approved by the Academy of Family Mediators. Currently, the Academy requires 40 hours minimum for divorce and custody training and 30 hours minimum for custody training only. Each type of training includes at least two hours of domestic violence training. Prior to mediating independently, the mediator must also mediate at least four cases under the supervision of a court-connected mediator. A mediator must also have his or her own professional liability insurance.

Rule 1940.5. Duties of the Mediator.

(a) At the orientation session, the mediator must inform the parties in writing of the following:

(1) the costs of mediation;

(2) the process of mediation;

(3) that the mediator does not represent either or both of the parties;

(4) the nature and extent of any relationships with the parties and any personal, financial, or other interests that could result in a bias or conflict of interest;

(5) that mediation is not a substitute for the benefit of independent legal advice; and

(6) that the parties should obtain legal assistance for drafting any agreement or for reviewing any agreement drafted by the other party or the mediator.

(b) When mediating a custody dispute, the mediator shall ensure that the parties consider fully the best interests of the children.

(c) With the consent of the parties, the mediator may meet with the party's children or invite other persons to participate in the mediation.

Explanatory Comment

Proposed Rule 1940.5 sets forth the mediator's responsibilities to the parties. Subdivision (c) permits the participation of third persons with the consent of the parties. Such persons would include attorneys, other family members, mental health professionals, accountants, appraisers or any other person who may be of assistance in resolving the disputed issues.

Rule 1940.6. Termination of Mediation.

(a) Mediation shall terminate upon the earliest of the following circumstances to occur:

(1) a complete agreement of the parties;

(2) a partial agreement of the parties and a determination by the mediator that further mediation will not resolve the remaining issues; or

(3) a determination by the mediator that the parties are unable to reach an agreement through mediation or that the proceeding is inappropriate for mediation.

(b) If the parties reach a complete or partial agreement, the mediator shall, within 14 days, prepare and transmit to the parties and their attorneys, if any, a non-binding memorandum of understanding setting forth the terms of the parties' agreement. In no event shall any agreement, whether reflected in the memorandum of understanding or otherwise, be binding on the parties until and unless it is subsequently incorporated into a writing and signed by the parties.

(d) If no agreement is reached during mediation, the mediator shall, within 14 days, report this in writing to the court, without further explanation.

(e) The mediator may mediate in subsequent disputes between the parties, but shall not act as attorney, counselor, or psychotherapist for any party either during or after the mediation of a divorce or custody action or in any matter which was the subject of the mediation.

Explanatory Comment

This proposed Rule sets forth the circumstances for termination of mediation. Subdivision (a)(3) reflects the mediator's continuing ethical obligation to screen for domestic violence, substance abuse and any other factors which make the case unsuitable for mediation.

Subdivision (b) requires the mediator to prepare a memorandum of understanding summarizing the agreements reached by the parties during mediation. This memorandum is primarily for the benefit of the parties

and is not binding on either party until and unless the agreement reflected therein is subsequently reduced to a signed, written agreement evidencing the parties' intention to be bound by that agreement. This is accomplished either by the parties' attorneys or, if not represented, the parties themselves, but in no event is the mediator responsible for drafting the parties' agreement. Court approval of the final agreement is not necessary for the purpose of enforcing it to the same extent as a court order. See 23 Pa.C.S. § 3105.

Rule 1940.7. Confidentiality.

(a) Except as provided in (b) and (c),

(1) all mediation communications and mediation documents, as those terms are defined in 42 P. S. § 5949 of the Judicial Code, are privileged, not subject to discovery and inadmissible as evidence in any proceeding; and

(2) no party, mediator or other person who participates in the mediation may be called as a witness or otherwise compelled to reveal any matter disclosed in the mediation.

(b) A fraudulent communication is not privileged in an action to enforce or set aside a mediation agreement reached as a result of that fraudulent communication.

(c) Unless its terms provide otherwise, the final agreement signed by the parties is not privileged.

Explanatory Comment

The parties' expectations that matters disclosed in mediation will remain confidential are essential to encouraging candid and forthright discussion during the mediation process. Thus, the proposed Rule provides that all mediation communications and documents, as those terms are defined in 42 P. S. § 5949 of the Judicial Code, are privileged. Nothing in this proposed Rule is intended to modify or restrict the provisions of the Judicial Code which define, describe and limit the types of communications and documents which are privileged. Note that under the Judicial Code all but fraudulent communications are privileged whereas only documents which are prepared for the purpose of, in the course of, or pursuant to the mediation are privileged. 42 Pa.C.S. § 5949(b)(4).

The proposed rule does not explicitly permit the parties to waive confidentiality, even if the parties were to agree to execute a written waiver to this effect. The committee invites comments from the bench, bar and other interested persons on whether the parties should be permitted to waive confidentiality and, if so, the circumstances under which it may appropriately be waived.

Rule 1940.8. Mediator Compensation.

Mediators shall be compensated for their services at a rate to be established by each court.

Explanatory Comment

Mediator compensation is necessary to establish and maintain a quality mediation program. However, in the absence of a statewide office for alternative dispute resolution, each court must develop and secure its own funds for the mediation program. Since the availability of funds will vary significantly from court to court, each court may establish its own rate and method of compensation at this time. In doing so, however, the fees should be structured so that all parties are assured equal access to mediation services.

Rule 1940.9. Sanctions.

On its own motion or a party's motion, the court may impose sanctions against any party or attorney who fails

to comply or causes a party not to comply with these mediation rules. Sanctions may include an award of mediation costs and attorney fees, including those incurred in the filing and presentation of the motion for sanctions.

Rule 1940.10. Evaluation of Mediation Program.

(a) Each court shall require mediators and court personnel to evaluate the mediation program at least semi-annually.

(b) The court shall require uniform statistical and evaluation report forms to be completed by the mediator after each mediation session.

Explanatory Comment

This proposed rule contemplates peer review evaluation at the local level for the benefit of the courts and mediators to discuss and evaluate the effectiveness of their particular programs. Peer review is also essential to mediator accountability.

Pursuant to 23 Pa.C.S. § 3904, the Supreme Court is also required to monitor and evaluate the overall effectiveness of mediation programs statewide. At present, however, there is no central office for alternative dispute resolution that can provide the expertise, resources and statistical information necessary for the development of uniform statewide reporting requirements. Reporting is necessary to assess the overall effectiveness of mediation as an alternative to litigation, and it will eventually be required. The current lack of reporting requirements, however, should not be cause for delay in the establishment of mediation programs or the implementation of statewide mediation rules.

MAX BAER,
Chairperson

[Pa.B. Doc. No. 97-1444. Filed for public inspection September 5, 1997, 9:00 a.m.]

Title 234—RULES OF CRIMINAL PROCEDURE

PART I. GENERAL

[234 PA. CODE CH. 100]

Order Amending Rule 149; No. 225; Doc. No. 2

The Criminal Procedural Rules Committee has prepared a Final Report explaining the August 22, 1997 amendments to Rule of Criminal Procedure 149 (Pleas of Guilty Before Issuing Authority in Court Cases). These amendments clarify that once a district justice accepts a guilty plea in a court case and imposes sentence, the case must be forwarded to the court of common pleas for all further proceedings, including the collection of restitution, fines, and costs; supervision of probation; and revocation proceedings. The Final Report follows the Court's Order.

Order

Per Curiam:

Now, this 22nd day of August, 1997, upon the recommendation of the Criminal Procedural Rules Committee; this Recommendation having been published at 26 Pa.B. 4897 (October 12, 1996) and in the *Pennsylvania Reporter* (Atlantic Second Series Advance Sheets Vol. 682) before adoption, with a Final Report to be published with this Order:

It Is Ordered pursuant to Article V, Section 10 of the Constitution of Pennsylvania that Pa.R.Crim.P. 149 is hereby amended in the following form.

This *Order* shall be processed in accordance with Pa.R.J.A. 103(b), and shall be effective January 1, 1998.

Annex A

TITLE 234. RULES OF CRIMINAL PROCEDURE

PART I. GENERAL

CHAPTER 100. PROCEDURE IN COURT CASES

PART IV. PROCEEDINGS BEFORE ISSUING AUTHORITIES

Rule 149. Pleas of Guilty Before [Issuing Authority] District Justice in Court Cases.

(a) In a court case in which [an issuing authority] a district justice is specifically empowered by statute to exercise jurisdiction, a defendant may plead guilty before an issuing authority at any time up to the completion of the preliminary hearing or the waiver thereof.

(b) The [issuing authority] district justice may refuse to accept a plea of guilty, and the [issuing authority] district justice shall not accept such plea unless there has been a determination, after inquiry of the defendant, that the plea is voluntarily and understandingly tendered.

(c) The plea shall be in writing,

(1) [Signed] signed by the defendant, with a representation by the defendant that the plea is entered knowingly, voluntarily, and intelligently; and

(2) [Signed] signed by the [issuing authority] district justice, with a certification that the plea was accepted after a full inquiry of the defendant, and that the plea was made knowingly, voluntarily, and intelligently.

(d) A defendant who enters a plea of guilty under this rule may, within [ten () 10 ()] days after sentence, change the plea to not guilty by so notifying the [issuing authority] district justice in writing. In such event, the [issuing authority] district justice shall vacate the plea and judgment of sentence, and the case shall proceed in accordance with Rule 146, as though the defendant had been held for court.

(e) Ten days after the acceptance of the guilty plea and the imposition of sentence, the district justice shall certify the [Judgment] judgment [on a plea of guilty entered under this rule must be certified], and shall forward the case to the clerk of [court] courts of the judicial district for further proceedings. [within ten (10) days of disposition.]

Official Note: Adopted June 30, 1977, effective September 1, 1977; Comment revised January 28, 1983, effective July 1, 1983; amended November 9, 1984, effective January 2, 1985; amended August 22, 1997, effective January 1, 1998.

Comment:

In certain cases, provisions for taking a plea of guilty in what would ordinarily be a court case within the jurisdiction of the court of common pleas have been placed within the jurisdiction of [issuing authorities] district justices. This rule [was initially adopted] provides the

procedures to implement [procedures for such] this expanded [issuing authority] jurisdiction of district justices to accept pleas of guilty under certain circumstances in certain specified [third degree] misdemeanors. [, pursuant to the Act of July 15, 1976, P. L. 1014, No. 204 §§ 303, 304, 42 P. S. §§ 2303, 2304. This Act has now been replaced by Section 1515(a)(5) and (6) of the] See Judicial Code, 42 Pa.C.S. § 1515(a)(5), (6), (6.1), and (7).

This rule applies whenever [an issuing authority] a district justice has jurisdiction to accept a plea of guilty in a court case.

Under paragraph (a), it is intended that a defendant may plead guilty at the completion of the preliminary hearing or at any time prior thereto.

Prior to accepting a plea of guilty under this rule, it is suggested that the [issuing authority] district justice consult with the attorney for the Commonwealth concerning the case, [with regard to] concerning the defendant's possible eligibility for A.R.D. or other types of diversion, and concerning possible related offenses which might be charged in the same complaint. See *Commonwealth v. Campana*, [452 Pa. 233,] 304 A.2d 432 (Pa. 1973). [The issuing authority should, in any event, determine before accepting the plea whether any other related offenses exist which might affect jurisdiction.]

Before accepting a plea,

(a) [the] The [issuing authority] district justice should [also] be satisfied of jurisdiction to accept the plea, and should determine whether any other related offenses exist which might affect jurisdiction.

(b) The district justice should be satisfied that the defendant is eligible under the law to plead guilty before [an issuing authority] a district justice, and, when relevant, should check [. This may include, for example, a check of] the defendant's prior record and inquire [inquiry] into the amount of damages. [, where relevant.]

(c) The district justice should advise the defendant of the right to counsel. For purposes of appointment of counsel, these cases should be treated as court cases, and the Rule 316 (Assignment of Counsel) procedures should be followed.

(d) The district justice should advise the defendant that, if the defendant wants to change the plea to not guilty, the defendant, within 10 days after imposition of sentence, must notify the district justice who accepted the plea of this decision in writing.

(e) The [issuing authority] district justice should make a searching inquiry into the voluntariness of the defendant's plea. A colloquy similar to that suggested in Rule 319 should be conducted to determine the voluntariness of the plea. At a minimum, the [issuing authority] district justice should ask questions to elicit the following information:

(1) [That] that the defendant understands the nature of the charges pursuant to which the plea is entered[.];

(2) **[That] that** there is a factual basis for the plea **[.]**;

(3) **[That] that** the defendant understands that he or she is waiving the right to trial by jury **[.]**;

(4) **[That] that** the defendant understands that he or she is presumed innocent until **[he is]** found guilty **[.]**;

(5) **[That] that** the defendant is aware of the permissible range of sentences and/or fines for the offenses charged **[.]**;

(6) **[That] that** the defendant is aware that the **[issuing authority] district justice** is not bound by the terms of any plea agreement tendered unless the **[issuing authority] district justice** accepts such agreement **[.]**; and

(7) **[That] that** the defendant understands that the plea precludes consideration for A.R.D. or other diversionary programs **[.]**;

See Rule 319 and the Comment thereto for further elaboration of the required colloquy. See also *Commonwealth v. Minor*, [467 Pa. 230,] 356 A.2d [246] 346 (Pa. 1976), overruled on other grounds in *Commonwealth v. Minarik*, 427 A.2d 623, 627 (Pa. 1981); *Commonwealth v. Ingram*, [455 Pa. 198,] 316 A.2d 77 (Pa. 1974); *Commonwealth v. Martin*, [455 Pa. 49,] 282 A.2d 241 (Pa. 1971).

[Before accepting the plea, the issuing authority should advise the defendant of the right to counsel. For purposes of appointment of counsel, these cases should be treated as court cases, and the Rule 318 (Assignment of Counsel) procedure should be followed. The defendant should also be advised, at the time the plea is taken, that any attempt to change the plea to not guilty must be made before the issuing authority within ten (10) days of imposition of sentence.]

While the rule continues to require a written plea incorporating the contents specified in paragraph (c), the form of plea was deleted in 1985 because it is no longer necessary to control the specific form of written plea by rule.

Paragraph (c) does not preclude verbatim transcription of the colloquy and plea.

[Under paragraph (a), it is intended that a defendant may plead guilty at the completion of the preliminary hearing or at any time prior thereto.]

At the time of sentencing, or at any time within the 10-day period before transmitting the case to the clerk of courts pursuant to paragraph (e), the district justice may accept payment of, or may establish a payment schedule for, installment payments of restitution, fines, and costs.

If a plea is not entered pursuant to this rule, the papers must be transmitted to the clerk of **[court] courts** of the judicial district in accordance with Rule 146. After the time set forth in paragraph (a) for acceptance of the plea of guilty has expired, the **[issuing authority] district justice** no longer has jurisdiction to accept a plea. **[Once the case is transmitted in accordance with Rule 146, the court of common**

pleas has exclusive jurisdiction over the case and any plea incident thereto.]

Regardless of whether a plea stands or is timely changed to not guilty by the defendant, the **[issuing authority] district justice** must transmit the transcript and all supporting documents to the appropriate court, in accordance with Rule 146.

Once the case is forwarded as provided in this rule and in Rule 146, the court of common pleas has exclusive jurisdiction over the case and any plea incident thereto. The case would thereafter proceed in the same manner as any other court case, which would include, for example, the collection of restitution, fines, and costs; the establishment of time payments; and the supervision of probation in those cases in which the district justice has accepted a guilty plea and imposed sentence.

Committee Explanatory Reports:

Final Report explaining the August 22, 1997 amendments, which clarify the procedures following a district justice's acceptance of a guilty plea and imposition of sentence in a court case, published with the Court's order at 27 Pa.B. 4549 (September 6, 1997).

FINAL REPORT

Amendments to Rule of Criminal Procedure 149; Pleas of Guilty Before Issuing Authority in Court Cases

Introduction

On August 22, 1997, upon the recommendation of the Criminal Procedural Rules Committee, the Supreme Court amended Rule of Criminal Procedure 149 (Pleas of Guilty Before Issuing Authority in Court Cases) to clarify that once a district justice accepts a guilty plea in a court case and imposes sentence, the case must be forwarded to the court of common pleas for all further proceedings, including the collection of restitution, fines, and costs, the supervision of probation, and revocation proceedings. The amendments will be effective January 1, 1998. This Final Report highlights the Committee's considerations in formulating these amendments.¹

Background

The Committee received correspondence from State Court Administrator Nancy Sobolevitch and others requesting that the Committee clarify the Rule 149 (Pleas of Guilty Before Issuing Authority in Court Cases) procedures following the acceptance of a guilty plea and imposition of sentence. Specifically, the correspondents questioned whether fines, costs, and restitution imposed by the district justice are to be collected by the district justice or the court of common pleas. The correspondents pointed out that the statewide practice is not uniform, with some district justices retaining the case until all the fines and costs are collected, and other district justices forwarding the entire case to the court of common pleas for collection.

The Committee reviewed the history of Rule 149, which was originally recommended in 1977 to provide procedures to implement 42 Pa.C.S. § 1515(a)(5) and (6). This statutory provision expanded the jurisdiction of district justices by permitting them to accept guilty pleas under certain circumstances in certain specified third degree misdemeanors. Because these pleas were technically court cases, the Committee had agreed that, once the plea process was completed, the case should be forwarded to

the court of common pleas. This requirement was included as paragraph (e), which provides:

Judgment on a plea of guilty entered under this rule must be certified to the clerk of courts of the judicial district within ten (10) days of disposition.

Furthermore, the Committee intended that after the judgment was certified by the district justice, and the case forwarded to the court of common pleas, all further proceedings would be in the court of common pleas.

Although the rule clearly provides that the cases are to be forwarded to the court of common pleas, and the rule history makes it clear that once the case was forwarded, all further proceedings would be in the court of common pleas, the Committee considered the correspondence suggesting that the procedure be changed to permit the case to remain with the district justice, and concluded that the procedure should not be changed. However, persuaded by the correspondents' concern about the lack of statewide uniformity, and their obvious confusion about the intended procedure, the Committee agreed that Rule 149 and the Comment should be amended to more clearly provide that once the district justice accepts the guilty plea and imposes sentence, the case should be forwarded to the court of common pleas, where all further proceedings are to occur. In addition, we agreed that the rule should make it clear that "further proceedings" includes the collection of restitution, fines, and costs, the supervision of probation, and revocation proceedings.

Finally, the Committee agreed that the rule should clear up another area of confusion—the district justice's authority to act while the case remains within the district justice's jurisdiction, which is the 10-day period within which the defendant may withdraw the plea. Although the members thought the rule was clear that the district justice has the authority to accept payment of, or to establish a payment schedule for installment payments of, any restitution and the fines and costs, they concluded that a paragraph in the Comment underscoring this authority would be helpful to the members of the minor judiciary.

Discussion of Amendments

1. The term "issuing authority" has been changed to "district justice" throughout the rule and Comment to make the rule consistent with 42 Pa.C.S. § 1515, which applies only to district justices, and provides for the acceptance of guilty pleas in certain third degree misdemeanors and other cases.

2. Paragraph (e) has been amended in several ways.

(a) The phrases "shall forward the case" and "for further proceedings" have been added to make it clear that the case must be forwarded to the court of common pleas and that all further proceedings are to occur in the court of common pleas.

(b) The phrase "ten days after the acceptance of the guilty plea and the imposition of sentence, the district justice shall certify that..." has been added at the beginning of the paragraph to more accurately convey that the case is not forwarded until after the tenth day after imposition of sentence. The Committee agreed that this clarification was necessary to reduce the likelihood that a case would be forwarded before the expiration of the defendant's 10-day grace period, during which the

defendant may withdraw the guilty plea and have the case proceed as though the defendant had been held for court.

3. The Comment has been revised in several ways.

(a) A paragraph has been added which explains that at the time of sentencing or during the 10-day period before a case is forwarded to the court of common pleas, the district justice may accept payment of restitution, fines, and costs, or establish a payment schedule.

(b) A paragraph has been added which explains that once the case is forwarded, it is to be treated in the same manner as any other court case. We have included examples of what might occur in these cases, such as the collection of restitution, fines, and costs, the establishment of payment schedules, or the supervision of probation.

(c) Finally, several paragraphs in the present Comment which elaborate on the general requirements concerning acceptance of guilty pleas in court cases have been reorganized, moved, and/or revised for purposes of clarity, but have not been substantively modified.

¹The Committee's Final Reports 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 the Committee's explanatory Final Reports.

[Pa.B. Doc. No. 97-1445. Filed for public inspection September 5, 1997, 9:00 a.m.]

[234 PA. CODE CH. 1400]

Adoption of Pa.R.Crim.P. 1411; Amendment of Pa.R.Crim.P. 1410; Revision of Comment to Pa.R.Crim.P. 1409; No. 226; Doc. No. 2

The Criminal Procedural Rules Committee has prepared a *Final Report* explaining the Supreme Court's adoption of Pa.R.Crim.P. 1411 (Procedures for Commonwealth Challenges to Sentence; Sentencing Appeals), amendment of Rule 1410 (Post-Sentence Motion; Appeal), and revision of the *Comment* to Pa.R.Crim.P. 1409 (Violation of Probation, Intermediate Punishment, or Parole: Hearing and Disposition) on August 22, 1997, effective January 1, 1998. The changes provide procedures for Commonwealth sentencing challenges, and make it clear that judges may not vacate sentence in order to extend the time for consideration or reconsideration of a post-sentence motion or a Commonwealth motion to modify sentence. The *Final Report* follows the Court's Order.

Order

Per Curiam:

And Now, this 22nd day of August, 1997, upon the recommendation of the Criminal Procedural Rules Committee, the proposal having been published in the *Pennsylvania Bulletin* at 26 Pa.B. 1343 (March 30, 1996), and in the *Atlantic Reporter* (Second Series Advance Sheets, Vol. 671-672), it is *Ordered*:

(1) Rule of Criminal Procedure 1411 is hereby adopted,
 (2) Rule of Criminal Procedure 1410 is amended, and
 (3) The *Comment* to Rule of Criminal Procedure 1409 is approved,
 in the following form.

This *Order* shall be processed in accordance with Pa.R.J.A. 103(b), and shall be effective January 1, 1998.

Annex A

TITLE 234. RULES OF CRIMINAL PROCEDURE

PART I. GENERAL

CHAPTER 1400. SENTENCING

Rule 1409. Violation of Probation, Intermediate Punishment, or Parole: Hearing and Disposition.

* * * * *

Official Note: Adopted July 23, 1973, effective 90 days hence; amended May 22, 1978, effective as to cases in which sentence is imposed on or after July 1, 1978; Comment revised November 1, 1991, effective January 1, 1992; amended September 26, 1996, effective January 1, 1997, 26 Pa.B. 4898; Comment revised August 22, 1997, effective January 1, 1998.

Comment

* * * * *

This rule was amended in 1996 to include sentences of intermediate punishment. See 42 Pa.C.S. §§ 9763 and 9773.

Rules 1405, [and] 1410, and 1411 do not apply to revocation cases.

* * * * *

Committee Explanatory Reports: Report explaining the January 1, 1992 amendments published at 20 Pa.B. 1697 (March 24, 1990), 21 Pa.B. 2246 (May 11, 1990); Supplemental Report published with the Court's Order at 21 Pa.B. 5329 (November 16, 1991).

Final Report explaining the September 26, 1996 amendments published with the Court's Order at 26 Pa.B. 4900 (October 12, 1996).

Final Report explaining the August 22, 1997 Comment revision which cross-references Rule 1411 published with the Court's Order at 27 Pa.B. 4553 (September 6, 1997).

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 subsection 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 subsection.

* * * * *

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; the April 1, 1996 effective date extended to July 1, 1996. Comment revised September 26, 1996, effective January 1, 1997; amended August 22, 1997, effective January 1, 1998.

Comment

* * * * *

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.

Optional Post-Sentence Motion

* * * * *

In those cases in which [where] a petitioner under the Post Conviction Relief Act has been granted leave to file a post-sentence motion or to appeal nunc pro tunc, the filing of the post-sentence motion or the notice of appeal must comply with the timing requirements contained in Section A of this rule. See the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541 et seq.

Briefs; Transcripts; Arguments

* * * * *

There is no requirement that oral argument be heard on every post-sentence motion. [Where] When argument is to be heard, however, the judge should determine whether the post-sentence motion argument must be argued before the judge alone, or before a panel sitting en banc. It is recommended that, except in extraordinary circumstances, the post-sentence motion be heard by the judge alone. The judge may make any rulings that could be made by a court en banc. Commonwealth v. Norris, 389 A.2d 668 (Pa. Super. 1978). On the powers of courts en banc, see Commonwealth v. Bonser, 258 A.2d 675 (Pa. Super. 1969). For cases in which there has been a change of venue, see Rule 312.

When oral argument is heard on the post-sentence motion, the defendant need not be present.

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. [It is not necessary for the judge to vacate the sentence imposed.]**

* * * * *

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

* * * * *

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 **under subsection B(1)(a)(v) or Rule 1411, [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] [issues] 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 Rule 1411(C)(1). 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.*

* * * * *

Committee Explanatory Reports:

Final Report explaining the provisions of the new rule published with the Court's Order at 23 Pa.B. 1699 (April 10, 1993). Report explaining the December 17, 1993 amendments published with the Court's Order at 24 Pa.B. 334 (January 15, 1994).

Final Report explaining the September 13, 1995 amendments **concerning bail** published with the Court's Order at 25 Pa.B. 4116 (September 30, 1995).

Final Report explaining the September 26, 1996 Comment revision on Rule 1409 procedures published at 26 Pa.B. 4900 (October 12, 1996).

Final Report explaining the August 22, 1997 amendments to subsections A(4) and B(3) published with the Court's Order at 27 Pa.B. 4553 (September 6, 1997).

(Editor's Note: The following rule is new. It is printed in regular type to enhance readability.)

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 on a preserved issue, 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 subsection (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 subsection (C)(2).

(C) *Trial Court Action; Disposition*

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

(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 section shall not be subject to reconsideration.

Official Note: Adopted August 22, 1997, effective January 1, 1998.

Comment:

New Rule 1411 was promulgated to clarify the procedures for Commonwealth challenges to sentences in light

of the 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 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.

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

Section (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 subsection (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 limit 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 this time limit, the motion is deemed denied by operation of law. See Rule 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 subsection (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 subsection (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 subsection (D)(2). The clerk of courts must also comply with the notice and docketing requirements of Rule 9024.

Appeal of Sentence

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

No Commonwealth Motion to Modify Sentence Filed

Subsection (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 subsection depends on whether the defendant has filed a post-sentence motion. When the defendant files a post-sentence motion, subsection (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 subsection (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 it is the entry of the order disposing of the defendant's post-sentence motion that 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

Subsection (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 subsection (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 limit of subsection (C)(2).

Committee Explanatory Reports:

Final Report explaining the new rule published with the Court's Order at 27 Pa.B. 4553 (September 6, 1997).

FINAL REPORT¹

Commonwealth Challenges to Sentences; Preservation of Sentencing Issues; Vacation of Sentence

On August 22, 1997, upon the recommendation of the Criminal Rules Committee,² the Supreme Court of Pennsylvania adopted Pa.R.Crim.P. 1411 (Procedures for Commonwealth Challenges to Sentence; Sentencing Appeals), amended Rule 1410 (Post-Sentence Motion; Appeal), and approved a revision to the Comment to Pa.R.Crim.P. 1409 (Violation of Probation, Intermediate Punishment, or Parole: Hearing and Disposition), effective January 1, 1998.³ The changes provide procedures for Commonwealth sentencing challenges and make it clear that judges may not vacate sentence in order to extend the time for consideration or reconsideration of a post-sentence motion or a Commonwealth motion to modify sentence.

A. Overview

When the Court adopted present Rule 1410 (Post-Sentence Motion; Appeals) in 1993, the Court rescinded former Rule 1410 (Motion to Modify Sentence), a rule which historically applied to both the Commonwealth and defendants. Present 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, since 1994, the Rules of Criminal Procedure have been silent on what procedures the Commonwealth should follow to challenge a sentence, and over time, 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 was that some judges appeared 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, new Rule 1411 provides procedures for Commonwealth sentencing challenges, with correlative amendments to Rule 1410, and both Rules 1410 and 1411 expressly prohibit a judge from vacating sentence during the rule's dispositional period.

B. Summary of Changes

1. New Rule 1411 (Procedures for Commonwealth Challenges to Sentence; Sentencing Appeals)

New Rule 1411 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 disposition of the Commonwealth's motion to modify sentence, limits which must be met or the Commonwealth's motion will be

denied by operation of law. The judge may not vacate sentence pending disposition or pending reconsideration of that disposition.

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

In addition to clarifying amendments to Section A, Timing, necessitated by the interplay between new Rule 1411 and Rule 1410, the 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. See Rule 1410B(3).

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. *Comment Revision to Rule 1409 (Violation of Probation, Intermediate Punishment, or Parole: Hearing and Disposition)*

Rule 1409 was amended in 1996 to provide separate sentencing procedures for revocation proceedings. We have added a cross-reference to new Rule 1411 in the Comment to make it clear that Rule 1411 does not apply to revocation proceedings.

4. *Relationship of Criminal Rule Changes to Revision of Note to Pa.R.A.P. 1701(b)(3)*

The Note to Rule of Appellate Procedure 1701 contained an out-of-date cross-reference to former Rule 1410. At the Committee's request, the Appellate Court Rules Committee recommended to the Court 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 governed by these two rules.

C. *Correspondence Received in Response to Publication of the Proposal*

The Committee received several comments in response to the proposal. After review, we concluded that no modification of the proposal, as published, was warranted. Subsequent to our review of the comments received in response to publication, the Court directed that new Rule 1411(A)(1) be revised to make it clearer that when the Commonwealth chooses not to file a motion to modify sentence but only to appeal a sentencing issue, the issue must be preserved at the time of sentencing.

D. *Discussion*

NOTE: Section D departs from the Committee's traditional format for the discussion of rule changes. The changes are discussed below in individual annotations, which appear as separate paragraphs within the rules, in bold and italics.

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

(A) *Commonwealth Challenges to Sentence*

Because there was considerable confusion among prosecutors and judges concerning the applicability of Rule 1410 to Commonwealth sentencing challenges, the Committee agreed that there should be a separate rule, and

that the new rule should make it clear that the Commonwealth has the same options as to sentencing challenges that the defendant does, options analyzed at length in the *Comment* to Rule 1411 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 on a preserved issue, 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.

Subsection (B)(2)(a) applies when the Commonwealth has preserved the sentencing challenge at the sentencing hearing, see subsections (A)(1) and (2), above, 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.

(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.

Subsection (B)(2)(b) applies when the Commonwealth has filed a motion to modify sentence no later than 10 days after imposition of sentence. See subsection (B)(1). The judge's disposition of the motion triggers the Commonwealth's 30-day appeal period. The time limit for the disposition of the Commonwealth motion, however, depends on whether the defendant has filed a post-sentence motion, as provided in the following subsections.

(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 subsection (C)(1).

Subsection (C)(1) requires that the judge 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 subsection (C)(2).

(C) *Trial Court Action; Disposition*

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

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 the amendments to Rule 1410. 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 the disposition period on the defendant's post-sentence motion 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 a 30-day extension as permitted under Rule 1410B(3)(b), the total dispositional 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 section 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 ample time for the resolution of a Commonwealth motion. Unlike Rule 1410B(3)(b), therefore, no extension of this disposition period is permitted.

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

Subsection (D) is a simplified version of its counterpart in Rule 1410. See also Rule 1410A(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 section shall not be subject to reconsideration.

Comment:

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

New Rule 1411 was promulgated to clarify the procedures for Commonwealth challenges to sentences in light of the 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 in order to preserve it for appellate review.

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.

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

Section (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 subsection (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 limit 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 this time limit, the motion is deemed denied by operation of law. See Rule 1410B(3).

Rule 1410 Motion Not Filed

The purpose of the next 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 subsection (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 subsection (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 subsection (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 subsection depends on whether the defendant has filed a post-sentence motion. When the defendant files a post-sentence motion, subsection (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 next 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 subsection (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 it is the entry of the order disposing of the defendant's post-sentence motion that 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

Subsection (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 subsection (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 limit of subsection (C)(2).

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

A. Changes to the Text of Rule 1410

Annotation 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.

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 subsection 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 subsection A(4). See also Rule 1411(D), which insures that the defendant will receive a copy of the clerk of courts' order denying a Commonwealth motion by operation of law.

(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 subsection 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(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 subsection.

Subsection 1410B(3) has been 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).

(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.

New Rule 1411(C)(2) does not permit any 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 subsection 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 the dispositional period begins to run, it will apply to any timely filed Commonwealth motion to modify sentence, regardless of which motion is filed first. See 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 fails to decide the defendant's post-sentence motion, the clerk of courts must enter an order pursuant to Rule 1410 B(3)(c), above. If the judge fails 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.

B. Changes to the Rule 1410 Comment

The "Timing" section has been revised to explain the addition of subsection A(4) and to provide a cross-reference to 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 in subsection B(3) against vacating sentence pending disposition of the post-sentence motion. This Comment revision also reiterates 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. [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 noted that Rule 1410 did not specify how to preserve a discretionary sentencing issue for appeal if no post-sentence motion will be 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, citing *Commonwealth v. Jarvis*, 663 A.2d 790 (Pa. Super. 1995), 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.

* * * * *

Issues **[raised]** properly preserved at the sentencing proceeding need not, but may¹, 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 next 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, **[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 following paragraph explains the Rule 1411 procedures and their impact on the timing of a defendant's notice of appeal.

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 Rule 1411(C)(1). 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).

The next paragraph discusses how the defendant should proceed under subsection 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.

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.

¹The Committee's Final Reports 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 the Committee's Explanatory Final Reports.

²The Committee's proposal was published for comment at 26 Pa.B. 1343 (March 30, 1996).

³The Supreme Court also approved a correlative revision to the Note to Pa.R.A.P. 1701 (Effect of Appeal Generally).

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