

THE COURTS

Title 234—RULES OF CRIMINAL PROCEDURE

[234 PA. CODE CH. 5]

Proposed Amendments to Rule 513, Proposed new Rule 513.1 and Correlative Changes to Rules 504, 540 and 547

Introduction

The Criminal Procedural Rules Committee is planning to recommend that the Supreme Court of Pennsylvania: (1) amend Rule 513 to provide for the temporary delay in the dissemination of arrest warrant information to the public prior to execution; (2) adopt new Rule 513.1 to provide for the sealing of arrest warrant information; and (3) approve correlative changes to Rules 504, 540 and 547. This Second *Supplemental Report* resulted from the Committee's review of the correspondence received in response to publication of our original explanatory *Report* and first *Supplemental Report*. This proposal has not been submitted for review by the Supreme Court of Pennsylvania.

The following explanatory *Supplemental Report* highlights the Committee's considerations in formulating this proposal. Note that the Committee's *Supplemental 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 amendments to Rule 513 and proposed new Rule 513.1 precedes the *Report*. Additions are shown in bold and 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,

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no later than Friday, November 14, 2008.

By the Criminal Procedural Rules Committee:

D. PETER JOHNSON,
Chair

Annex A

TITLE 234. RULES OF CRIMINAL PROCEDURE

PART I. GENERAL

CHAPTER 5. PRETRIAL PROCEDURES IN COURT CASES

PART B(1). Complaint Procedures

Rule 504. Contents of Complaint.

Every complaint shall contain:

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(11) a verification by the affiant that the facts set forth in the complaint are true and correct to the affiant's personal knowledge, or information and belief, and that any false statements therein are made subject to the penalties of the Crimes Code, 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities; [and]

(12) the signature of the affiant and the date of the execution of the complaint [.]; and

(13) if an order sealing the arrest warrant information pursuant to Rule 513.1 has been approved, a notation by the judge that the case has been sealed.

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Official Note: Original Rule 104 adopted June 30, 1964, effective January 1, 1965; suspended January 31, 1970, effective May 1, 1970. New Rule 104 adopted January 31, 1970, effective May 1, 1970; renumbered Rule 132 September 18, 1973, effective January 1, 1974; amended October 22, 1981, effective January 1, 1982; amended November 9, 1984, effective January 2, 1985; amended July 25, 1994, effective January 1, 1995; renumbered Rule 104 and Comment revised August 9, 1994, effective January 1, 1995; renumbered Rule 504 and Comment revised March 1, 2000, effective April 1, 2001; Comment revised March 9, 2006, effective September 1, 2006; amended July 10, 2008, effective February 1, 2009; **amended** , **2008, effective** , **2009.**

Committee Explanatory Reports:

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Final Report explaining the March [9] 3, 2006 Comment revision published with the Court's Order at 36 Pa.B. 1385 (March 25, 2006).

Final Report explaining the July 10, 2008 amendments adding new paragraph (9) requiring a notation concerning fingerprinting published with the Court's Order at 38 Pa.B. [3975] 3971 (July 26, 2008).

Report explaining the proposed amendments adding paragraph (13) concerning the notation of the sealing of arrest warrant information published at 38 Pa.B. 5752 (October 18, 2008).

Part B(3). Arrest Procedures in Court Cases

(a) Arrest Warrants

Rule 513. Requirements for Issuance; **Dissemination of Arrest Warrant Information.**

(A) For purposes of this rule, "arrest warrant information" is defined as the criminal complaint in cases in which an arrest warrant is issued, the arrest warrant, any affidavit(s) of probable cause, and documents or information related to the case.

(B) ISSUANCE OF ARREST WARRANT

(1) In the discretion of the issuing authority, advanced communication technology may be used to submit a complaint and affidavit(s) for an arrest warrant and to issue an arrest warrant.

[(B)] (2) No arrest warrant shall issue but upon probable cause supported by one or more affidavits sworn to before the issuing authority in person or using advanced communication technology. The issuing authority, in determining whether probable cause has been established, may not consider any evidence outside the affidavits.

[(C)] (3) Immediately prior to submitting a complaint and affidavit to an issuing authority using advanced communication technology, the affiant must personally communicate with the issuing authority by any device which, at a minimum, allows for simultaneous audio-visual communication. During the communication, the issuing authority shall verify the identity of the affiant, and orally administer an oath to the affiant.

[(D)] (4) At any hearing on a motion challenging an arrest warrant, no evidence shall be admissible to establish probable cause for the arrest warrant other than the affidavits provided for in paragraph (B)(2).

(C) DISSEMINATION OF ARREST WARRANT INFORMATION

(1) Delay in Dissemination

(a) When an arrest warrant is issued following the filing of a complaint, the affiant or the attorney for the Commonwealth may request that the availability of the arrest warrant information for inspection or dissemination be delayed. The arrest warrant affidavit shall include the facts and circumstances that are alleged to establish good cause for delay in inspection and dissemination.

(b) Upon a finding of good cause, the issuing authority shall order that the availability of the arrest warrant information for inspection or dissemination be delayed until the warrant has been executed or for a period of 10 days after the warrant is issued, whichever occurs first.

(c) In those counties in which the attorney for the Commonwealth requires that complaints and arrest warrant affidavits be approved prior to filing as provided in Rule 507, only the attorney for the Commonwealth may request a delay in the inspection or dissemination of the arrest warrant information.

(2) Extension of Delay in Dissemination of Arrest Warrant Information

(a) The period of the delay in inspection or dissemination may be extended by a judge of the court of common pleas in the judicial district in which the arrest warrant is issued upon good cause shown by the attorney for the Commonwealth until the warrant has been executed or for a period of not more than 30 days, whichever occurs first, unless the time period is extended as provided in paragraph (c).

(b) The motion requesting an extension shall include a copy of the original order to delay inspection or dissemination, a copy of the arrest warrant information, and an additional affidavit listing the facts and circumstances that are alleged to establish good cause for the continued delay in inspection or dissemination of the arrest warrant information.

(c) Until the warrant is executed, upon motion with additional good cause shown, the judge may grant an unlimited number of extensions of the time that the arrest warrant information shall not be inspected or disseminated. Each extension shall be until the warrant has been executed or for a period of not more than 30 days, whichever occurs first.

(d) The motion and any record of the hearing on the motion, the order extending the delay in inspection or dissemination of the arrest warrant information, the original order to delay inspection or dissemination, and the arrest warrant information shall not be inspected or disseminated and shall be filed with the clerk of courts in the judicial district in which the arrest warrant is issued.

(e) A copy of the order extending the delay of inspection or dissemination of the arrest warrant information promptly shall be provided to the proper issuing authority.

(f) Until the order delaying inspection or dissemination of the arrest warrant information and any extensions thereof expires, the clerk of courts and issuing authority shall not make the arrest warrant information available for public inspection and dissemination.

Comment

This rule was amended in 2008 to add provisions concerning the delay in inspection or dissemination of arrest warrant information. Paragraph (A) provides a definition of the term "arrest warrant information" that is used throughout the rule. Paragraph (B) retains the existing requirements for the issuance of arrest warrants. Paragraph (C)(1) establishes the procedures for a temporary delay in the inspection or dissemination of arrest warrant information prior to the execution of the warrant. Paragraph (C)(2) establishes the procedures for extension of the delay in inspection or dissemination of arrest warrant information.

Issuance of Arrest Warrants

Paragraph **[(A)] (B)(1)** recognizes that an issuing authority either may issue an arrest warrant using advanced communication technology or order that the law enforcement officer appear in person to apply for an arrest warrant.

This rule does not preclude oral testimony before the issuing authority, but it requires that such testimony be reduced to an affidavit prior to issuance of a warrant. All affidavits in support of an application for an arrest warrant must be sworn to before the issuing authority prior to the issuance of the warrant. The language "sworn to before the issuing authority" contemplates, when advanced communication technology is used, that the affiant would not be in the physical presence of the issuing authority. See paragraph **[(C)] (B)(3)**.

This rule carries over to the arrest warrant the requirement that the evidence presented to the issuing authority be reduced to writing and sworn to, and that only the writing is subsequently admissible to establish that there was probable cause. In these respects, the procedure is similar to that applicable to search warrants. See Rule 203.

For a discussion of the requirement of probable cause for the issuance of an arrest warrant, see *Commonwealth v. Flowers*, 24 Pa. Super. 198, 369 A.2d 362 (**[Pa. Super.]** 1976).

The affidavit requirements of this rule are not intended to apply when an arrest warrant is to be issued for noncompliance with a citation, with a summons, or with a court order.

An affiant seeking the issuance of an arrest warrant, when permitted by the issuing authority, may use advanced communication technology as defined in Rule 103.

When advanced communication technology is used, the issuing authority is required by this rule to (1) determine that the evidence contained in the affidavit(s) establishes probable cause, and (2) verify the identity of the affiant.

The "visual" requirement in paragraph **[(C)] (B)(3)** must allow, at a minimum, the issuing authority to see the affiant at the time the oath is administered and the information received.

Under Rule 540, the defendant receives a copy of the warrant and supporting affidavit at the time of the preliminary arraignment.

Delay in Dissemination of Arrest Warrant Information

Paragraph **(C)** was added in 2008 to address the potential dangers to law enforcement and the general public and the risk of flight when arrest warrant information is disseminated prior to the execution of the arrest warrant. The paragraph provides that the affiant or the attorney for the Commonwealth may request, for good cause shown, the delay in the inspection or dissemination of the arrest warrant information for 10 days or until execution, whichever occurs first. Upon a finding of good cause, the issuing authority must delay the inspection or dissemination.

The initial request for delay in inspection or dissemination is intended to provide a very limited delay in public access to arrest warrant information in those cases in which there is concern that pre-execution disclosure of the existence of the arrest warrant will endanger those serving the warrant or will impel the subject of the warrant to flee. This initial request is intended to be an expedited procedure with the request submitted to an issuing authority.

Once the arrest warrant is executed, or when 10 days have elapsed from the issuance of the warrant and the warrant has not been executed, whichever occurs first, the information must be available for inspection or disseminated unless the period of delay is extended pursuant to paragraph **(C)(2)**.

Recognizing that an extension of the period of delay beyond the initial 10-days impacts on the public's right of access to this information, the extension may only be granted by a judge of the court of common pleas.

When determining whether good cause exists to delay inspection or dissemination of the arrest warrant information, for either the initial request for the delay or for any extension, the issuing authority or judge must consider whether the presumption of openness is rebutted by other interests that include, but are not limited to, whether revealing the information would encourage flight or resistance, the need to protect the safety of police officers executing the warrant, the necessity of preserving the integrity of ongoing criminal inves-

tigations, and the availability of reasonable alternative means to protect the interest threatened by disclosure.

Magisterial district judges, Philadelphia bail commissioners, and Philadelphia Municipal Court judges do not have authority to extend the delay in inspection or dissemination beyond the initial 10-day period; the request for the delay to be extended must be presented to a judge of the court of common pleas.

When the order delaying inspection or dissemination of the arrest warrant information expires, the clerk of courts and the issuing authority must make the arrest warrant information available for inspection and dissemination.

Nothing in this rule is intended to limit the dissemination of arrest warrant information to court personnel as needed to perform their duties. Nothing in this rule is intended to limit the dissemination of arrest warrant information to or by law enforcement as needed to perform their duties.

Official Note: Rule 119 adopted April 26, 1979, effective as to arrest warrants issued on or after July 1, 1979; Comment revised August 9, 1994, effective January 1, 1995; renumbered Rule 513 and amended March 1, 2000, effective April 1, 2001; amended May 10, 2002, effective September 1, 2002; amended , 2008, effective , 2009.

Committee Explanatory Reports:

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Report explaining the proposed amendments concerning procedures for delay in dissemination of arrest warrant information published at 37 Pa.B. 4178 (August 4, 2007); *Supplemental Report* explaining the proposed amendments that would provide procedures for delay in dissemination and sealing of arrest warrant information published at 37 Pa.B. 6392 (December 8, 2007); *Second Supplemental Report* explaining the proposed amendments that would provide procedures for delay in dissemination and sealing of arrest warrant information published at 38 Pa.B. 5747 (October 18, 2008).

Rule 513.1. Sealing of Arrest Warrant.

(A) For purposes of this rule, "arrest warrant information" is defined as the criminal complaint in cases in which an arrest warrant is issued, the arrest warrant, any affidavit(s) of probable cause, and documents or information related to the case.

(B) At the request of the attorney for the Commonwealth, the arrest warrant information shall be sealed upon good cause shown at the time the complaint is filed or any time thereafter.

(C) Submission to Judge or Justice of Request for Sealed Arrest Warrant.

When the attorney for the Commonwealth intends to request that the arrest warrant information be sealed at the time the complaint is filed, the attorney for the Commonwealth shall present the arrest warrant information to a judge of the court of common pleas or an appellate court justice or judge. The arrest warrant affidavit(s) shall include the facts and circumstances that are alleged to establish good cause for the sealing of the arrest warrant information.

(1) When the judge or justice orders the arrest warrant information sealed, the order shall:

(a) certify that for good cause shown the arrest warrant information is sealed and state the date and time that the sealing of the arrest warrant information shall expire; and

(b) when requested by the attorney for the Commonwealth, specify that the arrest warrant information be released to any law enforcement agency listed in the order.

(2) When the judge or justice issues the sealed arrest warrant, the judge or justice also shall issue an order designating the proper issuing authority before whom the case shall proceed upon execution of the warrant.

(3) When the sealed arrest warrant is issued, the sealed arrest warrant information, the sealing order, and the order designating the proper issuing authority shall be filed with the clerk of courts in the judicial district in which the charges are being filed.

(4) Upon execution of the sealed arrest warrant, the affiant shall file a copy of the sealed arrest warrant information with the proper issuing authority along with copies of the order sealing the arrest warrant information and the order designating the proper issuing authority. Thereafter, the case will proceed before the proper issuing authority.

(D) Submission to Judge or Justice of Request for Sealing of Previously Issued Arrest Warrant.

Any time after the complaint has been filed and the warrant issued, the attorney for the Commonwealth may request that the arrest warrant information be sealed by presenting a copy of the arrest warrant information to a judge of the court of common pleas or an appellate court justice or judge. The attorney also shall present an additional affidavit(s) listing the facts and circumstances that are alleged to establish good cause for the sealing of the arrest warrant information.

(1) When the judge or justice orders the arrest warrant information sealed, the order shall

(a) certify that for good cause shown the arrest warrant information is sealed and state the date and time that the sealing of the arrest warrant information shall expire, and,

(b) when requested by the attorney for the Commonwealth, specify that the arrest warrant information be released to any law enforcement agency listed in the order.

(2) When the order sealing a previously issued arrest warrant is issued, copies of the sealed arrest warrant information and the order shall be filed with the clerk of courts in the judicial district in which the charges are filed. If the sealed arrest warrant was issued for a complaint previously filed with another issuing authority, a copy of the sealed arrest warrant and order shall be filed with the issuing authority of the magisterial district where the complaint was filed. The issuing authority shall ensure that the arrest warrant information remains sealed pursuant to the terms of the judge's order.

(3) Upon execution of the sealed arrest warrant, the affiant shall file a copy of the sealed arrest warrant with the proper issuing authority. Thereafter, the case will proceed before the proper issuing authority.

(E) The arrest warrant information shall be sealed for a period of not more than 60 days, unless the time period is extended as provided in paragraph (E)(1) or (E)(2).

(1) Upon motion of the attorney for the Commonwealth for good cause shown, the justice or judge who sealed the

arrest warrant information shall extend the period of time that the arrest warrant information will remain sealed. If the justice or judge is unavailable, another justice or judge shall be assigned to decide the motion.

(2) Upon motion for good cause shown, the justice or judge shall grant an unlimited number of extensions of the time that the arrest warrant information shall remain sealed. Each extension shall be for a period of not more than 30 days.

(3) If the motion requesting any extension pursuant to paragraphs (E)(1) or (E)(2) is granted, the motion and any record of the hearing on the motion shall be sealed and transmitted with the extension order to the clerk of courts and a copy of the extension order shall be transmitted to the proper issuing authority.

(F) Upon motion of the attorney for the Commonwealth, the justice or judge shall order the arrest warrant information to be unsealed.

(G) Defendant's Access to Sealed Arrest Warrant Information.

(1) After the sealed arrest warrant is executed, a copy of the arrest warrant information shall be given to the defendant at the preliminary arraignment as provided in Rule 540, unless otherwise ordered as provided in paragraph (G)(2).

(2) Upon motion of the attorney for the Commonwealth, the justice or judge who issued the warrant, for good cause shown and after hearing, may delay giving the defendant a copy of the sealed arrest warrant information for periods of not more than 30 days. In no case shall the delay extend beyond the date of the preliminary hearing.

(3) If the justice or judge is unavailable, another justice or judge shall be assigned to decide the motion.

(H) Until the order sealing the arrest warrant information and any extensions thereof expires, the judge and clerk of courts shall not make the arrest warrant information available for public inspection and dissemination.

Comment

This rule was adopted in 2008 to codify and further define the practice of temporarily sealing arrest warrants previously recognized in case law such as *Commonwealth v. Fenstermaker*, 515 Pa. 501, 530 A.2d 414 (1987). Unlike existing case law, which only addresses the sealing of arrest warrants after execution, the procedures in this rule apply to all arrest warrants.

Magisterial district judges, bail commissioners, and municipal court judges do not have authority to seal arrest warrant information; the request for the warrant to be sealed must be presented to a judge of the court of common pleas or a justice or judge of an appellate court.

The rule establishes a standard of "good cause" for temporarily sealing the arrest warrant information. When determining whether good cause exists to seal the arrest warrant information, the justice or judge should consider, for example, whether revealing the arrest warrant information would encourage flight or resistance, defeat an ongoing criminal investigation, or endanger an undercover agent or informant. Similarly, when determining whether there is good cause to extend the time that the arrest warrant information is to remain sealed or to delay providing a copy of the arrest warrant information to the defendant, in addition to examining the Commonwealth's need to have the arrest warrant information sealed, the justice or judge should consider any pertinent information about the case, such as whether additional co-defendants

are still at large. The justice or judge should also consider the defendant's need to have the arrest warrant information to prepare his or her case.

The rule assumes that access to a sealed arrest warrant will be severely limited and generally will not be entered onto law enforcement computer systems such as The Commonwealth Law Enforcement Assistance Network (CLEAN) and the National Crime Information Center system (NCIC). However, in order to assist in the execution of the warrant, the attorney for the Commonwealth may request that the sealing order provide that the sealed arrest warrant information may be provided to specified law enforcement agencies.

The initial request to seal usually will occur at the time of the filing of the complaint. However, there may be circumstances in which the initial request to seal is made after the complaint has been filed and the arrest warrant issued. Allowance of this procedure is provided in paragraph (D). However, the requester should recognize that information already may have been released to the public prior to the request. Additionally, the requester may request that the sealing order provide for the withdrawal of the arrest warrant information that may have been added to law enforcement systems, such as CLEAN and NCIC.

Paragraphs (C)(4) and (D)(2) require that the order sealing the arrest warrant information be filed with the proper issuing authority. This is to ensure that the case proceeds with the proper issuing authority for such procedures as the preliminary arraignment.

Under paragraph (E), an order sealing the arrest warrant information is limited in duration to not more than 60 days. Extension of this period may be granted only upon the showing of good cause for the extension. Each extension of the order is limited to no more than 30 days duration.

The judge issuing the order to seal has the discretion to set the appropriate duration of the order and whether there are any conditions for unsealing the order. For example, a judge may order that the arrest warrant information must be unsealed 15 days from issuance or automatically upon execution of the warrant.

Paragraph (F) provides that the attorney for the Commonwealth may move to unseal the arrest warrant information and the judge or justice must order the information unsealed. Ordinarily, this will occur in circumstances in which law enforcement wishes to publicize the existence of a previously sealed warrant in order to obtain public assistance in the apprehension of the defendant. The judge or justice may not deny the motion.

When a sealed copy of the arrest warrant information has been given to the defendant, nothing in this rule is intended to preclude the attorney for the Commonwealth from requesting that the justice or judge issue a protective order to prevent or restrict the defendant from disclosing the arrest warrant or the contents of the affidavit. See Rule 573(F).

Until the order sealing the arrest warrant information terminates, the judge and the clerk of courts shall not make the arrest warrant information available for inspection and dissemination.

Official Note: New Rule 513.1 adopted , 2008, effective , 2008.

Committee Explanatory Reports:

Report explaining proposed new Rule 513.1 that would provide procedures for sealing of arrest warrant information published at 38 Pa.B. 5752 (October 18, 2008).

Part D. Proceedings in Court Cases Before Issuing Authorities

Rule 540. Preliminary Arraignment.

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(F) Unless the preliminary hearing is waived by a defendant who is represented by counsel, the issuing authority shall:

(1) fix a day and hour for a preliminary hearing which shall not be less than 3 nor more than 10 days after the preliminary arraignment, unless:

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Comment

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Paragraph (C) requires that the defendant receive copies of the arrest warrant and the supporting affidavit(s) at the time of the preliminary arraignment. See also Rules 513(A), 208(A), and 1003. **See Rule 513.1(G) concerning a defendant's access to arrest warrant information that has been sealed.**

Paragraph (C) includes a narrow exception which permits the issuing authority to provide copies of the arrest warrant and supporting affidavit(s) on the first business day after the preliminary arraignment. This exception applies only when copies of the arrest warrant and affidavit(s) are not available at the time the issuing authority conducts the preliminary arraignment, and is intended to address purely practical situations such as the unavailability of a copier at the time of the preliminary arraignment.

[Nothing in this rule is intended to address public access to arrest warrant affidavits. See *Commonwealth v. Fenstermaker*, 530 A.2d 414 (Pa. 1987).]

For public access to arrest warrant information, see Rules 513, 513.1, and *Commonwealth v. Fenstermaker*, 530 A.2d 414 (Pa. 1987).

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Official Note: Original Rule 119 adopted June 30, 1964, effective January 1, 1965; suspended January 31, 1970, effective May 1, 1970. New Rule 119 adopted January 31, 1970, effective May 1, 1970; renumbered Rule 140 September 18, 1973, effective January 1, 1974; amended April 26, 1979, effective July 1, 1979; amended January 28, 1983, effective July 1, 1983; rescinded August 9, 1994, effective January 1, 1995. New Rule 140 adopted August 9, 1994, effective January 1, 1995; 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; renumbered Rule 540 and amended March 1, 2000, effective April 1, 2001; amended May 10, 2002, effective September 1, 2002; amended August 24, 2004, effective August 1, 2005; **Comment revised , 2009, effective , 2009.**

Committee Explanatory Reports:

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Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. [1478] 1477 (March 18, 2000).

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Final Report explaining the August 24, 2004 amendments concerning notice that the case will proceed in defendant's absence published with the Court's Order at 34 Pa.B. [5025] 5016 (September 11, 2004).

Report explaining the Comment revisions concerning sealed arrest warrant information published with the Court's Order at 38 Pa.B. 5752 (October 18, 2008).

Rule 547. Return of Transcript and Original Papers.

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Comment

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When arrest warrant information has been sealed pursuant to Rule 513.1, the arrest warrant information already will have been filed with the clerk of courts. When the case is transmitted to the court of common pleas, the clerk of courts should merge the transcript and other documents transmitted by the issuing authority with the original file created for the sealing procedure.

Official Note: Formerly Rule 126, adopted June 30, 1964, effective January 1, 1965; suspended January 31, 1970, effective May 1, 1970; revised January 31, 1970; effective May 1, 1970; renumbered Rule 146 and amended September 18, 1973, effective January 1, 1974; amended October 22, 1982, effective January 1, 1982; amended July 12, 1985, effective January 1, 1986; effective date extended to July 1, 1986; renumbered Rule 547 and amended March 1, 2000, effective April 1, 2001; amended August 24, 2004, effective August 1, 2005; amended May 1, 2007, effective September 4, 2007, and May 1, 2007 Order amended May 15, 2007; amended July 10, 2008, effective February 1, 2009; **Comment revised 2009, effective 2009.**

Committee Explanatory Reports:

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Final Report explaining the May 1, 2007 amendments concerning the request for a bench warrant published with the Court's Order at 37 Pa.B. [2503] 2496 (June 2, 2007).

Report explaining the Comment revisions concerning sealed arrest warrant documents published at 38 Pa.B. 5752 (October 18, 2008).

SECOND SUPPLEMENTAL REPORT

New Pa.R.Crim.P. 513.1, Proposed Amendments to Pa.Rs.Crim.P. 504 and 513, and Comment Revisions to Pa.Crim.P. 540 and 547

Delay in Dissemination of Arrest Warrant Information; Sealing of Arrest Warrant Information*Introduction*

The Committee has been examining at some length the question of an issuing authority's obligation to disseminate

arrest warrant information¹ to the public prior to the execution of the arrest warrant. The Committee recognizes the strong tradition and policy in Pennsylvania of maintaining the openness of the courts and court records. At the same time, the Committee recognizes that disclosure of arrest warrant information prior to execution has the potential for injury or loss of life to the executing officers in addition to the possibility of flight on the part of the defendant. This concern has been heightened by the increased level of automation of court records and increased accessibility of this information. As a result, the Committee has been struggling to reach a balance between the interests of safety and public access. Ultimately, the Committee concluded that reasonable limitations on pre-execution disclosure should be put into place, regardless of whether that information is disseminated electronically or was physically available for inspection at the issuing authority's office.

In August 2007, the Committee published for comment a proposal that would have added a procedure for delaying the dissemination of pre-execution arrest warrant information.² Based on comments received, the Committee realized that the limited procedure contemplated in the original proposal did not sufficiently address the safety needs that prompted the question nor ensure that the defendant's or the public's right to access were not unduly impinged.

The Committee concluded that the best method of addressing these questions was by the creation of a "two-tiered" system for access to arrest warrant information. As originally conceived, the first tier provided for a limitation on dissemination of the arrest warrant information, requested by the affiant or the attorney for the Commonwealth, for no more than 10 days or until the warrant is executed, whichever is sooner. The second tier, which was based on the sealing of search warrant procedures in Rule 211, could have been used to extend the time under which public access to arrest warrant information is limited or could have been used as a sealing order from the start.

In devising this approach, the Committee concluded that detailing procedures for sealing arrest warrants would have the added benefit of providing definition to a practice currently established only in caselaw, see *Commonwealth v. Fenstermaker*, 515 Pa. 501, 530 A.2d 414 (1987).³ The Committee determined that, while the authority of a court to seal arrest warrants was generally recognized, gaps exist in the practice. This point is highlighted in *Fenstermaker* that explicitly left open the question of public access to pre-execution arrest warrant information.

The Committee believed then, as it still believes, that judges, practitioners, and the public would benefit from the clarity and uniformity that a detailed rule would provide as to how access to arrest warrant information

¹"Arrest warrant information" is defined under the proposed amendments as the criminal complaint in cases in which an arrest warrant is issued, the arrest warrant, any affidavit(s) of probable cause, and documents or information related to the case.

²The original Report was published at 37 Pa.B. 4178 (August 4, 2007).

³In *Fenstermaker*, a newspaper filed a motion for access to the probable cause affidavits for an executed arrest warrant. The Supreme Court of Pennsylvania noted that there were important policy considerations which underlay a general right to public access to court records, such as discouraging perjury, enhancing police and prosecutorial performance, and promoting a public perception of fairness in the arrest warrant process. However, the Court found that the public's right to inspect judicial documents is not absolute and the decision regarding public access to arrest warrant affidavits is best left to the discretion of the court. The remedy the Court supported was to require that affidavits be sealed under a court order, not simply upon the request of one of the parties.

may be restricted and the standards for determining if such restrictions should be granted. This clarity and uniformity would provide law enforcement and prosecutors with the tools to ensure public safety while ensuring that defense and public interests are protected.

In December 2007, the Committee published for comment the revised proposal that contained this approach.⁴ The Committee again received a number of insightful comments and, as a result, determined to revise the proposal further.

A few commentators raised concerns that the delay in dissemination procedures as published did not permit the judge to whom a request for delay was addressed any discretion to refuse to grant the delay. They argued that this was contrary to the intent of the holding in *Fenstermacher* that there should be a judicial determination of the sufficiency of good cause to seal an arrest warrant.

While the Committee still considers that the delay in dissemination procedure is not a "sealing" procedure and that *Fenstermacher* specifically excludes pre-execution warrants, the Committee believes that inclusion of a good cause requirement and judicial approval are not incompatible with the underlying principle of the proposal, i.e., an expedited means of temporarily delaying public disclosure to ensure the protection of law enforcement.

Additional concerns were raised regarding the specific procedures to be followed for the execution of sealed arrest warrants, especially with regard to the preliminary arraignment. There were also concerns about whether the rule would unduly restrict dissemination of the warrant information to law enforcement.

The Committee concluded that part of the problem with the proposal as published was that the second portion of the proposal mixed procedures for extending the delay in dissemination with procedures similar to the sealing of search warrants. The Committee determined that the distinction would be clearer if the two concepts, delay in dissemination and sealing, were placed in separate rules. The first would provide a limited delay in public access to arrest warrant information, Rule 513(C)(1) and (C)(2), while the second rule would provide procedures for sealing an arrest warrant in the traditional sense, new Rule 513.1.

Rule 513

The proposed amendments to Rule 513 contain only a delay in dissemination procedure providing for: (1) an initial 10-day delay by the issuing authority for good cause; and (2) extension of the delay presented to a common pleas judge and based on good cause to justify the extension. This delay in dissemination would be applicable only to the public, while the police and court personnel would have access to the information.

Rule 513 would be reorganized with an initial paragraph (A) containing a definition of "arrest warrant information" and the current text of the rule appearing as paragraph (B), titled "Issuance of Arrest Warrant." Paragraph (C), titled "Dissemination of Arrest Warrant Information," would contain two paragraphs providing procedures for: (1) the initial delay in dissemination; and (2) the extension of the delay of dissemination. The paragraph (C)(1) procedures for the initial delay in dissemination are similar to the Committee's original proposal. An

affiant or attorney for the Commonwealth may request that an issuing authority delay dissemination of arrest warrant information, in any form, to the public for 10 days only or until the warrant is executed, whichever occurs sooner. Under paragraph (C)(2), the delay could be extended by a judge of the court of common pleas for no more than 30 days at a time. The standard for both the initial request for delay and the extension of delay is one of "good cause."

Rule 513.1

New Rule 513.1, which is based on the procedures for sealing search warrants contained in Rule 211, would provide procedures by which, upon a showing of good cause, a common pleas judge must order the arrest warrant information to be sealed. There are two circumstances in which sealing may be requested under Rule 513.1. Paragraph (C) sets forth the procedures for sealing of the arrest warrant information at the time of the issuance of the arrest warrant. Paragraph (D) provides the procedure to be used for requesting the sealing of an arrest warrant that has already been issued.

The procedures in paragraph (C) would require that the sealing order contain the expiration date of the seal as well as designation of the issuing authority before whom the defendant should be brought upon execution of the warrant.

Originally, the Committee preferred that the rules provide that the common pleas judge would issue only the sealing order and that the police would then file the order, complaint, and probable cause affidavit with the proper issuing authority. However, the Committee concluded that a more realistic procedure is to provide that most of the initial procedures/paperwork in a sealed case should remain at the common pleas court, at least until execution of the arrest warrant. The Committee envisions that the general course of the case, once the common pleas judge orders the sealing, will be that the arrest warrant information will be filed in the clerk of courts' office as a miscellaneous docket case. When the warrant is executed, the attorney for the Commonwealth or the police officer take copies of all the original filings to the issuing authority designated in the sealing order, and, thereafter, the case will proceed as any other case before the issuing authority and, if it is held for court, it will be merged with the miscellaneous case previously filed in the clerk of courts' office.

The Committee also believes that the concept of sealing should be very restrictive, even with regard to entry of the warrant information onto the various law enforcement systems such as CLEAN and NCIC. Paragraph (C)(1)(b) therefore places the burden on the attorney for the Commonwealth, if he or she wants the information releasable to law enforcement, to specifically request that the sealing order permit this availability.

The procedures under paragraph (D) would mirror those in paragraph (C) to a great extent. In proposing this procedure, the Committee accepts that there may be cases in which a later "pulling back" of the arrest warrant information would be beneficial. It should be understood, however, that under this procedure, because the warrant already has been issued without restrictions, the information would have been available to the public.

⁴ This *Supplemental Report* was published at 37 Pa.B. 6395 (December 8, 2007).

The standard for sealing the arrest warrant information also is one of good cause. The Comment provides direction on the application of this standard to requests to seal the arrest warrant information and it utilizes language taken from *Fenstermacher*.

Rule 513.1(G) recognizes the defendant's access to the sealed arrest warrant information may be limited in exceptional circumstances even after execution and preliminary arraignment. The paragraph provides that, upon a further finding of good cause, the defendant may be denied access to the arrest warrant information for a period of no more than thirty days or the date of the preliminary hearing.

Correlative Changes

The Committee is also proposing that Rule 504 (Contents of the Complaint) be amended to include the requirement that the complaint contain a notation indicating that the arrest warrant information had been sealed. In addition, the Comments to Rules 540 (Preliminary Arraignments) and 547 (Return of Transcript and Original Papers) would be revised to include cross-references to new Rule 513.1.

[Pa.B. Doc. No. 08-1882. Filed for public inspection October 17, 2008, 9:00 a.m.]

DISCIPLINARY BOARD OF THE SUPREME COURT

Notice of Hearing

A Petition for Reinstatement to the active practice of law has been filed by Mark Allan Kovler and will be the subject of a hearing on November 3, 2008, before a hearing committee designated by the Board. Anyone wishing to be heard in reference to this matter should contact the District III Office of the Disciplinary Board of the Supreme Court of Pennsylvania, 2nd Floor, Two Lemoyne Drive, Lemoyne, PA 19042, (717) 731-7083, on or before October 24, 2008. In accordance with Board Rule § 89.274(b), since this formerly admitted attorney resides outside of the Commonwealth of Pennsylvania, this notice is published in the *Pennsylvania Bulletin*.

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

[Pa.B. Doc. No. 08-1883. Filed for public inspection October 17, 2008, 9:00 a.m.]