THE COURTS

Title 234—RULES OF CRIMINAL PROCEDURE

[234 PA. CODE CHS. 1 AND 7]

Post-Sentence Ineffectiveness Assistance of Trial Counsel Claims

The Criminal Procedural Rules Committee is planning to recommend that the Supreme Court of Pennsylvania amend Pa.R.Crim.P. 720 (Post-Sentence Procedures; Appeal) and revise the Comments to Rules 120 (Attorneys—Appearances and Withdrawals) and 122 (Assignment of Counsel) to provide guidance in the Criminal Rules concerning raising ineffective assistance of counsel claims post-sentence in view of *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002). This proposal has not been submitted for review by the Supreme Court of Pennsylvania.

The following explanatory Report highlights the Committee's considerations in formulating this proposal. Please note that the Committee's Report should not be confused with the official Committee Comments to the rules. Also note that the Supreme Court does not adopt the Committee's Comments or the contents of the explanatory Reports.

The text of the proposed rule changes precedes the Report. Additions are shown in bold; deletions are in bold and brackets.

We request that interested persons submit suggestions, comments, or objections concerning this proposal in writing to the Committee through counsel,

Anne T. Panfil, Chief Staff Counsel
Supreme Court of Pennsylvania
Criminal Procedural Rules Committee
5035 Ritter Road, Suite 800
Mechanicsburg, PA 17055
fax: (717) 795-2106
e-mail: criminal.rules@supreme.court.state.pa.us

no later than Friday, June 6, 2003.

By the Criminal Procedural Rules Committee

JOHN J. DRISCOLL,
Chair

Annex A

TITLE 234. RULES OF CRIMINAL PROCEDURE

CHAPTER 1. SCOPE OF RULES, CONSTRUCTION AND DEFINITIONS, LOCAL RULES

PART B. Counsel

Rule 120. Attorneys—Appearances and Withdrawals.

* * * * *

Comment

* * * * *

Under paragraph (C), the court should make a determination of the status of a case before permitting counsel to withdraw.

The court should not replace appointed counsel at the post-verdict stage for the purpose of challenging trial counsel's effectiveness unless new counsel is prepared to preserve ineffectiveness issues pursuant to Rule 720.

* * * * *

Official Note: Adopted June 30, 1964, effective January 1, 1965; formerly Rule 303, renumbered Rule 302 and 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; amended March 22, 1993, effective January 1, 1994; renumbered Rule 120 and amended March 1, 2000, effective April 1, 2001**; Comment revised , 2003, effective , 2003**.

Committee Explanatory Reports:

* * * * *

Report explaining the proposed Comment revision concerning appointment of counsel published at 33 Pa.B. 2162 (May 3, 2003).

Rule 122. Assignment of Counsel.

* * * * *

Comment

* * * * *

The court should not replace appointed counsel at the post-verdict stage for the purpose of challenging trial counsel's effectiveness unless new counsel is prepared to preserve ineffectiveness issues pursuant to Rule 720.

For suspension of Acts of Assembly, see Rule 1101.

Official Note: Rule 318 adopted November 29, 1972, effective 10 days hence; replacing prior rule; amended September 18, 1973, effective immediately; renumbered Rule 316 and amended June 29, 1977, and October 21, 1977, effective January 1, 1978; renumbered Rule 122 and amended March 1, 2000, effective April 1, 2001**; Comment revised , 2003, effective , 2003**.

Committee Explanatory Reports:

* * * * *

Report explaining the proposed Comment revision concerning post-verdict appointment of counsel published at 33 Pa.B. 2162 (May 3, 2003).

CHAPTER 7. POST-TRIAL PROCEDURES IN COURT CASES

PART B. Post-Sentence Procedures

Rule 720. Post-Sentence Procedures; Appeal.

* * * * *

(B) OPTIONAL POST-SENTENCE MOTION.

(1) Generally.

* * * * *

(c) Issues raised before or during trial shall be deemed preserved for appeal whether or not the defendant elects to file a post-sentence motion on those issues. **If, after the verdict, the defendant retains new counsel or receives new appointed counsel at his or her request, issues of trial counsel's ineffectiveness must be raised in a post-sentence motion to be preserved for further review.**

* * * * *

(3) Time Limits for Decision on Motion.

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

* * * * *

(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 post-sentence motions include claims of trial counsel's ineffectiveness, and the judge determines that the existing record is inadequate to resolve the claims, the judge may grant an additional extension of up to 60 days for further proceedings.** If the judge fails to decide the motion within the **[30-day]** extension period, the motion shall be deemed denied by operation of law.

* * * * *

Comment

* * * * *

OPTIONAL POST-SENTENCE MOTION

* * * * *

The judge's discretion to permit supplemental motions should be exercised liberally when new counsel seeks to raise the ineffectiveness of trial counsel.

For procedures governing post-sentence challenges to the sufficiency of the evidence, see Rule 606(A)(6) and (A)(7). For challenges to the weight of the evidence, see Rule 606(A).

* * * * *

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 revised October 15, 1997, effective January 1, 1998; amended July 9, 1999, effective January 1, 2000; renumbered Rule 720 and amended March 1, 2000, effective April 1, 2001**; amended , 2003, effective , 2003**.

Committee Explanatory Reports:

* * * * *

Report explaining the proposed changes concerning post-sentence ineffective assistance of counsel claims published at 33 Pa.B. 2162 (May 3, 2003).

REPORT

Proposed Amendments to Pa.R.Crim.P. 720,
Revision of the Comments to Pa.Rs.Crim.P. 120 and 122

POST-SENTENCE INEFFECTIVENESS ASSISTANCE OF TRIAL COUNSEL CLAIMS

Introduction

The Committee is proposing amendments to Pa.R.Crim.P. 720 (Post-Sentence Procedures; Appeal) and the revision of the Comments to Pa.Rs.Crim.P. 120 (Attorneys—Appearances and Withdrawals) and 122 (Assignment of Counsel) that will provide guidance to the bench and bar concerning the post-verdict appointment of new counsel to raise trial counsel's ineffectiveness, and the procedures for raising trial counsel's ineffectiveness in a post-sentence motion. The Committee concluded these changes are necessary after reviewing the Court's decision in *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002) holding, inter alia, that "as a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review," and "a claim raising trial counsel ineffectiveness will no longer be considered waived because new counsel on direct appeal did not raise a claim related to prior counsel's ineffectiveness," at 738. The Court added in a footnote:

> The general rule announced today is limited by the issues raised in this case. Appellant does not raise an allegation that there has been a complete or constructive denial of counsel or that counsel has breached his or her duty of loyalty. Under those limited circumstances, this court may choose to create an exception to the general rule and review those claims on direct appeal. However, as there is no issue raising such a question in this case, such a consideration is more appropriately left to another day. Id. at 738, footnote 14.

In analyzing this decision, the Committee made several observations about the interplay of the *Grant* decision and the Criminal Rules, persuading the members changes to the rules are necessary. First, the members noted that, traditionally, judges have allowed lawyers to withdraw from a case at the post-trial stage when the defendant wishes to challenge trial counsel's ineffectiveness, which, until *Grant* was decided, was consistent with the case law that required new counsel to fulfill the purpose of the appointment by actually raising ineffectiveness at the first opportunity. Now, with the Court's holding in Grant that ineffectiveness claims generally should be postponed until the post-conviction collateral review process, no purpose is served by appointing new counsel at the post-verdict stage to litigate ineffective assistance of counsel when a defendant wishes to proceed pursuant to the new "general rule" promulgated in *Grant*. In view of this, the Committee reasoned that without referencing this change in procedure, judges by "force of habit" may continue to make new appointments at the post-verdict stage, resulting in extra expense to the court's already limited resources and unnecessary delay, with no benefit for the defendant or the system.

On the other hand, as the Court acknowledged in *Grant*, there may be cases in which the defendant does not wish to delay ineffectiveness litigation for the year or more necessary to complete the direct appeal process. The Committee agreed in these cases, if the defendant seeks to litigate ineffectiveness of trial counsel as soon as possible, the appointment of new counsel would be appropriate at the post-verdict stage. We also concluded in these limited cases when new counsel is appointed at the post-verdict stage, new counsel must raise the ineffectiveness claim in the post-sentence motion in order to preserve the issue for appeal.

Discussion of Rule Changes

A. *Amendments to Rule 720*

The Committee is proposing that Rule 720(B)(1)(c) be amended by the addition of the requirement that if new counsel is retained or appointed at the post-verdict stage of the proceedings, the issues of trial counsel's ineffectiveness must be raised in a post-sentence motion to be

preserved for appeal. Recognizing that there may be legitimate needs in some of the cases raising counsel's ineffectiveness for extended hearings or additional time to review the trial transcript because the existing record is inadequate to resolve the claims, the Committee is proposing the judge be authorized to grant one extension to the 120-day time limit on the disposition of the post-sentence motion of up to 60 days for further proceedings on the ineffectiveness claim only. Paragraph (B)(3)(b). The Committee also is proposing a new paragraph be added to the Comment suggesting that supplemental motions should be liberally allowed when new counsel intends to raise trial counsel's ineffectiveness.

B. *Correlative Revision of the Comments to Rules 120 and 122*

The Committee is proposing cautionary language be added to the Comments to Rules 120 and 122 to alert the bench and bar that if new counsel is retained or appointed at the post-verdict stage, pursuant to Rule 720, the new attorney must raise trial counsel's ineffectiveness in the post-sentence motion.

[Pa.B. Doc. No. 03-817. Filed for public inspection May 2, 2003, 9:00 a.m.]

[234 PA. CODE CH. 2]

Administration of the Oath to Investigating Grand Jury Witnesses

The Criminal Procedural Rules Committee is planning to recommend that the Supreme Court of Pennsylvania amend Pa.R.Crim.P. Rule 227 (Administering Oath to Witness) to permit a court representative, who has the authority to administer oaths, to administer the oath to all witnesses who are scheduled to testify before an investigating grand jury, except those witnesses who are required to receive constitutional warnings. For these witnesses, the warnings and the oath must be administered by the supervising judge. This proposal has not been submitted for review by the Supreme Court of Pennsylvania.

The following explanatory Report highlights the Committee's considerations in formulating this proposal. Please note that the Committee's Report should not be confused with the official Committee Comments to the rules. Also note that the Supreme Court does not adopt the Committee's Comments or the contents of the explanatory Reports.

The text of the proposed Rule 227 amendments precedes the Report. Additions are shown in bold; deletions are in bold and brackets.

We request that interested persons submit suggestions, comments, or objections concerning this proposal in writing to the Committee through counsel,

Anne T. Panfil, Chief Staff Counsel
Supreme Court of Pennsylvania
Criminal Procedural Rules Committee
5035 Ritter Road, Suite 800
Mechanicsburg, PA 17055
fax: (717) 795-2106
e-mail: criminal.rules@supreme.court.state.pa.us

no later than Friday, June 6, 2003.

By the Criminal Procedural Rules Committee

JOHN J. DRISCOLL,
Chair

Annex A

TITLE 234. RULES OF CRIMINAL PROCEDURE

CHAPTER 2. INVESTIGATIONS

PART B(1). Investigating Grand Juries

Rule 227. Administering Oath to Witness.

Each witness to be heard by the investigating grand jury shall be sworn **[by the court]** before testifying. The witness may elect to be sworn in camera or in open court.

Comment

* * * * *

When it is necessary to give constitutional warnings to a witness, the warnings and the oath must be administered by the court. As to warnings that the court may have to give to the witness when the witness is sworn, see, e.g., *Commonwealth v. McCloskey*, 277 A.2d 764 (Pa. 1971).

Offfficial Note: Rule 259 adopted June 26, 1978, effective January 9, 1979; renumbered Rule 227 and Comment revised March 1, 2000, effective April 1, 2001**; amended , 2003, effective , 2003**.

Committee Explanatory Reports:

* * * * *

Report explaining the proposed amendments to concerning administration of the oath published at 33 Pa.B. 2163 (May 3, 2003).

REPORT

Proposed Amendments to Pa.R.Crim.P. 227

ADMINISTRATION OF THE OATH TO INVESTIGATING GRAND JURY WITNESSES

The Criminal Procedural Rules Committee is proposing changes to Rule 227 (Administering Oath to Witness) that will make the rule clear that (1) when it is necessary to give constitutional warnings to a witness who will testify in an investigating grand jury proceeding, the warnings and the oath must be administered by the supervising judge, and (2) for all other witnesses in the investigating grand jury proceeding, a court representative, who is authorized to administer oaths, is permitted to administer the oath. These changes are intended to protect the rights of those witnesses who under the law are to be afforded constitutional warnings prior to testifying before the investigating grand jury, and to facilitate overall the investigating grand jury proceedings by allowing another court official to administer the oath.

As part of the Committee's ongoing general review of the Criminal Rules, we recently reviewed Rule 227. Several members opined, in view of the manner in which an investigating grand jury proceeding is conducted, that the provision in the rule "by the court" may be archaic, impractical, and unnecessary.[1] In determining whether to propose changes to Rule 227, the Committee reviewed the Committee's rule history. When the Committee originally proposed Rule 227 in 1978, the impetus for the requirement that the court administer the oath to witnesses were concerns of the Committee about the warnings and instructions which should be given to a witness prior to testifying. The members relied on *Commonwealth v. McCloskey*, 277 A.2d 764 (Pa. 1971), in which the Supreme Court stated, inter alia, that "the proper procedure

[1] Rule 227 originally was Rule 259. The rule was renumbered Rule 227 as part of the Court's reorganization and renumbering of the Criminal Rules in 2001. Except for this 2001 change, this rule remains in its original form.

is for the court supervising the investigating grand jury to instruct the witness when administering the oath" about the right to counsel, at 777, as the basis for including the "sworn by the court" language.

In view of this history, the Committee concluded the "sworn by the court" requirement only applies to witnesses who also must be given warnings at the time the oath is administered. The Committee also noted the witnesses who do not require constitutional warnings in most cases are law enforcement officers or other individuals involved in the investigation, and to require them to appear before the supervising judge to be sworn, which is frequently hours before the witness is to testify, is inefficient, an inconvenience to the law enforcement officers, an economic and staffing burden on their departments, and serves no purpose. In view of these considerations and the rule history, the members agreed changing the rule to allow any court official who is authorized to administer oaths to administer the oath to all other investigating grand jury witnesses (1) would not be contrary to what is required by law, (2) would promote judicial economy, and (3) would be a benefit to the other witnesses who would be able to appear at the time scheduled for their testimony rather than at the time the supervising judge is available for the administration of oaths.[2] Accordingly, the Committee is proposing that "by the court" be deleted from the rule, and a cautionary provision be added to the second paragraph of the Comment that explains when it is necessary to give constitutional warnings to a witness, the warnings and oath must be administered by the court.

[Pa.B. Doc. No. 03-818. Filed for public inspection May 2, 2003, 9:00 a.m.]

[234 PA. CODE CH. 6]
Note Taking by Jurors

The Criminal Procedural Rules Committee is planning to recommend that the Supreme Court of Pennsylvania rescind Pa.R.Crim.P. 644 (Note Taking by Jurors) that prohibits the jurors in a criminal trial from taking notes and replace it with a new Rule 644 (Note Taking by Jurors), and make correlative changes to Rules 646 (Material Permitted in Possession of the Jury) and 647 (Request for Instructions, Charge to the Jury, and Preliminary Instructions). Theses changes would provide the procedures for jurors to take notes during a criminal trial and use them during deliberations. This proposal has not been submitted for review by the Supreme Court of Pennsylvania.

The following explanatory Report highlights the Committee's considerations in formulating this proposal. Please note that the Committee's Report should not be confused with the official Committee Comments to the rules. Also note that the Supreme Court does not adopt the Committee's Comments or the contents of the explanatory Reports.

The text of the proposed rule changes precedes the Report. Additions are shown in bold; deletions are in bold and brackets.

[2] From our examination of this matter, we learned that, due to logistical difficulties and the manner in which the proceedings are conducted, frequently the supervising judge is available only one time during the day to administer oaths to the investigating grand jury witnesses.

We request that interested persons submit suggestions, comments, or objections concerning this proposal in writing to the Committee through counsel,

Anne T. Panfil, Chief Staff Counsel
Supreme Court of Pennsylvania
Criminal Procedural Rules Committee
5035 Ritter Road, Suite 800
Mechanicsburg, PA 17055
fax: (717) 795-2106
e-mail: criminal.rules@supreme.court.state.pa.us

no later than Friday, June 6, 2003.

By the Criminal Procedural Rules Committee

JOHN J. DRISCOLL,
Chair

Annex A

TITLE 234. RULES OF CRIMINAL PROCEDURE

CHAPTER 6. TRIAL PROCEDURES IN COURT CASES

PART C(2). Conduct of Jury Trial

Rule 644. **[Note Taking by Jurors] (Rescinded)**.

[The jurors shall not be permitted to take notes during the course of the trial.]

[Comment

This rule codifies the present Pennsylvania practice that discourages note taking by jurors. Cf. *Fisher v. Strader,* 160 A.2d 303 (Pa. 1960); *Thornton v. Weaber,* 112 A.2d 344 (Pa. 1955) (both involving civil cases); *Commonwealth v. Fontaine,* 128 A.2d 131 (Pa. Super. 1956) (involving a criminal case).]

Official Note: Rule 1113 adopted January 24, 1968, effective August 1, 1968; renumbered Rule 644 and Comment revised March 1, 2000, effective April 1, 2001. **Rule 644 rescinded , 2003, effective , 2003.**

Committee Explanatory Reports:

* * * * *

Report explaining the proposed rescission of Rule 644 published at 33 Pa.B. 2166 (May 3, 2003).

Rule 644. Note Taking by Jurors.

(A) The judge shall instruct the jurors that they may take notes during the trial.

(B) The court shall provide materials to the jurors that are suitable for note taking. These are the only materials that may be used by the jurors for note taking.

(C) The notes of the jurors shall remain in the custody of the court at all times.

(D) The jurors may have access to their notes and use their notes only during the trial and deliberations. The notes shall be collected or maintained by the court at each break and recess, and at the end of each day of the trial.

(E) The notes of the jurors shall be confidential and limited to use for the jurors' deliberations.

(F) Before announcing the verdict, the jury shall return their notes to the court, and their notes shall be destroyed by court personnel.

Comment

This rule was amended in 2003 to permit the jurors to take notes during the course of the trial.

Pursuant to this amendment, the jury may take notes as a matter of right without the permission of the court. See, e.g., *ABA Standards For Criminal Justice,* Second Edition, Standard 15-3.2 (Note taking by jurors) (1980).

The judge must instruct the jurors concerning the note taking. At a minimum, the judge must explain that the jurors do not need to take notes and they should not permit note taking to interfere with their attentiveness. The judge also must emphasize the confidentiality of the notes.

It is strongly recommended the judge instruct the jurors along the lines of the following:

We will distribute notepads and pens to each of you in the event you wish to take notes during the trial. You are under no obligation to take notes and it is entirely up to you whether you wish to take notes to help you remember what witnesses said and to use during your deliberations.

If you do take notes, remember that one of your responsibilities as a juror is to observe the demeanor of witnesses to help you assess their credibility. Do not become so involved with note taking that it interferes with your ability to observe a witness or distracts you from hearing other answers being given by the witness.

Your notes may help you refresh your recollection of the testimony and should be treated as a supplement to, rather than a substitute for, your memory. Your notes are only to be used by you as memory aids and should not take precedence over your independent recollection of the facts.

Those of you who do not take notes should not be overly influenced by the notes of other jurors. It is just as easy to write something down incorrectly as it is to remember it incorrectly and your fellow jurors' notes are entitled to no greater weight than each juror's independent memory. Although you may refer to your notes during deliberations, give no more or no less weight to the view of a fellow juror just because that juror did or did not take notes. Although you are permitted to use your notes for your deliberations, the only notes you may use are the notes you write in the courtroom during the proceedings on the materials distributed by the court staff.

Each time that we adjourn, your notes will be collected and secured by court staff. Your notes are completely confidential and no one will ever be allowed to read them. After you have reached a verdict in this case, your notes will be destroyed immediately by court personnel. Pennsylvania Bar Association Civil Litigation Update, *Juror Note-taking in Civil Trials: An Idea Whose Time Has Come,* Volume 5, No. 2 (Spring 2002), at 12.

Pursuant to paragraph (C), the jurors are not permitted to remove the notes from the courtroom during the trial.

Pursuant to paragraph (E), the judge must ensure the notes are collected and destroyed immediately after the jury renders its verdict. The court may designate a court official to collect and destroy the notes.

***Official Note*: Rule 1113 adopted January 24, 1968, effective August 1, 1968; renumbered Rule 644 and Comment revised March 1, 2000, effective April 1, 2001. Rule 644 rescinded , 2003, effective , 2003. New Rule 644 adopted , 2003, effective , 2003.**

Committee Explanatory Reports:

Final report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1478 (March 18, 2000).

Report explaining the proposed new Rule 644 allowing note taking by jurors published at 33 Pa.B. 2166 (May 3, 2003).

Rule 646. Material Permitted in Possession of the Jury.

* * * * *

(C) The jurors shall be permitted to have their notes for use during deliberations.

Comment

* * * * *

The 1996 amendment adding "or otherwise recorded" in paragraph (B)(2) is not intended to enlarge or modify what constitutes a confession under this rule. Rather, the amendment is only intended to recognize that a confession can be recorded in a variety of ways. See *Commonwealth v. Foster*, 624 A.2d 144 (Pa. Super. 1993).

Paragraph (C) was added in 2003 to make it clear that the notes the jurors take pursuant to Rule 644 may be used during deliberations.

* * * * *

***Official Note*: Rule 1114 adopted January 24, 1968, effective August 1, 1968; amended June 28, 1974, effective September 1, 1974; Comment revised August 12, 1993, effective September 1, 1993; amended January 16, 1996, effective July 1, 1996; amended November 18, 1999, effective January 1, 2000 ; renumbered Rule 646 March 1, 2000, effective April 1, 2001; amended , effective .**

Committee Explanatory Reports:

* * * * *

Report explaining the proposed amendment concerning jurors' notes published at 33 Pa.B. 2166 (May 3, 2003).

Rule 647. Request for Instructions, Charge to the Jury, and Preliminary Instructions.

* * * * *

Comment

* * * * *

Paragraph (D), added in 1985, recognizes the value of jury instructions to juror comprehension of the trial process. It is intended that the trial judge determine on a case by case basis whether instructions before the taking of evidence or at anytime during trial are appropriate or necessary to assist the jury in hearing the case. The judge should determine what instructions to give based on the particular case, but at a minimum the preliminary instructions should orient the jurors to the trial procedures and to their duties and function as jurors. In addition, it is suggested that the instructions may include such points as **note taking,** the elements of the crime charged, presumption of innocence, burden of proof, and

credibility. Furthermore, if a specific defense is raised by evidence presented during trial, the judge may want to instruct on the elements of the defense immediately after it is presented to enable the jury to properly evaluate the specific defense. See also Pennsylvania Suggested Standard Criminal Jury Instructions, Chapter II (1979).

Official Note: Rule 1119 adopted January 24, 1968, effective August 1, 1968; amended April 23, 1985, effective July 1, 1985; renumbered Rule 647 and amended March 1, 2000, effective April 1, 2001**; Comment revised , 2003, effective 2003**.

Committee Explanatory Reports:

* * * * *

Report explaining the proposed Comment revision concerning the note taking instruction published at 33 Pa.B. (May 3, 2003).

REPORT

New Pa.R.Crim.P. 644; Rescission of Current Rule 644; and Correlative Changes to Rules 646 and 647

NOTE TAKING BY JURORS

Introduction

The Criminal Procedural Rules Committee is proposing to recommend the Court adopt new Rule 644 (Note Taking by Jurors) and make correlative changes to Rules 646 (Material Permitted in Possession of the Jury) and 647 (Request for Instructions, Charge to the Jury, and Preliminary Instructions) that would provide the procedures to permit note taking by jurors in a criminal jury trial, and would include provisions governing, inter alia, instructions by the court concerning note taking, confidentiality, and destruction of the jurors' notes prior to the announcement of the verdict.[1] These changes are intended to facilitate jury trial procedures, and align the Pennsylvania "note taking" rule with the procedures in most other state and federal jurisdictions.[2]

Over the past several years, the Committee has visited and revisited the concept of jury trial innovations generally, and specifically the issue of note taking by jurors. The Committee has received correspondence each time another jurisdiction changes the rules or statutes or case law to allow jurors to take notes during trial, and from time to time we also have received correspondence from members of the bench suggesting that the ban on note taking should be removed. The issue of note taking by jurors also has been receiving a lot of attention by the Legislature, the media, and some Pennsylvania trial judges. In addition, in every Legislative session over the past several years, a bill that would provide for jurors to take notes during a trial has been introduced in the Senate.[3]

In view of the increased attention the issue note taking by jurors is receiving, recognizing that there is interest among members of the bench and bar in having this prohibition removed, and concluding, after a review of the studies on note taking, that note taking does serve as an aid to the jurors' comprehension without negative consequences, the Committee agreed that there should be procedures in place that would permit jurors to take notes and promote uniformity.

Discussion of Proposed Rule Changes

1. *New Rule 644 (Note Taking by Jurors)*

After the Committee agreed that the ban on note taking should be removed, we encountered some difficulty in determining how to incorporate this change in the Criminal Rules. Since the adoption of Rule 644 in 1968,[4] the prohibition on juror note taking has not changed. The Committee concluded we should propose a completely new rule to emphasize the change. In addition, 1) recognizing that, although recent developments in trial practice have emphasized the necessity of developing procedures to improve jurors' comprehension, which includes permitting juror note taking, there continues to be some opposition to permitting note taking by jurors, 2) attempting to be sympathetic to the sensitivities surrounding this issue, and 3) being cognitive of the Court's goal of statewide uniformity, the Committee identified several areas that needed to be addressed to successfully advance this change.

The Committee first discussed the issue whether juror note taking should be permitted only when the trial judge permits it, or only when counsel agree, or in all cases. The Committee agreed if the decision to permit note taking in a particular case were left to the trial judge, this would neither foster nor promote uniformity and would be likely to create problems when, for example, a judge in one courtroom would permit the jurors to take notes in a case, but a judge in another judicial district, or even another court room in the same judicial district, would not permit the jurors to take notes in a similar type of case, or a case that would take roughly the same amount of time to complete, or a case with the same number of witnesses. The Committee also thought that if note taking only were permitted when counsel agree, the same type of problems would arise. Having fully considered and debated the merits of allowing the trial judges the discretion to decide in what cases to permit juror note taking, or counsel to agree to permit note taking by jurors, the Committee ultimately agreed that juror note taking should be permitted in every case, and the jurors should decide for themselves whether to take notes. Paragraph (A), therefore, would provide that the judge shall instruct the jurors that they may take notes during the trial, and the Comment would augment this new rule by setting forth suggested general topics for the trial judge to instruct the jury concerning note taking, including: 1) taking notes is the juror's decision; 2) the importance of not allowing the note taking to interfere with the juror's observation of the proceedings; 3) parameters for using the notes; and 4) confidentiality, security, and destruction of the notes.[5]

Paragraph (B) would require the court to provide suitable note taking materials to the jurors, and that these "court-supplied" materials are the only materials the jurors may use for note taking. This paragraph makes it clear that the jurors are not permitted to bring outside materials for note taking. For example, a juror could not bring in his or her own laptop computer or palm pilot to

[1] Correlative to this proposal, the Committee is proposing the rescission of Rule 644 (Note Taking by Jurors) that, historically, has prohibited jurors in a criminal trial from taking notes.

[2] From our research, it appears there are only two states that prohibit note taking by jurors, and Pennsylvania is one of them. The Federal Courts and the District of Columbia also permit jurors to take notes during a jury trial.

[3] For example, in at least the last four legislative sessions, a bill has been introduced that would permit juror note taking. See, e.g., Senate Bill 97 (Printer's Number 96) Session of 2003. During previous sessions, the bill was not passed; in this current session, however, the Senate Bill 97 has passed the Senate and is now in the House for consideration.

[4] Rule 644 originally was numbered 1113, but was renumbered 644 as part of the Court's March 18, 2000 Order that reorganized and renumbered the Criminal Rules.

[5] The Committee learned the *Handbook for Pennsylvania Trial Judges* advocates note taking and includes a suggested jury note taking instruction. We agreed a similar suggested juror note taking instruction should be included in the new Rule 644 Comment because of the significant change in practice the new procedure would be. The Committee also agreed using similar language would be helpful for the judges.

"store" his or her notes, which would be distracting to other jurors and would be problematic for the court to control the notes and protect the confidentiality of the notes.

Paragraphs (C), (D), and (E) would require that the jurors' notes shall remain in the custody of the court at all times, spell out when the jurors may have access to their notes, and emphasize the notes of the jurors are confidential and the use of the notes is limited to deliberations. These paragraphs make it clear that the notes of the jurors are the property of the court, and safeguard misuse, whether intended or unintended, of the notes by ensuring the notes are maintained by the court.

Finally, paragraph (F) would require that before the verdict is announced, the jurors must return their notes to the court, and their notes must be destroyed. This will further protect the confidentiality of the notes, and also prevent the notes from becoming the subject of appeals, which we believe is an inappropriate use of the notes.

2. *Correlative Changes: Rules 646 (Material Permitted in Possession of the Jury) and 647 (Request for Instructions, Charge to the Jury, and Preliminary Instructions)*

The Committee also is proposing correlative changes to Rules 646 and 647. Rule 646 would be amended by the addition of a new paragraph (C) that would make it clear the jury may take their notes for use during deliberations, and the Comment to Rule 647 would be revised to include as "suggested preliminary instructions" the trial judge include instructions on note taking.

[Pa.B. Doc. No. 03-819. Filed for public inspection May 2, 2003, 9:00 a.m.]

Title 246—MINOR COURT CIVIL RULES

PART I. GENERAL

[246 PA. CODE CH. 100]

Order Amending Rule 111 of the Rules of Conduct, Office Standards and Civil Procedure for District Justices; No. 194; Magisterial Doc. No. 1; Book No. 2

The Minor Court Rules Committee has prepared a Final Report explaining the amendment to Rule 111 of the Rules of Conduct, Office Standards and Civil Procedure for District Justices, effective January 1, 2004. This rule change provides for the use of a facsimile or preprinted seal in lieu of an original seal on documents signed by a district justice.

Order

Per Curiam:

And Now, this 15th day of April, 2003, upon the recommendation of the Minor Court Rules Committee; the proposal having been published before adoption at 32 Pa.B. 5875 (November 30, 2002), 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 Rule 111 of the Rules of Conduct, Office Standards and Civil Procedure for District Justices is amended in the following form.

This *Order* shall be processed in accordance with Pa.R.J.A. No. 103(b), and shall be effective January 1, 2004.

Annex A

TITLE 246. MINOR COURT CIVIL RULES

PART I. GENERAL

CHAPTER 100. RULES AND STANDARDS WITH RESPECT TO OFFICES OF DISTRICT JUSTICES

Rule 111. Seal.

A. Each magisterial district shall have and use a seal, which shall be in the custody of the district justice elected or appointed for **[such] the magisterial** district. The official acts of **[said] the** district justice shall be authenticated therewith. There shall be engraved on **[such] the** seal the same device as is engraved on the great seal of the State, and the words "Commonwealth of Pennsylvania," the name of the county, the number of the magisterial district, and the words "District Justice."

B. A facsimile or preprinted seal may be used for all purposes in lieu of the original seal.

***Official Note*: This rule was amended in 2003 to provide for the use of a facsimile or preprinted seal for all purposes in lieu of an original seal. See 42 Pa.C.S. § 1512.**

Adopted Nov. 28, 1969, effective Jan. 1, 1970**; amended June 30, 1982, effective 30 days after July 17, 1982; amended and Note added April 15, 2003, effective January 1, 2004**.

FINAL REPORT[1]

Amendment to Rule 111 of the Rules of Conduct, Office Standards and Civil Procedure for District Justices

FACSIMILE SEAL

On April 15, 2003, effective January 1, 2004, upon the recommendation of the Minor Court Rules Committee,[2] the Supreme Court of Pennsylvania amended Rule 111 of the Rules of Conduct, Office Standards and Civil Procedure for District Justices.[3]

I. Background

The Committee reviewed Rule 111 at the request of the Special Court Judges Association of Pennsylvania (SCJAP), and in response to the passage of Act 2002-86.[4] Act 86, inter alia, amended Section 1512 of the Judicial Code, 42 Pa.C.S. § 1512, to provide for the use of a facsimile or preprinted seal in lieu of an original seal on documents signed by a district justice.[5]

In 2001, the SCJAP had contacted the Committee and suggested that Rule 111 of the Rules and Standards with Respect to Offices of District Justices be amended to provide for the use of a facsimile seal on documents produced by the District Justice Automated System (DJS), similar to the automated facsimile signature provided for in Rule 113. The SCJAP noted that facsimile or preprinted seals are routinely used on documents origi-

[1] The Committee's Final Report should not be confused with the official Committee Notes to the Rules. Also, the Supreme Court of Pennsylvania does not adopt the Committee's Notes or the contents of the Committee's explanatory Final Reports.
[2] Recommendation No. 1 Minor Court Rules 2003.
[3] Supreme Court of Pennsylvania Order No. 194, Magisterial Docket No. 1, Book No. 2 (April 15, 2003).
[4] The Act of June 28, 2002 (P. L. 518, No. 86) (hereinafter Act 86).
[5] d. § 1.

nating in the courts of common pleas. In addition, the SCJAP asserted that the use of a facsimile seal would increase the efficiency of the district justice courts and would save money by reducing the number of costly engraved seals needed in the courts. While the Committee saw merit in the SCJAP's suggestion, the Committee, at that time, declined to propose such an amendment to Rule 111 because the statutory scheme relating to judicial seals did not appear to allow the use of a facsimile seal at the district justice level.

Specifically, the Committee noted that district justice seals are governed by statute, Section 1512 of the Judicial Code, 42 Pa.C.S. § 1512 (Seal), and by court rule, Rule 111 of the Rules and Standards with Respect to Offices of District Justices (Seal). Section 1512, at that time, stated, "[e]ach magisterial district shall have a seal, which shall be in the custody of the district justice elected or appointed for such district. The official acts of the district justice shall be authenticated therewith. There shall be *engraved* on the seal such inscription as may be specified by general rule." 42 Pa.C.S. § 1512 (West 1981) (emphasis added).

Rule 111 is based on the statute, and prior to the April 15, 2003 amendment stated:

> Each magisterial district shall have and use a seal, which shall be in the custody of the district justice elected or appointed for such district. The official acts of said district justice shall be authenticated therewith. There shall be *engraved* on such seal the same device as is engraved on the great seal of the State, and the words "Commonwealth of Pennsylvania," the name of the county, the number of the magisterial district, and the words "District Justice."

Rule 111 of the Rules and Standards with Respect to Offices of District Justices (emphasis added).

The Committee believed that the use of the word "engraved" in both the statute and the rule suggested that the legislature and the Supreme Court contemplated the use of only an engraved, embossed seal.

As noted above, however, the legislature subsequently amended Section 1512 by adding the language, "[a] facsimile or preprinted seal may be used for all purposes in lieu of the original seal." 42 Pa.C.S. § 1512, as amended by Act 86.

Accordingly, the Committee recommended that the Supreme Court amend Rule 111 to provide for the use of a facsimile or preprinted seal in lieu of an original seal.

The Committee's proposal was published for public comment at 32 Pa.B. 5875 (November 30, 2002). The Committee carefully considered all public comments received in formulating its final recommendation. In addition, the Committee sought comment from the Civil Procedural Rules Committee and the Criminal Procedural Rules Committee. Neither committee objected to the proposal.

II. Discussion of Rule Changes

To provide for the use of a facsimile or preprinted seal, Rule 111 has been divided in two subdivisions. Subdivision A contains the pre-amendment language of the rule, with only minor editorial changes. The new subdivision B incorporates into the Rule the language from Section 1512 allowing the use of the facsimile or preprinted seal "for all purposes in lieu of the original seal." Finally, an official Committee Note has been added to the Rule to explain the 2003 amendment and to cross-reference Section 1512.

It is contemplated that the Administrative Office of Pennsylvania Courts (AOPC) will program the District Justice Automated System (DJS) to automatically print a facsimile seal on all DJS-generated documents requiring a seal.[6] This will eliminate the need for an embossed seal on all DJS-generated documents. The district justice courts might, however, need to continue to use an embossed seal on "manual" forms or documents not generated by the DJS.

[Pa.B. Doc. No. 03-820. Filed for public inspection May 2, 2003, 9:00 a.m.]

Title 255—LOCAL COURT RULES

YORK COUNTY

Fees for Adoption Investigations and Information Requirements; No. 67-03-0584

Administrative Order Regarding Adoption Procedures

Effective June 1, 2003, *Notice* is hereby given that the minimum compensation for the Court Investigator in adoption proceedings shall be increased to One Hundred Dollars ($100.00) per investigation and Twenty Dollars ($20.00) each for additional siblings to be adopted within the household; and

All Petitioners seeking Court approval for Adoptions shall secure a Pennsylvania Criminal History Check and Child Line Clearance Certificate from the Department of Welfare; and

All Petitioners seeking an adoption shall provide within the body of the Petition or by separate attachment, a personal telephone number by which they may be contacted by the Court Investigator in order to schedule the in-home investigation.

This Administrative Order shall be published in the *York County Legal Record*, two (2) certified copies shall be distributed to the Legislative Reference Bureau for publishing in the *Pennsylvania Bulletin*, seven (7) certified copies shall be filed with the Administrative Office of Pennsylvania Courts, and one (1) certified copy with the Orphans' Court Procedural Rules Committee no later than thirty (30) days in advance of the implementation date of June 1, 2003.

By the Court

JOHN C. UHLER,
Judge

[Pa.B. Doc. No. 03-821. Filed for public inspection May 2, 2003, 9:00 a.m.]

---

[6] The January 1, 2004 effective date of this rule change was established to allow sufficient time for the AOPC to make necessary programming changes and revisions to DJS-generated documents to accommodate the facsimile seal.