

# THE COURTS

## Title 234—RULES OF CRIMINAL PROCEDURE

### PART I. GENERAL

[234 PA. CODE CH. 300]

#### Proposal to Adopt Amendments to Rules 319 and 320

##### Introduction

The Criminal Procedural Rules Committee is planning to recommend that the Supreme Court of Pennsylvania adopt amendments to Rules 319 (Pleas and Plea Agreements) and 320 (Withdrawal of Guilty Pleas and Pleas of Nolo Contendere). This proposal clarifies the procedures for a defendant to withdraw a plea of guilty or nolo contendere, and provides the attorney for the Commonwealth a 10-day opportunity to respond to a defendant's motion to withdraw. This proposal has not been submitted for review by the Supreme Court of Pennsylvania.

The following explanatory Report highlights the Committee's considerations on formulating this proposal. Please note that the Committee's Reports should not be confused with the official Committee Comments to the rules. Also note that the Supreme Court does not adopt the Committee's Comments or the contents of the explanatory Reports.

The text of the proposed rule changes precedes the Report. Deletions are in bold and brackets, and additions are in bold.

We request that interested persons submit suggestions, comments, or objections concerning this proposal to the Committee through counsel, Anne T. Panfil, Chief Staff Counsel, Supreme Court of Pennsylvania, Criminal Procedural Rules Committee, P. O. Box 1325, Doylestown, PA 18901, no later than Wednesday, November 4, 1998.

*By the Criminal Procedural Rules Committee:*

FRANCIS BARRY MCCARTHY,  
*Chair*

##### Annex A

#### TITLE 234. RULES OF CRIMINAL PROCEDURE

##### PART I. GENERAL

##### CHAPTER 300. PRETRIAL PROCEEDINGS

Rule 320. Withdrawal of plea of guilty **or nolo contendere**.

(A) At any time before **the imposition of sentence**, the court may, in its discretion, permit, **upon motion of the defendant**, or direct, **sua sponte, the withdrawal of a plea of guilty or nolo contendere [to be withdrawn]** and **the substitution of a plea of not guilty [substituted]**.

(B) **When a defendant moves for the withdrawal of a plea of guilty or nolo contendere, the attorney for the Commonwealth shall be given 10 days to respond.**

**Official Note:** Adopted June 30, 1964, effective January 1, 1965; Comment added June 29, 1977, effective September 1, 1977; Comment revised March 22, 1993, effective January 1, 1994; Comment deleted August 19,

1993, effective January 1, 1994; new Comment approved December 22, 1995, effective July 1, 1996; amended \_\_\_\_\_, 1998, effective \_\_\_\_\_, 1998.

##### Comment

**Under paragraph (A), when a defendant moves to withdraw a plea of guilty or nolo contendere, ordinarily the motion should be filed in writing before the date of the sentencing hearing. For the procedures governing motions, see Chapter 9000. However, nothing in this rule would preclude a defendant from making an oral and on-the-record motion to withdraw a plea at the sentencing hearing prior to the imposition of sentence.**

**When the defendant orally moves to withdraw a plea of guilty or nolo contendere at the sentencing hearing, the court should conduct an on-the-record colloquy to determine whether a fair and just reason to permit the withdrawal of the plea exists. If the court finds that there is not a fair and just reason, then the motion should be denied, and the court should proceed to sentencing. If the court finds that there may be a fair and just reason, then pursuant to paragraph (B), the court must give the attorney for the Commonwealth 10 days to respond to the motion. See *Commonwealth v. Hutchins*, 683 A.2d 674 (Pa. 1996).**

**Under paragraph (B), the trial court may not permit the withdrawal of a guilty plea or plea of nolo contendere until the expiration of the 10 days from the date on which the attorney for the Commonwealth receives the defendant's motion to withdraw the plea, unless the attorney for the Commonwealth responds prior to the expiration, nor may it compel the attorney for the Commonwealth to respond prior to the expiration of the 10-day period.**

**The 10-day response period in paragraph (B) affords the attorney for the Commonwealth time to investigate whether there is a fair and just reason for the withdrawal and whether the withdrawal would result in substantial prejudice to the Commonwealth. However, nothing in this rule would preclude the attorney for the Commonwealth from responding immediately or before the expiration of the 10-day period.**

When a defendant [withdraws] is permitted to withdraw a guilty plea or plea of nolo contendere under this rule and proceeds with a non-jury trial, the court and the parties should consider whether recusal might be appropriate to avoid prejudice to the defendant. See, e.g., *Commonwealth v. Pierce*, 527 A.2d 973 (Pa. 1987).

For a discussion of plea withdrawals when a guilty plea or plea of nolo contendere includes a plea agreement, see the Comment to Rule 319.

*Committee Explanatory Reports:*

**[Final Report explaining the March 22, 1993 amendments published with the Court's Order at 23 Pa.B. 1699 (April 10, 1993).]**

Committee Note explaining the August 12, 1993 deletion of the Comment published with the Court's Order at 23 Pa.B. 4215 (September 4, 1993).

Final Report explaining the new Comment approved on December 22, 1995 published with the Court's Order at 26 Pa.B. 8 (January 6, 1996).

**Report explaining the proposed amendments concerning the requirements for the withdrawal of a plea published at 28 Pa.B. 5091 (October 10, 1998).**

**Rule 319. Pleas and plea agreements.**

**[ (a) ] (A) Generally.**

\* \* \* \* \*

(3) The judge may refuse to accept a plea of guilty **or nolo contendere**, and shall not accept it unless the judge determines after inquiry of the defendant that the plea is voluntarily and understandingly tendered. Such inquiry shall appear on the record.

**[ (b) ] (B) Plea agreements.**

\* \* \* \* \*

(2) The judge shall conduct a separate inquiry of the defendant on the record to determine whether the defendant understands and voluntarily accepts the terms of the plea agreement on which the guilty plea **or plea of nolo contendere** is based.

**[ (c) ] (C) Murder cases.**

In cases in which the imposition of a sentence of death is not authorized, when a defendant enters a plea of guilty **or nolo contendere** to a charge of murder generally, the judge before whom the plea was entered shall alone determine the degree of guilt.

**Official Note:** Paragraph (a) adopted June 30, 1964, effective January 1, 1965; amended November 18, 1968, effective February 3, 1969; paragraph (b) adopted and title of rule amended October 3, 1972, effective 30 days hence; specific areas of inquiry in Comment deleted in 1972 amendment, reinstated in revised form March 28, 1973, effective immediately; amended June 29, 1977, and November 22, 1977, effective as to cases in which the indictment or information is filed on or after January 1, 1978; paragraph (c) added and Comment **[ amended ] revised** May 22, 1978, effective July 1, 1978; Comment revised November 9, 1984, effective January 2, 1985; amended December 22, 1995, effective July 1, 1996; amended \_\_\_\_\_, 1998, effective \_\_\_\_\_, 1998.

**Comment**

The purpose of paragraph **[ (a) ] (A)(3)** is to codify the requirement that the judge, on the record, ascertain from the defendant that the guilty plea **or plea of nolo contendere** is voluntarily and understandingly tendered. On the mandatory nature of this practice, see *Commonwealth v. Ingram*, 316 A.2d 77 (Pa. 1974); *Commonwealth v. Campbell*, 304 A.2d 121 (Pa. 1973); and *Commonwealth v. Jackson*, 299 A.2d 209 (Pa. 1973).

It is difficult to formulate a comprehensive list of questions a judge must ask of a defendant in determining whether the judge should accept the plea of guilty **or a plea of nolo contendere**. Court decisions may add areas to be encompassed in determining whether the defendant understands the full impact and consequences of the plea, but is nevertheless willing to enter that plea. At a minimum the judge should ask questions to elicit the following information:

(1) Does the defendant understand the nature of the charges to which he or she is pleading guilty **or nolo contendere**?

\* \* \* \* \*

It is advisable that the judge conduct the examination of the defendant. However, paragraph **[ (a) ] (A)** does not prevent defense counsel or the attorney for the Commonwealth from conducting part or all of the examination of the defendant, as permitted by the judge. In addition, nothing in the rule would preclude the use of a written colloquy that is read, completed, signed by the defendant, and made part of the record of the plea proceedings. This written colloquy would have to be supplemented by some on-the-record oral examination. Its use would not, of course, change any other requirements of law, including these rules, regarding the prerequisites of a valid guilty plea **or plea of nolo contendere**.

The "terms" of the plea agreement, referred to in paragraph **[ (b) ] (B)(1)**, frequently involve the attorney for the Commonwealth—in exchange for the defendant's plea of guilty **or nolo contendere**, and perhaps for the defendant's promise to cooperate with law enforcement officials—promising concessions such as a reduction of a charge to a less serious offense, the dropping of one or more additional charges, a recommendation of a lenient sentence, or a combination of these. In any event, paragraph **[ (b) ] (B)** is intended to insure that all terms of the agreement are openly acknowledged for the judge's assessment. See, e.g., *Commonwealth v. Wilkins*, 277 A.2d 341 (Pa. 1971).

The 1995 amendment deleting former paragraph **[ (b) ] (B)(1)** eliminates the absolute prohibition against any judicial involvement in plea discussions in order to align the rule with the realities of current practice. For example, the rule now permits a judge to inquire of defense counsel and the attorney for the Commonwealth whether there has been any discussion of a plea agreement, or to give counsel, when requested, a reasonable period of time to conduct such a discussion. Nothing in this rule, however, is intended to permit a judge to suggest to a defendant, defense counsel, or the attorney for the Commonwealth, that a plea agreement should be negotiated or accepted.

Under paragraph **[ (b) ] (B)(1)**, upon request and with the consent of the parties, a judge may, as permitted by law, order that the specific conditions of a plea agreement be placed on the record in camera and that portion of the record sealed. Such a procedure does not in any way eliminate the obligation of the attorney for the Commonwealth to comply in a timely manner with Rule 305 and the constitutional mandates of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Similarly, the attorney for the Commonwealth is responsible for notifying the cooperating defendant that the specific conditions to which the defendant agreed will be disclosed to third parties within a specified time period, and should afford the cooperating defendant an opportunity to object to the unsealing of the record or to any other form of disclosure.

When a guilty plea, **or plea of nolo contendere**, includes a plea agreement, the 1995 amendment to paragraph **[ (b) ] (B)(2)** requires that the judge conduct a separate inquiry on the record to determine that the defendant understands and accepts the terms of the plea agreement. See *Commonwealth v. Porreca*, 595 A.2d 23 (Pa. 1991).

Former paragraph **[ (b) ] (B)(3)** was deleted in 1995 for two reasons. The first sentence merely reiterated an earlier provision in the rule. See **[ (a) ] (A)(3)**. The second sentence concerning the withdrawal of a guilty plea was deleted to eliminate the confusion being generated when

that provision was read in conjunction with Rule 320. As provided in Rule 320, it is a matter of judicial discretion and case law whether to permit or direct a guilty plea or **plea of nolo contendere** to be withdrawn. See also *Commonwealth v. Porreca*, 595 A.2d 23 (Pa. 1991) (the terms of a plea agreement may determine a defendant's right to withdraw a guilty plea).

**For the procedures governing the withdrawal of a plea of guilty or nolo contendere, see Rule 320.**

Paragraph [ (c) ] (C) reflects a change in Pennsylvania practice, which formerly required the judge to convene a panel of three judges to determine the degree of guilt in murder cases in which the imposition of a sentence of death was not statutorily authorized.

*Committee Explanatory Reports:*

\* \* \* \* \*

**Report explaining the proposed amendments concerning references to nolo contendere pleas and the Comment reference to Rule 320 published at 28 Pa.B. 5091 (October 10, 1998).**

### REPORT

*Proposed Amendments to Pa.Rs.Crim.P. 319 and 320*

*Withdrawal of Guilty Pleas and Pleas of Nolo Contendere in Court Cases*

#### A. Background

The Committee considered correspondence that suggested that the Criminal Rules be amended to provide a notice to the attorney for the Commonwealth in those situations in which a defendant requests the withdrawal of a plea of guilty. The correspondence pointed out that, often, a defendant requests to withdraw the guilty plea immediately before sentencing, and that, in many cases, the attorney for the Commonwealth is not adequately prepared to argue the motion, or the court grants a continuance, resulting in the delay of the sentencing hearing. As a solution to this problem, it was suggested that Rule 320 be amended to require that a defendant, who wants to withdraw a plea, provide reasonable notice, in writing, to the attorney for the Commonwealth, prior to the time of the sentencing hearing.

Initially, the members considered an amendment requiring the defendant to give notice to the attorney for the Commonwealth in those situations in which a defendant moves to withdraw a plea of guilty. However, after further discussion and review of the rules and the correspondence, the Committee concluded that our initial focus on having the defendant give notice at least 10 days prior to sentencing was misdirected, and that providing a 10-day opportunity for the attorney for the Commonwealth to respond was a more logical solution to the problem presented in the correspondence. In addition, we were concerned that incorporating a 10-day notice requirement would change the substantive law that a defendant is permitted to make a motion to withdraw a plea at any time up to the imposition of sentence.

Before settling on the final procedures, the Committee reviewed Pennsylvania case law concerning plea withdrawals. We found it well established that the withdrawal of a guilty plea is to be liberally allowed, particularly prior to sentencing. *Commonwealth v. Faust*, 471 A.2d 1263 (Pa. Super. 1984). We also found that the "preferred procedure" is for a defendant to file a motion for leave to withdraw the plea, and that the trial court, in its discretion, will decide the matter on the basis of the petition and answer, or make an on-the-record determina-

tion after an evidentiary hearing. *Commonwealth v. Turiano*, 601 A.2d 846 (Pa. Super. 1992); *Commonwealth v. Zakrewski*, 333 A.2d 898 (Pa. Super. 1975). The case law sets forth a two-pronged standard for the court to employ in making its determination: that there is a fair and just reason for the withdrawal and a lack of substantial prejudice to the Commonwealth. See *Commonwealth v. Hutchins*, 683 A.2d 674 (Pa. Super. 1996).

In view of the case law and our decision to amend the rules to provide the attorney for the Commonwealth with an opportunity to respond to a defendant's motion to withdraw a plea, and recognizing that (1) a defendant may move for the withdrawal well in advance of the sentencing hearing, (2) a defendant may orally make the motion as late as immediately prior to the imposition of sentence, or (3) the trial court may, in some circumstances, sua sponte direct the withdrawal of the plea, the Committee settled on the following:

1. Rule 320 should retain the present procedure that a defendant move, orally or by written motion, to withdraw a plea.

2. The motion requirement should permit the defendant to move to withdraw a plea of guilty at any time prior to the imposition of sentence.

3. Rule 320 should provide the attorney for the Commonwealth with an opportunity to address the fair and just reason claimed by the defendant.

4. Rule 320 should provide the attorney for the Commonwealth with an opportunity to investigate whether a withdrawal of the plea of guilty would substantially prejudice its case.

5. The rule changes should not change the substantive law.

We concluded that the "10-day opportunity to respond" approach would (1) be more consistent with current practice and case law; (2) not preclude a defendant from making a motion at any time prior to sentencing (including while standing at the bar of the court at the time of sentencing); (3) still provide an adequate opportunity for the attorney for the Commonwealth to investigate whether the withdrawal would prejudice the case; (4) be consistent with Rule 9022 governing motions; (5) promote more efficient use of the court's time; and (6) benefit any victims and witnesses by providing them with information related to the progress of the case, as well as providing a measure of courtesy to them.

Having agreed to provide for a 10-day period for the attorney for the Commonwealth to respond to a defendant's motion to withdraw a guilty plea, the Committee also wanted to make it clear in Rule 320 that the 10-day period provides the attorney for the Commonwealth an opportunity to submit an answer which: 1) responds to a defendant's assertion that there is a fair and just reason to permit a withdrawal of the plea; and 2) sets forth the reasons why the Commonwealth's case would be substantially prejudiced if the defendant's motion were granted. Furthermore, although sympathetic to the concerns that the "eleventh hour" motions which result in delays are inconvenient to those who have appeared for sentencing, including the judge, the attorneys, any victims, and witnesses, the Committee concluded that the inconvenience and delays did not outweigh the right conferred upon defendants to move to withdraw the plea at any time before the sentencing. Finally, agreeing that it was important not to "cut off" a defendant by mandating that a motion to withdraw a plea be "filed in writing," and to maintain consistency throughout the Criminal Rules, and,

in keeping with the motion requirements of Rule 9022, the Committee concluded that Rule 320 should retain a defendant's ability to make an oral motion to withdraw a plea immediately prior to sentencing.

#### B. Discussion of Rule Changes

##### 1. Rule 320 (Withdrawal of Guilty Pleas and Pleas of Nolo Contendere)

Rule 320 establishes the procedures for the withdrawal of a plea of guilty or nolo contendere. Rule 320 would be amended to provide a simple, logical approach to plea withdrawals. First, the rule would be divided into two paragraphs. In order to maintain the substantive law that a defendant is permitted to move to withdraw a plea at any time, orally or in writing, before the imposition of sentence, including at the bar of the court at the sentencing hearing, new paragraph (A) incorporates the current provisions of Rule 320, providing that the court, in its discretion, may permit or direct the withdrawal of a plea of guilty or nolo contendere. Paragraph (A) has been modified to include the qualifiers "upon motion of the defendant" referring to the situations in which the court may "permit" the withdrawal of a plea of guilty, and "sua sponte" referring to the situations in which the court may "direct" the withdrawal of a plea of guilty.

New paragraph (B) provides that the attorney for the Commonwealth shall be given 10 days to respond to a defendant's motion to withdraw a plea of guilty or nolo contendere.

The Rule 320 Comment makes it clear that, although the filing of a written motion to withdraw a plea of guilty is the preferred procedure, oral motions which are made on the record are acceptable. The Comment also emphasizes that, following an oral motion, if the judge determines that no fair and just reason exists to permit the withdrawal, the judge should proceed with the sentencing. However, if the court finds that there may be a fair and just reason to substantiate a withdrawal, then before proceeding, to prevent the attorney for the Commonwealth from being "blindsided" by having to respond immediately to a last minute, oral motion to withdraw for which there is no time to adequately prepare, the court must give the attorney for the Commonwealth 10 days to respond to the defendant's motion and to provide reasons why there is not a fair and just reason to permit the withdrawal, or that if the withdrawal is permitted, substantial prejudice to the Commonwealth's case will result.

We also added to the Comment a clarification that the trial court may not permit the withdrawal of a plea of guilty before the 10-day period expires, unless the attorney for the Commonwealth responds to the motion prior to the expiration of the 10 days, and that the court may not compel the attorney to respond in less than 10 days.

##### 2. Rule 319 (Pleas and Pleas Agreements)

The Rule 319 Comment would be revised to include a cross-reference to Rule 320 concerning the procedure governing the withdrawal of a guilty plea or plea of nolo contendere.

##### 3. Pleas of Nolo Contendere

As we were discussing the general concept of pleas, we reexamined Rules 319 and 320, and discussed whether these rules apply to nolo contendere pleas. After researching the issue, we found that the courts treat a plea of nolo contendere the same as a plea of guilty. See *Commonwealth v. Nelson*, 666 A.2d 714 (Pa. Super. 1995) and *Commonwealth v. West*, 378 A.2d 1289 (Pa. Super. 1977).

Additionally, we did not find any Committee history which distinguished between the two types of pleas. The Committee therefore agreed to modify Rules 319 and 320 to include appropriate references to nolo contendere pleas.

[Pa.B. Doc. No. 98-1643. Filed for public inspection October 9, 1998, 9:00 a.m.]

## Title 25—LOCAL COURT RULES

### BEDFORD COUNTY

#### Local Rule Relating to Termination of Inactive Civil and Criminal Cases; Misc. Doc. No. 60071

##### Order of Court

And now, this 17th day of September, 1998, pursuant to Pennsylvania Rule of Civil Procedure No. 239, Pennsylvania Rule of Criminal Procedure No. 6 and Pennsylvania Rule of Judicial Administration No. 1901, the Court hereby promulgates this Local Rule of Court relating to termination of inactive civil and criminal cases for Bedford County, comprising the 57th Judicial District of the Commonwealth of Pennsylvania, effective thirty (30) days after publication in the *Pennsylvania Bulletin*. The said Rule follows hereto as Exhibit I.

*By the Court*

DANIEL LEE HOWSARE,  
*President Judge*

#### TERMINATION OF INACTIVE CIVIL AND CRIMINAL CASES

##### Rule of Judicial Administration No. 1901.

(A) The prothonotary shall list for general call at the first civil argument court held after September 1 of each year all civil matters in which no steps or proceedings have been taken for two years or more prior thereto and shall give notice thereof to counsel of record, and to the parties for whom no appearance has been entered, as provided by Pa.R.J.A. No. 1901(c). If no action is taken or no written objection is docketed in such a matter prior to the commencement of the general call, the prothonotary shall strike the matter from the list and enter an order as of course dismissing the matter with prejudice for failure to prosecute, under the provisions of this rule. If no good cause for continuing a matter is shown at the general call, an order shall be entered forthwith by the court for dismissal.

(B) The clerk of court shall list at the first criminal argument court held after September 1 of each year all criminal proceedings in which no steps or proceedings have been taken for two years or more prior thereto and shall give notice thereof to the district attorney, any private prosecutor and the defendant, as provided by Pa.R.J.A. No. 1901(c). If no good cause for continuing a proceeding is shown at the general call, an order for dismissal shall be entered forthwith by the court.

##### Exhibit I

[Pa.B. Doc. No. 98-1644. Filed for public inspection October 9, 1998, 9:00 a.m.]

**WYOMING AND SULLIVAN COUNTIES  
1999 Court Calendar; No. 98-944**

**Order of Court**

And Now, the 29th day of September, 1998, *It Is Ordered* that the Court Calendar of the Court of Common Pleas of the 44th Judicial District of Pennsylvania for the year of 1999, be and the same is hereby established in accordance with the schedule hereto and made a part hereof.

By the Court

BRENDAN J. VANSTON,  
*President Judge*

**1999 Court Calendar—Wyoming County**

*Account Confirmation*

January 19	July 6
February 2	August 3
March 2	September 7
April 6	October 5
May 4	November 2
June 1	December 7

*Arraignments*

January 13	July 14
February 10	August 11
March 10	September 8
April 14	October 13
May 12	November 10
June 9	December 8

*Domestic Relations*

*De Novos*

January 18	19
February 9	10
March 9	10
April 13	15
May 11	13
June 8	10
July 13	15
August 10	12
Sept. 14	9
October 12	14
November 9	12
December 6	9

*General Call*

September 7

*Juveniles*

January 19	July 7
February 3	August 4
March 3	September 1
April 7	October 6
May 5	November 3
June 2	December 1

*Criminal Trial Weeks*

February 16, 1999	August 16, 1999
April 19, 1999	October 18, 1999
June 21, 1999	December 13, 1999

*Guilty Pleas & Status Call*

January 22	June 4
February 5	July 9
March 5	August 13
April 9	September 3
May 7	October 8

November 5  
December 3

*Dependency*

January 22	July 15
February 11	August 12
March 11	September 9
April 15	October 14
May 13	November 12
June 10	December 9

*Civil Trial Weeks*

January 25, 1999	July 26, 1999
March 15, 1999	September 20, 1999
May 24, 1999	November 15, 1999

*Close Civil Trial List*

December 4, 1998 (March, 1999)  
February 5, 1999 (May, 1999)  
April 1, 1999 (July, 1999)  
June 4, 1999 (September, 1999)  
August 6, 1998 (November, 1999)  
October 1, 1998 (January, 2000)  
December 3, 1998 (March, 2000)

*Sentences and ARD Hearings*

January 20	July 16
February 10	August 11
March 10	September 8
April 14	October 13
May 12	November 10
June 9	December 8

*Prison Board*

January 5	July 6
February 2	August 3
March 2	September 7
April 6	October 5
May 4	November 2
June 1	December 7

**1998 Calendar—Sullivan County**

*Miscellaneous, Arraignments and Account Confirmations*

January 21	July 8
February 4	August 5
March 4	September 2
April 8	October 7
May 6	November 4
June 3	December 2

*Civil and Criminal Trial Weeks*

March 22, 1999  
June 14, 1999  
September 27, 1999  
October 25, 1999

*Close Civil Trial List*

December 4, 1998	(March, 1999 Trial Term)
March 5, 1999	(June, 1999 Trial Term)
June 4, 1999	(September, 1999 Trial Term)
August 6, 1999	(October, 1999 Trial Term)
November 5, 1999	(January, 2000 Trial Term)
December 3, 1999	(March, 2000 Trial Term)

*General Call*

September 2, 1999

[Pa.B. Doc. No. 98-1645. Filed for public inspection October 9, 1998, 9:00 a.m.]