THE COURTS

Title 204—JUDICIAL SYSTEM GENERAL PROVISIONS

PART V. PROFESSIONAL ETHICS AND CONDUCT

[204 PA. CODE CH. 83]

Amendment of Rules 205(b) and (c), 208(c) and (d)(1), and 213(d)(3) of the Pennsylvania Rules of Disciplinary Enforcement; No. 198 Disciplinary Rules Doc.

Order

Per Curiam

And Now, this 6th day of July, 2020, upon the recommendation of the Disciplinary Board of the Supreme Court of Pennsylvania, which follows the proposal having been published for comment in the *Pennsylvania Bulletin*, 50 Pa.B. 642 (February 1, 2020),

It Is Ordered pursuant to Article V, Section 10 of the Constitution of Pennsylvania, that Rules 205(b) and (c), 208(c) and (d)(1), and 213(d)(3) of the Pennsylvania Rules of Disciplinary Enforcement are amended as set forth in the following form.

This *Order* shall be processed in accordance with Pa.R.J.A. No. 103(b), and shall be effective in thirty (30) days.

Annex A

TITLE 204. JUDICIAL SYSTEM GENERAL PROVISIONS

PART V. PROFESSIONAL ETHICS AND CONDUCT

Subpart B. DISCIPLINARY ENFORCEMENT

CHAPTER 83. PENNSYLVANIA RULES OF DISCIPLINARY ENFORCEMENT

Subchapter B. MISCONDUCT

Rule 205. The Disciplinary Board of the Supreme Court of Pennsylvania.

* * * * *

(b) The regular terms of members of the Board shall be for six years, unless otherwise specified by order of the Court, and no member shall serve for more than one term. Except when acting under Paragraph (c)(5), (7), (8) **[and],** (9) **and (16)** of this rule, the Board shall act only with the concurrence of not less than the lesser of:

(i) seven members, or

(ii) a majority of the members in office who are not disqualified from participating in the matter or proceeding.

Seven members shall constitute a quorum. The presence of members who are disqualified from participating in one or more matters to be considered at a meeting shall nonetheless be counted for purposes of determining the existence of a quorum for the consideration of all matters on the agenda.

(c) The Board shall have the power and duty:

* * * * *

(15) To recommend the temporary suspension of a respondent-attorney pursuant to Enforcement Rule 208(f)(5) (relating to emergency temporary suspension orders and related relief).

(16) **To decide, through the Board Chair, the Vice-Chair, or a designated lawyer-member of the Board, an interlocutory appeal to the Board when such appeal is permitted by the Enforcement Rules, the Board Rules, or other law.**

[16] **(17)** To exercise the powers and perform the duties vested in and imposed upon the Board by law.

(d) The Board shall, to the extent it deems feasible, consult with officers of local bar associations in the counties affected concerning any appointment which it is authorized to make under these rules.

Rule 208. Procedure.

* * * * *

(c) **[** ***Hearing procedures.*** **Proceedings]** ***Prehearing and hearing procedures.*** **The procedure in formal proceedings** before hearing committees and special masters shall be governed by Board rules, **[except that, unless] the Enforcement Rules, and the decisional law of the Court and the Board in attorney discipline and reinstatement matters. Unless** waived in the manner provided by **[such rules] the Board Rules**, at the conclusion of the hearing the hearing committee or special master shall submit a report to the Board containing the findings and recommendations of the hearing committee or special master.

(d) *Review and action by Board.*

(1) **[Proceedings] The procedure in formal proceedings** before the Board shall be governed by Board rules, **[except that, unless] the Enforcement Rules, and the decisional law of the Court and the Board in attorney discipline and reinstatement matters. Unless** waived in the manner provided by **[such rules] the Board Rules**, both parties shall have the right to submit briefs and to present oral argument to a panel of at least three members of the Board. Members of the Board who have participated on a reviewing panel under paragraph (a)(4) or (5) of this rule shall not participate in further consideration of the same matter or decision thereof on the merits under this subdivision (d).

* * * * *

Rule 213. Subpoena power, depositions and related matters.

* * * * *

(d) *Challenges; appeal of challenges to subpoena.* Any attack on the validity of a subpoena issued under this rule shall be handled as follows:

(1) A challenge to a subpoena authorized by subdivision (a)(1) shall be heard and determined by the hearing committee or special master before whom the subpoena is returnable in accordance with the procedure established by the Board. *See* D.Bd. Rules § 91.3(b) (relating to procedure).

(2) A challenge to a subpoena authorized by subdivision (a)(2) shall be heard and determined by a member of a hearing committee in the disciplinary district in which

the subpoena is returnable in accordance with the procedure established by the Board. *See* D.Bd. Rules § 91.3(b) (relating to procedure).

(3) A determination under paragraph (1) or (2) may be appealed to a lawyer-Member of the Board within ten days after service pursuant to D.Bd. Rules §§ 89.21 and 89.24 of the determination on the party bringing the appeal by filing a petition with the Board setting forth in detail the grounds for challenging the determination. The appealing party shall serve a copy of the petition on the non-appealing party by mail on the date that the appealing party files the appeal, and the non-appealing party shall have five business days after delivery to file a response. No attack on the validity of a subpoena will be considered by the Designated lawyer-Member of the Board unless previously raised before the hearing committee **or special master**. The Board Member shall decide the appeal within five business days of the filing of the non-appealing party's response, if any. There shall be no right of appeal to the Supreme Court. Any request for review shall not serve to stay any hearing or proceeding before the hearing committee**, special master** or the Board unless the Court enters an order staying the proceedings.

* * * * *

[Pa.B. Doc. No. 20-929. Filed for public inspection July 17, 2020, 9:00 a.m.]

Title 231—RULES OF CIVIL PROCEDURE

PART I. GENERAL

[231 PA. CODE CH. 200]

Proposed Adoption of Pa.R.C.P. No. 202.1

The Civil Procedural Rules Committee is considering proposing to the Supreme Court of Pennsylvania the adoption of new Rule 202.1 governing representation of parties 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 25, 2020. 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 Civil Procedural Rules Committee

JOHN J. HARE,
Chair

Annex A

TITLE 231. RULES OF CIVIL PROCEDURE

PART 1. GENERAL

CHAPTER 200. BUSINESS OF COURTS

(*Editor's Note*: The following rule is proposed to be added and printed in regular text to enhance readability.)

Rule 202.1. Representation of Parties.

(a) *Individuals or Sole Proprietorships*. An individual or a sole proprietorship may represent themselves, or be represented by an attorney.

(b) *Partnerships, Corporations or Similar Entities, and Unincorporated Associations*. Except as provided in subdivision (c), a partnership, a corporation or similar entity, or an unincorporated association, shall be represented by an attorney. A corporation shall be represented by an attorney regardless of the amount in controversy if the action involves a dispute between shareholders or officers of the same corporation.

(c) *Pro Se Representation of Partnerships, Corporations or Similar Entities, and Unincorporated Associations*.

(1) A partnership, corporation or similar entity, or unincorporated association may be represented by a partner or officer in an appeal of a civil action for money damages or landlord-tenant action for the recovery of the possession of real property from:

(i) the Magisterial District Court, in which the relief sought in the court of common pleas does not exceed the jurisdictional limit of the Magisterial District Court; or

(ii) the Philadelphia Municipal Court, in which the relief sought in the court of common pleas does not exceed the jurisdictional limit of the Philadelphia Municipal Court; or

(2) Representation pursuant to this subdivision in the court of common pleas shall terminate at the conclusion of trial and shall not extend to appellate proceedings.

***Official Note*: *See* 42 Pa.C.S. § 1515(a)(3) for the jurisdictional limit in the magisterial district courts and 42 Pa.C.S. § 1123(a)(4) for the jurisdictional limit in the Philadelphia Municipal Court.

See Rules 2026 *et seq*. as to representation of minors and 2051 *et seq*. as to representation of incapacitated persons by guardians.

PUBLICATION REPORT

The Civil Procedural Rules Committee is considering proposing new Rule 202.1 to govern representation of parties in the courts of common pleas. It is based on Allegheny County Local Rule 200 and would permit under certain parameters for a partnership, corporation or similar entity, or an unincorporated association to appear *pro se*.

In developing the proposed rule, the Committee initially examined a conflict in the case law concerning representation of incorporated entities in appeals from magisterial district courts. In *Jamestown Condominium, an unincorporated association v. Sofayov* (No. 2642 C.D. 2015, filed January 13, 2017), the Commonwealth Court determined that a general partner of a limited partnership who is not authorized to practice law could appear *pro se* on behalf of the limited partnership. The case was commenced in Allegheny County magisterial district court and the general partner, who was not a lawyer, appeared *pro se* on behalf of the limited partnership. Upon appeal to the court of common pleas, absent a statewide rule, Allegheny Local Rule 200 authorized a general partner of a limited partnership to appear *pro se* provided that the relief sought is within the jurisdictional limits of the magisterial district court.

However, in *David R. Nicholson Building, LLC v. Jablonski*, 163 A.3d 1048 (Pa. Super. 2017), the Superior Court determined that the sole member of a limited liability company could not appear *pro se* on behalf of his entity even in the case where the amount in controversy was within the jurisdictional limit of the magisterial district courts. This case was commenced in Union County magisterial district court. Upon appeal to the court of common pleas, no state or local rule permitted the limited liability company to appear *pro se*.

Additionally, the Committee observed that representation of partnerships, corporations, and unincorporated associations is already permitted by a non-lawyer in proceedings before the minor judiciary. In the magisterial district courts, Pa.R.C.P.M.D.J. No. 207 authorizes nonlawyers to represent individuals, partnerships, corporations, and unincorporated associations. The rule allows the representation of (1) individuals to include an authorized representative, (2) partnerships to include a partner, or employee or authorized agent of the partnership, and (3) corporations and unincorporated associations to be represented by an officer, employee, or authorized agent.

The Philadelphia Municipal Court also permits similar representation pursuant to Phila.M.C.R.Civ.P No. 131.

It was also reported to the Committee that some courts of common pleas are establishing housing courts. Many landlords are small incorporated businesses, who, even if incorporated, may represent themselves in the magisterial district courts pursuant to Pa.R.C.P.M.D.J. No. 207. Yet, on appeal of the same case from the minor judiciary to the court of common pleas, continuation of such representation is not currently permitted; an incorporated entity must then seek out representation by an attorney for the same matter adjudicated in the magisterial district court. A request was made to create continuity of representation in both the minor courts to the court of common pleas for these cases.

Finally, the Committee reviewed Allegheny County Local Rule 200. It authorizes a partner or officer to represent a partnership, corporation, or unincorporated association in the Court of Common Pleas of Allegheny County. Unlike Pa.R.C.P.M.D.J. 207 and Phila. M.C.R.Civ.P. No. 131, it is more limited. The local rule permits only a partner or an officer to represent a partnership, corporation, or unincorporated association. The local rule is also limited in scope. It applies only to (1) a civil action commenced in or appealed to the court of common pleas in which the relief sought does not exceed the jurisdictional limits of the magisterial district court, or (2) an appeal from a judgment entered in a magisterial district court for the recovery of the possession of real property.

Proposed new Rule 202.1 is intended to permit limited *pro se* representation of a partnership, a corporation or similar entity, or an unincorporated association. Such representation would be permitted only in appeals from the minor judiciary; no action could be initially commenced in the court of common pleas by a partnership, corporation or similar entity, or unincorporated association appearing *pro se*. Specifically, such representation would be permitted in an appeal of a civil action or a landlord-tenant action for the recovery of the possession of real property from (1) a magisterial district court provided the relief sought in the court of common pleas does not exceed the jurisdictional limit[1] of the magisterial district court, or (2) the Philadelphia Municipal Court provided the relief sought in the court of common pleas does not exceed the jurisdictional limit[2] of the Philadelphia Municipal Court.

The proposed rule would intentionally limit the relief sought in the court of common pleas to the jurisdictional limits of the minor judiciary to promote continuity of representation on the exact same case as well as to prevent a party from abusing proceedings before the minor judiciary as entrée to *pro se* representation in the court of common pleas to seek a greater relief.

Any and all representation pursuant to the rule would terminate at the conclusion of trial and would not extend to appellate proceedings.

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

[Pa.B. Doc. No. 20-930. Filed for public inspection July 17, 2020, 9:00 a.m.]

Title 231—RULES OF CIVIL PROCEDURE

PART I. GENERAL

[231 PA. CODE CH. 400]

Proposed Amendment of Pa.R.C.P. No. 400

The Civil Procedural Rules Committee is considering proposing to the Supreme Court of Pennsylvania the amendment of Pa.R.C.P. No. 400 governing the person to make service 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.

[1] The current jurisdictional limit for civil actions in the magisterial district courts is $12,000. See 42 Pa.C.S. § 1515(a)(3).

[2] The current jurisdictional limit for civil actions in the Philadelphia Municipal Court is $12,000. See 42 Pa.C.S. § 1123(a)(4)

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 25, 2020. 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 Civil Procedural Rules Committee

JOHN J. HARE,
Chair

Annex A

TITLE 231. RULES OF CIVIL PROCEDURE

PART I. GENERAL

CHAPTER 400. SERVICE OF ORIGINAL PROCESS

SERVICE GENERALLY

Rule 400. Person to Make Service.

(a) Except as provided in subdivisions (b) and (c) and in Rules 400.1 and 1930.4, original process shall be served within the Commonwealth only by the sheriff.

(b) In addition to service by the sheriff, original process may be served also by a competent adult in the following actions:

(1) **a** civil action in which the complaint includes a request for injunctive relief under Rule 1531, perpetuation of testimony under Rule 1532 or appointment of a receiver under Rule 1533**[,];**

(2) partition**[, and];**

(3) declaratory judgment when declaratory relief is the only relief sought**[.]; and**

(4) a civil action in which there is a complete diversity of citizenship between all plaintiffs and all defendants, and at least one defendant is a citizen of Pennsylvania.

***Official Note*:** See Rule 76 for the definition of "competent adult."

Service of original process in domestic relations matters is governed by Rule 1930.4.

(c) When the sheriff is a party to the action, original process shall be served by the coroner or other officer authorized by law to perform the duties of coroner.

(d) If service is to be made by the sheriff in a county other than the county in which the action was commenced, the sheriff of the county where service may be made shall be deputized for that purpose by the sheriff of the county where the action was commenced.

PUBLICATION REPORT

The Civil Procedural Rules Committee is considering proposing the amendment of Rule 400(b) governing those actions in which both the sheriff and a competent adult may serve original process. The proposal is the result of the Committee's examination of the holding in *Encompass Ins. Co. v. Stone Mansion Restaurant Inc.*, 902 F.3d 147 (3d Cir. 2018) concerning the removal of actions from state to federal court and permitting pre-service or "snap" removal.

28 U.S.C. § 1441(a) provides that a civil action brought in a state court may be removed to federal court where there is federal subject matter jurisdiction, including where there is complete diversity of citizenship between all plaintiffs and all defendants. Section 1441(b) states the "forum defendant" exception to that rule: an action otherwise removable on the basis of diversity jurisdiction "may not be removed if any of the parties in interest properly joined *and* served as defendants is a citizen of the State in which the action is brought." 28 U.S.C. § 1441(b) (emphasis added).

In *Encompass Ins. Co.*, the United States Third Circuit Court of Appeals held that Section 1441(b) does not prevent removal to federal court on the basis of diversity jurisdiction where there is a forum defendant when the forum defendant has not yet been served. In other words, removal is proper where the plaintiff intends to serve and proceed against an in-state defendant, but removal is filed before both joinder and service have occurred.

Preliminarily, delay between the filing of the complaint and original service provides opportunity for "snap" removal. As reported to the Committee, the method of original service available to plaintiffs is a significant factor in the magnitude of any delay. For example, employing a private process server permits prompt, plaintiff-directed service on defendants whereas the timing of sheriff-effectuated service varies widely within Pennsylvania. The Committee focused on reducing this potential inconsistency in statewide practice as it relates to "snap" removal.

The Committee observed that Rule 400(a) provides that the sheriff must serve original process of civil actions within the Commonwealth. Rule 400(b) sets forth certain, discrete civil actions for which, in addition to service by the sheriff, original process within the Commonwealth may be served by a competent adult. These include civil actions in which the complaint includes a request for injunctive relief, perpetuation of testimony, appointment of a receiver; partition; and declaratory judgment when declaratory relief is the only relief sought. In addition, Rule 400.1 also permits service of original process in Philadelphia County only by either the sheriff or a competent adult.

The various means of permissible original service in Pennsylvania, as provided by the Rules, has resulted in disparate delays in original service, which has led to inconsistent "snap" removal opportunities based upon the county of filing. To address this disparity, the Committee is proposing a modest amendment to Rule 400(b) to extend service of original process by a competent adult to every county only in the narrow category of cases impacted by the *Encompass Ins. Co.* decision, providing the same options for service in these cases regardless of the county in which the defendant is located.

An alternative resolution would be to remove the category of cases subject to "snap" removal from operation of Rule 400(b) so that such cases must also be served by sheriff pursuant to Rule 400(a). However, this approach, which seemingly fosters additional delay, appeared contrary to the purpose of the Rules to obtain speedy determinations of actions. *See, e.g.*, Pa.R.C.P. No. 128.

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

[Pa.B. Doc. No. 20-931. Filed for public inspection July 17, 2020, 9:00 a.m.]

Title 231—RULES OF CIVIL PROCEDURE

PART I. GENERAL

[231 PA. CODE CH. 400]

Proposed Amendment of Pa.R.C.P. No. 401(b)(2)

The Civil Procedural Rules Committee is considering proposing to the Supreme Court of Pennsylvania the amendment of Rule 401(b)(2) governing the reissuance or reinstatement of original process 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
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Supreme Court of Pennsylvania
Pennsylvania Judicial Center
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Harrisburg, PA 17106-2635
FAX: 717-231-9526
civilrules@pacourts.us

All communications in reference to the proposal should be received by September 25, 2020. 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 Civil Procedural Rules Committee

JOHN J. HARE,
Chair

Annex A

TITLE 231. RULES OF CIVIL PROCEDURE

PART I. GENERAL

CHAPTER 400. SERVICE OF ORIGINAL PROCESS

SERVICE GENERALLY

Rule 401. Time for Service. Reissuance, Reinstatement, and Substitution of Original Process.

(a) Original process shall be served within the Commonwealth within 30 days after the issuance of the writ or the filing of the complaint.

***Official Note*: *See* Rule 404 for the time for service outside the Commonwealth.**

(b)(1) If service within the Commonwealth is not made within the time prescribed by subdivision (a) of this rule or outside the Commonwealth within the time prescribed by Rule 404, the prothonotary upon *praecipe* and upon presentation of the original process, shall continue its validity by reissuing the writ or reinstating the complaint, by writing thereon "reissued" in the case of a writ or "reinstated" in the case of a complaint.

(2) A writ may be reissued or a complaint reinstated at any time and any number of times. A new party defendant may be named in a reissued writ or a reinstated complaint **only if the writ or complaint has not been served on any defendant**.

***Official Note*: A new party defendant cannot be added to a reissued writ or reinstated complaint if service has been completed on a defendant already named in the writ or complaint. For cases involving multiple defendants, a new party defendant cannot be added to a reissued writ or reinstated complaint if service has been completed on any defendant already named in the writ or complaint.**

If a new party defendant cannot be added pursuant to this rule, other procedures are available. *See* Rule 219 to discontinue to start a new action; Rule 1033 to amend the caption of the writ or complaint by agreement of the party or by leave of court; or Rule 2232 to seek leave of court for an order joining a defendant.

(3) A substituted writ may be issued or a substituted complaint filed upon *praecipe* stating that the former writ or complaint has been lost or destroyed.

(4) A reissued, reinstated, or substituted writ or complaint shall be served within the applicable time prescribed by subdivision (a) of this rule or by Rule 404 after reissuance, reinstatement, or substitution.

(5) If an action is commenced by writ of summons and a complaint is thereafter filed, the plaintiff, instead of reissuing the writ, may treat the complaint as alternative original process and as the equivalent for all purposes of a reissued writ, reissued as of the date of the filing of the complaint. Thereafter the writ may be reissued, or the complaint may be reinstated as the equivalent of a reissuance of the writ, and the plaintiff may use either the reissued writ or the reinstated complaint as alternative original process.

***Official Note*: If the applicable time has passed after the issuance of the writ or the filing of the complaint, the writ must be reissued or the complaint reinstated to be effective as process. Filing or reinstatement or substitution of a complaint, which is used as alternative process under this subdivision, has been held effective in tolling the statute of limitations as the reissuance or substitution of a writ.**

Explanatory Comment

Rule 401(b)(2) provides: "A writ may be reissued or a complaint reinstated at any time and any number of times. A new party defendant may be named in a reissued writ or a reinstated complaint." On its own, a literal reading of Rule 401(b)(2) suggests that a new party defendant can be added at any time upon the reissuance of a writ or reinstatement of a complaint; neither the rule nor its explanatory comment provide context as to its application. In practice, self-represented litigants have interpreted this provision to allow new defendants to be

added simply by reissuing the writ or reinstating the complaint without any context as to whether service of the writ or complaint has already been completed pursuant to subdivision (a) on a named defendant. In addition, the rule does not provide any guidance as to the operation of this subdivision when there are multiple defendants.

The proposed amendment would clarify that a new party defendant may be added to a reissued writ or reinstated complaint only if service of the writ or complaint on the defendant has not yet been completed. A proposed note would also be added to provide guidance for cases involving multiple defendants: if service has been completed for any defendant, a plaintiff cannot add a new defendant pursuant to this rule. In addition, the proposed note would cross-reference three other procedural methods for adding a defendant should a plaintiff be precluded from doing so pursuant to Rule 401(b)(2). These procedural methods include: discontinuance pursuant to Rule 229 and starting a new action; agreement by the parties or seeking leave of court to amend the pleading pursuant to Rule 1033, and seeking leave of court for an order joining a defendant pursuant to Rule 2232.

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

[Pa.B. Doc. No. 20-932. Filed for public inspection July 17, 2020, 9:00 a.m.]

Title 234—RULES OF CRIMINAL PROCEDURE

[234 PA. CODE CH. 6]

Proposed Amendment of Pa.R.Crim.P. 644

The Criminal Procedural Rules Committee is considering proposing to the Supreme Court of Pennsylvania the amendment of Rule 644 (Note Taking by Jurors) 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:

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

All communications in reference to the proposal should be received by no later than Friday, September 4, 2020. E-mail is the preferred method for submitting comments, suggestions, or objections; any e-mailed submission need not be reproduced and resubmitted via mail. The Committee will acknowledge receipt of all submissions.

By the Criminal Procedural Rules Committee

MARGHERITA PATTI-WORTHINGTON,
Chair

Annex A

TITLE 234. RULES OF CRIMINAL PROCEDURE

CHAPTER 6. TRIAL PROCEDURES IN COURT CASES

PART C(2). Conduct of Jury Trial

Rule 644. Note Taking by Jurors.

(A) **[When a jury trial is expected to last for more than two days, jurors]** **Jurors** shall be permitted to take notes during **[the trial]** **opening statements, the presentation of evidence, and closing arguments** for their use during deliberations. **[When the trial is expected to last two days or less, the judge may permit the jurors to take notes.]**

(1) The jurors shall not take notes during the judge's charge at the conclusion of the trial.

(2) The court shall provide materials to the jurors that are suitable for note taking. These are the only materials that may be used by the jurors for note taking.

(3) The court, the attorney for the Commonwealth, and the defendant's attorney, or the defendant if unrepresented, shall not request or suggest that jurors take notes, comment on the jurors' note taking, or attempt to read any notes.

(4) The notes of the jurors shall remain in the custody of the court at all times.

(5) The jurors may have access to their notes and use their notes only during the trial and deliberations. The notes shall be collected or maintained by the court at each break and recess, and at the end of each day of the trial.

(6) The notes of the jurors shall be confidential and limited to use for the jurors' deliberations.

(7) Before announcing the verdict, the jury shall return their notes to the court. The notes shall be destroyed by court personnel without inspection upon the discharge of the jury.

(8) The notes shall not be used as a basis for a request for a new trial, and the judge shall deny any request that the jurors' notes be retained and sealed pending a request for a new trial.

(B) The judge shall instruct the jurors about taking notes during the trial. At a minimum, the judge shall instruct the jurors that:

(1) the jurors are not required to take notes, and those jurors 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 opening statements, or closing arguments**;

(3) the notes merely are memory aids, not evidence or the official record;

(4) the 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) the jurors may not show their notes or disclose the contents of the notes to other jurors until deliberations begin, but may show the notes or disclose the contents during deliberations;

(6) the jurors may not take their notes out of the courtroom except to use their notes during deliberations; and

(7) the jurors' notes are confidential, will not be reviewed by the court or anyone else, will be collected before the verdict is announced, and will be destroyed immediately upon discharge of the jury.

Comment

[This rule was adopted in 2005 to permit the jurors to take notes during the course of any trial that is expected to last more than two days. Pursuant to this rule, except for trials expected to last two days or less, the jury may take notes as a matter of right without the permission of the court. *See, e.g.*, ABA Standards for Criminal Justice, Second Edition, Standard 15-3.2 (Note taking by jurors) (1980). This rule was originally adopted as a temporary rule for the purpose of assessing whether juror note taking in criminal cases is beneficial to the system of justice in Pennsylvania. As the rule has found favor with the bench, bar, and public, the sunset provision of paragraph (C) has been rescinded and the rule has been made permanent.]

The judge must instruct the jurors concerning the note taking. Paragraph (B) sets forth the minimum information the judge must explain to the jurors. The judge also must emphasize the confidentiality of the notes.

It is strongly recommended the judge instruct the jurors along the lines of the following:

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 it is entirely up to you whether you wish to take notes to help you remember what witnesses said and to use during your deliberations.

If you do take notes, remember that one of your responsibilities as a juror is to observe the demeanor of witnesses to help you assess their credibility. Do not become so involved with note taking that it interferes with your ability to observe a witness or distracts you from hearing the questions being asked the witness and the answers being given by the witness.

You may also take notes while the attorneys' present their opening statements and when they will make their closing arguments about the evidence at the end of the trial. Again, if you do take notes, do not become so involved with note taking that it distracts from paying attention to the remainder of the opening statement or hearing all of the closing argument.

Your notes may help you refresh your recollection of the **[testimony and]** **evidence as well as the attorneys' opening statements and 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 should not take precedence over your independent recollection of the facts.

Those of you who do not take notes should not be overly influenced by the notes of other jurors. 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. Although you are permitted to use your notes for your deliberations, the only notes you may use are the notes you write in the courtroom during the proceedings on the materials distributed by the court staff.

Each time that we adjourn, your notes will be collected and secured by court staff. Your notes are completely confidential and neither I nor any member of the court's staff will read your notes, now or at any time in the future. After you have reached a verdict in this case, your notes will be destroyed immediately by court personnel. Pennsylvania Bar Association Civil Litigation Update, *Juror Note-taking in Civil Trials: An Idea Whose Time Has Come*, Volume 5, No. 2 (Spring 2002), at 12.

Pursuant to paragraph (B)(6), the jurors are not permitted to remove the notes from the courtroom during the trial.

Pursuant to paragraph (A)(7), the judge must ensure the notes are collected and destroyed immediately after the jury renders its verdict. The court may designate a court official to collect and destroy the notes.

***Official Note*: Rule 1113 adopted January 24, 1968, effective August 1, 1968; renumbered Rule 644 and Comment revised March 1, 2000, effective April 1, 2001. Rule 644 rescinded June 30, 2005, effective August 1, 2005. New Rule 644 adopted June 30, 2005, effective August 1, 2005; amended August 7, 2008, effective immediately; amended , 2020, effective , 2020.**

Committee Explanatory Reports:

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

Final Report explaining the provisions of new Rule 644 allowing note taking by jurors published with the Court's Order at 35 Pa.B. 3917 (July 16, 2005).

Final Report explaining the August 7, 2008 amendments making permanent the provisions of Rule 644 allowing note taking by jurors published with the Court's Order at 38 Pa.B. 4606 (August 23, 2008).

Report explaining the proposed amendments clarifying that note taking by jurors is permitted during the presentation of evidence and closing arguments published comment at 50 Pa.B. 3577 (July 18, 2020).

REPORT

Proposed Amendment of Pa.R.Crim.P. 644

JUROR NOTE TAKING DURING OPENINGS AND CLOSINGS

The Committee had been examining a question presented to both the Civil Procedural Rules Committee ("Civil Rules Committee") and Criminal Procedural Rules Committees ("Criminal Rules Committee") regarding whether note taking by jurors is permitted during closing arguments. Pa.R.Crim.P. 644 (Note Taking by Jurors) was adopted in 2005 and was based heavily on the language contained in Pa. Rule of Civil Procedure 223.2 (Conduct of the Jury Trial. Juror Note Taking), which was adopted in 2003. Pa.R.C.P. 223.2 states that the jurors may take

notes during "the proceedings" for use during deliberations while Pa.R.Crim.P. 644 uses the phrase "during trial." The question is whether "proceeding" and "trial" includes closing arguments. Both Pa.R.Crim.P. 644 and Pa.R.C.P. 223.2 contain prohibitions against note taking during the judge's charge but are silent as to openings or closings. Pa.R.Crim.P. 644 provides that the judge is required to allow jurors to take notes in trials lasting more than two days, while it is in the judge's discretion to permit note taking in trials of shorter duration. Pa.R.C.P. No. 223.2 provides that a judge has the discretion to permit note taking in trials lasting more than two days.

Following the work of a joint subcommittee formed from members of both Committees, the Civil Rules Committee published for comment a proposal to amend Pa.R.C.P. No. 223.2.[1] Under this proposal the rule would be amended to require the trial judge to allow juror note taking in trials lasting more than two days, as is already provided in Pa.R.Crim.P. 644. The amendments would also specifically permit note-taking during closing arguments. The proposed amendments would preclude note-taking during opening statements. As stated in the Explanatory Comment in the published proposal, the Civil Rules Committee "believes that note taking during opening statements, during which information that may ultimately not be supported by evidence or even entered into evidence, could lead to confusion for jurors. Note taking during closing arguments would help jurors with their deliberations."

The Committees reconvened the joint subcommittee to review the results of the Civil Rules Committee's publication. As described in more detail below, the joint subcommittee recommended changes to the note taking rules in two regards: (1) that the two-day trial time limitation on the jurors' right to take notes be removed from the rules; and (2) that the rules should be clarified that note taking is permitted during opening statements and closing arguments. The Criminal Rules Committee accepted the recommendations of the joint subcommittee and is now publishing a proposal incorporating these recommendations as changes to Pa.R.Crim.P. 644.

Based on the members experience with jurors' feedback following trial, the Committee observed that jurors liked being able to take notes during opening statements because it gave them the opportunity to become familiar with the theories that were going to be presented to them and to organize their thoughts. Similarly, jurors reported satisfaction with taking notes during closing arguments because it made it easier to remember those arguments. In addition, it was clear that jurors had no trouble distinguishing the difference between evidence and arguments. Note taking throughout the trial offers several benefits. It shows respect and trust in the jurors to do their job. It also keeps attorneys accountable; if jurors take notes, a discrepancy has the potential to harm the litigant. To the concern that opening statements may include references to evidence that may be ultimately precluded, it was pointed out that there are instances during the presentation of evidence when testimony can be stricken. Allowing note taking during openings would give jurors the chance to note what the attorneys have suggested were important items of evidence for which the jurors should be looking. Finally, it was observed that the federal courts permit jurors to take notes with no limitation to any part of the trial.[2]

As a result of these discussions, the Committee concluded that note taking should be permitted during both openings and closings in addition to the presentation of evidence. Note taking still would be precluded during the judge's charge.

Second, the Committee discussed the extent of the trial judge's discretion in allowing juror note taking. As originally published, the proposed amendment of Pa.R.C.P. Rule 223.2(a) would remove the discretionary aspect for note taking in trials lasting more than two days. Pa.R.Crim.P. 644 currently requires the judge to permit note taking in trials lasting more than two days but allowing the judge discretion in trials lasting less than that. The Committee questioned why this time limit was chosen and whether it was an arbitrary limitation. In reviewing the history of Pa.R.Crim.P. 644, it was noted that when the juror note taking rules were first adopted, there was some skepticism that note taking by jurors was necessary or beneficial. As a result, it was reasoned that trials lasting less than two days would be more simple and not necessitate note taking; longer trials were deemed more complicated and thus jurors could benefit from the ability to take notes if they so desired.[3] The Committee noted that courts have become more accustomed to juror note taking, recognizing the benefits while observing that few of the problems originally feared with the practice have been realized. The Committee agreed that regardless of the length of the trial or its complexity, jurors should be allowed to take notes and that the two-day limitation should be eliminated.

Therefore, it is proposed that Pa.R.Crim.P. 644 be changed to add "opening statements" and "closing arguments" to the text of the rule and the provision limiting mandatory note taking to trials more than two days be removed. Similar revisions are made to the Comment to the rule.

[Pa.B. Doc. No. 20-933. Filed for public inspection July 17, 2020, 9:00 a.m.]

[1] See 49 Pa.B. 3885 (July 27, 2019).

[2] Note taking by jurors in federal court is permitted at the discretion of each judge. The directive appears to be set forth in pattern jury instructions and not pursuant to rule.

[3] In addition, when Pa.R.C.P. 223.2 was initially adopted in 2003, it was done so on a trial basis and included a two-year sunset provision. The success of the rule resulted in it becoming permanent in 2005. When Pa.R.Crim.P. 644 was adopted in 2005, it contained a similar sunset provision that was removed in 2008.

Title 249—PHILADELPHIA RULES

PHILADELPHIA COUNTY

Commerce Court Temporary Financial Monitor Program; No. 42 of 2020

Order

And Now, this 22nd day of June, 2020, consistent with the goals of the Commerce Court, which hears, inter alia, disputes between or among two or more business entities and handles dissolution and liquidation of business entities, the court takes judicial notice that the COVID-19 pandemic has caused significant economic harm to local for-profit businesses and non-profit institutions, many of which were forced to close for lengthy periods of time and have been unable to generate sufficient income to pay their debts or retain their staff, and it appears that the current economic climate threatens their ability to operate in the future, it is hereby *Ordered* and *Decreed* that, in order to provide assistance to keep local enterprises operational, a Commerce Court Temporary Financial Monitor Program (hereinafter the "Monitor Program") shall be created within the First Judicial District's Com-

merce Court under the general supervision of the Commerce Court Supervising Judge as follows:

1. *Establishment and Eligibility of the Monitor Program.*

A. The Commerce Court Supervising Judge, upon consultation with the Administrative Judge of the Trial Division, members of the bar, and other stakeholders, shall adopt appropriate case management orders and other protocols for the implementation of the Monitor Program in accordance with the Administrative Orders governing the Commerce Court and other applicable rules of court.

B. Any for-profit or non-profit entity, including a sole proprietorship, is eligible to participate in the Monitor Program if its principal place of business is located in Philadelphia County and it ceased to conduct a substantial portion of its operations due to the Covid-19 pandemic, resulting in a loss of revenue and causing the entity to be unable to pay its usual and customary costs and expenses coming due in the ordinary course on and after March 1, 2020. Entities whose defaults or failure to pay costs and expenses occurred on or before February 29, 2020, are generally ineligible to participate, unless otherwise determined by the court upon Petition.

2. *Assignment to the Monitor Program.*

A case is commenced and will be assigned to the Monitor Program when an eligible entity files a Petition to Enjoin Collection Activities and Appoint a Temporary Financial Monitor (hereinafter the "Petition").

3. *Information to be included in the Petition.*

The petitioning entity must include in, or as exhibits to, the Petition financial statement(s) identifying pre- and post-COVID assets, revenues, costs, and expenses, along with detailed information regarding the entity's creditors and the amounts owed to each of them. Exhibits containing financial information may be filed under seal, but they will be available for viewing by creditors and the Temporary Financial Monitor. The Petition must be filed as a public document.

4. *Court Review and Assignment of Temporary Financial Monitor.*

The Petition shall be assigned to the Commerce Court Supervising Judge or his designee, who may issue one or more orders: directing the filing of Response(s) to the Petition by creditors and other interested parties; appointing a legal or accounting professional to act as a Temporary Financial Monitor; scheduling meetings or conferences with creditors; enjoining creditors from engaging in any collection activities against the petitioning entity and its assets; requiring the entity to post a nominal bond; and directing such other actions as the court, sitting in equity, deems appropriate.

5. *Duties and Obligations of Temporary Financial Monitor.*

The Temporary Financial Monitor shall be responsible for evaluating the financial information provided by the petitioning entity and, upon consultation with the entity and its creditors, shall prepare a proposed Operating Plan to enable the entity to resume and/or continue operations while paying off its accumulated debts. The Operating Plan will be shared with creditors and other interested parties and submitted to the court for approval. The Temporary Financial Monitor shall provide periodic reports, as well as any revised Operating Plans, as directed by the court.

6. *Termination or Conclusion of Assignment of Temporary Financial Monitor.*

The Temporary Financial Monitor will be discharged within one year from the date of appointment, unless otherwise ordered by the court.

As required by Pa.R.J.A. 103(d), this Administrative Order and the proposed local rule were submitted to the Supreme Court of Pennsylvania Civil Procedural Rules Committee for review and written notification has been received from the Rules Committee certifying that the proposed local rule is not inconsistent with any general rule of the Supreme Court. This Administrative Order and the following local rule shall be filed with the Office of Judicial Records (formerly the Prothonotary, Clerk of Courts and Clerk of Quarter Sessions) in a docket maintained for Administrative Orders issued by the First Judicial District of Pennsylvania. As required by Pa.R.J.A. 103(d)(5)(ii), two certified copies of this Administrative Order and the following local rule, as well as one copy of the Administrative Order and local rule shall be distributed to the Legislative Reference Bureau on a computer diskette for publication in the *Pennsylvania Bulletin*. As required by Pa.R.J.A. 103(d)(6) one certified copy of this Administrative Order and local rule shall be filed with the Administrative Office of Pennsylvania Courts, shall be published on the website of the First Judicial District at www.courts.phila.gov, and shall be incorporated in the compiled set of local rules no later than 30 days following publication in the *Pennsylvania Bulletin*. Copies of the Administrative Order and local rules shall also be published in *The Legal Intelligencer* and will be submitted to American Lawyer Media, Jenkins Memorial Law Library, and the Law Library for the First Judicial District.

By the Court

HONORABLE IDEE C. FOX,
President Judge, Court of Common Pleas
Philadelphia County

HONORABLE JACQUELINE F. ALLEN,
Administrative Judge, Trial Division
Court of Common Pleas, Philadelphia County

HONORABLE GARY S. GLAZER,
Supervising Judge, Commerce Court
Court of Common Pleas, Philadelphia County

[Pa.B. Doc. No. 20-934. Filed for public inspection July 17, 2020, 9:00 a.m.]

Title 255—LOCAL COURT RULES

FAYETTE COUNTY

Designation of Bail Agency; No. 250 MD 2020

Order

And Now, this 18th day of June, 2020, pursuant to Pennsylvania Rule of Judicial Administration 103(d), it is hereby ordered that Fayette County Criminal Rule 530, Designation of Bail Agency is adopted as follows hereto.

The Clerk of Courts is directed as follows:

(1) Two copies and computer diskette of the Local Rule shall be distributed to the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.

(2) One copy of the Local Rule shall be filed with the Administrative Office of Pennsylvania Courts.

(3) One copy of the Local Rule shall be sent to the Fayette County Law Library and the Editor of the *Fayette Legal Journal*.

The Administrative Office of Fayette County Courts is directed as follows:

(1) Publish a copy of the Local Rule on the website of the Administrative Office of Fayette County Courts.

(2) Thereafter, compile the Local Rule within the complete set of local rules no later than 30 days following the publication in the *Pennsylvania Bulletin*.

The adoption of the above listed Local Rule shall become effective thirty (30) days after publication in the *Pennsylvania Bulletin*.

By the Court

JOHN F. WAGNER, Jr.,
President Judge

Rule 530. Designation of Bail Agency.

The Fayette County Adult Probation and Parole Office, Pre-Trial Services Unit, is designated as the bail agency of the Court of Common Pleas of Fayette County.

[Pa.B. Doc. No. 20-935. Filed for public inspection July 17, 2020, 9:00 a.m.]