

THE COURTS

Title 207—JUDICIAL CONDUCT

PART IV. COURT OF JUDICIAL DISCIPLINE

[207 PA. CODE CH. 21]

Amendment to the Internal Operating Procedures of the Court of Judicial Discipline; Doc. No. 1 JD 94

Order

And Now, this 3rd day of August, 2016, the Court, pursuant to Article 5, Section 18(b)(4) of the Constitution of Pennsylvania, having adopted amendments to the Internal Operating Procedures, Sections 101 and 102, on March 29, 2016, as more specifically hereinafter set forth, it is hereby ordered:

That said Internal Operating Procedures became effective March 29, 2016.

Per Curiam

JACK A. PANELLA,
President Judge

Annex A

TITLE 207. JUDICIAL CONDUCT

PART IV. COURT OF JUDICIAL DISCIPLINE

ARTICLE IV. INTERNAL OPERATING PROCEDURES

CHAPTER 21. INTERNAL OPERATING PROCEDURES

GENERAL PROVISIONS

§ 101. Classification of Judges.

(A) Judges who are serving a term of office which has not expired shall be classified as Active Members or Judges. Those Judges whose terms have expired, but who must continue to participate in a hearing in accordance with Article V, § 18(b)(2), shall be classified as Participating Former Members or Judges.

(B) The phrase “any hearing in progress” as used in Article V, § 18(b)(2) refers to a trial on the merits (not a pretrial matter) in which the Court has heard testimony from at least the first witness.

(C) The requirement that a judge continue to participate in “any hearing in progress” as used in Article V, (b)(2) does not apply to any matter on remand from the Pennsylvania Supreme Court. In the event of a remand, the then Active Members or Judges shall preside over the matter.

§ 102. Composition of Court or Panel.

(A) En banc or full Court proceedings shall be conducted by the entire Court. The President Judge shall preside unless he or she is unavailable to participate, in which case, the empaneled Judge most senior shall preside.

(B) Panels appointed to conduct a trial pursuant to C.J.D.R.P. No. 501 shall be composed of no fewer than three Judges of the Court, one of whom shall be the Conference Judge[, and at least one of whom shall be

a non-lawyer elector in accordance with C.J.D.R.P. No. 501(B)]. [The Judge who has seniority shall preside over three-member panel proceedings.]

[Pa.B. Doc. No. 16-1387. Filed for public inspection August 12, 2016, 9:00 a.m.]

Title 234—RULES OF CRIMINAL PROCEDURE

[234 PA. CODE CH. 2]

Proposed Amendments of Pa.R.Crim.P. 205

The Criminal Procedural Rules Committee is planning to propose to the Supreme Court of Pennsylvania the amendment of Rule 205 (Contents of Search Warrant) 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:

Jeffrey M. Wasileski, Counsel
Supreme Court of Pennsylvania
Criminal Procedural Rules Committee
601 Commonwealth Avenue, Suite 6200
Harrisburg, PA 17106-2635
fax: (717) 231-9521
e-mail: criminalrules@pacourts.us

All communications in reference to the proposal should be received by no later than Friday, September 16, 2016. 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*

CHARLES A. EHRLICH,
Chair

Annex A

TITLE 234. RULES OF CRIMINAL PROCEDURE

CHAPTER 2. INVESTIGATIONS

PART A. Search Warrant

Rule 205. Contents of Search Warrant.

(A) Each search warrant shall be signed by the issuing authority and shall:

* * * * *

(8) when applicable, certify on the face of the warrant that for good cause shown the affidavit(s) is sealed pursuant to Rule 211 and state the length of time the affidavit(s) will be sealed.

(B) A warrant under paragraph (A) may authorize the seizure of electronic storage media or of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The time for executing the warrant in (A)(1)(4)(a) refers to the seizure of the media or information, and not to any later off-site copying or review.

Comment

Paragraphs [(2) and (3)] (A)(2) and (A)(3) are intended to proscribe general or exploratory searches by requiring that searches be directed only towards the specific items, persons, or places set forth in the warrant. Such warrants should, however, be read in a common sense fashion and should not be invalidated by hypertechnical interpretations. This may mean, for instance, that when an exact description of a particular item is not possible, a generic description may suffice. See *Commonwealth v. Matthews*, [446 Pa. 65, 69–74,] 285 A.2d 510, 513-14 (Pa. 1971).

Paragraph [(4)] (A)(4) is included pursuant to the Court's supervisory powers over judicial procedure to supplement *Commonwealth v. McCants*, 450 Pa. 245, 299 A.2d 283 (1973), holding that an unreasonable delay between the issuance and service of a search warrant jeopardizes its validity. Paragraph [(4)] (A)(4) sets an outer limit on reasonableness. A warrant could, in a particular case, grow stale in less than two days. If the issuing authority believes that only a particular period which is less than two days is reasonable, he or she must specify such period in the warrant.

Paragraph [(4)(b)] (A)(4)(b) provides for anticipatory search warrants. These types of warrants are defined in *Commonwealth v. Glass*, [562 Pa. 187,] 754 A.2d 655 (Pa. 2000), as "a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place."

Paragraph [(5)] (A)(5) supplements the requirement of Rule 203(C) that special reasonable cause must be shown to justify a nighttime search. A warrant allowing a nighttime search may also be served in the daytime.

Paragraph [(6)] (A)(6) anticipates that the warrant will list the correct judicial officer to whom the warrant should be returned. There may be some instances in which the judicial officer who issues the warrant may not be the one to whom the warrant will be returned. For example, it is a common practice in many judicial districts to have an "on-call" magisterial district judge. This "on-call" judge would have the authority to issue search warrants anywhere in the judicial district but may not be assigned to the area in which the search warrant would be executed. There may be cases when the warrant is incorrectly returned to the judge who originally issued the warrant. In such cases, the issuing judge should forward the returned search warrant to the correct judicial officer. Thereafter, that judicial officer should administer the search warrant and supporting documents as provided for in these rules, including the Rule 210 requirement to file the search warrant and supporting documents with the clerk of courts.

Paragraph [(8)] (A)(8) implements the notice requirement in Rule 211(C). When the affidavit(s) is sealed pursuant to Rule 211, the justice or judge issuing the warrant must certify on the face of the warrant that there is good cause shown for sealing the affidavit(s) and must also state how long the affidavit will be sealed.

For purposes of this rule, the term "electronically stored information" includes writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained. This definition is intended to cover all current types of computer-based information and to encompass future changes and developments.

For purposes of this rule, the term "seizure" includes the copying of material or information that is subject to the search warrant. This includes the copying of electronically stored information for later analysis.

For the procedures for motions for return of property, see Rule 588.

Official Note: Rule 205 adopted October 17, 1973, effective 60 days hence; amended November 9, 1984, effective January 2, 1985; amended September 3, 1993, effective January 1, 1994; renumbered Rule 205 and amended March 1, 2000, effective April 1, 2001; amended October 19, 2005, effective February 1, 2006; Comment revised October 22, 2013, effective January 1, 2014; amended , 2016, effective , 2016.

Committee Explanatory Reports:

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Final Report explaining the October 22, 2013 revisions to the Comment regarding the return of the search warrant published at 43 Pa.B. 6652 (November 9, 2013).

Report explaining the proposed amendment regarding the search warrants for electronically stored information published for comment at 46 Pa.B. 4952 (August 13, 2016).

REPORT

Proposed amendment of Pa.R.Crim.P. 205 **Search Warrants for Electronically Stored Information: Copying and Later Review**

The Committee has recently examined a suggestion from one of its members to amend Rule 205 (Contents of Search Warrant) to clarify that electronic storage data may be seized or copied for later analysis. This suggestion was based on language that is contained currently in Federal Rule of Criminal Procedure 41(B). The intention of the proposed amendment is to eliminate any confusion that, when a search warrant is for the seizure of electronically stored information and that information must be extracted, reviewed or analyzed, these additional processes do not need to be performed within the period set for execution of the search warrant.

The Committee examined the history of Federal Rule 41 and the specific provision related to warrants for electronically stored information which reads:

(B) *Warrant Seeking Electronically Stored Information.* A warrant under Rule 41(e)(2)(A) may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The time for executing the warrant in

Rule 41(e)(2)(A) and (f)(1)(A) refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review.

Federal Rule 41 (“the federal rule”) was amended in 2009 to add this provision regarding warrants for electronically stored information. Searches of electronic storage media are problematic because computers and external electronic storage devices contain an almost incomprehensible amount and variety of data. The use of computers in all stages of life and business has become ubiquitous. This is only further complicated by the storage of electronic data on networks and, with increasing frequency, “cloud” servers. Additionally, the information is stored as lines of code, often of little practical use without some type of program to convert into a usable form. As a result, it is often impossible to conduct a search on-site for evidence within the computer or server and necessitating analysis by specialists. The federal rule was amended to recognize the need for a two-step process: officers either may seize or may copy the entire storage medium and conduct a review of the storage medium later to determine what electronically stored information falls within the scope of the warrant. The Committee recognizes that Pennsylvania search warrant procedures differ from federal procedures. However, the Committee concluded that the same concerns that prompted the change to the federal rule are applicable to search warrant practice in Pennsylvania and that a similar solution would be beneficial in Pennsylvania. For that reason, the language that the Committee is proposing to be added to Rule 205 is similar to that in the federal rule.

The term “electronically stored information” is derived from Rule 34(a) of the Federal Rules of Civil Procedure, which states that it includes “writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained.” The Committee concluded that this description is an apt one and is intended to cover all current types of computer-based information and to encompass future changes and developments.

The federal rule contains references to the “copying of electronically stored information” in addition to its “seizure.” The Committee believes that the term “seizure” used in a search warrant context encompasses the copying of the information and that to retain this terminology would unduly emphasize this single aspect. Therefore, the term “copying” is not used but a statement would be added to the Comment to ensure that it is understood that this is included in the “seizure” of the information.

As in the federal rule, the Committee rejected adding a specific time period within which any subsequent off-site copying or review of the media or electronically stored information would take place. Given the vast divergences in the amount of time required for forensic analysis and review of information. The Committee concluded that if a time limit were set for these processes it would be highly arbitrary and result in frequent petitions for additional time.

One of the concerns raised during the development of the federal rule change was the ability of an aggrieved party to pursue the return of property associated with electronic media. In the note to the 2009 change to the federal rule, it was observed that Federal Rule 41(g), which provides for a motion for return of property, applies to electronic storage media. Pennsylvania Rule 588 provides a similar motion for return. However, the only

cross-reference in Chapter 2 that refers to Rule 588 is in the Comment to Rule 211 (Sealing of Search Warrant Affidavits). The Committee also proposes that a cross-reference to Rule 588 be added to the Rule 205 Comment to emphasize the availability of this remedy.

[Pa.B. Doc. No. 16-1388. Filed for public inspection August 12, 2016, 9:00 a.m.]

Title 255—LOCAL COURT RULES

SCHUYLKILL COUNTY

Criminal Rules of Procedure Rule 310, Motion for ARD Disposition Rule 590.1, Pleas and Plea Agreements; AD 54-2016

Order of Court

And Now, this 29th day of July, 2016 at 8:55 a.m., Schuylkill County Criminal Rule of Procedure, Rule 310, Motion for ARD Disposition, and Rule 590.1, Pleas and Plea Agreements, are amended for use in the Court of Common Pleas of Schuylkill County, Pennsylvania, Twenty-First Judicial District, Commonwealth of Pennsylvania, effective thirty days after publication in the *Pennsylvania Bulletin*.

The Clerk of Courts of Schuylkill County is Ordered and Directed to do the following:

1) File one (1) certified copy of this Order and Rules with the Administrative Office of the Pennsylvania Courts.

2) Forward two (2) certified copies of this Order and Rule and a CD-ROM containing the text of the local rules to the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.

3) Forward one (1) copy to the Schuylkill County Law Library for publication in the *Schuylkill Legal Record*.

4) Copies shall be kept continuously available for public inspection in the Office of the Schuylkill County Clerk of Courts and the Schuylkill County Law Library.

It is further *Ordered* that said rules as they existed prior to the amendment are hereby repealed and annulled on the effective date of said rule as amended, but no right acquired thereunder shall be disturbed.

By the Court

WILLIAM E. BALDWIN,
President Judge

Rule 310. Motion for A.R.D. Disposition.

(a) In all cases in which a defendant charged with violation of 75 Pa.C.S.A. § 3731 (Driving Under the Influence) seeks a special handling by way of A.R.D., the District Attorney shall arrange with (1) the Drug and Alcohol Clinic at the Good Samaritan Hospital for examination and evaluation, and (2) the Adult Probation Department for an investigation of prior criminal history.

Reports prepared by the Drug and Alcohol Clinic and the Adult Probation Department shall be delivered to the District Attorney and shall be subject to inspection by the District Attorney and defense counsel. Such reports shall become part of the defendant’s probation department file.

All such reports shall be submitted along with the necessary A.R.D. forms to the Criminal Court Administrator.

(b) The A.R.D. motions for defendants who have been recommended by the District Attorney for the Fast Track A.R.D. Program shall be heard on the dates published for Fast Track A.R.D. in the Court Calendar.

Rule 590.1. Pleas and Plea Agreements.

(a) The District Attorney shall prepare the sentencing guideline forms provided by the Court as soon as practicable after the informations are lodged, setting forth the sentences required by the guidelines if a plea of guilty is entered by the defendant, and shall forward this material to defense counsel. Counsel for defendants who wish to engage in plea negotiations shall promptly thereafter schedule a meeting with the District Attorney.

(b) In those cases where no plea agreement has been made, a plea negotiation conference shall be held. At said conference, the District Attorney assigned to the case and prosecuting officer or an officer from his department with authority to resolve the case shall meet with the defendant and defense counsel with the end in view to determine whether they can arrive at a plea agreement. The victim shall be notified and given an opportunity to attend and participate in the negotiations.

(c) If the parties arrive at a plea agreement, the defense counsel or defendant shall complete the form for entry of a written guilty plea available at the office of the District Attorney and promptly return it to that office. The District Attorney shall promptly attach to the written guilty plea a copy of the information against the defendant, a report of the defendant's prior criminal record, and a list of maximum penalties and sentence guidelines

for each charge. The District Attorney shall file the written guilty plea with attachments in the office of the Clerk of Courts, who shall promptly forward the guilty plea and attachments to the Criminal Court Administrator. When the charge is D.U.I., a copy of the CRN shall also be provided to the Court.

Each written guilty plea shall be accompanied by a "Guilty Plea Certification" completed and signed by the District Attorney and defense counsel, certifying to the Court that the defendant's guilty plea has not previously been presented to the Court, or specifying the date when the plea was presented and identifying the judge who rejected the plea. Counsel who fail to comply with this rule may be held in contempt of Court.

The Criminal Court Administrator shall assign all guilty pleas and motions for A.R.D. among the judges who will hear those cases. Except for a plea of guilty entered after commencement of trial, the Court shall accept no guilty plea or A.R.D. motion unless scheduled and assigned by the Criminal Court Administrator.

(d) All guilty pleas and motions for A.R.D. received by the Criminal Court Administrator shall be heard on one of the dates scheduled for guilty pleas in the published Court Calendar unless otherwise scheduled by the Court.

(1) The pleas of incarcerated defendants and those defendants represented by the Public Defender or who have no counsel shall be heard at 9:30 a.m. on a published plea date.

(2) The pleas of all defendants who are not incarcerated and have retained private counsel shall be heard on the published guilty plea date at 1:30 p.m.

[Pa.B. Doc. No. 16-1389. Filed for public inspection August 12, 2016, 9:00 a.m.]