THE COURTS

Title 210—APPELLATE PROCEDURE

PART I. RULES OF APPELLATE PROCEDURE

[210 PA. CODE CHS. 9 AND 19]

Order Amending Rules 905, 1922, 1925 and 1931 of the Pennsylvania Rules of Appellate Procedure; No. 283 Appellate Procedural Rules Doc.

Amended Order

Per Curiam

And Now, this 24th day of June, 2019, upon the recommendation of the Appellate Court Procedural Rules Committee; the proposal having been published for public comment at 46 Pa.B. 5886 (September 17, 2016):

It is Ordered pursuant to Article V, Section 10 of the Constitution of Pennsylvania that Rules 905, 1922, 1925, and 1931 of the Pennsylvania Rules of Appellate Procedure is amended in the following form.

This Order shall be processed in accordance with Pa.R.J.A. No. 103(b), and shall be effective October 1, 2019.

Annex A

TITLE 210. APPELLATE PROCEDURE

PART I. RULES OF APPELLATE PROCEDURE

ARTICLE II. APPELLATE PROCEDURE

CHAPTER 9. APPEALS FROM LOWER COURTS

Rule 905. Filing of Notice of Appeal.

(a) *Filing with clerk.*

(1) Two copies of the notice of appeal, the order for transcript, if any, and the proof of service required by **[Rule 906 (service of notice of appeal)]** **Pa.R.A.P. 906**, shall be filed with the clerk of the trial court. If the appeal is to the Supreme Court, the jurisdictional statement required by **[Rule]** **Pa.R.A.P.** 909 shall also be filed with the clerk of the trial court.

(2) If the appeal is a children's fast track appeal, **[the]** **a** concise statement of errors complained of on appeal as described in **[Rule]** **Pa.R.A.P.** 1925(a)(2) shall be filed with the notice of appeal and served **on the trial judge** in accordance with **[Rule 1925(b)(1)]** **Pa.R.A.P. 906(a)(2)**.

(3) Upon receipt of the notice of appeal**,** the clerk shall immediately stamp it with the date of receipt, and that date shall constitute the date when the appeal was taken, which date shall be shown on the docket.

(4) If a notice of appeal is mistakenly filed in an appellate court, or is otherwise filed in an incorrect office within the unified judicial system, the clerk shall immediately stamp it with the date of receipt and transmit it to the clerk of the court which entered the order appealed from, and upon payment of an additional filing fee the notice of appeal shall be deemed filed in the trial court on the date originally filed.

(5) A notice of appeal filed after the announcement of a determination but before the entry of an appealable order shall be treated as filed after such entry and on the day thereof.

(b) *Transmission to appellate court.*—The clerk shall immediately transmit to the prothonotary of the appellate court named in the notice of appeal a copy of the notice of appeal **[showing the date of receipt, the related proof of service]** and **all attachments, as well as** a receipt showing collection of any docketing fee in the appellate court required under **[Subdivision]** **paragraph** (c). If the appeal is a children's fast track appeal, the clerk shall stamp the notice of appeal with a "Children's Fast Track" designation in red ink, advising the appellate court that the appeal is a children's fast track appeal**,** and **the clerk** shall **also** transmit to the prothonotary of the appellate court named in the notice of appeal the concise statement of errors complained of on appeal required by **[Subdivision]** **subparagraph** (a)(2) of this rule. The clerk shall also transmit with such papers:

1. **[a copy of any order for transcript]** **copies of all orders for transcripts relating to orders on appeal**;

2. a copy of any verified statement, application**,** or other document filed under **[Rule 551 through Rule 561]** **Pa.R.A.P. 551—561** relating to *in forma pauperis*; and

3. if the appeal is to the Supreme Court, the jurisdictional statement required by **[Rule]** **Pa.R.A.P.** 909.

(c) *Fees.*—The appellant upon filing the notice of appeal shall pay any fees therefor (including docketing fees in the appellate court) prescribed by Chapter 27 **[(fees and costs in appellate courts and on appeal)]**.

***Official Note*: [Insofar as the clerk or prothonotary of the lower court is concerned, the notice of appeal is for all intents and purposes a writ in the nature of certiorari in the usual form issued out of the appellate court named therein and returnable thereto within the time prescribed by Chapter 19 (preparation and transmission of record and related matters).]**

To preserve a mailing date as the filing date for an appeal as of right from an order of the Commonwealth Court, *see* **[Rule]** **Pa.R.A.P.** 1101(b).

As to number of copies, *see* **[note to Rule 124 (form of papers; number of copies)]** **Pa.R.A.P. 124, note**. The appellate court portion of the filing fee will be transmitted pursuant to regulations adopted under 42 Pa.C.S. § 3502 **[(financial regulations)]**.

[Pending adoption of such rules the subject is regulated by Paragraph 4 of the Order amending this rule, which provides as follows:

"4. Pending adoption of initial regulations under 42 Pa.C.S. § 3502 (financial regulations), the docketing fee (currently $12 in the Supreme Court and the Superior Court and $25 in the Commonwealth Court) paid through the clerk or prothonotary of the lower court pursuant to Rule 905(c) (fees) of the Pennsylvania Rules of Appellate Procedure shall be transmitted as follows:

(a) If the docketing fee is tendered by check payable to the appellate prothonotary, the clerk or

prothonotary of the lower court shall transmit the check pursuant to Rule 905(b).

(b) If the docketing fee is tendered by check payable to the clerk or prothonotary of the lower court he or she shall endorse it without recourse to the appropriate appellate prothonotary and transmit the check pursuant to Rule 905(b).

(c) If the docketing fee is tendered in cash the clerk or prothonotary of the lower court shall draw a check in like amount on the account of such clerk or prothonotary to the order of the appropriate appellate prothonotary and transmit the check pursuant to Rule 905(b).

(d) In matters arising under 42 Pa.C.S. § 723 (appeals from the Commonwealth Court), the appellant shall tender the docketing fee in the Supreme Court to the Prothonotary of the Commonwealth Court by check payable to the order of the Prothonotary of the Supreme Court, which shall be transmitted pursuant to Rule 905(b).”

The better practice will be to pay the fee for filing the notice of appeal in the lower court and the docketing fee in the appellate court by separate checks payable to the respective clerks or prothonotaries.

The 1982 amendment to Subdivision (a) corrects deficiencies in previous practice which were illustrated in *State Farm Mutual Auto. Ins. Co. v. Schultz*, 281 Pa. Super. 212, 421 A.2d 1224 (1980).]

CHAPTER 19. PREPARATION AND TRANSMISSION OF RECORD AND RELATED MATTERS

RECORD ON APPEAL FROM LOWER COURT

Rule 1922. Transcription of Notes of Testimony.

(a) **[*General Rule*.—Upon receipt of the order for transcript and any required deposit to secure the payment of transcript fees the official court reporter shall proceed to have his notes transcribed, and not later than 14 days after receipt of such order and any required deposit shall lodge the transcript (with proof of service of notice of such lodgment on all parties to the matter) with the clerk of the trial court. Such notice by the court reporter shall state that if no objections are made to the text of the transcript within five days after such notice, the transcript will become a part of the record. If objections are made the difference shall be submitted to and settled by the trial court. The trial court or the appellate court may on application or upon its own motion shorten the time prescribed in this subdivision.]** ***Request for Transcripts*.—An appellant may file a request for transcripts under Pennsylvania Rule of Judicial Administration 4007 prior to or concurrent with the notice of appeal. If a deposit is required, the appellant shall make the deposit at the time of the request for the transcript unless the appellant is requesting a waiver of the cost because of economic hardship. Unless another Rule of Appellate Procedure provides a shorter time, the court reporter shall provide the trial judge with the transcript within 14 days of the request for transcript. When the appellant receives notice under Rule of Judicial Administration 4007(D)(3) that the transcript has been prepared, the appellant has 14 days to pay the final balance in compliance with that rule.**

(b) **[*Diminution of transcription*.**

(1) In civil cases, an application for an order providing that less than the entire proceedings shall be transcribed may be made to the trial court by any party within two days after the order for transcript is filed. A party shall have the right to require that any specified part of the notes of testimony or recordings be transcribed, subject to the applicable requirements for the payment of transcript fees.

(2) In criminal cases, diminution of transcription shall be in accordance with Rule 115 of the Pennsylvania Rules of Criminal Procedure (recording and transcribing court proceedings).

(3) In any case, untranscribed notes or recordings shall not be part of the record on appeal for any purpose.] ***Filing of the Transcript*.—When the transcript is delivered to the filing office and the parties under Rule of Judicial Administration 4007(D)(4), the transcript shall be entered on the docket.**

(c) **[*Certification and filing*.—The trial judge shall examine any part of the transcript as to which an objection is made pursuant to subdivision (a) of this rule or which contains the charge to the jury in a criminal proceeding, and may examine any other part of the transcript, and after such examination and notice to the parties and opportunity for objection (unless previously given) shall correct such transcript. If the trial judge examines any portion of the transcript, he shall certify thereon, by reference to the page and line numbers or the equivalent, which portions thereof he has read and corrected. If no objections are filed to the transcript as lodged, or after any differences have been settled or other corrections have been made by the court, the official court reporter shall certify the transcript, and cause it to be filed with the clerk of the lower court.]** ***Corrections to Transcript*.—If a transcript contains an error or is an incomplete representation of the proceedings, the omission or misstatement may be corrected by the following means:**

(1) *By objection*. A party may file a written objection to the filed transcript. Any party may answer the objection. The trial court shall resolve the objections and then direct that the transcript as corrected be made a part of the record and transmitted to the appellate court.

(2) *By stipulation of the parties filed in the trial court*. If the trial court clerk has already certified the record, the parties shall file in the appellate court a copy of any stipulation filed pursuant to this rule, and the trial court shall direct that the transcript as corrected be made a part of the record and transmitted to the appellate court.

(3) By the trial court or, if the record has already been transmitted to the appellate court, by the appellate court or trial court on remand, with notice to all parties and an opportunity to respond.

(d) *Emergency appeals*.—Where the exigency of the case is such as to impel immediate consideration in the appellate court, the trial judge shall take all action necessary to expedite the preparation and transmission of the record notwithstanding the usual procedures prescribed in this chapter **or in the Rules of Judicial**

Administration. **[Pending action by the lower court under this subdivision any party may proceed in the appellate court under Rule 1923 (statement in absence of transcript) and may append to any filing in the appellate court as much of the record below as the party desires to bring to the attention of the appellate court.]**

***Official Note*: [Based in part upon former Supreme Court Rule 56, former Superior Court Rule 46, and former Commonwealth Court Rule 25 and the act of May 11, 1911 (P.L. 279, No. 179), § 4 (12 P.S. § 1199). The 14 day requirement is designed to fix an objective standard to guide the official court reporter and the lower court, so as to permit the settling of any objections by the lower court and the physical preparation and transmission by the clerk of the record within the 40 day period fixed by Rule 1931 (transmission of the record). Although under these rules a writ of certiorari is no longer issued, the requirements of these rules have the effect of a Supreme Court order, and the lower court is expected to give the transcription of notes of testimony under this rule priority over unappealed matters in the lower court.**

The certification requirement of subdivision (c) recognizes that in practice the trial judge ordinarily will not actually read the transcript prior to certification unless objection is made by one of the parties. However, the rule requires the judge to review and correct the charge in criminal cases, to avoid the problems which arise when a later attempt is made by the trial judge under Rule 1926 (correction and modification of the record) to conform the transcript to his recollection of events.] Depending on the order issued by the trial court, a party may wish to seek appellate review of an order under paragraph (c) by application or in the merits brief. The 2017 amendments addressed changes in the Rules of Judicial Administration. In addition, the amendment eliminated time limits for objections to or requests for correction of the transcript. An objection to a transcript must be raised if, for example, a critical portion of the proceedings was not transcribed.

Rule 1925. Opinion in Support of Order.

(a) *Opinion in support of order*.

(1) *General rule*.—Except as otherwise prescribed by this rule, upon receipt of the notice of appeal, the judge who entered the order giving rise to the notice of appeal, if the reasons for the order do not already appear of record, shall **[forthwith] within the period set forth in Pa.R.A.P. 1931(a)(1)** file of record at least a brief opinion of the reasons for the order, or for the rulings or other errors complained of, or shall specify in writing the place in the record where such reasons may be found.

If the case appealed involves a ruling issued by a judge who was not the judge entering the order giving rise to the notice of appeal, the judge entering the order giving rise to the notice of appeal may request that the judge who made the earlier ruling provide an opinion to be filed in accordance with the standards above to explain the reasons for that ruling.

(2) *Children's fast track appeals*.—In a children's fast track appeal:

(i) The concise statement of errors complained of on appeal shall be filed and served with the notice of appeal **[required by Rule 905. *See* Pa.R.A.P. 905(a)(2)]**.

(ii) Upon receipt of the notice of appeal and the concise statement of errors complained of on appeal required by **[Rule] Pa.R.A.P.** 905(a)(2), the judge who entered the order giving rise to the notice of appeal, if the reasons for the order do not already appear of record, shall within 30 days file of record at least a brief opinion of the reasons for the order, or for the rulings or other errors complained of, which may, but need not, refer to the transcript of the proceedings.

(3) *Appeals arising under the Pennsylvania Code of Military Justice*.—In an appeal arising under the Pennsylvania Code of Military Justice, the concise statement of errors complained of on appeal shall be filed and served with the notice of appeal. *See* Pa.R.A.P. 4004(b).

(b) *Direction to file statement of errors complained of on appeal; instructions to the appellant and the trial court*.—If the judge entering the order giving rise to the notice of appeal ("judge") desires clarification of the errors complained of on appeal, the judge may enter an order directing the appellant to file of record in the trial court and serve on the judge a concise statement of the errors complained of on appeal ("Statement").

(1) *Filing and service*.—**[Appellant] The appellant** shall file of record the Statement and concurrently shall serve the judge. Filing of record **[and service on the judge shall be in person or by mail] shall be** as provided in Pa.R.A.P. 121(a) and**, if mail is used,** shall be complete on mailing if **the** appellant obtains a United States Postal Service Form 3817, Certificate of Mailing, or other similar United States Postal Service form from which the date of deposit can be verified in compliance with the requirements set forth in Pa.R.A.P. 1112(c). **Service on the judge shall be at the location specified in the order, and shall be either in person, by mail, or by any other means specified in the order.** Service on the parties shall be concurrent with filing and shall be by any means of service specified under Pa.R.A.P. 121(c).

(2) *Time for filing and service*.**[—]**

(i) The judge shall allow the appellant at least 21 days from the date of the order's entry on the docket for the filing and service of the Statement. Upon application of the appellant and for good cause shown, the judge may enlarge the time period initially specified or permit an amended or supplemental Statement to be filed. Good cause includes, but is not limited to, delay in the production of a transcript necessary to develop the Statement so long as the delay is not attributable to a lack of diligence in ordering or paying for such transcript by the party or counsel on appeal. In extraordinary circumstances, the judge may allow for the filing of a Statement or amended or supplemental Statement *nunc pro tunc*.

(ii) If a party has ordered but not received a transcript necessary to develop the Statement, that party may request an extension of the deadline to file the Statement until 21 days following the date of entry on the docket of the transcript in accordance with Pa.R.A.P. 1922(b). The party must attach the transcript purchase order to the motion for the extension. If the motion is filed at least five days before the Statement is due but the trial court does not rule on the motion prior to the original due date, the motion will be deemed to have been granted.

(3) *Contents of order*.—The judge's order directing the filing and service of a Statement shall specify:

(i) the number of days after the date of entry of the judge's order within which the appellant must file and serve the Statement;

(ii) that the Statement shall be filed of record;

(iii) that the Statement shall be served on the judge pursuant to paragraph (b)(1)**[;]** **and both the place the appellant can serve the Statement in person and the address to which the appellant can mail the Statement. In addition, the judge may provide an email, facsimile, or other alternative means for the appellant to serve the Statement on the judge; and**

(iv) that any issue not properly included in the Statement timely filed and served pursuant to subdivision (b) shall be deemed waived.

(4) *Requirements; waiver*.

(i) The Statement shall set forth only those **[rulings or]** errors that the appellant intends to **[challenge]** **assert**.

(ii) The Statement shall concisely identify each **[ruling or]** error that the appellant intends to **[challenge]** **assert** with sufficient detail to identify **[all pertinent issues]** **the issue to be raised** for the judge. The judge shall not require the citation to authorities **or the record**; however, appellant may choose to include pertinent authorities **and record citations** in the Statement.

(iii) The judge shall not require **[appellant or appellee]** **any party** to file a brief, memorandum of law, or response as part of or in conjunction with the Statement.

(iv) The Statement should not be redundant or provide lengthy explanations as to any error. Where non-redundant, non-frivolous issues are set forth in an appropriately concise manner, the number of errors raised will not alone be grounds for finding waiver.

(v) Each error identified in the Statement will be deemed to include every subsidiary issue **[contained therein which]** **that** was raised in the trial court; this provision does not in any way limit the obligation of a criminal appellant to delineate clearly the scope of claimed constitutional errors on appeal.

(vi) If the appellant in a civil case cannot readily discern the basis for the judge's decision, the appellant shall preface the Statement with an explanation as to why the Statement has identified the errors in only general terms. In such a case, the generality of the Statement will not be grounds for finding waiver.

(vii) Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived.

(c) *Remand*.

(1) An appellate court may remand in either a civil or criminal case for a determination as to whether a Statement had been filed and/or served or timely filed and/or served.

(2) Upon application of the appellant and for good cause shown, an appellate court may remand in a civil case for the filing *nunc pro tunc* of a Statement or for amendment or supplementation of a timely filed and served Statement and for a concurrent supplemental opinion. **If an appellant has a statutory or rule-based right to counsel, good cause shown includes a failure by counsel to file a Statement timely or at all.**

(3) If an appellant **represented by counsel** in a criminal case was ordered to file a Statement and failed to do so **or filed an untimely Statement**, such that the appellate court is convinced that counsel has been *per se* ineffective, **and the trial court did not file an opinion,** the appellate court **[shall]** **may** remand for **appointment of new counsel,** the filing of a Statement *nunc pro tunc*, and **[for]** the preparation and filing of an opinion by the judge.

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

(d) *Opinions in matters on petition for allowance of appeal*.—Upon receipt of notice of the filing of a petition for allowance of appeal under **[Rule]** **Pa.R.A.P.** 1112(c) (appeals by allowance), the appellate court **[below which]** **that** entered the order sought to be reviewed, if the reasons for the order do not already appear of record, shall forthwith file of record at least a brief statement, in the form of an opinion, of the reasons for the order.

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

[Subdivision] **Paragraph** (b)**:** This **[subdivision]** **paragraph** permits the judge whose order gave rise to the notice of appeal ("judge") to ask for a statement of errors complained of on appeal ("Statement") if the record is inadequate and the judge needs to clarify the errors complained of. The term "errors" is meant to encourage appellants to use the Statement as an opportunity to

winnow the issues, recognizing that they will ultimately need to be refined to a statement that will comply with the requirements of Pa.R.A.P. 2116. Nonetheless, the term "errors" is intended in this context to be expansive, and it encompasses all of the reasons the trial court should not have reached its decision or judgment, including, for example, those that may not have been decisions of the judge, such as challenges to jurisdiction.

[Paragraph] Subparagraph (b)(1): This **[paragraph]** subparagraph maintains the requirement that the Statement be both filed of record in the trial court and served on the judge. Service on the judge may be accomplished by mail **[or],** by personal service**, or by any other means set forth by the judge in the order**. The date of mailing will be considered the date of filing **[and of service upon the judge]** only if counsel obtains a United States Postal Service form from which the date of mailing can be verified, as specified in Pa.R.A.P. 1112(c). Counsel is advised **both when filing and when serving the trial judge** to retain date-stamped copies of **[the]** postal forms (or **[pleadings if served by hand]** **other proofs of timely service**), in case questions **of waiver** arise later **[as to whether], to demonstrate that** the Statement was timely filed or served on the judge. **This subparagraph was amended in 2019 to permit the increasingly frequent preference of judges to receive electronic or facsimile copies of filings.**

[Paragraph] Subparagraph (b)(2): This **[paragraph]** subparagraph extends the time period for drafting the Statement from 14 days to at least 21 days, with the trial court permitted to enlarge the time period or to allow the filing of an amended or supplemental Statement upon good cause shown. In *Commonwealth v. Mitchell*, **[588 Pa. 19, 41,]** 902 A.2d 430, 444 (**Pa.** 2006), the Court expressly observed that a Statement filed "after several extensions of time" was timely. An enlargement of time upon timely application might be warranted if, for example, there was a serious delay in the transcription of the notes of testimony or in the delivery of the order to appellate counsel. **The 2019 amendments to the rule provided the opportunity to obtain an extension of time to file the Statement until 21 days after the transcript is filed pursuant to Pa.R.A.P. 1922(b). The appellant may file a motion for an extension of time, which, if filed in accordance with the rule, will be deemed granted if not expressly denied before the Statement is due.**

A trial court should **also** enlarge the time or allow for an amended or supplemental Statement when new counsel is retained or appointed. A supplemental Statement may also be appropriate when the ruling challenged was so non-specific—*e.g.*, "Motion Denied"—that counsel could not be sufficiently definite in the initial Statement.

In general, *nunc pro tunc* relief is allowed only when there has been a breakdown in the process constituting extraordinary circumstances. *See, e.g., In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, **[577 Pa. 231, 248-49,]** 843 A.2d 1223, 1234 (**Pa.** 2004) ("We have held that fraud or the wrongful or negligent act of a court official may be a proper reason for holding that a statutory appeal period does not run and that the wrong may be corrected by means of a petition filed *nunc pro tunc*.") Courts have also allowed *nunc pro tunc* relief when "non-negligent circumstances, either as they relate to appellant or his counsel" occasion delay. *McKeown v. Bailey*, 731 A.2d 628, 630 (Pa. Super. 1999). However, even when there is a breakdown in the process, the appellant must attempt to remedy it within a "very short duration" of time. *Id.***[; *Amicone v. Rok*, 839 A.2d 1109, 1113 (Pa. Super. 2003) (recognizing a breakdown in process, but finding the delay too long to justify nunc pro tunc relief).]**

[Paragraph] Subparagraph (b)(3): This **[paragraph]** subparagraph specifies what the judge must advise appellants when ordering a Statement.

[Paragraph] Subparagraph (b)(4): This **[paragraph]** subparagraph sets forth the parameters for the Statement and explains what constitutes waiver. It should help counsel to comply with the concise-yet-sufficiently-detailed requirement and avoid waiver under either *Lineberger v. Wyeth*, 894 A.2d 141, 148-49 (Pa. Super. 2006) or *Kanter v. Epstein*, 866 A.2d 394, 400-03 (Pa. Super. 2004), allowance of appeal denied, **[584 Pa. 678,]** 880 A.2d 1239 (**Pa.** 2005), cert. denied sub nom. *Spector Gadon & Rosen, P.C. v. Kanter*, 546 U.S. 1092 (2006). The paragraph explains that the Statement should be sufficiently specific to allow the judge to draft the opinion required under **Pa.R.A.P.** 1925(a), and it provides that the number of issues alone will not constitute waiver—so long as the issues set forth are non-redundant and non-frivolous. It allows appellants to rely on the fact that subsidiary issues will be deemed included if the overarching issue is identified and if all of the issues have been properly preserved in the trial court. This provision has been taken from the United States Supreme Court rules. *See* Sup. Ct. R. 14(1). This **[paragraph]** subparagraph does not in any way excuse the responsibility of an appellant who is raising claims of constitutional error to raise those claims with the requisite degree of specificity. This **[paragraph]** subparagraph also allows—but does not require—an appellant to state the authority upon which the appellant challenges the ruling in question**[, but it expressly recognizes that a Statement is not a brief and that an appellant shall not file a brief with the Statement. This paragraph also recognizes that there may be times that a civil appellant cannot be specific in the Statement because of the non-specificity of the ruling complained of on appeal. In such instances, civil appellants may seek leave to file a supplemental Statement to clarify their position in response to the judge's more specific Rule 1925(a) opinion] and to identify the place in the record where the basis for the challenge may be found**.

Neither the number of issues raised nor the length of the Statement alone is enough to find that a Statement is vague or non-concise enough to constitute waiver. *See Astorino v. New Jersey Transit Corp.*, 912 A.2d 308, 309 (Pa. Super. 2006). The more carefully the appellant frames the Statement, the more likely it will be that the judge will be able to articulate the rationale underlying the decision and provide a basis for counsel to determine the advisability of raising that issue on appeal. Thus, counsel should begin the winnowing process when preparing the Statement and should articulate specific errors with which the appellant takes issue and why. Nothing in the rule requires an appellant to articulate the arguments within a Statement. It is enough for an appellant—except where constitutional error must be raised with greater specific-

ity—to have identified the rulings and issues in regard to which the trial court is alleged to have erred.

[Subdivision] **Paragraph** (c)**:** The appellate courts have the right under the Judicial Code to "affirm, modify, vacate, set aside or reverse any order brought before it for review, and may remand the matter and direct the entry of such appropriate order, or require such further proceedings to be had as may be just under the circumstances." 42 Pa.C.S. § 706. **[The following additions to the rule are based upon this statutory authorization.]**

[Paragraph] **Subparagraph** (c)(1)**:** This **[paragraph]** **subparagraph** applies to both civil and criminal cases and allows an appellate court to seek additional information—whether by supplementation of the record or additional briefing—if it is not apparent whether an initial or supplemental Statement was filed and/or served or timely filed and/or served.

[Paragraph] **Subparagraph** (c)(2)**:** This **[paragraph]** **subparagraph** allows an appellate court to remand a civil case to allow an initial, amended, or supplemental Statement and/or a supplemental opinion. *See also* 42 Pa.C.S. § 706. **In 2019, the rule was amended to clarify that for those civil appellants who have a statutory or rules-based right to counsel (such as appellants in post-conviction relief, juvenile, parental termination, or civil commitment proceedings) good cause includes a failure of counsel to file a Statement or a timely Statement.**

[Paragraph] **Subparagraph** (c)(3)**:** This **[paragraph]** **subparagraph** allows an appellate court to remand in criminal cases only when **[the]** **an** appellant**, who is represented by counsel,** has completely failed to respond to an order to file a Statement **or has failed to do so timely**. It is thus narrower than **subparagraph** (c)(2)**[, above. Prior to these amendments of this rule, the appeal was quashed if no timely Statement was filed or served; however, because the failure to file and serve a timely Statement is a failure to perfect the appeal, it is presumptively prejudicial and "clear" ineffectiveness. See, e.g.]. *See, e.g., Commonwealth v. Burton*, 973 A.2d 428, 431 (Pa. Super. 2009);** *Commonwealth v. Halley*, **[582 Pa. 164, 172,]** 870 A.2d 795, 801 (**Pa.** 2005); *Commonwealth v. West*, 883 A.2d 654, 657 (Pa. Super. 2005). ***Per se* ineffectiveness applies in all circumstances in which an appeal is completely foreclosed by counsel's actions, but not in circumstances in which the actions narrow or serve to foreclose the appeal in part. *Commonwealth v. Rosado*, 150 A.3d 425, 433-35 (Pa. 2016). *Pro se* appellants are excluded from this exception to the waiver doctrine as set forth in *Commonwealth v. Lord*, 719 A.2d 306 (Pa. 1998).**

Direct appeal rights have typically been restored through a post-conviction relief process, but when the ineffectiveness is apparent and *per se*, the court in *West* recognized that the more effective way to resolve such *per se* ineffectiveness is to remand for the filing of a Statement and opinion. *See West*, 883 A.2d at 657**; *see also Burton* (late filing of Statement is *per se* ineffective assistance of counsel)**. The procedure set forth in *West* is codified in **[paragraph]** **subparagraph** (c)(3). As the *West* court recognized, this rationale does not apply when waiver occurs due to the improper filing of a Statement. In such circumstances, relief may occur only through the post-conviction relief process and only upon demonstration by the appellant that, but for the deficiency of counsel, it was reasonably probable that the appeal would have been successful. An appellant must be able to identify *per se* ineffectiveness to secure a remand under this section, and any appellant who is able to demonstrate *per se* ineffectiveness is entitled to a remand. Accordingly, this **[paragraph]** **subparagraph** does not raise the concerns addressed in *Johnson v. Mississippi*, 486 U.S. 578, 588-89 (1988) (observing that where a rule has not been consistently or regularly applied, it is not—under federal law—an adequate and independent state ground for affirming petitioner's conviction.)

[Paragraph] **Subparagraph** (c)(4)**:** This **[paragraph]** **subparagraph** clarifies the special expectations and duties of a criminal lawyer. Even lawyers seeking to withdraw pursuant to the procedures set forth in *Anders v. California*, 386 U.S. 738 (1967) and **[*Commonwealth v. McClendon*, 495 Pa. 467, 434 A.2d 1185 (1981)]** ***Commonwealth v. Santiago*, 978 A.2d 349 (Pa. 2009),** are obligated to comply with all rules**[, including the filing of a Statement. See *Commonwealth v. Myers*, 897 A.2d 493, 494-96 (Pa. Super. 2006); *Commonwealth v. Ladamus*, 896 A.2d 592, 594 (Pa. Super. 2006)]**. However, because a lawyer will not file an **[*Anders/McClendon*]** ***Anders/Santiago*** brief without concluding that there are no non-frivolous issues to raise on appeal, this amendment allows a lawyer to file, in lieu of a Statement, a representation that no errors **[have been raised]** **are asserted** because the lawyer is (or intends to be) seeking to withdraw under **[*Anders/McClendon*]** ***Anders/Santiago***. At that point, the appellate court will reverse or remand for a supplemental Statement and/or opinion if it finds potentially non-frivolous issues during its constitutionally required review of the record.

[Subdivision (d) was formerly (c). The text has not been revised, except to update the reference to Pa.R.A.P. 1112(c).

The 2007 amendments attempt to address the concerns of the bar raised by cases in which courts found waiver: (a) because the Statement was too vague; or (b) because the Statement was so repetitive and voluminous that it did not enable the judge to focus on the issues likely to be raised on appeal. See, e.g., *Lineberger v. Wyeth*, 894 A.2d 141, 148-49 (Pa. Super. 2006); *Kanter v. Epstein*, 866 A.2d 394, 400-03 (Pa. Super. 2004), allowance of appeal denied, 584 Pa. 678, 880 A.2d 1239 (2005), cert. denied sub nom. *Spector Gadon & Rosen, P.C. v. Kanter*, 546 U.S. 1092 (2006). Courts have also cautioned, however, "against being too quick to find waiver, claiming that Rule 1925(b) statements are either too vague or not specific enough." *Astorino v. New Jersey Transit Corp.*, 912 A.2d 308, 309 (Pa. Super. 2006).

While conciseness and vagueness are very case-specific inquiries, certain observations may be helpful. First, the Statement is only the first step in framing the issues to be raised on appeal, and the requirements of Pa.R.A.P. 2116 are even more stringent. Thus, the Statement should be viewed as an initial winnowing. Second, when appellate courts have been critical of sparse or vague Statements, they have not criticized the number of issues raised

but the paucity of useful information contained in the Statement. Neither the number of issues raised nor the length of the Statement alone is enough to find that a Statement is vague or non-concise enough to constitute waiver. See *Astorino v. New Jersey Transit Corp.*, 912 A.2d 308, 309 (Pa. Super. 2006). The more carefully the appellant frames the Statement, the more likely it will be that the judge will be able to articulate the rationale underlying the decision and provide a basis for counsel to determine the advisability of appealing that issue. Thus, counsel should begin the winnowing process when preparing the Statement and should articulate specific rulings with which the appellant takes issue and why. Nothing in the rule requires an appellant to articulate the arguments within a Statement. It is enough for an appellant—except where constitutional error must be raised with greater specificity—to have identified the rulings and issues that comprise the putative trial court errors.]

Rule 1931. Transmission of the Record.

(a) *Time for transmission.*

(1) *General rule.*—Except as otherwise prescribed by this rule **or if an extension has been granted pursuant to Pa.R.A.P. 1925(b)(2)**, the record on appeal, including the transcript and exhibits necessary for the determination of the appeal, shall be transmitted to the appellate court within 60 days after the filing of the notice of appeal. If an appeal has been allowed or if permission to appeal has been granted, the record shall be transmitted as provided by **[Rule] Pa.R.A.P.** 1122 **[(allowance of appeal and transmission of record)]** or by **[Rule] Pa.R.A.P.** 1322 **[(permission to appeal and transmission of record)]**, as the case may be. The appellate court may shorten or extend the time prescribed by this **[subdivision] subparagraph** for a class or classes of cases.

(2) *Children's fast track appeals.*—In a children's fast track appeal, the record on appeal, including the transcript and exhibits necessary for the determination of the appeal, shall be transmitted to the appellate court within 30 days after the filing of the notice of appeal. If an appeal has been allowed or if permission to appeal has been granted, the record shall be transmitted as provided by **[Rule] Pa.R.A.P.** 1122 **[(allowance of appeal and transmission of record)]** or by **[Rule] Pa.R.A.P.** 1322 **[(permission to appeal and transmission of record)]**, as the case may be.

(b) *Duty of* **[lower] trial** *court.*—After a notice of appeal has been filed**,** the judge who entered the order appealed from shall comply with **[Rule] Pa.R.A.P.** 1925 **[(opinion in support of order)]**, shall cause the official court reporter to comply with **[Rule] Pa.R.A.P.** 1922 **[(transcription of notes of testimony)]** or shall otherwise settle a statement of the evidence or proceedings as prescribed by this chapter, and shall take any other action necessary to enable the clerk to assemble and transmit the record as prescribed by this rule.

(c) *Duty of clerk to transmit the record.*—When the record is complete for purposes of the appeal, the clerk of the **[lower] trial** court shall transmit it to the prothonotary of the appellate court. The clerk of the **[lower] trial** court shall number the documents comprising the record and shall transmit with the record a list of the documents correspondingly numbered and identified with sufficient specificity to allow the parties on appeal to identify each document and whether it is marked as confidential, so as to determine whether the record on appeal is complete. Any Confidential Information Forms and the "Unredacted Version" of any pleadings, documents, or other legal papers where a "Redacted Version" was also filed shall be separated either physically or electronically and transmitted to the appellate court. Whatever is confidential shall be labeled as such. If any case records or documents were sealed in the lower court, the list of documents comprising the record shall specifically identify such records or documents as having been sealed in the lower court. Documents of unusual bulk or weight and physical exhibits other than documents shall not be transmitted by the clerk unless he or she is directed to do so by a party or by the prothonotary of the appellate court. A party must make advance arrangements with the clerk for the transportation and receipt of exhibits of unusual bulk or weight. Transmission of the record is effected when the clerk of the **[lower] trial** court mails or otherwise forwards the record to the prothonotary of the appellate court. The clerk of the **[lower] trial** court shall indicate, by endorsement on the face of the record or otherwise, the date upon which the record is transmitted to the appellate court.

(d) *Service of the list of record documents.*—The clerk of the **[lower] trial** court shall, at the time of the transmittal of the record to the appellate court, mail a copy of the list of record documents to all counsel of record, or if unrepresented by counsel, to the parties at the address they have provided to the clerk. The clerk shall note on the docket the giving of such notice.

(e) *Multiple appeals.*—Where more than one appeal is taken from the same order, it shall be sufficient to transmit a single record, without duplication.

(f) *Inconsistency between list of record documents and documents actually transmitted.*—If the clerk of the **[lower] trial** court fails to transmit to the appellate court all of the documents identified in the list of record documents, such failure shall be deemed a breakdown in processes of the court. Any omission shall be corrected promptly pursuant to **[Rule] Pa.R.A.P.** 1926 **[(correction or modification of the record)]** and shall not be the basis for any penalty against a party.

***Official Note*:**

[Rule] Pa.R.A.P. 1926 **[(correction or modification of the record)]** provides the means to resolve any disagreement between the parties as to what should be included in the record on appeal.

[Pa.B. Doc. No. 19-1131. Filed for public inspection July 26, 2019, 9:00 a.m.]

Title 225—RULES OF EVIDENCE

[225 PA. CODE ART. I]

Proposed Amendment of the Comment to Pa.R.E. 104

The Committee on Rules of Evidence is considering proposing to the Supreme Court of Pennsylvania the amendment of the Comment to Pennsylvania Rule of

Evidence 104 suggesting procedural guidance for analyzing claims involving the right against testimonial self-incrimination 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 and underlined; 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 September 10, 2019. 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 Committee on
Rules of Evidence

JOHN P. KRILL, Jr.,
Chair

Annex A

TITLE 225. RULES OF EVIDENCE

ARTICLE I. GENERAL PROVISIONS

Rule 104. Preliminary Questions.

(a) *In General*. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) *Relevance That Depends on a Fact*. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

(c) *Conducting a Hearing So That the Jury Cannot Hear it*. The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

(1) the hearing involves evidence alleged to have been obtained in violation of the defendant's rights;

(2) a defendant in a criminal case is a witness and so requests; or

(3) justice so requires.

(d) *Cross-Examining a Defendant in a Criminal Case*. By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(e) *Weight and Credibility*. Even though the court rules that evidence is admissible, this does not preclude a party from offering other evidence relevant to the weight or credibility of that evidence.

Comment

Pa.R.E. 104(a) is identical to F.R.E. 104(a).

The second sentence of Pa.R.E. 104(a) is based on the premise that, by and large, the law of evidence is a "child of the jury system" and that the rules of evidence need not be applied when the judge is the fact finder. The theory is that the judge should be empowered to hear any relevant evidence to resolve questions of admissibility. This approach is consistent with Pennsylvania law. *See Commonwealth v. Raab*, **[594 Pa. 18,]** 934 A.2d 695 (**Pa.** 2007).

Pa.R.E. 104(a) does not resolve whether the allegedly inadmissible evidence alone is sufficient to establish its own admissibility. Some other rules specifically address this issue. For example, Pa.R.E. 902 provides that some evidence is self-authenticating. But under Pa.R.E. 803(25), the allegedly inadmissible evidence alone is not sufficient to establish some of the preliminary facts necessary for admissibility. In other cases the question must be resolved by the trial court on a case-by-case basis.

Pa.R.E. 104(b) is identical to F.R.E. 104(b).

Pa.R.E. 104(c)(1) differs from F.R.E. 104(c)(1) in that the Federal Rule says "the hearing involves the admissibility of a confession;" Pa.R.E. 104(c)(1) is consistent with Pa.R.Crim.P. 581(F), which requires hearings outside the presence of the jury in all cases in which it is alleged that the evidence was obtained in violation of the defendant's rights.

Pa.R.E. 104(c)(2) and (3) are identical to F.R.E. 104(c)(2) and (3). Paragraph (c)(3) is consistent with *Commonwealth v. Washington*, **[554 Pa. 559,]** 722 A.2d 643 (**Pa.** 1998), a case involving child witnesses, in which the Supreme Court created a *per se* rule requiring competency hearings to be conducted outside the presence of the jury. In *Commonwealth v. Delbridge*, **[578 Pa. 641,]** 855 A.2d 27 (**Pa.** 2003), the Supreme Court held that a competency hearing is the appropriate way to explore an allegation that the memory of a child has been so corrupted or "tainted" by unduly suggestive or coercive interview techniques as to render the child incompetent to testify.

Pa.R.E. 104(d) is identical to F.R.E. 104(d). In general, when a party offers himself or herself as a witness, the party may be questioned on all relevant matters in the case. *See Agate v. Dunleavy*, **[398 Pa. 26,]** 156 A.2d 530 (**Pa.** 1959). Under Pa.R.E. 104(d), however, when the accused in a criminal case testifies with regard to a preliminary question only, he or she may not be cross-examined as to other matters. This is consistent with Pa.R.E. 104(c)(2) in that it is designed to preserve the defendant's right not to testify in the case in chief.

Pa.R.E. 104(e) differs from F.R.E. 104(e) to clarify the meaning of this paragraph.

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

Assessing Assertion of Right Against Self-Incrimination

The basis for a right against self-incrimination can be found in constitution and statute. *See* U.S. Const. amend.

V; Pa. Const. art 1, § 9; 42 Pa.C. § 5941. In terms of evidence, this right has been described as a "privilege." *See, e.g.*, 42 Pa.C.S. § 5947(b)(2) ("privilege against self-incrimination"); *Commonwealth v. Swinehart*, 664 A.2d 957 (Pa. 1995) (same). The assertion of privilege raises a preliminary question under Pa.R.E. 104(a).

A witness may refuse to testify unless it is "*perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer *cannot possibly* have such tendency" to incriminate. *Hoffman v. United States*, 341 U.S. 479, 488 (1951) (emphasis in original); *see also Commonwealth v. Allen*, 462 A.2d 624, 627 (Pa. 1983). "The privilege afforded not only extends to answers that would in themselves support a conviction. . .but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute." *Ullmann v. United States*, 350 U.S. 422, 429 (1956); *see also Commonwealth v. Carrera*, 227 A.2d 627, 629 (Pa. 1967), *superseded by statute on other grounds, Commonwealth v. Swinehart*, 664 A.2d 957 (Pa. 1995). "The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." *Marchetti v. U.S.*, 390 U.S. 39, 53 (1968).

By way of example for the benefit of the bench and bar, the following procedural guidance is offered to assess whether there is a risk of self-incrimination. When a question requires a patently incriminating response, a judicial determination may be made without further inquiry. However, when a response may result in an incriminatory "link in the chain of evidence," then the judge may require more information than presently before the court. *See generally* 1 McCormick on Evidence § 132 (7th ed.); 98 C.J.S. Witnesses § 613.

When further judicial inquiry is necessary, the questioning party should provide the judge with the questions to be asked of the witness and the witness should be appointed counsel if not already represented. Next, the trial judge should consider the claim of privilege *in camera* in the presence of the witness and the witness's counsel, and outside the presence of the parties. The scope of judicial inquiry is not focused on the merits of the case; rather, it is focused on the whether the witness's response to the proposed questions is at risk of self-incrimination.

Thereafter, in the presence of the parties and on the record, the witness's counsel should offer a sufficient proffer for the judge to determine the claim. Upon hearing the parties' arguments, if any, the judge should state on the record whether there are any areas of potential testimony for which a claim of privilege had been substantiated and the reasons therefor. *See also Commonwealth v. Kirwan*, 847 A.2d 61, 65 (Pa. Super. 2004) (A witness may ordinarily only assert the privilege to avoid responding to a particular question; a blanket privilege generally is not permitted.).

***Official Note*:** Adopted May 8, 1998, effective October 1, 1998; Comment revised March 29, 2001, effective April 1, 2001; rescinded and replaced January 17, 2013, effective March 18, 2013**; Comment revised , 2019, effective , 2019**.

Committee Explanatory Reports:

Final Report explaining the March 29, 2001 revision of the Comment published with the Court's Order at 31 Pa.B. 1995 (April 14, 2001).

Final Report explaining the January 17, 2013 rescission and replacement published with the Court's Order at 43 Pa.B. 651 (February 2, 2013).

Final Report explaining the , 2019 revision of the Comment published with the Court's Order at 49 Pa.B. (, 2019).

REPORT

Proposed Amendment of the Comment to Pa.R.E. 104

The Committee on Rules of Evidence is considering proposing the amendment of the Comment to Pennsylvania Rule of Evidence 104 to suggest procedural guidance for determining claims involving the right against testimonial self-incrimination. The Pennsylvania Rules of Evidence and the various bodies of procedural rules are silent on the topic. The Pennsylvania case law provides little guidance with the practice of addressing these claims:

> [T]here is no formula for determining when and how the Fifth Amendment privilege can be asserted (nor do we think one should be created). *Commonwealth v. Kirwan*, 847 A.2d 61, 65 (Pa. Super. 2004). We are confident that trial courts can draw on their wealth of experience and fashion procedures appropriate to the practicalities of the case and that will allow the judge to make a sufficiently informed decision. We are likewise confident that lower courts will create a record sufficient to demonstrate the propriety of permitting or denying the privilege at the same time as preserving any Fifth Amendment right.

Commonwealth v. Treat, 848 A.2d 147, 148 (Pa. Super. 2004) (internal quotations omitted).

The timing of these claims can be particularly problematic in proceedings where pre-trial discovery is limited, including criminal, juvenile, and custody proceedings. In the absence of thorough pre-trial discovery, proponents and opponents of testimony can be surprised at trial with assertions of privilege. As indicated to the Committee, these claims are "trial stoppers," and the need for the trial judge to resolve expeditiously the claims is hindered by the lack of procedural guidance.

To address this need, the Committee has prepared a Comment to Pa.R.E. 104 suggesting a procedure for resolving these claims. The Committee elected to place this procedure in a Comment intending for it to be suggestive rather than placement in the rule text as a requirement.

As background, the basis for a right against self-incrimination can be found in constitution and statute. *See* U.S. Const. amend. V; Pa. Const. art 1, § 9; 42 Pa.C. § 5941. In terms of evidence, this right has been described as a "privilege." *See, e.g.*, 42 Pa.C.S. § 5947(b)(2) ("privilege against self-incrimination"); *Commonwealth v. Swinehart*, 664 A.2d 957 (Pa. 1995) (same). The assertion of privilege raises a preliminary question under Pa.R.E. 104(a). As Pennsylvania precedent has not firmly established a process to analyze these claims, the Committee focused largely on federal practice.

A witness may refuse to testify unless it is "*perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer *cannot possibly* have such tendency" to incriminate. *Hoffman v. U.S.*, 341 U.S. 479, 488 (1951) (emphasis in original); *see also Commonwealth v. Allen*, 462 A.2d 624, 627 (Pa. 1983). "The privilege afforded not only extends to answers that would in themselves support

a conviction. . .but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute." *Ullmann v. U.S.*, 350 U.S. 422, 429 (1956); *see also Commonwealth v. Carrera*, 227 A.2d 627, 629 (Pa. 1967), *superseded by statute on other grounds, Commonwealth v. Swinehart*, 664 A.2d 957 (Pa. 1995). "The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." *Marchetti v. U.S.*, 390 U.S. 39, 53 (1968).

When a question requires an incriminating response, such as "did you bribe John Doe?," the judicial determination can be made without further inquiry. However, when a facially innocent inquiry, such as "do you know John Doe?," may result in an incriminatory "link in the chain of evidence," then the judge may require more information than presently before the court. *See generally* 1 McCormick on Evidence § 132 (7th ed.); 98 C.J.S. Witnesses § 613. A judge's inquiry will be directed at potentially sensitive information, which assuming the privilege applies, the parties are not entitled to hear.

A witness asserting a privilege against self-incrimination should be appointed counsel if not already represented. The Committee believed it was important that an unrepresented claimant be appointed counsel to explain the privilege being asserted and whether the claim has merit. *See* 42 Pa.C.S. § 4549(c) (Investigating Grand Jury Act providing counsel for witnesses to guard against self-incrimination); *Commonwealth v. Schultz*, 133 A.3d 294, 309 (Pa. Super. 2016) ("In affording the right to counsel inside the grand jury room, our legislature sought to offer greater protections to individuals' constitutional right against self-incrimination when appearing in the grand jury setting.").

The federal courts have approved the use of an *in camera* inquiry when a claim of privilege is made and the information available to the judge does not, in the judge's estimation, afford adequate verification of the witness's assertion of the privilege. *See United States v. Goodwin*, 625 F.2d 693, 702 (5th Cir. 1980); *In re Brogna*, 589 F.2d 24, 28 & n. 5 (1st Cir. 1978); *see also Commonwealth v. Martin*, 668 N.E.2d 825 (Mass. 1996). In these circumstances, a judge has the authority to conduct an *in camera* review with a witness who has asserted his privilege.

The questioning party should provide the judge with the questions to be asked of the witness. The permissible scope of inquiry open to a judge is narrow. "A proper use for an *in camera* hearing is to allow a witness to impart sufficient facts in confidence to the judge to verify the privilege claim . . . the judge is simply providing the most favorable setting possible for the witness to 'open the door a crack' where there is no other way for the witness to verify his claim." *In re Brogna, supra* at 28 n. 5.

The Committee deliberated at length whether the witness should be required to testify as to the facts that may be potentially incriminating. Members did not believe that requiring a witness to provide potentially incriminating testimony was consonant with the purpose of the privilege. Rather, the information should be presented to the judge by the witness's counsel in the form of an offer of proof, *i.e.*, proffer.

The *in camera* review is limited to the witness, his or her counsel, and the judge. *See United States v. Fricke*, 684 F.2d 1126, 1131 (5th Cir. 1982). The exclusion of parties' counsel at this stage is a point for consideration:

> Subjecting a witness to an examination by a partisan party might effectively destroy the privilege. Nevertheless, we do not hold that it is always proper to exclude defense counsel from these *in camera* hearings. Even if his participation is primarily passive, counsel's presence can be important in preserving, or preventing, an error by the court. However, a reciprocity problem is present. The value of an *in camera* inquiry is that it allows the court to probe the witness' fifth amendment claim more deeply than it could in open court. A witness' rights are threatened if this is done in the presence of the government's attorney. Yet, if the court allows defense counsel to remain present, fairness suggests that the government's interest be represented as well.

Fricke, 684 F.2d at 1131. In the criminal context, "[a] defendant's sixth amendment rights do not override the fifth amendment rights of others." *Id.* at 1130.

In *Commonwealth v. Miller*, 518 A.2d 1187 (Pa. 1986), the Court considered the propriety of an *in camera* examination of the police officer to test the credibility of statements contained in an affidavit of probable cause. The Superior Court directed that the defendant and defendant's counsel should be excluded from the examination. The Supreme Court rejected this approach, stating:

> The concept of an *in-camera* hearing during which the defendant and his counsel are both excluded from an inquiry which may impact upon the ultimate finding of guilt or innocence is antithetical to the concept of due process as it has evolved in this Commonwealth under our Constitution. The defendant should not be forced to accept the judge as his advocate during that segment of the proceeding, nor is it proper to remove the judge from the role of an impartial arbiter. Our adjudicative process is an adversary one and the defendant is entitled to counsel at every critical stage. If this was a competent area of inquiry the defendant would have an absolute right to have counsel's participation in that inquiry.

Id. at 1195. While *Miller* did not involve the right to remain silent, it does signal an approach favoring the presence of the parties.

To address this concern, the Committee proposes procedural guidance whereby the witness's counsel makes a further proffer on the record before the parties at which time the judge can receive argument from the parties and make a determination whether the testimony is at risk of self-incrimination. Thereafter, further proceedings become a procedural matter outside the purview of Pa.R.E. 104.

All comments, concerns, and suggestions concerning this proposal are welcome.

[Pa.B. Doc. No. 19-1132. Filed for public inspection July 26, 2019, 9:00 a.m.]

Title 225—RULES OF EVIDENCE

[225 PA. CODE ART. IX]

Proposed Amendment of Pa.R.E. 901

The Committee on Rules of Evidence is considering proposing to the Supreme Court of Pennsylvania the amendment of Pennsylvania Rule of Evidence 901 to add a new paragraph (b)(11) to provide an example of authentication of digital evidence 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 and underlined; 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 September 10, 2019. 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 Committee on
Rules of Evidence

JOHN P. KRILL, Jr.,
Chair

Annex A

TITLE 225. RULES OF EVIDENCE

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule 901. Authenticating or Identifying Evidence.

(a) *In General.* To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) *Examples.* The following are examples only—not a complete list—of evidence that satisfies the requirement:

(1) *Testimony of a Witness with Knowledge.* Testimony that an item is what it is claimed to be.

(2) *Nonexpert Opinion about Handwriting.* A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) *Comparison by an Expert Witness or the Trier of Fact.* A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) *Distinctive Characteristics and the Like.* The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) *Opinion About a Voice.* An opinion identifying a person's voice—whether heard firsthand or through mechanical or electronic transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) *Evidence About a Telephone Conversation.* For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) *Evidence About Public Records.* Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

(8) *Evidence About Ancient Documents or Data Compilations.* For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 30 years old when offered.

(9) *Evidence About a Process or System.* Evidence describing a process or system and showing that it produces an accurate result.

(10) *Methods Provided by a Statute or a Rule.* Any method of authentication or identification allowed by a statute or a rule prescribed by the Supreme Court.

(11) *Digital Evidence.* To connect digital evidence with a person or entity:

(A) direct evidence such as testimony of a person with personal knowledge; or

(B) circumstantial evidence such as:

(i) identifying content; or

(ii) proof of ownership of, possession of, control of, or access to a device or account at the relevant time when corroborated by circumstances indicating authorship.

Comment

Pa.R.E. 901(a) is identical to F.R.E. 901(a) and consistent with Pennsylvania law. The authentication or identification requirement may be expressed as follows: When a party offers evidence contending either expressly or impliedly that the evidence is connected with a person, place, thing, or event, the party must provide evidence sufficient to support a finding of the contended connection. *See Commonwealth v. Hudson*, **[489 Pa. 620,]** 414 A.2d 1381 (**Pa.** 1980); *Commonwealth v. Pollock*, **[414 Pa. Super. 66,]** 606 A.2d 500 (**Pa. Super.** 1992).

In some cases, real evidence may not be relevant unless its condition at the time of trial is similar to its condition at the time of the incident in question. In such cases, the party offering the evidence must also introduce evidence sufficient to support a finding that the condition is similar. Pennsylvania law treats this requirement as an aspect of authentication. *See Commonwealth v. Hudson*, **[489 Pa. 620,]** 414 A.2d 1381 (**Pa.** 1980).

Demonstrative evidence such as photographs, motion pictures, diagrams and models must be authenticated by evidence sufficient to support a finding that the demonstrative evidence fairly and accurately represents that which it purports to depict. *See Nyce v. Muffley*, **[384 Pa. 107,]** 119 A.2d 530 (**Pa.** 1956).

Pa.R.E. 901(b) is identical to F.R.E. 901(b).

Pa.R.E. 901(b)(1) is identical to F.R.E. 901(b)(1). It is consistent with Pennsylvania law in that the testimony of a witness with personal knowledge may be sufficient to authenticate or identify the evidence. *See Commonwealth v. Hudson*, **[489 Pa. 620,]** 414 A.2d 1381 (**Pa.** 1980).

Pa.R.E. 901(b)(2) is identical to F.R.E. 901(b)(2). It is consistent with 42 Pa.C.S. § 6111, which also deals with the admissibility of handwriting.

Pa.R.E. 901(b)(3) is identical to F.R.E. 901(b)(3). It is consistent with Pennsylvania law. When there is a question as to the authenticity of an exhibit, the trier of fact will have to resolve the issue. This may be done by comparing the exhibit to authenticated specimens. *See Commonwealth v. Gipe*, **[169 Pa. Super. 623,]** 84 A.2d 366 (**Pa. Super.** 1951) (comparison of typewritten document with authenticated specimen). Under this rule, the court must decide whether the specimen used for comparison to the exhibit is authentic. If the court determines that there is sufficient evidence to support a finding that the specimen is authentic, the trier of fact is then permitted to compare the exhibit to the authenticated specimen. Under Pennsylvania law, lay or expert testimony is admissible to assist the jury in resolving the question. *See, e.g.*, 42 Pa.C.S. § 6111.

Pa.R.E. 901(b)(4) is identical to F.R.E. 901(b)(4). Pennsylvania law has permitted evidence to be authenticated by circumstantial evidence similar to that discussed in this illustration. The evidence may take a variety of forms including: evidence establishing chain of custody, see *Commonwealth v. Melendez*, **[326 Pa. Super. 531,]** 474 A.2d 617 (**Pa. Super.** 1984); evidence that a letter is in reply to an earlier communication, see *Roe v. Dwelling House Ins. Co. of Boston*, **[149 Pa. 94,]** 23 A. 718 (**Pa.** 1892); testimony that an item of evidence was found in a place connected to a party, see *Commonwealth v. Bassi*, **[284 Pa. 81,]** 130 A. 311 (**Pa.** 1925); a phone call authenticated by evidence of party's conduct after the call, see *Commonwealth v. Gold*, **[123 Pa. Super. 128,]** 186 A. 208 (**Pa. Super.** 1936); and the identity of a speaker established by the content and circumstances of a conversation, see *Bonavitacola v. Cluver*, **[422 Pa. Super. 556,]** 619 A.2d 1363 (**Pa. Super.** 1993).

Pa.R.E. 901(b)(5) is identical to F.R.E. 901(b)(5). Pennsylvania law has permitted the identification of a voice to be made by a person familiar with the alleged speaker's voice. *See Commonwealth v. Carpenter*, **[472 Pa. 510,]** 372 A.2d 806 (**Pa.** 1977).

Pa.R.E. 901(b)(6) is identical to F.R.E. 901(b)(6). This paragraph appears to be consistent with Pennsylvania law. *See Smithers v. Light*, **[305 Pa. 141,]** 157 A. 489 (**Pa.** 1931); *Wahl v. State Workmen's Ins. Fund*, **[139 Pa. Super. 53,]** 11 A.2d 496 (**Pa. Super.** 1940).

Pa.R.E. 901(b)(7) is identical to F.R.E. 901(b)(7). This paragraph illustrates that public records and reports may be authenticated in the same manner as other writings. In addition, public records and reports may be self-authenticating as provided in Pa.R.E. 902. Public records and reports may also be authenticated as otherwise provided by statute. *See* Pa.R.E. 901(b)(10) and its Comment.

Pa.R.E. 901(b)(8) differs from F.R.E. 901(b)(8), in that the Pennsylvania Rule requires thirty years, while the Federal Rule requires twenty years. This change makes the rule consistent with Pennsylvania law. *See Commonwealth ex rel. Ferguson v. Ball*, **[277 Pa. 301,]** 121 A. 191 (**Pa.** 1923).

Pa.R.E. 901(b)(9) is identical to F.R.E. 901(b)(9). There is very little authority in Pennsylvania discussing authentication of evidence as provided in this illustration. The paragraph is consistent with the authority that exists. For example, in *Commonwealth v. Visconto*, **[301 Pa. Super. 543,]** 448 A.2d 41 (**Pa. Super.** 1982), a computer print-out was held to be admissible. In *Appeal of Chartiers Valley School District*, **[67 Pa. Cmwlth. 121,]** 447 A.2d 317 (**Pa. Cmwlth.** 1982), computer studies were not admitted as business records, in part, because it was not established that the mode of preparing the evidence was reliable. The court used a similar approach in *Commonwealth v. Westwood*, **[324 Pa. 289,]** 188 A. 304 (**Pa.** 1936) (test for gun powder residue) and in other cases to admit various kinds of scientific evidence. *See Commonwealth v. Middleton*, **[379 Pa. Super. 502,]** 550 A.2d 561 (**Pa. Super.** 1988) (electrophoretic analysis of dried blood); *Commonwealth v. Rodgers*, **[413 Pa. Super. 498,]** 605 A.2d 1228 (**Pa. Super.** 1992) (results of DNA/RFLP testing).

Pa.R.E. 901(b)(10) differs from F.R.E. 901(b)(10) to eliminate the reference to Federal law and to make the paragraph conform to Pennsylvania law.

Pa.R.E. 901(b)(11) has no counterpart in the Federal Rules of Evidence. "Digital evidence," as used in this rule, is intended to include a communication, statement, or image existing in an electronic medium. This includes emails, text messages, social media postings, and images. The rule illustrates the manner in which digital evidence may be attributed to the author.

The proponent of digital evidence is not required to prove that no one else could be the author. Rather, the proponent must produce sufficient evidence to support a finding that a particular person or entity was the author. *See* Pa.R.E. 901(a).

Direct evidence under Pa.R.E. 901(b)(11)(A) may also include an admission by a party-opponent.

Circumstantial evidence of identifying content under Pa.R.E. 901(b)(11)(B)(i) may include self-identification or other distinctive characteristics, including a display of knowledge only possessed by the author. Circumstantial evidence of content may be sufficient to connect the digital evidence to its author.

Circumstantial evidence of ownership, possession, control, or access of or to a device or account alone is insufficient for authentication of authorship of digital evidence under Pa.R.E. 901(b)(11)(B)(ii). *See, e.g., Commonwealth v. Mangel*, 181 A.3d 1154, 1163 (Pa. Super. 2018) (social media account bearing defendant's name, hometown, and high school was insufficient to authenticate the online and mobile device chat messages as having been authored by defendant). However, this evidence is probative in combination with other evidence of the author's identity.

Expert testimony may also be used for authentication purposes. *See, e.g., Commonwealth v. Manivannan*, 186 A.3d 472 (Pa. Super. 2018).

There are a number of statutes that provide for authentication or identification of various types of evidence. *See,*

e.g., 42 Pa.C.S. § 6103 (official records within the Commonwealth); 42 Pa.C.S. § 5328 (domestic records outside the Commonwealth and foreign records); 35 P.S. § 450.810 (vital statistics); 42 Pa.C.S. § 6106 (documents filed in a public office); 42 Pa.C.S. § 6110 (certain registers of marriages, births and burials records); 75 Pa.C.S. § 1547(c) (chemical tests for alcohol and controlled substances); 75 Pa.C.S. § 3368 (speed timing devices); 75 Pa.C.S. § 1106(c) (certificates of title); 42 Pa.C.S. § 6151 (certified copies of medical records); 23 Pa.C.S. § 5104 (blood tests to determine paternity); 23 Pa.C.S. § 4343 (genetic tests to determine paternity).

***Official Note*: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced January 17, 2013, effective March 18, 2013; adopted , 2019, effective , 2019.**

Committee Explanatory Reports:

Final Report explaining the January 17, 2013 rescission and replacement published with the Court's Order at 43 Pa.B. 651 (February 2, 2013).

Final Report explaining the , 2019 amendment published with the Court's Order at 49 Pa.B. (, 2019).

REPORT

Proposed Amendment of Pa.R.E. 901

The Committee on Rules of Evidence is considering amendment of Pennsylvania Rule of Evidence 901 to add a new paragraph (b)(11) to provide an example of evidence for the authentication of digital evidence. The Committee's initial consideration of this issue arose from its review of *Commonwealth v. Koch*, 106 A.3d 705 (Pa. 2014) (plurality) and the lack of rules-based guidance for resolving authentication questions involving attributed-authorship of digital evidence.

Authorship is a component of authentication when the proponent intends to attribute authorship to a person. The Comment to Pa.R.E. 901 indicates such: "When a party offers evidence contending either expressly or impliedly that the evidence is connected with a person, place, thing, or event, the party must provide evidence sufficient to support a finding of the contended connection."

Attribution can be established either by direct or circumstantial evidence. Direct evidence to connect digital evidence with the author may be from a person who witnessed the author construct and transmit the digital evidence. It may also include the author's admission. The more perplexing issue is the quantum of circumstantial evidence necessary to attribute authorship of digital evidence.

The Committee previously proposed rulemaking to provide such guidance at 46 Pa.B. 3795 (July 16, 2016). The proposal provided examples of authentication through the testimony of persons with knowledge and by circumstantial evidence involving content or the exclusivity of ownership, access, or possession of the device or account at the relevant time. Upon further review, the Committee has refined its earlier proposal and now solicits comments.

Generally, the requirement of authentication is satisfied when the judge determines there is sufficient proof so that a reasonable juror could find in favor of authentication or identification. *See* Pa.R.E. 901(a); Pa.R.E. 104 (Preliminary Questions); *see also Sublet v. State*, 113 A.3d 695, 718 (M.D. 2015) (collecting cases). The growing national consensus is that digital evidence can be authenticated using the existing rules:

> Courts and legal commentators have reached a virtual consensus that, although rapidly developing electronic communications technology often presents new and protean issues with respect to the admissibility of electronically generated, transmitted and/or stored information, including information found on social networking web sites, the rules of evidence already in place for determining authenticity are at least generally "adequate to the task."

Tienda v. State, 358 S.W.3d 633, 638-39 (Tex. Crim. App. 2012) (footnote omitted); *see also In re F.P.*, 878 A.2d 91, 95-96 (Pa. Super. 2005).

While jurisdictions have relied upon existing, identically worded authentication rules, namely Rule of Evidence 901, to authenticate digital evidence, the jurisdictions have applied the rules differently. The authentication of digital evidence has developed into several approaches. "The Maryland Approach" and "The Texas Approach" are at opposite ends of the spectrum:

> [The] Maryland Approach courts are skeptical of social media evidence, finding the odds too great that someone other than the alleged author of the evidence was the actual creator. The proponent must therefore affirmatively disprove the existence of a different creator in order for the evidence to be admissible.
>
> Courts following the Texas Approach are seen as more lenient in determining what amount of evidence a "reasonable juror" would need to be persuaded that the alleged creator did create the evidence. The burden of production then transfers to the objecting party to demonstrate that the evidence was created or manipulated by a third party.

Wendy Angus-Anderson, *Authenticity and Admissibility of Social Media Website Printouts*, 14 Duke L. & Tech. Rev. 33, 37-38 (2015) (footnotes omitted); *see also Parker v. State*, 85 A.3d 682 (Del. 2014).

A middle ground has evolved: "The Massachusetts Approach." This approach is neither the heightened proof of no one else being the author (Maryland) nor the lower proof of sufficient evidence for a reasonable juror to determine authorship (Texas); rather, it is a "reasonable juror plus" standard. *See* John T. Lee *et al., Status Update on Authenticating Social Media Evidence: The Three Primary Approaches Applied Nationally*, 2 NAGTRI J. 2, 6 (2017).

> Evidence that the defendant's name is written as the author of an e-mail or that the electronic communication originates from an e-mail or a social networking Web site such as Facebook or MySpace that bears the defendant's name is not sufficient alone to authenticate the electronic communication as having been authored or sent by the defendant. There must be some "confirming circumstances" sufficient for a reasonable jury to find by a preponderance of the evidence that the defendant authored the e-mails.

Commonwealth v. Purdy, 945 N.E.2d 372, 381 (Mass. 2011) (internal citations omitted). The "reasonable juror plus" standard requires not only sufficient evidence for a reasonable juror to attribute the digital evidence to the purported author, but also "confirming circumstances" showing authorship.

In *Commonwealth v. Koch*, 106 A.3d 705 (Pa. 2014), the opinion in support of affirmance eschewed the Massachu-

setts Approach ("This is not an elevated form of 'prima facie plus' standard or imposition of an additional requirement."), although it required corroboration of authorship of text messages. *See id.* at 714. An opinion in support of reversal contended that authorship went to the weight of the evidence, not authentication, *see id.* at 721-22, while another opinion in support of reversal aligned more closely with the view that authorship is a relevant consideration in most electronic communication authentication matters, *see id.* at 717.

The Committee does not believe that the authentication of digital evidence requires a heightened standard of proof; the *prima facie* standard applies. *See* Pa.R.E. 901(a). However, Pennsylvania case law is developing with regard to the type of circumstantial evidence used to authenticate digital evidence. Mere evidence of ownership of an account no longer appears adequate to attribute authorship of digital evidence. For example, in *Commonwealth v. Mangel*, 181 A.3d 1154 (Pa. Super. 2018), the prosecution tried to attribute Facebook postings to the defendant by showing the account bore the defendant's name, hometown, and high school. Citing *In re F.P.*, 878 A.2d 91 (Pa. Super. 2005) and *Commonwealth v. Koch*, 39 A.3d 996 (Pa. Super. 2011), and relying upon *U.S. v. Browne*, 834 F.3d 403 (3rd Cir. 2016), the Superior Court held that a proponent of text messages and social media must present direct or circumstantial evidence to corroborate the identity of the author of the communication. Citing other jurisdictions' precedent, the Superior Court concluded that the mere fact that an electronic communication facially appears to have originated from a certain person's account is generally insufficient to attribute the communication to the author. *Cf. State v. Hannah*, 151 A.3d 99, 107 (N.J. Super. 2016) (court holding that identity similarities, including Twitter handle and profile picture, and content containing information known by the sender and its nature as a reply to be sufficient to connect a Tweet to the author).

The authentication of digital evidence with circumstantial evidence is nuanced. The use of circumstantial evidence of content ("attribution by content") appears distinct from the use of circumstantial evidence of ownership of, possession of, control of, or access to a device or account ("attribution by device or account") to attribute digital evidence to an author. With "attribution by content," the content of the digital evidence itself is used to connect it to the author. This concept that connectivity can be proven circumstantially through content, similar to Rule 901(b)(4), is not new with regard to digital evidence. *See, e.g., U.S. v. Siddiqui*, 235 F.3d 1318 (11th Cir. 2000) and *Massimo v. State*, 144 S.W.3d 210 (Tex. App. 2004).

The Committee believes that "attribution by content" can be a means of attributing authorship. There may be words or statements in the content of digital evidence that establish *prima facie* evidence sufficient for the jury to decide authorship. This is consistent with Pa.R.E. 901(b)(4). However, the Committee is mindful of appropriated identity concerns. Therefore proposed paragraph (b)(11)(B)(i) specifies "identifying content" of digital evidence rather than reiterating the more inclusive language of Pa.R.E. 901(b)(4). This was intended to exclude evidence of the device or account when making a content-only authentication determination involving authorship. Further, it was intended to emphasize "identity" and focus less on potentially imitated appearance and patterns contained within the evidence.

With "attribution by device or account," the ownership, possession, control, or access of the device or account is used to connect the digital evidence to the author. For example, the ownership of a cellular telephone is used to attribute the owner as the author of a text message sent from the telephone number associated with the telephone. Connecting digital evidence to a person or entity as the author based solely on a device or account when the substance of the digital evidence does not contain distinctive characteristics may be a cause of uneasiness. There are concerns about false attribution when devices are shared, accounts were unsecure, or exclusive access was otherwise compromised. Relatedly, the issue of "spoofing" arises wherein another may masquerade as the author by appropriating the author's identity even though the author's account or device remains secure.

The Committee believes that "attribution by device or account" has a role in authentication, but with respect to Pennsylvania case law, proposed paragraph (b)(11)(B)(ii) contains a requirement for corroboration by circumstances indicating authorship. In considering language, the Committee rejected evidence of "sole" ownership, possession, control, or access to authenticate digital evidence. Such a standard appeared near impossible to prove in some matters. Instead, the proponent would need to show sufficient proof of ownership of, possession of, control of, or access to a device or account at the relevant time for a reasonable juror to make a finding, as well as corroborating circumstances indicating authorship, which can include content-related evidence, the strength of which may not be sufficient to authenticate the digital evidence.

The proposal does not alter the quantum of evidence for authentication; rather it illustrates the nature of the evidence sufficient for a finding of attribution. All comments, concerns, and suggestions concerning this proposal are welcome.

[Pa.B. Doc. No. 19-1133. Filed for public inspection July 26, 2019, 9:00 a.m.]

Title 231—RULES OF CIVIL PROCEDURE

PART I. GENERAL

[231 PA. CODE CH. 1915]

Proposed Amendments of Pa.R.C.P. Nos. 1915.3, 1915.5 and 1915.15

The Domestic Relations Procedural Rules Committee is planning to propose to the Supreme Court of Pennsylvania the amendment of Pa.R.C.P. Nos. 1915.3, 1915.5, and 1915.15 for the reasons set forth in the accompanying publication 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 and underlined; 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 October 4, 2019. 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 Domestic Relations Procedural Rules Committee

WALTER J. McHUGH, Esq.,
Chair

Annex A

TITLE 231. RULES OF CIVIL PROCEDURE

PART I. GENERAL

CHAPTER 1915. ACTIONS FOR CUSTODY OF MINOR CHILDREN

Rule 1915.3. Commencement of Action. Complaint. Order**[.]**

(a) Except as provided **[by]** **in** subdivision (c), **[an action shall be commenced]** **the plaintiff shall commence a custody action** by filing a verified complaint substantially in the form provided by Pa.R.C.P. No. 1915.15(a).

Official Note*: *See Pa.R.C.P. No. 1930.1(b). This rule may require attorneys or unrepresented parties to file confidential documents and documents containing confidential information that are subject to the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania*.

(b) An order shall be attached to the complaint **or petition for modification** directing the defendant to appear at a time and place specified. The order shall be substantially in the form provided by **[Rule 1915.5(b)]** **Pa.R.C.P. No. 1915.15(c)**.

Official Note*: *See **[§ 5430(d) of the]** Uniform Child Custody Jurisdiction and Enforcement Act, 23 Pa.C.S. § 5430(d), relating to costs and expenses for appearance of parties and child, and 23 Pa.C.S. § 5471, relating to intrastate application of the Uniform Child Custody Jurisdiction and Enforcement Act.

(c) A **[claim for custody which]** **custody claim that** is joined with **[an action of divorce]** **a divorce action** shall be asserted in the **divorce** complaint or a subsequent petition, which shall be substantially in the form provided by **[Rule]** **Pa.R.C.P. No.** 1915.15(a).

Official Note*: [Rule]** ***See **Pa.R.C.P. No.** 1920.13(b) **[provides that claims which may be joined with an]** **(claims that are joined in a divorce** action **[of divorce]** shall be raised **[by the]** **in a** complaint or a subsequent petition**)**.

(d) If the **child's** mother **[of the child]** is not married and the child has no legal or presumptive father, **[then]** a putative father initiating **[an action of]** **a** custody **[must]** **action shall** file a **paternity** claim **[of paternity]** pursuant to 23 Pa.C.S. § 5103 and attach a copy to the **custody** complaint **[in the custody action]**.

***Official Note*:** If a putative father is uncertain of paternity, the correct procedure is to commence a civil action for paternity pursuant to the procedures set forth at **[Rule]** **Pa.R.C.P. No.** 1930.6.

[(e) A grandparent who is not in loco parentis to the child and is seeking physical and/or legal custody of a grandchild pursuant to 23 Pa.C.S. § 5323 must plead, in paragraph 9 of the complaint set forth at Rule 1915.15(a), facts establishing standing under § 5324(3). A grandparent or great-grandparent seeking partial physical custody or supervised physical custody must plead, in paragraph 9 of the complaint, facts establishing standing pursuant to 23 Pa.C.S. § 5325.]

(e) *Pleading Facts Establishing Standing*.

(1) An individual seeking physical or legal custody of a child, who is *in loco parentis* to the child, shall plead facts establishing standing under 23 Pa.C.S. § 5324(2) in Paragraph 9(a) of the complaint in Pa.R.C.P. No. 1915.15(a).

(2) A grandparent seeking physical or legal custody of a grandchild, who is not *in loco parentis* to the child, shall plead facts establishing standing under 23 Pa.C.S. § 5324(3) in Paragraph 9(b) of the complaint in Pa.R.C.P. No. 1915.15(a).

(3) An individual seeking physical or legal custody of a child, who is not *in loco parentis* to the child, shall plead facts establishing standing under 23 Pa.C.S. § 5324(4) and (5) in Paragraph 9(c) of the complaint in Pa.R.C.P. No. 1915.15(a).

(4) A grandparent or great-grandparent seeking partial physical custody or supervised physical custody of a grandchild or great-grandchild shall plead facts establishing standing under 23 Pa.C.S. § 5325 in Paragraph 9(d) of the complaint in Pa.R.C.P. No. 1915.15(a).

(f) An unemancipated minor parent may commence, maintain**,** or defend **[an action for]** **a** custody **action** of the minor parent's child without the requirement of the appointment of a guardian for the minor parent.

Explanatory Comment—2019

Act of May 4, 2018, P.L. 112, No. 21, amended 23 Pa.C.S. § 5324 by adding a new class of third-party standing for individuals seeking custody of a child whose parents do not have care and control of the child. The individual seeking custody may or may not be related to the child. Subject to Section 5324(5), the newly added standing provision requires that: (1) the individual has assumed or is willing to assume responsibility for the child; (2) the individual has a sustained, substantial, and sincere interest in the child's welfare; and (3) the child's parents do not have care and control of the child. In asserting standing under Section 5324(4), the plaintiff shall demonstrate the Section 5324(4) standing provisions by clear and convincing evidence. Additionally, if a juvenile dependency proceeding has been initiated or is ongoing or if there is an order for permanent legal custody, Section 5324(5) provides that an individual cannot assert standing under Section 5324(4).

Consistent with the statutory change in Act 21 of 2018, subdivision (e) has been revised to include a third party seeking custody of a child under 23 Pa.C.S. § 5324(4). The subdivison has been reorganized to follow the statutory provisions in 23 Pa.C.S. §§ 5324(2)—(4) and 5325. Similarly, Paragraph 9 on the Complaint for Custody form in Pa.R.C.P. No. 1915.15(a) has been reorganized to follow the statutory and rules sequence, as well. ***See*** **Pa.R.C.P. No. 1915.15(a).**

Rule 1915.5. Question of Jurisdiction, Venue or Standing. **[No Responsive Pleading by Defendant Required.]** Counterclaim. Discovery. **No Responsive Pleading by Defendant Required**

[(a) A party must raise any question of jurisdiction of the person or venue, and may raise any question of standing, by preliminary objection filed within twenty days of service of the pleading to which objection is made or at the time of hearing, whichever first occurs. No other pleading shall be required, but if one is filed it shall not delay the hearing.]

(a) ***Question of Jurisdiction, Venue, or Standing.***

(1) A party shall raise jurisdiction of the person or venue by preliminary objection.

(2) A party may raise standing by preliminary objection or at a custody hearing or trial.

(3) The court may raise standing ***sua sponte*****.**

(4) In a third-party plaintiff custody action in which standing has not been resolved by preliminary objection, the court shall address the third-party plaintiff's standing and include its standing decision in a written opinion or order.

Official Note**:** The court may raise at any time a question of (1) jurisdiction over the subject matter of the action or (2) the exercise of its jurisdiction pursuant to **[§]** **Section** 5426 of the Uniform Child Custody Jurisdiction and Enforcement Act, relating to simultaneous proceedings in other courts, **[§]** **Section** 5427, relating to inconvenient forum, and **[§]** **Section** 5428, relating to jurisdiction declined by reason of conduct. The Uniform Child Custody Jurisdiction and Enforcement Act, 23 Pa.C.S. § 5407, provides that, upon request of a party, an action in which a question of the existence or exercise of jurisdiction is raised shall be given calendar priority and handled expeditiously.

(b) A party may file a counterclaim asserting the right of physical or legal custody within **[twenty]** **20** days of service of the complaint upon that party or at the time of hearing, whichever first occurs. The claim shall be in the same form as a complaint as required by **[Rule]** **Pa.R.C.P. No.** 1915.3.

(c) There shall be no discovery unless authorized by special order of court.

Official Note**:** The rule relating to discovery in domestic relations matters generally is **[Rule]** **Pa.R.C.P. No.** 1930.5.

(d) Except as set forth in subdivisions (a) and (b), a responsive pleading shall not be required. If a party files a responsive pleading, it shall not delay a hearing or trial.

Explanatory Comment—1994

Under subdivision (a), the defendant may but is not required to plead to the complaint. All averments may be disputed by the defendant at the custody hearing. An attorney who wished to file another pleading may do so. However, the action is not to be delayed to permit its filing.

Explantory Comment—2019

Act of May 4, 2018, P.L. 112, No. 21, amended 23 Pa.C.S. § 5324 by adding a new class of third-party standing for individuals seeking custody of a child whose parents do not have care and control of the child. Subject to the limitations in 23 Pa.C.S. § 5324(5), the newly added standing provision requires that: (1) the individual has assumed or is willing to assume responsibility for the child; (2) the individual has a sustained, substantial, and sincere interest in the child's welfare; and (3) the child's parents do not have care and control of the child. In asserting standing under Section 5324(4), the plaintiff shall demonstrate the Section 5324(4) standing provisions by clear and convincing evidence.

Typically, when a third party is seeking custody of a child, the child's parents can raise the issue of the third party's standing to pursue custody. However, Section 5324(4) permits a party to seek custody of a child when the child's parents do not have care and control of the child. If the parents' lack of care and control also results in their non-participation in the custody litigation, the third party's standing may go unchallenged. Subdivision (a) has been amended by including two new subdivisions to address this circumstance. Subdivision (a)(3) permits the court to raise standing ***sua sponte*** **and, if third-party standing is not resolved by preliminary objection, the court shall address the standing issue in its written opinion or order as required by subdivision (a)(4).**

Rule 1915.15. Form of Complaint. Caption. Order. Petition to Modify a Custody Order**[.]**

(a) The complaint in **[an action for custody]** **a custody action** shall be substantially in the following form:

(Caption)

COMPLAINT FOR CUSTODY

1. The plaintiff is _____, residing at _____.
(Street) (City) (Zip Code) (County)

2. The defendant is _____, residing at _____.
(Street) (City) (Zip Code) (County)

3. Plaintiff seeks (shared legal custody) (sole legal custody) (partial physical custody) (primary physical custody) (shared physical custody) (sole physical custody) (supervised physical custody) of the following child(ren):

Name	Present Residence	Age

The child (was) (was not) born out of wedlock.

The child is presently in the custody of _____, (Name) who resides at _____.
(Street) (City) (State)

During the past five years, the child has resided with the following persons and at the following addresses:

(List All Persons)	(List All Addresses)	(Dates)

A parent of the child is _____, currently residing at _____.

This parent is (married) (divorced) (single).

A parent of the child is _____, currently residing at _____.

This parent is (married) (divorced) (single).

4. **[The]** **Plaintiff's** relationship **[of plaintiff]** to the child is that of _____.

[The plaintiff] **Plaintiff** currently resides with the following persons:

Name	Relationship

5. **[The]** **Defendant's** relationship **[of defendant]** to the child is that of _____.

[The defendant] **Defendant** currently resides with the following persons:

Name	Relationship

6. Plaintiff (has) (has not) participated as a party or witness, or in another capacity, in other litigation concerning the custody of the child in this or another court. The court, term and number, and its relationship to this action is: _____

Plaintiff (has) (has no) information of a custody proceeding concerning the child pending in a court of this Commonwealth or any other state. The court, term and number, and its relationship to this action is: _____.

Plaintiff (knows) (does not know) of a person not a party to the proceedings who has physical custody of the child or claims to have custodial rights with respect to the child. The name and address of such person is: _____.

7. The **child's** best interest and permanent welfare **[of the child]** will be served by granting the relief requested because (set forth facts showing that the granting of the relief requested will be in the **child's** best interest and permanent welfare **[of the child]**): _____

8. Each parent whose parental rights to the child have not been terminated and the person who has physical custody of the child have been named as parties to this action. All other persons, named below, who are known to have or claim a right to custody of the child will be given notice of the pendency of this action and the right to intervene:

Name	Addresses	Basis of Claim

[9. (a) If the plaintiff is a grandparent who is not in loco parentis to the child and is seeking physical and/or legal custody pursuant to 23 Pa.C.S. § 5323, you must plead facts establishing standing pursuant to 23 Pa.C.S. § 5324(3).

(b) If the plaintiff is a grandparent or great-grandparent who is seeking partial physical custody or supervised physical custody pursuant to 23 Pa.C.S. § 5325, you must plead facts establishing standing pursuant to § 5325.

(c) If the plaintiff is a person seeking physical and/or legal custody pursuant to 23 Pa.C.S. § 5324(2) as a person who stands in loco parentis to the child, you must plead facts establishing standing.

]

9. (a) If the plaintiff is seeking physical or legal custody of a child, who is *in loco parentis* to the child, the plaintiff shall plead facts establishing standing under 23 Pa.C.S. § 5324(2).

(b) If the plaintiff is a grandparent seeking physical or legal custody of a grandchild and is not *in loco parentis* to the child, the plaintiff shall plead facts establishing standing under 23 Pa.C.S. § 5324(3).

(c) If the plaintiff is seeking physical or legal custody of a child and is not in *loco parentis* to the child, the plaintiff shall plead facts establishing standing pursuant to 23 Pa.C.S. §§ 5324(4) and (5).

(d) If the plaintiff is a grandparent or great-grandparent seeking partial physical custody or supervised physical custody of a grandchild or great-grandchild, the plaintiff shall plead facts establishing standing under 23 Pa.C.S. § 5325.

10. Plaintiff has attached the Criminal Record/Abuse History Verification form required pursuant to Pa.R.C.P. No. 1915.3-2.

Wherefore, **[plaintiff]** **Plaintiff** requests the court to grant (shared legal custody) (sole legal custody) (partial physical custody) (primary physical custody) (shared physical custody) (sole physical custody) (supervised physical custody) of the child.

Plaintiff/Attorney for Plaintiff

I verify that the statements made in this Complaint are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Plaintiff

***Official Note*:** The form of complaint is appropriate if there is one plaintiff and one defendant and **[if]** the custody of one child is sought**[, or if]** **or** the custody of several children is sought and the information required by **[paragraphs]** **Paragraphs** 3 to 7 is identical for all of the children. If there are **[multiple]** **more than two** parties, the complaint should be appropriately adapted to accommodate them. If the custody of several children is sought and the information required is not identical for all of the children, the complaint should contain a separate paragraph for each child.

See Pa.R.C.P. No. 1930.1(b). This rule may require attorneys or unrepresented parties to file confidential documents and documents containing confidential information that are subject to the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania.*

* * * * *

Explanatory Comment—2019

Act of May 4, 2018, P.L. 112, No. 21, amended 23 Pa.C.S. § 5324 by adding a new class of third-party standing for individuals seeking custody of a child whose parents do not have care and control of the child. The individual seeking custody may or may not be related to the child. Subject to the limitations in 23 Pa.C.S. § 5324(5), the newly added standing provision requires that: (1) the individual has assumed or is willing to assume responsibility for the child; (2) the individual has a sustained, substantial, and sincere interest in the child's welfare; and (3) the child's parents do not have care and control of the child. In asserting standing under Section 5324(4), the plaintiff shall demonstrate the Section 5324(4) standing provisions by clear and convincing evidence. Additionally, if a juvenile dependency proceeding has been initiated or is ongoing or if there is an order for permanent legal

custody, Section 5324(5) provides that an individual cannot assert standing under Section 5324(4).

Consistent with the statutory change in the Act, Paragraph 9 in the Complaint for Custody form has been revised to include a third party seeking custody of a child under 23 Pa.C.S. § 5324(4). Also, Paragraph 9 has been reorganized to sequentially follow the statutory provisions in 23 Pa.C.S. §§ 5324(2)—(4) and 5325. Similarly, Pa.R.C.P. No. 1915.3(e) has been reorganized to follow the statutory sequence. *See* Pa.R.C.P. No. 1915.3(e).

PUBLICATION REPORT
RULE PROPOSAL 172

The Domestic Relations Procedural Rules Committee (Committee) is proposing amendments to Pa.R.C.P. Nos. 1915.3, 1915.5, and 1915.15.

Act of May 4, 2018, P.L. 112, No. 21 (Act), amended 23 Pa.C.S. § 5324 by adding a new class of third-party standing for individuals seeking custody of a child whose parents do not have care and control of the child. The individual seeking custody may or may not be related to the child. Subject to 23 Pa.C.S. § 5324(5), the newly added standing provision requires that: (1) the individual has assumed or is willing to assume responsibility for the child; (2) the individual has a sustained, substantial, and sincere interest in the child's welfare; and (3) the child's parents do not have care and control of the child. In asserting standing under Section 5324(4), the plaintiff shall demonstrate standing by clear and convincing evidence. Additionally, if a juvenile dependency proceeding has been initiated or is ongoing or if there is an order for permanent legal custody, Section 5324(5) provides that an individual cannot assert standing under Section 5324(4).

Consistent with the statutory change in the Act, the Committee proposes revising Pa.R.C.P. No. 1915.3(e) to include a third party seeking custody of a child under Section 5324(4). The Rule Proposal reorganizes subdivision (e) to follow the sequential order in the statutory provisions in Sections 5324(2)—(4) and 5325. Similarly, the Rule Proposal revises and reorganizes Paragraph 9 in Pa.R.C.P. No. 1915.15(a), which is the Complaint for Custody form, to include a third party seeking custody of a child under Section 5324(4) and follows the statutory and rules sequence, as well.

Typically, when a third party seeks custody of a child, the child's parents can raise the issue of the third party's standing to pursue custody. However, Section 5324(4) only permits a party to seek custody of a child when the child's parents do not have care and control of the child. If the parents' lack of care and control also results in their non-participation in the custody litigation, the third party's standing may go unchallenged. The Committee proposes amending Pa.R.C.P. No. 1915.5(a) by including two new subdivisions to address this circumstance.

First, the proposed amendment to Pa.R.C.P. No. 1915.5(a)(3) would permit the court to raise standing *sua sponte*. This proposed rule amendment may appear to be in tension with Supreme Court precedent. *See In re: Nomination Petition of DeYoung*, 903 A.2d 1164 (Pa. 2006); *Rendell v. Pa. State Ethics Comm'n*, 983 A.2d 708 (Pa. 2009). Specifically, the Supreme Court in *DeYoung* noted it "has consistently held that a court is prohibited from raising the issue of standing sua sponte." *DeYoung*, 903 A.2d at 1168. However, the Superior Court has analyzed third-party standing as being intertwined with subject-matter jurisdiction and, as such, within the province of the court to raise standing *sua sponte*. *See Hill v. Divecchio*, 625 A.2d 642 (Pa. Super. 1993), *alloc. denied*, 645 A.2d 1316 (Pa. 1991); *Grom v. Burgoon*, 672 A.2d 823, 824-825 (Pa. Super. 1996); and *R.M. v. J.S.*, 20 A.3d 496 (Pa. Super. 2011).

With the statutory requirement under Section 5324(4)(iii) that the parents not have care and control of the child, the typical preliminary objection process of a parent raising the issue of a third party's standing or litigating the issue at trial may be ineffective and impractical. The Committee proposes that permitting a court to raise standing *sua sponte* may be the most efficient, timely, and perhaps the only way this issue properly comes before the court in order for the third-party plaintiff to demonstrate by clear and convincing evidence the statutory requirements under Section 5324(4).

Second, if third-party standing is not resolved by preliminary objection, the Rule Proposal requires in subdivision (a)(4) that the court address the standing issue in its written opinion or order. This procedure will ensure that the court will properly assess and determine a third party's standing, whether by the court *sua sponte* or a party by preliminary objection.

The Committee invites comments, concerns, and suggestions regarding this rulemaking proposal.

[Pa.B. Doc. No. 19-1134. Filed for public inspection July 26, 2019, 9:00 a.m.]

Title 231—RULES OF CIVIL PROCEDURE

PART I. GENERAL

[231 PA. CODE CH. 200]

Proposed Amendment of Pa.R.C.P. No. 223.2

The Civil Procedural Rules Committee is considering proposing to the Supreme Court of Pennsylvania the amendment of Pa.R.C.P. No. 223.2 governing juror note taking 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 will neither constitute a part of the rules nor will be officially adopted by the Supreme Court.

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

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

Karla M. Shultz, Counsel
Civil Procedural Rules Committee
Supreme Court of Pennsylvania
Pennsylvania Judicial Center
PO Box 62635
Harrisburg, PA 17106-2635
FAX: 717-231-9526
civilrules@pacourts.us

All communications in reference to the proposal should be received by September 27, 2019. E-mail is the pre-

ferred 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 Civil Procedural Rules Committee

JOHN J. HARE,
Chair

Annex A

TITLE 231. RULES OF CIVIL PROCEDURE

PART I. GENERAL

CHAPTER 200. BUSINESS OF COURTS

Rule 223.2. Conduct of the Jury Trial. Juror Note Taking.

(a)(1) **[Whenever]** **When** a jury trial is expected to last for more than two days, jurors**[, except as otherwise provided by subdivision (a)(2), may]** **shall be permitted to** take notes during the **[proceedings]** **presentation of evidence and closing arguments** and use their notes during deliberations.

***Official Note*:** The court in its discretion may permit jurors to take notes when the jury trial is not expected to last for more than two days.

(2) Jurors **[are]** **shall** not **be** permitted to take notes **during opening statements or** when the judge is instructing the jury as to the law that will govern the case.

(b) The court shall give an appropriate cautionary instruction to the jury prior to the commencement of the testimony before the jurors. The instruction shall include:

(1) Jurors are not required to take notes and those who take notes are not required to take extensive notes**[,];**

(2) Note taking should not divert jurors from paying full attention to the evidence and evaluating witness credibility, **or the closing arguments;**

(3) Notes are merely memory aids and are not evidence or the official record**[,];**

(4) Jurors who take few or no notes should not permit their independent recollection of the evidence to be influenced by the fact that other jurors have taken notes**[,];**

(5) Notes are confidential and will not be reviewed by the court or anyone else**[,];**

(6) A juror may not show his or her notes or disclose their contents to other jurors until deliberations begin, but may show the notes or disclose the contents during deliberations**[,];**

(7) Jurors shall not take their notes out of the courtroom except to use their notes during deliberations**[,];** and

(8) All juror notes will be collected after the trial is over and immediately destroyed.

***Official Note*:** It is recommended that the trial judge instruct the jurors along the following lines:

> We will distribute notepads and pens to each of you in the event you wish to take notes during the trial. You are under no obligation to take notes and those who take notes are not required to take extensive notes.
>
> Remember that one of your responsibilities as a juror is to observe the demeanor of witnesses to help you assess their credibility. If you do take notes, do not become so involved with note taking that it interferes with your ability to observe a witness or distracts you from hearing other answers being given by the witness.
>
> **You may also take notes while the closing arguments are presented at the end of the trial. Again, if you do take notes, do not become so involved with note taking that it distracts you from paying attention to the remainder of the closing argument.**
>
> **[Your notes may help you refresh your recollection of the testimony and should be treated as a supplement to, rather than a substitute for, your memory. Your notes are only to be used by you as memory aids and are not evidence or the official record.]** **Your notes may help you refresh your recollection of the evidence as well as the closing arguments. Your notes should be treated as a supplement to, rather than a substitute for, your memory. Your notes are only to be used by you as memory aids and are not evidence or the official record.**
>
> Those of you who do not take notes should not permit your independent recollection of the evidence to be influenced by the fact that other jurors have taken notes. It is just as easy to write something down incorrectly as it is to remember it incorrectly and your fellow jurors' notes are entitled to no greater weight than each juror's independent memory. Although you may refer to your notes during deliberations, give no more or no less weight to the view of a fellow juror just because that juror did or did not take notes.
>
> Each time that we adjourn, your notes will be collected and secured by court staff. Jurors shall not take their notes out of the courtroom except to use their notes during deliberations.
>
> A juror may not show his or her notes or disclose their contents to other jurors until deliberations begin, but may show the notes or disclose their contents during deliberations. The only notes you may use during the deliberations are the notes you write in the courtroom during the proceedings on the materials distributed by the court staff.
>
> Your notes are completely confidential and will not be reviewed by the court or anyone else. After the trial is over, your notes will be collected by court personnel and immediately destroyed.

(c) The court shall

(1) provide materials suitable for note taking,

***Official Note*:** The materials provided by the court are the only materials that jurors may use for note taking.

(2) safeguard all juror notes at each recess and at the end of each trial day, and

(3) collect all juror notes as soon as the jury is dismissed and, without inspection, immediately destroy them.

(d)(1) Neither the court nor counsel may (i) request or suggest that jurors take notes, (ii) comment on their note taking, or (iii) attempt to read any notes.

(2) Juror notes may not be used by any party to the litigation as a basis for a request for a new trial.

***Official Note*:** A court shall immediately deny a litigant's request that juror notes be placed under seal until they are reviewed in connection with a request for a new trial on any ground, including juror misconduct. The notes shall be destroyed without inspection as soon as the jury is dismissed.

EXPLANATORY COMMENT

The Civil Procedural Rules Committee is considering proposing the amendment of Pa.R.C.P. No. 223.2 governing note taking by jurors to clarify and expand when note taking is permitted during a trial that is expected to last more than two days.

Current subdivision (a)(1) provides that jurors "may take notes during the proceedings," but does not specify or define the term "proceedings." Pa.R.C.P. No. 223.2 has generally been interpreted to permit juror note taking only when witnesses are testifying during trial and not during opening statements and closing arguments. While subdivision (a)(2) of the rule expressly prohibits note taking during the reading of the jury charge, there is no similar express prohibition on note taking during opening statements and closing arguments.

To provide clarification, the Committee proposes amending Pa.R.C.P. No. 223.2 to permit note taking during the presentation of evidence and closing arguments only. The rule would continue to prohibit note taking during the reading of the jury charge, but be amended to extend that prohibition to opening statements. The Committee believes that note taking during opening statements, during which information that may ultimately not be supported by the evidence or even entered into evidence, could lead to confusion for jurors. Note taking during closing arguments would help jurors with their deliberations.

The Committee is also proposing an amendment to preserve the ability for jurors to take notes for all trials expected to last more than two days. Current subdivision (a)(1) uses the permissive "may" to allow juror note taking, which offers the opportunity for variation in procedure. The Committee believes that, in order to ensure a uniform practice throughout the Commonwealth, all jurors should be permitted to take notes subject to the parameters of the rule. The rule would continue to place no obligation on the part of jurors to take notes, but the authority for jurors to use this tool for deliberations would be expressly permitted.

As proposed, the amendment of Rule 223.2 is intended to clarify the specific "proceedings" during which jurors may take notes. Subdivision (a)(1) would be amended to clarify that jurors shall be permitted to take notes during the presentation of evidence and expand that subdivision to include closing arguments. Subdivision (a)(2) would be amended to expressly prohibit note taking during opening statements and the reading of the jury charge. In addition, subdivision (b) would be amended to include a cautionary juror instruction that note taking should not divert jurors' attention from, *inter alia*, the closing arguments. Those requirements would also be incorporated into the suggested jury instruction set forth in the note following the rule text.

Accordingly, the Committee invites all comments, objections, concerns, and suggestions regarding this rulemaking proposal.

By the Civil Procedural Rules Committee

JOHN J. HARE,
Chair

[Pa.B. Doc. No. 19-1135. Filed for public inspection July 26, 2019, 9:00 a.m.]

Title 237—JUVENILE RULES

PART I. RULES

[237 PA. CODE CH. 13]

Proposed Amendment of Pa.R.J.C.P. 1300 and Rescission and Replacement of Pa.R.J.C.P. 1302

The Juvenile Court Procedural Rules Committee is considering proposing to the Supreme Court of Pennsylvania the amendment of Pennsylvania Rule of Juvenile Court Procedure 1300 and the rescission and replacement of Pennsylvania Rule of Juvenile Court Procedure 1302 concerning venue and intercounty transfers of dependency matters 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 and underlined; deletions to the text are bolded and bracketed.

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

Daniel A. Durst, Chief Counsel
Juvenile Court Procedural Rules Committee
Supreme Court of Pennsylvania
Pennsylvania Judicial Center
PO Box 62635
Harrisburg, PA 17106-2635
FAX: 717-231-9541
juvenilerules@pacourts.us

All communications in reference to the proposal should be received by September 10, 2019. 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 Juvenile Court Procedural Rules Committee

JUDGE JENNIFER R. SLETVOLD,
Chair

Annex A

TITLE 237. JUVENILE RULES

PART I. RULES

Subpart B. DEPENDENCY MATTERS

CHAPTER 13. PRE-ADJUDICATORY PROCEDURES

PART A. VENUE

Rule 1300. Venue.

A. *Generally*. A dependency proceeding shall be commenced in:

1) the county in which the child is present; or

2) the child's county of residence.

B. *Change of* **[** ***venue*** **]** ***Venue***. **[For]** **At any time prior to the adjudicatory hearing, for** the convenience of parties and witnesses, the court, upon its own motion or motion of any party, may transfer an action to the appropriate court of any county where the action could originally have been brought or could be brought at the time of filing the motion to change venue.

C. *Transmission of* **[** ***all records*** **]** ***All Records***. If there is a change of venue **ordered** pursuant to paragraph (B)**, within five days**:

1) the transferring county's clerk of courts shall inform the receiving county's clerk of courts of the manner in which certified copies of all documents, reports, and summaries in the child's official court record will be transferred;

[1) the transferring court] **2) the transferring county's clerk of courts** shall transfer certified copies of all documents, reports, and summaries in the child's official court record to the **[receiving court]** **receiving county's clerk of court**; **[and]**

[2) The] **3) the transferring** county agency **[of the transferring court]** shall transfer all its records to the **receiving** county agency **[where venue has been transferred.];**

4) the receiving county's clerk of courts shall notify its county agency and the transferring county's clerk of courts of its receipt of the official court records; and

5) the receiving county agency shall schedule the next court proceeding in accordance with the time requirements of these Rules.

Comment

See 42 Pa.C.S. § 6321**(b)**.

For procedures regarding motions and answers, see Rule 1344. In addition to the procedures for service of orders under Rule 1167, an order changing venue is to be served upon the new county agency and the receiving court so they may begin proceedings in the receiving county.

Pursuant to paragraph (C), all records are to be transferred within five days of the order for change in venue. Nothing in this rule prohibits the use of electronic means when transferring and receiving records, but the manner in which records are transmitted must be communicated. If there is an electronic transfer, the receiving county is to send an electronic confirmation of receipt of the records as the return receipt. The transferring county's clerk of courts is to docket the confirmation of receipt of records by the receiving county and may close the case once the confirmation has been received.

For transfer of agency records, see 55 Pa. Code § 3490.401.

To ensure there is no interruption in services, the transferring county agency is to continue services until the case has been transferred officially, which is the receiving county's clerk of court's notification of receipt of the official court record as provided in paragraph (C)(4).

***Official Note*: Rule 1300 adopted August 21, 2006, effective February 1, 2007. Amended December 24, 2009, effective immediately. Amended , 2019, effective , 2019.**

Committee Explanatory Reports:

Final Report explaining the provisions of Rule 1300 published with the Court's Order at 36 Pa.B. 5571 (September 2, 2006).

Final Report explaining the amendments to Rule 1300 published with the Court's Order at 40 Pa.B. 222 (January 9, 2010).

Final Report explaining the amendments to Rule 1300 published with the Court's Order at Pa.B. (, 2019).

Rule 1302. **[Inter-County]** **Intercounty** Transfer.

[A. *Transfer*. A court may transfer a case to another county at any time.

B. *Transmission of official court record*. If the case is transferred pursuant to paragraph (A):

1) the transferring court shall transfer certified copies of all documents, reports, and summaries in the child's official court record to the receiving court; and

2) the county agency of the transferring court shall transfer all its records to the county agency where jurisdiction has been transferred.

Comment

***See* 42 Pa.C.S. § 6321.]**

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

A. *Best Interest of the Child*. Any time after the adjudicatory hearing, upon motion of a party or court, a court may consider the transfer of a case to another county if the transfer is best suited to the safety, protection, and physical, mental, and moral welfare of the child.

B. *Notice*. The court shall serve notice of a hearing upon the parties. The county agency in the proposed receiving county shall receive notice of the hearing and be granted standing to participate in the hearing.

C. *Hearing*. The hearing should be conducted in the transferring county no more than 20 days from the date of the notice in paragraph (B). The county agency in the proposed receiving county shall be permitted to appear at the hearing utilizing advance communications technology.

D. *Acceptance of Jurisdiction*. If the court in the transferring county finds that a proposed transfer would be in the child's best interest and would result in a transfer between judicial districts:

1) the court shall communicate with the president judge or designee of the receiving judicial district to ascertain whether jurisdiction will be accepted;

2) a record of the communication shall be made and served promptly by the court on the parties; and

3) upon service of the record, the parties shall have five days to file written responses with the court regarding the decision to accept jurisdiction.

E. *Order*.

1) An order approving a transfer shall specify an effective date for the transfer no less than ten days from date of the order to allow for the coordination of services and preparation of the official court record for transmission.

2) The court shall direct the clerk of courts to serve the order upon the parties, the receiving county agency, and the president judge or designee of the receiving court, if applicable.

F. *Matters of Cooperation between Courts*. Communication between courts on schedules, calendars, court records, and similar matters may occur without informing the parties. A record need not be made of the communication.

G. *Receiving Court*. On or before the effective date of the order established in paragraph (E)(1), the receiving court shall enter an order:

1) accepting jurisdiction of the case as of the effective date;

2) appointing a guardian ad litem and counsel, if necessary;

3) directing the clerk of courts to serve the order upon the transferring court, if necessary, the county agencies, the parties, and the transferring county's clerk of courts;

4) directing the receiving county agency to conduct a home visit and safety assessment consistent with the requirements of 55 Pa. Code § 3490.401; and

5) scheduling a review hearing to occur within 30 days.

H. *Transmission of Official Court Record*.

1) The transferring county's clerk of courts shall inform the clerk of the receiving court of the manner in which certified copies of all documents, reports, and summaries in the child's official court record will be transferred.

2) On the effective date of the transfer, the transferring county's clerk of courts shall transmit certified copies of all documents, reports, and summaries in the child's official court record to the clerk of the court of the receiving county.

3) The receiving county's clerk of the courts shall notify its county agency and the transferring court of its receipt of the official court records.

I. *County Agencies*. The transferring county agency shall continue services until the effective date of the transfer.

Comment

If proceedings are commenced in a county other than the county of the child's residence, then a change of venue should be sought pursuant to Rule 1300 prior to adjudication.

The child's best interest concerning an intercounty transfer includes, but is not limited to, the child's current or anticipated county of residence, the resources of the receiving county, and needs of the child and family. A proposed transfer between judicial districts is not in the child's best interest unless the court of the receiving judicial district accepts jurisdiction.

Service of the acceptance order on the transferring court pursuant to paragraph (G)(3) is unnecessary if the transfer occurs within the same judicial district.

The period between the order approving the transfer and the effective date of the transfer is intended to prepare for the case transfer. The county agencies are expected to communicate prior to the actual transfer of a case to another county so that efforts can be coordinated and services transitioned without interruption. Coordination includes the inter-agency transfer of records maintained by the county agency that are not otherwise included in the official court record. *See* 55 Pa. Code § 3490.401. This period also allows the clerk to prepare the official court record for transmission to the receiving county on the effective date of the transfer.

Nothing in this rule prohibits the use of electronic means when transferring and receiving records. However, if there is an electronic transfer, the receiving county is to send an electronic confirmation of receipt of the records as the return receipt. The transferring county's clerk of courts is to docket the confirmation of receipt of records by the receiving county and may close the case once the confirmation has been received.

Upon receiving the order accepting the case, the transferring court may order the termination of court supervision pursuant to Rule 1631(A)(12).

***Official Note*: Rule 1302 adopted August 21, 2006, effective February 1, 2007. Amended December 24, 2009, effective immediately. Rescinded and replaced , 2019, effective , 2019.**

Committee Explanatory Reports:

Final Report explaining the provisions of Rule 1302 published with the Court's Order at 36 Pa.B. 5571 (September 2, 2006).

Final Report explaining the amendments to Rule 1302 published with the Court's Order at 40 Pa.B. 222 (January 9, 2010).

Final Report explaining the rescission and replacement of Rule 1302 published with the Court's Order at Pa.B. (, 2019).

REPORT

Proposed Amendment of Pa.R.J.C.P. 1300 and Rescission and Replacement of Pa.R.J.C.P. 1302

The Juvenile Court Procedural Rules Committee proposes amendment of Pennsylvania Rules of Juvenile Court Procedure 1300 concerning venue in dependency proceedings together with rescission and replacement of Pennsylvania Rule of Juvenile Court Procedure 1302 concerning intercounty transfer of dependency cases.

In 2014, as part of a larger proposal, the Committee published proposed amendments to Rule 1302 to clarify the procedures for intercounty transfers. *See* 44 Pa.B. 3307 (June 7, 2014). After reviewing comments and further deliberations, this rulemaking proposal was discontinued. More recently, the Committee received a request that several facets of intercounty transfers be addressed in the Pennsylvania Rules of Juvenile Court Procedure.

In formulating the current proposal, the Committee considered several issues. First, whether the child's residence was the only determinate of an intercounty trans-

fer. Second, whether the decision to transfer was in the sole discretion of the transferring court or whether it was a shared decision between the transferring and receiving courts. The following discussion of these issues is that of the Committee; it does not carry with it the imprimatur of the Supreme Court of Pennsylvania.

Best Interest of the Child

The statutory basis for a transfer is the child's residence either when the adjudication occurs in a nonresidential county or if the child's residence changes after adjudication. *See* 42 Pa.C.S. § 6321(c)(1). The case law interpreting this statutory provision is scant. Distilled from *Interest of J.S.M.*, 514 A.2d 899 (Pa. Super. 1986) and *In re G.B.*, 530 A.2d 496 (Pa. Super. 1987), it appears that an intercounty transfer decision is not based entirely on residence; rather, it is a best interest determination concerning the child.

Authority to Order Transfer

Under the Uniform Child Custody Jurisdiction and Enforcement Act, the receiving court can decline jurisdiction if it finds that it is an inconvenient forum based on enumerated factors or when the person seeking to invoke the court's jurisdiction has engaged in unjustifiable conduct. *See* 23 Pa.C.S. §§ 5427, 5428. However, the Juvenile Act does not provide a similar mechanism for a dependency court to refuse to accept a transfer. Notably, Section 6321(c)(1) uses "the court" in the singular when identifying the entity to transfer a proceeding. If construed strictly, then the transferring court where the transfer motion is made, as opposed to the receiving court, is statutorily authorized to unilaterally decide the transfer.

Yet, if the transferring court is the only authority deciding whether a transfer is in the child's best interest, then there is nothing to prevent a case from "ping ponging" back to the transferring county once received in the receiving county. Comity informs that instances of refused transfers will be rare, but the Committee also recognizes that the receiving court should be part of the decision-making process given the compressed timeline set forth in the proposal. Further, mutual decision-making ensures that a case will be received with the attendant judicial oversight necessary to maintain the child's best interest.

Proposed Amendments—Venue

The Committee proposes to amend Rule 1300 (Venue) to indicate in paragraph (B) that the window for seeking a change in venue is prior to adjudicatory hearing. The basis for a change in venue is the convenience of the parties and witnesses with the option of venue being the county in which the child is present or where the child resides. This basis and option are contained in the existing venue rule.

As proposed, paragraph (C) contains a specific five-day deadline for the transfer of records. Further, the paragraph includes a communication loop to indicate that the records have been received, and a requirement for the receiving county agency to schedule the next court proceeding. These further revisions are intended to facilitate the location of records and ensure the case proceeds after the change of venue.

Proposed Amendments—Intercounty Transfer

Given the scope of the revisions, the Committee proposes to rescind and replace Rule 1302 in its entirety. The procedural concept for intercounty transfers involves a two-step process. First, the transferring county is to conduct a hearing to determine whether it is in the child's best interest for an intercounty transfer. Second, assuming the transferring court determines in the affirmative, the transferring court then communicates with the receiving court to ascertain whether jurisdiction will be accepted, if the decision will result in a transfer between judicial districts.

In paragraph (A), the child's best interest for an intercounty transfer is set forth. The Committee believes that the receiving county agency, as the provider of services and the party to receive legal custody, has an interest in the transfer. Therefore, in paragraph (B), that county agency is given notice of the transfer hearing in the transferring county and granted standing to participate. Further, in paragraph (C), the receiving county agency is permitted to appear via advance communications technology.

Paragraph (D) requires the subsequent communication with the court in the receiving judicial district. The manner of communication and requirements of a record are intentionally non-specific. Judges, at their preference, may opt to communicate via email or telephonically. A "record of the communication" can be memorialization of communications or a transcript. Thereafter, the parties may file written responses with the transferring court regarding the decision to accept jurisdiction. While the Committee did not anticipate intercounty transfers to often be contested, this provision for written responses is intended to provide due process in contested transfers. Paragraph (F) permits the courts to discuss administrative matters without informing the parties or making a record. Paragraphs (D) and (F) are based, in part, on the Uniform Child Custody Jurisdiction and Enforcement Act, 23 Pa.C.S. § 5410.

Paragraph (E) requires that an order approving a transfer contain a date certain and at least a ten-day window before the actual transfer. This window is to provide for the transmission of the record and coordination of services between the county agencies as set forth in paragraphs (H) and (I). Prior to the transfer order's effective date, the receiving court is required to enter an order accepting jurisdiction, as well as appointing a guardian ad litem and counsel, as needed, directing a home visit and safety assessment, and scheduling a review hearing.

The Committee invites all comments, concerns, and suggestions regarding this rulemaking proposal.

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