THE COURTS

Title 204—JUDICIAL SYSTEM GENERAL PROVISIONS

PART V. PROFESSIONAL ETHICS AND CONDUCT

[204 PA. CODE CHS. 91 AND 93]

Amendments to Rules of Organization and Procedure of The Disciplinary Board of the Supreme Court of Pennsylvania; Doc Nos. R-116 and R-121

Order No. 54

The Rules of Organization and Procedure of the Board have been drafted to restate in full the substance of the Pennsylvania Rules of Disciplinary Enforcement. By two Orders dated April 9, 1998, the Supreme Court of Pennsylvania (i) amended Pa.R.D.E. 219 to require attorneys to agree to venue in suits by the Pennsylvania Lawyers Fund for Client Security (No. 411, Disciplinary Docket No. 3); and (ii) amended Pa.R.D.E. 301 relating to disabled attorneys to modernize its terminology and clarify its procedures (No. 412, Disciplinary Docket No. 3).

By this Order, the Board is making conforming changes to its Rules to reflect those changes in the Rules of Disciplinary Enforcement.

The Disciplinary Board of the Supreme Court of Pennsylvania finds that:

(1) To the extent that 42 Pa.C.S. § 1702 (relating to rule making procedures) and Article II of the act of July 31, 1968 (P. L. 769, No. 240), known as the Commonwealth Documents Law, would otherwise require notice of proposed rulemaking with respect to the amendments adopted hereby, such proposed rulemaking procedures are inapplicable because the amendments adopted hereby relate to agency procedure and are perfunctory in nature.

(2) The amendments to the Rules of Organization and Procedure of the Board adopted hereby are not inconsistent with the Pennsylvania Rules of Disciplinary Enforcement and are necessary and appropriate for the administration of the affairs of the Board.

The Board, acting pursuant to Pa.R.D.E. 205(c)(10), orders:

(1) Title 204 of the *Pennsylvania Code* is hereby amended as set forth in Annex A.

(2) The Secretary of the Board shall duly certify this Order, and deposit the same with the Administrative Office of Pennsylvania Courts as required by Pa.R.J.A. 103(c).

(3) The amendments adopted hereby shall take effect upon publication in the *Pennsylvania Bulletin.*

(4) This Order shall take effect immediately.

By The Disciplinary Board of the
Supreme Court of Pennsylvania

ELAINE M. BIXLER,
Executive Director & Secretary

Annex A

TITLE 204. JUDICIAL SYSTEM GENERAL PROVISIONS

PART V. PROFESSIONAL ETHICS AND CONDUCT

Subpart C. DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA

CHAPTER 91. MISCELLANEOUS MATTERS

Subchapter D. DISABILITY

§ 91.70. Preliminary provisions.

(a) Definition. Enforcement Rule 301(k) provides that, as used in this subchapter, the term "disabled attorney" means an attorney transferred to inactive status under this subchapter.

(b) Cross reference. See Enforcement Rule 601(a) which suspends the act of July 9, 1976 (P. L. 817, No. 143), known as the Mental Health Procedures Act, to the extent it is inconsistent with the Enforcement Rules.

§ 91.71. Notification by clerks of declaration of **[incompetence] incapacity.**

(a) ***Duty to report.*** Enforcement Rule 301(a) provides that the clerk of any court within this Commonwealth **[in which] that declares that** an attorney is **[declared incompetent or is involuntarily committed to an institution] incapacitated or that orders involuntary treatment of an attorney** on the grounds **[of incompetency or disability] that the attorney is severely mentally disabled or that denies a petition for review of a certification by a mental health review officer subjecting an attorney to involuntary treatment** shall within **[20 days] 24 hours** of such disposition transmit a certificate thereof to Disciplinary Counsel, who shall file such certificate with the Supreme Court by means of Form DB-20 (Certificate of Judicial Determination of Incompetency of Attorneys).

(b) ***Local procedures.*** **The Official Note to Enforcement Rule 301(a) provides that it is the responsibility of each local court to adopt any necessary procedures so that mental health officers and individual judges notify the clerk of the court that the respondent in a matter is an attorney and that a certificate must accordingly be sent to Disciplinary Counsel under this section.**

§ 91.72. Notification by Office of Disciplinary Counsel of declaration of **[incompetence] incapacity.**

Enforcement Rule 301(b) provides that upon being advised that an attorney has been declared **[incompetent] incapacitated** or involuntarily committed to an institution on the grounds of **[incompetency] incapacity** or **severe mental** disability, Disciplinary Counsel shall secure and file a Form DB-20 (Certificate of Judicial Determination of Incompetency of Attorney) in accordance with the provisions of § 91.71 (relating to notification by clerks of declaration of **[incompetence] incapacity)**; and that if the declaration of **[incompetence] incapacity** or commitment occurred in another jurisdiction, it shall be the responsibility of Disciplinary Counsel to secure and file a certificate of such declaration or commitment.

§ 91.73. Attorney subject to judicial determination of **[incompetency] incapacity.**

(a) ***Transfer to inactive status.*** Enforcement Rule 301(c) provides that where an attorney has been judicially declared **[incompetent] incapacitated** or involuntarily committed on the grounds of **[incompetency] incapacity** or **severe mental** disability, the Supreme Court, upon proper proof of the fact, shall enter an order transferring such attorney to inactive status effective immediately and for an indefinite period until the further order of the Court; and that a copy of such order shall be served upon such formerly admitted attorney, the guardian of such person, and/or the director of the institution to which such person has been committed in such manner as the Court may direct.

(b) ***Summary reinstatement.*** **Where an attorney has been transferred to inactive status by an order in accordance with the provisions of subdivision (a) and, thereafter, in proceedings duly taken, the person is judicially declared to be competent, the Supreme Court upon application may dispense with further evidence that the disability has been removed and may direct reinstatement to active status upon such terms as are deemed proper and advisable.**

§ 91.78. Procedure for reinstatement.

Enforcement Rule 301(h) provides as follows:

(1) **[No formerly admitted attorney transferred to inactive status under the provisions of this subchapter may] Except as provided in § 91.73(b) (relating to summary reinstatement), a disabled attorney may not** resume active status until reinstated by order of the Supreme Court upon petition for reinstatement pursuant to Chapter 89 Subchapter F (relating to reinstatement).

(2) **[Any formerly admitted attorney transferred to inactive status under the provisions of this subchapter] A disabled attorney** shall be entitled to apply for reinstatement to active status once a year or at such shorter intervals as the Court may direct in the order transferring the respondent to inactive status or any modification thereof.

* * * * *

[(4) Where an attorney has been transferred to inactive status by an order in accordance with the provisions of § 91.73 (relating to attorney subject to judicial determination of incompetency) and, thereafter, in proceedings duly taken, such person has been judicially declared to be competent, the Supreme Court may dispense with further evidence that the disability has been removed and may direct reinstatement to active status upon such terms as are deemed proper and advisable.]

CHAPTER 93. ORGANIZATION AND ADMINISTRATION

Subchapter G. FINANCIAL MATTERS

ANNUAL ASSESSMENT OF ATTORNEYS

§ 93.142. Filing of annual statement by attorneys.

* * * * *

(b) *Filing of annual statement.* Enforcement Rule 219(d) provides that on or before July 1 of each year all persons required by the rule to pay an annual fee shall file with the Administrative Office a signed statement on the form prescribed by the Administrative Office in accordance with the following procedures:

(1) The statement shall set forth:

* * * * *

(v) **A statement that any action brought against the attorney by the Pennsylvania Lawyers Fund for Client Security for the recovery of monies paid by the Fund as a result of claims against the attorney may be brought in the Court of Common Pleas of Allegheny, Dauphin or Philadelphia County.**

(vi) Such other information as the Administrative Office may from time to time direct.

[Pa.B. Doc. No. 99-1218. Filed for public inspection July 30, 1999, 9:00 a.m.]

PART VII. ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS

[204 PA. CODE CH. 215]

Special Independent Prosecutor's Panel; Appointment of Independent Counsel

The Independent Counsel Authorization Act (February 18, 1998, P. L. 24, No. 19, §§ 9301—9352) requires the Special Independent Prosecutor's Panel to select an independent counsel upon receipt of an application for appointment. Under § 9319(a)(4), the Special Independent Prosecutor's Panel is further required to disclose the identity of the independent counsel upon appointment.

In accordance with § 9319(a), the Special Independent Prosecutor's Panel appointed Anthony M. Mariani, Esquire as independent counsel on June 25, 1999 in an additional matter docketed at 1 I.C. 1998.

NANCY M. SOBOLEVITCH,
Court Administrator of Pennsylvania

[Pa.B. Doc. No. 99-1219. Filed for public inspection July 30, 1999, 9:00 a.m.]

PART VII. ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS

[204 PA. CODE CH. 215]

Special Independent Prosecutor's Panel; Appointment of Independent Counsel

The Independent Counsel Authorization Act (February 18, 1998, P. L. 24, No. 19, §§ 9301-9352) requires the Special Independent Prosecutor's Panel to select an independent counsel upon receipt of an application for appointment. Under § 9319(a)(4), the Special Independent Prosecutor's Panel is further required to disclose the identity of the independent counsel upon appointment.

In accordance with § 9319(a), the Special Independent Prosecutor's Panel appointed William F. Manifesto, Esquire as independent counsel on July 21, 1999 in a matter docketed at 1 I.C. 1999.

NANCY M. SOBOLEVITCH,
Court Administrator of Pennsylvania

[Pa.B. Doc. No. 99-1220. Filed for public inspection July 30, 1999, 9:00 a.m.]

Title 234—RULES OF CRIMINAL PROCEDURE

PART I. GENERAL

[234 PA. CODE CH. 300]

Order Amending Rules 319 and 320; No. 249 Criminal Procedural Rules Doc. No. 2

The Criminal Procedural Rules Committee has prepared a Final Report explaining the July 15, 1999 amendments to Rules of Criminal Procedure 319 (Pleas and Plea Agreements) and 320 (Withdrawal of Plea of Guilty or Nolo Contendere) that clarify in the rules the procedures for a defendant to withdraw a guilty plea or plea of nolo contendere, and provide the attorney for the Commonwealth a 10-day opportunity within which to respond to the defendant's motion to withdraw. The Final Report follows the Court's Order.

Order

Per Curiam:

Now, this 15th day of July, 1999, upon the recommendation of the Criminal Procedural Rules Committee;

It Is Ordered pursuant to Article V, Section 10 of the Constitution of Pennsylvania that Rules of Criminal Procedure 319 and 320 are hereby amended, all in the following form.

This *Order* shall be processed in accordance with Pa.R.J.A. 103(b), and shall be effective January 1, 2000.

Annex A

TITLE 234. RULES OF CRIMINAL PROCEDURE

PART I. GENERAL

CHAPTER 300. PRETRIAL PROCEEDINGS

Rule 319. Pleas and Plea Agreements.

[(a)] (A) *Generally.*

* * * * *

(3) The judge may refuse to accept a plea of guilty **or nolo contendere**, and shall not accept it unless the judge determines after inquiry of the defendant that the plea is voluntarily and understandingly tendered. Such inquiry shall appear on the record.

[(b)] (B) *Plea agreements.*

(1) When counsel for both sides have arrived at a plea agreement**,** they shall state on the record in open court, in the presence of the defendant, the terms of the agreement, unless the judge orders, for good cause shown and with the consent of the defendant, counsel for the defendant, and the attorney for the Commonwealth, that specific conditions in the agreement be placed on the record in camera and the record sealed.

(2) The judge shall conduct a separate inquiry of the defendant on the record to determine whether the defendant understands and voluntarily accepts the terms of the plea agreement on which the guilty plea **or plea of nolo contendere** is based.

[(c)] (C) *Murder cases.*

In cases in which the imposition of a sentence of death is not authorized, when a defendant enters a plea of guilty **or nolo contendere** to a charge of murder generally, the judge before whom the plea was entered shall alone determine the degree of guilt.

Official Note: Paragraph (a) adopted June 30, 1964, effective January 1, 1965; amended November 18, 1968, effective February 3, 1969; paragraph (b) adopted and title of rule amended October 3, 1972, effective 30 days hence; specific areas of inquiry in Comment deleted in 1972 amendment, reinstated in revised form March 28, 1973, effective immediately; amended June 29, 1977, and November 22, 1977, effective as to cases in which the indictment or information is filed on or after January 1, 1978; paragraph (c) added and Comment amended May 22, 1978, effective July 1, 1978; Comment revised November 9, 1984, effective January 2, 1985; amended December 22, 1995, effective July 1, 1996 **[.]; amended July 15, 1999, effective January 1, 2000.**

Comment

The purpose of paragraph **[(a)] (A)**(3) is to codify the requirement that the judge, on the record, ascertain from the defendant that the guilty plea **or plea of nolo contendere** is voluntarily and understandingly tendered. On the mandatory nature of this practice, see *Commonwealth v. Ingram*, 316 A.2d 77 (Pa. 1974); *Commonwealth v. Campbell*, 304 A.2d 121 (Pa. 1973); and *Commonwealth v. Jackson*, 299 A.2d 209 (Pa. 1973).

It is difficult to formulate a comprehensive list of questions a judge must ask of a defendant in determining whether the judge should accept the plea of guilty **or a plea of nolo contendere**. Court decisions may add areas to be encompassed in determining whether the defendant understands the full impact and consequences of the plea, but is nevertheless willing to enter that plea. At a minimum the judge should ask questions to elicit the following information:

(1) Does the defendant understand the nature of the charges to which he or she is pleading guilty **or nolo contendere**?

* * * * *

It is advisable that the judge conduct the examination of the defendant. However, paragraph **[(a)] (A)** does not prevent defense counsel or the attorney for the Commonwealth from conducting part or all of the examination of the defendant, as permitted by the judge. In addition, nothing in the rule would preclude the use of a written colloquy that is read, completed, signed by the defendant, and made part of the record of the plea proceedings. This written colloquy would have to be supplemented by some on-the-record oral examination. Its use would not, of course, change any other requirements of law, including these rules, regarding the prerequisites of a valid guilty plea **or plea of nolo contendere**.

The "terms" of the plea agreement, referred to in paragraph **[(b)] (B)**(1), frequently involve the attorney

for the Commonwealth—in exchange for the defendant's plea of guilty **or nolo contendere**, and perhaps for the defendant's promise to cooperate with law enforcement officials—promising concessions such as a reduction of a charge to a less serious offense, the dropping of one or more additional charges, a recommendation of a lenient sentence, or a combination of these. In any event, paragraph **[(b)] (B)** is intended to insure that all terms of the agreement are openly acknowledged for the judge's assessment. See, e.g., *Commonwealth v. Wilkins*, 277 A.2d 341 (Pa. 1971).

The 1995 amendment deleting former paragraph **[(b)] (B)**(1) eliminates the absolute prohibition against any judicial involvement in plea discussions in order to align the rule with the realities of current practice. For example, the rule now permits a judge to inquire of defense counsel and the attorney for the Commonwealth whether there has been any discussion of a plea agreement, or to give counsel, when requested, a reasonable period of time to conduct such a discussion. Nothing in this rule, however, is intended to permit a judge to suggest to a defendant, defense counsel, or the attorney for the Commonwealth, that a plea agreement should be negotiated or accepted.

Under paragraph **[(b)] (B)**(1), upon request and with the consent of the parties, a judge may, as permitted by law, order that the specific conditions of a plea agreement be placed on the record in camera and that portion of the record sealed. Such a procedure does not in any way eliminate the obligation of the attorney for the Commonwealth to comply in a timely manner with Rule 305 and the constitutional mandates of Brady v. Maryland, 373 U.S. 83 (1963), and its progeny. Similarly, the attorney for the Commonwealth is responsible for notifying the cooperating defendant that the specific conditions to which the defendant agreed will be disclosed to third parties within a specified time period, and should afford the cooperating defendant an opportunity to object to the unsealing of the record or to any other form of disclosure.

When a guilty plea**, or plea of nolo contendere,** includes a plea agreement, the 1995 amendment to paragraph **[(b)] (B)**(2) requires that the judge conduct a separate inquiry on the record to determine that the defendant understands and accepts the terms of the plea agreement. See *Commonwealth v. Porreca*, 595 A.2d 23 (Pa. 1991).

Former paragraph **[(b)] (B)**(3) was deleted in 1995 for two reasons. The first sentence merely reiterated an earlier provision in the rule. See **[(a)] (A)**(3). The second sentence concerning the withdrawal of a guilty plea was deleted to eliminate the confusion being generated when that provision was read in conjunction with Rule 320. As provided in Rule 320, it is a matter of judicial discretion and case law whether to permit or direct a guilty plea **or plea of nolo contendere** to be withdrawn. See also *Commonwealth v. Porreca*, 595 A.2d 23 (Pa. 1991) (the terms of a plea agreement may determine a defendant's right to withdraw a guilty plea).

For the procedures governing the withdrawal of a plea of guilty or nolo contendere, see Rule 320.

Paragraph **[(c)] (C)** reflects a change in Pennsylvania practice, which formerly required the judge to convene a panel of three judges to determine the degree of guilt in murder cases in which the imposition of a sentence of death was not statutorily authorized.

Committee Explanatory Reports:

* * * * *

Final Report explaining the July 15, 1999 amendments concerning references to nolo contendere pleas and cross-referencing Rule 320 published with the Court's Order at 29 Pa.B. 4057 (July 31, 1999).

Rule 320. Withdrawal of plea of guilty **or nolo contendere.**

(A) At any time before **the imposition of** sentence, the court may, in its discretion, permit**, upon motion of the defendant,** or direct**, sua sponte, the withdrawal of** a plea of guilty **or nolo contendere [to be withdrawn]** and **the substitution of** a plea of not guilty **[substituted].**

(B) When a defendant moves for the withdrawal of a plea of guilty or nolo contendere, the attorney for the Commonwealth shall be given 10 days to respond.

Official Note: Adopted June 30, 1964, effective January 1, 1965; Comment added June 29, 1977, effective September 1, 1977; Comment revised March 22, 1993, effective January 1, 1994; Comment deleted August 19, 1993, effective January 1, 1994; new Comment approved July 1, 1996, effective July 1, 1996 **[.] ; amended July 15, 1999, effective January 1, 2000.**

Comment

Under paragraph (A), when a defendant moves to withdraw a plea of guilty or nolo contendere, ordinarily the motion should be filed in writing before the date of the sentencing hearing. For the procedures governing motions, see Chapter 9000. However, nothing in this rule would preclude a defendant from making an oral and on-the-record motion to withdraw a plea at the sentencing hearing prior to the imposition of sentence.

When the defendant orally moves to withdraw a plea of guilty or nolo contendere at the sentencing hearing, the court should conduct an on-the-record colloquy to determine whether a fair and just reason to permit the withdrawal of the plea exists. If the court finds that there is not a fair and just reason, then the motion should be denied, and the court should proceed to sentencing. If the court finds that there may be a fair and just reason, then pursuant to paragraph (B), the court must give the attorney for the Commonwealth 10 days to respond to the motion.

Under paragraph (B), the trial court may not permit the withdrawal of a guilty plea or plea of nolo contendere until the expiration of the 10 days from the date on which the attorney for the Commonwealth receives the defendant's motion to withdraw the plea, unless the attorney for the Commonwealth responds prior to the expiration, nor may it compel the attorney for the Commonwealth to respond prior to the expiration of the 10-day period.

After the attorney for the Commonwealth has had an opportunity to respond, a request to withdraw a plea made before sentencing should be liberally allowed. See *Commonwealth v. Randolph*, 718 A.2d 1242 (Pa. 1998); *Commonwealth v. Forbes*, 299 A.2d 268 (Pa. 1973).

When a defendant **[withdraws] is permitted to withdraw** a guilty plea **or plea of nolo contendere** under this rule and proceeds with a non-jury trial, the court and the parties should consider whether recusal might be appropriate to avoid prejudice to the defendant. See, e.g., *Commonwealth v. Pierce*, 527 A.2d 973 (Pa. 1987).

For a discussion of plea withdrawals when a guilty plea **or plea of nolo contendere** includes a plea agreement, see the Comment to Rule 319.

Committee Explanatory Reports:

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Final Report explaining the July 15, 1999 amendments concerning the requirements for the withdrawal of a plea published with the Court's Order at 29 Pa.B. 4057 (July 31, 1999).

FINAL REPORT[1]

Amendments to Rules 319 and 320

Introduction

On July 15, 1999, upon the recommendation of the Criminal Procedural Rules Committee, the Supreme Court adopted amendments to Rules of Criminal Procedure 319 (Pleas and Plea Agreements) and 320 (Withdrawal of Plea of Guilty or Nolo Contendere). These changes, which will become effective on January 1, 2000, clarify in the rules the procedures for a defendant to withdraw a guilty plea or plea of nolo contendere, and provide the attorney for the Commonwealth a 10-day opportunity within which to respond to the defendant's motion to withdraw. This Final Report highlights the Committee's considerations in formulating these amendments.

Background

The Committee's consideration of plea withdrawals in court cases began in response to correspondence suggesting that the Criminal Rules be amended to provide a notice to the attorney for the Commonwealth in those situations in which a defendant requests to withdraw a plea of guilty. The correspondence pointed out that, often, a defendant requests to withdraw the guilty plea immediately before sentencing, and that in many cases, the attorney for the Commonwealth is not adequately prepared to argue the motion, or the court grants a continuance, and the sentencing is delayed. As a solution to this problem, the correspondence suggested that Rule 320 be amended to require that a defendant who wants to withdraw a plea provide reasonable notice, in writing, to the attorney for the Commonwealth prior to the time of the sentencing hearing.

The Committee reviewed Rule 320, which provides a minimum of procedure, only stating that the court may permit or direct a plea of guilty to be withdrawn, and the case law, which provides that 1) the withdrawal of a guilty plea is to be liberally allowed, particularly prior to sentencing, see *Commonwealth v. Forbes*, 299 A.2d 268 (Pa. 1973), and 2) the "preferred procedure" is for a defendant to file a motion for leave to withdraw the plea, and the trial court, in its discretion, will decide the matter on the basis of the petition and answer, or make an on-the-record determination after an evidentiary hearing, see *Commonwealth v. Zakrewski*, 333 A.2d 898 (Pa. Super. 1975). Considering the rule and case law, the Committee acknowledged that a defendant may move for the withdrawal in advance of the sentencing hearing, a defendant may orally make the motion as late as immediately before the imposition of sentence, or the trial court may sua sponte direct the withdrawal of the plea. In view of these considerations, and the suggestion to amend Rule 320 to require a defendant to provide notice to the attorney for the Commonwealth before the sentencing date, the Committee concluded that a more detailed procedure providing the attorney for the Commonwealth an opportunity to respond to a defendant's motion to withdraw a plea would allay the concerns of being "blindsided" or caught off guard, and ensure the court has the benefit of both positions before ruling.

Initially, the Committee agreed that Rule 320 should:

1. Retain the present procedure that a defendant move, orally or by written motion, to withdraw a plea at any time prior to the imposition of sentence;

2. Provide for a notice to the attorney for the Commonwealth before the date scheduled for sentencing; and

3. Provide the attorney for the Commonwealth with an opportunity to address the fair and just reason claimed by the defendant, and investigate whether a withdrawal of the plea would substantially prejudice its case. While drafting the Rule 320 amendments, however, the Committee realized that the focus on requiring the defendant to provide notice to the attorney for the Commonwealth in advance of sentencing was confusing because the amendment would be open to interpretation that it was a change in the substantive law that a defendant is permitted to make a motion to withdraw a plea at any time until the imposition of sentence. After considering various means to accomplish notice, the Committee settled on providing the attorney for the Commonwealth with a 10-day opportunity to respond. This procedure is a more logical solution, and promotes the two-pronged standard for deciding whether to allow a plea withdrawal espoused in *Forbes*, supra, and reiterated in *Commonwealth v. Randolph*, 718 A.2d 1242 (Pa. 1988): first, the judge must determine that there is a fair and just reason for the withdrawal; second, the judge must determine that, if the withdrawal is allowed, there will be a lack of substantial prejudice to the Commonwealth. The Committee also concluded that the "10-day opportunity to respond" approach would be more consistent with current practice and case law, and would provide an adequate opportunity for the attorney for the Commonwealth to investigate whether the withdrawal would prejudice the case.

Finally, the Committee agreed that it is important not to create waiver issues or to "cut off" a defendant by mandating that a motion to withdraw a plea be "filed in writing." Rule 320, therefore, maintains a defendant's ability to make an oral motion to withdraw a plea immediately prior to sentencing. This approach promotes consistency throughout the Criminal Rules, and corresponds with the motion requirements of Rule 9022.

Discussion of Rule Changes

1. *Rule 320 (Withdrawal of Plea of Guilty or Nolo Contendere)*

Rule 320 has been divided into two paragraphs. New paragraph (A) incorporates the current provisions of Rule 320, providing that the court in its discretion may permit or direct the withdrawal of a plea of guilty or nolo contendere. Paragraph (A) also includes the qualifiers "upon motion of the defendant" referring to the situations in which the court may "permit" the withdrawal of a plea

[1] The 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.

of guilty, and "sua sponte" in which the court may "direct" the withdrawal of a plea of guilty.

A new paragraph (B) provides that the attorney for the Commonwealth shall be given 10 days to respond to a defendant's motion to withdraw a plea of guilty or nolo contendere.

The Rule 320 Comment contains several revisions. First, the Comment clarifies that, although the filing of a written motion to withdraw a plea of guilty is the preferred procedure, oral motions that are made on the record are acceptable. It also explains that, following an oral motion, if the judge determines that no fair and just reason exists to permit the withdrawal, the judge should proceed with the sentencing. If the court finds, however, that there may be a fair and just reason to substantiate a withdrawal, then before proceeding to sentencing, the court must give the attorney for the Commonwealth 10 days to respond to the defendant's motion. Finally, the Comment clarifies that the trial judge may not permit the withdrawal of a plea of guilty before the 10-day period expires, unless the attorney for the Commonwealth responds to the motion prior to the expiration of the 10 days, and that the court may not compel the attorney to respond in less than 10 days.

2. *Rule 319 (Pleas and Plea Agreements)*

Rule 319 provides the procedures for entering pleas. The Comment has been revised to include a cross-reference to Rule 320 concerning the procedure governing the withdrawal of a guilty plea or plea of nolo contendere.

3. *Pleas of Nolo Contendere*

Rules 319 and 320 have been modified to include references to nolo contendere pleas because, in Pennsylvania criminal courts, a plea of nolo contendere is considered the same as a plea of guilty. See *Commonwealth v. Nelson*, 666 A.2d 714 (Pa. Super. 1995) and *Commonwealth v. West*, 378 A.2d 1289 (Pa. Super. 1977).

[Pa.B. Doc. No. 99-1221. Filed for public inspection July 30, 1999, 9:00 a.m.]

PART I. GENERAL

[234 PA. CODE CH. 1400]

Order Adopting Amendments to Rule 1405; No. 248 Criminal Procedural Rules Doc. No. 2

The Criminal Procedural Rules Committee has prepared a Final Report explaining the July 15, 1999 amendments to Rule 1405 (Procedures at the Time of Sentencing). These changes expand the time limits for sentencing from 60 to 90 days, reduce the time for extensions of the time for sentencing from 60 to 30 days, and add a citation to *Commonwealth v. Anders*, 725 A.2d 170 (Pa. 1999), concerning the sanctions for failing to comply with the Rule 1405 time limits. The Final Report follows the Court's Order.

Order

Per Curiam:

Now, this 15th day of July, 1999, upon the recommendation of the Criminal Procedural Rules Committee; this proposal having been submitted without publication pursuant to Pa.R.J.A. 103(a)(3), and 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. 1405 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, 2000.

Annex A

TITLE 234. RULES OF CRIMINAL PROCEDURE

PART I. GENERAL

CHAPTER 1400. SENTENCING

Rule 1405. Procedure at Time of Sentencing.

A. *Time for Sentencing.*

(1) Except as provided by Rule 1403.B, sentence in a court case shall ordinarily be imposed within **[60] 90** days of conviction or the entry of a plea of guilty or nolo contendere.

* * * * *

Official Note: Previous Rule 1405 approved July 23, 1973, effective 90 days hence; Comment amended June 30, 1975, effective immediately; Comment amended and paragraphs (c) and (d) added June 29, 1977, effective September 1, 1977; amended May 22, 1978, effective as to cases in which sentence is imposed on or after July 1, 1978; Comment amended April 24, 1981, effective July 1, 1981; Comment amended November 1, 1991, effective January 1, 1992; 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 1405. Present Rule 1405 adopted March 22, 1993, effective as to cases in which the determination of guilt occurs on or after January 1, 1994; amended January 3, 1995, effective immediately; amended September 13, 1995, effective January 1, 1996. The January 1, 1996 effective date extended to April 1, 1996. Comment revised December 22, 1995, effective February 1, 1996. The April 1, 1996 effective date extended to July 1, 1996. Comment revised September 26, 1996, effective January 1, 1997; Comment revised April 18, 1997, effective immediately; Comment revised January 9, 1998, effective immediately **[.]; amended July 15, 1999, effective January 1, 2000.**

Comment

This rule is derived in part from previous Rule 1405.

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Time for Sentencing

* * * * *

Under paragraph A(1), sentence should be imposed within **[60] 90** days of conviction or the entry of a plea of guilty or nolo contendere, unless the court orders a psychiatric or psychological examination pursuant to Rule 1403.B. Such an order should extend the time for sentencing for only as much time as is reasonably required, but in no event should sentencing be extended for more than **[60] 30** days beyond the original **[60] 90**-day limit. In summary appeal cases, however, sentence must be imposed immediately at the conclusion of the de novo trial.

* * * * *

Because such extensions are intended to be the exception rather than the rule, the extension must be for a specific time period, and the judge must include in the record the length of the extension. A hearing need not be held before an extension can be granted. Once a specific extension has been granted, however, some provision

should be made to monitor the extended time period to insure prompt sentencing when the extension period expires.

Failure to sentence within the time specified in paragraph (A) may result in the discharge of the defendant. See *Commonwealth v. Anders,* 725 A.2d 170 (Pa. 1999) (discharge is appropriate remedy for violation of Rule 1405 time limits, but only if the defendant can demonstrate that the delay in sentencing was prejudicial to the defendant).

* * * * *

Sentencing Procedures

* * * * *

After sentencing, following a conviction in a trial de novo in a summary case, the judge should advise the defendant of the right to appeal and the time limits within which to exercise that right, the right to proceed in forma pauperis and with assigned counsel to the extent provided in Rule 316(a), and of the qualified right to bail under Rule 4009(b). See paragraphs C(3)(a), (b), and (e). See also Rule 1410 **[.] (**D**)** (no post-sentence motion after a trial de novo).

* * * * *

For the duty of the sentencing judge to state on the record the reasons for the sentence imposed, see *Commonwealth v. Riggins,* 377 A.2d 140 (Pa. 1977) and *Commonwealth v. Devers,* 546 A.2d 12 (Pa. 1988). If the sentence initially imposed is modified pursuant to Rule 1410 **[.] (**B**)**(1)(a)(v), the sentencing judge should ensure that the reasons for the ultimate sentence appear on the record. See also Sentencing Guidelines, 204 Pa. Code §§ 303.1(b), 303.1(h), and 303.3(2) **[(1982)].**

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Committee Explanatory Reports:

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Final Report explaining the January 9, 1998 Comment revisions concerning Guideline Sentence Forms, and summary case appeal notice, published with the Court's Order at 28 Pa.B. 481 (January 31, 1998).

Final Report explaining the July 15 , 1999 amendments concerning the time for sentencing published with the Court's Order at 29 Pa.B. 4059 (July 31, 1999).

FINAL REPORT[1]

Amendments to Pa.R.Crim.P. 1405 (Procedures at the Time of Sentencing) Time for Sentencing; *Commonwealth v. Anders*

On July 15, 1999, effective January 1, 2000, upon the recommendation of the Criminal Procedural Rules Committee, the Court amended Rule 1405 (Procedures at the Time of Sentencing) by expanding the time limits for sentencing from 60 to 90 days. The Court also approved the revision of the Rule 1405 Comment that (1) reduces the time for extensions of the time for sentencing from 60 to 30 days, and (2) adds a citation to *Commonwealth v. Anders*, 725 A.2d 170 (Pa. 1999), concerning the sanctions for failing to comply with the Rule 1405 time limits.

I. Expansion of Rule 1405 Time Limits for Sentencing

In the communications between the Court and the Committee, it was suggested that, as a practical matter, the 60-day period may be too short to realistically get all the sentencing information to the trial judge before sentencing, and that a 90-day period may be more consistent with other rules requiring trial court action.

The Committee considered these points, examined the relevant case law, and reviewed the history of Rule 1405, particularly the development of the 60-day time limit. As explained in the Committee's Final Report that was published with the Court's 1993 Order adopting, inter alia, the Rule 1405 time limits, the "Committee determined that sixty days, or approximately two months, was a reasonable time within which to expect the completion of pre-sentence investigation reports, based on the members' experience and on the information contained in the AOPC Survey." See 23 Pa.B. 1685, 1700 (4/10/93). The Final Report goes on to explain that the Committee recognized that there would be extraordinary circumstances when the 60-day limit was not long enough, such as when a Rule 1403 (Aids In Imposing Sentence) examination is ordered. In these cases, as stated in the Rule 1405 Comment, the extension should not be longer than sixty days beyond the Rule 1405 60-day time limit.

In the Committee's current discussions, the members commented that the 1993 assessment of the reasonableness of the 60-day time limit was still accurate. They have found that, since the Rule 1405 time limit went into effect, it has been their experience in the jurisdictions in which they practice or are judges that there are no serious problems with meeting the time limit. However, the members were cognizant of the cases in which the courts have had difficulty meeting the time requirements, and the majority agreed that an expansion of the initial time limit would be an aid to these few lower courts without significantly compromising the original intent of the rule.

Having agreed that the initial time for sentencing should be extended, the Committee also discussed whether there should be a change in the suggested 60-day limit on the length of an extension. We concluded that the purpose of the time limits and the goal of promoting prompt and fair sentencing procedures is best served if the total time, including any extensions, does not exceed the 120 days provided in present Rule 1405. Accordingly, Rule 1405.A(1) has been amended by changing the 60-day time limit to 90 days. In addition, the second paragraph of the "Time for Sentencing" section of the Comment has been revised by (1) conforming the time for sentencing with the paragraph (A)(1) amendment, and (2) changing the 60-day limit on extensions to 30 days.

II. Commonwealth v. Anders

The issue of sanctions for a court's failure to sentence a defendant within the Rule 1405 time limits was generated by the rule's silence, and has been the subject of several appellate court opinions. The Superior Court first addressed the matter in *Commonwealth v. Thomas*, 674 A.2d 1119 (Pa. Super. 1996), holding that the remedy for a violation of the Rule 1405(A) time limits on sentencing was dismissal of the charges and discharge of the defendant. Subsequently, the Superior Court, sitting en banc, overturned *Thomas* "to the extent that it holds that discharge is an appropriate remedy for a violation of Rule 1405(A)." See *Commonwealth v. Anders*, 699 A.2d 1258, 1262 (Pa. Super. 1997). The Supreme Court ultimately resolved the question in *Commonwealth v. Anders*, 725 A.2d 170 (Pa. 1999), in which Madam Justice Newman stated that "[a]lthough Rule 1405 does not expressly

[1] The 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.

provide for a remedy, it is axiomatic that every rule must have a remedy. Appellant argues, and we agree, that the appropriate remedy for a violation of Rule 1405 is discharge," and that discharge is not automatic, but only in cases in which the defendant "can demonstrate that the delay in sentencing prejudiced him or her." Id at 173.

Following our review of these cases, the Committee agreed that it would be helpful to the bench and bar if there was something in Rule 1405 to alert them to these issues and the Court's resolution. The Committee concluded that this could be accomplished by revising the Rule 1405 Comment to include a citation to *Anders*. Accordingly, the following language has been added as the last paragraph of the "Time for Sentencing" section of the Rule 1405 Comment:

> Failure to sentence within the time specified in paragraph (A) may result in the discharge of the defendant. See *Commonwealth v. Anders*, 725 A.2d 170 (Pa. 1999) (discharge is appropriate remedy for violation of Rule 1405 time limits, but only if the defendant can demonstrate that the delay in sentencing was prejudicial to the defendant).

[Pa.B. Doc. No. 99-1222. Filed for public inspection July 30, 1999, 9:00 a.m.]

Title 255—LOCAL COURT RULES

SOMERSET COUNTY

Consolidated Rules of Court; No. 62 Miscellaneous 1999

Adopting Order

Now, this 15 day of July, 1999, it is hereby *Ordered*:

1. Somerset Rule of Civil Procedure 209, Proceedings After Petition Filed; Somerset Rule of Civil Procedure 210, Briefs, and Somerset Rule of Civil Procedure 211, Argument Cases. Scheduling, are amended to read in their entirety, as reflected in revised Som.R.C.P. 209, revised Som. R.C.P. 210 and revised Som.R.C.P. 211, as follows, effective thirty days after publication in the *Pennsylvania Bulletin*.

2. Som.R.C.P. 205.3. Scheduling of Petitions and Motions, is rescinded, effective thirty days after publication in the *Pennsylvania Bulletin*.

3. The following designated Somerset County Rules of Judicial Administration (Som.R.J.A.), are adopted as rules of this Court, effective thirty days after publication in the *Pennsylvania Bulletin:*

Som.R.J.A. 160. Administration of Oaths and Acknowledgments.

Som.R.J.A. 410. Prothonotary's Issuance and Delivery of Process.

4. The Somerset County Court Administrator is directed to:

A. File seven (7) certified copies of this Order and the following Rules with the Administrative Office of Pennsylvania Courts.

B. Distribute two (2) certified copies of this Order to the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.

C. File one (1) certified copy of this Order with the Pennsylvania Civil Procedural Rules Committee.

D. File proof of compliance with this Order in the docket for these rules, which shall include a copy of each transmittal letter.

By the Court

EUGENE E. FIKE, II,
President Judge

Rules of Court

Petition And Motion Practice

Som.R.C.P. 209. Proceedings After Petition Filed.

A. An affidavit, return or acceptance of service of every petition shall be filed which shall state the name of the party or parties served and the time, place and manner of service with sufficient particularity to enable the court to determine whether proper service has been made.

NOTE: For form of return of service, see Pa.R.C.P. 405.

(Derived from former R35-104).

B. Unless provided otherwise by these Rules or by Court Order, a petition shall be scheduled for argument or hearing only by the filing of a scheduling praecipe in the form specified in Som.R.J.A. 1099, available from the Prothonotary or Court Administrator.

C. Unless otherwise ordered, the case shall be scheduled for disposition only after the expiration of twenty (20) days following service of the petition, and after a return, affidavit or acceptance of service is filed.

(Derived from former R35-105).

NOTE: See Som.R.C.P. 211 for scheduling procedure.

Briefs

Som.R.C.P. 210. Briefs.

A. Briefs are required to be filed when directed by order of court, or by these Rules.

(Formerly R8-101).

B. In an argument case now pending, unscheduled or hereafter filed, which presents a question of law for decision by the Court, each party shall file a brief as follows:

1. When a moving party files a scheduling praecipe, the moving party's brief, if not previously filed, shall be filed at the time the scheduling praecipe is presented, and the moving party shall serve copies of the brief as provided by these rules. Upon filing and service of a scheduling praecipe and brief by the moving party, each other party who has not already done so shall file a brief within twenty (20) days thereafter or at the time of earlier scheduled argument.

2. When a responding party files a scheduling praecipe, or if the Court places a case on an argument list, the moving party, shall, within twenty (20) days of receipt of the scheduling order, file and serve a brief as required by these rules. Upon service, each other party who has not already done so shall file a reply brief within fifteen (15) days thereafter, or at the time of earlier scheduled argument.

3. If a party's brief is not timely filed, the Court may, in its discretion:

a. In the case of a moving party's failure to file a brief, delay scheduling until the brief is filed;

b. Disregard the untimely brief;

c. Refuse oral argument by the offending party;

d. Consider the issues raised by the offending party to be waived;

e. Order argument to be continued;

f. Enter such other order as the interests of justice may require.

C. A party filing a brief shall file the original with the Prothonotary, shall promptly serve a copy on each other Counsel and unrepresented party, and shall promptly provide a copy to the Court Administrator.

D. Matters not briefed shall not be argued or considered, unless the omission is excused by the Court, for cause.

E. Any party who has filed a brief may, if no party has filed a scheduling praecipe, file a written request for submission on briefs, copy to each counsel and unrepresented party, and if no scheduling praecipe is filed within twenty (20) days thereafter, the Prothonotary shall transmit the record to the Motions Judge for such disposition accompanied by a Prothonotary's record transmission memo in substantially the following form:

(CASE CAPTION)

RECORD TRANSMISSION MEMO

Attached is the record in the above entitled case for disposition on briefs. The following briefs are filed on the date stated and included in the record:

Party filing brief *Date filed:*

No other brief has been filed and no scheduling praecipe has been filed.

Date: _____ _____

Prothonotary

List of counsel and unrepresented parties:

A copy of the record transmission memo shall be furnished to each counsel and unrepresented party by the Prothonotary.

Unless already filed, each party shall file a brief within twenty (20) days after the written request for submission is filed.

(Derived from former R8-103).

F. Briefs shall be in the form prescribed by Pennsylvania Rule of Civil Procedure 210, and shall consist of concise and summary statements, separately and distinctly titled, of the following items in the order listed:

(1) *Matter before the Court*: State the particular pleading (motion, petition, objection, exception, application, etc.) before the court for disposition, and the particular relief requested therein.

(2) *Statement of the question(s) involved*: State the issue(s) in question form containing factual context sufficient to present the precise matter to be decided by the Court, each susceptible of a yes or no answer, each followed by the answer desired or advocated.

(3) *Facts*: State the operative facts.

(4) *Argument*: State the reason(s) why the court should answer the questions involved as proposed, including citation of the authorities relied on. An authority shall not be cited for general reference but in all cases shall be immediately preceded or followed by its relevant holding or particular proposition for which it stands.

(5) *Relief*: State the specific action(s) requested of the court.

(Formerly R8-102).

Argument Case

Procedure

Som.R.C.P. 211 Argument Cases. Scheduling.

A. An "argument case" is any case ready for non-trial hearing or argument before the court.

B. All argument cases shall be scheduled for argument or hearing only upon the filing of a scheduling praecipe in the form specified in Som.R.J.A. 1099, available through the Court Administrator's office or Prothonotary's office, except that the following argument cases shall be scheduled sec. reg. by the Court Administrator without requiring a scheduling praecipe:

1. Argument cases on the list of the Domestic Relations Director (Som.R.J.A 1011.C.).

2. Motions or petitions presented to regularly scheduled Motions Court pursuant to the provisions of Som.R.C.P. 205.4.

3. Petitions for adoption, appointment of guardian for an incapacitated person, complaint for custody, preliminary injunctions, and similar complaints or petitions which require date certain scheduling, and any other case in which a Judge of the Court has fixed a date certain for hearing or argument, provided that unless Counsel indicate otherwise when the motion, petition or complaint is presented, such cases will be allowed not more than thirty (30) minutes on the schedule and will be treated as proper for scheduling before any Judge.

4. Motions or petitions which are permitted to be presented ex parte, without prior notice of presentation and opportunity to be heard, pursuant to the provisions of Som.R.C.P. 209.2, subparagraph A.

5. Motions or petitions which, because of extraordinary and compelling circumstances, cannot be scheduled otherwise, and which must be heard upon short notice.

C. Argument before the Court shall not be permitted in excess of twenty (20) minutes for each party, unless extension is granted by the Court for cause.

Administration Of Oaths And Acknowledgments Som.R.J.A. 160.

The Chief Probation Officer, secretaries of the Probation Department, Director and Assistant Director of the Domestic Relations Section, and secretaries in the Domestic Relations Section, are empowered as Clerk and Deputy Clerks of the Court to take affidavits to petitions, complaints, applications and other documents filed in cases docketed in the Juvenile and Domestic Relations dockets, and other dockets now or hereafter in the custody of the Probation Department or Domestic Relations Section.

(Formerly R29-404).

Issuance And Delivery Of Process

Som.R.J.A. 410. Prothonotary's Issuance And Delivery Of Process.

When a writ is issued by the Prothonotary, or any complaint is filed, and upon presentation of proper copies,

the Prothonotary shall, unless otherwise instructed in writing by the party issuing or filing the same, attest the copies to be served in compliance with applicable Rules of Civil Procedure, and shall deliver the same promptly to the Sheriff for service.

NOTE: See Kuzupas v. Kammerer, 35 Somerset Legal Journal 168 (1978).

(Formerly R45-101).

[Pa.B. Doc. No. 99-1223. Filed for public inspection July 30, 1999, 9:00 a.m.]

DISCIPLINARY BOARD OF THE SUPREME COURT

Notice of Suspension

Notice is hereby given that Angela C. W. Belfon, having been suspended from the practice of law in the State of New Jersey for a period of nine months, the Supreme Court of Pennsylvania issued an Order dated July 15, 1999 suspending Angela C. W. Belfon for a period of nine months. In accordance with the Rule 217(f), Pa.R.D.E., since this formerly admitted attorney resides outside of the Commonwealth of Pennsylvania, this notice is published in the *Pennsylvania Bulletin*.

ELAINE M. BIXLER,
Executive Director & Secretary
The Disciplinary Board of the
Supreme Court of Pennsylvania

[Pa.B. Doc. No. 99-1224. Filed for public inspection July 30, 1999, 9:00 a.m.]

Notice of Suspension

Notice is hereby given that James E. Conley, III, having been suspended from the practice of law in the State of Texas for a period of three months, the Supreme Court of Pennsylvania issued an Order dated July 15, 1999 suspending James E. Conley, III for a period of three months. In accordance with the Rule 217(f), Pa.R.D.E., since this formerly admitted attorney resides outside of the Commonwealth of Pennsylvania, this notice is published in the *Pennsylvania Bulletin*.

ELAINE M. BIXLER,
Executive Director & Secretary
The Disciplinary Board of the
Supreme Court of Pennsylvania

[Pa.B. Doc. No. 99-1225. Filed for public inspection July 30, 1999, 9:00 a.m.]