THE COURTS

Title 210—APPELLATE PROCEDURE

PART I. RULES OF APPELLATE PROCEDURE

[210 PA. CODE CHS. 1, 9, 19, 27]

Proposed Amendments to Rules of Appellate Procedure 120, 907, 1925 and 2744

The Appellate Court Procedural Rules Committee proposes to amend Pennsylvania Rules of Appellate Procedure 120, 907, 1925 and 2744. These amendments have been developed in conjunction with the Criminal Procedural Rules Committee, which is proposing the amendment of Pennsylvania Rules of Criminal Procedure 120, 122, and 904. These amendments are being submitted to the bench and bar for comments and suggestions. The proposed amendments have not been submitted to the Supreme Court.

Proposed new material is bold, while deleted material is bold and bracketed.

All communications in reference to the proposed amendment should be sent no later than Friday, June 3, 2011 to:

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An Explanatory Comment precedes the proposed amendment and has been inserted by this Committee for the convenience of the bench and bar. It will not constitute part of the rule nor will it be officially adopted or promulgated.

By the Appellate Court
Procedural Rules Committee

HONORABLE MAUREEN LALLY-GREEN,
Chair

(*Editor's Note*: For a correlative Rules of Criminal Procedure proposal, see 41 Pa.B. 2214 (April 30, 2011).)

Annex A

TITLE 210. APPELLATE PROCEDURE

PART I. RULES OF APPELLATE PROCEDURE

ARTICLE I. PRELIMINARY PROVISIONS

CHAPTER 1. GENERAL PROVISIONS

DOCUMENTS GENERALLY

Rule 120. Entry of Appearance.

(a) *Filing.*—Any counsel filing papers required or permitted to be filed in an appellate court must enter an appearance with the prothonotary of the appellate court unless that counsel has been previously noted on the docket as counsel pursuant to Rules 907(b), 1112(f), 1311(d) or 1514(d). **All counsel governed by Pa.R.Crim.P. 120 or 904 in the trial court continue to be governed by those rules in the appellate court, unless an application for withdrawal is filed in the appellate court accompanied by a simultaneous entry of appearance of new counsel. Any application for withdrawal unaccompanied by a simultaneous entry of appearance of new counsel will be remanded for resolution by the trial court in accordance with the procedures set forth in Pa.R.Crim.P. 120(B).**

New counsel appearing for a party after docketing pursuant to Rules 907(b), 1112(f), 1311(d), or 1514(d) shall file an entry of appearance simultaneous with or prior to the filing of any papers signed by new counsel. The entry of appearance shall specifically designate each party the attorney represents and the attorney shall file a **[certificate] proof** of service pursuant to Subdivision (d) of Rule 121 and Rule 122. Where new counsel enters an appearance on behalf of a party currently represented by counsel and there is no simultaneous withdrawal of appearance, new counsel shall serve the party that new counsel represents and all other counsel of record and **shall** file a **[certificate] proof** of service.

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ARTICLE II. APPELLATE PROCEDURE

CHAPTER 9. APPEALS FROM LOWER COURTS

Rule 907. Docketing of Appeal.

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(b) *Entry of appearance.* Upon the docketing of the appeal the prothonotary of the appellate court shall note on the record as counsel for the appellant the name of counsel, if any, set forth in or endorsed upon the notice of appeal, and, as counsel for other parties, counsel, if any, named in the proof of service. The prothonotary of the appellate court shall upon praecipe of any such counsel for other parties, filed within 30 days after filing of the notice of appeal, strike off or correct the record of appearances. Thereafter a counsel's appearance for a party may not be withdrawn without leave of court, unless another lawyer has entered or simultaneously enters an appearance for the party. **All counsel governed by Pa.R.Crim.P. 120 or 904 in the trial court continue to be governed by those rules in the appellate court, unless an application for withdrawal is filed in the appellate court accompanied by a simultaneous entry of appearance of new counsel. Any application for withdrawal unaccompanied by a simultaneous entry of appearance of new counsel will be remanded for resolution by the trial court in accordance with the procedures set forth in Pa.R.Crim.P. 120(B).**

***Official Note*:** The transmission of a photocopy of the notice of appeal, showing a stamped notation of filing and the appellate docket number assignment, without a letter of transmittal or other formalities, will constitute full compliance with the notice requirement of Subdivision (a) of this rule.

With regard to **[subdivision] Subdivision** (b) and withdrawal of appearance without leave of the appellate

court, counsel may nonetheless be subject to trial court supervision pursuant to Pa.R.Crim.P. 904 (Entry of Appearance and Appointment of Counsel; In Forma Pauperis).

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CHAPTER 19. PREPARATION AND TRANSMISSION OF RECORD AND RELATED MATTERS

RECORD ON APPEAL FROM LOWER COURT

Rule 1925. Opinion in Support of Order.

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(c) *Remand.*

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[(4) In a criminal case, counsel may file of record and serve on the judge a statement of intent to file an *Anders/McClendon* brief in lieu of filing a Statement. If, upon review of the *Anders/McClendon brief*, the appellate court believes that there are arguably meritorious issues for review, those issues will not be waived; instead, the appellate court may remand for the filing of a Statement, a supplemental opinion pursuant to Rule 1925(a), or both. Upon remand, the trial court may, but is not required to, replace appellant's counsel.]

* * * * *

***Official Note*:** Subdivision (a) The 2007 amendments clarify that a judge whose order gave rise to the notice of appeal may ask a prior judge who made a ruling in question for the reasons for that judge's decision. In such cases, more than one judge may issue separate Rule 1925(a) opinions for a single case. It may be particularly important for a judge to author a separate opinion if credibility was at issue in the pretrial ruling in question. See, e.g., *Commonwealth v. Yogel*, 307 Pa. Super. 241, 243-44, 453 A.2d 15, 16 (1982). At the same time, the basis for some pre-trial rulings will be clear from the order and/or opinion issued by the judge at the time the ruling was made, and there will then be no reason to seek a separate opinion from that judge under this rule. See, e.g., Pa.R.Crim.P. 581(I). Likewise, there will be times when the prior judge may explain the ruling to the judge whose order has given rise to the notice of appeal in sufficient detail that there will be only one opinion under Rule 1925(a), even though there are multiple rulings at issue. The time period for transmission of the record is specified in Pa.R.A.P. 1931, and that rule was concurrently amended to expand the time period for the preparation of the opinion and transmission of the record.

* * * * *

[Paragraph (c)(4) This paragraph clarifies the special expectations and duties of a criminal lawyer. Even lawyers seeking to withdraw pursuant to the procedures set forth in *Anders v. California*, 386 U.S. 738 (1967) and *Commonwealth v. McClendon*, 495 Pa. 467, 434 A.2d 1185 (1981) are obligated to comply with all rules, including the filing of a Statement. *See Commonwealth v. Myers*, 897 A.2d 493, 494-96 (Pa. Super. 2006); *Commonwealth v. Ladamus*, 896 A.2d 592, 594 (Pa. Super. 2006). However, because a lawyer will not file an *Anders/McClendon* brief without concluding that there are no non-frivolous issues to raise on appeal, this amendment allows a lawyer to file, in lieu of a Statement, a representation that no errors have been raised because the lawyer is (or intends to be) seeking to withdraw under *Anders/McClendon*. At that point, the appellate court will reverse or remand for a supplemental Statement and/or opinion if it finds potentially non-frivolous issues during its constitutionally required review of the record.]

Former Paragraph (c)(4) permitted lawyers to avoid filing a Statement in cases that were on direct appeal, if the lawyer sought to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967) and *Commonwealth v. McClendon*, 495 Pa. 467, 434 A.2d 1185 (1981). Those procedures have been replaced. *See* Pa.R.Crim.P. 120.

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CHAPTER 27. FEES AND COSTS IN APPELLATE COURTS AND ON APPEAL COSTS

Rule 2744. Further Costs. Counsel Fees. Damages for Delay.

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***Official Note*:** See 42 Pa.C.S. § 1726(1) and (3) (relating to establishment of taxable costs) and 42 Pa.C.S. § 2503(6), (7) and (9) (relating to the right of participants to receive counsel fees).

[Some concern was expressed that the rule should contain an exception for criminal cases in which the defendant may have a constitutional right to appeal, whether frivolous or not. It is felt that such right will be taken into consideration, when appropriate, and that such a blanket exception should not be written into the rule.]

In criminal and Post-Conviction Relief Act ("PCRA") appeals, this Rule should be construed with reference to Pa.R.Crim. P. 120. There may be circumstances, however, in criminal as well as in civil cases, in which a party takes an appeal for no purpose other than to delay a matter or engages in conduct during the appeal that is dilatory, obdurate or vexatious. In such cases, the fact that a defendant has a constitutional or statutory right of appeal will not in itself preclude an appellate court from remanding the case for a determination of the damages authorized under this rule. Nevertheless, any evaluation of the taking of an appeal or conduct during the appeal must take into account the duty of counsel in a criminal or PCRA case to be a zealous advocate, even when the position advocated for may be contrary to the factual findings of the trial court or existing law. While counsel is ethically obligated to avoid frivolous argument—*i.e.*, arguments that are advanced without any evidentiary or legal support whatsoever—it is within the bounds of zealous advocacy to argue, for example, that a "trial court did not conduct as extensive a review of the testimony and other proofs as was necessary to fairly address" a party's claims, *see Thomas A. McElwee & Son, Inc. v. SEPTA*, 596 Pa. 654, 669, 948 A.2d 762, 771 (2008), or that changing community standards render certain forms of punishment cruel and unusual and thus in violation of the United States Constitution as to certain classes of crimes or defendants. *See, e.g., Coker v. Georgia*, 433 U.S. 584, 593-596 (1977); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

EXPLANATORY COMMENT

The Appellate Court Procedural Rules Committee proposes to amend Pennsylvania Rules of Appellate Procedure 120, 907, 1925 and 2744. These amendments have been developed in conjunction with the Criminal Procedural Rules Committee, which is proposing the amendment of Pennsylvania Rules of Criminal Procedure 120, 122, and 904 by publication of the same date. These amendments are being submitted to the bench and bar for comments and suggestions. The proposed amendments have not been submitted to the Supreme Court.

Both bench and bar have commented on the unwieldy (and confusing) practice that has developed around counsel's attempts to withdraw in representing defendants on direct appeal or petitioners in Post-Conviction Relief Act proceedings. After evaluation of the law in this and other jurisdictions, the two Committees are soliciting comments on the below proposal to alter significantly the procedure for withdrawal in criminal and Post-Conviction Relief Act appeals. In both cases, counsel would be obligated to remain as counsel to raise any issues that are consistent with his or her ethical obligations to be candid with the Court. For example, if a lawyer can in good faith argue for a change in the law, the lawyer may make that argument, although the lawyer would remain obligated to inform the courts as to any precedent contrary to his or her position.

The current procedure arises out of four cases, two in the United States Supreme Court and two in the Pennsylvania Supreme Court: *Anders v. California*, 386 U.S. 738 (1967), *Commonwealth v. McClendon*, 495 Pa. 467, 434 A.2d 1185 (1981) (both of which govern withdrawal on direct appeal); and *Pennsylvania v. Finley*, 481 U.S. (1987), *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988) (both of which govern withdrawal during Post-Conviction Relief Act proceedings). As these cases have been construed here, counsel may move to withdraw from representing a criminal defendant if there are no non-frivolous issues to raise (on direct appeal) or if there only non-meritorious issues to raise (during Post-Conviction Relief Act proceedings). The United States Supreme Court has held that the states do not need to follow *Anders*; they do need to have a process that guarantees each criminal defendant counsel who satisfies the requirements of the Sixth Amendment of the United States Constitution. *See Smith v. Robbins*, 528 U.S. 259 (2000).

As the problems with following the resultant procedures have become more pronounced, other jurisdictions have recognized that there is much to be gained by having counsel brief any issue consistent with his or her duty of candor toward the courts. First, the burden is on counsel, rather than the courts, to conduct a thorough review of the record and identify potentially appealable issues. Second, and related, because when courts review applications pursuant to *Anders/McClendon* and *Turner/Finley*, several are returned for further briefing, having counsel brief the issues in the first instance promotes judicial efficiency. Finally, counsel is not placed in a position of appearing to argue against his or her client, a role that is unlike any other counsel fulfills. Indeed, some lawyers have reported that the process for withdrawal is so awkward that they do not consider it a viable option.

The Criminal Procedural Rules Committee has highlighted the observations of three such states in its concurrently-published Report, including Idaho (*see State v. McKenney*, 98 Idaho 551, 568 P.2d 1213, 1214 (1977)); Massachusetts (*see Commonwealth v. Moffett*, 383 Mass. 201, 418 N.E.2d 585 (1981)); and New Hampshire (*see New Hampshire v. Cigic*, 138 N.H. 313, 314, 639 A.2d 251 (1994).

The proposed rules—and reports—of the two Committees should be read in tandem.

[Pa.B. Doc. No. 11-715. Filed for public inspection April 29, 2011, 9:00 a.m.]

Title 234—RULES OF CRIMINAL PROCEDURE

[234 PA. CODE CHS. 1 AND 9]

Proposed Amendments to Pa.Rs.Crim.P. 120, 122, and 904

The Criminal Procedural Rules Committee is planning to recommend that the Supreme Court of Pennsylvania amend Rules of Criminal Procedure 120, 122, and 904. The proposed amendments would replace Pennsylvania's Anders/Finley procedures with a procedure that would require counsel to proceed with a direct appeal even when the attorney determines there are no non-frivolous issues to raise. These amendments have been developed in conjunction with the Appellate Court Procedural Rules Committee, which is proposing correlative amendments to Pennsylvania Rules of Appellate Procedure 120, 907, 1925, and 2744 by publication of the same date.

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 amendments to the Rules 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
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no later than Friday, June 3, 2011.

By the Criminal Procedural Rules Committee

RISA VETRI FERMAN,
Chair

(*Editor's Note*: For a correlative Rules of Appellate Procedure proposal, see 41 Pa.B. 2212 (April 30, 2011).)

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.

* * * * *

(B) WITHDRAWAL OF APPEARANCE

(1) Counsel for a defendant may not withdraw his or her appearance except by leave of court. **Counsel shall not be permitted to withdraw solely on the ground that the appeal is frivolous or otherwise lacking in merit.**

* * * * *

Comment

The 2011 amendments to this rule, to Pa.Rs.Crim.P. 122 and 904, and to Pa.Rs.A.P. 120, 907, 1925, and 2744 supersede the procedures set forth in *Anders v. California*, 386 U.S. 738 (1967), and *Commonwealth v. McClendon*, 495 Pa. 467, 434 A.2d 1185 (1981), and *Pennsylvania v. Finley*, 481 U.S. (1987), and *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988), in Pennsylvania practice.

ENTRY OF APPEARANCE

Representation as used in this rule is intended to cover court appearances or the filing of formal motions. Investigation, interviews, or other similar pretrial matters are not prohibited by this rule.

An attorney may not represent a defendant in a capital case unless the attorney meets the educational and experiential requirements set forth in Rule 801 (Qualifications for Defense Counsel in Capital Cases).

Paragraph (A)(2) was added in 2005 to make it clear that the filing of an order appointing counsel to represent a defendant enters the appearance of appointed counsel. Appointed counsel does not have to file a separate entry of appearance. Rule 122 (Appointment of Counsel) requires that (1) the judge include in the appointment order the name, address, and phone number of appointed counsel, and (2) the order be served on the defendant, appointed counsel, the previous attorney of record, if any, and the attorney for the Commonwealth pursuant to Rule 114 (Orders and Court Notices: Filing; Service; and Docket Entries).

If a post-sentence motion is filed, trial counsel would normally be expected to stay in the case until disposition of the motion under the post-sentence procedures adopted in 1993. *See* Rules 704 and 720. Traditionally, trial counsel stayed in a case through post-verdict motions and sentencing.

***See* Rule 904(A) that requires an attorney who has been retained to represent a defendant during post-conviction collateral proceedings to file a written entry of appearance**

WITHDRAWAL OF APPEARANCE

Under paragraph (B)(2), counsel must file a motion to withdraw in all cases, and counsel's obligation to represent the defendant, whether as retained or appointed counsel, remains until leave to withdraw is granted by the court. *See, e.g., Commonwealth v. Librizzi,* 810 A.2d 692 (Pa. Super. Ct. 2002). The court must make a determination of the status of a case before permitting counsel to withdraw. Although there are many factors considered by the court in determining whether there is good cause to permit the withdrawal of counsel, when granting leave, the court should determine whether new counsel will be stepping in or the defendant is proceeding without counsel, and that the change in attorneys will not delay the proceedings or prejudice the defendant, particularly concerning time limits. In addition, case law suggests other factors the court should consider, such as whether (1) the defendant has failed to meet his or her financial obligations to pay for the attorney's services and (2) there is a written contractual agreement between counsel and the defendant terminating representation at a specified stage in the proceedings such as sentencing. *See, e.g., Commonwealth v. Roman. Appeal of Zaiser,* 549 A.2d 1320 (Pa. Super. Ct. 1988).

[If a post-sentence motion is filed, trial counsel would normally be expected to stay in the case until disposition of the motion under the post-sentence procedures adopted in 1993. *See* Rules 704 and 720. Traditionally, trial counsel stayed in a case through post-verdict motions and sentencing.]

The court may not grant a motion to withdraw when the only reason for the request to withdraw is that there are no non-frivolous issues that could be raised on appeal or in collateral proceedings under the PCRA. The prohibition on withdrawal changes Pennsylvania's procedure under *Anders/McClendon, supra,* and *Turner/Finley, supra,* and counsel will no longer file an *Anders/McClendon* brief or a *Turner/Finley* no-merit letter and will proceed with the appeal or collateral proceedings under the PCRA. This change in procedure is consistent with the United States Supreme Court's decision in *Smith v. Robbins,* 529 U.S. 259 (2000) (*Anders* procedure not obligatory upon states as long as states' procedures adequately safeguard defendants' rights).

Under the new procedures, following conviction, counsel must advise the defendant of any right to appeal and must consult with the defendant about the possible grounds for appeal. Counsel also must advise the defendant of counsel's opinion of the probable outcome of an appeal. If, in counsel's estimation, the appeal lacks merit or is frivolous, counsel must inform the defendant and seek to persuade the defendant to abandon the appeal. If the defendant chooses to proceed with an appeal against the advice of counsel, counsel is required to present the case, as long as such advocacy does not involve deception of the court.

Pennsylvania Rule of Professional Conduct 3.1 (Meritorious Claims and Contentions) should be construed with reference to this rule.

Counsel has the ultimate authority to decide which arguments to make on appeal. *See Jones v. Barnes,* 463 U.S. 745 (1983). *See also Commonwealth v. Padden,* 783 A.2d 299 (Pa. Super. Ct. 2001).

For the filing and service procedures, see Rules 575-576.

For waiver of counsel, see Rule 121.

For the procedures for appointment of counsel, see Rule 122.

[*See* Rule 904(A) that requires an attorney who has been retained to represent a defendant during

post-conviction collateral proceedings to file a written entry of appearance.]

***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 February 26, 2002, effective July 1, 2002; Comment revised June 4, 2004, effective November 1, 2004; amended April 28, 2005, effective August 1, 2005; amended , 2011, effective , 2011**.

Committee Explanatory Reports:

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Report explaining the proposed amendments to paragraph (B)(1) and the Comment that change Pennsylvania practice with regard to withdrawal of counsel and filing *Anders/McClendon* briefs and *Finley/Turner* no merit letters published for comment at 41 Pa.B. 2218 (April 30, 2011).

Rule 122. Appointment of Counsel.

* * * * *

(C) A motion for change of counsel by a defendant for whom counsel has been appointed shall not be granted except for substantial reasons.

(D) Appointed counsel shall not be permitted to withdraw without leave of court pursuant to Rule 120(B). Appointed counsel shall not be permitted to withdraw solely on the ground that the appeal is frivolous or otherwise lacking in merit.

Comment

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[*See Commonwealth v. Alberta*, 601 Pa. 473, 974 A.2d 1158 (2009), in which the Court stated that "[a]ppointed counsel who has complied with *Anders* [*v. California*, 386 U.S. 738 (1967),] and is permitted to withdraw discharges the direct appeal obligations of counsel. Once counsel is granted leave to withdraw per *Anders*, a necessary consequence of that decision is that the right to appointed counsel is at an end.")]

The 2011 amendments to this rule, to Pa.Rs.Crim.P. 120 and 904, and to Pa.Rs.A.P. 120, 907, 1925, and 2744 supersede the procedures set forth in *Anders v. California*, 386 U.S. 738 (1967), and *Commonwealth v. McClendon*, 495 Pa. 467, 434 A.2d 1185 (1981), and *Pennsylvania v. Finley*, 481 U.S. (1987), and *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988), in Pennsylvania practice.

Pursuant to paragraph (D), if an appointed attorney seeks to withdraw, the attorney must proceed pursuant to the procedures in Rule 120(B). Pursuant to Rule 120, the court may not grant a motion to withdraw when the only reason for the request to withdraw is that there are no non-frivolous issues that could be raised on appeal or in collateral proceedings under the PCRA. The prohibition on withdrawal changes Pennsylvania's procedure under *Anders/McClendon*, *supra*, and *Turner/Finley*, *supra*, and counsel will no longer file an *Anders/McClendon* brief or a *Turner/Finley* no-merit letter and will proceed with the appeal or collateral proceedings under the PCRA. This change in procedure is consistent with the United States Supreme Court's decision in *Smith v. Robbins*, 529 U.S. 259 (2000) (*Anders* procedure not obligatory upon states as long as states' procedures adequately safeguard defendants' rights).

Under the new procedures, following conviction, counsel must advise the defendant of any right to appeal and must consult with the defendant about the possible grounds for appeal. Counsel also must advise the defendant of counsel's opinion of the probable outcome of an appeal. If, in counsel's estimation, the appeal lacks merit or is frivolous, counsel must inform the defendant and seek to persuade the defendant to abandon the appeal. If the defendant chooses to proceed with an appeal against the advice of counsel, counsel is required to present the case, as long as such advocacy does not involve deception of the court.

Pennsylvania Rule of Professional Conduct 3.1 (Meritorious Claims and Contentions) should be construed with reference to this rule.

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; amended March 12, 2004, effective July 1, 2004; Comment revised March 26, 2004, effective July 1, 2004; Comment revised June 4, 2004, effective November 1, 2004; amended April 28, 2005, effective August 1, 2005; Comment revised February 26, 2010, effective April 1, 2010; amended , 2011, effective , 2011**.

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. **[1477] 1478** (March 18, 2000).

Final Report explaining the March 12, 2004 editorial amendment to paragraph (C)(3), and the Comment revision concerning duration of counsel's obligation, published with the Court's Order at 34 Pa.B. **[1671] 1672** (March 27, 2004).

Final Report explaining the March 26, 2004 Comment revision concerning *Alabama v. Shelton* published with the Court's Order at 34 Pa.B. **[1929] 1931** (April 10, 2004).

Final Report explaining the April 28, 2005 changes concerning the contents of the appointment order published with the Court's Order at 35 Pa.B. **[2855] 2859** (May 14, 2005).

Final Report explaining the February 26, 2010 revision of the Comment adding a citation to *Commonwealth v. Alberta* published at 40 Pa.B. 1396 (March 13, 2010).

Report explaining the proposed amendments adding paragraph (D) and revising the Comment that change Pennsylvania practice with regard to withdrawal of counsel and filing *Anders/McClendon* briefs and *Finley/Turner* no merit letters published for comment at 41 Pa.B. 2218 (April 30, 2011).

CHAPTER 9. POST-CONVICTION COLLATERAL PROCEEDINGS

Rule 904. Entry of Appearance and Appointment of Counsel; In Forma Pauperis.

* * * * *

(G) **Counsel, whether retained or appointed, shall not be permitted to withdraw without leave of court pursuant to Rule 120(B). Counsel shall not be permitted to withdraw solely on the ground that the appeal is frivolous or otherwise lacking in merit.**

(H) When a defendant satisfies the judge that the defendant is unable to pay the costs of the post-conviction collateral proceedings, the judge shall order that the defendant be permitted to proceed *in forma pauperis.*

[(H)] (I) Appointment of Counsel in Death Penalty Cases.

* * * * *

Comment

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Paragraphs (F)(1) and **[(H)(2)(a)] (I)(2)(a)** require that (1) the judge include in the appointment order the name, address, and phone number of appointed counsel, and (2) the order be served on the defendant, appointed counsel, the previous attorney of record, if any, and the attorney for the Commonwealth pursuant to Rule 114 (Orders and Court Notices: Filing; Service; and Docket Entries).

Pursuant to paragraphs (F)(2) and **[(H)(2)(b)] (I)(2)(b)**, appointed counsel retains his or her assignment until final judgment, which includes all avenues of appeal through the Supreme Court of Pennsylvania. In making the decision whether to file a petition for allowance of appeal, counsel must (1) consult with his or her client, and (2) review the standards set forth in Pa.R.A.P. 1114 (Considerations Governing Allowance of Appeal) and the note following that rule. If the decision is made to file a petition, counsel must carry through with that decision. *See Commonwealth v. Liebel,* 573 Pa. 375, 825 A.2d 630 (2003). Concerning counsel's obligations as appointed counsel, see *Jones v. Barnes,* 463 U.S. 745 (1983). *See also Commonwealth v. Padden,* 783 A.2d 299 (Pa. Super. 2001).

The 2011 amendments to this rule, to Pa.Rs.Crim.P. 120 and 122, and to Pa.Rs.A.P. 120, 907, 1925, and 2744 supersede the procedures set forth in *Anders v. California,* 386 U.S. 738 (1967), and *Commonwealth v. McClendon,* 495 Pa. 467, 434 A.2d 1185 (1981), and *Pennsylvania v. Finley,* 481 U.S. (1987), and *Commonwealth v. Turner,* 518 Pa. 491, 544 A.2d 927 (1988), in Pennsylvania practice.

Pursuant to paragraph (G), if an attorney seeks to withdraw, the attorney must proceed pursuant to the procedures in Rule 120(B). Pursuant to Rule 120, the court may not grant a motion to withdraw when the only reason for the request to withdraw is that there are no non-frivolous issues that could be raised on appeal or in collateral proceedings under the PCRA. The prohibition on withdrawal changes Pennsylvania's procedure under *Anders/McClendon, supra,* and *Turner/Finley, supra,* and counsel will no longer file an *Anders/McClendon* brief or a *Turner/Finley* no-merit letter and will proceed with the appeal or collateral proceedings under the PCRA. This change in procedure is consistent with the United States Supreme Court's decision in *Smith v. Robbins,* 529 U.S. 259 (2000) (*Anders* procedure not obligatory upon states as long as states' procedures adequately safeguard defendants' rights).

Under the new procedures, following conviction, counsel must advise the defendant of any right to appeal and must consult with the defendant about the possible grounds for appeal. Counsel also must advise the defendant of counsel's opinion of the probable outcome of an appeal. If, in counsel's estimation, the appeal lacks merit or is frivolous, counsel must inform the defendant and seek to persuade the defendant to abandon the appeal. If the defendant chooses to proceed with an appeal against the advice of counsel, counsel is required to present the case, as long as such advocacy does not involve deception of the court.

Pennsylvania Rule of Professional Conduct 3.1 (Meritorious Claims and Contentions) should be construed with reference to this rule.

Paragraph **[(H)] (I)** was added in 2000 to provide for the appointment of counsel for the first petition for post-conviction collateral relief in a death penalty case at the conclusion of direct review.

Paragraph **[(H)(1)(a)] (I)(1)(a)** recognizes that a defendant may proceed *pro se* if the judge finds the defendant competent, and that the defendant's election is knowing, intelligent, and voluntary. In *Indiana v. Edwards,* 128 S.Ct. 2379, 2388 (2008), the Supreme Court recognized that, when a defendant is not mentally competent to conduct his or her own defense, the U. S. Constitution permits the judge to require the defendant to be represented by counsel.

An attorney may not represent a defendant in a capital case unless the attorney meets the educational and experiential requirements set forth in Rule 801 (Qualifications for Defense Counsel in Capital Cases).

***Official Note*: Previous Rule 1504 adopted January 24, 1968, effective August 1, 1968; rescinded December 11, 1981, effective June 27, 1982; rescission vacated June 4, 1982; rescinded February 1, 1989, effective July 1, 1989, and replaced by Rule 1507. Present Rule 1504 adopted February 1, 1989, effective July 1, 1989; amended August 11, 1997, effective immediately; amended January 21, 2000, effective July 1, 2000; renumbered Rule 904 and amended March 1, 2000, effective April 1, 2001; amended February 26, 2002, effective July 1, 2002; Comment revised March 12, 2004, effective July 1, 2004; Comment revised June 4, 2004, effective November 1, 2004; amended April 28, 2005, effective August 1, 2005; Comment revised March 29, 2011, effective May 1, 2011; amended , 2011, effective , 2011.**

Committee Explanatory Reports:

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Report explaining the proposed amendments adding paragraph (G) and revising the Comment that change Pennsylvania practice with regard to withdrawal of counsel and filing Anders/McClendon

briefs and Finley/Turner no merit letters published for comment at 41 Pa.B. 2218 (April 30, 2011).

REPORT

Proposed Amendments to Pa.Rs.Crim.P. 120, 122, and 904
Modification of the *Anders/Finley* Procedures

I. Introduction

The Committee, in conjunction with the Appellate Court Procedural Rules Committee,[1] is planning to propose to the Supreme Court amendments to Rules of Criminal Procedure 120, 122, and 904. The proposed rules of the two Committees, and their respective explanatory Report and Explanatory Comment, should be read in tandem.

The proposed amendments would replace Pennsylvania's *Anders-McClendon/Turner-Finley* procedures[2] with a procedure that would require counsel to proceed with a direct appeal even when the attorney determines there are no non-frivolous issues to raise. The Committee reasoned that requiring counsel to stay in the case through the direct appeal would better protect the defendant's constitutional rights, would promote judicial economy, and would satisfy the goals of *Anders* without its cumbersome mechanism.

II. Background

The United States Supreme Court in 1967 in *Anders* addressed the extent of the duty of appointed appellate counsel in a criminal case to proceed with a first appeal after that attorney has conscientiously determined that there is no merit to the indigent's appeal. The Court noted that indigent defendants taking an appeal have a Sixth Amendment right to counsel. In cases involving frivolous appeals, however, counsel may request and receive permission to withdraw without depriving the indigent defendant of his or her right to representation if certain safeguards are met. The Court elaborated on the procedure counsel and the courts should follow:

> [The attorney's] role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal. . . . This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain. It would also induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel. *Supra.* at 744-745

Subsequently in *Finley*, the Court concluded that federal constitutional law does not require that *Anders* be made applicable to collateral proceedings under the Post Conviction Hearing Act (PCHA, now PCRA). The Pennsylvania Supreme Court, in *Commonwealth v. Turner, supra,* after making a finding that defendants have a rule-made right to counsel for collateral proceedings under Pennsylvania law, reaffirmed the procedures for withdrawal of counsel in collateral attacks on criminal convictions after trial or on appeal that the Superior Court had applied in *Finley.* Pursuant to *Finley,* counsel must present the court with a "no-merit" letter that detail the nature and extent of the attorney's review, listing each issue the petitioner wishes to have raised, with the attorney's explanation of why those issues were meritless. The PCHA court must conduct its own independent review. If the court agrees with counsel that the petition was meritless, the attorney may be permitted to withdraw.

Since these cases were decided, there have continued to be appeals in cases in which counsel has not properly followed the procedures enumerated in the case law. *See, e.g., Commonwealth v. Pitts,* 603 Pa. 1; 981 A.2d 875 (2009); *Commonwealth v. Santiago,* 602 Pa. 159; 978 A.2d 349 (2009); *Commonwealth v. Ferguson,* 761 A.2d 613, 616 (Pa. Super. 2000); *Commonwealth v. Peterson,* 756 A.2d 687 (Pa. Super. 2000); *Commonwealth v. Smith,* 700 A.2d 1301, 1304 (Pa. Super. 1997). The number of cases raising these issues was the impetus for the Appellate Court Rules Committee to undertake the development of proposed procedures for the Appellate Rules to govern withdrawal of counsel (*Anders* brief and *Finley* letter).

The Appellate Court Rules Committee's initial proposal was for amendments to Pa.R.A.P. 120 (Entry of Appearance) to provide the procedural steps when counsel is requesting permission to withdraw on appeal or on collateral review. This proposal was published for comment in December 2009[3] and met with a number of objections that sent the Appellate Rules Court Committee back to the drawing board. In view of these objections, the Committee considered a new approach that included a post sentence determination concerning defendant's and defendant's counsel's appeal intentions. This new idea was based on research evidencing that this is done in other jurisdictions. Because this new approach would require amendments to the Criminal Rules, a Joint Appellate-Criminal Subcommittee was formed to address this matter.[4]

The Joint Subcommittee considered the Appellate Court Rules Committee's suggestions, and looked at the case law, as well as the procedures in other jurisdictions. The members noted that some jurisdictions have developed different approaches to *Anders.*[5] For example, in *State v.*

[1] The Appellate Court Procedural Rules Committee proposal is for conforming amendments to Pa.Rs.A.P. 120, 907, 1925, and 2744.

[2] *Anders v. California,* 386 U.S. 738 (1967), *Commonwealth v. McClendon,* 495 Pa. 467, 434 A.2d 1185 (1981) (direct appeal), *Pennsylvania v. Finley*, 481 U.S. (1987), and *Commonwealth v. Turner,* 518 Pa. 491, 544 A.2d 927 (1988) (PCRA).

[3] 39 Pa.B. 6866 (December 5, 2009).

[4] The Joint Subcommittee membership included a retired appellate court judge, a common pleas court judge, prosecutors, and a private defense attorney.

[5] Several treatises provide a summary of the different states' *Anders* procedures and alternative procedures. *See, e.g.,* Martha C. Warner, *Anders in the Fifty States: Some Appellants' Equal Protection Is More Equal Than Others',* 23 Florida State University Law Review 625 (Winter, 1996); James E. Duggan and Andrew W. Moeller, *Make Way for the ABA: Smith V. Robbins Clears A Path For Anders Alternatives,* 3 Journal of Appellate Practice and Process 65 (Spring 2001).

McKenney, 98 Idaho 551, 568 P.2d 1213, 1214 (1977), the Idaho Supreme Court declined to follow *Anders* altogether, deciding that "once counsel is appointed to represent an indigent client during appeal on a criminal case, no withdrawal will thereafter be permitted on the basis that the appeal is frivolous or lacks merit." *Id.* at 1214. The Court observed that the mere filing of a motion to withdraw based on the frivolousness of issues will result in prejudice and that there is less conflict and less judicial energy focusing on reviewing motions rather than the merits of the case if counsel is not allowed to motion for withdrawal.

In *Commonwealth v. Moffett,* 383 Mass. 201, 418 N.E.2d 585 (1981), the Massachusetts Supreme Judicial Court held that appointed counsel would not be permitted to withdraw based solely on the ground that the appeal is frivolous or other wise lacking in merit. The Court based its holding on the following analysis:

> Although meant to resolve the tension between an indigent defendant's right to a counseled appeal and counsel's desire to withdraw because he finds the appeal frivolous, the *Anders* procedure has been criticized not only as cumbersome and impractical, but also as insufficiently responsive both to the position of the indigent and to the ethical concerns of appointed counsel. The major difficulty with the *Anders* procedure is its requirement that an attorney assume contradictory roles if he wishes to withdraw on the grounds that the appeal lacks merit. . . . Some courts have recognized that the mere submission by appointed counsel of a request to withdraw on grounds of frivolousness may result in prejudice to the indigent defendant, and have adopted the position of disallowing such motions to withdraw. . . . Aside from the possibility of prejudice, practical administrative reasons exist for prohibiting withdrawal. If appointed counsel may move to withdraw on grounds of frivolousness, the court must determine whether the appeal is frivolous in order to rule on counsel's motion, and the determination necessarily entails consideration of the merits of the appeal. As long as counsel must research and prepare an advocate's brief, he or she may as well submit it for the purposes of an ordinary appeal. Even if the appeal is frivolous, less time and energy will be spent directly reviewing the case on the merits. *Id.* at 205-206, 418 N.E.2d at 590-591.

In *New Hampshire v. Cigic,* 138 N.H. 313, 314, 639 A.2d 251 (1994), the New Hampshire Supreme Court held that "the efficiency and integrity of the appellate process are better ensured by the adoption of a modified Idaho rule" instead of continuing to adhere to the withdrawal requirements set forth in *Anders, supra*. The Court also addressed the implications of filing a frivolous appeal that could arise under the new procedures, observing that:

> [s]uch instances, however, would be extremely rare, especially in light of the fact that it is not considered frivolous to make "a good faith argument for an extension, modification or reversal of existing law." *N.H.R.Prof.Conduct* 3.1. In addition, the ABA Model Code Comments to Rule 3.1 state that '[an] action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail.' An action cannot be considered frivolous, therefore, if the lawyer is able 'either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.' 138 N.H at 317, 639 A.2d at 253.

Recognizing that by adopting the new procedure, there may be rare occasions when appellate counsel would be required to assert a frivolous issue, the Court created an exception to New Hampshire Rule of Professional Conduct 3.1 for such conduct.

In 2000, the U. S. Supreme Court considered the alternative procedures developed by California following *Anders*.[6] *Smith v. Robbins,* 528 U.S. 259 (2000). In *Smith*, the Court observed "[t]he procedure we sketched in *Anders* is a prophylactic one; the States are free to adopt different procedures, so long as those procedures adequately safeguard a defendant's right to appellate counsel." *Id.* 265. The Court held:

> Accordingly, we hold that the *Anders* procedure is merely one method of satisfying the requirements of the Constitution for indigent criminal appeals. States may-and, we are confident, will-craft procedures that, in terms of policy, are superior to, or at least as good as, that in *Anders*. The Constitution erects no barrier to their doing so. *Id* at 276.

The Joint Subcommittee considered the procedures developed to replace *Anders* in these other jurisdictions, and agreed that proposing a comparable change in Pennsylvania would be beneficial to the bench and bar. The new approach being proposed would require counsel to proceed with a direct appeal even when the attorney determines there are no non-frivolous issues to raise. The members reasoned that requiring counsel to stay in the case through the direct appeal would protect the defendant's constitutional rights and promote judicial economy, and would satisfy the goals of *Anders* without its cumbersome mechanism.

To implement this new approach, the new procedures would be incorporated into the Criminal Rules' counsel rules, Rules 120, 122, and 904, as well as Appellate Rule 120 (Entry of Appearance), and that any withdrawal of counsel, whether the case is before the trial court or the appellate court, would be pursuant to Criminal Rule 120. In addition, the text of the rules would make it clear that counsel no longer would be permitted to withdraw solely because the attorney believes there are no non-frivolous issues to raise. Because the new procedures are changing years of practice, the Comments to the rules will emphasize that, with this change, there no longer will be *Anders* briefs or *Finley* no-merit letters in Pennsylvania. In addition, the Comments would elaborate what counsel's obligations are under the new procedures.

Discussion of Proposed Criminal Rule Changes

Rule 120 (Attorneys—Appearances and Withdrawals)

Rule 120 would be amended by adding a second sentence to paragraph (B)(1) that says "counsel shall not be permitted to withdraw solely on the ground that the appeal is frivolous or otherwise lacking in merit." The Committee considered incorporating several other procedures that provided more detail, such as requiring the attorney to file the appeal, found in other jurisdictions'

[6] California's new procedure was established in *People v. Wende,* 25 Cal.3d 436, 441-442, 158 Cal.Rptr. 839, 600 P.2d 1071, 1074-1075 (1979).

rules, but ultimately concluded because this proposal does not change the appeal process, the rule should contain only the new prohibition on withdrawal. Correlatively, the Rule 120 Comment would be revised by adding a new first paragraph that explains that the 2011 changes to the Criminal and Appellate Rules supersede the procedures set forth in the *Anders/McClendon* and *Turner/Finley* line of cases. The Comment explains further that with this change, there no longer will be *Anders* briefs or *Finley* no-merit letters in Pennsylvania.

The proposed revisions to the Rule 120 Comment also address counsel's obligations when proceeding with an appeal or collateral review under the new procedures.[7] These obligations include advising the client of any right to appeal, the possible grounds for appeal, and counsel's opinion of the probable outcome of an appeal. If, in the attorney's estimation, the appeal lacks merit or is frivolous, the attorney must inform the defendant and seek to persuade the defendant to abandon the appeal. If the defendant chooses to proceed with an appeal against the advice of counsel, counsel is required to present the case, as long as such advocacy does not involve deception of the court.

One issue that presented a bit of a hurdle with regard to requiring the attorney to stay in the case even when the attorney believes there are no non-frivolous issues concerns the provisions of Rule of Professional Conduct 3.1 (Meritorious Claims and Contentions). Rule 3.1 provides:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

The Note to Rule 3.1 states:

> [3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

The members believe that the new procedures fall within the "exception" set forth in Note 3 since the new procedures protect a defendant's constitutional right to counsel.[8] However, there was some concern that, because this "exception" in the Note is broader than the language of Rule 3.1, without some clarification, there would be confusion for the bench and bar. Accordingly, the Rule 120 Comment would include a statement to the effect that Pa.R.P.C. 3.1 should be construed with reference to Rule 120.

Another issue concerns whether counsel must raise all the issues a defendant asks to be raised. This issue was discussed at length by the Committee during the development of the 2004 amendments to Rule 122. The Committee at that time agreed to add a reference to *Jones v. Barnes,* 463 U.S. 745 (1983), noting Chief Justice Burger's remarks that:

> Neither *Anders* nor any other decision of this Court suggests, however, that the indigent defendant has a constitutional right to compel appointed counsel to press non-frivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points. This Court, in holding that a State must provide counsel for an indigent appellant on his first appeal as of right, recognized the superior ability of trained counsel in the 'examination into the record, research of the law, and marshalling of arguments on [the appellant's] behalf.' . . . Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. *Id.* at 751.

The Committee agreed a similar cross-reference should be added to the Rule 120 Comment to emphasize that appellate counsel has the ultimate authority to decide which arguments to make on appeal. The members also included a cross-reference to *Commonwealth v. Padden,* 783 A.2d 299 (Pa. Super. 2001) for the same principle.

Finally, the Committee thought the Rule 120 Comment would be clearer if the Comment provisions are separated into provisions concerning entry of appearance and provisions concerning withdrawal of appearance with section titles in the same manner as in the text of the rule. Correlative to this organization of the Comment, the provisions related to entry of appearance that currently are in the fifth to the last paragraph and the last paragraph of Comment would be moved to be the fourth and fifth paragraphs under the new section titled "Entry of Appearance."

Rule 122 (Appointment of Counsel) and Rule 904 (Entry of Appearance and Appointment of Counsel; In Forma Pauperis)

The provisions proposed for Rule 120 explained above also would be added to Rules 122 and 904 with modifications to conform to the procedures in these rules. Because neither Rule 122 nor Rule 904 provide for the withdrawal of counsel, both rules would be amended to provide that counsel will not be permitted to withdraw without leave of court pursuant to Rule 120(B), thereby making it clear that the procedures for withdrawal of counsel in all cases are governed by Rule 120(B). In addition to the new withdrawal of counsel provisions, Rules 122 and 904 would include the same prohibition on permitting withdrawals solely on the ground that the appeal is frivolous or otherwise lacking in merit that is being added to Rule 120(B)(1).

The Comments to Rules 122 and 904 would be revised in the same manner as the Rule 120 Comment. The language of some of the provisions that are in the Rule 120 Comment has been modified to conform to the procedures in Rules 122 and 904.

Finally, cross-references to all the other Criminal and Appellate Rules would be included in the Comments to all the rules. This is important given the significant changes in procedure that are being proposed so the bench and bar will know which rules to consult with regard to the new procedures.

[Pa.B. Doc. No. 11-716. Filed for public inspection April 29, 2011, 9:00 a.m.]

[7] The source of the obligations included in the proposed Comment revision, in addition to Pennsylvania law, include the ABA *Standards for Appeals,* Standard 21-3.2, and ABA *Defense Function Standard,* Standard 4-8.3, and the procedures set forth in *New Hampshire v. CIGIC, supra.*

[8] *See, also,* the discussion in *New Hampshire v. CIGIC, supra.,* concerning this issue.

Title 255—LOCAL COURT RULES

FRANKLIN AND FULTON COUNTIES

In the Matter of the Adoption and Amendment of Local Rules of Civil Procedure; Misc. Doc. 2011-1624

Order Pursuant to Pa.R.C.P. 239.8

April 14th, 2011, *It Is Hereby Ordered* that the following Rules of the Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin and Fulton County Branches, Civil Division, are amended, rescinded or adopted as indicated this date, to be effective upon publication on the Pennsylvania Judiciary's Web Application Portal:

Local Rules of Civil Procedure 1028(c), 1034(a), and 1035.2(a) are amended and shall now read as follows.

It Is Further Ordered that The District Court Administrator shall

1. Transmit a copy of this order and the foregoing rules to the Civil Procedural Rules Committee for transmittal to the Administrative Office of Pennsylvania Courts (AOPC) for publication on the Pennsylvania Judiciary's Web Application Portal.

2. Distribute two (2) certified paper copies and one (1) computer diskette or CD-ROM copy to the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.

3. Provide one (1) certified copy of the Local Rule changes to the Franklin County Law Library and one (1) certified copy to the Fulton County Law Library.

4. Keep such local rule changes, as well as all local civil rules, continuously available for public inspection and copying in the Office of the Prothonotary of Franklin County and the Office of the Prothonotary of Fulton County. Upon request and payment of reasonable costs of reproduction and mailing, the Prothonotary shall furnish to any person a copy of any local rule.

5. Arrange to have the local rule changes published on the Franklin County Bar Association web site at www.franklinbar.org.

By the Court

DOUGLAS W. HERMAN,
President Judge

Local Rule 1028(c). Preliminary Objections.

Preliminary Objections shall be scheduled, argued and decided in accordance with Local Rule 211.

Note: Local Rule 211, relating to Oral Arguments, reads as follows:

39-211.1 Except as otherwise provided by the Court, arguments in the Franklin County Branch shall be held on the first Thursday of each month excluding August, except when that Thursday is a legal holiday, in which case the argument shall be held on as scheduled by the Court; and in the Fulton County Branch, arguments shall be held on days as established by the annual Court calendar or as scheduled by the Court.

39-211.2 In the Franklin County Branch, causes for argument shall be listed in the Prothonotary's office in a docket to be provided for that purpose, on or before the Thursday which is six (6) weeks preceding the day for argument. Any party may list a cause by filing a Praecipe directing the Prothonotary to list the cause for argument. In the Fulton County Branch, causes for argument may be listed in the Prothonotary's office in a docket to be provided for that purpose upon Praecipe of a party filed at least six (6) weeks before the argument is to be scheduled before the assigned judge. The party entering a cause for argument shall forthwith, by ordinary mail, notify all other parties that the cause has been listed for argument; and shall file proof of service of such notice. Failure to give such notice shall be grounds for striking the cause from the list upon Motion.

39-211.3 The parties may agree in writing to add a cause to the argument list at any time so long as service of briefs may be made in accordance with the time requirements of Rule 39-211.7. The Court may order a cause listed for argument at the next scheduled argument court or on such other day as it may direct and, in that event, it may set the time for service of briefs.

39-211.4 When the ascertainment of facts is necessary for the proper disposition of a cause listed for argument, such facts may be determined by deposition or as otherwise provided in the Pennsylvania Rules of Civil Procedure.

39-211.5 The person seeking the order applied for shall argue first, and may also argue in rebuttal, if permitted by the Court, but such rebuttal shall be limited to answering arguments advanced by the opposing party. In causes where there is more than one responding party, the order of argument by the responding parties shall be as directed by the Court.

39-211.6 Each party shall furnish to every other party a typewritten brief in the form set forth in Local Rule 210, Form and content of Briefs.

39-211.7 When a case is listed for argument, the moving party shall file and serve a copy of his brief upon all other parties in the manner set forth in Pa.R.C.P. 440(a) to insure receipt by the responding party not later than the thirty-fifth (35th) day preceding the day scheduled for argument. The responding party shall, in return, serve a copy of his brief upon the moving party in the manner set forth in Pa.R.C.P. 440(a) to insure receipt by the moving party not later than the twenty-eighth (28th) day preceding the day scheduled for argument. At the time each party serves his brief, he shall furnish two copies thereof to the assigned judge.

39-211.8 Unless the time for filing and serving briefs is extended by the Court for cause shown, where briefs have not been timely filed and served as required by Rule 39-211.7, the Court may upon its own motion or upon request of a party:

(1) Deny the relief requested where the moving party has failed to comply;

(2) Grant the requested relief where the responding party has failed to comply;

(3) Permit oral argument, but only by the complying party;

(4) Grant such other relief or impose such other sanctions as it shall deem proper.

39-211.9 With the approval of the Court, oral argument may be dispensed with by agreement of the parties and the matter shall be submitted to the Court on briefs filed.

39-211.10 Cases shall be continued or stricken from the argument list only pursuant to order of Court. A party may request such an order of Court by petition setting forth the basis for the request. Such petition must include certification regarding concurrence or non-concurrence of all other parties as required by Local Rule 39-206.1.

Local Rule 1034(a). Motion for Judgment on the Pleadings.

Within twenty (20) days after service of a motion for judgment on the pleadings, the responding party shall file an answer and concurrently serve same on the moving party. Motions for judgment on the pleadings shall be scheduled, argued and decided in accordance with Local Rule 211.

Note: Local Rule 211, relating to Oral Arguments, reads as follows:

39-211.1 Except as otherwise provided by the Court, arguments in the Franklin County Branch shall be held on the first Thursday of each month excluding August, except when that Thursday is a legal holiday, in which case the argument shall be held on as scheduled by the Court; and in the Fulton County Branch, arguments shall be held on days as established by the annual Court calendar or as scheduled by the Court.

39-211.2 In the Franklin County Branch, causes for argument shall be listed in the Prothonotary's office in a docket to be provided for that purpose, on or before the Thursday which is six (6) weeks preceding the day for argument. Any party may list a cause by filing a Praecipe directing the Prothonotary to list the cause for argument. In the Fulton County Branch, causes for argument may be listed in the Prothonotary's office in a docket to be provided for that purpose upon Praecipe of a party filed at least six (6) weeks before the argument is to be scheduled before the assigned judge. The party entering a cause for argument shall forthwith, by ordinary mail, notify all other parties that the cause has been listed for argument; and shall file proof of service of such notice. Failure to give such notice shall be grounds for striking the cause from the list upon Motion.

39-211.3 The parties may agree in writing to add a cause to the argument list at any time so long as service of briefs may be made in accordance with the time requirements of Rule 39-211.7. The Court may order a cause listed for argument at the next scheduled argument court or on such other day as it may direct and, in that event, it may set the time for service of briefs.

39-211.4 When the ascertainment of facts is necessary for the proper disposition of a cause listed for argument, such facts may be determined by deposition or as otherwise provided in the Pennsylvania Rules of Civil Procedure.

39-211.5 The person seeking the order applied for shall argue first, and may also argue in rebuttal, if permitted by the Court, but such rebuttal shall be limited to answering arguments advanced by the opposing party. In causes where there is more than one responding party, the order of argument by the responding parties shall be as directed by the Court.

39-211.6 Each party shall furnish to every other party a typewritten brief in the form set forth in Local Rule 210, Form and content of Briefs.

39-211.7 When a case is listed for argument, the moving party shall file and serve a copy of his brief upon all other parties in the manner set forth in Pa.R.C.P. 440(a) to insure receipt by the responding party not later than the thirty-fifth (35th) day preceding the day scheduled for argument. The responding party shall, in return, serve a copy of his brief upon the moving party in the manner set forth in Pa.R.C.P. 440(a) to insure receipt by the moving party not later than the twenty-eighth (28th) day preceding the day scheduled for argument. At the time each party serves his brief, he shall furnish two copies thereof to the assigned judge.

39-211.8 Unless the time for filing and serving briefs is extended by the Court for cause shown, where briefs have not been timely filed and served as required by Rule 39-211.7, the Court may upon its own motion or upon request of a party:

(1) Deny the relief requested where the moving party has failed to comply;

(2) Grant the requested relief where the responding party has failed to comply;

(3) Permit oral argument, but only by the complying party;

(4) Grant such other relief or impose such other sanctions as it shall deem proper.

39-211.9 With the approval of the Court, oral argument may be dispensed with by agreement of the parties and the matter shall be submitted to the Court on briefs filed.

39-211.10 Cases shall be continued or stricken from the argument list only pursuant to order of Court. A party may request such an order of Court by petition setting forth the basis for the request. Such petition must include certification regarding concurrence or non-concurrence of all other parties as required by Local Rule 39-206.1.

Local Rule 1035.2(a). Motion for Summary Judgment

After the filing of a response in accordance with Pa.R.C.P. 1035.3, motions for summary judgment shall be scheduled, argued and decided in accordance with Local Rule 211.

Note: Local Rule 211, relating to Oral Arguments, reads as follows:

39-211.1 Except as otherwise provided by the Court, arguments in the Franklin County Branch shall be held on the first Thursday of each month excluding August, except when that Thursday is a legal holiday, in which case the argument shall be held on as scheduled by the Court; and in the Fulton County Branch, arguments shall be held on days as established by the annual Court calendar or as scheduled by the Court.

39-211.2 In the Franklin County Branch, causes for argument shall be listed in the Prothonotary's office in a docket to be provided for that purpose, on or before the Thursday which is six (6) weeks preceding the day for argument. Any party may list a cause by filing a Praecipe directing the Prothonotary to list the cause for argument. In the Fulton County Branch, causes for argument may be listed in the Prothonotary's office in a docket to be provided for that purpose upon Praecipe of a party filed at least six (6) weeks before the argument is to be scheduled before the assigned judge. The party entering a cause for argument shall forthwith, by ordinary mail, notify all other parties that the cause has been listed for argument; and shall file proof of service of such notice. Failure to give such notice shall be grounds for striking the cause from the list upon Motion.

39-211.3 The parties may agree in writing to add a cause to the argument list at any time so long as service of briefs may be made in accordance with the time requirements of Rule 39-211.7. The Court may order a cause listed for argument at the next scheduled argument court or on such other day as it may direct and, in that event, it may set the time for service of briefs.

39-211.4 When the ascertainment of facts is necessary for the proper disposition of a cause listed for argument, such facts may be determined by deposition or as otherwise provided in the Pennsylvania Rules of Civil Procedure.

39-211.5 The person seeking the order applied for shall argue first, and may also argue in rebuttal, if permitted by the Court, but such rebuttal shall be limited to answering arguments advanced by the opposing party. In causes where there is more than one responding party, the order of argument by the responding parties shall be as directed by the Court.

39-211.6 Each party shall furnish to every other party a typewritten brief in the form set forth in Local Rule 210, Form and content of Briefs.

39-211.7 When a case is listed for argument, the moving party shall file and serve a copy of his brief upon all other parties in the manner set forth in Pa.R.C.P. 440(a) to insure receipt by the responding party not later than the thirty-fifth (35th) day preceding the day scheduled for argument. The responding party shall, in return, serve a copy of his brief upon the moving party in the manner set forth in Pa.R.C.P. 440(a) to insure receipt by the moving party not later than the twenty-eighth (28th) day preceding the day scheduled for argument. At the time each party serves his brief, he shall furnish two copies thereof to the assigned judge.

39-211.8 Unless the time for filing and serving briefs is extended by the Court for cause shown, where briefs have not been timely filed and served as required by Rule 39-211.7, the Court may upon its own motion or upon request of a party:

(1) Deny the relief requested where the moving party has failed to comply;

(2) Grant the requested relief where the responding party has failed to comply;

(3) Permit oral argument, but only by the complying party;

(4) Grant such other relief or impose such other sanctions as it shall deem proper.

39-211.9 With the approval of the Court, oral argument may be dispensed with by agreement of the parties and the matter shall be submitted to the Court on briefs filed.

39-211.10 Cases shall be continued or stricken from the argument list only pursuant to order of Court. A party may request such an order of Court by petition setting forth the basis for the request. Such petition must include certification regarding concurrence or non-concurrence of all other parties as required by Local Rule 39-206.1.

[Pa.B. Doc. No. 11-717. Filed for public inspection April 29, 2011, 9:00 a.m.]

FRANKLIN AND FULTON COUNTIES

In the Matter of the Adoption and Amendment of Local Rules of Civil Procedure; Misc. Doc. 2011-1625

Order

April 14th, 2011, *It Is Hereby Ordered* that the following Rules of the Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin and Fulton County Branches, Civil Division, are amended, rescinded or adopted as indicated this date, to be effective upon publication on the Pennsylvania Judiciary's Web Application Portal:

Local Rule of Civil Procedure 205.2(a) is amended and shall now read as follows.

It Is Further Ordered that The District Court Administrator shall

1. Transmit a copy of this order and the foregoing rules to the Civil Procedural Rules Committee for transmittal to the Administrative Office of Pennsylvania Courts (AOPC) for publication on the Pennsylvania Judiciary's Web Application Portal.

2. Distribute two (2) certified paper copies and one (1) computer diskette or CD-ROM copy to the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.

3. Provide one (1) certified copy of the Local Rule changes to the Franklin County Law Library and one (1) certified copy to the Fulton County Law Library.

4. Keep such local rule changes, as well as all local civil rules, continuously available for public inspection and copying in the Office of the Prothonotary of Franklin County and the Office of the Prothonotary of Fulton County. Upon request and payment of reasonable costs of reproduction and mailing, the Prothonotary shall furnish to any person a copy of any local rule.

5. Arrange to have the local rule changes published on the Franklin County Bar Association web site at www.franklinbar.org.

By the Court

DOUGLAS W. HERMAN,
President Judge

Local Rule 205.2(a). **Physical Characteristics of Pleadings and Other Legal Papers;** Assignment to Judge upon Filing of Complaint.

Upon the filing of a complaint, the Prothonotary shall assign the case to a specific judge and shall indicate the name of the particular judge assigned in the caption. The name of the judge to whom the case is assigned shall be noted in the caption of each service copy of the complaint.

(i) All pleadings and papers filed subsequent to the complaint shall have the name of the judge to whom the case is assigned noted in the caption.

(ii) Subsequent to the filing of a complaint, motions and petitions shall be directed to the assigned judge for disposition unless such judge is unavailable.

(iii) Unless required by an applicable law or rule of court or unless so directed by the court, parties or their attorneys may include in documents filed of record only (a) the last four digits of a social security number or taxpayer identification number; (b) the month and year of a person's birth; and (c) the last four digits of financial account information. Responsibility for redacting personal identifiers rests solely with the parties and documents will not be reviewed by the Prothonotary or Clerk of Courts for compliance with this requirement.

[Pa.B. Doc. No. 11-718. Filed for public inspection April 29, 2011, 9:00 a.m.]

LEHIGH COUNTY

Adoption of Local Rules of Court; Administrative Order: No. 2011-J-28

Order of Court

And now, this 17th day of March 2011, effective May 30, 2011, it is hereby *Ordered* that Lehigh County Rules pertaining to Voluntary Mediation in Custody Actions are *Amended* as follows:

Rule 1940.3. Rescinded.

Rule 1940.4. Rescinded.

Rule 1940.6. Rescinded.

Rule 1940.7. Rescinded.

New Rules Adopted

Rule 1940.3. Order for Orientation Session and Mediation.

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

(1) Upon commencement of an action for custody or upon filing of a petition for modification or contempt, the moving party may request in writing an order directing the parties to attend a mediation orientation session. The request shall be directed to the family court administrator on the form provided by the family court office.

(2) If the moving party has not made such a request, the non-moving party may, within five (5) business days of receipt of the pleading, request in writing an order for a mediation orientation session. The request shall be directed to the family court administrator on the form provided by the family court office.

(3) At the conclusion of the mediation orientation session, the parties may consent to proceed immediately with mediation.

(4) Upon agreement of the parties, the court may schedule mediation at any time during the pendency of an action involving custody.

(b) Notwithstanding a request by a party, the court shall not issue an order for a mediation orientation session if a party or a child of either party is or has been the subject of domestic violence or child abuse either during the pendency of the action or within 24 months preceding the filing of the action.

Rule 1940.4. Minimum Qualifications of the Mediator.

A mediator is a person approved by the Lehigh County Court of Common Pleas who has met the requirements of Pa.R.C.P. 1940.4 and any additional qualifications this court may from time to time require.

Rule 1940.6. Termination of Mediation.

(a) If an agreement is reached through mediation, the mediator shall prepare a memorandum of agreement as follows:

(1) for the parties' signatures, if neither is represented by counsel, or

(2) for the parties' review with counsel.

(b) If no agreement is reached, the case shall be scheduled for conference before a custody hearing officer.

Rule 1940.7. Mediator Compensation.

(a) Mediators shall be compensated for their services at a rate to be established by the court.

(b) Fees for mediation shall be established by the court, and shall be paid to the Clerk of Judicial Records prior to a mediation orientation session.

By the Court

CAROL K. MCGINLEY,
President Judge

[Pa.B. Doc. No. 11-719. Filed for public inspection April 29, 2011, 9:00 a.m.]

SNYDER AND UNION COUNTIES

Adoption of Local Rules; No. 11 0288; MC-13-2011

Order

And Now, this 8th day of April, 2011 it is hereby *Ordered*:

1. That existing Local Rule 17CV1915.4 is amended to include subsection (e).

2. That the Court hereby adopts the following Local Rule. The said rule shall become effective thirty (30) days after publication in the *Pennsylvania Bulletin*.

17CV1915.4(e).

(e). There shall be imposed on each party a $10.00 fee to be paid to the Central Susquehanna Valley Mediation Center, Inc. This fee **shall be paid** at the first (1st) Mediation Session for the purpose of deferring the cost of the mediation services. In extraordinary circumstances as determined by the Mediator this fee may be waived for either party.

3. That the Court Administrator of the 17th Judicial District is ordered and directed to do the following:

3.1. File seven (7) certified copies of this Order and of the pertinent Local Rule with the Administrative Office of Pennsylvania Courts.

3.2. Distribute two (2) certified copies of this Order and the pertinent Local Rule and a computer diskette to the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin* for publication.

3.3. File one (1) certified copy of this Order and the pertinent Local Rule with the Civil Procedural Rules Committee.

3.4. Provide one (1) copy of this Order and the pertinent Local Rule to each member of the Union-Snyder County Bar Association that maintains an active practice in Snyder and Union Counties.

3.5. Keep continuously available for public inspection copies of this Order and the pertinent Local Rule.

By the Court

MICHAEL H. SHOLLEY,
President Judge

[Pa.B. Doc. No. 11-720. Filed for public inspection April 29, 2011, 9:00 a.m.]

SUPREME COURT

Modification of the Magisterial Districts Within the Nineteenth Judicial District; No. 281 Magisterial Rules Doc.

Order

Per Curiam

And Now, this 15th day of April, 2011, upon consideration of the Request of the President Judge of York County to eliminate Magisterial District 19-3-02, reconfigure Magisterial Districts 19-2-01, 19-2-04, 19-3-01, 19-3-03, 19-3-06, 19-3-07, and 19-3-09 and create a new magisterial district in the Nineteenth Judicial District (York County) of the Commonwealth of Pennsylvania, it is hereby *Ordered and Decreed* that the Request is granted. This Order is effective January 2, 2012. The vacancy for District 19-3-02 shall not appear on the ballot for the primary or general election in 2011.

Said Magisterial Districts shall be as follows:

Magisterial District 19-2-01: Magisterial District Judge Barry L. Bloss, Jr.	Springettsbury Township
Magisterial District 19-2-04: Magisterial District Judge Vacant	Manchester Township
Magisterial District 19-3-01: Magisterial District Judge John H. Fishel	East Prospect Borough Felton Borough Red Lion Borough Windsor Borough Yorkana Borough Chanceford Township Lower Windsor Township Windsor Township
New Magisterial District Magisterial District Judge to be determined	East Manchester Township Hellam Township Hellam Borough Manchester Borough Mount Wolf Borough Wrightsville Borough
Magisterial District 19-3-03: Magisterial District Judge John R. Olwert	Cross Roads Borough Delta Borough Fawn Grove Borough Stewartstown Borough Winterstown Borough East Hopewell Township Fawn Township Hopewell Township Lower Chanceford Township North Hopewell Township Peach Bottom Township

Magisterial District 19-3-06:	Jefferson Borough
Magisterial District Judge	New Salem Borough
Kim S. Leppo	Seven Valleys Borough
	Spring Grove Borough
	Codorus Township
	Heidelberg Township
	Jackson Township
	Manheim Township
	North Codorus Township
	Paradise Township
Magisterial District 19-3-07:	Dover Borough
Magisterial District Judge	Conewago Township
Gerald E. Shoemaker	Dover Township
Magisterial District 19-3-09:	Goldsboro Borough
Magisterial District Judge	Lewisberry Borough
Scott J. Gross	York Haven Borough
	Fairview Township
	Newberry Township

[Pa.B. Doc. No. 11-721. Filed for public inspection April 29, 2011, 9:00 a.m.]

Modification of the Magisterial Districts Within the Twelfth Judicial District; No. 280 Magisterial Rules Doc.

Order

Per Curiam

And Now, this 15th day of April, 2011, upon consideration of the Request of the President Judge of Dauphin County to eliminate Magisterial District 12-1-03 of the Twelfth Judicial District (Dauphin County) of the Commonwealth of Pennsylvania, it is hereby *Ordered and Decreed* that the Request is granted. This Order is effective January 2, 2012. The vacancy for District 12-1-03 shall not appear on the ballot for the primary or general election in 2011.

The President Judge of Dauphin County shall submit to the Administrative Office of Pennsylvania Courts a recommendation for the distribution of the wards contained within that district to other magisterial districts.

[Pa.B. Doc. No. 11-722. Filed for public inspection April 29, 2011, 9:00 a.m.]

Provisions for Electronic Filing of Attorney Registration Statements; No. 99 Disciplinary Rules Doc.

Order

Per Curiam:

And Now, this 13th day of April, 2011, the Disciplinary Board having established a procedure for Attorney Annual Registration Statements and accompanying fees required by Pa.R.D.E. 219 and 502 and Pa.R.P.C. 1.15 to be filed electronically beginning with the 2011 reporting year.

It Is Ordered that the submission of the Attorney Annual Registration Statement through electronic means signifies the Attorney's intent to sign the form. By submitting the form electronically, the attorney certifies that the electronic filing is true and correct.

This order shall be effective immediately.

[Pa.B. Doc. No. 11-723. Filed for public inspection April 29, 2011, 9:00 a.m.]