THE COURTS

Title 207—JUDICIAL CONDUCT

PART II. CONDUCT STANDARDS

[207 PA. CODE CH. 33]

Formal Advisory Opinion 2015-4

Notice is hereby given that the Ethics Committee of the Pennsylvania Conference of State Trial Judges has issued Formal Advisory Opinion 2015-4 Disqualification and Recusal which is set forth as follows.

EDWARD D. REIBMAN,
Chairperson
Ethics Committee
Pennsylvania Conference of State Trial Judges

Annex A

TITLE 207. JUDICIAL CONDUCT

PART II. CONDUCT STANDARDS

CHAPTER 33. CODE OF JUDICIAL CONDUCT

Subchapter B. FORMAL OPINIONS

§ 15-4. Disqualification and Recusal.

A function of The Ethics Committee of the Pennsylvania Conference of State Trial Judges (the "Committee") is to provide guidance regarding ethical concerns to judicial officers subject to the Code of Judicial Conduct (the "Code"). Inquiries regarding disqualification and recusal are among the more numerous questions addressed to the Committee. Because of the frequency of these inquiries, the Committee issues this Formal Advisory Opinion to assist judges on a matter of general importance to judicial officers subject to the Code.

This Formal Advisory Opinion is general in nature, does not address a particular situation, and is not in response to a specific request for an advisory opinion from a judicial officer. Therefore, the "rule of reliance" set forth in Preamble (8) of the Code does not apply to this Formal Advisory Opinion.[1]

"Disqualification" and "Recusal"

The terms "disqualification" and "recusal" have generated some confusion. According to the American Bar Association's Joint Commission to Evaluate the Model Code of Judicial Conduct, the terms are used interchangeably in many jurisdictions.[2] In fact, Rules 2.7 and 2.11 of the ABA Model Code, which are the bases of Rules 2.7 and 2.11 of the *Pennsylvania Code*, refer only to "disqualification." The Model Code does not refer to "recusal."

Rules 2.7 and 2.11 of the *Pennsylvania Code* and their respective Comments use both terms and seem to recognize a distinction between them. Rule 2.7 of the *Code* provides:

> A judge shall hear and decide matters assigned to the judge, except where the judge has recused himself or herself or when disqualification is required by Rule 2.11 or other law.

Comment (1) to Rule 2.7 states, in pertinent part:

> . . . Although there are times when disqualification or recusal is necessary . . . [u]nwarranted disqualification or recusal may bring public disfavor to the court, and to the judge personally . . . [and] . . . a judge should not use disqualification or recusal to avoid cases that present difficult, controversial, or unpopular issues.

Comment (2) to Rule 2.7 provides:

> This Rule [2.7] describes the duty of a judge to decide matters assigned to the judge. However, there may be instances where a judge is disqualified from presiding over a particular matter or shall recuse himself or herself from doing so. A judge is disqualified from presiding over a matter when a specified disqualifying fact or circumstance is present. *See* Rule 2.11. The concept of recusal envisioned in this Rule overlaps with disqualification. In addition, however, a judge may recuse himself or herself from presiding over a matter even in the absence of a disqualifying fact or circumstance where—in the exercise of discretion, in good faith, and with due consideration for the general duty to hear and decide matters—the judge concludes that prevailing facts and circumstances could engender a substantial question in reasonable minds as to whether disqualification nonetheless should be required. . . .

Comment (3) to Rule 2.7 states:

> A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification or recusal, even if the judge believes there is no proper basis for disqualification or recusal.

Rule 2.11(A)(4) states:

> . . . There shall be a rebuttable presumption that recusal or disqualification is not warranted when a contribution or reimbursement. . . .

And Comment (3) to Rule 2.6 states:

> Judges must be mindful of the effect settlement discussions can have, not only on their objectivity and impartiality, but also on the appearance of their objectivity and impartiality. Despite a judge's best efforts, there may be instances when information obtained during settlement discussions could influence a judge's decision making during trial, and, in such instances, the judge should consider whether recusal may be appropriate. See Rule 2.11(A)(1).

In general, "disqualification" is a specified fact, circumstance or condition that makes one ineligible or unfit to serve, or otherwise deprives the judge of the power to preside. "Recusal" is the act of removing or absenting oneself in a particular case because the judge concludes that the prevailing facts or circumstances could engender a substantial question in reasonable minds whether the judge can be impartial.[3] Again,

[1] Preamble (8) states:
"The Ethics Committee of the Pennsylvania Conference of State Trial Judges is designated as the approved body to render advisory opinions regarding ethical concerns involving judges, other judicial officers and judicial candidates subject to the Code of Judicial Conduct. Although such opinions are not, *per se*, binding upon the Judicial Conduct Board, the Court of Judicial Discipline or the Supreme Court of Pennsylvania, action taken in reliance thereon and pursuant thereto shall be taken into account in determining whether discipline should be recommended or imposed."

[2] American Bar Association's Joint Commission to Evaluate the Model Code of Judicial Conduct, The Revised Model Code of Judicial Conduct, Rule 2.11, Comment (1).

[3] *Black's Law Dictionary*, 7th Ed.

. . . a judge may recuse himself or herself from presiding over a matter even in the absence of a disqualifying fact or circumstance where—in the exercise of discretion, in good faith, and with due consideration for the general duty to hear and decide matters—the judge concludes that prevailing facts and circumstances could engender a substantial question in reasonable minds as to whether disqualification nonetheless should be required.

Rule 2.7 Comment (2).[4]

Historical Perspective

The current Code became effective on July 1, 2014. Prior to that time, Canon 3 C of the then-existing code, titled "Disqualification," stated:

Judges *should* disqualify themselves in a proceeding in which their impartiality might reasonably be questioned. . . .

Code of Judicial Conduct (Pre-July 1, 2014), Canon 3 C. (Emphasis added.) Some have argued use of the word "should" made the command aspirational or permissive instead of mandatory, leaving the decision to recuse largely to the discretion of the judge.

The Committee rarely gave inquiring judges firm advice about the course of conduct to be taken in a particular situation; it simply issued a memorandum setting forth what it considered to be the relevant case law the judge should consider when exercising his/her discretion. A majority of the Committee felt only the Supreme Court or the Court of Judicial Discipline had the authority to relieve a judge of his/her duty to decide assigned matters; and, as a practical matter, if the Committee advised a judge to recuse in a particular situation, the judge would be almost obliged to follow that advice to avoid having to defend a potential charge of unethical conduct if the judge decided to reject the Committee's advice and proceed to hear the matter. Furthermore, many of the operative facts bearing on recusal are best ascertained and weighed by the inquiring judge rather than by the Committee.

The current Code clarifies the use of the word "should." Preamble (6) provides:

Where a Rule contains a permissive term, such as "may" or "should," the conduct being addressed is committed to the personal and professional discretion of the judge or candidate in question, and no disciplinary action should be taken for action or inaction within the bounds of such discretion. . . .

The implication is the use of the word "shall" connotes an obligation.[5] It also clarified that a judge acting within the bounds of discretion should suffer no disciplinary action.

Canon 1

Canon 1 and the Rules under it reflect the broad, general, overarching principles of the Code. Canon 1 states:

A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

And Rule 1.2 states:

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.[6]

Although the Rules under Canon 1, including Rule 1.2, standing alone, can be the basis for discipline, the succeeding Canons and their associated Rules more specifically address situations concerning the judge performing the duties of judicial office (Canon 2), engaging in personal and extrajudicial activities (Canon 3), and participating in political or campaign activities (Canon 4).

Rules 2.7 (Responsibility to Decide) and 2.11 (Disqualification)

As noted above, Rule 2.7 requires ("shall") a judge to hear and decide assigned matters unless the judge recuses himself or herself, or is disqualified by Rule 2.11 or other law. Rule 2.11(A) provides:

A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

(2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:

a. a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

b. acting as a lawyer in the proceeding;

c. a person who has more than a de minimis interest that could be substantially affected by the proceeding;

or

d. likely to be a material witness in the proceeding.

(3) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or is a party to the proceeding.

(4) The judge knows or learns that a party, a party's lawyer, or the law firm of a party's lawyer has made a direct or indirect contribution(s) to the judge's campaign in an amount that would raise a reasonable concern about the fairness or impartiality of the judge's consideration of a case involving the party, the party's lawyer, or the law firm of the party's lawyer. In doing so, the judge should consider the public perception regarding such contributions and their effect on the judge's ability to be fair and impartial. There shall be a rebuttable presumption that recusal or disqualification is not warranted when a contribution or reimbursement for transportation, lodging, hospitality or other expenses is equal to or less than the amount required to be reported as a gift on a judge's Statement of Financial Interest.

[4] But *see* Pennsylvania Rule 2.11(A): "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, . . ."

[5] Garwin, et al., *Annotated Model Code of Judicial Conduct*, 2nd Ed., 2011, p.7.

[6] The Code defines "impartiality":

Absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.

Terminology, "Impartial, impartiality, impartially."

The Code defines "impropriety" as:

. . . conduct that undermines a judge's independence, integrity, or impartiality.

Terminology, "Impropriety."

(5) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(6) The judge:

a. served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

b. served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy; or

c. was a material witness concerning the matter.

Id.

The enumerated circumstances are not exhaustive. Under the Rule, the judge must disqualify himself/herself in any proceeding in which "the judge's impartiality might reasonably be questioned." *Id.*

Some of the circumstances outlined in the Rule are straightforward. E.g., there is little room for discretion where the judge or the judge's spouse or domestic partner is a party or acting as a lawyer or is likely to be a material witness in the proceeding, or if the judge served as a lawyer in the matter in controversy. See Rule 2.11(A)(2)(a), (b) and (d), and Rule 2.11(A)(6)(a), respectively. In those situations, the judge is disqualified. However, other circumstances require the exercise of judgment and discretion, e.g., whether the interest of the judge or the judge's spouse or domestic partner is "de minimis." Rule 2.11(A)(2)(c).

Rule 2.11(A)(4) introduces, for the first time, the role of campaign contributions as a basis for mandatory disqualification.[7] However, this is not the first time judges have been cautioned that actions taken during a campaign can lead to recusal or disqualification. In *Caperton v. A. T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009), the United States Supreme Court considered whether a state Supreme Court Justice's denial of a recusal motion based upon campaign contributions violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The majority stated:

> [U]nder our precedents there are objective standards that require recusal when "the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable."

Id. at 872 (citation omitted). The Court found:

> [T]here is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case is pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.

Id. at 884. The *Caperton* Court concluded the campaign efforts of the litigant's chairman, chief executive officer and president had "a significant and disproportionate influence" in placing the state Supreme Court Justice on the case, *id.*, and this influence,

> coupled with the temporal relationship between the election and the pending case[,] "offer[s] a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."

Id. at 886 (citation omitted). The Court held that, under the circumstances, due process required recusal. *Id.* at 889-890.[8]

In all situations where the judge's "impartiality might reasonably be questioned," the ethical standards for disqualification and recusal are an objective test. See, *Pepsico v. McMillen*, 764 F.2d 458, 460 (7th Cir. 1985) (whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case).

Exceptions to Mandatory Disqualification

Unless the judge is disqualified for bias or prejudice under Rule 2.11(A)(1), Rule 2.11(C) permits a judge to disclose the basis for disqualification on the record and affords the parties and their lawyers the opportunity to consider, outside the presence of the judge and court personnel, whether they wish to waive the disqualification. If, following the disclosure, the parties and their lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement must be incorporated into the record of the proceeding.

In addition, the "rule of necessity" may override the requirement of disqualification. This rule permits a judge to decide a matter even though the judge would ordinarily be required to recuse, where the matter could not otherwise be heard by any other court, or the matter requires immediate judicial action and only that judge is available. Although Comment (3) to Rule 2.11 specifically recognizes that the "rule of necessity" may override the rule of disqualification, the effect of the Comments in the Code is unclear.[9] However, regardless of the effect of the Comments, the "rule of necessity" is based on common law and is an accepted part of Pennsylvania's jurisprudence.

[7] Rule 2.11(A)(4) is a "first inroad into complex issues associated with the financing of judicial campaigns. . . ."). *Id.* at Rule 2.11(A), Comment (6).

[8] For example, the Tennessee Code of Judicial Conduct provides:

> The fact that a lawyer in a proceeding, or a litigant, contributed to the judge's campaign, or supported the judge in his or her election does not of itself disqualify the judge. Absent other facts, campaign contributions within the limits of the "Campaign Contributions Limits Act of 1995," *Tennessee Code Annotated* Title 2, Chapter 10, Part 3, or similar law should not result in disqualification. However, campaign contributions or support a judicial candidate receives may give rise to disqualification if the judge's impartiality might reasonably be questioned. In determining whether a judge's impartiality might reasonably be questioned for this reason, a judge should consider the following factors among others:
> (1) The level of support or contributions given, directly or indirectly, by a litigant in relation both to aggregate support (direct and indirect) for the individual judge's campaign and to the total amount spent by all candidates for that judgeship;
> (2) If the support is monetary, whether any distinction between direct contributions or independent expenditures bears on the disqualification question;
> (3) The timing of the support or contributions in relation to the case for which disqualification is sought; and
> (4) If the supporter or contributor is not a litigant, the relationship, if any, between the supporter or contributor and (i) any of the litigants, (ii) the issue before the court, (iii) the judicial candidate or opponent, and (iv) the total support received by the judicial candidate or opponent and the total support received by all candidates for that judgeship

Tennessee Code of Judicial Conduct, Rule 2.11, Comment 7.

[9] The ABA Revised Model Code of Judicial Conduct 2007 includes Comments as well as Canons and Rules. The Model Code states:

> The Comments that accompany the Rules serve two functions. First, they provide guidance regarding the purpose, meaning and proper application of the Rules. They contain explanatory material and, in some instances, provide examples of permitted or prohibited conduct. . . . .
> Second, the Comments identify aspirational goals for judges. . . .

ABA Revised Model Code of Judicial Conduct 2007, Scope (3) and (4).

In contrast, the Pennsylvania Supreme Court's order of January 8, 2014, adopting the Pennsylvania Code, does not mention the Comments. The Order states, in part, that "new Canons 1 through 4 of the Code of Judicial Conduct of 2014 and the corresponding Rules are adopted in the attached form."

See, e.g., *Stilp v. Commonwealth*, 905 A.2d 918, 929 (Pa. 2006) (justices with pecuniary interest in outcome of case may decide challenge to law affecting judicial compensation where all other judges have similar interest and no other provision or procedure exists to consider matter).

When and What Should a Judge Disclose?

Comment (3) to Rule 2.7, addresses the issue of *what* information a judge should disclose:

> A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification or recusal, even if the judge believes there is no proper basis for disqualification or recusal.

Id. at Rule 2.7, Comment (3); *see also* Rule 2.11, Comment (5).

In deciding whether to disclose information and what information to disclose, a judge should first review the record to gain an understanding of the claims and defenses of the parties. A judge also should determine, to the extent possible, the identity of witnesses and the subject matter of their testimony. In obtaining information, a judge should avoid *ex parte* communications. Examples of appropriate disclosures include, but are not limited to, the following:

• A judge should disclose facts regarding the judge's current or former association or relationship with a party, a lawyer, or a witness.

• A judge should disclose that he or she provided legal services to a party or witness prior to taking the bench.

• A judge should disclose that a lawyer in the case represents or previously represented the judge.

• A judge should disclose that he or she holds an opinion about the merits of a claim or defense or the credibility of a witness. Even though the judge believes he or she can set aside the opinion and base decisions solely on the evidence and the law, the judge should disclose the opinion.

The Comments explain how a judge should make a disclosure. The disclosure should be on the record. In most instances, the judge will simply state the relevant facts on the record in the presence of the parties and the attorneys. The judge may also make a disclosure in a writing that is made part of the record. A judge may present documents or refer to records in other cases for the parties and lawyers to consider. In any case, after completing the disclosure, the judge should notify the parties that they may move orally or in writing for disqualification or recusal.

Disqualification and Recusal Decision Worksheet

Judges concerned about whether disqualification or recusal is appropriate may consider utilizing the following worksheet:

1.) Does the judge subjectively believe he/she can decide the case fairly and impartially? If so, proceed with the following steps of the worksheet. If not, the judge must recuse unless Question 7 (rule of necessity) is answered affirmatively.

2.) Is the fact pattern one of the enumerated examples in Rule 2.11(A) (1)—(6)? If so, disqualification is required unless either Question 6 (waiver) or Question 7 (rule of necessity) is answered affirmatively.

3.) Does the fact pattern suggest that the judge's impartiality might reasonably be questioned, that is, do the prevailing facts and circumstances engender a substantial question in reasonable minds that the judge would not be fair or impartial? If so, disqualification or recusal is required under Rule 2.11(A) or Rule 2.7 Comment (2) unless either Question 6 (waiver) or Question 7 (rule of necessity) is answered affirmatively.

4.) Even though the judge has concluded that disqualification or recusal is not required, are there facts or information the judge believes the parties or lawyers might reasonably consider relevant to a motion to disqualify or remove the judge? If so, the judge should disclose that information to the parties or lawyers.

5.) If a party moves for disqualification or recusal, the court should hold a hearing. "A party seeking recusal bears the burden of producing evidence to establish bias, prejudice, or unfairness which raises a substantial doubt as to the jurist's ability to preside impartially." *Com. v. Watkins*, 108 A.3d 692, 734 (Pa. 2014) (citation omitted).

6.) Except in instances of a judge's personal bias or prejudice as outlined in Rule 2.11(A)(1), do the parties waive disqualification pursuant to Rule 2.11(C)? If so, the judge may participate in the case after using the following procedure:

a. the judge discloses the basis for the disqualification on the record;

b. the judge asks the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification; and

c. the judge incorporates any agreement to waive disqualification into the record of the proceeding.

7.) Does the rule of necessity override the rule of disqualification? See Comment 3 to Rule 2.11. If so, the judge may be able to participate.

a. If the judge is the only judge available to hear a matter requiring immediate judicial action, the judge must disclose on the record the basis for disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable.

b. Other issues of necessity must be addressed on a case-by-case basis.

Conclusion

Ultimately, the issue of disqualification or recusal requires the judge to determine whether his or her impartiality might reasonably be questioned. If the judge has a doubt as to disclosure, it is, of course, more prudent to err on the side of disclosure. A judge should consider the following principle stated by the Supreme Court of Pennsylvania:

> Due consideration should be given by [the judge] to the fact that the administration of justice should be beyond the appearance of unfairness. But, while the mediation of courts is based upon the principle of judicial impartiality, disinterestedness, and fairness pervading the whole system of judicature, so that courts may as near as possible be above suspicion, there is, on the other side, an important issue at stake: that is, that causes may not be unfairly prejudiced, unduly delayed, or discontent created through unfounded charges of prejudice or unfairness made against the judge in the trial of a cause. . . .

Reilly by Reilly v. Southeastern Pennsylvania Transportation Authority, 489 A.2d 1291, 1299 (Pa. 1985). The Court further stated that judges should not permit "unfounded and ofttimes malicious charges . . . to discredit the judicial system." *Id.* While frivolous claims will no doubt come before the courts, it is imperative that, first and foremost, judges remain mindful of their duty to fairness, impartiality and judicial independence.

The "Rule of Reliance"

This Formal Advisory Opinion is intended to provide judges with broad guidance regarding one of the Ethics Committee's most frequent areas of inquiry. Because this Formal Advisory Opinion does not address the specific facts of a particular case, a judge does not receive the benefit of the "rule of reliance" by reviewing the Committee's general advice. If a judge has questions concerning the application of these guidelines, the judge should make a written request for advice from a member of the Committee, ordinarily from the representative for the zone in which the judge sits. The Code of Judicial Conduct provides that, although such opinions are not *per se* binding on the Judicial Conduct Board, the Court of Judicial Discipline, or the Supreme Court of Pennsylvania, action taken in reliance thereon shall be considered in determining whether discipline should be recommended or imposed. CODE, PREAMBLE (8).

[Pa.B. Doc. No. 15-1719. Filed for public inspection September 25, 2015, 9:00 a.m.]

Title 234—RULES OF CRIMINAL PROCEDURE

[234 PA. CODE CH. 5]

Order Amending Rule 556 of the Rules of Criminal Procedure; No. 465 Criminal Procedural Rules Doc.

Order

Per Curiam

And Now, this 8th day of September, 2015, upon the recommendation of the Criminal Procedural Rules Committee; the proposal having been submitted without publication pursuant to Pa.R.J.A. No. 103(a)(3) in the interests of justice and efficient administration, 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 amendment of Pennsylvania Rule of Criminal Procedure 556 is approved in the following form.

This *Order* shall be processed in accordance with Pa.R.J.A. No. 103(b), and shall be effective November 1, 2015.

Annex A

TITLE 234. RULES OF CRIMINAL PROCEDURE

CHAPTER 5. PRETRIAL PROCEDURES IN COURT CASES

PART E. Indicting Grand Jury

Rule 556. Indicting Grand Jury.

(A) Each of the several courts of common pleas may proceed with an indicting grand jury pursuant to these rules only in cases in which witness intimidation has occurred, is occurring, or is likely to occur.

(B) Any court of common pleas seeking to resume the use of indicting grand juries pursuant to these rules shall petition the Supreme Court of Pennsylvania in the following form:

(1) The petition shall identify the petitioner, who shall be either the president judge or a designee, and the judicial district. If the petition is seeking permission to resume the use of indicting grand juries in a two-county judicial district, and the indicting grand jury is sought for only one county, that county shall be identified in the petition. The president judge's designee shall be a member of the court of common pleas of the judicial district.

(2) The petition shall aver that the petitioner has reviewed the district attorney's certificate required under paragraphs (B)(4) and (5) and the petitioner agrees with the averments contained therein.

(3) An original and 2 copies of the petition shall be filed, and shall bear an original signature of the petitioner.

(4) There shall be appended to the petition a certificate from the district attorney for the judicial district or, in the case of a two-county judicial district, a certificate from the district attorney or district attorneys for the county or counties within the judicial district.

(5) The district attorney's certificate shall contain:

(a) the name and county of the district attorney;

(b) an averment that witness intimidation has occurred, is occurring, or is likely to occur in the judicial district or, in the case of a two-county district where an indicting grand jury is sought for only one county, the county;

(c) An averment that the district attorney believes that an indicting grand jury will remedy the problem of witness intimidation; and

(d) the original signature of the district attorney.

Comment

This rule was adopted in 2012 to permit the use of an indicting grand jury as an alternative to the preliminary hearing but only in cases in which witness intimidation has occurred, is occurring, or is likely to occur.

The Supreme Court, by Order issued with the promulgation of the new Rules of Criminal Procedure governing the indicting grand jury, requires that each of the judicial districts must petition the Court for permission to resume using the indicting grand jury, *but only* as provided in these rules. **By further Order of the Supreme Court, the form and contents of the petition were established. *See* 43 Pa.B. 1706 (March 30, 2013). This rule was amended in 2015 to include the form and contents of the petition required to resume indicting grand juries as established by the Court's Order.**

The rules in Chapter 5 Part E apply only to the indicting grand jury and do not apply to any county, regional, or statewide investigating grand jury.

***Official Note*:** New Rule 556 adopted June 21, 2012, effective in 180 days**; amended September 8, 2015, effective November 1, 2015**.

Committee Explanatory Reports:

Final Report explaining the new rule published with the Court's Order at 42 Pa.B. 4153 (July 7, 2012).

Final Report explaining the September 8, 2015 amendment regarding the content of the petition to resume using indicting grand juries published with the Court's Order at 45 Pa.B. 5786 (September 26, 2015).

FINAL REPORT[1]

Amendment of Pa.R.Crim.P. 556

Petitions Seeking Leave to Resume Indicting Grand Juries

On September 8, 2015, effective November 1, 2015, upon the recommendation of the Criminal Procedural Rules Committee, the Court approved the amendment of Rule of Criminal Procedure 556 (Indicting Grand Jury) to include the required contents of the petition seeking leave to resume the use of indicting grand juries. The requirement to petition for the resumption of indicting grand juries was established in the Court's Order adopting the new indicting grand jury rules.[2] The contents of the petition were established by a later Order of the Court issued on March 12, 2013.[3]

The reason for this requirement was the manner in which the use of the indictment was originally supplanted by the use of criminal informations. The 1973 amendment of Article I, § 10 of the Pennsylvania Constitution and the subsequent enabling legislation permitted, but did not mandate, the courts of common pleas to proceed by information instead of by indictment, but only with the permission of the Court. The Court then mandated that each court of common pleas petition for the Court's permission to proceed in the use of informations. The last court of common pleas received the Court's approval to proceed by information in 1991 and, effective in 1993, the Court rescinded the indicting grand jury rules as no longer necessary. The Court's approval of petitions to resume indicting grand juries merely reverses these earlier actions.

After two years of experience with the new indicting grand jury rules, the Committee concluded that it would be helpful to provide in the indicting grand jury rules, rather than just the Court's order, directions on how to go about doing so to courts seeking to resume indicting grand juries. Therefore, a new paragraph (B) has been added to Rule 556 listing the requirements for the contents of the petition. These requirements are taken from the Court's March 12, 2013 Order.

The amendment also clarifies the process for the resumption of the use of indicting grand juries. The Court's Orders used the phrase, "permission to summon an indicting grand jury" that suggests that a petition might need to be filed each time a grand jury has been summoned. Such an interpretation would be cumbersome and contrary to the intent of the current indicting grand jury rules when originally adopted. The existing text of the Rule 556 Comment uses the terminology of a petition "to resume using the indicting grand jury." The intention for the use of this terminology was that a court of common pleas would only petition the Court once for the initial permission to resume the use of indicting grand juries.

Additionally, the amendment retains the terminology of the Court's Orders that the certification must be made by "the district attorney" rather than "the attorney for the Commonwealth" since the procedure under this rule would encompass the practice within judicial district as a whole rather than being applicable to an individual case.

[Pa.B. Doc. No. 15-1720. Filed for public inspection September 25, 2015, 9:00 a.m.]

[1] 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.
[2] *See* 42 Pa.B. 4140 (July 7, 2012).
[3] *See* 43 Pa.B. 1706 (March 30, 2013).

Title 249—PHILADELPHIA RULES

PHILADELPHIA COUNTY

Pinelands Insurance Company Risk Retention Group, Inc.; Administrative Doc. No. 02 of 2015

Order

And Now, this 3rd day of September, 2015, upon consideration of the following Order of Liquidation involving Pinelands Insurance Company Risk Retention Group, Inc. issued by the Superior Court for the District of Columbia on August 25, 2015, it is hereby *Ordered* and *Decreed* that all cases in which Pinelands Insurance Company Risk Retention Group, Inc. is a named party shall be placed in deferred status until further notice.

It is further *Ordered* and *Decreed* that all actions currently pending against any insured of Pinelands Insurance Company Risk Retention Group, Inc. shall be placed in deferred status until further notice.

By the Court

KEVIN M. DOUGHERTY,
Administrative Judge
Trial Division

ARNOLD L. NEW,
Supervising Judge
Trial Division—Civil Section

This Administrative Order is issued in accordance with the April 11, 1986 order of the Supreme Court of Pennsylvania, Eastern District, No. 55 Judicial Administration, Docket No. 1; and with the March 26, 1996 order of the Supreme Court of Pennsylvania, Eastern District, No. 164 Judicial Administration, Docket No. 1, as amended. This Order shall be filed with the Office of Judicial Records in a docket maintained for Orders issued by the First Judicial District of Pennsylvania, and one certified copy of this Order shall be filed with the Administrative Office of Pennsylvania Courts. Two certified copies of this Order, and a copy on a computer diskette, shall be distributed to the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*, shall be published in *The Legal Intelligencer*, and will be posted on the First Judicial District's website at http://courts.phila.gov. Copies shall be submitted to American Lawyer Media, the Jenkins Memorial Law Library, and the Law Library for the First Judicial District of Pennsylvania.

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA CIVIL DIVISION

District of Columbia, A Municipal Corporation, Petitioner v. Pinelands Insurance Company Risk Retention Group, Inc., Respondent; Civil Action No: 2015 CA 006558 B; Judge: JIC; Calendar No.:

Order of Liquidation

Upon consideration of the Emergency Consent Petition for an Expedited Order of Liquidation of Pinelands Insurance Company Risk Retention Group, Inc. Pursuant to D.C. Official Code §§ 31-1303, 31-1315, 31-1316 and 31-3931.01 et seq. on or before August 31, 2015, the Memorandum of Points and Authorities in support thereof, and the entire record herein, it is by this Court, this 25th day of August, 2015,

Ordered, that the Petition is hereby *Granted*; and it is

Further Ordered, that the Commissioner and his successors in office, are hereby appointed Liquidator of Pinelands Insurance Company Risk Retention Group, Inc. pursuant to D.C. Official Code § 31-1316 (2012 Repl.); and it is

Further Ordered, that the Commissioner as Liquidator shall take possession of the assets of Pinelands Insurance Company Risk Retention Group, Inc. and shall administer them under the supervision of this Court; and it is

Further Ordered, that the Commissioner as Liquidator shall be vested with the title to all property, contracts, and rights of actions, and all of the books and records, wherever located, of Pinelands Insurance Company Risk Retention Group, Inc.; and it is

Further Ordered, that the Commissioner as Liquidator shall conduct the liquidation proceedings consistent with D.C. Official Code § 31-1316 (2012 Repl.) and shall be vested with the powers identified at D.C. Official Code § 31-1319 (2012 Repl.); and it is

Further Ordered, that for the purpose granting such order and further relief as this cause and the interests of the policyholders, creditors and the public may require, the Court shall retain jurisdiction in this matter until the Liquidator petitions this Court for an order discharging the liquidator pursuant to D.C. Official Code § 31-1318 (2012 Repl.); and it is

Further Ordered, that a status hearing in this matter shall be set for September 16, 2015, at 2:00 pm, at which time the parties shall report to Courtroom 317 of the Superior Court of the District of Columbia, 500 Indiana Avenue, NW, Washington, DC.

So Ordered.

GREGORY E. MIZE,
Judge-In-Chambers
D.C. Superior Court

[Pa.B. Doc. No. 15-1721. Filed for public inspection September 25, 2015, 9:00 a.m.]