

# THE COURTS

## Title 234—RULES OF CRIMINAL PROCEDURE

[ 234 PA. CODE CH. 1 ]

### Proposed Rescission of Rule 107 and Adoption of New Rule 107

The Criminal Procedural Rules Committee is planning to propose to the Supreme Court of Pennsylvania the rescission of current Rule 107 (Contents of Subpoenas) and the adoption of new Rule 107 (Subpoenas) for the reasons set forth in the accompanying explanatory report. Pursuant to Pa.R.J.A. No. 103(a)(1), the proposal is being published in the *Pennsylvania Bulletin* for comments, suggestions, or objections prior to submission to the Supreme Court.

Any reports, notes, or comments in the proposal have been inserted by the Committee for the convenience of those using the rules. They neither will constitute a part of the rules nor will be officially adopted by the Supreme Court.

Additions to the text of the proposal are bolded; deletions to the text are bolded and bracketed.

The Committee invites all interested persons to submit comments, suggestions, or objections in writing to:

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All communications in reference to the proposal should be received by no later than Friday, June 5, 2015. E-mail is the preferred method for submitting comments, suggestions, or objections; any e-mailed submission need not be reproduced and resubmitted via mail. The Committee will acknowledge receipt of all submissions.

*By the Criminal Procedural  
Rules Committee*

PAUL M. YATRON,  
*Chair*

#### Annex A

### TITLE 234. RULES OF CRIMINAL PROCEDURE CHAPTER 1. SCOPE OF RULES, CONSTRUCTION AND DEFINITIONS, LOCAL RULES

#### PART A. Business of the Courts

Rule 107. [ Contents of Subpoena ] (Reserved).

[ A subpoena in a criminal case shall order the witness named to appear before the court at the date, time, and place specified, and to bring any items identified or described. The subpoena shall also state on whose behalf the witness is being ordered to testify and the identity, address, and phone number of the attorney, if any, who applied for the subpoena.

#### Comment

The form of subpoena was deleted in 1985 because it is no longer necessary to control the specific form of subpoena by rule.

It is intended that the subpoena shall be used not only for trial but also for any other stage of the proceedings when a subpoena is issuable, including preliminary hearings, hearings in connection with pretrial and post-trial motions, *etc.*

When the subpoena is for the production of documents, records, or things, these should be specified. ]

**Official Note:** Previous Rule 9016 adopted January 28, 1983, effective July 1, 1983; rescinded November 9, 1984, effective January 2, 1985. Present Rule 9016 adopted November 9, 1984, effective January 2, 1985; renumbered Rule 107 and amended March 1, 2000, effective April 1, 2001; rescinded , 2015, effective , 2015, and replaced by new Rule 107.

*Committee Explanatory Reports:*

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**Report explaining the rescission of Rule 107 and the adoption of new Rule 107 establishing procedures for the issuance, service, and content of subpoenas published for comment at 45 Pa.B. 2141 (May 2, 2015).**

*(Editor's Note:* The following rule is new and printed in regular type to enhance readability.)

#### Rule 107. Subpoenas.

##### (A) ISSUANCE OF SUBPOENA

##### (1) COURT OF COMMON PLEAS

Upon the request of a party, the clerk of courts shall issue a subpoena. The subpoena shall be signed and under the seal of the court.

##### (2) MINOR JUDICIARY

Upon the request of a party, the issuing authority may issue a subpoena.

(a) The individual requesting the subpoena shall provide the issuing authority with the information required in paragraph (C).

(b) If the subpoena is to be issued, the issuing authority shall fill in the information provided.

(c) The subpoena shall be signed by and under the seal of the issuing authority.

##### (B) SERVICE OF SUBPOENA

(1) Subpoenas in criminal proceedings shall be served:

(a) by a competent adult personally delivering the subpoena to a witness; or

(b) by certified, registered, or first class mail to a witness; or

(c) by carrier service delivering the subpoena to a witness.

(2) If a subpoenaed witness is under the age of 18, a parent or guardian of the witness shall be served a copy of the subpoena. A subpoena may be served on a witness under the age of 18 without the requirement of serving a parent or guardian if permitted by the judge for good cause shown.

(3) The party requesting the subpoena shall be responsible for the service of the subpoena.

## (C) CONTENTS OF SUBPOENA

A subpoena in a criminal proceeding shall:

- (1) order the witness named to appear before the court at the date, time, and place specified to give testimony and to bring any records, books, papers, documents, data, or other items identified or described in the subpoena;
- (2) state on whose behalf the witness is being ordered to testify;
- (3) state the name, address, and phone number of the individual who applies for the subpoena; and
- (4) inform the witness that the failure to comply with the subpoena may be considered by the court as grounds for contempt and that a bench warrant may be issued for the witness' arrest.

**Comment**

It is intended that the subpoena will be used not only for summary trials or trials in the courts of common pleas and the Philadelphia Municipal Court, but also for any other stage of the proceedings before the minor judiciary, Philadelphia Municipal Court, or common pleas court when a subpoena is issuable, including preliminary hearings, hearings in connection with pretrial and post-trial motions, *etc.* For the procedures governing investigating grand jury subpoenas, see 42 Pa.C.S. § 4548.

The subpoenas issued by the judges of the Philadelphia Municipal Court should be issued pursuant to paragraph (A)(1).

When issuing a subpoena pursuant to paragraph (A)(2), the issuing authority may limit the scope of the subpoena to persons, documents, or things that are relevant to the cause of action before the issuing authority.

All subpoenas issued pursuant to paragraph (A)(2) must be signed by a judge of the court issuing the subpoena. The signature may be in any of the forms of signature authorized in the Rule 103 definition of "signature."

The service provisions in paragraph (B) apply to subpoenas issued by the judges of the courts of common pleas, the magisterial district courts, the Philadelphia Municipal Court, and the Pittsburgh Municipal Court.

It is intended under paragraph (B)(2) that parties subpoenaing witnesses under the age of 18 are responsible for any additional costs for the service of the subpoena on a parent or guardian.

Nothing in paragraph (B)(2) gives the parent or guardian of a witness under the age of 18 legal standing in the matter being heard or creates a right for the minor witness to have his or her parent or guardian present. In addition, lack of required notice to a parent or guardian does not prevent the minor witness from appearing and testifying.

As noted in paragraph (B)(3), service is the responsibility of the party requesting the subpoena not the court.

Concerning service of subpoenas by first class mail and proof of service, see 42 Pa.C.S. § 5904.

Paragraph (C) sets forth the mandatory contents of the subpoena. Although this paragraph does not require that the address of the person being subpoenaed be included on the subpoena, this is not intended to prohibit inclusion of the address on the subpoena for purposes of service. When the subpoena is for the production of records, books, papers, documents, photographs, data, or other

items, these must be specified in the subpoena. Concerning subpoenas for medical records, see 42 Pa.C.S. §§ 6151—6160.

Although paragraph (C)(1) requires the name of the witness to be included in the subpoena, in cases in which a specific name is not known, for example when the subpoena is for records from a hospital and the name of the record keeper is not available at the time the subpoena is issued, this requirement may be satisfied by providing a description of the person to receive the subpoena such as "records custodian."

Before issuing a bench warrant for failure to obey the subpoena, the judge or issuing authority must ensure that the subpoenaed person has received sufficient notice of the proceeding. The requesting party has the burden of presenting proof of service. If the judge determines the person did not have sufficient notice, the judge may grant a continuance and order that the person be served the subpoena either in person or by certified mail, return receipt requested.

For the procedures following the execution of a bench warrant, see Rules 150 and 151.

The scope of an issuing authority's authority to enforce a subpoena is limited by statute. See 42 Pa.C.S. §§ 4137(d), 4138(d), and 4139(d) that provide, *inter alia*, issuing authorities "shall have the power to issue an attachment by means of a warrant" to have the witness brought before the issuing authority for a hearing on the failure to comply with the subpoena. See also, Rule 140(B)(1).

**Official Note:** Previous Rule 9016 adopted January 28, 1983, effective July 1, 1983; rescinded November 9, 1984, effective January 2, 1985. Present Rule 9016 adopted November 9, 1984, effective January 2, 1985; renumbered Rule 107 and amended March 1, 2000, effective April 1, 2001; rescinded , 2015, effective , 2015, and replaced by new Rule 107. New Rule 107 adopted , 2015, effective , 2015.

*Committee Explanatory Reports:*

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

Report explaining the rescission of Rule 107 and the adoption of new Rule 107 establishing procedures for the issuance, service, and content of subpoenas published for comment at 45 Pa.B. 2141 (May 2, 2015).

**REPORT*****Proposed Rescission of Pa.R.Crim.P. 107 and Adoption of New Pa.R.Crim.P. 107*****Procedures for Issuance and Service of Subpoenas***Background*

The Committee at various times since 2004 has worked on developing procedures that would govern subpoenas. After extensive study into the different procedures governing subpoenas in Pennsylvania, including the formulation of a subcommittee, study of the various rules and statutes governing subpoenas in other forums,<sup>1</sup> and the publication of two prior versions of this proposal,<sup>2</sup> as well as discussion with the Court regarding the proposal, the

<sup>1</sup> See, e.g., the Rules of Criminal Procedure (Criminal Rules) (Rule 107), the Rules of Civil Procedure (Civil Rules) (Rules 234.1, 234.2, 234.5, and 234.6), and the Rules of Civil Procedure Governing Actions and Proceedings Before Magisterial District Judges (MDJ Rules) (Rules 213 and 214), and 42 Pa.C.S. §§ 5904 (Subpoena of Witnesses) and 5905 (Subpoenas).

<sup>2</sup> See 35 Pa.B. 1556 (March 5, 2005) and 35 Pa.B. 5676 (October 15, 2005).

Committee concluded that the rules would benefit from providing more clarity as to the procedures for the issuance and service of subpoenas, particularly in the magisterial district courts. The proposed rule changes would create a new Rule 107 that would set forth the procedures for the issuance and service of subpoenas in addition to the provisions contained in current Rule 107 regarding content. They are not intended to change existing practice.

#### *Provisions of New Rule 107*

##### *A. Issuance*

Paragraph (A)(1) would set forth the procedures for the issuance of a subpoena in cases pending before the common pleas court. It would include the requirements that the clerk of courts in cases in the court of common pleas is to issue a subpoena upon the request of a party and that the subpoena is to be signed by a judge. The Committee anticipates that the signature will be affixed by any of the means provided in the definition of "signature" in Rule 103, including the use of a signature stamp or electronically.

Paragraph (A)(2) would provide the procedures for the issuance of a subpoena in cases pending before the minor judiciary. The issuing authority would be given some discretion in paragraph (A)(2) comparable to the discretion given magisterial district judges in civil cases pursuant to MDJ Rule 214. Additionally, the requesting individual would be required to provide the information required by paragraph (C) for the contents of the subpoena, and the issuing authority is required to fill in the subpoena with this information. All subpoenas issued by a member of the minor judiciary must be signed by the issuing authority.

The version of this proposal published in October 2005 included a proposal to permit the issuance of subpoenas by an attorney under his or her authority as an officer of the court, as is currently permitted in the federal courts under paragraph (D)(3) of F.R.Civ.P. 45 (Subpoena).<sup>3</sup> However, in more recent discussions, several members expressed a concern with the possibility of abuse in a procedure in which the actions of a party could be clothed in the authority of the court without any form of review by that issuing authority, particularly when the consequences for failure to obey a subpoena include the issuance of a bench warrant. Therefore, this provision was not included in the current proposal.

##### *B. Service and Parental Notification*

Paragraph (B) would set forth the requirements for service of the subpoena, whether issued by a common pleas judge or magisterial district judge. The proposed service provisions in paragraph (B) are a combination of provisions from Rule 576(B) and from Minor Court Rule 214, and provide for personal service by a competent adult; service by certified, registered, or first class mail; or service by a carrier service.

Earlier versions of this proposal<sup>4</sup> had included a requirement that the person serving a subpoena issued by a magisterial district judge file a certificate of service. During more recent discussions, several members expressed concern about this provision, suggesting that it is an unnecessary step in a criminal case, so that provision is not included in the new draft. However, the Comment

would note that, in order for a bench warrant to be issued for failure to obey the subpoena, the requesting party has the burden of presenting proof of service.

The provisions concerning parental notification when the subpoenaed witness is under the age of 18 are included in paragraph (B)(2). The Committee recognized that not all individuals under the age of 18 are under the supervision or control of a parent or guardian and some are emancipated. In view of this, a provision similar to Juvenile Rule 123(E)(2) that would provide an exception to the service requirement when permitted by a judge for good cause shown has been added as the second sentence of paragraph (B)(2). Additionally, the Comment explains that the party subpoenaing the minor bears the responsibility for the costs of service on the parent, that the service provision does not provide legal standing or give the parent or guardian any right to be present, and that lack of the required notice does not prevent the minor witness from appearing and testifying.

Paragraph (B)(3) would provide that the party requesting the subpoena shall be responsible for the service of the subpoena. This provision was added in response to the report of the practice in some jurisdictions that the police were insisting that MDJs be responsible for serving subpoenas requested by the police.

The service provisions in paragraph (B) are a combination of provisions from Rule 576(B) and from Minor Court Rule 214, and provide for personal service by a competent adult; service by certified, registered, or first class mail; or service by a carrier service.

##### *C. Contents*

Paragraph (C) sets forth the contents of the subpoena, incorporating the provisions in current Rule 107. Additionally, paragraph (C)(3) requires that the subpoena include the name and address for service on the person being subpoenaed. Paragraph (C)(4) provides that the subpoena shall "inform the witness that the failure to comply with the subpoena may be considered by the court as grounds for contempt and that a bench warrant may be issued for the witness' arrest."

##### *D. Comment*

In addition to the provisions noted above, the Comment to new Rule 107 would include an explanation that subpoenas issued by Philadelphia Municipal Court judges are to be issued as provided in paragraph (A)(1). In addition, the Comment emphasizes that the subpoenas must be signed by a judge of the issuing court (common pleas court, Philadelphia Municipal, or magisterial district courts), and includes a cross-reference to the Criminal Rule 103 definition of "signature" to make it clear that the subpoena may be signed using any of the forms of signature set forth in Rule 103.

The Comment also explains that the party subpoenaing the minor bears the responsibility for the costs of service on the parent, that the service provision does not provide legal standing or give the parent or guardian any right to be present, and that lack of the required notice does not prevent the minor witness from appearing and testifying. The Comment also includes cross-references to 42 Pa.C.S. §§ 4137, 4138, and 4139 and Pa.R.Crim.P. 140 to make it clear that subpoenas issued pursuant to paragraph (B)(1) are subject to the minor court contempt powers.

[Pa.B. Doc. No. 15-804. Filed for public inspection May 1, 2015, 9:00 a.m.]

<sup>3</sup> See 35 Pa.B. 5676 (October 15, 2005).

<sup>4</sup> *Ibid.*