

# THE COURTS

## Title 204—JUDICIAL SYSTEM GENERAL PROVISIONS

### PART IV. ADMISSION TO PRACTICE OF LAW [204 PA. CODE CH. 71]

Amendment of Rule 231 of the Pennsylvania Bar  
Admission Rules; No. 0185; Doc. No. 1

#### Order

*Per Curiam:*

*And Now*, this 2nd day of October, 1997, Rule 231 of the Pennsylvania Bar Admission Rules is amended to read as follows.

To the extent that notice of proposed rulemaking would be required by Pennsylvania Rule of Judicial Administration No. 103 or otherwise, the immediate amendment of Pa. B.A.R. 231 is hereby found to be required in the interest of justice and efficient administration.

This Order shall be processed in accordance with Pennsylvania Rule of Judicial Administration No. 103(b) and shall be effective immediately.

#### Annex A

### TITLE 204. JUDICIAL SYSTEM GENERAL PROVISIONS

#### PART IV. ADMISSION TO PRACTICE OF LAW

#### CHAPTER 71. PENNSYLVANIA BAR ADMISSION RULES

#### Subchapter B. ADMISSION TO THE BAR GENERALLY ADMISSION TO PRACTICE

#### Rule 231. Motions for Admission.

(a) *General rule.* Motions for admission to the bar of this Commonwealth shall be made by filing one copy thereof with the Prothonotary. The motion shall be in writing on a form prescribed by the Board and shall include or be accompanied by:

(1) A certificate from the Board recommending such admission, either:

(i) dated within [ **one year** ] **six months** of the filing of the motion; or

(ii) dated [ **one year** ] **six months** or more prior to the filing of the motion and accompanied by a written statement of the Board dated within [ **one year** ] **six months** of the filing of the motion to the effect that it knows of no reason why the motion should not be granted. **All applicants shall file a motion for admission to the bar within three years of the date that the original certificate recommending admission had been issued by the Board. The failure to file a motion for admission within three years of the date when the certificate had been issued by the Board will cause the right to admission to the bar to lapse and require the applicant to reapply and successfully meet all of the requirements for admission to**

the bar including, where applicable, the taking and passing of a future bar examination.

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[Pa.B. Doc. No. 97-1656. Filed for public inspection October 17, 1997, 9:00 a.m.]

## Title 234—RULES OF CRIMINAL PROCEDURE

### PART I. GENERAL

#### [234 PA. CODE CH. 30]

Order Adopting Rules 30, 31, 32 and 39; No. 228;  
Doc. No. 2

The Criminal Procedural Rules Committee has prepared a Final Report explaining the Supreme Court's promulgation of new Chapter 30, Rules 30 through 39, which establishes the procedures to implement 42 Pa.C.S. § 4137, 4138, and 4139 concerning criminal contempt powers of district justices, judges of the Pittsburgh Magistrates Court, and judges of the Traffic Court of Philadelphia. The Final Report follows the Court's Order.

#### Order

*Per Curiam:*

*Now*, this 1st day of October, 1997, upon the recommendation of the Criminal Procedural Rules Committee; this Recommendation having been published at 25 Pa.B. 12 (January 7, 1995) and 25 Pa.B. 1841 (May 13, 1995) and in the *Pennsylvania Reporter* (Atlantic Second Series Advance Sheets Vols. 650 and 656) before adoption, with a Final Report to be published with this Order:

*It Is Ordered* pursuant to Article V, Section 10 of the Constitution of Pennsylvania that new Pa.Rs.Crim.P. 30, 31, 32, and 39 are hereby promulgated in the following form.

This *Order* shall be processed in accordance with Pa.R.J.A. 103(b), and shall be effective October 1, 1998.

#### Annex A

### TITLE 234. RULES OF CRIMINAL PROCEDURE

#### PART I. GENERAL

#### CHAPTER 30. PROCEDURES PROCEDURES IMPLEMENTING 42 Pa.C.S. §§ 4137, 4138, and 4139: CRIMINAL CONTEMPT POWERS OF DISTRICT JUSTICES, JUDGES OF THE PITTSBURGH MAGISTRATES COURT, AND JUDGES OF THE TRAFFIC COURT OF PHILADELPHIA

Rule 30. Contempt Proceedings before District Justices, Pittsburgh Magistrates Court Judges, and Philadelphia Traffic Court Judges.

(A) *Contempt in the Presence of the Court.*

1. An issuing authority may summarily hold an individual in contempt for misbehavior in the presence of the court which obstructs the administration of justice, and, after affording the individual an opportunity to be heard, may impose a punishment of a fine or imprisonment as provided by law.

2. The issuing authority shall orally advise the contemnor of the right to appeal within 30 days for a trial de novo in the court of common pleas, and that:

a. any punishment shall be automatically stayed for a period of 30 days from the date of the imposition of the punishment;

b. if the contemnor files an appeal within the 30-day period, the stay will remain in effect pending disposition of the appeal;

c. when the punishment is imprisonment, the contemnor has the right to assistance of counsel for the purpose of the de novo hearing in the court of common pleas, and, if the contemnor is without financial resources or otherwise unable to employ counsel, counsel will be assigned as provided in Rule 316;

d. the contemnor must appear in the court of common pleas for the de novo hearing or the appeal may be dismissed; and

e. unless a notice of appeal is filed within the 30-day period, on the date specified by the issuing authority, the contemnor must:

(1) pay any fine imposed, and

(2) appear before the issuing authority for execution of any punishment of imprisonment.

3. The issuing authority shall issue a written order of contempt, in which the issuing authority shall:

a. set forth the facts of the case which constitute the contempt;

b. certify that the issuing authority saw or heard the conduct constituting the contempt, and that the contempt was committed in the actual presence of the issuing authority;

c. set forth the punishment imposed, and the date on which the contemnor is to pay any fine or to appear for the execution of any punishment of imprisonment; and

d. set forth the information specified in paragraph (A)2.

4. The order of contempt shall be signed by the issuing authority, and a copy shall be given to the contemnor.

(B) *Contempt not in the Presence of the Court.*

1. *Institution of Proceedings*

a. An issuing authority may institute contempt proceedings by either

(1) giving written notice to the alleged contemnor of the time, date, and place of the contempt hearing, or

(2) when deemed appropriate by the issuing authority, issuing an attachment by means of a warrant, whenever a person is alleged to have (i) failed to obey a subpoena issued by the issuing authority; (ii) failed to comply with an order of the issuing authority directing a defendant to pay fines and costs in accordance with an installment payment order; (iii) failed to comply with an order of a district justice directing a defendant to compensate a victim; (iv) violated an order issued pursuant to 23 Pa.C.S. § 6110; or (v) failed to comply with an order of an issuing authority in any case in which the issuing authority is by statute given the power to find the person in contempt.

b. If the proceedings are instituted by notice, the notice shall:

(1) specify the acts or omissions and the essential facts constituting the contempt charged;

(2) advise what the statutorily provided punishment may be for a finding of contempt in the case;

(3) if, in the event of a finding of contempt, there is a likelihood that the punishment will be imprisonment, advise the alleged contemnor of the right to the assistance of counsel and that counsel will be assigned pursuant to Rule 316 if the alleged contemnor is without financial resources or is otherwise unable to employ counsel; and

(4) advise the alleged contemnor that failure to appear at the hearing may result in the issuance of a warrant of arrest.

c. The notice shall be served in person or by both first class and certified mail, return receipt requested.

2. *Hearing*

a. The hearing shall be conducted in open court, and the alleged contemnor shall be given a reasonable opportunity to defend.

b. At the conclusion of the hearing:

(1) The issuing authority in open court shall announce the decision, and, upon a finding of contempt, impose punishment, if any.

(2) If the issuing authority finds contempt and imposes punishment, the issuing authority shall orally advise the contemnor of the right to appeal within 30 days for a trial de novo in the court of common pleas, and that:

(a) any punishment shall be automatically stayed for a period of 30 days from the date of the imposition of the punishment;

(b) if the contemnor files an appeal within the 30-day period, the stay will remain in effect until disposition of the appeal;

(c) when the punishment is imprisonment, that the contemnor has the right to assistance of counsel for the purpose of the de novo hearing in the court of common pleas and, if the contemnor is without financial resources or otherwise unable to employ counsel, that counsel will be assigned as provided in Rule 316;

(d) the contemnor must appear in the court of common pleas for the de novo hearing or the appeal may be dismissed; and

(e) unless a notice of appeal is filed within the 30-day period, on the date specified by the issuing authority, the contemnor must:

(i) pay any fine imposed, and

(ii) appear before the issuing authority for execution of any punishment of imprisonment.

(3) If the issuing authority finds contempt and imposes punishment, the issuing authority shall issue a written order of contempt setting forth:

(a) the facts of the case which constitute the contempt;

(b) the punishment imposed, and the date on which the contemnor is to pay any fine or to appear for the execution of any punishment of imprisonment; and

(c) the information specified in paragraph (B)2.b(2).

(4) The order of contempt shall be signed by the issuing authority, and a copy given to the contemnor.

(5) Whether or not the issuing authority finds an individual in contempt for failure to comply with an order to pay restitution or to pay fines and costs, the issuing

authority may alter or amend the order. If the issuing authority alters or amends the order, the issuing authority shall:

(a) issue a written order setting forth the amendments and the reasons for the amendments, make the order a part of the transcript, and give a copy of the order to the defendant; and

(b) advise the defendant that the defendant has 30 days within which to file a notice of appeal of the altered or amended order pursuant to Rule 31.

c. The issuing authority shall not hold a contempt hearing in the absence of the alleged contemnor. If the alleged contemnor fails to appear for the contempt hearing, the issuing authority may continue the hearing and issue a warrant of arrest.

**Official Note:** Adopted October 1, 1997, effective October 1, 1998.

#### Comment

This rule sets forth the procedures to implement 42 Pa.C.S. §§ 4137, 4138, and 4139 concerning contempt powers of the minor judiciary, as well as any other statutes subsequently enacted which would provide for findings of contempt by the minor judiciary. It is not intended to supplant the procedures set forth in 23 Pa.C.S. § 6113 concerning violations of protection from abuse orders.

The scope of the contempt powers of district justices, Pittsburgh Magistrates Court judges, and Philadelphia Traffic Court judges is governed by 42 Pa.C.S. §§ 4137, 4138, and 4139 respectively. Therefore, as used in this rule, "issuing authority" refers only to district justices, Pittsburgh Magistrates Court judges, and Philadelphia Traffic Court judges when acting within the scope of their contempt powers.

All contempt proceedings under this rule are to be entered on the issuing authority's miscellaneous docket, and a separate docket transcript for the contempt proceeding is to be prepared. If an appeal is taken, the issuing authority is required to forward the transcript and the contempt order to the clerk of courts. See Rule 31.

Paragraph (A) sets forth the procedures for handling contempt proceedings when the misbehavior is committed in the presence of the court and is obstructing the administration of justice. 42 Pa.C.S. §§ 4137(a)(1), 4138(a)(1), and 4139(a)(1). This type of contempt is commonly referred to as "direct" or "summary" contempt. The issuing authority may immediately impose punishment without a formal hearing because prompt action is necessary to maintain or restore order in the courtroom and to protect the authority and dignity of the court. Although immediate action is permitted in these cases, the alleged contemnor is ordinarily given an opportunity to be heard before the imposition of punishment. See *Commonwealth v. Stevenson*, 393 A.2d 386 (Pa. 1978).

Customarily, individuals are not held in summary contempt for misbehavior before the court without prior oral warning by the presiding judicial officer.

Paragraph (B) provides the procedures for instituting and conducting proceedings in all other cases of alleged contemptuous conduct subject to the minor judiciary's statutory contempt powers, which are commonly referred to as "indirect criminal contempt" proceedings.

Pursuant to 42 Pa.C.S. §§ 4137(a)(2), (3), (4), and (5), 4138(a)(2) and (3), and 4139(a)(2) and (3), only district

justices have the power to impose punishment for contempt of court for failure to comply with an order directing a defendant to compensate a victim or an order issued pursuant to 23 Pa.C.S. § 6110. See paragraph (B)1.a.

"Indirect criminal contempt" proceedings must be instituted either by serving the alleged contemnor with a notice of the contempt hearing, or by issuing an attachment in the form of a warrant. The alleged contemnor must be afforded the same due process protections that are normally provided in criminal proceedings, including notice of the charges, an opportunity to be heard and to present a defense, and counsel. See, e.g., *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974), and *Bloom v. Illinois*, 391 U.S. 194 (1968).

When a warrant of arrest is executed under this rule, the alleged contemnor should be taken without unreasonable delay before the proper issuing authority.

Although 42 Pa.C.S. §§ 4137(a)(4), 4138(a)(3), and 4139(a)(3) permit an issuing authority to impose summary punishments for indirect criminal contempt when a defendant fails to comply with an order of the issuing authority directing the defendant to pay fines and costs in accordance with an installment payment order, nothing in this rule is intended to preclude an issuing authority from proceeding pursuant to Rule 85 (Default Procedures: Restitution, Fines, and Costs).

The Supreme Court in *Commonwealth v. Abrams*, 336 A.2d 308 (Pa. 1975) held that the right to counsel applies in cases of criminal contempt. See also *Commonwealth v. Crawford*, 352 A.2d 52 (Pa. 1976).

For the assignment of counsel, follow the Rule 316 procedures for summary cases.

For waiver of counsel, follow the Rule 318 procedures for proceedings before an issuing authority.

For the procedures for taking, perfecting, and handling an appeal from an order entered pursuant to this rule, see Rule 31.

If a contemnor defaults in the payment of a fine imposed as punishment for contempt pursuant to 42 Pa.C.S. §§ 4137(c), 4138(c), or 4139(c), the matter is to proceed as provided in Rule 32.

See Chapter 4000 concerning bail before a contempt hearing. See 42 Pa.C.S. § 4137(e) concerning a district justice's authority to set bail after an adjudication of contempt.

Paragraphs (A)2.e and (B)2.b(2)(e) require the issuing authority to set a date for the contemnor to pay any fine or to appear for execution of any punishment of imprisonment. This date should be at least 35 days from the date of the contempt proceeding to allow for the expiration of the 30-day automatic stay period and the 5-day period within which the clerk of courts is to serve a copy of the notice of appeal on the issuing authority. See Rule 31.

Paragraph (B)2.b(5) requires that the case be reviewed at the conclusion of a contempt hearing to determine whether the restitution order or the fines and costs installment order should be altered or amended, rather than scheduling another hearing. This review should be conducted whether or not the district justice finds an individual in contempt for failure to comply with an order to pay restitution, or whether or not the issuing authority finds an individual in contempt for failure to comply with an installment order to pay fines and costs. For the authority to alter or amend a restitution order, see 18 Pa.C.S. § 1106(c)(2)(iii).

*Committee Explanatory Reports:*

Final Report explaining the provisions of new Rule 30 published with the Court's Order at 27 Pa.B. 5405 (October 18, 1997).

**Rule 31. Appeals from Contempt Adjudications by District Justices, Pittsburgh Magistrates Court Judges, or Philadelphia Traffic Court Judges.**

(A) An appeal authorized by 42 Pa.C.S. §§ 4137(d), 4138(d), or 4139(d) of the action of an issuing authority in a contempt proceeding shall be perfected by filing a notice of appeal within 30 days after the action of the issuing authority with the clerk of courts and by appearing in the court of common pleas for the de novo hearing.

(B) In all cases, the punishment imposed for contempt shall be stayed for 30 days from the imposition of the punishment. If an appeal is filed within the 30-day period, the stay shall remain in effect pending disposition of the appeal.

(C) The notice of appeal shall contain the following information:

- (1) the name and address of the appellant;
- (2) the name and address of the issuing authority who heard the case;
- (3) the magisterial district number where the case was heard;
- (4) the date of the imposition of punishment;
- (5) the punishment imposed;
- (6) the type or amount of bail furnished to the issuing authority, if any; and
- (7) the name and address of the attorney, if any, filing the notice of appeal.

(D) Within 5 days after the filing of the notice of appeal, the clerk of courts shall serve a copy either personally or by mail upon the issuing authority.

(E) The issuing authority shall, within 20 days after receipt of the notice of appeal, file with the clerk of courts:

- (1) the transcript of the proceedings;
- (2) either the notice of the hearing or a copy of the attachment;
- (3) the contempt order; and
- (4) any warrant of arrest.

(F) Upon the filing of the transcript and other papers by the issuing authority, the case shall be heard de novo by the appropriate division of the court of common pleas as the president judge shall direct. If the appellant fails to appear for the de novo hearing, the judge assigned to hear the matter may dismiss the appeal and enter judgment in the court of common pleas on the judgment of the issuing authority.

**Official Note:** Adopted October 1, 1997, effective October 1, 1998.

**Comment**

This rule provides the procedures for taking an appeal from a finding of contempt by a district justice, a Pittsburgh Magistrates Court judge, or a Philadelphia Traffic Court judge.

As used in this rule, "issuing authority" refers only to district justices, Pittsburgh Magistrates Court judges, and

Philadelphia Traffic Court judges when acting within the scope of their contempt powers. See 42 Pa.C.S. §§ 4137, 4138, and 4139.

Pursuant to paragraph (B), any punishment imposed for contempt will be automatically stayed for 30 days from the date of the imposition of the punishment, during which time a notice of appeal may be filed with the clerk of courts. To the extent that 42 Pa.C.S. §§ 4137(d), 4138(d), and 4139(d) are inconsistent with this rule, they are suspended by Rule 39 (Suspension of Acts of Assembly—Chapter 30).

If no notice of appeal is filed within the 30-day period following imposition of the punishment, Rule 30 requires the issuing authority to direct the contemnor on a date certain to pay any fine imposed or to appear for execution of any punishment of imprisonment.

See 42 Pa.C.S. § 4137(e) concerning the imposition of bail as a condition of release by a district justice.

Paragraph (F) makes it clear that the judge assigned to conduct the de novo hearing may dismiss an appeal of the action of an issuing authority in a contempt proceeding when the judge determines that the appellant is absent without cause from the de novo hearing. If the appeal is dismissed, the judge should enter judgment and order execution of any punishment imposed by the issuing authority.

*Committee Explanatory Reports:*

Final Report explaining the provisions of new Rule 31 published with the Court's Order at 27 Pa.B. 5405 (October 18, 1997).

**Rule 32. Procedures Governing Defaults in Payment of Fine Imposed as Punishment For Contempt.**

(A) If a contemnor defaults on the payment of a fine imposed as punishment for contempt pursuant to 42 Pa.C.S. §§ 4137(c), 4138(c), or 4139(c), the issuing authority shall notify the contemnor in person or by first class mail that within 10 days of the date on the default notice the contemnor must either:

- (1) pay the amount due as ordered, or
- (2) appear before the issuing authority to show cause why the contemnor should not be imprisoned for nonpayment as provided by law, or a warrant for the contemnor's arrest shall be issued.

(B) When the contemnor appears either in response to the paragraph (A)(2) notice or following an arrest with a warrant issued pursuant to paragraph (A), the issuing authority shall conduct a hearing to determine whether the contemnor is financially able to pay as ordered.

(1) Upon a determination that the defendant is financially able to pay as ordered, the issuing authority may impose imprisonment for nonpayment, as provided by law.

(2) Upon a determination that the contemnor is financially unable to pay as ordered, the issuing authority may order a schedule for installment payments.

(C) A contemnor may appeal an issuing authority's determination pursuant to this rule by filing a notice of appeal within 30 days of the issuing authority's order. The appeal shall proceed as provided in Rule 31.

**Official Note:** Adopted October 1, 1997, effective October 1, 1998.

### Comment

This rule provides the procedures governing defaults in the payment of fines imposed as punishment for contempt in proceedings before district justices, Pittsburgh Magistrates Court judges, and Philadelphia Traffic Court judges. See 42 Pa.C.S. §§ 4137(c), 4138(c), or 4139(c).

As used in this rule, "issuing authority" refers only to district justices, Pittsburgh Magistrates Court judges, and Philadelphia Traffic Court judges when acting within the scope of their contempt powers. See 42 Pa.C.S. §§ 4137, 4138, and 4139.

For contempt procedures generally, see Rule 30.

When a contemnor defaults on a payment of a fine, paragraph (A) requires the issuing authority to notify the contemnor of the default, and to provide the contemnor with an opportunity to either pay the amount due or appear within a 10-day period to show cause why the contemnor should not be imprisoned for nonpayment. If the contemnor fails to pay or appear, the issuing authority must issue a warrant for the arrest of the contemnor.

If the hearing on the default can not be held immediately, the issuing authority may set bail as provided in Chapter 4000.

This rule contemplates that when there has been an appeal pursuant to paragraph (C), the case would return to the issuing authority who presided at the default hearing for completion of the collection process.

#### *Committee Explanatory Reports:*

Final Report explaining the provisions of new Rule 32 published with the Court's Order at 27 Pa.B. 5405 (October 18, 1997).

### **Rule 39. Suspension of Acts of Assembly—Chapter 30.**

The Act of June 15, 1994, P.L. 273, No. 45, § 1, 42 Pa.C.S. §§ 4137, 4138, and 4139, which provides, *inter alia*, that any punishment imposed for contempt will be "automatically stayed for a period of 10 days from the date of the imposition of the punishment during which time an appeal of the action" of a district justice, a Pittsburgh Magistrates Court judge, or a Philadelphia Traffic Court judge "may be filed with the court of common pleas of the judicial district," and which is implemented by Rules 30, 31, and 32, is hereby suspended only insofar as it is inconsistent with the 30-day appeal period and 30-day automatic stay period set forth in Rule 31.

**Official Note:** Adopted October 1, 1997, effective October 1, 1998.

#### *Committee Explanatory Reports:*

Final Report explaining the provisions of new Rule 39 published with the Court's Order at 27 Pa.B. 5405 (October 18, 1997).

### **FINAL REPORT**

*Procedures Implementing 42 Pa.C.S. §§ 4137, 4138, and 4139: Criminal Contempt Powers of District Justices, Judges of the Pittsburgh Magistrates Court, and Judges of the Traffic Court of Philadelphia*

#### *Introduction*

On October 1, 1997, upon the recommendation of the Criminal Procedural Rules Committee, the Supreme Court adopted new Chapter 30 of the Rules of Criminal Procedure, which provides the procedures to implement 42 Pa.C.S. § 4137, 4138, and 4139 concerning criminal

contempt powers of district justices, judges of the Pittsburgh Magistrates Court, and judges of the Traffic Court of Philadelphia. New Chapter 30 consists of new Rules of Criminal Procedure 30 (Contempt Proceedings Before District Justices, Pittsburgh Magistrates Court Judges, and Philadelphia Traffic Court Judges), 31 (Appeals From Contempt Adjudications by District Justices, Pittsburgh Magistrates Court Judges, and Philadelphia Traffic Court Judges), 32 (Procedures Governing Defaults in Payment of Fine Imposed as Punishment for Contempt), and 39 (Suspension of Acts of Assembly—Chapter 30). The new rules will become effective October 1, 1998. This Final Report highlights the Committee's considerations in formulating these new rules.<sup>1</sup>

#### *Discussion*

##### *A. New Chapter 30: Organization and Definitions*

The Committee reviewed the legislation providing for the new power of the minor judiciary to "impose summary punishments for criminal contempts" of their courts (42 Pa.C.S. §§ 4137(a), 4138(a), 4139(a)), and concluded that this new power is separate and distinct from the minor judiciary's jurisdiction in summary criminal cases as provided in 42 Pa.C.S. §§ 1143, 1321, and 1515. In view of this, the new rules governing the contempt powers of the minor judiciary have been incorporated into a new and separate chapter, Chapter 30 (Procedures Implementing 42 Pa.C.S. §§ 4137, 4138, and 4139: Criminal Contempt Powers of District Justices, Judges of the Pittsburgh Magistrates Court, and Judges of the Traffic Court of Philadelphia).

Throughout the new rules, the term "issuing authority" has been used to refer to those members of the minor judiciary whose contempt powers are governed by the new statute and the new rules. This usage is explained in the Comments to new Rules 30, 31, and 32.

##### *B. New Rule 30. Contempt Proceedings before District Justices, Pittsburgh Magistrates Court Judges, and Philadelphia Traffic Court Judges.*

###### *1. Rule Title*

Because this area of contempt is new, the title to new Rule 30 spells out exactly to whom it applies.

###### *2. Organization of Rule*

The general contempt statute gives the minor judiciary contempt powers in specific categories, and defines all these categories as criminal contempts.

(1) The first category involves cases in which there is misbehavior in the presence of the court which obstructs the administration of justice (42 Pa.C.S. §§ 4137(a)(1), 4138(a)(1), and 4139(a)(1)), i.e., direct criminal contempt, which may be summarily handled.

(2) The remaining categories all pertain to situations in which an individual fails to act as ordered by the issuing authority, but the disobedience to the order does not occur in the presence of the court (42 Pa.C.S. §§ 4137(a)(2)-(5), 4138(a)(2)(3), and 4139(a)(2)(3)), i.e., indirect criminal contempt. In these cases, the alleged contemnor must be afforded the same procedural safeguards afforded a defendant in a criminal proceeding.

With these distinctions in mind, new Rule 30 has been divided into two parts. Paragraph (A) sets forth the procedures when the contempt occurs in the presence of the court, and paragraph (B) sets forth the procedures

<sup>1</sup> The Committee's Final Reports should not be confused with the official Committee Comments to the Rules. Also note that the Supreme Court does not adopt the Committee's Comments or the contents of the Committee's explanatory Final Reports.

when the contempt is not in the presence of the court. The paragraphs (A)1. and (B)1.a(2) enumerate the statutory categories to which the respective paragraphs apply. Because these rules will be used primarily by the minor judiciary, who generally have had little experience with the law relating to criminal contempt, there is a lengthy explanatory Comment which discusses the basic concepts of direct criminal contempt and indirect criminal contempt as set forth in paragraphs (A) and (B) respectively.

### 3. Paragraph (A)—Contempt in the Presence of the Court

Bearing in mind the "summary" nature of the contempt proceeding when the contempt is committed in the presence of the court, the Committee kept the procedures in paragraph (A) to a minimum. We discussed at length whether any due process rights are constitutionally required in these proceedings. After looking at the case law and Federal Rule of Criminal Procedure 42 (Criminal Contempt), the Committee concluded that paragraph (A)1. should only require the issuing authority to afford the alleged contemnor an opportunity to be heard before imposing a punishment, and that the Comment should include a provision to alert the issuing authorities that before finding an individual in direct contempt, it is customary to warn the individual that their behavior is contemptuous.

Paragraph (A)2.a-e enumerates the information which the issuing authority is to orally give the contemnor at the conclusion of the contempt proceeding concerning the right to appeal to the court of common pleas for a de novo hearing; the automatic stay of punishment during the appeal period; if an appeal is taken, the right to counsel when the punishment is imprisonment; and the date the contemnor is to appear for imposition of punishment if no appeal is taken. The authority for the automatic stay of the punishment, paragraph (A)2.a, b, and the appeal, paragraph (A)2, is derived from 42 Pa.C.S. §§ 4137(d), 4138(d), and 4139(d).

The issue of the right to counsel in these direct criminal contempt proceedings generated a great deal of discussion. The Committee ultimately concluded that the contemnor should be advised of the right to counsel for the purpose of the de novo hearing in the court of common pleas when the issuing authority has imposed a punishment of imprisonment. Paragraph (A)2.c.

Paragraph (A)2.e requires the issuing authority to inform the contemnor of the date on which the contemnor is to pay any fine or to appear for execution of any punishment of imprisonment if no appeal is filed within the 30-day appeal period. As explained in the Comment, this date should be at least 35 days from the date of the contempt proceeding to allow for the expiration of the 30-day appeal period and for the 5-day period within which the clerk of courts is to serve a copy of the notice of appeal on the issuing authority. See Rule 31(d).

Because proceedings at the minor judiciary level are not of record, paragraph (A)3 requires the issuing authority to issue a written order setting forth the facts of the case which constitute the contempt, certifying that the issuing authority saw or heard the conduct constituting the contempt and that the contempt was committed in the actual presence of the issuing authority. The written order also must set forth the punishment imposed, the date on which the contemnor is to pay any fine or to appear for the execution of any punishment of imprisonment, and the information specified in paragraph (A)2. Paragraph (A)4 requires the issuing authority to sign the order, and to give a copy to the contemnor.

The Comment includes an explanation of the administrative procedures implemented by the Administrative Office of Pennsylvania Courts for processing contempt proceedings. These cases are docketed as separate cases on the miscellaneous docket, with a separate docket transcript. The information for the docket transcript is entered into the computer, and a hard copy of the transcript is printed when there is an appeal.

### 4. Paragraph (B)—Contempt not in the Presence of the Court

Paragraph (B) sets forth the procedures for handling cases in which the minor judiciary have indirect criminal contempt powers.

Paragraph (B)1.a(2)(i)—(iv) enumerates the four statutory categories of summary criminal contempt authorized by 42 Pa.C.S. §§ 4137(a), 4138(a), and 4239(a).<sup>2</sup> Because Pittsburgh Magistrates Court judges and Philadelphia Traffic Court judges only have contempt powers in two of the four categories of indirect criminal contempt—where the individual fails to obey a subpoena or fails to comply with an order directing a defendant to pay an installment payment order for fines and costs, 42 Pa.C.S. §§ 4138(a) and 4139(a), the Committee used the broader term "issuing authority" in paragraph (B)1.a(2)(i) and (ii). However, because only district justices are given the authority by the statute to find contempt in cases in which there is a failure to comply with a restitution order, we used the term "district justice" in paragraph (B)1.a(2)(iii). This distinction is also explained in the Comment. Finally, paragraph (B)1.a(2)(v) provides a catchall category to cover any other cases in which the issuing authority, by a statute other than 42 Pa.C.S. §§ 4137-4139, is given the power to find a person in contempt. See, e.g., 42 Pa.C.S. § 1523(b).

Paragraph (B)1.a provides that indirect criminal contempt proceedings may be instituted either by notice of the hearing or, in the appropriate case, by issuing an attachment by means of a warrant.

#### (a) Contempt Hearing Notice, Service

Paragraph (B)1.b sets forth the contents of the contempt hearing notice, and paragraph (B)1.c provides that service may be accomplished either in person, or by both first class mail and certified mail, return receipt requested. In the latter method, the Committee agreed to require both types of mailing to provide a more reliable gauge of service.

In developing these service by mail procedures, the Committee noted that the criminal contempt proceeding is separate and distinct from the underlying case, and is being instituted by the notice required in paragraph (B)1.a(1). In view of this, the Committee agreed that the new rule should provide the minor judiciary with a means of ensuring adequate service, and looked to Chapter 50 for guidance. Under Chapter 50, summary criminal cases are instituted by personal service of the citation or mailing of the summons by certified or first class mail. See Rule 80 (Service). Rule 80 requires that, when a summons is served by first class mail, and the defendant fails to respond or appear, a second summons must be either personally served or mailed by certified mail. We also looked at the practicalities of service by mail. It has been the experience of the Committee members and others involved in the criminal justice system that there

<sup>2</sup> There was a good deal of discussion about the Protection from Abuse Act (PFA), which permits the arrest without a warrant of an alleged contemnor, as it relates to the new contempt statute and the new rule. The Committee agreed that Rule 30 would only provide the procedures to implement the contempt statute and the Comment would make it clear that the rule procedures are not intended to supplant the PFA.

are occasions when certified mail is intentionally not accepted, but a first class mailing is not returned. In these cases, it has been generally accepted that there is a presumption that the notice was served. Therefore, based on these considerations, the Committee concluded that for summary criminal contempt proceedings, it is less onerous to require the dual mailing in every case, as long as the rule makes it clear that, if the certified mail is returned undelivered, and the first class mail is not returned, there is a presumption that the notice was served. In fact, we agreed that this dual service procedure is more expeditious than providing for the initial service to be by first class mail, followed by a second service requirement if the defendant fails to appear.

(b) Hearing

Paragraph (B)2.a requires that the hearing be conducted in open court, and that the alleged contemnor be given a reasonable opportunity to defend. At the conclusion of the hearing, the issuing authority is required to announce the decision, impose punishment if there is a finding of contempt, and orally advise the contemnor of his or her rights following the finding of contempt. Paragraphs (B)2.b(1) and (2). The issuing authority must issue a signed written order as provided in paragraphs (B)2.b(3) and (4).

Paragraph (B)2.b(5) permits the issuing authority, at the conclusion of a contempt hearing, to review an order for payment of fine and costs or restitution to determine whether the order should be amended or altered. The issuing authority should conduct this review whether or not the issuing authority finds the individual in contempt. This process is elaborated in the Comment.

(c) Hearings in the Defendant's Absence

The question of whether Rule 30 should specifically prohibit summary criminal contempt hearings in the defendant's absence was discussed by the Committee when the proposal was initially being developed. The Committee explored permitting contempt hearings in the alleged contemnor's absence, similar to the procedure in Rule 84 for summary criminal trials in the defendant's absence, and concluded that this procedure was inappropriate for contempt hearings and should not be permitted.

The Committee's decision was based on several factors. First, the members considered that holding a contempt hearing in the defendant's absence was inappropriate because, in the criminal contempt proceeding, where the court is making a determination whether the defendant disregarded the court's order and should be disciplined, the defendant should be present to answer the allegations. If a purpose of contempt is to vindicate the court's authority, then finding someone in contempt in absentia seemed an empty gesture. After all, the defendant has already allegedly ignored an order of the court, and failing to appear for the hearing is another incident of the defendant ignoring the court's authority. Second, the members determined that it was virtually impossible to devise adequate procedures to follow a hearing in absentia in view of (1) the statutorily required automatic stay of sentence immediately following the hearing during the time period for filing an appeal, and (2) the constitutional right to counsel if the sentence is imprisonment.

Agreeing that these factors outweighed any potential benefit that expediting the matter by holding the hearing in the defendant's absence would have, the Committee added paragraph (B)2.c, which specifically prohibits in absentia hearings, and provides that, if the alleged contemnor fails to appear, the issuing authority may continue the hearing and issue a warrant of arrest.

5. Comment Provisions

In addition to the Comment provisions discussed above, the Comment refers to the statutory bail provision, 42 Pa.C.S. § 4137(e), concerning procedures for the setting of bail after adjudication of contempt, which applies only to district justices. The Comment also refers to Chapter 4000 of the Criminal Rules for the procedures for setting bail before a contempt hearing takes place, a process not addressed in the statute.

We have included in the Comment a reference to *Commonwealth v. Abrams*, 336 A.2d 308 (Pa. 1975) and *Commonwealth v. Crawford*, 352 A.2d 52 (Pa. 1976), cases in which the Court held that the right to counsel applies in criminal contempt cases, to emphasize that a contemnor may not be imprisoned if the right to counsel was not afforded at the contempt hearing. In this same vein, we have included cross-references to the procedures in Rule 316 for assignment of counsel and Rule 318 concerning waiver of counsel.

The Comment includes a cross-reference to Rule 85 (Procedures Regarding Default in Payment of Fine and Costs After Conviction). The Committee wanted to eliminate any confusion concerning the interplay between the new power to impose summary punishments for indirect criminal contempt when a defendant fails to pay fines and costs in accordance with an installment payment order under 42 Pa.C.S. § 4137(a)(3), 4138(a)(3), and 4139(a)(3) and the Rule 85 default procedures. This reference makes it clear that the Rule 85 procedures are separate and distinct from contempt proceedings.<sup>3</sup>

C. *New Rule 31. Appeals from Contempt Adjudications by District Justices, Pittsburgh Magistrates Court Judges, or Philadelphia Traffic Court Judges.*

1. Background

During the development of this proposal, the Committee debated at length whether the language in 42 Pa.C.S. §§ 4137(d), 4138(d), and 4139(d), which provides that any punishment imposed for contempt will be "automatically stayed for a period of ten days from the date of the imposition of the punishment during which time an appeal of the action" of a district justice, a Pittsburgh Magistrates Court judge, or a Philadelphia Traffic Court judge "may be filed with the court of common pleas of the judicial district," created a new ten-day appeal period or was merely a ten-day stay period within the standard thirty-day appeal period.

When the Committee initially developed its proposal, the members elected to merely reflect in Rule 31 the language in the statute. Following the publication of the proposal, the Committee received a number of comments which revealed that this question needed to be resolved in the new contempt rules.

In determining how best to address this matter, the Committee extensively researched the legislative history of the statute, including a review of the House Journal and conversations with the House Judiciary Committee staff, with Representative Caltagirone (one of the bill's sponsors) and some of his staff, and the staff of the Chief Clerk of the House. This research yielded nothing that explained the intent of the statute concerning the appeal time.

The Committee also looked at the statutory basis for a thirty-day appeal period, in particular 42 Pa.C.S. § 5571(b), which provides:

<sup>3</sup> For the same reasons, the Rule 85 Comment was revised in October 1997 to include a cross-reference to the new contempt rules.

(b) Other Courts.—Except as otherwise provided in subsections (a) and (c), an appeal from a tribunal or other government unit to a court or from a court to an appellate court must be commenced within 30 days after the entry of the order from which the appeal is taken, in the case of an interlocutory or final order.

In addition, we noted that 42 Pa.C.S. § 1722(c) gives the Supreme Court, as the governing authority, the power: to prescribe and modify general rules:

(1) on any subject covered by Subchapter D of Chapter 55 (relating to appeals)<sup>a</sup> . . . .

and provides that:

The provisions of Chapter 55 (relating to limitation of time)<sup>b</sup> and all other statutes shall be suspended to the extent that they are inconsistent with rules prescribed under this subsection. The intention of this subsection is to authorize the governing authority to develop and maintain uniformity in time periods within the scope of this subsection by eliminating statutory time limitations which are inconsistent with the general pattern of similar time limitations then in effect.

In view of the Supreme Court's authority to modify by rule the general appeal time periods, the Committee agreed that the new contempt rules should specify the time for taking an appeal, and that time period should be the standard thirty-day period. Similarly, the Committee concluded that the automatic stay of sentence time period should be extended to thirty days to be consistent with the thirty-day appeal period. In this way, the appeal provisions for appeals from minor judiciary contempt findings are consistent with the appeal periods for other appeals from decisions by the minor judiciary, thus achieving the uniformity referred to in 42 Pa.C.S. § 1722(c).

## 2. Discussion of rule provisions

For the most part, Rule 31 is modeled on Rule 86, which governs appeals in summary criminal cases. Paragraph (A) provides that, to perfect an appeal, the appellant is required to file a notice of appeal with the clerk of courts within thirty days after the action of the issuing authority, and to appear in the court of common pleas.

Paragraph (B) implements the provisions of 42 Pa.C.S. §§ 4137(d), 4138(d), and 4139(d) concerning staying the imposition of punishment, but provides for a thirty-day stay.

Paragraph (C) sets forth the contents of the notice of appeal, and paragraph (D) requires the clerk of courts to serve a copy of the notice on the issuing authority within five days of the filing. The issuing authority is required in paragraph (E) to file with the clerk of courts a copy of the hearing notice or the attachment and the contempt order, as well as the transcript and any arrest warrant.

The Comment explains that the rule provides the procedures for taking an appeal pursuant to the statute, and points out that to the extent the statute is inconsistent with Rule 31, the statute is suspended by new Rule 39.

### D. New Rule 32. Procedures Governing Defaults in Payment of Fine Imposed as Punishment for Contempt.

Consistent with the Committee's decision to keep all procedures related to the minor judiciary's new contempt powers within one chapter, there is a separate rule

addressing the procedures for handling cases in which a contemnor fails to pay a fine imposed as punishment for contempt.

Paragraph (A) requires the issuing authority to notify the contemnor in person or by first class mail that unless the contemnor, within ten days of the notice, either pays the amount due or appears for a hearing, a warrant for the contemnor's arrest will be issued.

Paragraph (B) requires that the issuing authority conduct an ability to pay hearing when the contemnor appears voluntarily in response to the notice or involuntarily following an arrest for failing to respond to the notice. Paragraph (B)(1) provides that if the defendant is found to be financially able to pay, the issuing authority may impose imprisonment as provided by law. Paragraph (B)(2) provides that the issuing authority may schedule installment payments if the contemnor is financially unable to pay.

Paragraph (C) provides that an appeal may be taken by filing a notice of appeal within thirty days of the order, and that the appeal is to proceed as provided in Rule 31.

### E. New Rule 39. Suspension of Acts of Assembly—Chapter 30.

Because the automatic stay period has been extended from the ten days provided in 42 Pa.C.S. §§ 4137(d), 4138(d), and 4139(d) to thirty days to be consistent with the thirty-day appeal period provided in new Rule 31, 42 Pa.C.S. §§ 4137, 4138, and 4139 have been suspended by new Rule 39 (Suspension of Acts of Assembly—Chapter 30), but only insofar as they are inconsistent with the thirty-day appeal period and the thirty-day automatic stay period set forth in Rule 31.

[Pa.B. Doc. No. 97-1657. Filed for public inspection October 17, 1997, 9:00 a.m.]

## [234 PA. CODE CH. 50]

### Order Rescinding Rule 85; Adopting New Rule 85; and Amending Rules 75, 76, 83, 84 and 86; No. 227; Doc. No. 2

The Criminal Procedural Rules Committee has prepared a Final Report explaining the Supreme Court's changes to Chapter 50, which (1) clarify the process by which an issuing authority sets fines and restitution in the first instance, to increase the likelihood that the amount imposed will be paid, (2) provide that, in a summary case, an arrest warrant should not be issued for a default unless the defendant has been given notice that failure to pay or appear may result in the issuance of an arrest warrant, and (3) encourage defendants to seek adjustments in payment schedules before a default occurs. The Final Report follows the Court's Order.

#### Order

*Per Curiam:*

Now, this 1st day of October, 1997, upon the recommendation of the Criminal Procedural Rules Committee, the proposal having been published before adoption at 25 Pa.B. 937 (March 18, 1995), and in the *Atlantic Reporter* (Second Series Advance Sheets, Vol. 652-653), with a Final Report to be published with this Order:

*It Is Ordered* pursuant to Article V, Section 10 of the Constitution of Pennsylvania that:

<sup>a</sup> Sections 5571 to 5574 of Title 42

<sup>b</sup> Section 5501 *et seq.* of Title 42



- (1) Rule of Criminal Procedure 85 is rescinded,
- (2) New Rule of Criminal Procedure 85 is adopted, and
- (3) Rules of Criminal Procedure 75, 76, 83, 84, and 86 are amended, all in the following form.

This *Order* shall be processed in accordance with Pa.R.J.A. 103(b), and shall be effective October 1, 1998.

**Annex A**

**TITLE 234. RULES OF CRIMINAL PROCEDURE**

**PART I. GENERAL**

**CHAPTER 50. PROCEDURE IN SUMMARY CASES**

**PART V. PROCEDURES REGARDING ARREST WARRANTS IN SUMMARY CASES**

**Rule 75. Issuance of Arrest Warrant.**

\* \* \* \* \*

(3) A warrant for the arrest of the defendant may be issued when:

(a) the defendant has entered a guilty plea by mail and the money forwarded with the plea is less than the amount of fine and costs specified in the citation or summons; or

**(b) the defendant has been sentenced to pay restitution, a fine, or costs and has defaulted on the payment; or**

(c) the issuing authority has, in the defendant's absence, tried and sentenced the defendant to pay a fine and costs, and the collateral deposited by the defendant is less than the amount of fine and costs imposed.

**(4) No warrant shall issue under Rule 75(3) unless the defendant has been given notice in person or by first class mail that failure to pay the amount due or to appear for a hearing may result in the issuance of an arrest warrant, and the defendant has not responded to this notice within 10 days. Notice by first class mail shall be considered complete upon mailing to the defendant's last known address.**

**Official Note:** Adopted July 12, 1985, effective January 1, 1986; effective date extended to July 1, 1986; amended January 31, 1991, effective July 1, 1991; amended April 18, 1997, effective July 1, 1997; **amended October 1, 1997, effective October 1, 1998.**

**Comment**

Personal service of a citation under paragraph (1)(a) is intended to include the issuing of a citation to a defendant as provided in Rule 51(a) and the rules of Part IIA.

An arrest warrant may not be issued under paragraph (1)(a) when a defendant fails to respond to a citation or summons that was served by first class mail. See Rule 80.

Ordinarily, pursuant to Rule 84, the issuing authority must conduct a summary trial in the defendant's absence. However, if the issuing authority determines that there is a likelihood that the sentence will be imprisonment or that there is other good cause not to conduct the summary trial, the issuing authority may issue a warrant for the arrest of the defendant pursuant to paragraph (2) in order to bring the defendant before the issuing authority for the summary trial.

**[An]** The arrest warrant issued under paragraph (3) should state the amount required to satisfy the sentence.

**When contempt proceedings are also involved, see Chapter 30 for the issuance of arrest warrants.**

*Committee Explanatory Reports:*

Report explaining the January 31, 1991 amendments published at 20 Pa.B. 4788 (September 15, 1990); Supplemental Report published at 21 Pa.B. 621 (February 16, 1991).

Final Report explaining the April 18, 1997 amendments concerning arrest warrants when defendant fails to appear for trial published with the Court's Order at 27 Pa.B. 2117 ( May 3, 1997).

**Final Report explaining the October 1, 1997, amendments in paragraph (3) and the provisions of new paragraph (4) published with the Court's Order at 27 Pa.B. (October 18, 1997).**

**Rule 76. Procedure when Defendant Arrested with Warrant.**

**[ (a) ](A) \*\*\***

**[ (b) ](B) \*\*\***

\* \* \* \* \*

(3) accept from the defendant the amount of fine and costs due as specified in the warrant if the warrant is for collection of fine and costs after a guilty plea or conviction; or

\* \* \* \* \*

**[ (c) ](C)** When the police officer accepts fine and costs or collateral under **[ subparagraphs ] paragraphs [ (b) ](B)**(1), (2), or (3), the officer shall issue a receipt **to the defendant** setting forth the amount of fine and costs or collateral received **[ to the defendant ]** and return a copy of the receipt, signed by the defendant and the police officer, to the proper issuing authority.

**[ (d) ](D)** When the defendant is taken before the issuing authority under **[ subparagraph ] paragraph [ (b) ](B)**(4), the defendant shall be given an immediate trial unless:

\* \* \* \* \*

**Official Note:** Adopted July 12, 1985, effective January 1, 1986; Comment revised September 23, 1985, effective January 1, 1986; January 1, 1986 effective date extended to July 1, 1986; Comment revised January 31, 1991, effective July 1, 1991; amended August 9, 1994, effective January 1, 1995; **amended October 1, 1997, effective October 1, 1998.**

**Comment**

**[ This rule is derived from the arrest warrant procedures in previous Rules 60, 61, and 65(g), (h).**

**Under former Rule 61, when a defendant was arrested in a summary case with a warrant outside the judicial district where the warrant was issued, the defendant was first taken before an issuing authority in the judicial district where the arrest was made for the purpose of posting bail. Thereafter, the defendant appeared or was taken for trial before the proper issuing authority in the judicial district where the warrant was issued. This procedure was deleted with the general revision of the summary case rules in 1985. ]**

For the procedure in court cases following arrest with a warrant, see Rules 123 and 124.

Section 8953 of the Judicial Code, 42 Pa.C.S. § 8953, provides for the execution of warrants of arrest beyond

the territorial limits of the police officer's primary jurisdiction. See also *Commonwealth v. Mason*, [ 507 Pa 396, ] 490 A.d. 421 (Pa. 1985).

Delay of trial under [ subparagraph ] paragraph [ (d) ](D)(1) is required by statutes such as 18 Pa.C.S. § 3929 (pretrial fingerprinting and record-ascertainment requirements).

Although the defendant's trial may be delayed under this rule, the requirement that an arrested defendant be taken without unnecessary delay before the proper issuing authority remains unaffected.

**For the procedures required before an arrest warrant may issue for a defendant's failure to pay restitution, a fine, or costs, see Rule 75(4). When contempt proceedings are also involved, see Chapter 30 for the issuance of arrest warrants.**

For what constitutes a [ the ] "proper" issuing authority, see Rule 21.

[ On ] Concerning the defendant's right to counsel and waiver of counsel, see Rules 316 and 318.

*Committee Explanatory Reports:*

Report explaining the January 31, 1991 [ amendments ] revision published at 20 Pa.B. 4788 (September 15, 1990); Supplemental Report published at 21 Pa.B. 621 (February 16, 1991).

Final Report explaining the August 9, 1994 amendments published at 22 Pa.B. 6 (January 4, 1992); Final Report published with the Court's Order at 24 Pa.B. 4342 (August 27, 1994).

Final Report explaining the October 1, 1997 amendments published with the Court's Order at 27 Pa.B. 5414 (October 18, 1997).

## PART VI. GENERAL PROCEDURES IN SUMMARY CASES

### Rule 83. Trial in Summary Cases.

\* \* \* \* \*

(D) The verdict and sentence, if any, shall be announced in open court immediately upon the conclusion of the trial. [ When the defendant is sentenced to pay fine and costs and is found to be without the financial means to pay immediately, the issuing authority shall provide for installment payments as provided in Rule 85. ]

(E) At the time of sentencing, the issuing authority shall:

(1) if the defendant's sentence includes restitution, a fine, or costs, state the date on which payment is due. If the defendant is without the financial means to pay the amount in a single remittance, the issuing authority may provide for installment payments and shall state the date on which each installment is due;

(2) advise the defendant of the right to appeal within 30 days for a trial de novo in the court of common pleas, [ and trial de novo, of the time within which to exercise that right, ] and that if an appeal is filed:

(a) the execution of sentence will be stayed and the issuing authority may set bail or collateral; and

(b) the defendant must appear for the de novo trial or the appeal may be dismissed [ . ] ;

(3) if a sentence of imprisonment has been imposed, direct the defendant to appear for the execution of sentence on a date certain unless the defendant files a notice of appeal within the 30-day period; and

(4) issue a written order imposing sentence, signed by the issuing authority. The order shall include the information specified in paragraphs (E)(1) through (E)(3), and a copy of the order shall be given to the defendant.

**Official Note:** Adopted July 12, 1985, effective January 1, 1986; amended September 23, 1985, effective January 1, 1986; effective date extended to July 1, 1986; amended February 2, 1989, effective March 1, 1989; amended October 28, 1994, effective as to cases instituted on or after January 1, 1995; Comment revised April 18, 1997, effective July 1, 1997; amended October 1, 1997, effective October 1, 1998.

### Comment

The defendant has a right to counsel at trial in all summary cases in which the issuing authority determines there is a likelihood of imprisonment. See Rules 316 and 318.

The affiant may be permitted to withdraw the charges pending before the issuing authority. See Rule 87 (Withdrawal of Charges in Summary Cases).

Paragraph (E)(2)(b) is included in the rule in light of *North v. Russell*, 427 U.S. 328 (1976). For the procedures for taking, perfecting, and handling an appeal, see Rule 86.

Although the scheduling of summary trials is left by the rules to the discretion of the issuing authority, it is intended that trial will be scheduled promptly upon receipt of a defendant's plea or promptly after a defendant's arrest. When a defendant is incarcerated pending a summary trial, it is incumbent upon the issuing authority to schedule trial for the earliest possible time.

Under paragraph (E)(2)(a), the issuing authority should explain to the defendant that if an appeal is filed, any sentence, including imprisonment, fines, or restitution, will be stayed.

When setting the specific date for the defendant to appear for execution of a sentence of imprisonment pursuant to paragraph (E)(3), the issuing authority should set the earliest possible date for sentencing after the appeal period expires.

For the statutory authority to sentence a defendant to pay a fine, see 42 Pa.C.S. § 9726.

For the statutory authority to sentence a defendant to pay restitution, see 42 Pa.C.S. § 9721(c) and 18 Pa.C.S. § 1106(c). See also 18 Pa.C.S. § 1106(c)(2)(iv), which prohibits the court from ordering the incarceration of a defendant for failure to pay restitution if the failure results from the defendant's inability to pay.

Before imposing both a fine and restitution, the issuing authority must determine that the fine will not prevent the defendant from making restitution to the victim. 42 Pa.C.S. § 9726(c)(2) and § 9730(b)(3).

See Rule 85 for the procedures when a defendant defaults in the payment of restitution, fines, or costs.

**A defendant should be encouraged to seek an adjustment of a payment schedule for restitution, fines, or costs before a default occurs. See Rule 85(A).**

*Committee Explanatory Reports:*

Final Report explaining the October 28, 1994 amendments published with the Court's Order at 24 Pa.B. 5841 (November 26, 1994).

Final Report explaining the April 18, 1997 Comment revision cross-referencing new Rule 87 published with the Court's Order at 27 Pa.B. 2119 (May 3, 1997).

**Final Report explaining the October 1, 1997 amendments to paragraph (E) and the Comment concerning the procedures at the time of sentencing published with the Court's Order at 27 Pa.B. 5414 (October 18, 1997).**

**Rule 84. Trial in Defendant's Absence.**

\* \* \* \* \*

(D) If the defendant is found guilty, the issuing authority shall impose sentence, and shall [ **notify** ] **give notice** to the defendant of the conviction and sentence by first class mail. **In those cases in which the amount of collateral deposited does not satisfy the fine and costs imposed or the issuing authority imposes a sentence of restitution, the notice shall also state that failure within 10 days of the date on the notice to pay the amount due or to appear for a hearing to determine whether the defendant is financially able to pay the amount due may result in the issuance of an arrest warrant.**

(E) Any collateral previously deposited shall be forfeited and applied **only** to the payment of the fine and costs. When the amount of collateral deposited is more than the fine and costs, the balance shall be returned to the defendant. **[When the amount of collateral deposited does not satisfy the fine and costs, ]**

**(F) If the defendant does not respond within 10 days to the notice in paragraph (D), the issuing authority may issue a warrant for the defendant's arrest.**

**Official Note:** Adopted July 12, 1985, effective January 1, 1986; effective date extended to July 1, 1986; amended February 1, 1989, effective July 1, 1989; amended April 18, 1997, effective July 1, 1997, 27 Pa.B. 2116; **amended October 1, 1997, effective October 1, 1998.**

\* \* \* \* \*

*Committee Explanatory Reports:*

Final Report explaining the April 18, 1997 amendments mandating a summary trial in absentia with certain exceptions published with the Court's Order at 27 Pa.B. 2117 (May 3, 1997).

**Final Report explaining the October 1, 1997 amendments to paragraphs (D) and (E) published with the Court's Order at 27 Pa.B. 5414 (October 18, 1997).**

**[ Rule 85. Procedures Regarding Default in Payment of Fine and Costs after Conviction. ] Rescinded.**

**[ (a) When a defendant defaults in the payment of a fine or costs after a finding of guilt, the issuing**

**authority shall conduct a hearing to determine whether the defendant is financially able to pay the fine or costs.**

**(b) If the issuing authority determines that the defendant is financially able to pay the fine or costs, the issuing authority may impose imprisonment for nonpayment, as provided by law.**

**(c) If the issuing authority determines that the defendant is without the financial means to pay the fine or costs immediately or in a single remittance, the issuing authority may provide for payment in installments. In determining the appropriate installments, the issuing authority shall consider the defendant's financial resources, the defendant's ability to make restitution and reparations, and the nature of the burden payment will impose on the defendant.**

**(d) When installment payments are ordered, and the defendant is in default of a payment or advises the issuing authority that such default is imminent, the issuing authority may schedule a rehearing on the payment schedule. At the rehearing the defendant shall have the burden of proving changes of financial condition such that the defendant is without the means to meet the payment schedule. The issuing authority may extend or accelerate the schedule or leave it unaltered, as the issuing authority finds to be just and practicable under the circumstances.**

**(e) The defendant may appeal the issuing authority's determination in (b), (c), or (d) by filing a notice of appeal within thirty (30) days after the date of the default hearing. The appeal shall proceed as provided in Rule 86. ]**

**Official Note:** Adopted July 12, 1985, effective January 1, 1986; amended September 23, 1985, effective January 1, 1986; effective date extended to July 1, 1986. Comment revised February 1, 1989, effective July 1, 1989; **rescinded October 1, 1997, effective October 1, 1998, and replaced by new Rule 85.**

**[ Comment**

**This rule replaces previous Rule 65(a)–(d). ]**

**[ When a "child" fails to pay a fine levied for a summary offense, notice of that fact shall be certified to the court of common pleas and the Juvenile Act would then apply, rather than these rules. Juvenile Act §§ 6302–6303, 42 Pa.C.S. §§ 6302–6303 (1982).**

**If the hearing on the default can not be held immediately, the issuing authority may set bail as provided in Chapter 4000 or may fix collateral as provided in Rule 81.**

**It is intended, pursuant to paragraph (d), that when the defendant is in default of an installment payment, the issuing authority on his or her own motion or at the request of the defendant or the attorney for the Commonwealth may schedule a rehearing to determine the cause of the default. Before an issuing authority may impose a sentence of imprisonment as provided by law for nonpayment of fine and costs a hearing or rehearing must be held whenever a defendant alleges that his or her ability to pay has been diminished. See 42 Pa.C.S. § 9730(b). See also Rules 316 and 318 (dealing with the right to counsel).**

**This rule contemplates that when there has been an appeal pursuant to paragraph (e), the case would return to the issuing authority who presided at the default hearing for completion of the collection process. ]**

**Committee Explanatory Reports:**

**Final Report explaining the October 1, 1997 rescission published with the Court's Order at 27 Pa.B. 5414 (October 18, 1997).**

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

**Rule 85. Default Procedures: Restitution, Fines, and Costs.**

(A) When a defendant advises the issuing authority that a default on a single remittance or installment payment of restitution, fines, or costs is imminent, the issuing authority may schedule a hearing on the defendant's ability to pay. If a new payment schedule is ordered, the order shall state the date on which each payment is due, and the defendant shall be given a copy of the order.

(B) If a defendant defaults on the payment of fines and costs, or restitution, as ordered, the issuing authority shall notify the defendant in person or by first class mail that, unless within 10 days of the date on the default notice, the defendant pays the amount due as ordered, or appears before the issuing authority to show cause why the defendant should not be imprisoned for nonpayment as provided by law, a warrant for the defendant's arrest may be issued.

(C) If the defendant appears as provided in paragraph (B), the issuing authority shall conduct a hearing to determine whether the defendant is financially able to pay as ordered.

(1) Upon a determination that the defendant is financially able to pay as ordered, the issuing authority may impose any sanction provided by law.

(2) Upon a determination that the defendant is financially unable to pay as ordered, the issuing authority may order a schedule or reschedule for installment payments, or alter or amend the order as otherwise provided by law.

(3) At the conclusion of the hearing, the issuing authority shall:

(a) if the issuing authority has ordered a schedule of installment payments or a new schedule of installment payments, state the date on which each installment payment is due;

(b) advise the defendant of the right to appeal within 30 days for a hearing de novo in the court of common pleas, and that if an appeal is filed:

(i) the execution of the order will be stayed and the issuing authority may set bail or collateral; and

(ii) the defendant must appear for the hearing de novo in the court of common pleas or the appeal may be dismissed;

(c) if a sentence of imprisonment has been imposed, direct the defendant to appear for the execution of sentence on a date certain unless the defendant files a notice of appeal within the 30-day period; and

(d) issue a written order imposing sentence, signed by the issuing authority. The order shall include the information specified in paragraphs (C)(3)(a) through (C)(3)(c), and a copy of the order shall be given to the defendant.

(D) A defendant may appeal an issuing authority's determination pursuant to this rule by filing a notice of appeal within 30 days of the issuing authority's order. The appeal shall proceed as provided in Rule 86.

**Official Note:** Adopted July 12, 1985, effective January 1, 1986; amended September 23, 1985, effective January 1, 1986; January 1, 1996 effective dates extended to July 1, 1986. Comment revised February 1, 1989, effective July 1, 1989; rescinded October 1, 1997, effective October 1, 1998. New Rule 85 adopted October 1, 1997, effective October 1, 1998.

**Comment**

The purpose of this rule is to provide the procedures governing defaults in the payment of restitution, fines, and costs.

Although most of this rule concerns the procedures followed by the issuing authority after a default occurs, paragraph (A) makes it clear that a defendant should be encouraged to seek a modification of the payment order when the defendant knows default is likely, but before it happens. For fines and costs, see 42 Pa.C.S. § 9730(b)(3).

An issuing authority may at any time alter or amend an order of restitution. See 18 Pa.C.S. § 1106(c)(2) and (3).

When a defendant defaults on a payment of restitution, fines, or costs, paragraph (B) requires the issuing authority to notify the defendant of the default, and to provide the defendant with an opportunity to pay the amount due or appear within 10 days to show cause why the defendant should not be imprisoned for nonpayment. Notice by first class mail is considered complete upon mailing to the defendant's last known address. See Rule 75(4).

If the default hearing cannot be held immediately, the issuing authority may set bail as provided in Chapter 4000.

Under paragraph (C)(1), when the issuing authority determines that a defendant is able to pay as ordered, the issuing authority may, as provided by law, impose imprisonment or other sanctions. In addition, delinquent fines or court costs may be turned over to a private collection agency, 42 Pa.C.S. § 9730(b)(2).

When a "child" fails to pay a fine levied for a summary offense, notice of that fact must be certified by the court of common pleas and the Juvenile Act would then apply, rather than these rules. 42 Pa.C.S. §§ 6302—6303.

When a defendant is in default of an installment payment, the issuing authority on his or her own motion or at the request of the defendant or the attorney for the Commonwealth must schedule a rehearing to determine the cause of the default. Before an issuing authority may impose a sentence of imprisonment as provided by law for nonpayment of fines or costs, a hearing or rehearing must be held whenever a defendant alleges that his or her ability to pay has been diminished. See 42 Pa.C.S. § 9730(b). See also Rules 316 and 318 (dealing with the right to counsel).

When a rehearing is held on a payment schedule for fines or costs, the issuing authority may extend or accelerate the payment schedule, leave it unaltered, or sentence the defendant to a period of community service, as the issuing authority finds to be just and practicable under the circumstances. 42 Pa.C.S. § 9730(b)(3).

This rule contemplates that when there has been an appeal pursuant to paragraph (D), the case would return

to the issuing authority who presided at the default hearing for completion of the collection process.

Nothing in this rule is intended to preclude an issuing authority from imposing punishment for indirect criminal contempt when a defendant fails to pay fines and costs in accordance with an installment payment order, 42 Pa.C.S. §§ 4137(a)(4), 4138(a)(3), and 4139(a)(3), or fails to pay restitution, 42 Pa.C.S. § 4137(a)(3). Separate Rules of Criminal Procedure govern contempt adjudications. See Chapter 30.

**Committee Explanatory Reports:**

**Final Report explaining the new rule published with the Court's Order at 27 Pa.B. 5414 (October 18, 1997).**

**Rule 86. Appeals [ From Summary Judgments ].**

**[(a)] (A)** When an appeal is authorized by law in a summary proceeding, including a prosecution for violation of a municipal ordinance which provides for imprisonment upon conviction or upon failure to pay a fine, an appeal shall be perfected by filing a notice of appeal within 30 days after the conviction or other final order from which the appeal is taken and by appearing in the court of common pleas for the trial de novo. The notice of appeal shall be filed with the clerk of courts.

**[(b)] (B) Stays.**

**[In all cases where a sentence of imprisonment is imposed, the execution of sentence shall be stayed until the time for appeal expires, and the issuing authority may set bail or collateral. The issuing authority shall direct the defendant to appear for the execution of sentence on a date certain unless a notice of appeal is filed within the period prescribed.]**

**(1) In all cases in which a sentence of imprisonment has been imposed, execution of sentence shall be stayed until the time for appeal expires.**

**(2) In any case in which a notice of appeal is filed, the execution of sentence shall be stayed.**

**(3) Whenever the execution of sentence is stayed pursuant to this paragraph, the issuing authority may set bail or collateral.**

**(C) During the 30-day appeal period, failure to pay fines and costs, or restitution, shall not be grounds for imprisonment and shall not be grounds to preclude the taking of an appeal.**

**[(c)] (D)** The notice of appeal shall contain the following information:

\* \* \* \* \*

**(7) the sentence imposed, [if any,] and if the sentence includes a fine, [and] costs, or restitution, whether the [same have] amount due has been paid;**

\* \* \* \* \*

**[(d)] (E) \*\*\***

**[(e)] (F) \*\*\***

**[(f)] (G) \*\*\***

**[(g)] (H) \*\*\***

**(I) This rule shall not apply to appeals from contempt adjudications.**

**Official Note:** Adopted July 12, 1985, effective January 1, 1986; revised September 23, 1985, effective January 1, 1986; **January 1, 1986** effective [date] dates extended to July 1, 1986; amended February 2, 1989, effective March 1, 1989; amended March 22, 1993, effective January 1, 1994; amended October 28, 1994, effective as to cases instituted on or after January 1, 1995; amended February 25, 1995, effective July 1, 1995; **amended October 1, 1997, effective October 1, 1998.**

**Comment**

This rule [replaces former Rule 67. It] applies to appeals in all summary proceedings, including prosecutions for violations of municipal ordinances which provide for the possibility of imprisonment, and default hearings.

**Appeals from contempt adjudications are governed by Rule 31.**

The Rules of Criminal Procedure are applicable generally to these proceedings. See, e.g., Rule 3, Chapter 50 (Summary Cases), Rule 1117, and Chapter 6000. The narrow holding in *City of Easton v. Marra*, [230 Pa. Super. 352,] 326 A.d. 637 (Pa. Super. 1974), is not in conflict, since the record before the court did not indicate that imprisonment was possible under the ordinance there in question.

**Under paragraph (B)(2), the stay applies to all "sentences" imposed after conviction, including sentences of imprisonment, fines and costs, or restitution, and sentences of imprisonment for defaults in payment pursuant to Rule 85.**

When the only issues on appeal arise solely from an issuing authority's determination after a default hearing pursuant to Rule 85, the matter must be heard de novo by the appropriate judge of the court of common pleas and only those issues arising from the default hearing are to be considered. It is not intended to reopen other issues not properly preserved for appeal. A determination after a default hearing would be a final order for purposes of these rules.

Certiorari was abolished by former Rule 67 in 1973, pursuant to Article V Schedule Section 26 of the Constitution of Pennsylvania, which specifically empowers the Supreme Court of Pennsylvania to do so by rule. This Schedule section is still viable, and the substance of this Schedule section has also been included in the Judicial Code, [as Section 934.] 42 Pa.C.S. § 934 [(1981)]. The abolition of certiorari, of course, continues.

Bail, when set in a summary case, [shall] must be set in accordance with the bail rules, Chapter 4000.

*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).

Final Report explaining the October 28, 1994 amendments published with the Court's Order at 24 Pa.B. 5843 (November 26, 1994).

Final Report explaining the February 27, 1995 amendments published with the Court's Order at 25 Pa.B. 935 (March 18, 1995).

**Final Report explaining the October 1, 1997 amendments published with the Court's Order at 27 Pa.B. 5414 (October 18, 1997).**

## FINAL REPORT

### *Imposition of Fines, Costs, and Restitution in Summary Cases; Default Procedures; Appeals*

#### *Introduction*

On October 1, 1997, upon the recommendation of the Criminal Procedural Rules Committee, the Supreme Court of Pennsylvania rescinded present Rule 85 (Procedures Regarding Default in Payment of Fine and Costs after Conviction), adopted new Rule 85 (Default Procedures: Restitution, Fines, and Costs), and amended Rule 75 (Issuance of Arrest Warrant), Rule 76 (Procedure When Defendant Arrested with Warrant), Rule 83 (Trial in Summary Cases), Rule 84 (Trial in Defendant's Absence), and Rule 86 (Appeals from Summary Judgments). These changes will become effective on October 1, 1998.

This Final Report has three parts. The Background section explains how the Committee came to consider the various issues addressed in the proposal, and the manner in which the Committee developed the proposal through research and discussion. The Statutory section discusses the statutes providing the substantive law on sentencing, fines, and restitution, the problems of interpretation encountered as we considered the substantive law, and how the Committee resolved those problems. The Explanation of Rule Changes section contains an overview of the changes and a rule-by-rule discussion.

#### *Background*

The Committee's consideration of restitution procedures in summary cases began in response to an inquiry from the Supreme Court's Minor Courts Rules Committee asking us to consider recommending amendments to the summary case rules to address restitution. This request raised two questions. The first issue was straightforward: should the summary case rules be amended to expressly recognize restitution as a sentence in summary cases? The second issue was more problematic: under 18 Pa.C.S. § 1106, may the summary case rules, under existing law, include a procedure for terminating an order of restitution (or fines) as "uncollectible"?

After the Committee reviewed the substantive law governing restitution in the Sentencing Code and the Crimes Code, as discussed more fully below, we readily agreed that the summary case rules should recognize restitution as a sentence. The second question, whether the Legislature intended to authorize issuing authorities to "terminate" restitution pursuant to 18 Pa.C.S. § 1106, was far more difficult. Although there is no direct statutory authority for a district justice to terminate a restitution order, 18 Pa.C.S. § 1106(c)(2)(iii) provides that the issuing authority may at any time "alter or amend any order of restitution" as long as the reasons for the change are stated. The Committee agreed that, practically speaking, this language could be construed to permit a district justice to "alter or amend" an order to reflect the amount already paid by a defendant, a reduction which would effectively terminate the order. Despite this possible interpretation, the Committee concluded that the Rules of Criminal Procedure could not be used to resolve the statute's ambiguities.<sup>1</sup>

Our discussion of these two issues generated a broader consideration of the degree to which the rules should also be amended to more clearly reflect the statutorily re-

quired process by which a district justice determines the amount of fine or restitution to impose, because the amount and payment schedule — relative to a defendant's resources—have a direct impact on the "collectability" of those monies.

Defaults in the payment of fines and restitution occur often in summary cases, and therefore constitute an ongoing problem for all of us concerned with a fair and final resolution of summary cases. On the one hand, fines, costs, and restitution are an important part of the criminal justice system's response to summary criminal violations. They serve to deter and rehabilitate defendants and, in the case of restitution, directly respond to the losses suffered by victims. On the other hand, often a defendant's lack of financial resources, practically speaking, prevents the collection of some or all of the fine or restitution imposed. We are also aware that some district justices, frustrated by the entire process, are too quick to issue warrants for a defendant's arrest for default in payment, a practice which the Committee criticized.

Finally, as the Committee concluded the development of its proposal, Act 45 of 1994 was signed, permitting issuing authorities to impose sanctions for contempt under certain circumstances, including defaults in payment of fines, costs, and restitution. 42 Pa.C.S. §§ 4137—4139. We agreed that the new contempt sanction was separate and distinct from the Rule 85 default procedures, and accordingly have made that distinction clear in these rule changes.

#### *Statutes Involved*

This section of the Final Report provides an overview of the basic statutory law governing the imposition of fines and restitution in summary cases. Implicit in the statutory law governing the imposition of fines and restitution is the principle that, as a sentence, a fine or restitution can only successfully punish, deter, or rehabilitate a defendant if the defendant can realistically be expected to pay the amount ordered.

#### A. Authority to Impose Sentence of Fines and Restitution: In General

Both the Sentencing Code, 42 Pa.C.S. § 9701 et seq., and the Crimes Code, 18 Pa.C.S. § 101 et seq., authorize the imposition of sentences by a district justice when the district justice exercises criminal or quasi-criminal jurisdiction pursuant to 42 Pa.C.S. § 1515. See 18 Pa.C.S. § 103; 42 Pa.C.S. § 9702. The imposition of a fine as a sentence is generally governed by the Sentencing Code, 42 Pa.C.S. § 9701 et seq., and the Crimes Code, 18 Pa.C.S. § 1101. Similarly, the imposition of a sentence of restitution is governed by the Crimes Code, 18 Pa.C.S. § 1106, and the Sentencing Code, 42 Pa.C.S. § 9721(c).

#### B. Fines

1. *When a fine may be imposed.* Except for mandatory fines, a district justice may sentence a defendant to pay a fine or to pay a fine in addition to another sentence if (1) the defendant is or will be able to pay the fine; and (2) the fine will not prevent the defendant from making restitution to the victim. See 42 Pa.C.S. § 9726(a), (b), and (c)

2. *How the amount of a fine and the payment schedule are determined.* In determining the amount and method of payment of a fine, the district justice must take into account (1) the financial resources of the defendant, and (2) the nature of the burden that payment of the fine will impose. See 42 Pa.C.S. § 9726(d) and 42 Pa.C.S. § 9730(b)(3).

<sup>1</sup> Article 5, § 10(c) of the Pennsylvania Constitution provides, "The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts . . . if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose." (emphasis added)

3. *What the sentence of a fine must include.* When imposing a fine, the district justice must, at the time of sentencing, specify the amount of the fine—up to the amount authorized by law, and must provide when it is to be paid. See 42 Pa.C.S. § 9758(a). The district justice may permit installment payments. See 42 Pa.C.S. § 9758(b) and 42 Pa.C.S. § 9730(b)(3). The sentence may include an alternative sentence in the event of nonpayment. See 42 Pa.C.S. § 9758(c) and 42 Pa.C.S. § 9730(b)(3).

4. *Defaults in fines.* After a fine is imposed, if a defendant defaults in payment, and the district justice determines that the defendant is financially able to pay the fine or costs, the district justice may turn the delinquent account over to a private collection agency or impose imprisonment for nonpayment as provided by law. See 42 Pa.C.S. § 9730(b)(2) and 42 Pa.C.S. § 9728.

When installment payments have been ordered and a defendant defaults or tells the district justice that a default is imminent, the district justice may schedule a rehearing, and may extend or accelerate the payment schedule, leave it as ordered, or sentence the defendant to a period of community service as is just and practicable. See 42 Pa.C.S. § 9730(b)(3) and 42 Pa.C.S. § 9728.

#### C. Restitution

1. *When restitution may be imposed.* In addition to the other sentencing alternatives, a district justice may sentence a defendant to make restitution to the victim of the criminal conduct for the damage or injury that the victim suffered as a direct result of the defendant's criminal conduct. See 18 Pa.C.S. §§ 1106(a) and 42 Pa.C.S. § 9721(c).

2. *How the amount of restitution and payment schedule are determined.*

In determining whether to order restitution, the district justice must consider the extent of the injury to the victim, and such other matters as the district justice deems appropriate. See 18 Pa.C.S. § 1106(b)(1). Furthermore, the statute limits the amount of restitution which may be ordered by a district justice. See 18 Pa.C.S. § 1106(d). When a district justice decides to impose restitution, the district justice may order payment in installments. See 18 Pa.C.S. § 1106(b)(2). At any time, the district justice may alter or amend an order of restitution made pursuant to 18 Pa.C.S. § 1106, but must state the reasons and conclusions as a matter of record for any change or amendment to any previous order.

3. *Defaults in restitution.* The statutes do not address defaults in restitution as clearly as they do defaults in fines and costs. Prior to the enactment of the contempt statute, 42 Pa.C.S. § 4137, noncompliance with a restitution order was governed by 18 Pa.C.S. § 1106(f), which provides that when a defendant does not comply with a restitution order, the district justice is required to forward the case to the court of common pleas. To the best of our knowledge, this provision has not been utilized by district justices very often. Rather, most district justices have looked to present Rule 85 default procedures and applied them to restitution matters. We anticipate—despite the availability of the new contempt statute—that district justices will continue to use the Rule 85 procedures when defendants default in payment of fines and costs or restitution, and that the contempt sanction of 42 Pa.C.S. § 4137(a)(3) will only be used as a last resort.

#### *Explanation of Rule Changes*

After reviewing the current rules, the problems raised by correspondents, and the substantive law, the Commit-

tee concluded that the following changes were necessary. (1) The rules should clarify the process by which an issuing authority sets fines and restitution in the first instance, to increase the likelihood that the amount imposed will be paid. (2) The rules should provide that, in a summary case, an arrest warrant should not be issued for a default unless the defendant has been given notice that failure to pay or appear may result in the issuance of an arrest warrant. (3) The rules should encourage defendants to seek adjustments in payment schedules before a default occurs.

#### A. Rule 75. Issuance of Arrest Warrant.

Rule 75 has two distinct provisions. Paragraph (1) governs the circumstances under which an arrest warrant must be issued. Paragraphs (2) and (3) govern those circumstances under which a district justice has the discretion to issue an arrest warrant, including cases in which a defendant has failed to pay monies due after a conviction or plea.

The rule has been amended in two ways. First, paragraph (3)(b) makes it clear that an arrest warrant may be issued when a defendant defaults on the payment of restitution, as well as fines or costs. See Rule 75(3)(b).

Second, new paragraph (4) makes it clear that before an arrest warrant may issue pursuant to paragraph (3), the defendant must be given notice, in person or by first class mail, to pay or appear. To avoid generating litigation on the issue of notice, the new requirement also makes it clear that it is the sending of the notice that completes it. Paragraph (4) was added to discourage a practice which we learned about during the development of these changes. Some district justices, frustrated by their inability to collect money owed, and hence their inability to close out cases, are far too quick to issue a warrant to arrest a defendant for defaulting in payment. The Committee felt that, before a defendant is arrested for failure to pay, he or she should at least be notified that failure to pay or appear may result in an arrest warrant's being issued.

The Rule 75 Comment has been expanded to include a reference to the separate procedures in new Chapter 30 (Procedures Implementing 42 Pa.C.S. §§ 4137, 4138, and 4139; Criminal Contempt Powers of District Justices, Judges of the Pittsburgh Magistrates Court, and Judges of the Traffic Court of Philadelphia)<sup>2</sup> for arrest warrants when contempt proceedings are involved.

#### B. Rule 76. Procedure when Defendant Arrested With Warrant.

The Comment to Rule 76 has been revised to reference the changes to Rule 75 discussed above, and the separate procedures in new Chapter 30 for issuance of arrest warrants when contempt proceedings are involved. A few stylistic changes have been made to the text of the rule.

#### C. Rule 83. Trial in Summary Cases.

1. *Changes to text of rule.* The amendments to Rule 83 affect paragraph (E), which covers procedures at the time of sentencing. New paragraph (E)(1) addresses sentences which include fines, costs, or restitution. We have moved to this paragraph a provision in present Rule 85(C) which permits an issuing authority to order installment payments if a defendant cannot pay the required amount in a single remittance. In addition, paragraph (E)(1) requires the issuing authority to state the date or dates on which payments are due.

<sup>2</sup> See 27 Pa.B. (October 18, 1997) for the Final Report explaining new Chapter 30.

Paragraph (E)(2) covers the appeal-related information which must be communicated to the defendant. The issuing authority must advise the defendant of the right to appeal within thirty days, and of the requirement that the defendant appear for the trial de novo or the appeal may be dismissed. New language requires the issuing authority to advise the defendant that, if an appeal is filed, the execution of the sentence will be stayed, and the issuing authority may set bail or collateral. See Rule 83(E)(2)(a).

Under paragraph (E)(3), if a sentence of imprisonment has been imposed, the issuing authority is required to direct the defendant to appear for the execution of sentence on a date certain unless the defendant files an appeal within the thirty-day appeal period. This paragraph was moved from Rule 86(B). The Comment notes that the specified date for the execution of sentence should be the earliest date possible after the thirty-day appeal period expires.

New paragraph (E)(4) requires the issuing authority to issue and sign a written order imposing sentence. The order must include the information in paragraphs (E)(1) through (E)(3), described above, and a copy of the order must be given to the defendant.

2. *Comment revisions.* The Comment to Rule 83 has been revised in several ways. The issuing authority is reminded that under paragraph (E)(2)(a), he or she should explain to the defendant that if an appeal is filed, any sentence — fines, restitution, or imprisonment — will be stayed for the appeal period.

The Comment also references the default procedures in new Rule 85, and includes the common sense recommendation that at the time of sentencing, the defendant should be encouraged to seek an adjustment of a payment schedule before a default occurs.

Finally, the Rule 83 Comment contains an extensive discussion of the statutory bases for determining the amount of fine or restitution to impose. The discussion includes a citation to *Commonwealth v. McLaughlin*, 574 A. 2d. 610 (Pa. Super. 1990), appeal denied 590 A. 2d. 756, cert. denied 502 U.S. 916, which discusses the factors which must be considered when determining the amount of restitution to impose and the method of payment. *Id.* at 617. The Comment also underscores the importance of the statutory requirement that before imposing both a fine and restitution, the issuing authority must determine that the fine will not prevent the defendant from making restitution to the victim, citing 42 Pa.C.S. § 9726(c)(2) and 42 Pa.C.S. § 9730(b)(3).

#### D. Rule 84. Trial in Defendant's Absence.

The amendments to Rule 84 align the notice and warrant procedures in paragraph (D) with the changes to Rule 75. Paragraph (D) requires that when a defendant has been found guilty in absentia and either the amount of collateral deposited does not satisfy the fine and costs imposed, or restitution has been imposed, the notice of conviction and sentence must also state that failure within ten days to pay or to appear for an ability to pay hearing, may result in the issuance of an arrest warrant. Paragraph (F) makes the defendant's failure to respond to this notice a precondition to the issuance of an arrest warrant.

#### E. Rescission of Present Rule 85. Procedures Regarding Default in Payment of Fine and Costs after Conviction.

Because of the number of clarifying changes to the default procedures in present Rule 85, the Committee

agreed that it would be less confusing to the reader if the changes were shown in a new rule.

#### F. New Rule 85. Default Procedures: Restitution, Fines, and Costs.

New Rule 85 covers the procedures, both mandatory and discretionary, that the issuing authority must follow when a defendant notifies the issuing authority that a default is imminent, or when a default occurs.

1. *Text of Rule.* Paragraph (A), derived in part from former Rule 85(d), provides that when a defendant notifies the issuing authority that a default on a single remittance or installment payment is imminent, the issuing authority may schedule an ability to pay hearing. If a new payment schedule is ordered, paragraph (A) requires that the order state the date on which each payment is due, and that the defendant be given a copy of the order. These latter requirements, similar to the amendments to Rule 83(E), are intended to insure that the defendant has specific instructions, in writing, for complying with the new installment schedule.

Paragraph (B) contains new default procedures, and mirrors the notice requirement in Rule 75(4), discussed above. If a defendant defaults on the payment of fines, costs, or restitution, this paragraph requires the issuing authority to notify the defendant, in person or by first class mail, that a warrant for the defendant's arrest may be issued unless, within ten days of the date on the default notice, the defendant pays the amount due or appears before the issuing authority to show cause why he or she should not be imprisoned for nonpayment as provided by law. This provision is intended to give the defendant a short grace period to act on the default before the issuing authority decides whether to issue an arrest warrant.

If a defendant appears in response to this notice, paragraph (C) requires the issuing authority to conduct an ability to pay hearing. Under paragraph (C)(1), if the issuing authority determines that the defendant is able to pay, the issuing authority may then impose any sanction permitted by law. Under paragraph (C)(2), if the issuing authority determines that the defendant cannot pay as ordered, the issuing authority may change the payment schedule, or alter or amend the order as permitted by law. See 18 Pa.C.S. § 1106(c)(3) (an issuing authority may alter or amend an order of restitution at any time), and 42 Pa.C.S. § 9730(b)(3) (as to fines, an issuing authority may extend or accelerate a payment schedule, leave it unaltered, or sentence the defendant to a period of community service, as the issuing authority finds to be just and practicable under the circumstances).

Under paragraph (C)(3), at the conclusion of the hearing, the issuing authority must do the following:

1. state the date on which each installment is due, if a new or first schedule of installments is ordered;
2. advise the defendant of the right to appeal within thirty days and that, if an appeal is filed, the execution of the order will be stayed and the issuing authority may set bail or collateral;
3. advise the defendant that, if the defendant appeals, he or she must appear for the de novo default hearing in the court of common pleas or the appeal may be dismissed.

Under paragraph (C)(3)(c), if the issuing authority imposes imprisonment, the defendant must be directed that unless the defendant files a timely appeal, the



defendant must appear for the execution of the order of imprisonment on a specific date.

Finally, the issuing authority is required to issue a written and signed order imposing sentence. The order must include all the information outlined in paragraph (C), and the defendant must be given a copy of the order. See Rule 85(C)(3)(d).

Paragraph (D) of new Rule 85 provides that appeals of Rule 85 determinations must be filed within thirty days of the order and are governed by Rule 86 (Appeals).

2. *Comment.* The Rule 85 Comment underscores the key provisions of the rule by highlighting the various stages of default proceedings, and by providing the statutory authority for the alternatives available to the issuing authority when a default occurs. The Comment notes, for example, that when the issuing authority determines after a default hearing that a defendant is able to pay as ordered, the issuing authority may not only impose any "sanction" provided by law, but also may turn the delinquent fine account over to a private collection agency, as provided in 42 Pa.C.S. § 9730(b)(2). Similarly, the Comment provides the issuing authority with the various actions he or she may take when a defendant is unable to meet a payment schedule on fines, as provided in 42 Pa.C.S. § 9730(b)(3), or when a defendant is unable to pay restitution, as provided in 18 Pa.C.S. § 1106(c)(2) and (3).

The Comment also contains a recommendation that, pursuant to paragraph (A), defendants should be encouraged to seek an adjustment in a payment schedule before they are in default.

Finally, the last paragraph of the Comment addresses the new contempt provisions in 42 Pa.C.S. §§ 4137-4139. The Comment makes it clear that Rule 85 default procedures are not intended to preclude an issuing authority from imposing punishment for criminal contempt, and references the separate Rules of Criminal Procedure governing contempt adjudications in Chapter 30.

#### G. Rule 86. Appeals.

The amendments to Rule 86 contain two significant provisions. First, restitution has been added to the possible sentences subject to an appeal under the rule. Second, new language has been added to address an open question under the present rule: what happens to a sentence of fines and costs, or restitution, when an appeal is filed?

Formerly, Rule 86 provided that when a sentence of imprisonment was imposed, the execution of that sentence was stayed until the appeal period expired, but made no reference to the disposition of sentences of fines or restitution during the appeal period. Although the Committee recognized that, in practical terms, monies owed should be collected as soon as possible, we debated at length the fairness of treating sentences involving fines and restitution differently from sentences of imprisonment during the appeal period. We were concerned to learn, for example, that in some judicial districts, defendants are precluded from filing an appeal unless fines and costs are paid, and in others, defendants are imprisoned for default in the payment of fines and costs during the thirty-day appeal period. Ultimately, we agreed that the Rule 86 procedures should be amended to address these issues.

New paragraph (B), which is titled "Stays," contains three sections. Paragraph (B)(1) carries over the present Rule 86(b) requirement that, when a sentence of impris-

onment has been imposed, execution of that sentence is stayed for the entire appeal period, regardless of whether the defendant files an appeal. Under paragraph (B)(2), when a notice of appeal is filed, the execution of sentence is stayed. The Comment to this new provision explains that the stay applies to all sentences, including sentences of imprisonment, fines and costs, restitution, and imprisonment ordered after a Rule 85 default hearing. Paragraph (B)(3) contains the provision in former paragraph (b) that, when the execution of sentence is stayed, the issuing authority may set bail or collateral.

In addition, paragraph (C) states expressly that during the thirty-day appeal period, failure to pay fines, costs, or restitution shall not be grounds for imprisonment or grounds to preclude the taking of an appeal.

Finally, a new paragraph (I) has been added to make it clear that the appeal procedures in Rule 86 do not apply to appeals from contempt adjudications under the new contempt statutes. See 42 Pa.C.S. §§ 4137-4139.

[Pa.B. Doc. No. 97-1658. Filed for public inspection October 17, 1997, 9:00 a.m.]

## Title 25—LOCAL COURT RULES

### BRADFORD COUNTY

Rule of Civil Procedure No. 1910.4.1; No.  
96IR000066

#### Order

*And Now*, this 30th day of September, 1997, the Court hereby amends the following Bradford County Rule of Civil Procedure, to be effective thirty (30) days after the date of publication in the *Pennsylvania Bulletin*.

It is further ordered that the District Court Administrator shall file seven (7) certified copies of this Rule with the Administrative Office of Pennsylvania Courts, two (2) certified copies to the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*, one (1) certified copy to the Civil Procedural Rules Committee and one (1) copy to the *Bradford County Law Journal* for publication in the next issue of the *Bradford County Law Journal*.

It is further ordered that this local rule shall be kept continuously available for public inspection and copying in the Prothonotary's Office.

*By the Court:*

JEFFREY A. SMITH,  
*President Judge*

#### Bradford County Rule of Civil Procedure 1910.4.1.

(a) In any support proceeding, all pleadings, including, but not limited to, exceptions, support agreements, and motions must be filed in the Office of the Prothonotary and a copy thereof immediately served upon the Domestic Relations Office, the Court Administrator's Office, and all parties of record.

(b) The Prothonotary shall [ **not** ] accept for filing any pleading in a support action which is not accompanied by a certification that service will be made as required by section (a) of this rule, **but shall promptly notify the presiding judge of the party's failure to file the required certification.**

(c) The provisions of this rule shall not apply to pleadings filed by the Domestic Relations Office.

[Pa.B. Doc. No. 97-1659. Filed for public inspection October 17, 1997, 9:00 a.m.]

## LUZERNE COUNTY

### Amendment to Rule of Court No. 288; Criminal Division

#### Order

And Now, this 2nd day of October, 1997, at 12:25 p.m., upon consideration of the filing of the certification by the District Attorney of Luzerne County, pursuant to Pa.R.Crim.P. 107 (relating to Approval of Police Complaints and Arrest Warrant Affidavits by Attorney for the Commonwealth), which follows and is made a part hereof as Exhibit "A", it is hereby *Ordered* as follows:

(1) Local Rule 288 is rescinded and renumbered to Rule 107;

(2) Rule 107 follows and is made a part hereof as Exhibit "B";

(3) This Rule shall become effective thirty days following its publication in the *Pennsylvania Bulletin*.

*By the Court*

JOSEPH M. AUGELLO,  
*President Judge*

#### Exhibit "A"

##### *Certification Pursuant to PA.R. CRIM.P. 107*

The District Attorney of Luzerne County hereby files a certification pursuant to Pa.R.Crim.P. 107, criminal complaints and arrest warrant affidavits by police officers, as defined in the Rules of Criminal Procedure charging one or more of the following offenses, or an attempt, solicitation, or conspiracy to commit any of the following:

(a) All offenses set forth in Chapter 25 of the Crimes Code (relating to criminal homicide): Murder of the first degree; Murder of the second degree; Murder of the third degree; Voluntary manslaughter; Involuntary manslaughter; Causing or aiding suicide; and Drug delivery resulting in death;

(b) Rape, in violation of 18 Pa.C.S.A. § 3121;

(c) Statutory sexual assault, in violation of 18 Pa.C.S.A. § 3121.1;

(d) Involuntary deviate sexual intercourse, in violation of 18 Pa. C.S.A. § 3123;

(e) Sexual Assault, in violation of 18 Pa.C.S.A. § 3124.1;

(f) Aggravated indecent assault, in violation of 18 Pa.C.S.A. § 3125;

(g) Robbery, in violation of 18 Pa.C.S.A. § 3701;

(h) Arson, in violation of 18 Pa.C.S.A. § 3301;

(i) All prohibited acts as set forth in the Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. § 780-113 (a)(30);

(j) Kidnapping, in violation of 18 Pa.C.S.A. § 2901;

(k) Homicide by vehicle, in violation of 75 Pa.C.S.A. § 3732;

(l) Homicide by vehicle while driving under the influence, in violation of 75 Pa.C.S.A. § 3735;

(m) Corrupt organizations, in violation of 18 Pa.C.S.A. § 911;

(n) Ethnic intimidation, in violation of 18 Pa.C.S.A. § 2710;

(o) All offenses as set forth in Chapter 47 of the Crimes Code, relating to bribery and corrupt influence;

(p) Obstructing administration of law or other governmental function, in violation of 18 Pa.C.S.A. § 5101;

(q) All offenses as set forth in Chapter 53 of the Crimes Code, relating to abuse of office;

(r) All offenses as set forth in Chapter 57 of the Crimes Code, relating to wiretapping and electronic surveillance;

(s) Obscene and other sexual materials and performances, in violation of 18 Pa.C.S.A. § 5903 shall not hereafter be accepted by any judicial officer unless the complaint and/or affidavit has the approval of an attorney for the Commonwealth prior to filing.

#### Exhibit "B"

##### *Local Rule 107*

The District Attorney of Luzerne County having filed a certification pursuant to Pa.R.Crim.P. 107, criminal complaints and arrest warrant affidavits by police officers, as defined in the Rules of Criminal Procedure charging one or more of the following offenses, or an attempt, solicitation, or conspiracy to commit any of the following:

(a) All offenses set forth in Chapter 25 of the Crimes Code (relating to criminal homicide): Murder of the first degree; Murder of the second degree; Murder of the third degree; Voluntary manslaughter; Involuntary manslaughter; Causing or aiding suicide; and Drug delivery resulting in death;

(b) Rape, in violation of 18 Pa.C.S.A. § 3121;

(c) Statutory sexual assault, in violation of 18 Pa.C.S.A. § 3121.1;

(d) Involuntary deviate sexual intercourse, in violation of 18 Pa.C.S.A. § 3123;

(e) Sexual Assault, in violation of 18 Pa.C.S.A. § 3124.1;

(f) Aggravated indecent assault, in violation of 18 Pa.C.S.A. § 3125;

(g) Robbery, in violation of 18 Pa.C.S.A. § 3701;

(h) Arson, in violation of 18 Pa.C.S.A. § 3301;

(i) All prohibited acts as set forth in the Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. § 780-113 (a)(30);

(j) Kidnapping, in violation of 18 Pa.C.S.A. § 2901;

(k) Homicide by vehicle, in violation of 75 Pa.C.S.A. § 3732;

(l) Homicide by vehicle while driving under the influence, in violation of 75 Pa.C.S.A. § 3735;

(m) Corrupt organizations, in violation of 18 Pa. C.S.A. § 911;

(n) Ethnic intimidation, in violation of 18 Pa.C.S.A. § 2710;

(o) All offenses as set forth in Chapter 47 of the Crimes Code, relating to bribery and corrupt influence;

(p) Obstructing administration of law or other governmental function, in violation of 18 Pa.C.S.A. § 5101;

(q) All offenses as set forth in Chapter 53 of the Crimes Code, relating to abuse of office;

(r) All offenses as set forth in Chapter 57 of the Crimes Code, relating to wiretapping and electronic surveillance;

(s) Obscene and other sexual materials and performances, in violation of 18 Pa. C.S.A. § 5903 shall not hereafter be accepted by any judicial officer unless the complaint and/or affidavit has the approval of an attorney for the Commonwealth prior to filing.

PETER PAUL OLSZEWSKI, Jr.,  
*District Attorney*

[Pa.B. Doc. No. 97-1660. Filed for public inspection October 17, 1997, 9:00 a.m.]

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## WESTMORELAND COUNTY

### Administrative Order: Rules W205.1 and W211; No. 3 of 1997

#### Order of Court

*And Now*, to wit, this 29th day of September, 1997, it is *Ordered* that Westmoreland County Rule of Civil Procedure W205.1 and the Comment to Rule W211 be revised effective January 1, 1998.

*By the Court*

BERNARD F. SCHERER,  
*President Judge*

#### Rule W205.1. Filing of Motions and Petitions.

(a) The trial judge assigned to a specific case will hear all matters relating to that case through and including trial.

(b) Each judge will establish when motions and other matters may be presented.

(1) Judges Loughran, Ackerman, and Caruso will hear all routine motions, orders of court, etc. presented by counsel, in civil matters specifically assigned to them, on the first and last Wednesday of each month at 10:00 a.m. Emergency motions on civil matters assigned specifically to Judges Loughran, Ackerman, and Caruso may be presented at any time convenient to the Court.

Judge Scherer will hear motions on any matter specifically assigned to him at 8:30 a.m. on any work day on which he is available. Emergency motions may be presented at any time convenient to the Court.

(c) Except for emergency matters, before a motion or petition is presented, the moving party shall furnish a copy of the pleading and any proposed order to every other party or attorney of record at least 4 days in advance of when the presentation is to occur. The date and time of presentation is to be scheduled with the assigned judge. The matter must be accompanied by a certification stating that notice has been given under this rule and, in the case of an uncontested matter, that the matter is in fact uncontested. In emergency matters, the moving party must give telephone notice to every other party or attorney of record prior to presenting the motion or petition and shall, at the time of presentation of same, provide to the Court an affidavit of the notice provided.

(d) The moving party shall present any motion or petition and a copy of the judicial assignment form to the chambers of the assigned judge.

(e) The filing of preliminary objections, motions for judgment on the pleadings, motions for summary judgment, the post-trial relief shall be in accordance with Westmoreland County Rule of Civil Procedure W227.2.

#### Rule W211. Oral Arguments.

Each judge shall establish procedures for oral argument. The judge may establish a procedure requiring that no oral argument be scheduled unless requested by a party, subject to approval by the judge.

#### Comment

All argument court matters before Judge Loughran shall be automatically scheduled by the Court Administrator.

All argument court matters, excepting preliminary objections before Judges Ackerman and Caruso shall be automatically scheduled by the Court Administrator. Oral argument on Preliminary objections shall be scheduled on an individual basis after consideration of a petition or motion presented to the Court.

Oral argument shall not be scheduled before Judge Scherer except on a case by case basis. Parties may request oral argument by petition or motion. The Court Administrator shall then schedule the oral argument on a case by case basis.

[Pa.B. Doc. No. 97-1661. Filed for public inspection October 17, 1997, 9:00 a.m.]

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