

THE COURTS

Title 225—RULES OF EVIDENCE

[225 PA. CODE ART. VIII]

Order Amending Revision of Comment to Rule 804(b)(2); No. 346 Supreme Court Rules; Doc. No. 1

Order

Per Curiam:

Now, this 17th day of December, 2004, upon the recommendation of the Committee on Rules of Evidence, this proposal having been published before adoption at 34 Pa.B. 4020 (July 31, 2004) 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 the revision of comment is hereby amended in the following form.

This *Order* shall be processed immediately in accordance with Pa.R.J.A. 103(b), and shall be effective January 31, 2005.

Annex A

TITLE 225. RULES OF EVIDENCE

ARTICLE VIII. HEARSAY

Rule 804. Hearsay Exceptions; Declarant Unavailable.

* * * * *

(b) *Hearsay Exceptions.* The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * * * *

(2) *Statement Under Belief of Impending Death.* A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

Comment

Pa.R.E. 804(b)(2) is similar to F.R.E. 804(b)(2), except that the Pennsylvania rule applies in all cases, not just in homicide cases and civil actions. This is a departure from prior Pennsylvania law, which applied the exception only to statements made by the victim in a criminal prosecution for homicide.

The rationale for this exception [to] from the hearsay rule was set forth in *Commonwealth v. Smith*, 454 Pa. 515, 314 A.2d 224, 225 (Pa. 1973):

* * * * *

The common law [has] traditionally, but illogically, excepted a dying declaration [to] from the hearsay rule in a criminal prosecution for homicide, but not in a criminal prosecution for another crime, or in a civil case. Prior Pennsylvania case law followed the common law. See *Commonwealth v. Antonini*, 69 A.2d 436 (Pa. Super. 1949).

Reasoned analysis [dictates] dictated a change. If a dying declaration is trustworthy enough to be introduced

against a defendant charged with murder, it [should be] is trustworthy enough to be introduced against a defendant charged with attempted murder, robbery, or rape. It [should] is also [be] trustworthy enough to be introduced against a party in a civil case.

In *Crawford v. Washington*, 541 U. S. 36, 124 S.Ct. 1354 (2004), the Supreme Court interpreted the Confrontation Clause in the Sixth Amendment of the United States Constitution to prohibit the introduction of "testimonial" hearsay from an unavailable witness against a defendant in a criminal case unless the defendant had an opportunity to confront and cross-examine the declarant, regardless of its exception from the hearsay rule. However, in footnote 6, the Supreme Court said that there may be an exception, *sui generis*, for those dying declarations that are testimonial.

* * * * *

FINAL REPORT REVISING

Comment

Pa. R.E. 804(b)(2)

Comment Changes

The Introductory Comment to Article VIII, Hearsay calls attention to the role of the Sixth Amendment to the United States Constitution in determining the admissibility of hearsay evidence against a defendant in a criminal case.

The proposed revision of Comment to Pa.R.E. 804(b)(2) comes about as a result of the decision of the United States Supreme Court in *Crawford v. Washington*, 541 U. S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) interpreting the confrontation clause to prohibit the introduction of "testimonial" hearsay from an unavailable witness against a defendant in a criminal case unless the defendant had an opportunity to confront and cross-examine the declarant. One possible exception would be a dying declaration (Pa.R.E. 804(b)(2)). The proposed change cites *Crawford v. Washington* as confirming this exception.

Heretofore this issue was governed by the earlier United States Supreme Court in *Ohio v. Roberts*, 446 U. S. 56 (1980), now overruled by the *Crawford* opinion.

[Pa.B. Doc. No. 05-1. Filed for public inspection December 30, 2004, 9:00 a.m.]

[225 PA. CODE ART. VIII]

Order Amending Revision of the Introductory Comment to Article VIII, Hearsay; No. 347 Supreme Court Rules; Doc. No. 1

Order

Per Curiam:

Now, this 17th day of December, 2004, upon the recommendation of the Committee on Rules of Evidence, this proposal having been published before adoption at 34 Pa.B. 4021 (July 31, 2004) 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 the revision of comment is hereby amended in the following form.

This *Order* shall be processed immediately in accordance with Pa.R.J.A. 103(b), and shall be effective January 31, 2005.

Annex A
TITLE 225. RULES OF EVIDENCE
ARTICLE VIII. HEARSAY
Introductory Comment

The Federal Rules of Evidence list 24 exceptions [to] from the hearsay rule in which the availability of the declarant is immaterial, five exceptions in which the declarant must be unavailable, and four exceptions [to] from the definition of hearsay (which are, in reality, exceptions [to] from the hearsay rule), for a total of 33.

The Pennsylvania Rules of Evidence, while following the federal numbering system as far as possible, recognize fewer exceptions, and arrange them more logically. Article VIII of the Pennsylvania Rules of Evidence lists 16 exceptions [to] from the hearsay rule in which the availability of the declarant is immaterial, five exceptions in which the declarant must be unavailable, and three exceptions in which the testimony of the declarant is necessary, for a total of 24.

Defendant's Constitutional Right of Confrontation in Criminal Cases

The hearsay rule is applicable both in civil and criminal cases. In a criminal case, however, hearsay that is offered against a defendant under an exception [to] from the hearsay rule may sometimes be excluded because its admission would violate the defendant's right "to be confronted with the witnesses against him" under the Sixth Amendment [to] of the United States Constitution, or "to be confronted with the witnesses against him" under Article I, § 9 of the Pennsylvania Constitution.

* * * * *

In Crawford v. Washington, 541 U. S. 36, 124 S.Ct. 1354 (2004), the Supreme Court, overruling its prior opinion in *Ohio v. Roberts*, 446 U. S. 56 (1980), interpreted the Confrontation Clause to prohibit the introduction of "testimonial" hearsay from an unavailable witness against a defendant in a criminal case unless the defendant had an opportunity to confront and cross-examine the declarant, regardless of its exception from the hearsay rule, except, perhaps, if the hearsay qualifies as a dying declaration (Pa. R.E. 804(b)(2)).

In short, when hearsay is offered against a defendant in a criminal case, the defendant may interpose three separate objections: (1) admission of the evidence would violate the hearsay rule, (2) admission of the evidence would violate defendant's right to confront the witnesses against him under the Sixth Amendment [to] of the United States Constitution, and (3) admission of the evidence would violate defendant's right [of confrontation] "to be confronted with the witnesses against him" under Article I, § 9 of the Pennsylvania Constitution.

FINAL REPORT REVISING
The Introductory Comment
Article VIII, Hearsay
Comment Changes

The Introductory Comment to Article VIII, Hearsay calls attention to the role of the Sixth Amendment to the

United States Constitution in determining the admissibility of hearsay evidence against a defendant in a criminal case.

The proposed change comes about as a result of the decision of the United States Supreme Court in *Crawford v. Washington*, 541 U. S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) interpreting the confrontation clause to prohibit the introduction of "testimonial" hearsay from an unavailable witness against a defendant in a criminal case unless the defendant had an opportunity to confront and cross-examine the declarant. One possible exception would be a dying declaration (Pa.R.E. 804(b)(2)).

Heretofore this issue was governed by the earlier United States Supreme Court in *Ohio v. Roberts*, 446 U. S. 56 (1980), now overruled by the *Crawford* opinion.

[Pa.B. Doc. No. 05-2. Filed for public inspection December 30, 2004. 9:00 a.m.]

Title 231—RULES OF CIVIL PROCEDURE

PART I. GENERAL

[231 PA. CODE CH. 200]

Amendment of Rule 223.2 Governing Juror Note Taking; Proposed Recommendation No. 198

The Civil Procedural Rules Committee proposes that Rule of Civil Procedure 223.2 governing note taking by jurors be amended by deleting subdivision (e) as set forth herein. The proposed recommendation is being submitted to the bench and bar for comments and suggestions prior to its submission to the Supreme Court of Pennsylvania.

All communications in reference to the proposed recommendation should be sent not later than March 4, 2005 to:

Harold K. Don, Jr.,
 Counsel
 Civil Procedural Rules Committee
 5035 Ritter Road, Suite 700
 Mechanicsburg, Pennsylvania 17055

or E-Mail to
 civil.rules@pacourts.us

The Explanatory Comment which appears in connection with the proposed recommendation has been inserted by the Committee for the convenience of the bench and bar. It will not constitute part of the rules of civil procedure or be officially adopted or promulgated by the Court.

Annex A

TITLE 231. RULES OF CIVIL PROCEDURE

PART I. GENERAL

CHAPTER 200. BUSINESS OF COURTS

Rule 223.2. Conduct of the Jury Trial. Juror Note Taking.

* * * * *

[(e) This rule is rescinded as of December 31, 2005.]

Explanatory Comment

Rule 223.2 governing juror note taking was promulgated July 30, 2003, effective September 1st of the same year. The rule was experimental and contained a sunset provision, subdivision (e), which provided for the rescission of the rule on December 31, 2005.

The rule has now been in effect for more than a year and the response of the bench and bar has been overwhelmingly favorable. Consequently, it is proposed that subdivision (e) of Rule 223.2 be rescinded and the rule be made permanent.

By the Civil Procedural Rules Committee

R. STANTON WETTICK, Jr.,
Chair

[Pa.B. Doc. No. 05-3. Filed for public inspection December 30, 2004, 9:00 a.m.]

**Title 246—MINOR
COURT CIVIL RULES**

PART I. GENERAL

[246 PA. CODE CHS. 200, 300 AND 500]

Order Amending Rule 209 and Rescinding Rules 320 and 511 of the Rules of Conduct, Office Standards and Civil Procedure for District Justices; No. 213 Magisterial Doc. No. 1

The Minor Court Rules Committee has prepared a Final Report explaining the Supreme Court of Pennsylvania's Order amending Rule 209 and rescinding Rules 320 and 511 of the Rules of Conduct, Office Standards and Civil Procedure for District Justices, effective July 1, 2005. These rule changes consolidate into one rule all provisions relating to continuances in district justice civil proceedings. The changes also provide for technical or "housekeeping" amendments to Rule 209. The Final Report follows the Court's Order.

Order

Per Curiam:

And Now, this 16th day of December, 2004, upon the recommendation of the Minor Court Rules Committee; the proposal having been published before adoption at Volume 34, *Pennsylvania Bulletin*, page 480 (January 24, 2004), 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.C.P.D.J. No. 209 be, and hereby is, amended in the following form, and Pa.R.C.P.D.J. Nos. 320 and 511 be, and hereby are, rescinded.

This Order shall be processed in accordance with Pa.R.J.A. No. 103(b), and shall be effective July 1, 2005.

Annex A

TITLE 246. MINOR COURT CIVIL RULES

PART I. GENERAL

**CHAPTER 200. RULES OF CONSTRUCTION;
GENERAL PROVISIONS**

Rule 209. [Grounds for continuances generally] Continuances.

A. Continuances may be granted for cause or by agreement.

B. Continuances shall be to a specific time and date. The district justice shall note continuances on the docket and shall promptly give or mail to the parties written notice of continuances.

C. Except for good cause shown,

(1) not more than one continuance shall be granted to each party, and

(2) the aggregate of all continuances shall not extend the date of the hearing:

(a) beyond 90 days from the date of filing the plaintiff's complaint in proceedings commenced pursuant to Rule 303, or

(b) beyond 30 days from the date of filing the plaintiff's complaint in proceedings commenced pursuant to Rule 502.

D. In all proceedings governed by these rules the [The] following shall constitute cause for granting a continuance [under these rules]:

(1) [The] the scheduling of [counsel] a party's attorney of record to appear at any proceeding under the Pennsylvania Rules of Disciplinary Enforcement, whether[:]

(a) as counsel for a respondent-attorney before a hearing committee, special master, the Disciplinary Board, or the Supreme Court;

* * * * *

(2) [The] the scheduling of [counsel] a party's attorney of record to appear at any proceeding involving the discipline of a justice, judge, or district justice under Section 18 of Article V of the Constitution of Pennsylvania, whether[:]

(a) as counsel for a justice, judge, or district justice before the special tribunal provided for in 42 Pa.C.S. § 727, the Court of Judicial Discipline, the Judicial Conduct Board, or any hearing committee or other arm of the Judicial Conduct Board;

(b) as a member of the Court of Judicial Discipline, the Judicial Conduct Board, or any hearing committee or other arm of the Judicial Conduct Board.

Official Note: [This rule sets forth certain grounds for the granting of a continuance under the various provisions of these rules relating to continuances, including Rule 320 and Rule 511.] This rule was amended in 2005 to consolidate the provisions of former Rules 320 (relating to continuances in civil actions) and 511 (relating to continuances in possessory actions) into one general rule governing continuances. The limitations set forth in subdivision C are intended to ensure that these cases proceed expeditiously. The grounds set forth in [this rule] subdivision D, of course, are not intended to be the only grounds on which a continuance will be granted.

CHAPTER 300. CIVIL ACTION

Rule 320. [Continuances] (Rescinded).

[Continuances of not more than thirty (30) days may be granted for cause or by agreement. Con-

tinuances shall be for a specific time and date and shall be noted on the original complaint form. A Notice of Continuance form stating the time and date of hearing shall be mailed to all parties. Not more than two continuances shall be granted to either party. See Rule 209.]

Official Note: [A limitation was placed upon the number of continuances to insure the expeditious handling of actions before district justices and to prevent a clogging of their dockets.] See Rule 209 governing continuances.

CHAPTER 500. ACTIONS FOR THE RECOVERY OF POSSESSION OF REAL PROPERTY

Rule 511. [Continuances] (Rescinded).

[Continuances may be granted for cause or by agreement. Continuances shall be to a specific time and date and shall be noted on the original complaint form. Continuances shall not be granted to extend the date of the hearing beyond thirty (30) days from the date the plaintiff's complaint is filed or, if the defendant files a cross-complaint, beyond twenty (20) days from the date that complaint is filed, whichever is the longer period from the filing of the plaintiff's complaint. The district justice shall promptly give written or other notice of a continuance to the parties on a Notice of Continuance form, but if a party has an attorney of record named in the complaint form, the notice, unless given at the hearing in the presence of the party, shall be given to the attorney instead of to the party. See Rule 209.]

Official Note: [The limitations in this rule are intended to insure expedition in the processing of these cases.] See Rule 209 governing continuances.

FINAL REPORT¹

Amending Rule 209 and Rescinding Rules 320 and 511 of the Rules of Conduct, Office Standards and Civil Procedure for District Justices

Continuances

On December 16, 2004, effective July 1, 2005, upon recommendation of the Minor Court Rules Committee,² the Supreme Court of Pennsylvania amended Rule 209 and rescinded Rules 320 and 511 of the Rules of Conduct, Office Standards and Civil Procedure for District Justices.³

I. Background and Discussion

In an ongoing effort to simplify and consolidate certain district justice rules, the Committee undertook a review of the rules relating to continuances. The Committee noted that there are currently three separate rules relating to continuances: Rule 209 (relating to grounds for continuances generally), Rule 320 (relating to continu-

ances in civil actions), and Rule 511 (relating to continuances in possessory actions). The Committee was concerned about unnecessary duplication and confusion resulting from having three continuance rules. In addition, some members of the Committee expressed concern about the restrictions on the length of continuances, particularly in Rule 511, being unnecessarily complicated.

Accordingly, the Committee recommended that all provisions relating to continuances be consolidated in existing Rule 209,⁴ and that Rules 320 and 511 be rescinded.

II. Proposed Rule Changes

A. Rule 209

As indicated above, the Committee recommended that all provisions relating to continuances be consolidated in Rule 209. Subdivision A of the amended Rule retains the existing provisions from Rules 320 and 511 that continuances may be granted for cause or by agreement. Likewise, Subdivision B retains the existing provisions that continuances must be to a time and date certain, and that the district justice must note continuances on the docket and notify the parties.

Subdivision C of the amended Rule incorporates the limitations on continuances from Rules 320 and 511 with some changes. Specifically, the Rule provides that generally not more than one continuance may be granted to each party. In addition, the aggregate of all continuances is limited to extending the date of the hearing:

- not more than 90 days from the filing of the plaintiff's complaint in civil actions, or
- not more than 30 days from the filing of the plaintiff's complaint in possessory actions.

The Committee believes these time limitations are reasonable and will ensure that district justice cases proceed expeditiously, while allowing sufficient time for necessary continuances and taking into consideration the time frames for scheduling the original hearing date,⁵ service,⁶ and the filing of cross-complaints.⁷ The introductory clause of Subdivision C also provides that the limitations on continuances apply except for good cause shown, giving the district justice discretion to grant continuances outside the limitations when necessary.

Subdivision D of the amended Rule incorporates, with only minor editorial changes, the existing provisions of Rule 209 relating to continuances because of scheduling conflicts with a party's attorney who must participate in attorney or judicial disciplinary proceedings.

B. Rules 320 and 511

In light of the amendments to Rule 209, the Committee further recommended that Rule 320 (relating to continuances in civil actions) and Rule 511 (relating to continuances in possessory actions) be rescinded.

[Pa.B. Doc. No. 05-4. Filed for public inspection December 30, 2004, 9:00 a.m.]

¹ The Committee's Final Report should not be confused with the Official Notes to the Rules. Also, the Supreme Court of Pennsylvania does not adopt the Committee's Official Notes or the contents of the explanatory Final Report.

² Recommendation No. 1 Minor Court Rules 2004.

³ Supreme Court of Pennsylvania Order No. 213, Magisterial Docket No. 1 (December 16, 2004).

⁴ The placement of this Rule in Chapter 200 (Rules of Construction; General Provisions) makes it applicable to both civil actions (Chapter 300) and possessory actions (Chapter 500).

⁵ See Rules 305 and 504.

⁶ See Rules 307 and 506.

⁷ See Rules 315 and 508.

Title 255—LOCAL COURT RULES

FAYETTE COUNTY

Local Rule 1042; No. 2834 of 2004

Order

And Now, this 10th day of December, 2004, pursuant to Rule 239 of the Pennsylvania Rules of Civil Procedure, it is hereby ordered that Local Rule 1042 is adopted as set forth in the attachment.

The Prothonotary is directed as follows:

(1) Seven certified copies of the Local Rule shall be filed with the Administrative Office of Pennsylvania Courts.

(2) Two certified copies and diskette of the Local Rule shall be distributed to the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.

(3) One certified copy of the Local Rule shall be sent to the State Civil Procedural Rules Committee.

(4) One certified copy shall be sent to the Fayette County Law Library.

(5) One certified copy shall be sent to the Editor of the *Fayette Legal Journal*.

This Local Rule shall be continuously available for public inspection and copying in the Office of the Prothonotary. Upon request and payment of reasonable costs of reproduction and mailing, the Prothonotary shall furnish to any person a copy of any local rule.

This Local Rule shall be effective 30 days after the date of publication in the *Pennsylvania Bulletin*.

By the Court

CONRAD B. CAPUZZI,
President Judge

Rule 1042. Mediation of Medical Professional Liability Actions.

(a) A mediation conference may be requested at the F.C.R. 202 status conference or any time thereafter upon agreement and motion of the parties. The conference shall be confidential and no record shall be made thereof.

(b) (1) Except as provided in Pa.R.C.P. 1042.21(a)(2), each party shall pay, pro rata, an initial non-refundable mediation fee of \$500.00 per session. The fee shall be made payable to the Prothonotary for deposit in the Fayette County Medical Professional Liability Trustee Account and shall be submitted at the time the motion seeking a conference is filed. The receipt for payment shall be attached to the motion upon presentation to the assigned Judge through Motions Court or a mediator will not be appointed.

(2) A session shall consist of a time period of three (3) hours or less.

(c) The mediator will be appointed in seriatim fashion by the Court Administrator from a list approved by the Court and shall consist of lawyers from Fayette County who have experience in medical professional liability litigation and who shall receive the mediation fee of \$500.00 per session.

(d) The mediator shall conduct the session for the purpose of effectuating a settlement within sixty (60) days from the date of appointment.

(e) The attendance of trial counsel, the parties, and a representative of the insurance carrier for the Defendant(s) at all scheduled sessions shall be mandatory. Failure to attend will cause the session to be rescheduled with attorney fees and expenses assessed against the nonappearing person.

(f) At least ten (10) days prior to the session, each party shall provide the mediator and the parties with a statement which must include the following:

- (1) the party's position regarding liability and damages;
- (2) a listing of all legal issues involved, with citation of applicable legal authority;
- (3) medical reports;
- (4) expert reports;
- (5) an itemized list of damages; and
- (6) the last informal settlement posture and rationale.

If a party fails to timely provide the required statement, the session will be rescheduled with attorney's fees and expenses assessed against the offending party.

(g) If the initial session is insufficient to complete the conference, then subsequent sessions may be scheduled as necessary. In such event, the parties shall pay, pro rata, a non-refundable \$500.00 fee for each subsequent session, except if the mediation has been directed pursuant to Pa.R.C.P. 1042.21(a)(2), in which case the moving party shall pay the entire fee. The total fee for all subsequent sessions shall be paid to the Prothonotary for deposit in the Fayette County Medical Professional Liability Trustee Account immediately upon the conclusion of the final conference session.

(h) In the event a party withdraws from mediation resulting in the termination of the process, that party shall be responsible for the total cost of the mediation fee.

(i) (1) If the case is not settled, the mediator shall, within ten (10) days of the final conference session, file with the Prothonotary a report setting forth the following:

- (i) Plaintiff's final settlement demand;
- (ii) Defendant's/Additional Defendant's final settlement offer;
- (iii) The mediator's assessment of liability;
- (iv) The mediator's assessment of damages;
- (v) The mediator's opinion regarding the potential range of a verdict and settlement value of the case;
- (vi) The mediator's recommendations regarding settlement of the case; and
- (vii) The number of sessions conducted.

(2) The Prothonotary shall seal and make confidential the report of the mediator and shall provide a copy of the report to the assigned Judge.

(3) The Prothonotary shall pay the amount due to the mediator within ten (10) days of the filing of the report.

(4) If the case is settled, the mediator shall, within five (5) days of the final conference session, file a report indicating such settlement and the number of sessions conducted. Additionally, a written settlement agreement shall be executed by a person(s) having the authority to

do so and filed with the Prothonotary who shall discontinue the action. The agreement shall be sealed if requested by the parties.

[Pa.B. Doc. No. 05-5. Filed for public inspection December 30, 2004, 9:00 a.m.]

DISCIPLINARY BOARD OF THE SUPREME COURT

Notice of Suspension

Notice is hereby given that Joe Carl Ashworth having been suspended indefinitely from the practice of law in the state of Maryland, the Supreme Court of Pennsylvania issued an Order dated December 13, 2004 suspending Joe Carl Ashworth from the practice of law in this Commonwealth consistent with the order of the Court of Appeals of Maryland filed June 9, 2004. In accordance with Rule 217(f), Pa.R.D.E., since this formerly admitted attorney resides outside the Commonwealth of Pennsylvania, this notice is published in the *Pennsylvania Bulletin*.

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

[Pa.B. Doc. No. 05-6. Filed for public inspection December 30, 2004, 9:00 a.m.]

Notice of Suspension

Notice is hereby given that Kathleen M. Quigley, a/k/a Kathleen M. Vella, having been suspended from the practice of law in the State of New Jersey for a period of three months, the Supreme Court of Pennsylvania issued an Order dated December 13, 2004 suspending Kathleen M. Quigley, a/k/a Kathleen M. Vella, from the practice of law in this Commonwealth for a period of three months, effective January 12, 2005. In accordance with Rule 217(f), Pa.R.D.E., since this formerly admitted attorney resides outside the Commonwealth of Pennsylvania, this notice is published in the *Pennsylvania Bulletin*.

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

[Pa.B. Doc. No. 05-7. Filed for public inspection December 30, 2004, 9:00 a.m.]
