

# THE COURTS

## Title 210—APPELLATE PROCEDURE

### PART I. RULES OF APPELLATE PROCEDURE

[ 210 PA. CODE CH. 21 ]

Order Amending Rule 2112 of the Rules of Appellate Procedure; No. 226 Appellate Procedural Rules Doc.

#### Order

*Per Curiam*

*And Now*, this 1st day of May, 2013, upon the recommendation of the Appellate Court Procedural Rules Committee; the proposal having been published for public comment at 42 Pa.B. 7246 (December 1, 2012):

*It Is Ordered* pursuant to Article V, Section 10 of the Constitution of Pennsylvania that Pennsylvania Rule of Appellate Procedure 2112 is amended in the following form.

This *Order* shall be processed in accordance with Pa.R.J.A. No. 103(b), and the amendments herein shall be effective to appeals and petitions for review filed 30 days after adoption.

#### Annex A

### TITLE 210. APPELLATE PROCEDURE

#### PART I. RULES OF APPELLATE PROCEDURE

#### ARTICLE II. APPELLATE PROCEDURE

#### CHAPTER 21. BRIEFS AND REPRODUCED RECORD

#### CONTENT OF BRIEFS

#### Rule 2112. Brief of the Appellee.

The brief of the appellee, except as otherwise prescribed by these rules, need contain only a summary of argument and the complete argument for appellee **and may also include counter-statements of any of the matters required in the appellant's brief as stated in Pa.R.A.P. 2111(a). [ However, the appellee may add a counter-statement of the questions involved and a counter-statement of the case. ]** Unless the appellee does so, or the brief of the appellee otherwise challenges the [ **questions involved or the statement of the case as stated by appellant** ] matters set forth in the **appellant's brief**, it will be assumed the appellee is satisfied with them, or with such parts of them as remain unchallenged.

**Official Note:** [ Based on former Supreme Court Rule 48, former Superior Court Rule 40 and former Commonwealth Court Rule 91. See also *Cubitt v. New York Cent. R. Co.*, 278 Pa. 366, 370, 123 Atl. 308, 309 (1924). ] See Pa.R.A.P. 2111 and 2114—2119.

[Pa.B. Doc. No. 13-901. Filed for public inspection May 17, 2013, 9:00 a.m.]

## Title 234—RULES OF CRIMINAL PROCEDURE

[ 234 PA. CODE CHS. 5, 6 AND 10 ]

Order Amending Rules 510, 540, 543, 571, 602 and 1003 of the Rules of Criminal Procedure; No. 430 Criminal Procedural Rules Doc.

#### Order

*Per Curiam*

*And Now*, this 2nd day of May, 2013, upon the recommendation of the Criminal Procedural Rules Committee; the proposal having been published before adoption at 42 Pa.B. 5732 (September 8, 2012), and in the *Atlantic Reporter* (Second Series Advance Sheets, Vol. 967), and a Final Report to be published with this *Order*:

*It Is Ordered* pursuant to Article V, Section 10 of the Constitution of Pennsylvania that the amendments to Pennsylvania Rules of Criminal Procedure 510, 540, 543, 571, 602, and 1003 are adopted in the following form.

This *Order* shall be processed in accordance with Pa.R.J.A. No. 103(b), and shall be effective June 1, 2013.

#### Annex A

### TITLE 234. RULES OF CRIMINAL PROCEDURE

#### CHAPTER 5. PRETRIAL PROCEDURES IN COURT CASES

#### PART B(2). Summons Procedures

#### Rule 510. Contents of Summons; Notice of Preliminary Hearing.

(A) Every summons in a court case shall command the defendant to appear before the issuing authority for a preliminary hearing at the place and on the date and at the time stated on the summons. The date set for the preliminary hearing shall be not less than 20 days from the date of mailing the summons unless the issuing authority fixes an earlier date upon the request of the defendant or the defendant's attorney with the consent of the affiant.

(B) The summons shall give notice to the defendant:

(1) of the right to secure counsel of the defendant's choice and, for those who are without financial resources, of the right to assigned counsel in accordance with Rule 122;

(2) that bail will be set at the preliminary hearing; [ and ]

(3) that if the defendant fails to appear on the date, and at the time and place specified on the summons, the case will proceed in the defendant's absence, and a bench warrant will be issued for the defendant's arrest[. ] ; and

(4) if the case is held for court and if the defendant fails to appear without cause at any proceeding for which the defendant's presence is required, including the trial, that the defendant's absence may be deemed a waiver of the right to be present, and the proceeding, including the trial, may be conducted in the defendant's absence.

(C) The following items shall be attached to the summons:

- (1) a copy of the complaint; and
- (2) an order directing the defendant to submit to fingerprinting in all cases in which the defendant has not been fingerprinted, except cases initiated by private complaint.

**Comment**

For the summons procedures in non-summary cases in the Municipal Court of Philadelphia, see Rule 1003(C).

When a case proceeds by summons, the issuing authority also must issue an order requiring the defendant to submit to the administrative processing and identification procedures as authorized by law (such as fingerprinting) that ordinarily occur following an arrest.

**Paragraph (B)(4) requires that the defendant be advised of the consequences of failing to appear for any court proceeding. See Rule 602 concerning a defendant's failure to appear for trial; see also Commonwealth v. Bond, 693 A.2d 220, 223 (Pa. Super. 1997) (“[ A ] defendant who is unaware of the charges against him, unaware of the establishment of his trial date or is absent involuntarily is not absent ‘without cause.’”).**

Paragraph (C)(2), added in 2008, requires that the fingerprint order be sent to the defendant with the summons. The purpose of this change is to ensure that the fingerprinting process in summons cases is completed. See the Criminal History Record Information Act, 18 Pa.C.S. § 9112.

\* \* \* \* \*

**Official Note:** Original Rule 109 adopted June 30, 1964, effective January 1, 1965; suspended January 31, 1970, effective May 1, 1970. New Rule 109 adopted January 31, 1970, effective May 1, 1970; renumbered Rule 110 and amended September 18, 1973, effective January 1, 1974; amended October 22, 1981, effective January 1, 1982; amended November 9, 1984, effective January 2, 1985; amended August 9, 1994, effective January 1, 1995; renumbered Rule 510 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; **amended May 2, 2013, effective June 1, 2013.**

*Committee Explanatory Reports:*

\* \* \* \* \*

Final Report explaining the May 1, 2007 amendments to paragraph (B)(3) published with the Court's Order at 37 Pa.B. 2503 (June 2, 2007).

Final Report explaining the July 10, 2008 amendments to paragraph (C) concerning the fingerprint order published with the Court's Order at 38 Pa.B. 3975 (July 26, 2008).

**Final Report explaining the May 2, 2013 amendments concerning notice of consequences of failing to appear published the Court's Order at 43 Pa.B. 2710 (May 18, 2013).**

**PART D. Proceedings in Court Cases Before Issuing Authorities**

**Rule 540. Preliminary Arraignment.**

\* \* \* \* \*

(G) Unless the preliminary hearing is waived by a defendant who is represented by counsel, or the attorney for the Commonwealth is presenting the case to an indicting grand jury pursuant to Rule 556.2, the issuing authority shall:

\* \* \* \* \*

(2) give the defendant notice, orally and in writing,

(a) of the date, time, and place of the preliminary hearing, **[ and ]**

(b) that failure to appear without **[ good ]** cause for the preliminary hearing will be deemed a waiver by the defendant of the right to be present at any further proceedings before the issuing authority, and will result in the case proceeding in the defendant's absence and in the issuance of a warrant of arrest[ . ], **and**

**(c) if the case is held for court at the time of the preliminary hearing that if the defendant fails to appear without cause at any proceeding for which the defendant's presence is required, including the trial, the defendant's absence may be deemed a waiver of the right to be present, and the proceeding may be conducted in the defendant's absence.**

(H) After the preliminary arraignment, if the defendant is detained, the defendant shall be given an immediate and reasonable opportunity to post bail, secure counsel, and notify others of the arrest. Thereafter, if the defendant does not post bail, he or she shall be committed to jail as provided by law.

(I) If a monetary condition of bail is set, the issuing authority shall accept payment of the monetary condition, as provided in Rule 528, at any time prior to the return of the docket transcript to the court of common pleas.

**Comment**

\* \* \* \* \*

Pursuant to the 2004 amendment to paragraph (G)(2), at the time of the preliminary arraignment, the defendant must be given notice, both orally and in writing, of the date, time, and place of the preliminary hearing. The notice must also explain that, if the defendant fails to appear without **[ good ]** cause for the preliminary hearing, the defendant's absence will constitute a waiver of the right to be present, the case will proceed in the defendant's absence, and a warrant for the defendant's arrest will be issued.

The 2012 amendment to paragraph **[ (F) ]** (G) conforms this rule with the new procedures set forth in Chapter 5, Part E, permitting the attorney for the Commonwealth to proceed to an indicting grand jury without a preliminary hearing in cases in which witness intimidation has occurred, is occurring, or is likely to occur.

**Paragraph (G)(2)(b) was amended in 2013 changing the phrase “without good cause” to “without cause” in reference to whether the defendant's absence at the time of the preliminary hearing permits the preliminary hearing to proceed in the defendant's absence. This amendment is not intended as a change in the standard for making this determination. The change makes the language consistent with the language in Rule 602 describing the standard by which a defendant's absence is judged for the trial to proceed in the defendant's absence. In both situations, the standard is the same.**

Paragraph (G)(2)(c) requires that the defendant be advised of the consequences of failing to appear for any court proceeding. See Rule 602 concerning a defendant's failure to appear for trial; see also *Commonwealth v. Bond*, 693 A.2d 220, 223 (Pa. Super. 1997) (“[ A ] defendant who is unaware of the charges against him, unaware of the establishment of his trial date or is absent involuntarily is not absent ‘without cause.’”).

Nothing in these rules gives the defendant's parents, guardian, or other custodian legal standing in the matter being heard by the court or creates a right of the defendant to have his or her parents, guardian, or other custodian present.

See Rule 1003(D) for the procedures governing preliminary arraignments in the Municipal Court.

See Chapter 5, Part H, Rules 595, 596, 597, and 598, for the procedures governing requests for transfer from criminal proceedings to juvenile proceedings pursuant to 42 Pa.C.S. § 6322 in cases in which the defendant was under the age of 18 at the time of the commission of the alleged offense and charged with one of the offenses excluded from the definition of “delinquent act” in paragraphs (2)(i), (2)(ii), and (2)(iii) of 42 Pa.C.S. § 6302.

**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; amended June 21, 2012, effective in 180 days; amended July 31, 2012, effective November 1, 2012; amended May 2, 2013, effective June 1, 2013.

*Committee Explanatory Reports:*

\* \* \* \* \*

**Final Report explaining the May 2, 2013 amendments concerning notice of consequences of failing to appear published the Court's Order at 43 Pa.B. 2710 (May 18, 2013).**

**Rule 543. Disposition of Case at Preliminary Hearing.**

\* \* \* \* \*

(C) When the defendant has appeared and has been held for court, the issuing authority shall:

(1) set bail as permitted by law if the defendant did not receive a preliminary arraignment; or

(2) continue the existing bail order, unless the issuing authority modifies the order as permitted by Rule 529(A); **[ and ]**

(3) if the defendant has not submitted to the administrative processing and identification procedures as authorized by law, such as fingerprinting pursuant to Rule 510(C)(2), make compliance with these processing procedures a condition of bail[ . ] ; **and**

(4) advise the defendant that, if the defendant fails to appear without cause at any proceeding for which the defendant's presence is required, including the trial, the defendant's absence may be deemed a waiver of the right to be present, and the proceeding may be conducted in the defendant's absence.

(D) In any case in which the defendant fails to appear for the preliminary hearing:

(1) if the issuing authority finds that the defendant did not receive notice of the preliminary hearing by a summons served pursuant to Rule 511, a warrant of arrest shall be issued pursuant to Rule 509(2)(d).

(2) If the issuing authority finds that there was **[ good ]** cause explaining the defendant's failure to appear, the issuing authority shall continue the preliminary hearing to a specific date and time, and shall give notice of the new date, time, and place as provided in Rule 542(G)(2). The issuing authority shall not issue a bench warrant.

(3) If the issuing authority finds that the defendant's absence is without **[ good ]** cause and after notice, the absence shall be deemed a waiver by the defendant of the right to be present at any further proceedings before the issuing authority.

\* \* \* \* \*

**Comment**

\* \* \* \* \*

Paragraph (C) reflects the fact that a bail determination will already have been made at the preliminary arraignment, except in those cases in which, pursuant to a summons, the defendant's first appearance is at the preliminary hearing. See Rules 509 and 510.

Paragraph (C)(4) requires that the defendant be advised of the consequences of failing to appear for any court proceeding. See Rule 602 concerning a defendant's failure to appear for trial; see also *Commonwealth v. Bond*, 693 A.2d 220, 223 (Pa. Super. 1997) (“[ A ] defendant who is unaware of the charges against him, unaware of the establishment of his trial date or is absent involuntarily is not absent ‘without cause.’”).

If the administrative processing and identification procedures as authorized by law, such as fingerprinting required by the Criminal History Record Information Act, 18 Pa.C.S. § 9112, that ordinarily occur following an arrest are not completed previously, when bail is set at the conclusion of the preliminary hearing, the issuing authority must order the defendant to submit to the administrative processing and identification procedures as a condition of bail. See Rule 527 for nonmonetary conditions of release on bail.

If a case initiated by summons is held for court after the preliminary hearing is conducted in the defendant's absence pursuant to paragraph (D)(2) and the defendant has not complied with the fingerprint order issued pursuant to Rule 510(C)(2), the issuing authority must include with the transmittal of the transcript a notice to the court of common pleas that the defendant has not complied with the fingerprint order. See Rule 547.

Nothing in this rule is intended to preclude judicial districts from providing written notice of the arraignment to the defendant at the conclusion of the preliminary hearing when a case is held for court. See Rule 571.



**Paragraphs (D)(2) and (D)(3) were amended in 2013 changing the phrase “good cause” to “cause” in reference to whether the defendant’s absence at the time of the preliminary hearing permits the preliminary hearing to proceed in the defendant’s absence. This amendment is not intended as a change in the standard for making this determination. The change makes the language consistent with the language in Rule 602 describing the standard by which a defendant’s absence is judged for the trial to proceed in the defendant’s absence. In both situations, the standard is the same.**

When a defendant fails to appear for the preliminary hearing, before proceeding with the case as provided in paragraph (D), the issuing authority must determine (1) whether the defendant received notice of the time, date, and place of the preliminary hearing either in person at a preliminary arraignment as provided in Rule 540(G)(2) or in a summons served as provided in Rule 511, and (2) whether the defendant had [ **good** ] cause explaining the absence.

If the issuing authority determines that the defendant did not receive notice, the issuing authority must issue an arrest warrant as provided in Rule 509, and the case will proceed pursuant to Rules 516 or 517. *See* paragraph (D)(1).

If the issuing authority determines that there is [ **good** ] cause explaining why the defendant failed to appear, the preliminary hearing must be continued and rescheduled for a date certain. *See* paragraph (D)(2). For the procedures when a preliminary hearing is continued, see Rule 542(G).

If the issuing authority determines that the defendant received service of the summons as defined in Rule 511 and has not provided [ **good** ] cause explaining why he or she failed to appear, the defendant’s absence constitutes a waiver of the defendant’s right to be present for subsequent proceedings before the issuing authority. The duration of this waiver only extends through those proceedings that the defendant is absent.

When the defendant fails to appear after notice and without [ **good** ] cause, paragraph (D)(3)(a) provides that the case is to proceed in the same manner as if the defendant were present. The issuing authority either would proceed with the preliminary hearing as provided in Rule 542(A), (B), (C) and Rule 543(A), (B), (C), and (D)(3)(b) or (c); or, if the issuing authority determines it necessary, continue the case to a date certain as provided in Rule 542(G); or, in the appropriate case, convene the preliminary hearing for the taking of testimony of the witnesses who are present, and then continue the remainder of the hearing until a date certain. When the case is continued, the issuing authority may issue a bench warrant as provided in paragraph (D)(3)(d), and must send the required notice of the new date to the defendant, thus providing the defendant with another opportunity to appear.

\* \* \* \* \*

**Official Note:** Original Rule 123, adopted June 30, 1964, effective January 1, 1965, suspended January 31, 1970, effective May 1, 1970. New Rule 123 adopted January 31, 1970, effective May 1, 1970; renumbered Rule 143 September 18, 1973, effective January 1, 1974; amended January 28, 1983, effective July 1, 1983; amended 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 142 October 8, 1999, effective January 1, 2000; renumbered Rule 543 and amended March 1, 2000, effective April 1, 2001; amended August 24, 2004, effective August 1, 2005; amended December 30, 2005, effective August 1, 2006; amended March 9, 2006, effective September 1, 2006; 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; amended February 12, 2010, effective April 1, 2010; amended January 27, 2011, effective in 30 days; Comment revised July 31, 2012, effective November 1, 2012; amended October 1, 2012, effective July 1, 2013; **amended May 2, 2013, effective June 1, 2013.**

*Committee Explanatory Reports:*

\* \* \* \* \*

**Final Report explaining the May 2, 2013 amendments concerning notice of consequences of failing to appear published the Court’s Order at 43 Pa.B. 2710 (May 18, 2013).**

**PART G. Procedures Following Filing of Information**

**Rule 571. Arraignment.**

\* \* \* \* \*

(C) At arraignment, the defendant shall be advised [ **of** ]:

- (1) **of** the right to be represented by counsel;
- (2) **of** the nature of the charges contained in the information; [ **and** ]

(3) **of** the right to file motions, including a Request for a Bill of Particulars, a Motion for Pretrial Discovery and Inspection, a Motion Requesting Transfer from Criminal Proceedings to Juvenile Proceedings Pursuant to 42 Pa.C.S. § 6322, and an Omnibus Pretrial Motion, and the time limits within which the motions must be filed[ . ] ; **and**

**(4) if the defendant fails to appear without cause at any proceeding for which the defendant’s presence is required, including trial, that the defendant’s absence may be deemed a waiver of the right to be present, and the proceeding may be conducted in the defendant’s absence.**

If the defendant or counsel has not received a copy of the information(s) pursuant to Rule 562, a copy thereof shall be provided.

\* \* \* \* \*

**Comment**

\* \* \* \* \*

Under paragraph (B), two-way simultaneous audiovisual communication is a form of advanced communication technology.

**Paragraph (C)(4) requires that the defendant be advised of the consequences of failing to appear for any court proceeding. See Rule 602 concerning a defendant’s failure to appear for trial; see also *Commonwealth v. Bond*, 693 A.2d 220, 223 (Pa. Super. 1997) (“[ A ] defendant who is unaware of the charges against him, unaware of the establishment of his trial date or is absent involuntarily is not absent ‘without cause.’”).**

Paragraph (D) is intended to facilitate, for defendants represented by counsel, waiver of appearance at arraignment through procedures such as arraignment by mail. For the procedures to provide notice of court proceedings requiring the defendant's presence, see Rule 114.

See Rule 596 for the procedures for requesting transfer from criminal proceedings to juvenile proceedings pursuant to 42 Pa.C.S. § 6322 in cases in which the defendant was under the age of 18 at the time of the commission of the alleged offense and charged with one of the offenses excluded from the definition of "delinquent act" in paragraphs (2)(i), (2)(ii), and (2)(iii) of 42 Pa.C.S. § 6302. See also Rules 595 (mandatory status conference), 597 (procedures when motion filed), and 598 (place of detention).

**Official Note:** Formerly Rule 317, adopted June 30, 1964, effective January 1, 1965; paragraph (b) amended November 22, 1971, effective immediately; paragraphs (a) and (b) amended and paragraph (e) deleted November 29, 1972, effective 10 days hence; paragraphs (a) and (c) amended February 15, 1974, effective immediately. Rule 317 renumbered Rule 303 and amended June 29, 1977, amended and paragraphs (c) and (d) deleted October 21, 1977, and amended November 22, 1977, all effective as to cases in which the indictment or information is filed on or after January 1, 1978; Comment revised January 28, 1983, effective July 1, 1983; amended October 21, 1983, effective January 1, 1984; amended August 12, 1993, effective September 1, 1993; rescinded May 1, 1995, effective July 1, 1995, and replaced by new Rule 303. New Rule 303 adopted May 1, 1995, effective July 1, 1995; renumbered Rule 571 and amended March 1, 2000, effective April 1, 2001; amended November 17, 2000, effective January 1, 2001; amended May 10, 2002, effective September 1, 2002; amended March 3, 2004, effective July 1, 2004; 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 31, 2012, effective November 1, 2012; **amended May 2, 2013, effective June 1, 2013.**

*Committee Explanatory Reports:*

\* \* \* \* \*

**Final Report explaining the May 2, 2013 amendments concerning notice of consequences of failing to appear published the Court's Order at 43 Pa.B. 2710 (May 18, 2013).**

## CHAPTER 6. TRIAL PROCEDURES IN COURT CASES

### PART A. General Provisions

#### Rule 602. Presence of the Defendant.

(A) The defendant shall be present at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule. The defendant's absence without cause **at the time scheduled for the start of trial or during trial** shall not preclude proceeding with the trial, including the return of the verdict and the imposition of sentence.

(B) A corporation may appear by its attorney for all purposes.

#### Comment

This rule was amended in 2013 to clarify that, upon a finding that the absence was without cause, the trial judge may conduct the trial in the defendant's absence when the defendant fails to appear without cause at the time set for trial or during

trial. The burden of proving that the defendant's absence is without cause is upon the Commonwealth by a preponderance of the evidence. See *Commonwealth v. Scarborough*, 491 Pa. 300, 421 A.2d 147 (1980) (when a constitutional right is waived, the Commonwealth must show by a preponderance of the evidence that the waiver was voluntary, knowing and intelligent); *Commonwealth v. Tizer*, 454 Pa.Super. 1, 684 A.2d 597 (1996). See also *Commonwealth v. Bond*, 693 A.2d 220, 223 (Pa. Super. 1997) ("[A] defendant who is unaware of the charges against him, unaware of the establishment of his trial date or is absent involuntarily is not absent 'without cause.'").

This rule applies to all cases, including capital cases.

A defendant's presence may be deemed waived by the defendant intentionally failing to appear at any stage of the trial after proper notice. See *Commonwealth v. Wilson*, 551 Pa. 593, 712 A.2d 735 (1998) (a defendant, who fled courthouse after jury was impaneled and after subsequent plea negotiations failed, was deemed to have knowingly and voluntarily waived the right to be present); *Commonwealth v. Sullens*, 533 Pa. 99, 619 A.2d 1349 (1992) (when a defendant is absent without cause at the time his or her trial is scheduled to begin, the defendant may be tried *in absentia*).

Nothing in this rule is intended to preclude a defendant from affirmatively waiving the right to be present at any stage of the trial, see, e.g., *Commonwealth v. Vega*, 553 Pa. 255, 719 A.2d 227 (1998) (plurality) (requirements for a knowing and intelligent waiver of a defendant's presence at trial includes a full, on-the-record colloquy concerning consequences of forfeiture of the defendant's right to be present) [ or ]. **Once a defendant appears before the court, he or she cannot waive his or her right to appear in capital case.** See *Commonwealth v. Ford*, 539 Pa. 85, 650 A.2d 433 (1994) (right of defendant to be present at trial of capital offense is transformed into obligation due to gravity of potential outcome).

Nothing in this rule is intended to preclude a defendant from waiving the right to be present by his or her actions, see, e.g., [ *Commonwealth v. Wilson*, 551 Pa. 593, 712 A.2d 735 (1998) (defendant, who fled courthouse after jury was impaneled and after subsequent plea negotiations failed, was deemed to have knowingly and voluntarily waived the right to be present) ] *Illinois v. Allen*, 397 U.S. 337, 343 (1970) ("[A] defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.") and *Commonwealth v. Wilson*, *supra*.

[ Former Rule 1117(c) was moved to Rule 462 (Trial *de novo*) in 2000 as part of the reorganization of the rules. ]

The defendant's right to be present in the courtroom is not absolute. See *Commonwealth v. Boyle*, 498 Pa. 486, 491, n.7, 447 A.2d 250, 253, n.7 (1982) (defendant's presence in chambers and at sidebar is not required where he is represented by counsel.) and *Commonwealth v. Hunsberger*, \_\_\_ Pa. \_\_\_, 58

**A.3d 32, 39-40 (2012)** (“[ A ]lthough a defendant has the clear right to participate in the jury selection process, that right is not compromised where . . . the defendant, who was in the courtroom, was not present at sidebar where his counsel was questioning several venirepersons outside the range of his hearing.”)

**Official Note:** Rule 1117 adopted January 24, 1968, effective August 1, 1968; amended October 28, 1994, effective as to cases instituted on or after January 1, 1995; renumbered Rule 602 and amended March 1, 2000, effective April 1, 2001; amended December 8, 2000, effective January 1, 2001; Comment revised September 21, 2012, effective November 1, 2012; **amended May 2, 2013, effective June 1, 2013.**

*Committee Explanatory Reports:*

\* \* \* \* \*

**Final Report explaining the May 2, 2013 amendments concerning trials conducted in the defendant’s absence published with the Court’s Order at 43 Pa.B. 2710 (May 18, 2013).**

**CHAPTER 10. RULES OF CRIMINAL PROCEDURE FOR THE PHILADELPHIA MUNICIPAL COURT AND THE PHILADELPHIA TRAFFIC COURT**

**PART A. Philadelphia Municipal Court Procedures**

**Rule 1003. Procedure in Non-Summary Municipal Court Cases.**

\* \* \* \* \*

**(D) PRELIMINARY ARRAIGNMENT**

\* \* \* \* \*

(3) At the preliminary arraignment, the issuing authority:

\* \* \* \* \*

(d) also shall inform the defendant:

(i) of the right to secure counsel of choice and the right to assigned counsel in accordance with Rule 122;

(ii) of the day, date, hour, and place for the trial, which shall not be less than 20 days after the preliminary arraignment, unless the issuing authority fixes an earlier date for the trial [ **or the preliminary hearing** ] upon request of the defendant or defense counsel, with the consent of the attorney for the Commonwealth, **and that failure to appear without cause at any proceeding for which the defendant’s presence is required, including trial, may be deemed a waiver of the right to be present, and the proceeding may be conducted in the defendant’s absence, and a warrant of arrest shall be issued;**

(iii) in a case charging a felony, unless the preliminary hearing is waived by a defendant who is represented by counsel, or the attorney for the Commonwealth is presenting the case to an indicting grand jury pursuant to Rule 556.2, of the date, time, and place of the preliminary hearing, which shall not be less than 14 nor more than 21 days after the preliminary arraignment unless extended for cause or the issuing authority fixes an earlier date upon the request of the defendant or defense counsel with the consent of the complainant and the attorney for the Commonwealth; and that failure to appear without [ **good** ] cause for the preliminary hearing will be deemed a waiver by the defendant of the right to be present at any further proceedings before the issuing

authority, and that the case shall proceed in the defendant’s absence, and a warrant of arrest shall be issued; [ and ]

(iv) **if a case charging a felony is held for court at the time of the preliminary hearing, that failure to appear without cause at any proceeding for which the defendant’s presence is required, including trial, the defendant’s absence may be deemed a waiver of the right to be present, and the proceeding may be conducted in the defendant’s absence, and a warrant of arrest shall be issued; and**

(v) of the type of release on bail, as provided in Chapter 5 Part C [ . ] of these rules, and the conditions of the bail bond.

(4) After the preliminary arraignment, if the defendant is detained, he or she shall be given an immediate and reasonable opportunity to post bail, secure counsel, and notify others of the arrest. Thereafter, if the defendant does not post bail, he or she shall be committed to jail, as provided by law.

\* \* \* \* \*

**Comment**

\* \* \* \* \*

The 2012 amendment to paragraph (D)(3)(d)(iii) conforms this rule with the new procedures set forth in Chapter 5, Part E, permitting the attorney for the Commonwealth to proceed to an indicting grand jury without a preliminary hearing in cases in which witness intimidation has occurred, is occurring, or is likely to occur. *See* Rule 556.2. *See* also Rule 556.11 for the procedures when a case will be presented to the indicting grand jury.

**Paragraphs (D)(3)(d)(ii) and (D)(3)(d)(iv) require that, in all cases at the preliminary arraignment, the defendant be advised of the consequences of failing to appear for any court proceeding. See Rule 602 concerning a defendant’s failure to appear for trial. See also Commonwealth v. Bond, 693 A.2d 220 (Pa. Super. 1997) (“[ A ] defendant who is unaware of the charges against him, unaware of the establishment of his trial date or is absent involuntarily is not absent ‘without cause.’”)**

Under paragraph (D)(4), after the preliminary arraignment, if the defendant is detained, the defendant must be given an immediate and reasonable opportunity to post bail, secure counsel, and notify others of the arrest. Thereafter, if the defendant does not post bail, he or she must be committed to jail as provided by law.

\* \* \* \* \*

**Official Note:** Original Rule 6003 adopted June 28, 1974, effective July 1, 1974; amended January 26, 1977, effective April 1, 1977; amended December 14, 1979, effective April 1, 1980; amended July 1, 1980, effective August 1, 1980; amended October 22, 1981, effective January 1, 1982; Comment revised December 11, 1981, effective July 1, 1982; amended January 28, 1983, effective July 1, 1983; amended February 1, 1989, effective July 1, 1989; rescinded August 9, 1994, effective January 1, 1995. New Rule 6003 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; amended March 22, 1996, effective July 1, 1996; the April 1, 1996 effective date extended to July 1, 1996; amended August 28, 1998, effective immediately; renumbered Rule 1003 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; amended August 15, 2005, effective February 1, 2006; amended April 5, 2010, effective April 7, 2010; amended January 27, 2011, effective in 30 days; amended June 21, 2012, effective in 180 days; Comment revised July 31, 2012, effective November 1, 2012; amended April 25, 2013, effective June 1, 2013; **amended May 2, 2013, effective June 1, 2013.**

*Committee Explanatory Reports:*

\* \* \* \* \*

**Final Report explaining the May 2, 2013 amendments concerning proceedings conducted in the defendant's absence published with the Court's Order at 43 Pa.B. 2710 (May 18, 2013).**

### FINAL REPORT<sup>1</sup>

#### *Amendments to Pa.Rs.Crim.P. 510, 540, 543, 571, 602, and 1003*

#### *Trials In Absentia*

On May 2, 2013, effective June 1, 2013, upon the recommendation of the Criminal Procedural Rules Committee, the Court adopted amendments to several rules to clarify the procedures, particularly with regard to trials *in absentia*, when a defendant fails to appear without cause for a court proceeding. The amendments are intended to address the concerns caused by a growing number of cases in which a defendant, after receiving notice of a court proceeding, fails to appear without cause thus leading to unnecessary and lengthy delays in the case.

#### *Development of the Amendments*

Pursuant to the direction of the Pennsylvania Supreme Court, the Committee began an examination of the issues associated with trials *in absentia*. One suggested solution was to make changes to the rules to clarify that, when a defendant who has received notice of a trial proceeding fails to appear for a court proceeding without cause, the court may conduct the court proceeding in the defendant's absence. It was also suggested that the rules should provide that, when the attorney for the Commonwealth requests that the trial be conducted in the defendant's absence, the judge would be required to conduct the trial.

The Committee published proposed amendments to Rules 571 and 602<sup>2</sup> that would require the defendant to be informed that failure to appear at further proceedings could result ultimately in a trial *in absentia*, Rule 571, and would have stated that when a defendant fails to appear without cause, the judge may conduct the trial in the defendant's absence, Rule 602. In addition, the proposed changes to Rule 602 would have required that, if the judge determined that the defendant's absence was without cause and the Commonwealth requested that the trial proceed, the trial must be conducted.<sup>3</sup>

At the same time, the Committee also examined the law concerning trials in absentia. Specifically, the Committee reviewed the provisions in the Sixth Amendment of the United States Constitution, Article 1, § 9 of the Pennsylvania Constitution, and Rule of Criminal Proce-

dures 602(A) that guarantee the right of the accused to be present in court at every stage of a criminal trial, including the empanelling of the jury, the return of the verdict, and the imposition of sentence. However, a defendant may waive this right, expressly or by his or her actions. *See, e.g. Illinois v. Allen*, 397 U.S. 337, 343 (1970) (“[A] defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.”).

These concepts have been codified in Rule 602(A) since its adoption as then-Rule 1117(A) in 1967. A clarification was added to the Comment in 1998 following the decision in *Commonwealth v. Wilson*, 712 A.2d 735 (Pa. 1998), a case in which the defendant was deemed to have knowingly and voluntarily waived by his actions the right to be present when he fled the courthouse after the jury was impaneled.

However, when a defendant is unaware of the charges against him, unaware of the establishment of his trial date or is absent involuntarily, he is not absent “without cause” and therefore cannot be tried *in absentia*. *Commonwealth v. Bond*, 693 A.2d 220 (Pa.Super. 1997) (citing *Commonwealth v. Sullens*, 533 Pa. 99, 619 A.2d 1349 (1992)). *See also Commonwealth v. Hill*, 737 A.2d 255, (Pa.Super. 1999).

As a result of the foregoing review and the publication responses, the Committee concluded that providing some further guidance regarding the extent of the allowance of trials *in absentia*, especially the prerequisites for such trials such as the notice to the defendant of the effects of a failure to appear, would be beneficial.

Rule 602(A) therefore has been amended to read “The defendant's absence without cause at the time scheduled for the start of trial or during trial shall not preclude proceeding with the trial, including the return of the verdict and the imposition of sentence.” The new language emphasizes to trial judges that a failure to appear initially for trial is sufficient to hold the trial *in absentia*.

As noted above, the published proposal included a change to Rule 602 that would have required the trial judge, after a finding that the defendant is absent without cause, to proceed with a trial *in absentia* when it is requested by the Commonwealth. Some members supported this provision, believing that it encouraged the proper use of the trial *in absentia* mechanism while not impinging upon the trial judge's discretion since the judge must make an independent finding that the defendant's absence was without cause before being able to proceed to try the case in the defendant's absence.

Upon reflection, the Committee concluded that there may be circumstances outside of a simple determination of absence without cause that would argue against a trial *in absentia* and for which the trial judge should retain the discretion to determine. Therefore, the amendment of Rule 602 does not require the trial judge to hold the trial *in absentia* upon the request of the Commonwealth but rather permits the trial judge to make that determination on a case-by-case basis.

One publication comment suggested that the published amendments required the defendant to prove that the absence was with cause. The Committee believed this is an erroneous reading of the proposed amendment. The Committee concluded that, based upon existing case law,

<sup>1</sup> The Committee's Final Reports should not be confused with the official Committee Comments to the rules. Also note that the Supreme Court does not adopt the Committee's Comments or the contents of the Committee's explanatory Final Reports.

<sup>2</sup> The proposed amendments were published for comment at 42 Pa.B. 5732 (September 8, 2012).

<sup>3</sup> The Committee received several responses commenting on the proposal, in particular with regard to the removal of the judge's discretion whether to conduct a trial in the defendant's absence.

the burden of proof rests with the Commonwealth to show by a preponderance of the evidence that the defendant's absence was without cause. This also is consistent with current practice in which the trial judge will require the Commonwealth to determine if the defendant is unavailable for trial by checking with hospitals, other jails, etc. Accordingly, a statement of the burden of proof has been added to the Rule 602 Comment.

#### *Applicability to Capital Cases*

In addressing a specific question raised during examination of this issue, the Committee agreed that the revised proposal should include capital defendants as being subject to potential trials *in absentia*. The members noted that the situation in which a capital defendant fails to appear for trial is going to be a very rare occurrence since capital defendants are not released on bail. The occasions in which this might occur would be unusual, for example, where the defendant has escaped from pre-trial confinement. The Committee concluded that the situations in which this would arise are precisely the ones for which a trial *in absentia* would be desirable.

In reaching this conclusion, the Committee considered the holding in *Commonwealth v. Ford*, 539 Pa. 85, 650 A.2d 433 (1994) (right of defendant to be present at trial of capital offense is transformed into obligation due to gravity of potential outcome) but concluded that its application is limited to the situation in which a defendant is present before the court and seeks the court's permission to waive his or her presence during trial. The Committee agreed that a defendant who has escaped or fled should not be able to assert the obligation to be present to challenge a trial *in absentia* when the defendant was solely responsible for making that presence impossible. Therefore, the Rule 602 Comment has been revised to state that the rule applies to all cases, including capital cases.

Additionally, the Committee previously had under consideration a separate proposal that would add a cross-reference to *Commonwealth v. Ford*, *supra*, to the Rule 602 Comment. See Publication Report, 42 Pa.B. 4568 (July 21, 2012). This addition was incorporated into the current amendments and the reference to *Ford* has been added, along with a parenthetical describing the extent of its application.

#### *Warnings of Trial In Absentia Earlier in Proceedings*

The Committee agreed that when defendants fail to appear for the preliminary hearing and subsequently also fail to appear for trial, the option to conduct the trial in the defendant's absence should be available to the judge so long as appropriate notice of the trial date, time and place has been provided to the defendant. Therefore, additional warning language has been added to Rules 510, 540, 543, and 1003, similar to the warning being added to Rule 571, that requires the defendant to be informed that failure to appear at further proceedings could result ultimately in a trial *in absentia*.

The Committee considered whether summons cases should be included in this, given that the defendant was not directly before the judge when advised of the perils of failing to appear. Rule 510(B)(3) gives notice in the summons that failing to appear without cause will result in the preliminary hearing being conducted in the defendant's absence. Thus, the rules do not greatly distinguish between notice provided in the summons or at a preliminary arraignment in order for the preliminary hearing to proceed in the defendant's absence.

However, the provisions in these amendments permitting a trial in the defendant's absence are premised on the requirement that the defendant has received actual notice of the trial date. The Committee noted that it is unlikely that most judicial districts will be able to provide information by the summons or at the preliminary arraignment that would constitute sufficient notice of all further proceedings after the preliminary hearing, including the date of the trial. The Committee, however, agreed that, if this notice could be provided, the option for a trial *in absentia* should be available and the defendant must be warned of the possibility.

#### *"Without Cause" Terminology*

During its discussions, the Committee compared the use of the phrase "without cause" in Rule 602, referring to failure to appear for trial, and the phrase "without good cause" in Rule 540, referring to failure to appear for the preliminary hearing. The Committee concluded that these terms are referring to the same standard and that the terminology should be consistent. The Committee concluded that the adjective "good" is not a particularly helpful description and so should be removed from Rule 540. To ensure that this change to Rule 540 is not mistaken as a lessening of the standard, language has been added to the Comments to Rules 540 and 602 explaining that no change in the standard was intended.

[Pa.B. Doc. No. 13-902. Filed for public inspection May 17, 2013, 9:00 a.m.]

## Title 252—ALLEGHENY COUNTY RULES

### ALLEGHENY COUNTY

#### Civil and Family Rule of the Court of Common Pleas; No. 109 of 2013 Rules Doc.

#### Amended Order of Court

*And Now*, to-wit, this 30th day of April, 2013, *It Is Hereby Ordered, Adjudged and Decried* that the following Amended Rule of the Court of Common Pleas and Allegheny County, Pennsylvania, Civil and Family Division, adopted by the unanimous proxy vote of the Board of Judges on April 29th, 2013, shall be effective upon publication on the UJS webportal:

#### Rule 1301 Arbitration Limit

*By the Court*

DONNA JO McDANIEL,  
*President Judge*

#### Local Rule 1301. Scope.

(1) The following civil actions shall first be submitted to and heard by a Board of Arbitrators:

(a) Civil actions, proceedings and appeals or issues therein where the demand is for \$35,000 or less (exclusive of interest and costs);

(b) Replevin without bond and replevin with bond once bond has been set by the Court;

(c) Appeals from final judgments of Magisterial District Judges; and

(d) Matters transferred to Compulsory Arbitration by the Court even though the original demand may have exceeded \$35,000.



(2) The following civil actions are not subject to Compulsory Arbitration as set forth, above:

(a) Actions seeking only an accounting;

*Note:* In an action seeking both money damages and an accounting, a Board of Arbitrators may award money damages but may not order an accounting.

(b) Actions seeking only equitable relief; and

*Note:* In an action seeking both money damages and equitable relief, a Board of Arbitrators may award money damages but may not order equitable relief.

(c) Actions in which the Commonwealth is a party defendant or an employee of the Commonwealth is a party defendant under the provisions of 42 Pa.C.S., Chapter 85B (relating to actions against Commonwealth parties).

(3) A Board of Arbitrators may not enter an award in favor of any party in excess of \$35,000 (exclusive of interest and costs).

*Note:* While a Board of Arbitrators may hear a lawsuit in which any party claims an amount in excess of \$35,000, the award of the Board of Arbitrators to any party may not exceed \$35,000 (exclusive of interest and costs). However, with the agreement of all parties, a Board of Arbitrators may award up to the amount agreed upon in excess of \$35,000 if all parties also agree that the arbitration award is final and cannot be appealed to Court.

(4) If a party files a counterclaim or a cross-claim seeking an award in excess of \$35,000 (exclusive of interests and costs), any party may file a petition to transfer the entire case to the General Docket. At the discretion of a judge, such a counterclaim or cross-claim may be severed and transferred to the General Docket.

Effective \_\_\_\_\_

[Pa.B. Doc. No. 13-903. Filed for public inspection May 17, 2013, 9:00 a.m.]

## DISCIPLINARY BOARD OF THE SUPREME COURT

### Notice of Administrative Suspension

Notice is hereby given that the following attorneys have been Administratively Suspended by Order of the Supreme Court of Pennsylvania dated April 4, 2013, pursuant to Rule 111(b) Pa.R.C.L.E., which requires that every active lawyer shall annually complete, during the compliance period for which he or she is assigned, the continuing legal education required by the Continuing Legal Education Board. The Order became effective May 3, 2013 for Compliance Group 2 due August 31, 2012.

Notice with respect to attorneys having Pennsylvania registration addresses, which have been Administratively Suspended by said Order, was published in the appropriate county legal journal.

Berman, William Steven  
Marlton, NJ

Bolechowski, Michael W.  
San Francisco, CA

Boler, Megan Denise  
Charlotte, NC

Brady, Edward J.  
Westerville, OH

Breit, William David  
Virginia Beach, VA

Brown, Stephanie Julia  
Sewell, NJ

Cabot, Howard Ross  
Phoenix, AZ

Criste, Virginia S.  
Palm Desert, CA

Diego, Beverly L.  
Brooklyn, NY

Glover, Lee R.  
West Paterson, NJ

Howard, James Elliot  
Brooklyn, NY

Hudak, Gerard Paul  
Marlton, NJ

Jacobs, Jr., William Albert  
Charlotte, NC

Kane, Thomas  
Princeton, NJ

LeFebvre, Paul A.  
Roseland, NJ

Lubin, David S.  
Beachwood, NJ

Makanaki, Elisha  
Fayetteville, NC

Marshall, Thomas S.  
Washington, DC

McClenney, Joan M.  
Alexandria, VA

O'Callaghan, Sean James J.  
Arlington, VA

Paul, Michael G.  
Metuchen, NJ

Perlmutter, Ruben George  
Dallas, TX

Sawyer, Kenneth  
Cushing, ME

Shea, Edmund J.  
Kearny, NJ

Sheldon, Scott Aaron  
Marlton, NJ

Spitkovsky, Julie  
New York, NY

Taylor, Christopher Dwayne  
Pemberton, NJ

Tran, Phong Ngoc  
Mount Laurel, NJ

Tyminski, Patricia Daffodil  
Los Angeles, CA

Weisberg, Martin S.  
Cherry Hill, NJ

Winitzky, Jeffrey Daniel  
Mount Laurel, NJ

Wudowsky, Claire Leah  
Vienna, VA

Zagorski, John A.  
Millstone Township, NJ

SUZANNE E. PRICE,  
*Attorney Registrar*  
*The Disciplinary Board of the*  
*Supreme Court of Pennsylvania*

[Pa.B. Doc. No. 13-904. Filed for public inspection May 17, 2013, 9:00 a.m.]

---