THE COURTS

Title 225—RULES OF EVIDENCE

[225 PA. CODE ARTS. I—X]

Order Rescinding and Replacing the Rules of Evidence; No. 586 Supreme Court Rules Doc.

Order

Per Curiam

And Now, this 17th day of January, 2013, upon the recommendation of the Committee on Rules of Evidence; the proposal having been published for public comment at 41 Pa.B. 2795 (May 28, 2011):

It Is Ordered pursuant to Article V, Section 10 of the Constitution of Pennsylvania that the Pennsylvania Rules of Evidence are rescinded and replaced in the following form.

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

Annex A

TITLE 225. RULES OF EVIDENCE

ARTICLE I. GENERAL PROVISIONS

Rule 101. Scope; Adoption and Citation.

(a) *Scope.* These rules of evidence govern proceedings in all courts of the Commonwealth of Pennsylvania's unified judicial system, except as otherwise provided by law.

(b) *Adoption and Citation.* These rules of evidence are adopted by the Supreme Court of Pennsylvania under the authority of Article V § 10(c) of the Constitution of Pennsylvania, adopted April 23, 1968. They shall be known as the Pennsylvania Rules of Evidence and shall be cited as "Pa.R.E."

Comment

Preface to Comments

The original Comments to the Pennsylvania Rules of Evidence were prepared by the Ad Hoc Committee on Evidence. The Comments accompanied the Pennsylvania Rules of Evidence that were adopted by the Pennsylvania Supreme Court on May 8, 1998. The Pennsylvania Rules of Evidence closely followed the format, language, and style of the Federal Rules of Evidence, but the guiding principle was to preserve the Pennsylvania law of evidence. The original Comments reflected this approach by identifying the Pennsylvania sources of the law. The original Comments also compared the Pennsylvania Rules to the Federal Rules for the convenience of the Bench and Bar.

The Federal Rules of Evidence were amended effective December 1, 2011. The goal of the Federal amendments was to make the rules more easily understood and to make the format and terminology more consistent, but to leave the substantive content unchanged. The Pennsylvania Rules of Evidence were rescinded and replaced on January 17, 2013, and become effective on March 18, 2013. They closely follow the format, language, and style of the amended Federal Rules of Evidence. The goal of the Pennsylvania Supreme Court's rescission and replacement of the Pennsylvania Rules of Evidence was likewise to make its rules more easily understood and to make the format and terminology more consistent, but to leave the substantive content unchanged. Once again, the guiding principle is to preserve the Pennsylvania law of evidence.

These Comments are prepared by the Pennsylvania Supreme Court's Committee on Rules of Evidence for the convenience of the Bench and Bar. The Comments have not been adopted by the Supreme Court and it is not intended that they have precedential significance.

Comment to Rule 101

A principal goal of these rules is to construct a comprehensive code of evidence governing court proceedings in the Commonwealth of Pennsylvania. However, these rules cannot be all-inclusive. Some of our law of evidence is governed by the Constitutions of the United States and of Pennsylvania. Some is governed by statute. Some evidentiary rules are contained in the Rules of Civil and Criminal Procedure and the rules governing proceedings before courts of limited jurisdiction. Traditionally, our courts have not applied the law of evidence in its full rigor in proceedings such as preliminary hearings, bail hearings, grand jury proceedings, sentencing hearings, parole and probation hearings, extradition or rendition hearings, and others. Traditional rules of evidence have also been relaxed to some extent in custody matters, see, *e.g.*, Pa.R.C.P. No. 1915.11(b) (court interrogation of a child), and other domestic relations matters, see, *e.g.*, Pa.R.C.P. No. 1930.3 (testimony by electronic means).

Decisional law is applicable to some evidentiary issues not covered by these rules. This would include for example, the *corpus delicti* rule, see *Commonwealth v. Fears*, 575 Pa. 281, 836 A.2d 52 (2003); the collateral source rule, see *Boudwin v. Yellow Cab Co.*, 410 Pa. 31, 188 A.2d 259 (1963); and the parol evidence rule, see *Yocca v. Pittsburgh Steelers Sports, Inc.*, 578 Pa. 479, 854 A.2d 425 (2004). The Pennsylvania Rules of Evidence are not intended to supersede these other provisions of law unless they do so expressly or by necessary implication.

These rules are applicable in the courts of the Commonwealth of Pennsylvania's unified judicial system. In some respects, these rules are applicable in administrative proceedings. *See, e.g.*, *Gibson v. W.C.A.B.*, 580 Pa. 470, 861 A.2d 938 (2004) (evidentiary rules 602, 701 and 702 applicable in agency proceedings in general, including Workers' Compensation proceedings). These rules are also applicable in compulsory arbitration hearings, with spe-

cific exceptions relating to the admissibility of certain written evidence and official documents. *See* Pa.R.C.P. No. 1305.

***Official Note*:** Adopted May 8, 1998, effective October 1, 1998; Comment revised December 30, 2005, effective February 1, 2006; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the December 30, 2005 revision of the Comment published with the Court's Order at 36 Pa.B. 384 (January 28, 2006).

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

Rule 102. Purpose.

These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

Comment

This rule is identical to F.R.E. 102.

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

Committee Explanatory Reports:

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

Rule 103. Rulings on Evidence.

(a) *Preserving a Claim of Error.* A party may claim error in a ruling to admit or exclude evidence only:

(1) if the ruling admits evidence, a party, on the record:

(A) makes a timely objection, motion to strike, or motion *in limine*; and

(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) *Not Needing to Renew an Objection or Offer of Proof.* Once the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(c) *Court's Statement About the Ruling; Directing an Offer of Proof.* The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.

(d) *Preventing the Jury from Hearing Inadmissible Evidence.* To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

Comment

Pa.R.E. 103(a) differs from F.R.E. 103(a). The Federal Rule says, "A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party. . . ." In Pennsylvania criminal cases, the accused is entitled to relief for an erroneous ruling unless the court finds beyond a reasonable doubt that the error is harmless. *See Commonwealth v. Story*, 476 Pa. 391, 383 A.2d 155 (1978). Civil cases are governed by Pa.R.C.P. No. 126 which permits the court to disregard an erroneous ruling "which does not affect the substantial rights of the parties." Pa.R.E. 103(a) is consistent with Pennsylvania law.

Pa.R.E. 103(a)(1) specifically refers to motions *in limine*. These motions are not mentioned in the Federal rule. Motions *in limine* permit the trial court to make rulings on evidence prior to trial or at trial but before the evidence is offered. Such motions can expedite the trial and assist in producing just determinations.

Pa.R.E. 103(b), (c) and (d) are identical to F.R.E. 103(b), (c) and (d).

F.R.E. 103(e) permits a court to "take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved." This paragraph has not been adopted because it is inconsistent with Pa.R.E. 103(a) and Pennsylvania law. *See Commonwealth v. Clair*, 458 Pa. 418, 326 A.2d 272 (1974); *Dilliplaine v. Lehigh Valley Trust Co.*, 457 Pa. 255, 322 A.2d 114 (1974).

***Official Note*:** Adopted May 8, 1998, effective October 1, 1998; amended November 2, 2001, effective January 1, 2002; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the November 2, 2001 amendments to paragraph (a) published with the Court's Order at 31 Pa.B. 6384 (November 24, 2001).

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

Rule 104. Preliminary Questions.

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

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

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

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

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

(3) justice so requires.

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

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

Comment

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

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

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

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

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

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

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

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

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

Committee Explanatory Reports:

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

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

Rule 105. Limiting Evidence That is Not Admissible Against Other Parties or for Other Purposes.

If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly. The court may also do so on its own initiative.

Comment

The first sentence of Pa.R.E. 105 is identical to F.R.E. 105. The second sentence was added to conform to Pennsylvania practice. There are other ways to deal with evidence that is admissible against one party but not another, or for one purpose but not another. For example, the evidence may be redacted. *See Commonwealth v. Johnson*, 474 Pa. 410, 378 A.2d 859 (1977). In some cases, severance may be appropriate. *See Commonwealth v. Young*, 263 Pa. Super. 333, 397 A.2d 1234 (1979). Where the danger of unfair prejudice outweighs probative value the evidence may be excluded. *See* Pa.R.E. 403.

***Official Note*:** Adopted May 8, 1998, effective October 1, 1998; Comment revised March 10, 2000, effective immediately; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the March 10, 2000 revision of the Comment deleting "as amended" from the second sentence published with the Court's Order at 30 Pa.B. 1641 (March 25, 2000).

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

Rule 106. Remainder of or Related Writings or Recorded Statements.

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.

Comment

This rule is identical to F.R.E. 106. A similar principle is expressed in Pa.R.C.P. No. 4020(a)(4), which states: "If only part of a deposition is offered in evidence by a party, any other party may require the offering party to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts."

The purpose of Pa.R.E. 106 is to give the adverse party an opportunity to correct a misleading impression that may be created by the use of a part of a writing or recorded statement that may be taken out of context. This rule gives the adverse party the opportunity to correct the misleading impression at the time that the evidence is introduced. The trial court has discretion to decide whether other parts, or other writings or recorded statements, ought in fairness to be considered contemporaneously with the proffered part.

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

Committee Explanatory Reports:

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

ARTICLE II. JUDICIAL NOTICE

Rule
201. Judicial Notice of Adjudicative Facts.

Rule 201. Judicial Notice of Adjudicative Facts.

(a) *Scope.* This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) *Kinds of Facts That May Be Judicially Noticed.* The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) *Taking Notice.* The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) *Timing.* The court may take judicial notice at any stage of the proceeding.

(e) *Opportunity to Be Heard.* On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) *Instructing the Jury.* The court must instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

Comment

This rule is identical to F.R.E. 201, except for paragraph (f).

Pa.R.E. 201(a) limits the application of this rule to adjudicative facts. This rule is not applicable to judicial notice of law. Adjudicative facts are facts about the events, persons and places relevant to the matter before the court. *See* 2 McCormick, *Evidence* § 328 (6th ed. 2006).

In determining the law applicable to a matter, the judge is sometimes said to take judicial notice of law. In Pennsylvania, judicial notice of law has been regulated by decisional law and statute. *See In re Annual Controller's Reports for Years 1932, 1933, 1934, 1935 and 1936*, 333 Pa. 489, 5 A.2d 201 (1939) (judicial notice of public laws); 42 Pa.C.S. § 6107 (judicial notice of municipal ordinances); 42 Pa.C.S. § 5327 (judicial notice of laws of any jurisdiction outside the Commonwealth); 45 Pa.C.S. § 506 (judicial notice of the contents of the *Pennsylvania Code* and the *Pennsylvania Bulletin*). These rules are not intended to change existing provisions of law.

Pa.R.E. 201(f) differs from F.R.E. 201(f). Under the Federal Rule the court is required to instruct the jury to accept as conclusive any fact judicially noticed in a civil case. In a criminal case, the judicially noticed fact is not treated as conclusive. Under Pennsylvania law, the judicially noticed fact has not been treated as conclusive in either civil or criminal cases, and the opposing party may submit evidence to the jury to disprove the noticed fact. *See Appeal of Albert*, 372 Pa. 13, 92 A.2d 663 (1952); *Commonwealth v. Brown*, 428 Pa. Super. 587, 631 A.2d 1014 (1993).

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

Committee Explanatory Reports:

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

ARTICLE III. PRESUMPTIONS

Rule
301. Presumptions.

Rule 301. Presumptions.

Presumptions as they now exist or may be modified by law shall be unaffected by the adoption of these rules.

Comment

Pa.R.E. 301 is similar to F.R.E. 301 in that it does not modify existing law. Pa.R.E. 301 differs from F.R.E. 301 in that this rule does not establish the effect of a presumption on the burden of proof.

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

Committee Explanatory Reports:

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

ARTICLE IV. RELEVANCE AND ITS LIMITS

Rule
401. Test for Relevant Evidence.
402. General Admissibility of Relevant Evidence.
403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons.
404. Character Evidence; Crimes or Other Acts.
405. Methods of Proving Character.
406. Habit; Routine Practice.
407. Subsequent Remedial Measures.
408. Compromise Offers and Negotiations.
409. Offers to Pay Medical and Similar Expenses.
410. Pleas, Plea Discussions, and Related Statements.
411. Liability Insurance.
412. Sex Offense Cases: The Victim's Sexual Behavior or Predisposition (Not Adopted).

Rule 401. Test for Relevant Evidence.

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

Comment

This rule is identical to F.R.E. 401.

Whether evidence has a tendency to make a given fact more or less probable is to be determined by the court in the light of reason, experience, scientific principles and the other testimony offered in the case.

The relevance of proposed evidence may be dependent on evidence not yet of record. Under Pa.R.E. 104(b), the court may admit the proposed evidence on the condition that the evidence supporting its relevance be introduced later.

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

Committee Explanatory Reports:

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

Rule 402. General Admissibility of Relevant Evidence.

All relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible.

Comment

Pa.R.E. 402 differs from F.R.E. 402. The Federal Rule specifically enumerates the various sources of federal rule-making power. Pa.R.E. 402 substitutes the phrase "by law".

Pa.R.E. 402 states a fundamental concept of the law of evidence. Relevant evidence is admissible; evidence that is not relevant is not admissible. This concept is modified by the exceptions clause of the rule, which states another fundamental principle of evidentiary law—relevant evidence may be excluded by operation of constitutional law, by statute, by these rules, by other rules promulgated by the Supreme Court or by rules of evidence created by case law.

Examples of decisionally created rules of exclusion that are not abrogated by the adoption of these rules include: the *corpus delicti* rule, *Commonwealth v. Ware*, 459 Pa. 334, 329 A.2d 258 (1974); the collateral source rule, see *Boudwin v. Yellow Cab Co.*, 410 Pa. 31, 188 A.2d 259 (1963); the parol evidence rule, see *Yocca v. Pittsburgh Steelers Sports, Inc.*, 578 Pa. 479, 854 A.2d 425 (2004); and the rule excluding certain evidence to rebut the presumption of legitimacy, see *John M. v. Paula T.*, 524 Pa. 306, 571 A.2d 1380 (1990).

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

Committee Explanatory Reports:

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

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons.

The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Comment

Pa.R.E. 403 differs from F.R.E. 403. The Federal Rule provides that relevant evidence may be excluded if its probative value is "substantially outweighed." Pa.R.E. 403 eliminates the word "substantially" to conform the text of the rule more closely to Pennsylvania law. *See Commonwealth v. Boyle*, 498 Pa. 486, 447 A.2d 250 (1982).

"Unfair prejudice" means a tendency to suggest decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially.

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

Committee Explanatory Reports:

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

Rule 404. Character Evidence; Crimes or Other Acts.

(a) *Character Evidence.*

(1) *Prohibited Uses.* Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) *Exceptions for a Defendant or Victim in a Criminal Case.* The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to limitations imposed by statute a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) *Exceptions for a Witness.* Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(4) *Exception in a Civil Action for Assault and Battery.* In a civil action for assault and battery, evidence of the plaintiff's character trait for violence may be admitted when offered by the defendant to rebut evidence that the defendant was the first aggressor.

(b) *Crimes, Wrongs or Other Acts.*

(1) *Prohibited Uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.

(3) *Notice in a Criminal Case.* In a criminal case the prosecutor must provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence the prosecutor intends to introduce at trial.

Comment

Pa.R.E. 404(a) differs from F.R.E. 404(a). There are two differences. First, F.R.E. 404(a)(2)(B) gives the defendant the right to introduce evidence of a pertinent trait of character of the alleged victim of the crime subject to the limitations in F.R.E 412. The Pennsylvania Rule differs in that Pennsylvania has not adopted Rule 412. Instead, Pennsylvania recognizes statutory limitations on this right. In particular, 18 Pa.C.S. § 3104 (the Rape Shield Law) often prohibits the defendant from introducing evidence of the alleged victim's past sexual conduct, including reputation evidence. *See* Comment to Pa.R.E. 412 (Not Adopted), *infra*. Second, Pa.R.E 404(a)(4), which applies only to a civil action for assault and battery, is not part of the federal rule. It is based on *Bell v. Philadelphia*, 341 Pa. Super. 534, 491 A.2d 1386 (1985).

Pa.R.E 404(a)(1) prohibits the use of evidence of a person's character or trait of character to prove conduct in conformity therewith on a particular occasion. The ratio-

nale is that the relevance of such evidence is usually outweighed by its tendency to create unfair prejudice, particularly with a jury. This does not prohibit the introduction of evidence of a person's character, or trait of character, to prove something other than conduct in conformity therewith. For example, a party must sometimes prove a person's character or trait of character because it is an element of the party's claim or defense. *See* Pa.R.E. 405(b) and its Comment.

A person's trait of character is not the same as a person's habit. The distinction is discussed in the Comment to Rule 406, *infra*. If a person's trait of character leads to habitual behavior, evidence of the latter is admissible to prove conduct in conformity therewith on a particular occasion, pursuant to Rule 406.

Pa.R.E. 404(a)(2)(A) which deals with the character of a defendant in a criminal case, is identical to F.R.E. 404(a)(2)(A). It allows the defendant to "put his character in issue," usually by calling character witnesses to testify to his good reputation for a law-abiding disposition, or other pertinent trait of character. If the defendant does so, the Commonwealth may (1) cross-examine such witnesses, subject to the limitations imposed by Rule 405(a), and (2) offer rebuttal evidence.

If a defendant in a criminal case chooses to offer evidence of a pertinent trait of character of an alleged victim under subsection (a)(2)(B), then subsection (a)(2)(B)(ii) allows the Commonwealth to offer evidence that the defendant has the same trait of character. For example, in an assault and battery case, if the defendant introduces evidence that the alleged victim was a violent and belligerent person, the Commonwealth may counter by offering evidence that the defendant was also a violent and belligerent person. Thus, the jury will receive a balanced picture of the two participants to help it decide who was the first aggressor.

Pa.R.E. 404(b)(1) is identical to F.R.E. 404(b)(1). It prohibits the use of evidence of other crimes wrongs or acts to prove a person's character.

Pa.R.E. 404(b)(2), like F.R.E. 404(b)(2), contains a non-exhaustive list of purposes, other than proving character, for which a person's other crimes wrongs or acts may be admissible. But it differs in several aspects. First, Pa.R.E. 404(b)(2) requires that the probative value of the evidence must outweigh its potential for prejudice. When weighing the potential for prejudice of evidence of other crimes, wrongs, or acts, the trial court may consider whether and how much such potential for prejudice can be reduced by cautionary instructions. *See Commonwealth v. LaCava*, 542 Pa. 160, 666 A.2d 221 (1995). When evidence is admitted for this purpose, the party against whom it is offered is entitled, upon request, to a limiting instruction. *See Commonwealth v. Hutchinson*, 571 Pa. 45, 811 A.2d 556 (2002). Second, the federal rule requires the defendant in a criminal case to make a request for notice of the prosecutor's intent to offer evidence of other crimes, wrongs or acts. This issue is covered in Pa.R.E. 404(b)(3) which is consistent with prior Pennsylvania practice in that the requirement that the prosecutor give notice is not dependent upon a request by the defendant.

***Official Note*:** Adopted May 8, 1998, effective October 1, 1998; Comment revised November 2, 2001; effective January 1, 2002; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the November 2, 2001 revision of Subsection (a) of the Comment published with the Court's Order at 31 Pa.B. 6384 (November 24, 2001).

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

Rule 405. Methods of Proving Character.

(a) *By Reputation.* When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation. Testimony about the witness's opinion as to the character or character trait of the person is not admissible.

(1) On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct probative of the character trait in question.

(2) In a criminal case, on cross-examination of a character witness, inquiry into allegations of other criminal conduct by the defendant, not resulting in conviction, is not permissible.

(b) *By Specific Instances of Conduct.* Specific instances of conduct are not admissible to prove character or a trait of character, except:

(1) In a civil case, when a person's character or a character trait is an essential element of a claim or defense, character may be proved by specific instances of conduct.

(2) In a criminal case, when character or a character trait of an alleged victim is admissible under Pa.R.E. 404(a)(2)(B) the defendant may prove the character or character trait by specific instances of conduct.

Comment

Pa.R.E. 405(a) differs from F.R.E. 405(a). The first sentence of Pa.R.E 405(a) permits proof of character or a character trait by reputation testimony, as does F.R.E. 405(a). But the second sentence specifically prohibits opinion testimony about character or a trait of character. This prohibition is consistent with prior Pennsylvania law. *See Commonwealth v. Lopinson*, 427 Pa. 284, 234 A.2d 552 (1967), *vacated on other grounds*, 392 U.S. 647 (1968).

Pa.R.E. 405(a) also differs from F.R.E. 405(a) in that there are two subparagraphs, Pa.R.E. 405(a)(1) and Pa.R.E. 405(a)(2), dealing with cross-examination of a character witness. Pa.R.E. 405(a)(2) prohibits cross-examination of a criminal defendant's character witnesses regarding criminal conduct of the defendant not resulting in conviction. This is consistent with prior Pennsylvania law. *See Commonwealth v. Morgan*, 559 Pa. 248, 739 A.2d 1033 (1999). When a reputation witness is cross-examined regarding specific instances of conduct, the court should take care that the cross-examiner has a reasonable basis for the questions asked. *See Commonwealth v. Adams*, 426 Pa. Super. 332, 626 A.2d 1231 (1993).

Pa.R.E. 405(b) differs from F.R.E. 405(b). Unlike F.R.E. 405(b), Pa.R.E. 405(b) distinguishes between civil and criminal cases in permitting the use of specific instances of conduct to prove character.

With regard to civil cases, Pa.R.E. 405(b)(1) is similar to the Federal Rule in permitting proof of character by specific instances of conduct where character is an essential element of the claim or defense. This is consistent with prior Pennsylvania law. *See Matusak v. Kulczewski*,

295 Pa. 208, 145 A. 94 (1928); *Dempsey v. Walso Bureau, Inc.*, 431 Pa. 562, 246 A.2d 418 (1968). With regard to criminal cases, under Pa.R.E. 404(a)(2)(B), the accused may offer evidence of a pertinent trait of character of the alleged crime victim. Under Pa.R.E. 405(b)(2) the trait may be proven by specific instances of conduct without regard to whether the trait is an essential element of the charge, or defense. This is consistent with prior Pennsylvania law. *See Commonwealth v. Dillon*, 528 Pa. 417, 598 A.2d 963 (1991).

***Official Note*:** Adopted May 8, 1998, effective October 1, 1998; amended July 20, 2000; effective October 1, 2000; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the July 20, 2000 amendment of paragraph (a) concerning allegations of other criminal misconduct published with the Court's Order at 30 Pa.B. 3920 (August 5, 2000).

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

Rule 406. Habit; Routine Practice.

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or there was an eyewitness.

Comment

This rule is identical to F.R.E. 406. The concepts of "habit" and "routine practice" denote conduct that occurs with fixed regularity in repeated specific situations. Like the Federal Rule, Pa.R.E. 406 does not set forth the ways in which habit or routine practice may be proven, but leaves this for case-by-case determination. *See, e.g.*, *Commonwealth v. Rivers*, 537 Pa. 394, 644 A.2d 710 (1994) (allowing testimony based on familiarity with another's conduct); *Baldridge v. Matthews*, 378 Pa. 566, 570, 106 A.2d 809, 811 (1954) (testimony of uniform practice apparently permitted without examples of specific instances).

Evidence of habit must be distinguished from evidence of character. Character applies to a generalized propensity to act in a certain way without reference to specific conduct, and frequently contains a normative, or value-laden, component (*e.g.*, a character for truthfulness). Habit connotes one's conduct in a precise factual context, and frequently involves mundane matters (*e.g.*, recording the purpose for checks drawn).

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

Committee Explanatory Reports:

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

Rule 407. Subsequent Remedial Measures.

When measures are taken by a party that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible against that party to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.

Comment

Pa.R.E. 407 differs from F.R.E. 407. The rule has been modified to clarify that the rule only protects the party that took the measures. Though F.R.E. 407 is silent on the point, the courts have generally held that the federal rule does not apply when one other than the alleged tortfeasor takes the action because the reason for the rule (to encourage remedial measures) is not then implicated. *See, e.g.*, *TLT-Babcock, Inc. v. Emerson Electric Co.*, 33 F.3d 397, 400 (4th Cir. 1994) (collecting cases).

***Official Note*:** Adopted May 8, 1998, effective October 1, 1998; amended June 12, 2003, effective July 1, 2003; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the June 12, 2003 amendments published with the Court's Order at 33 Pa.B. 2973 (June 28, 2003).

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

Rule 408. Compromise Offers and Negotiations.

(a) *Prohibited Uses.* Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim.

(b) *Exceptions.* The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Comment

Pa.R.E. 408(a) differs from F.R.E. 408(a) in that the federal rule in paragraph (a)(2) contains language that seems to permit the use in criminal cases of statements made to government investigators, regulators, or enforcement authority in negotiations in civil cases. That language has not been adopted because the use of such statements might conflict with the policies underlying Pa.R.Crim.P. 586 (relating to dismissal of criminal charges not committed by force or violence upon payment of restitution) or Pa.R.Crim.P. 546 (relating to dismissal upon satisfaction or agreement).

This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

Pa.R.E. 408(b) is identical to F.R.E. 408(b).

Admissibility of conduct and statements in mediations pursuant to the Mediation Act of 1996, 42 Pa.C.S. § 5949, is governed by that statute.

Pa.R.E. 408 is consistent with 42 Pa.C.S. § 6141 which provides, in pertinent part, as follows:

§ 6141. Effect of certain settlements

(a) *Personal Injuries.* Settlement with or any payment made to an injured person or to others on behalf of such injured person with the permission of such injured person or to anyone entitled to recover damages on account of injury or death of such person shall not constitute an admission of liability by the person making the payment or on whose behalf the payment was made, unless the parties to such settlement or payment agree to the contrary.

(b) *Damages to Property.* Settlement with or any payment made to a person or on his behalf to others for damages to or destruction of property shall not constitute an admission of liability by the person making the payment or on whose behalf the payment was made, unless the parties to such settlement or payment agree to the contrary.

(c) *Admissibility in Evidence.* Except in an action in which final settlement and release has been pleaded as a complete defense, any settlement or payment referred to in subsections (a) and (b) shall not be admissible in evidence on the trial of any matter.

***Official Note*:** Adopted May 8, 1998, effective October 1, 1998; amended March 10, 2000; effective July 1, 2000; Comment revised March 29, 2001, effective April 1, 2001; amended September 18, 2008, effective October 30, 2008; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the March 10, 2000 amendments concerning the inadmissibility of evidence of conduct or statements made in compromise negotiations published at 30 Pa.B. 1643 (March 25, 2000).

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

Final Report explaining the September 18, 2008 amendments published with the Court's Order at 38 Pa.B. 5423 (October 4, 2008).

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

Rule 409. Offers to Pay Medical and Similar Expenses.

Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

Comment

This rule is identical to F.R.E. 409.

***Official Note*:** Adopted May 8, 1998, effective October 1, 1998; Comment revised December 30, 2005, effective February 1, 2006; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the December 30, 2005 revision of the Comment published with the Court's Order at 36 Pa.B. 384 (January 28, 2006).

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

Rule 410. Pleas, Plea Discussions, and Related Statements.

(a) *Prohibited Uses.* In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

(1) a guilty plea that was later withdrawn;

(2) a *nolo contendere* plea;

(3) a statement made in the course of any proceedings under Rules 311, 313, 409, 414, 424, 550 or 590 of the Pennsylvania Rules of Criminal Procedure, Rule 11 of the Federal Rules of Criminal Procedure, or a comparable rule or procedure of another state; or

(4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later withdrawn guilty plea.

(b) *Exceptions.* The court may admit a statement described in Rule 410(a)(3) or (4):

(1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or

(2) in a criminal proceeding for perjury, false swearing or unsworn falsification to authorities, if the defendant made the statement under oath, on the record, and with counsel present.

Comment

Pa.R.E. 410(a)(3) differs from F.R.E. 410(a)(3) in that it refers to the Pennsylvania proceedings to which the paragraph applies rather than the federal proceedings.

Pa.R.E. 410 does not prohibit the use of a conviction that results from a plea of *nolo contendere*, as distinct from the plea itself, to impeach in a later proceeding (subject to Pa.R.E. 609) or to establish an element of a charge in a later administrative proceeding. *See Commonwealth v. Snyder*, 408 Pa. 253, 182 A.2d 495 (1962) (conviction based on nolo contendere plea could be used to impeach witness in later criminal proceeding); *Eisenberg v. Commonwealth, Dep't. of Public Welfare*, 512 Pa. 181, 516 A.2d 333 (Pa. 1986) (conviction based on *nolo contendere* plea permitted to establish element of charge in administrative proceeding).

There is also a statute governing the admissibility of guilty pleas and pleas of *nolo contendere* in cases charging summary motor vehicle violations when offered in civil cases arising out of the same facts. *See* 42 Pa.C.S. § 6142 which provides:

(a) *General Rule.* A plea of guilty or *nolo contendere*, or a payment of the fine and costs prescribed after any such plea, in any summary proceeding made by any person charged with a violation of Title 75 (relating to vehicles) shall not be admissible as evidence in any civil matter arising out of the same violation or under the same facts or circumstances.

(b) *Exception.* The provisions of subsection (a) shall not be applicable to administrative or judicial pro-

ceedings involving the suspension of a motor vehicle or tractor operating privilege, learner's permit, or right to apply for a motor vehicle or tractor operating privilege, or the suspension of a certificate of appointment as an official inspection station, or the suspension of a motor vehicle, tractor, or trailer registration.

Pa.R.E. 410(b)(1) is identical to F.R.E. 410(b)(1).

Pa.R.E. 410(b)(2) differs from F.R.E. 410(b)(2) in that "false statement" has been omitted and replaced with "false swearing" and "unsworn falsification to authorities" to correlate with acts defined in the Pennsylvania Crime Code. *See* 18 Pa.C.S. §§ 4903, 4904.

***Official Note*:** Adopted May 8, 1998, effective October 1, 1998; Comment revised March 23, 1999, effective immediately; amended March 10, 2000, effective immediately; amended March 29, 2001, effective April 1, 2001; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the March 23, 1999 technical revisions of the Comment published with the Court's Order at 29 Pa.B. 1714 (April 3, 1999).

Final Report explaining the March 10, 2000 technical amendments updating the rule published with the Court's Order at 30 Pa.B. 1641 (March 25, 2000).

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

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

Rule 411. Liability Insurance.

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

Comment

This rule is identical to F.R.E. 411.

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

Committee Explanatory Reports:

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

Rule 412. Sex Offense Cases: The Victim's Sexual Behavior or Predisposition (Not Adopted).

Comment

Pennsylvania has not adopted a Rule of Evidence comparable to F.R.E. 412. In Pennsylvania this subject is governed by 18 Pa.C.S. § 3104 (the "Rape Shield Law").

18 Pa.C.S. § 3104 provides:

§ 3104. Evidence of victim's sexual conduct

(a) *General rule.*—Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

(b) *Evidentiary proceedings.*—A defendant who proposes to offer evidence of the alleged victim's past sexual conduct pursuant to subsection (a) shall file a written motion and offer of proof at the time of trial. If, at the time of trial, the court determines that the motion and offer of proof are sufficient on their faces, the court shall order an in camera hearing and shall make findings on the record as to the relevance and admissibility of the proposed evidence pursuant to the standards set forth in subsection (a).

***Official Note*:** Comment rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

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

ARTICLE V. PRIVILEGES

Rule 501. Privileges.

Privileges as they now exist or may be modified by law shall be unaffected by the adoption of these rules.

Comment

Pa.R.E. 501 is similar to F.R.E. 501 in that this rule does not modify existing law.

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

Committee Explanatory Reports:

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

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver (Not Adopted).

ARTICLE VI. WITNESSES

Rule 601. Competency.

(a) *General Rule.* Every person is competent to be a witness except as otherwise provided by statute or in these rules.

(b) *Disqualification for Specific Defects.* A person is incompetent to testify if the court finds that because of a mental condition or immaturity the person:

(1) is, or was, at any relevant time, incapable of perceiving accurately;

(2) is unable to express himself or herself so as to be understood either directly or through an interpreter;

(3) has an impaired memory; or

(4) does not sufficiently understand the duty to tell the truth.

Comment

Pa.R.E. 601(a) differs from F.R.E. 601(a). It is consistent, instead, with Pennsylvania statutory law. 42 Pa.C.S. §§ 5911 and 5921 provide that all witnesses are competent except as otherwise provided. Pennsylvania statutory law provides several instances in which witnesses are incompetent. *See, e.g.*, 42 Pa.C.S. § 5922 (persons convicted in a Pennsylvania court of perjury incompetent in civil cases); 42 Pa.C.S. § 5924 (spouses incompetent to testify against each other in civil cases with certain exceptions set out in 42 Pa.C.S. §§ 5925, 5926, and 5927); 42 Pa.C.S. §§ 5930—5933 and 20 Pa.C.S. § 2209 ("Dead Man's statutes").

Pa.R.E. 601(b) has no counterpart in the Federal Rules. It is consistent with Pennsylvania law concerning the factors for determining competency of a person to testify, including persons with a mental defect and children of tender years. *See Commonwealth v. Baker*, 466 Pa. 479, 353 A.2d 454 (1976) (standards for determining competency generally); *Commonwealth v. Goldblum*, 498 Pa. 455, 447 A.2d 234 (1982) (mental capacity); *Rosche v. McCoy*, 397 Pa. 615, 156 A.2d 307 (1959) (immaturity).

Pennsylvania case law recognizes two other grounds for incompetency, a child's "tainted" testimony, and hypnotically refreshed testimony. In *Commonwealth v. Delbridge*, 578 Pa. 641, 855 A.2d 27 (2003), the Supreme Court reiterated concern for the susceptibility of children to suggestion and fantasy and held that a child witness can be rendered incompetent to testify where unduly suggestive or coercive interview techniques corrupt or "taint" the child's memory and ability to testify truthfully about that memory. *See also Commonwealth v. Judd*, 897 A.2d 1224 (Pa. Super. 2006).

In *Commonwealth v. Nazarovitch*, 496 Pa. 97, 436 A.2d 170 (1981), the Supreme Court rejected hypnotically refreshed testimony, where the witness had no prior independent recollection. Applying the test of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) for scientific testimony, the Court was not convinced that the process of hypnosis as a means of restoring forgotten or repressed memory had gained sufficient acceptance in its field. *Commonwealth v. Nazarovitch, supra*; *see also Commonwealth v. Romanelli*, 522 Pa. 222, 560 A.2d 1384 (1989) (when witness has been hypnotized, he or she may testify concerning matters recollected prior to hypnosis, but not about matters recalled only during or after hypnosis); *Commonwealth v. Smoyer*, 505 Pa. 83, 476 A.2d 1304 (1984) (same). Pa.R.E 601(b) is not intended to change these results. For the constitutional implications when a defendant in a criminal case, whose memory has been hypnotically refreshed, seeks to testify, see *Rock v. Arkansas*, 483 U.S. 44 (1987).

The application of the standards in Pa.R.E. 601(b) is a factual question to be resolved by the court as a preliminary question under Rule 104. The party challenging competency bears the burden of proving grounds of incompetency by clear and convincing evidence. *Commonwealth v. Delbridge*, 578 Pa. at 664, 855 A.2d at 40. In *Commonwealth v. Washington*, 554 Pa. 559, 722 A.2d 643 (1998), a case involving child witnesses, the Supreme Court announced a *per se* rule requiring trial courts to conduct competency hearings outside the presence of the jury. Expert testimony has been used when competency under these standards has been an issue. *See e.g.*, *Commonwealth v. Baker*, 466 Pa. 479, 353 A.2d 454 (1976); *Commonwealth v. Gaerttner*, 335 Pa. Super. 203, 484 A.2d 92 (1984).

***Official Note*:** Adopted May 8, 1998, effective October 1, 1998; amended November 2, 2007, effective December 14, 2007; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

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Rule 602. Need for Personal Knowledge.

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

Comment

This rule is identical to F.R.E. 602.

Personal or firsthand knowledge is a universal requirement of the law of evidence. *See Johnson v. Peoples Cab Co.*, 386 Pa. 513, 514—15, 126 A.2d 720, 721 (1956) ("The primary object of a trial in our American courts is to bring to the tribunal, which is passing on the dispute involved, those persons who know of their own knowledge the facts to which they testify."). Pa.R.E. 602 refers to Pa.R.E. 703 to make clear that there is no conflict with Rule 703, which permits an expert to base an opinion on facts not within the expert's personal knowledge.

It is implicit in Pa.R.E. 602 that the party calling the witness has the burden of proving personal knowledge. This is consistent with Pennsylvania law. *Carney v. Pennsylvania R.R. Co.*, 428 Pa. 489, 240 A.2d 71 (1968).

Generally speaking, the personal knowledge requirement of Rule 602 is applicable to the declarant of a hearsay statement. *See, e.g.*, *Commonwealth v. Pronkoskie*, 477 Pa. 132, 383 A.2d 858 (1978) and *Carney v. Pennsylvania R.R. Co.*, 428 Pa. 489, 240 A.2d 71 (1968). However, personal knowledge is not required for an opposing party's statement under Pa.R.E. 803(25). *See Salvitti v. Throppe*, 343 Pa. 642, 23 A.2d 445 (1942); *Carswell v. SEPTA*, 259 Pa. Super. 167, 393 A.2d 770 (1978). In addition, Pa.R.E. 804(b)(4) explicitly dispenses with the need for personal knowledge for statements of personal or family history, and Pa.R.E. 803(19), (20) and (21) impliedly do away with the personal knowledge requirement by permitting testimony as to reputation to prove personal or family history, boundaries or general history, and a person's character.

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

Committee Explanatory Reports:

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

Rule 603. Oath or Affirmation to Testify Truthfully.

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

Comment

This rule is identical to F.R.E. 603.

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

Committee Explanatory Reports:

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Rule 604. Interpreter.

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

Comment

In 2006, legislation was enacted pertaining to the certification, appointment, and use of interpreters in judicial and administrative proceedings for persons having limited proficiency with the English language and persons who are deaf. *See* 42 Pa.C.S. §§ 4401—4438; 2 Pa.C.S. §§ 561—588. Pursuant to this legislation, the Administrative Office of the Pennsylvania Courts ("AOPC") has implemented an interpreter program for judicial proceedings. *See* 204 Pa. Code §§ 221.101—.407. Information on the court interpreter program and a roster of court interpreters may be obtained from the AOPC web site at www.pacourts.us/t/aopc/courtinterpreterprog.

***Official Note*: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 29, 2001, effective April 1, 2001; amended and Comment revised March 21, 2012, effective in 30 days; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

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

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

Rule 605. Judge's Competency as a Witness.

The presiding judge may not testify as a witness at the trial or other proceeding.

Comment

This rule differs from the first sentence of F.R.E. 605 with the inclusion of "or other proceeding." Pa.R.E. 605 makes a judge absolutely incompetent to be a witness on any matter in any proceeding at which the judge presides. *Cf. Municipal Publications, Inc. v. Court of Common Pleas*, 507 Pa. 194, 489 A.2d 1286 (1985) (applying Canon 3C of the Pennsylvania Code of Judicial Conduct, and holding that at a hearing on a motion to recuse a judge, the judge himself could not testify on the issues raised in the motion and continue to preside at the hearing).

The second sentence of F.R.E. 605 which provides, "A party need not object to preserve the issue," is not adopted. This is consistent with Pa.R.E. 103(a) which provides that error may not be predicated on a ruling admitting evidence in the absence of a timely objection, motion to strike, or motion in limine. Of course, the court should permit the making of the objection out of the presence of the jury. *See* Pa.R.E. 103(d).

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

Committee Explanatory Reports:

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

Rule 606. Juror's Competency as a Witness.

(a) *At the Trial.* A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

(b) *During an Inquiry into the Validity of a Verdict*

(1) *Prohibited Testimony or Other Evidence.* During an inquiry into the validity of a verdict, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) *Exceptions.* A juror may testify about whether:

(A) prejudicial information not of record and beyond common knowledge and experience was improperly brought to the jury's attention; or

(B) an outside influence was improperly brought to bear on any juror.

Comment

Pa.R.E. 606(a) is identical to F.R.E. 606(a). Note that this paragraph bars a juror from testifying "before the other jurors at the trial." That phrase indicates that a juror may testify outside the presence of the rest of the jury on matters occurring during the course of the trial. *See, e.g.*, *Commonwealth v. Santiago*, 456 Pa. 265, 318 A.2d 737 (1974) (jurors permitted to testify at hearing in chambers during trial on question of whether they received improper prejudicial information).

Pa.R.E. 606(b) differs from F.R.E. 606(b). First, the words, "extraneous prejudicial information" in F.R.E. 606(b)(2)(A) have been replaced by the phrase "prejudicial information not of record and beyond common knowledge and experience." This makes clear that the exception is directed at evidence brought before the jury which was not presented during the trial, and which was not tested by the processes of the adversary system and subjected to judicial screening for a determination of admissibility. The qualification of "common knowledge and experience" is a recognition that all jurors bring with them some common facts of life.

Second, the word "indictment" has been omitted because challenges to indicting grand juries and jurors are the subject of Pa.R.Crim.P. 556.4.

Third, Pa.R.E. 606(b)(2) does not contain the third exception to juror incompetency that appears in F.R.E. 606(b)(2)(C)—permitting juror testimony about whether there was a mistake in entering the verdict onto the verdict form. Pennsylvania law deals with possible mistakes in the verdict form by permitting the polling of the jury prior to the recording of the verdict. If there is no concurrence, the jury is directed to retire for further deliberations. *See* Pa.R.Crim.P. 648(G); *City of Pittsburgh*

v. Dinardo, 410 Pa. 376, 189 A.2d 886 (1963); *Barefoot v. Penn Central Transportation Co.*, 226 Pa. Super. 558, 323 A.2d 271 (1974).

Pa.R.E. 606(b) does not purport to set forth the substantive grounds for setting aside verdicts because of an irregularity.

***Official Note*:** Adopted May 8, 1998, effective October 1, 1998; Comment revised September 17, 2007, October 17, 2007; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the September 17, 2007 revision of the Comment published with the Court's Order at 37 Pa.B. 5247 (September 29, 2007).

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

Rule 607. Who May Impeach a Witness, Evidence to Impeach a Witness.

(a) *Who May Impeach a Witness.* Any party, including the party that called the witness, may attack the witness's credibility.

(b) *Evidence to Impeach a Witness.* The credibility of a witness may be impeached by any evidence relevant to that issue, except as otherwise provided by statute or these rules.

Comment

Pa.R.E. 607(a) is identical to F.R.E. 607. It abolishes the common law rule that prohibited a party from impeaching a witness called by that party.

The Federal Rules have no provision similar to Pa.R.E. 607(b). Pa.R.E. 607(b) applies the test for relevant evidence of Pa.R.E. 401 to evidence offered to impeach the credibility of a witness. As is the case under Pa.R.E. 402, there are limits on the admissibility of evidence relevant to the credibility of a witness imposed by these rules. For example, Pa.R.E. 403 excludes relevant evidence if its probative value is outweighed by danger of unfair prejudice, etc., and there are specific limitations on impeachment imposed by Rules 608, 609 and 610. There are statutory limitations such as 18 Pa.C.S. § 3104 (Rape Shield Law).

Pa.R.E. 607(b), however, is not curtailed by 42 Pa.C.S. § 5918, which prohibits, with certain exceptions, the questioning of a defendant who testifies in a criminal case for the purpose of showing that the defendant has committed, been convicted of or charged with another offense or that the defendant has a bad character or reputation. In *Commonwealth v. Bighum*, 452 Pa. 554, 307 A.2d 255 (1973), this statute was interpreted to apply only to cross-examination. Hence, it affects only the timing and method of impeachment of a defendant; it does not bar the impeachment entirely.

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

Committee Explanatory Reports:

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Rule 608. A Witness's Character for Truthfulness or Untruthfulness.

(a) *Reputation Evidence.* A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked. Opinion testimony about the witness's character for truthfulness or untruthfulness is not admissible.

(b) *Specific Instances of Conduct.* Except as provided in Rule 609 (relating to evidence of conviction of crime),

(1) the character of a witness for truthfulness may not be attacked or supported by cross-examination or extrinsic evidence concerning specific instances of the witness' conduct; however,

(2) in the discretion of the court, the credibility of a witness who testifies as to the reputation of another witness for truthfulness or untruthfulness may be attacked by cross-examination concerning specific instances of conduct (not including arrests) of the other witness, if they are probative of truthfulness or untruthfulness; but extrinsic evidence thereof is not admissible.

Comment

Pa.R.E. 608(a) differs from F.R.E. 608(a) in that the Federal Rule permits character for truthfulness or untruthfulness to be attacked or supported by testimony about the witness's reputation or by opinion testimony. Under Pa.R.E. 608(a), opinion testimony is not admissible. This approach is consistent with Pennsylvania law. *See Commonwealth v. Lopinson*, 427 Pa. 284, 234 A.2d 552 (1967), *vacated on other grounds*, 392 U.S. 647 (1968). *Compare* Pa.R.E. 405(a).

Pa.R.E. 608(b)(1) differs from F.R.E. 608(b). Pa.R.E. 608(b)(1) prohibits the use of evidence of specific instances of conduct to support or attack credibility. This is consistent with Pennsylvania law. *See Commonwealth v. Cragle*, 281 Pa. Super. 434, 422 A.2d 547 (1980). F.R.E. 608(b)(1) prohibits the use of extrinsic evidence for this purpose, but permits cross-examination of a witness about specific instances of conduct reflecting on the witness's credibility within the court's discretion. Both the Pennsylvania and the Federal Rule refer the issue of attacking a witness's credibility with evidence of prior convictions to Rule 609.

Pa.R.E. 608(b)(2) is similar to F.R.E. 608(b); it permits a witness who has testified to another witness's character for truthfulness to be cross-examined, about specific instances of conduct of the principal witness, in the discretion of the court. Pa.R.E. 608(b)(2) makes it clear that although the cross-examination concerns the specific acts of the principal witness, that evidence affects the credibility of the character witness only. This is in accord with Pennsylvania law. *See Commonwealth v. Peterkin*, 511 Pa. 299, 513 A.2d 373 (1986); *Commonwealth v. Adams*, 426 Pa. Super. 332, 626 A.2d 1231 (1993). In addition, Pa.R.E. 608(b)(2) excludes the use of arrests; this, too, is consistent with Pennsylvania law. *See Commonwealth v. Scott*, 496 Pa. 188, 436 A.2d 607 (1981). Because cross-examination concerning specific instances of conduct is subject to abuse, the cross-examination is not automatic; rather, its use is specifically placed in the discretion of the court, and like all other relevant evidence, it is subject to the balancing test of Pa.R.E. 403. Moreover, the court should take care that the cross-examiner has a reasonable basis for the questions asked. *See Adams, supra*.

Finally, the last paragraph of F.R.E. 608(b), which provides that the giving of testimony by an accused or any other witness is not a waiver of the privilege against

self-incrimination when the examination concerns matters relating only to credibility, is not adopted.

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Committee Explanatory Reports:

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Rule 609. Impeachment by Evidence of a Criminal Conviction.

(a) *In General.* For the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime, whether by verdict or by plea of guilty or *nolo contendere*, must be admitted if it involved dishonesty or false statement.

(b) *Limit on Using the Evidence After 10 Years.* This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(c) *Effect of Pardon or Other Equivalent Procedure.* Evidence of a conviction is not admissible under this rule if the conviction has been the subject of one of the following:

(1) a pardon or other equivalent procedure based on a specific finding of innocence; or

(2) a pardon or other equivalent procedure based on a specific finding of rehabilitation of the person convicted, and that person has not been convicted of any subsequent crime.

(d) *Juvenile Adjudications.* In a criminal case only, evidence of the adjudication of delinquency for an offense under the Juvenile Act, 42 Pa.C.S. §§ 6301 *et seq.*, may be used to impeach the credibility of a witness if conviction of the offense would be admissible to attack the credibility of an adult.

(e) *Pendency of an Appeal.* A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

Comment

Pa.R.E. 609(a) differs from F.R.E. 609(a). It is designed to be consistent with Pennsylvania case law. *See Commonwealth v. Randall*, 515 Pa. 410, 528 A.2d 1326 (1987); *Commonwealth v. Bighum*, 452 Pa. 554, 307 A.2d 255 (1973). In addition, Pa.R.E. 609(a), unlike F.R.E. 609(a)(2), specifically provides that a conviction based upon a plea of *nolo contendere* may be used to attack the credibility of a witness; this, too, is consistent with prior Pennsylvania case law. *See Commonwealth v. Snyder*, 408 Pa. 253, 182 A.2d 495 (1962).

As a general rule, evidence of a jury verdict of guilty or a plea of guilty or *nolo contendere* may not be used to attack the credibility of a witness before the court has pronounced sentence. *See Commonwealth v. Zapata*, 455 Pa. 205, 314 A.2d 299 (1974). In addition, evidence of admission to an Accelerated Rehabilitative Disposition program under Pa.R.Crim.P. 310—320 may not be used to attack credibility. *See Commonwealth v. Krall*, 290 Pa. Super. 1, 434 A.2d 99 (1981).

42 Pa.C.S. § 5918 provides (with certain exceptions) that when a defendant in a criminal case has been called to testify in his or her own behalf he or she cannot be cross-examined about prior convictions. However, evidence of a prior conviction or convictions of a crime or crimes admissible under paragraph (a) may be introduced in rebuttal after the defendant has testified. *See Commonwealth v. Bighum*, 452 Pa. 554, 307 A.2d 255 (1973).

Pa.R.E. 609(b) differs slightly from F.R.E. 609(b) in that the phrase "supported by specific facts and circumstances," used in F.R.E. 609(b)(1) with respect to the balancing of probative value and prejudicial effect, has been eliminated. Pa.R.E. 609(b) basically tracks what was said in *Commonwealth v. Randall*, 515 Pa. 410, 528 A.2d 1326 (1987). Where the date of conviction or last date of confinement is within ten years of the trial, evidence of the conviction of a *crimen falsi* is *per se* admissible. If more than ten years have elapsed, the evidence may be used only after written notice and the trial judge's determination that its probative value substantially outweighs its prejudicial effect. The relevant factors for making this determination are set forth in *Bighum, supra*, and *Commonwealth v. Roots*, 482 Pa. 33, 393 A.2d 364 (1978). For the computation of the ten-year period, where there has been a reincarceration because of a parole violation, see *Commonwealth v. Jackson*, 526 Pa. 294, 585 A.2d 1001 (1991).

Pa.R.E. 609(c) differs from F.R.E. 609(c) because the Federal Rule includes procedures that are not provided by Pennsylvania law.

Pa.R.E. 609(d) differs from F.R.E. 609(d). Under the latter, evidence of juvenile adjudications is generally inadmissible to impeach credibility, except in criminal cases against a witness other than the accused where the court finds that the evidence is necessary for a fair determination of guilt or innocence. Pa.R.E. 609(d), to be consistent with 42 Pa.C.S. § 6354(b)(4), permits a broader use; a juvenile adjudication of an offense may be used to impeach in a criminal case if conviction of the offense would be admissible if committed by an adult. Juvenile adjudications may also be admissible for other purposes. *See* 42 Pa.C.S. § 6354(b)(1), (2), and (3).

Pa.R.E. 609(e) is identical to F.R.E. 609(e).

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Committee Explanatory Reports:

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

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

Rule 610. Religious Beliefs or Opinions.

Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

Comment

This rule is identical to F.R.E. 610. It is consistent with 42 Pa.C.S. § 5902, which provides that religious beliefs and opinions shall not affect a person's "capacity" to

testify, that no witness shall be questioned about those beliefs or opinions, and that no evidence shall be heard on those subjects for the purpose of affecting "competency or credibility."

Pa.R.E. 610 bars evidence of a witness's religious beliefs or opinions only when offered to show that the beliefs or opinions affect the witness's truthfulness. Pa.R.E. 610 does not bar such evidence introduced for other purposes. *See McKim v. Philadelphia Transp. Co.*, 364 Pa. 237, 72 A.2d 122 (1950); *Commonwealth v. Riggins*, 374 Pa. Super. 243, 542 A.2d 1004 (1988).

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Committee Explanatory Reports:

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

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence.

(a) *Control by the Court; Purposes.* The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

(1) make those procedures effective for determining the truth;

(2) avoid wasting time; and

(3) protect witnesses from harassment or undue embarrassment.

(b) *Scope of Cross-Examination.* Cross-examination of a witness other than a party in a civil case should be limited to the subject matter of the direct examination and matters affecting credibility, however, the court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination. A party witness in a civil case may be cross-examined by an adverse party on any matter relevant to any issue in the case, including credibility, unless the court, in the interests of justice, limits the cross-examination with respect to matters not testified to on direct examination.

(c) *Leading Questions.* Leading questions should not be used on direct or redirect examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

(1) on cross-examination; and

(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Comment

Pa.R.E. 611(a) is identical to F.R.E. 611(a).

Pa.R.E. 611(b) differs from F.R.E. 611(b). F.R.E. 611(b) limits the scope of cross-examination of all witnesses to matters testified to on direct and matters bearing on credibility, unless the court in its discretion allows inquiry into additional matters as if on direct examination. This has been the traditional view in the Federal courts and many State courts. The cross-examiner does not lose the opportunity to develop the evidence because, unless the witness is the accused in a criminal case, the cross-examiner may call the witness as his or her own. Therefore, the introduction of the evidence is merely deferred.

Pa.R.E. 611(b), which is based on Pennsylvania law, applies the traditional view in both civil and criminal cases to all witnesses except a party in a civil case. Under Pa.R.E. 611(b), a party in a civil case may be cross-examined on all relevant issues and matters affecting credibility. *See Agate v. Dunleavy*, 398 Pa. 26, 156 A.2d 530 (1959); *Greenfield v. Philadelphia*, 282 Pa. 344, 127 A. 768 (1925). However, in both of those cases, the Court stated that the broadened scope of cross-examination of a party in a civil case does not permit a defendant to put in a defense through cross-examination of the plaintiff. The qualifying clause in the last sentence of Pa.R.E. 611(b) is intended to give the trial judge discretion to follow this longstanding rule.

When the accused in a criminal case is the witness, there is an interplay between the limited scope of cross-examination and the accused's privilege against self-incrimination. When the accused testifies generally as to facts tending to negate or raise doubts about the prosecution's evidence, he or she has waived the privilege and may not use it to prevent the prosecution from bringing out on cross-examination every circumstance related to those facts. *See Commonwealth v. Green*, 525 Pa. 424, 581 A.2d 544 (1990). However, when the accused's testimony is limited to a narrow topic, there is some authority that the scope of cross-examination may be limited as well. *See Commonwealth v. Camm*, 443 Pa. 253, 277 A.2d 325 (1971); *Commonwealth v. Ulen*, 414 Pa. Super. 502, 607 A.2d 779 (1992), *rev'd on other grounds*, 539 Pa. 51, 650 A.2d 416 (1994).

Pa.R.E. 611(c) differs from F.R.E. 611(c) in that the word "redirect" has been added to the first sentence. This is consistent with Pennsylvania law. *See Commonwealth v. Reidenbaugh*, 282 Pa.Super. 300, 422 A.2d 1126 (1980).

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Committee Explanatory Reports:

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Rule 612. Writing or Other Item Used to Refresh a Witness's Memory.

(a) *Right to Refresh Memory.* A witness may use a writing or other item to refresh memory for the purpose of testifying while testifying, or before testifying.

(b) *Rights of Adverse Party.*

(1) If a witness uses a writing or other item to refresh memory while testifying, an adverse party is entitled to have it produced at the hearing, trial or deposition, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony.

(2) If a witness uses a writing or other item to refresh memory before testifying, and the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have it produced at the hearing, trial or deposition, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony.

(c) *Rights of Producing Party.* If the producing party claims that the writing or other item includes unrelated matter, the court must examine it in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(d) *Failure to Produce or Deliver.* If the writing or other item is not produced or is not delivered as ordered, the

court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or—if justice so requires—declare a mistrial, or the court may use contempt procedures.

Comment

Pa.R.E. 612 differs from F.R.E. in several ways:

Pa.R.E. 612 applies to writings and other items. This would include such things as photographs, videos, and recordings. F.R.E 612 applies only to writings. The Pennsylvania rule is consistent with prior law. *See Commonwealth v. Proctor*, 253 Pa. Super. 369, 385 A.2d 383 (1978).

Pa.R.E. 612(a) states that a witness or a party has a right to refresh recollection. This is not expressly provided by F.R.E. 612.

Pa.R.E. 612(b) reorganizes the material that appears in F.R.E. 612(a) and the first sentence of F.R.E. 612(b) for clarity, includes the word "deposition" to clarify that the rule is applicable both at hearings and depositions, and deletes reference to 18 U.S.C. § 3500.

Paragraph (c) differs from the second sentence of F.R.E. 612(b) in that it refers to other items as well as writings.

Paragraph (d) differs from F.R.E. 612(c) in that it adds the phrase "or the court may use contempt procedures".

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Committee Explanatory Reports:

Final Report explaining the March 23, 1999 technical amendments to paragraph (a) published with the Court's Order at 29 Pa.B. 1714 (April 3, 1999).

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

Rule 613. Witness's Prior Inconsistent Statement to Impeach; Witness's Prior Consistent Statement to Rehabilitate.

(a) *Witness's Prior Inconsistent Statement to Impeach.* A witness may be examined concerning a prior inconsistent statement made by the witness to impeach the witness's credibility. The statement need not be shown or its contents disclosed to the witness at that time, but on request the statement or contents must be shown or disclosed to an adverse party's attorney.

(b) *Extrinsic Evidence of a Witness's Prior Inconsistent Statement.* Unless the interests of justice otherwise require, extrinsic evidence of a witness's prior inconsistent statement is admissible only if, during the examination of the witness,

(1) the statement, if written, is shown to, or if not written, its contents are disclosed to, the witness;

(2) the witness is given an opportunity to explain or deny the making of the statement; and

(3) an adverse party is given an opportunity to question the witness.

This paragraph does not apply to an opposing party's statement as defined in Rule 803(25).

(c) *Witness's Prior Consistent Statement to Rehabilitate.* Evidence of a witness's prior consistent statement is admissible to rehabilitate the witness's credibility if the opposing party is given an opportunity to cross-examine the witness about the statement and the statement is offered to rebut an express or implied charge of:

(1) fabrication, bias, improper influence or motive, or faulty memory and the statement was made before that which has been charged existed or arose; or

(2) having made a prior inconsistent statement, which the witness has denied or explained, and the consistent statement supports the witness's denial or explanation.

Comment

Pa.R.E 613 differs from F.R.E. 613 to clarify its meaning and to conform to Pennsylvania law.

Pa.R.E. 613(a) and (b) are similar to F.R.E. 613(a) and (b), but the headings and the substance make it clear that the paragraphs are dealing with the use of an inconsistent statement to impeach. The disclosure requirement in paragraph (a) is intended to deter sham allegations of the existence of an inconsistent statement.

Pa.R.E. 613(b) differs from F.R.E. 613(b) in that extrinsic evidence of a prior inconsistent statement is not admissible unless the statement is shown or disclosed to the witness during the witness's examination. Paragraph (b) is intended to give the witness and the party a fair opportunity to explain or deny the allegation.

F.R.E. 613 does not contain a paragraph (c); it does not deal with rehabilitation of a witness with a prior consistent statement. Pa.R.E. 613(c) gives a party an opportunity to rehabilitate the witness with a prior consistent statement where there has been an attempt to impeach the witness. In most cases, a witness's prior statement is hearsay, but F.R.E. 801(d)(1)(B) treats some prior consistent statements offered to rebut impeachment as not hearsay. Pa.R.E. 613(c) is consistent with Pennsylvania law in that the prior consistent statement is admissible, but only to rehabilitate the witness. *See Commonwealth v. Hutchinson*, 521 Pa. 482, 556 A.2d 370 (1989) (to rebut charge of recent fabrication); *Commonwealth v. Smith*, 518 Pa. 15, 540 A.2d 246 (1988) (to counter alleged corrupt motive); *Commonwealth v. Swinson*, 426 Pa. Super. 167, 626 A.2d 627 (1993) (to negate charge of faulty memory); *Commonwealth v. McEachin*, 371 Pa. Super. 188, 537 A.2d 883 (1988) (to offset implication of improper influence).

Pa.R.E. 613(c)(2) is arguably an extension of Pennsylvania law, but is based on the premise that when an attempt has been made to impeach a witness with an alleged prior inconsistent statement, a statement consistent with the witness's testimony should be admissible to rehabilitate the witness if it supports the witness's denial or explanation of the alleged inconsistent statement.

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Committee Explanatory Reports:

Final Report explaining the March 23, 1999 technical amendments to paragraph (b)(3) published with the Court's Order at 29 Pa.B. 1714 (April 3, 1999).

Final Report explaining the March 10, 2000 amendments adding "inconsistent" to section (a) published with the Court's Order at 30 Pa.B. 1645 (March 25, 2000).

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

Rule 614. Court's Calling or Examining a Witness.

(a) *Calling.* Consistent with its function as an impartial arbiter, the court, with notice to the parties, may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.

(b) *Examining.* Where the interest of justice so requires, the court may examine a witness regardless of who calls the witness.

(c) *Objections.* A party may object to the court's calling or examining a witness when given notice that the witness will be called or when the witness is examined. When requested to do so, the court must give the objecting party an opportunity to make objections out of the presence of the jury.

Comment

Pa.R.E. 614(a) and (b) differ from F.R.E. 614(a) and (b) in several respects. The phrase relating to the court's "function as an impartial arbiter" has been added to Pa.R.E. 614(a), and the clause regarding "interest of justice" has been added in Pa.R.E. 614(b). These additions are consistent with Pennsylvania law. *See Commonwealth v. Crews*, 429 Pa. 16, 239 A.2d 350 (1968); *Commonwealth v. DiPasquale*, 424 Pa. 500, 230 A.2d 449 (1967); *Commonwealth v. Myma*, 278 Pa. 505, 123 A. 486 (1924).

Pa.R.E. 614(a) also differs from F.R.E. 614(a) in that the Pennsylvania Rule requires the court to give notice of its intent to call a witness.

Pa.R.E. 614(c), unlike F.R.E. 614(c), does not permit an objection to the court's calling or questioning a witness "at the next available opportunity when the jury is not present." Pa.R.E. 614(c) is consistent with Pa.R.E. 103(a)(1)(A), which requires a "timely objection." The requirement that the objecting party be given an opportunity make its objection out of the presence of the jury is consistent with Pa.R.E. 103(d).

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Committee Explanatory Reports:

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Rule 615. Sequestering Witnesses.

At a party's request the court may order witnesses sequestered so that they cannot learn of other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize sequestering:

(a) a party who is a natural person;

(b) an officer or employee of a party that is not a natural person (including the Commonwealth) after being designated as the party's representative by its attorney;

(c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or

(d) a person authorized by statute or rule to be present.

Comment

Pa.R.E. 615 differs from F.R.E. 615 in that the word "sequestering" is used instead of the word "excluding", and the rule is discretionary not mandatory. Both of these are consistent with prior Pennsylvania law. *See Commonwealth v. Albrecht*, 510 Pa. 603, 511 A.2d 764 (1986). Pa.R.E. 615 uses the term "learn of" rather than the word "hear." This indicates that the court's order may prohibit witnesses from using other means of learning of the testimony of other witnesses.

Pa.R.E. 615(b) adds the parenthetical "(including the Commonwealth)."

Pa.R.E 615(d) differs from the Federal Rule in that it adds the words "or rule." This includes persons such as the guardian of a minor, see Pa.R.C.P. No. 2027, and the guardian of an incapacitated person, see Pa.R.C.P. No. 2053.

The trial court has discretion in choosing a remedy for violation of a sequestration order. *See Commonwealth v. Smith*, 464 Pa. 314, 346 A.2d 757 (1975). Remedies include ordering a mistrial, forbidding the testimony of the offending witness, or an instruction to the jury. *Commonwealth v. Scott*, 496 Pa. 78, 436 A.2d 161 (1981).

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Committee Explanatory Reports:

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ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses.

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Comment

This rule is identical to F.R.E. 701.

On January 17, 2013, the Rules of Evidence were rescinded and replaced. *See* Pa.R.E. 101, Comment. Within Article VII, the term "inference" has been eliminated when used in conjunction with "opinion." The term "inference" is subsumed by the broader term "opinion" and Pennsylvania case law has not made a substantive decision on the basis of any distinction between an opinion and an inference. No change in the current practice was intended with the elimination of this term.

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Committee Explanatory Reports:

Final Report explaining the November 2, 2001, amendments published with the Court's Order at 31 Pa.B. 6384 (November 24, 2001).

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

Rule 702. Testimony by Expert Witnesses.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson;

(b) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and

(c) the expert's methodology is generally accepted in the relevant field.

Comment

Pa.R.E. 702(a) and (b) differ from F.R.E. 702 in that Pa.R.E. 702(a) and (b) impose the requirement that the expert's scientific, technical, or other specialized knowledge is admissible only if it is beyond that possessed by the average layperson. This is consistent with prior Pennsylvania law. *See Commonwealth v. O'Searo*, 466 Pa. 224, 229, 352 A.2d 30, 32 (1976).

Pa.R.E. 702(c) differs from F.R.E. 702 in that it reflects Pennsylvania's adoption of the standard in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The rule applies the "general acceptance" test for the admissibility of scientific, technical, or other specialized knowledge testimony. This is consistent with prior Pennsylvania law. *See Grady v. Frito-Lay, Inc.*, 576 Pa. 546, 839 A.2d 1038 (2003). The rule rejects the federal test derived from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Pa.R.E. 702 does not change the Pennsylvania rule for qualifying a witness to testify as an expert. In *Miller v. Brass Rail Tavern, Inc.*, 541 Pa. 474, 480-81, 664 A.2d 525, 528 (1995), the Supreme Court stated:

> The test to be applied when qualifying a witness to testify as an expert witness is whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation. If he does, he may testify and the weight to be given to such testimony is for the trier of fact to determine.

Pa.R.E. 702 does not change the requirement that an expert's opinion must be expressed with reasonable certainty. *See McMahon v. Young*, 442 Pa. 484, 276 A.2d 534 (1971).

Pa.R.E. 702 states that an expert may testify in the form of an "opinion or otherwise." Much of the literature assumes that experts testify only in the form of an opinion. The language "or otherwise" reflects the fact that experts frequently are called upon to educate the trier of fact about the scientific or technical principles relevant to the case.

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Committee Explanatory Reports:

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Rule 703. Bases of an Expert's Opinion Testimony.

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

Comment

This rule is identical to the first two sentences of F.R.E. 703. It does not include the third sentence of the Federal Rule that provides that the facts and data that are the bases for the expert's opinion are not admissible unless their probative value substantially outweighs their prejudicial effect. This is inconsistent with Pennsylvania law which requires that facts and data that are the bases for the expert's opinion must be disclosed to the trier of fact. *See* Pa.R.E. 705.

Pa.R.E. 703 requires that the facts or data upon which an expert witness bases an opinion be "of a type reasonably relied upon by experts in the particular field. . . ." Whether the facts or data satisfy this requirement is a preliminary question to be determined by the trial court under Pa.R.E. 104(a). If an expert witness relies on novel scientific evidence, Pa.R.C.P. No. 207.1 sets forth the procedure for objecting, by pretrial motion, on the ground that the testimony is inadmissible under Pa.R.E. 702, or Pa.R.E. 703, or both.

When an expert testifies about the underlying facts and data that support the expert's opinion and the evidence would be otherwise inadmissible, the trial judge upon request must, or on the judge's own initiative may, instruct the jury to consider the facts and data only to explain the basis for the expert's opinion, and not as substantive evidence.

An expert witness cannot be a mere conduit for the opinion of another. An expert witness may not relate the opinion of a non-testifying expert unless the witness has reasonably relied upon it in forming the witness's own opinion. *See, e.g.*, *Foster v. McKeesport Hospital*, 260 Pa. Super. 485, 394 A.2d 1031 (1978); *Allen v. Kaplan*, 439 Pa. Super. 263, 653 A.2d 1249 (1995).

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

Rule 704. Opinion on an Ultimate Issue.

An opinion is not objectionable just because it embraces an ultimate issue.

Comment

Pa.R.E. 704 is identical to F.R.E. 704(a).

F.R.E. 704(b) is not adopted. The Federal Rule prohibits an expert witness in a criminal case from stating an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or a defense. This is inconsistent with Pennsylvania law. *Commonwealth v. Walzack*, 468 Pa. 210, 360 A.2d 914 (1976).

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Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion.

If an expert states an opinion the expert must state the facts or data on which the opinion is based.

Comment

The text and substance of Pa.R.E. 705 differ significantly from F.R.E. 705. The Federal Rule generally does not require an expert witness to disclose the facts upon which an opinion is based prior to expressing the opinion. Instead, the cross-examiner bears the burden of probing the basis of the opinion. Pennsylvania does not follow the Federal Rule. *See Kozak v. Struth*, 515 Pa. 554, 560, 531 A.2d 420, 423 (1987) (declining to adopt F.R.E. 705, the Court reasoned that "requiring the proponent of an expert opinion to clarify for the jury the assumptions upon which the opinion is based avoids planting in the juror's mind a general statement likely to remain with him in the jury room when the disputed details are lost.") Relying on cross-examination to illuminate the underlying assumption, as F.R.E. 705 does, may further confuse jurors already struggling to follow complex testimony. *Id.*

Accordingly, *Kozak* requires disclosure of the facts used by the expert in forming an opinion. The disclosure can be accomplished in several ways. One way is to ask the expert to assume the truth of testimony the expert has heard or read. *Kroeger Co. v. W.C.A.B.*, 101 Pa. Cmwlth. 629, 516 A.2d 1335 (1986); *Tobash v. Jones*, 419 Pa. 205, 213 A.2d 588 (1965). Another option is to pose a hypothetical question to the expert. *Dietrich v. J.I. Case Co.*, 390 Pa. Super. 475, 568 A.2d 1272 (1990); *Hussey v. May Department Stores, Inc.*, 238 Pa. Super. 431, 357 A.2d 635 (1976).

When an expert testifies about the underlying facts and data that support the expert's opinion and the evidence would be otherwise inadmissible, the trial judge upon request must, or on the judge's own initiative may, instruct the jury to consider the facts and data only to explain the basis for the expert's opinion, and not as substantive evidence.

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

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Rule 706. Court-Appointed Expert Witnesses.

Where the court has appointed an expert witness, the witness appointed must advise the parties of the witness's findings, if any. The witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by any party, including a party calling the witness. In civil cases, the witness's deposition may be taken by any party.

Comment

Pa.R.E. 706 differs from F.R.E. 706. Unlike the Federal Rule, Pa.R.E. 706 does not affect the scope of the trial court's power to appoint experts. Pa.R.E. 706 provides only the procedures for obtaining the testimony of experts after the court has appointed them.

In *Commonwealth v. Correa*, 437 Pa. Super. 1, 648 A.2d 1199 (1994), abrogated on other grounds by *Commonwealth v. Weston*, 561 Pa. 199, 749 A.2d 458 (2000), the Superior Court held that the trial court had inherent power to appoint an expert. 23 Pa.C.S. § 5104 provides for the appointment of experts to conduct blood tests in paternity proceedings.

See also Pa.R.E. 614 (Court's Calling or Examining a Witness).

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

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ARTICLE VIII. HEARSAY

Rule 801. Definitions That Apply to This Article.

(a) *Statement.* "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) *Declarant.* "Declarant" means the person who made the statement.

(c) *Hearsay.* "Hearsay" means a statement that

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

Comment

Pa.R.E. 801(a), (b) and (c) are identical to F.R.E. 801(a), (b) and (c). The matters set out in F.R.E. 801(d)(1) (A Declarant-Witness's Prior Statement) are covered in Pa.R.E. 803.1(1) and (2) and Pa.R.E. 613(c). The matters set out in F.R.E. 801(d)(2) (An Opposing Party's Statement) are covered in Pa.R.E. 803(25).

Communications that are not assertions are not hearsay. These would include questions, greetings, expressions of gratitude, exclamations, offers, instructions, warnings, etc.

Pa.R.E. 801(c), which defines hearsay, is consistent with Pennsylvania law, although the Pennsylvania cases have usually defined hearsay as an "out-of-court statement offered to prove the truth of the matter asserted" instead of the definition used Pa.R.E. 801(c). *See Heddings v. Steele*, 514 Pa. 569, 526 A.2d 349 (1987). The adoption of the language of the Federal Rule is not intended to change existing law.

A statement is hearsay only if it is offered to prove the truth of the matter asserted in the statement. There are many situations in which evidence of a statement is offered for a purpose other than to prove the truth of the matter asserted.

Sometimes a statement has direct legal significance, whether or not it is true. For example, one or more statements may constitute an offer, an acceptance, a promise, a guarantee, a notice, a representation, a misrepresentation, defamation, perjury, compliance with a contractual or statutory obligation, etc.

More often, a statement, whether or not it is true, constitutes circumstantial evidence from which the trier of fact may infer, alone or in combination with other evidence, the existence or non-existence of a fact in issue. For example, a declarant's statement may imply his or her particular state of mind, or it may imply that a particular state of mind ensued in the recipient. Evidence of a statement, particularly if it is proven untrue by other evidence, may imply the existence of a conspiracy, or fraud. Evidence of a statement made by a witness, if inconsistent with the witness's testimony, may imply that the witness is an unreliable historian. Conversely, evidence of a statement made by a witness that is consistent with the witness's testimony may imply the opposite. *See* Pa.R.E. 613(c).

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Committee Explanatory Reports:

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

Rule 802. The Rule Against Hearsay.

Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Pennsylvania Supreme Court, or by statute.

Comment

Pa.R.E. 802 differs from F.R.E. 802 in that it refers to other rules prescribed by the Pennsylvania Supreme Court, and to statutes in general, rather than federal statutes.

Often, hearsay will be admissible under an exception provided by these rules. The organization of the Pennsylvania Rules of Evidence generally follows the organization of the Federal Rules of Evidence, but the Pennsylvania Rules' organization of the exceptions to the hearsay rule is somewhat different than the federal organization. There are three rules which contain the exceptions: Pa.R.E. 803 Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant is Available as a Witness, Pa.R.E. 803.1 Exceptions to the Rule Against Hearsay—Testimony of Declarant Necessary, and Pa.R.E. 804 Exceptions to the Rule Against Hearsay—When the Declarant is Unavailable as a Witness.

On occasion, hearsay may be admitted pursuant to another rule promulgated by the Pennsylvania Supreme Court. For example, in civil cases, all or part of a deposition may be admitted pursuant to Pa.R.C.P. No. 4020, or a video deposition of an expert witness may be admitted pursuant to Pa.R.C.P. No. 4017.1(g). In preliminary hearings in criminal cases, the court may consider hearsay evidence pursuant to Pa.R.Crim.P. 542(E) and 1003(E).

Also, hearsay may be admitted pursuant to a state statute. Examples include:

1. A public record may be admitted pursuant to 42 Pa.C.S. § 6104. *See* Comment to Pa.R.E. 803(8) (Not Adopted).

2. A record of vital statistics may be admitted pursuant to 35 P. S. § 450.810. *See* Comment to Pa.R.E. 803(9) (Not Adopted).

3. In a civil case, a deposition of a licensed physician may be admitted pursuant to 42 Pa.C.S. § 5936.

4. In a criminal case, a deposition of a witness may be admitted pursuant to 42 Pa.C.S. § 5919.

5. In a criminal or civil case, an out-of-court statement of a witness 12 years of age or younger, describing certain kinds of sexual abuse, may be admitted pursuant to 42 Pa.C.S. § 5985.1.

6. In a dependency hearing, an out-of-court statement of a witness under 16 years of age, describing certain types of sexual abuse, may be admitted pursuant to 42 Pa.C.S. § 5986.

7. In a prosecution for speeding under the Pennsylvania Vehicle Code, a certificate of accuracy of an electronic speed timing device (radar) from a calibration and testing station appointed by the Pennsylvania Department of Motor Vehicles may be admitted pursuant to 75 Pa.C.S. § 3368(d).

On rare occasion, hearsay may be admitted pursuant to a federal statute. For example, when a person brings a civil action, in either federal or state court, against a common carrier to enforce an order of the Interstate Commerce Commission requiring the payment of damages, the findings and order of the Commission may be introduced as evidence of the facts stated in them. 49 U.S.C. § 11704(d)(1).

Hearsay Exceptions and the Right of Confrontation of a Defendant in a Criminal Case

The exceptions to the hearsay rule in Rules 803, 803.1, and 804 and the exceptions provided by other rules or by

statute are applicable both in civil and criminal cases. In a criminal case, however, hearsay that is offered against a defendant under an exception from the hearsay rule provided by these rules or by another rule or statute may sometimes be excluded because its admission would violate the defendant's right "to be confronted with the witnesses against him" under the Sixth Amendment of the United States Constitution, or "to be confronted with the witnesses against him" under Article I, § 9 of the Pennsylvania Constitution.

The relationship between the hearsay rule and the Confrontation Clause in the Sixth Amendment was explained by the United States Supreme Court in *California v. Green*, 399 U.S. 149, 155-56 (1970):

> While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. . . .
>
> Given the similarity of the values protected, however, the modification of a State's hearsay rules to create new exceptions for the admission of evidence against a defendant, will often raise questions of compatibility with the defendant's constitutional right to confrontation.

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court, overruling its prior opinion in *Ohio v. Roberts*, 448 U.S. 56 (1980), interpreted the Confrontation Clause to prohibit the introduction of "testimonial" hearsay from an unavailable witness against a defendant in a criminal case unless the defendant had an opportunity to confront and cross-examine the declarant, regardless of its exception from the hearsay rule, except, perhaps, if the hearsay qualifies as a dying declaration (Pa.R.E. 804(b)(2)).

In short, when hearsay is offered against a defendant in a criminal case, the defendant may interpose three separate objections: (1) admission of the evidence would violate the hearsay rule, (2) admission of the evidence would violate defendant's right to confront the witnesses against him under the Sixth Amendment of the United States Constitution, and (3) admission of the evidence would violate defendant's right "to be confronted with the witnesses against him" under Article I, § 9 of the Pennsylvania Constitution.

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Final Report explaining the March 10, 2000 changes updating the seventh paragraph of the Comment published with the Court's Order at 30 Pa.B. 1641 (March 25, 2000).

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

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

Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness.

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) *Present Sense Impression.* A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

Comment

This rule is identical to F.R.E. 803(1).

For this exception to apply, declarant need not be excited or otherwise emotionally affected by the event or condition perceived. The trustworthiness of the statement arises from its timing. The requirement of contemporaneousness, or near contemporaneousness, reduces the chance of premeditated prevarication or loss of memory.

Rule 803(2). Excited Utterance.

(2) *Excited Utterance.* A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

Comment

This rule is identical to F.R.E. 803(2).

This exception has a more narrow base than the exception for a present sense impression, because it requires an event or condition that is *startling*. However, it is broader in scope because an excited utterance (1) need not describe or explain the startling event or condition; it need only *relate* to it, and (2) need not be made contemporaneously with, or immediately after, the startling event. It is sufficient if the stress of excitement created by the startling event or condition persists as a substantial factor in provoking the utterance.

There is no set time interval following a startling event or condition after which an utterance relating to it will be ineligible for exception to the hearsay rule as an excited utterance. In *Commonwealth v. Gore*, 262 Pa. Super. 540, 547, 396 A.2d 1302, 1305 (1978), the court explained:

> The declaration need not be strictly contemporaneous with the existing cause, nor is there a definite and fixed time limit. . . . Rather, each case must be judged on its own facts, and a lapse of time of several hours has not negated the characterization of a statement as an "excited utterance." . . . The crucial question, regardless of the time lapse, is whether, at the time the statement is made, the nervous excitement continues to dominate while the reflective processes remain in abeyance.

Rule 803(3). Then-Existing Mental, Emotional, or Physical Condition.

(3) *Then-Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then-existing state of mind (such as motive, intent or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of

memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

Comment

This rule is identical to F.R.E. 803(3).

Rule 803(4). Statement Made for Medical Diagnosis or Treatment.

(4) *Statement Made for Medical Diagnosis or Treatment.* A statement that:

(A) is made for—and is reasonably pertinent to—medical treatment or diagnosis in contemplation of treatment; and

(B) describes medical history, past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to treatment, or diagnosis in contemplation of treatment.

Comment

Pa.R.E. 803(4) differs from F.R.E. 803(4) in that it permits admission of statements made for purposes of medical diagnosis only if they are made in contemplation of treatment. Statements made to persons retained solely for the purpose of litigation are not admissible under this rule. The rationale for admitting statements for purposes of treatment is that the declarant has a very strong motivation to speak truthfully. This rationale is not applicable to statements made for purposes of litigation. Pa.R.E. 803(4) is consistent with Pennsylvania law. *See Commonwealth v. Smith*, 545 Pa. 487, 681 A.2d 1288 (1996).

An expert medical witness may base an opinion on the declarant's statements of the kind discussed in this rule, even though the statements were not made for purposes of treatment, if the statements comply with Pa.R.E. 703. Such statements may be disclosed as provided in Pa.R.E. 705, but are not substantive evidence.

This rule is not limited to statements made to physicians. Statements to a nurse have been held to be admissible. *See Smith, supra*. Statements as to causation may be admissible, but statements as to fault or identification of the person inflicting harm have been held to be inadmissible. *See Smith, supra*.

Rule 803(5). Recorded Recollection (Not Adopted).

(5) *Recorded Recollection (Not Adopted)*

Comment

Recorded recollection is dealt with in Pa.R.E. 803.1(3). It is an exception to the hearsay rule in which the testimony of the declarant is necessary.

Rule 803(6). Records of a Regularly Conducted Activity.

(6) *Records of a Regularly Conducted Activity.* A record (which includes a memorandum, report, or data compilation in any form) of an act, event or condition if,

(A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a "business", which term includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor other circumstances indicate a lack of trustworthiness.

Comment

Pa.R.E. 803(6) differs from F.R.E. 803(6). One difference is that Pa.R.E. 803(6) defines the term "record." In the Federal Rules this definition appears at F.R.E. 101(b). Another difference is that Pa.R.E. 803(6) applies to records of an act, event or condition, but does not include opinions and diagnoses. This is consistent with prior Pennsylvania case law. *See Williams v. McClain*, 513 Pa. 300, 520 A.2d 1374 (1987); *Commonwealth v. DiGiacomo*, 463 Pa. 449, 345 A.2d 605 (1975). A third difference is that Pa.R.E. 803(6) allows the court to exclude business records that would otherwise qualify for exception to the hearsay rule if neither the "source of information nor *other circumstances* indicate lack of trustworthiness." The Federal Rule allows the court to do so only if neither "the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness."

If offered against a defendant in a criminal case, an entry in a record may be excluded if its admission would violate the defendant's constitutional right to confront the witnesses against him or her. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

Rule 803(7). Absence of a Record of a Regularly Conducted Activity (Not Adopted).

(7) *Absence of a Record of a Regularly Conducted Activity (Not Adopted)*

Comment

Pennsylvania has not adopted F.R.E. 803(7) which provides:

> Evidence that a matter is not included in a record described in paragraph (6) if:
>
> (A) the evidence is admitted to prove that the matter did not occur or exist; and
>
> (B) a record was regularly kept for a matter of that kind; and
>
> (C) neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

Principles of logic and internal consistency have led Pennsylvania to reject this rule. The absence of an entry in a record is not hearsay, as defined in Pa.R.E. 801(c). Hence, it appears irrational to except it to the hearsay rule.

On analysis, absence of an entry in a business record is circumstantial evidence—it tends to prove something by implication, not assertion. Its admissibility is governed by principles of relevance, not hearsay. *See* Pa.R.E. 401, *et seq*.

Pennsylvania law is in accord with the object of F.R.E. 803(7), *i.e.*, to allow evidence of the absence of a record of an act, event, or condition to be introduced to prove the nonoccurrence or nonexistence thereof, if the matter was one which would ordinarily be recorded. *See Klein v. F.W. Woolworth Co.*, 309 Pa. 320, 163 A. 532 (1932) (absence of person's name in personnel records admissible to prove

that he was not an employee). *See also Stack v. Wapner*, 244 Pa. Super. 278, 368 A.2d 292 (1976).

Rule 803(8). Public Records (Not Adopted).

(8) *Public Records (Not Adopted)*

Comment

Pennsylvania has not adopted F.R.E. 803(8). An exception to the hearsay rule for public records is provided by 42 Pa.C.S. § 6104 which provides:

(a) *General rule.*—A copy of a record of governmental action or inaction authenticated as provided in section 6103 (relating to proof of official records) shall be admissible as evidence that the governmental action or inaction disclosed therein was in fact taken or omitted.

(b) *Existence of facts.*—A copy of a record authenticated as provided in section 6103 disclosing the existence or nonexistence of facts which have been recorded pursuant to official duty or would have been so recorded had the facts existed shall be admissible as evidence of the existence or nonexistence of such facts, unless the sources of information or other circumstances indicate lack of trustworthiness.

Subsection (b) of the statute is limited to "facts." It does not include opinions or diagnoses. This is consistent with Pa.R.E. 803(6), and Pennsylvania case law. *See* Comment to Pa.R.E. 803(6).

Rule 803(9). Public Records of Vital Statistics (Not Adopted).

(9) *Public Records of Vital Statistics (Not Adopted)*

Comment

Pennsylvania has not adopted F.R.E. 803(9). Records of vital statistics are also records of a regularly conducted activity and may be excepted to the hearsay rule by Pa.R.E. 803(6). Records of vital statistics are public records and they may be excepted to the hearsay rule by 42 Pa.C.S. § 6104 (text quoted in Comment to Pa.R.E. 803(8)).

The Vital Statistics Law of 1953, 35 P. S. § 450.101 *et seq.*, provides for registration of births, deaths, fetal deaths, and marriages, with the State Department of Health. The records of the Department, and duly certified copies thereof, are excepted to the hearsay rule by 35 P. S. § 450.810 which provides:

Any record or duly certified copy of a record or part thereof which is (1) filed with the department in accordance with the provisions of this act and the regulations of the Advisory Health Board and which (2) is not a "delayed" record filed under section seven hundred two of this act or a record "corrected" under section seven hundred three of this act shall constitute *prima facie* evidence of its contents, except that in any proceeding in which paternity is controverted and which affects the interests of an alleged father or his successors in interest no record or part thereof shall constitute *prima facie* evidence of paternity unless the alleged father is the husband of the mother of the child.

Rule 803(10). Absence of a Public Record (Not Adopted).

(10) *Absence of a Public Record (Not Adopted)*

Comment

Pennsylvania has not adopted F.R.E. 803(10) for the same reasons that it did not adopt F.R.E. 803(7). *See* Comment to Pa.R.E. 803(7).

42 Pa.C.S. § 6104(b), provides for admissibility of evidence of the absence of an entry in a public record to prove the nonexistence of a fact:

(b) *Existence of facts.*—A copy of a record authenticated as provided in section 6103 disclosing the . . . nonexistence of facts which . . . would have been . . . recorded had the facts existed shall be admissible as evidence of the . . . nonexistence of such facts, unless the sources of information or other circumstances indicate lack of trustworthiness.

Pennsylvania also has a complementary statute, 42 Pa.C.S. § 5328, entitled "Proof of Official Records," which provides, in pertinent part:

(d) *Lack of record.*—A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in this section in the case of a domestic record, or complying with the requirements of this section for a summary in the case of a record in a foreign country, is admissible as evidence that the records contain no such record or entry.

Rule 803(11). Records of Religious Organizations Concerning Personal or Family History.

(11) *Records of Religious Organizations Concerning Personal or Family History.* A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

Comment

This rule is identical to F.R.E. 803(11).

Rule 803(12). Certificates of Marriage, Baptism, and Similar Ceremonies.

(12) *Certificates of Marriage, Baptism, and Similar Ceremonies.* A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

Comment

This rule is identical to F.R.E. 803(12).

Rule 803(13). Family Records.

(13) *Family Records.* A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

Comment

This rule is identical to F.R.E. 803(13).

Rule 803(14). Records of Documents That Affect an Interest in Property.

(14) *Records of Documents That Affect an Interest in Property.* The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

Comment

This rule is identical to F.R.E. 803(14).

Rule 803(15). Statements in Documents That Affect an Interest in Property.

(15) *Statements in Documents That Affect an Interest in Property.* A statement contained in a document, other than a will, that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose—unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

Comment

Pa.R.E. 803(15) differs from F.R.E. 803(15) in that Pennsylvania does not include a statement made in a will.

Pennsylvania's variation from the federal rule with respect to wills is consistent with case law. *See In Re Estate of Kostik*, 514 Pa. 591, 526 A.2d 746 (1987).

Rule 803(16). Statements in Ancient Documents.

(16) *Statements in Ancient Documents.* A statement in a document that is at least 30 years old and whose authenticity is established.

Comment

Pa.R.E. 803(16) differs from F.R.E. 803(16) in that Pennsylvania adheres to the common law view that a document must be at least 30 years old to qualify as an ancient document. The Federal Rule reduces the age to 20 years.

Pa.R.E. 803(16) is consistent with Pennsylvania law. *See Louden v. Apollo Gas Co.*, 273 Pa. Super. 549, 417 A.2d 1185 (1980); *Commonwealth ex rel. Ferguson v. Ball*, 277 Pa. 301, 121 A.191 (1923).

Rule 803(17). Market Reports and Similar Commercial Publications.

(17) *Market Reports and Similar Commercial Publications.* Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

Comment

This rule is identical to F.R.E. 803(17).

Rule 803(18). Statements in Learned Treatises, Periodicals, or Pamphlets (Not Adopted).

(18) *Statements in Learned Treatises, Periodicals, or Pamphlets (Not Adopted)*

Comment

Pennsylvania has not adopted F.R.E. 803(18). Pennsylvania does not recognize an exception to the hearsay rule for learned treatises. *See Majdic v. Cincinnati Machine Co.*, 370 Pa. Super. 611, 537 A.2d 334 (1988).

Regarding the permissible uses of learned treatises under Pennsylvania law, see *Aldridge v. Edmunds*, 561 Pa. 323, 750 A.2d 292 (Pa. 2000).

Rule 803(19). Reputation Concerning Personal or Family History.

(19) *Reputation Concerning Personal or Family History.* A reputation among a person's family by blood, adoption, or marriage—or among a person's associates or in the community—concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

Comment

This rule is identical to F.R.E. 803(19). It changed prior Pennsylvania case law by expanding the sources from which the reputation may be drawn to include (1) a person's associates; and (2) the community. Prior Pennsylvania case law, none of which is recent, limited the source to the person's family. *See Picken's Estate*, 163 Pa. 14, 29 A. 875 (1894); *American Life Ins. and Trust Co. v. Rosenagle*, 77 Pa. 507 (1875).

Rule 803(20). Reputation Concerning Boundaries or General History.

(20) *Reputation Concerning Boundaries or General History.* A reputation in a community—arising before the controversy—concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state or nation.

Comment

This rule is identical to F.R.E. 803(20).

Rule 803(21). Reputation Concerning Character.

(21) *Reputation Concerning Character.* A reputation among a person's associates or in the community concerning the person's character.

Comment

This rule is identical to F.R.E. 803(21).

Rule 803(22). Judgment of a Previous Conviction (Not Adopted).

(22) *Judgment of a Previous Conviction (Not Adopted)*

Comment

Pennsylvania has not adopted F.R.E. 803(22).

With respect to facts essential to sustain a judgment of criminal conviction, there are four basic approaches that a court can take:

1. The judgment of conviction is conclusive, *i.e.*, estops the party convicted from contesting any fact essential to sustain the conviction.

2. The judgment of conviction is admissible as evidence of any fact essential to sustain the conviction, only if offered against the party convicted.

3. The judgment of conviction is admissible as evidence of any fact essential to sustain the conviction when offered against any party (this is the federal rule for felonies, except that the Government cannot offer someone else's conviction against the defendant in a criminal case, other than for purposes of impeachment).

4. The judgment of conviction is neither conclusive nor admissible as evidence to prove a fact essential to sustain the conviction (common law rule).

For felonies and other major crimes, Pennsylvania takes approach number one. In subsequent litigation, the convicted party is estopped from denying or contesting any fact essential to sustain the conviction. Once a party is estopped from contesting a fact, no evidence need be introduced by an adverse party to prove it. *See Hurtt v. Stirone*, 416 Pa. 493, 206 A.2d 624 (1965); *In re Estate of Bartolovich*, 420 Pa. Super. 419, 616 A.2d 1043 (1992) (judgment of conviction conclusive under Slayer's Act, 20 Pa.C.S. §§ 8801—8815).

For minor offenses, Pennsylvania takes approach number four; it applies the common law rule. Evidence of a conviction is inadmissible to prove a fact necessary to sustain the conviction. *See Loughner v. Schmelzer*, 421 Pa. 283, 218 A.2d 768 (1966).

A plea of guilty to a crime is excepted to the hearsay rule as an admission of all facts essential to sustain a conviction, but only when offered against the pleader by a party-opponent. *See* Pa.R.E. 803(25); *see also* Pa.R.E. 410. A plea of guilty may also qualify as an exception to the hearsay rule as a statement against interest, if the declarant is unavailable to testify at trial. *See* Pa.R.E. 804(b)(3).

Rule 803(23). Judgments Involving Personal, Family, or General History or a Boundary (Not Adopted).

(23) *Judgments Involving Personal, Family, or General History or a Boundary (Not Adopted)*

Comment

Pennsylvania has not adopted F.R.E. 803(23).

Rule 803(24). Other Exceptions (Not Adopted).

(24) *Other Exceptions (Not Adopted)*

Comment

Pennsylvania has not adopted F.R.E. 803(24) (now F.R.E. 807).

Rule 803(25). An Opposing Party's Statement.

(25) *An Opposing Party's Statement.* The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement may be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Comment

Pa.R.E. 803(25) differs from F.R.E. 801(d)(2), in that the word "must" in the last paragraph has been replaced with the word "may."

The Federal Rules treat these statements as "not hearsay" and places them in F.R.E 801(d)(2). The traditional view was that these statements were hearsay, but admissible as exceptions to the hearsay rule. The Pennsylvania Rules of Evidence follow the traditional view and place these statements in Pa.R.E. 803(25), as exceptions to the hearsay rule—regardless of the availability of the declarant. This differing placement is not intended to have substantive effect.

The statements in this exception were traditionally, and in prior versions of both the Federal Rules of Evidence and the Pennsylvania Rules of Evidence, called admissions, although in many cases the statements were not admissions as that term is employed in common usage. The new phrase used in the federal rules—an opposing party's statement—more accurately describes these statements and is adopted here.

The personal knowledge rule (Pa.R.E. 602) is not applicable to an opposing party's statement. *See Salvitti v. Throppe*, 343 Pa. 642, 23 A.2d 445 (1942).

***Official Note*: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 23, 1999, effective immediately; Comment revised March 10, 2000, effective immediately; Comment revised May 16, 2001, effective July 1, 2001; amended November 2, 2001, effective January 1, 2002; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the March 23, 1999 technical revisions to the Comment for paragraph 25 published with the Court's Order at 29 Pa.B. 1714 (April 3, 1999).

Final Report explaining the March 10, 2000 revision of the Comment for paragraph 25 published with the Court's Order at 30 Pa.B. 1641 (March 25, 2000).

Final Report explaining the May 16, 2001 revision of the Comment for paragraph 18 published with the Court's Order at 31 Pa.B. 2789 (June 2, 2001).

Final Report explaining the November 2, 2001, amendments to paragraph 6 published with the Court's Order at 31 Pa.B. 6384 (November 24, 2001).

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

Rule 803.1. Exceptions to the Rule Against Hearsay—Testimony of Declarant Necessary.

The following statements are not excluded by the rule against hearsay if the declarant testifies and is subject to cross-examination about the prior statement:

(1) *Prior Inconsistent Statement of Declarant-Witness.* A prior statement by a declarant-witness that is inconsistent with the declarant-witness's testimony and:

(A) was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition;

(B) is a writing signed and adopted by the declarant; or

(C) is a verbatim contemporaneous electronic, audiotaped, or videotaped recording of an oral statement.

Comment

The Federal Rules treat statements corresponding to Pa.R.E. 803.1(1) and (2) as "not hearsay" and places them in F.R.E. 801(d)(1)(A) and (C). Pennsylvania follows the traditional approach that treats these statements as exceptions to the hearsay rule if the declarant testifies at the trial.

Pa.R.E. 803.1(1) is consistent with prior Pennsylvania case law. *See Commonwealth v. Brady*, 510 Pa. 123, 507 A.2d 66 (1986) (seminal case that overruled close to two centuries of decisional law in Pennsylvania and held that the recorded statement of a witness to a murder, inconsistent with her testimony at trial, was properly admitted as substantive evidence, excepted to the hearsay rule); *Commonwealth v. Lively*, 530 Pa. 464, 610 A.2d 7 (1992). In *Commonwealth v. Wilson*, 550 Pa. 518, 707 A.2d 1114 (1998), the Supreme Court held that to be admissible

under this rule an oral statement must be a verbatim contemporaneous recording in electronic, audiotaped, or videotaped form.

An inconsistent statement of a witness that does not qualify as an exception to the hearsay rule may still be introduced to impeach the credibility of the witness. *See* Pa.R.E. 613.

Rule 803.1(2). Prior Statement of Identification.

(2) *Prior Statement of Identification by Declarant-Witness.* A prior statement by a declarant-witness identifying a person or thing, made after perceiving the person or thing, provided that the declarant-witness testifies to the making of the prior statement.

Comment

Pennsylvania treats a statement meeting the requirements of Pa.R.E. 803.1(2) as an exception to the hearsay rule. F.R.E. 801(d)(1)(C) provides that such a statement is not hearsay. This differing organization is consistent with Pennsylvania law.

Pa.R.E. 803.1(2) differs from F.R.E. 801(d)(1)(C) in several respects. It requires the witness to testify to making the identification. This is consistent with Pennsylvania law. *See Commonwealth v. Ly*, 528 Pa. 523, 599 A.2d 613 (1991). The Pennsylvania rule includes identification of a thing, in addition to a person.

Rule 803.1(3). Recorded Recollection.

(3) *Recorded Recollection of Declarant-Witness.* A memorandum or record made or adopted by a declarant-witness that:

(A) is on a matter the declarant-witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the declarant-witness when the matter was fresh in his or her memory; and

(C) the declarant-witness testifies accurately reflects his or her knowledge at the time when made.

If admitted, the memorandum or record may be read into evidence and received as an exhibit, but may be shown to the jury only in exceptional circumstances or when offered by an adverse party.

Comment

Pa.R.E. 803.1(3) is similar to F.R.E. 803(5), but differs in the following ways:

1. Pennsylvania treats a statement meeting the requirements of Pa.R.E. 803.1(3) as an exception to the hearsay rule in which the testimony of the declarant is necessary. F.R.E. 803(5) treats this as an exception regardless of the availability of the declarant. This differing organization is consistent with Pennsylvania law.

2. Pa.R.E. 803.1(3)(C) makes clear that, to qualify a recorded recollection as an exception to the hearsay rule, the witness must testify that the memorandum or record correctly reflects the knowledge that the witness once had. In other words, the witness must vouch for the reliability of the record. The Federal Rule is ambiguous on this point and the applicable federal cases are conflicting.

3. Pa.R.E. 803.1(3) allows the memorandum or record to be received as an exhibit, and grants the trial judge discretion to show it to the jury in exceptional circumstances, even when not offered by an adverse party.

Pa.R.E. 803.1(3) is consistent with Pennsylvania law. *See Commonwealth v. Cargo*, 498 Pa. 5, 444 A.2d 639 (1982).

***Official Note*:** Adopted May 8, 1998, effective October 1, 1998; amended March 10, 2000, effective July 1, 2000; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the amendment to subsection (1) and the updates to the Comment to subsection (1) published with the Court's Order at 30 Pa.B. 1646 (March 25, 2000).

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

Rule 804. Exceptions to the Rule Against Hearsay—When the Declarant is Unavailable as a Witness.

(a) *Criteria for Being Unavailable.* A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

Comment

This rule is identical to F.R.E. 804(a).

Rule 804(b). The Exceptions.

(b) *The Exceptions.* The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

Comment

Pa.R.E. 804(b)(1) is identical to F.R.E. 804(b)(1).

In criminal cases the Supreme Court has held that former testimony is admissible against the defendant only if the defendant had a "full and fair" opportunity to examine the witness. *See Commonwealth v. Bazemore*, 531 Pa. 582, 614 A.2d 684 (1992).

Depositions

Depositions are the most common form of former testimony that is introduced at a modern trial. Their use is provided for not only by Pa.R.E. 804(b)(1), but also by statute and rules of procedure promulgated by the Pennsylvania Supreme Court.

The Judicial Code provides for the use of depositions in criminal cases. 42 Pa.C.S. § 5919 provides:

> *Depositions in criminal matters.* The testimony of witnesses taken in accordance with section 5325 (relating to when and how a deposition may be taken outside this Commonwealth) may be read in evidence upon the trial of any criminal matter unless it shall appear at the trial that the witness whose deposition has been taken is in attendance, or has been or can be served with a subpoena to testify, or his attendance otherwise procured, in which case the deposition shall not be admissible.

42 Pa.C.S. § 5325 sets forth the procedure for taking depositions, by either prosecution or defendant, outside Pennsylvania.

In civil cases, the introduction of depositions, or parts thereof, at trial is provided for by Pa.R.C.P. No. 4020(a)(3) and (5).

A video deposition of a medical witness, or any expert witness, other than a party to the case, may be introduced in evidence at trial, regardless of the witness's availability, pursuant to Pa.R.C.P. No. 4017.1(g).

42 Pa.C.S. § 5936 provides that the testimony of a licensed physician taken by deposition in accordance with the Pennsylvania Rules of Civil Procedure is admissible in a civil case. There is no requirement that the physician testify as an expert witness.

Rule 804(b)(2). Statement Under Belief of Imminent Death.

(2) *Statement Under Belief of Imminent Death.* A statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

Comment

Pa.R.E. 804(b)(2) differs from F.R.E. 804(b)(2) in that the Federal Rule is applicable in criminal cases only if the defendant is charged with homicide. The Pennsylvania Rule is applicable in all civil and criminal cases, subject to the defendant's right to confrontation in criminal cases.

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court interpreted the Confrontation Cause in the Sixth Amendment of the United States Constitution to prohibit the introduction of "testimonial" hearsay from an unavailable witness against a defendant in a criminal case unless the defendant had an opportunity to confront and cross-examine the declarant, regardless of its exception from the hearsay rule. However, in footnote 6, the Supreme Court said that there may be an exception, *sui generis*, for those dying declarations that are testimonial.

Rule 804(b)(3). Statement Against Interest.

(3) *Statement Against Interest.* A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

Comment

This rule is identical to F.R.E. 804(b)(3).

Rule 804(b)(4). Statement of Personal or Family History.

(4) *Statement of Personal or Family History.* A statement made before the controversy arose about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

Comment

Pa.R.E. 804(b)(4) differs from F.R.E. 804(b)(4) by requiring that the statement be made before the controversy arose. *See In re McClain's Estate*, 481 Pa. 435, 392 A.2d 1371 (1978). This requirement is not imposed by the Federal Rule.

Rule 804(b)(5). Other exceptions (Not Adopted).

(5) *Other exceptions (Not Adopted)*

Comment

Pennsylvania has not adopted F.R.E. 804(b)(5) (now F.R.E. 807).

Rule 804(b)(6). Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.

(6) *Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.* A statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness, and did so intending that result.

Comment

This rule is identical to F.R.E. 804(b)(6).

***Official Note*: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 10, 2000, effective immediately; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the March 10, 2000 revision of the Comment to paragraph (b)(4) published with the Court's Order at 30 Pa.B. 1641 (March 25, 2000).

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

Rule 805. Hearsay Within Hearsay.

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

Comment

This rule is identical to F.R.E. 805.

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

Committee Explanatory Reports:

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

Rule 806. Attacking and Supporting the Declarant's Credibility.

When a hearsay statement has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Comment

Pa.R.E. 806 differs from F.R.E. 806 in that Pa.R.E. 806 makes no reference to Rule 801(d)(2). The subject matter of F.R.E. 801(d)(2) (an opposing party's statement) is covered by Pa.R.E. 803(25). The change is not substantive. Pa.R.E. 806 is consistent with Pennsylvania law. *See Commonwealth v. Davis*, 363 Pa. Super. 562, 526 A.2d 1205 (1987).

The requirement that a witness be given an opportunity to explain or deny the making of an inconsistent statement provided by Pa.R.E. 613(b)(2) is not applicable when the prior inconsistent statement is offered to impeach a statement admitted under an exception to the hearsay rule. In most cases, the declarant will not be on the stand at the time when the hearsay statement is offered and for that reason the requirement of Pa.R.E. 613(b)(2) is not appropriate.

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

Committee Explanatory Reports:

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

Rule 807. Residual Exception (Not Adopted).

Comment

Pennsylvania has not adopted F.R.E. 807.

***Official Note*:** Comment rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

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

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule

Rule 901. Authenticating or Identifying Evidence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment

Pa.R.E. 901(a) is identical to F.R.E. 901(a) and consistent with Pennsylvania law. The authentication or identification requirement may be expressed as follows: When a party offers evidence contending either expressly or impliedly that the evidence is connected with a person, place, thing, or event, the party must provide evidence sufficient to support a finding of the contended connec-

tion. *See Commonwealth v. Hudson*, 489 Pa. 620, 414 A.2d 1381 (1980); *Commonwealth v. Pollock*, 414 Pa. Super. 66, 606 A.2d 500 (1992).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Committee Explanatory Reports:

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

Rule 902. Evidence That is Self-Authenticating.

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) *Domestic Public Documents That Are Sealed and Signed.* A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

(2) *Domestic Public Documents That Are Not Sealed But Are Signed and Certified.* A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal—or its equivalent—that the signer has the official capacity and that the signature is genuine.

(3) *Foreign Public Documents.* A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester—or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may for good cause, either:

(A) order that it be treated as presumptively authentic without final certification; or

(B) allow it to be evidenced by an attested summary with or without final certification.

(4) *Certified Copies of Public Records.* A copy of an official record—or a copy of a document that was recorded or filed in a public office as authorized by law—if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902(1), (2), or (3), a statute or a rule prescribed by the Supreme Court.

(5) *Official Publications.* A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) *Newspapers and Periodicals.* Printed material purporting to be a newspaper or periodical.

(7) *Trade Inscriptions and the Like.* An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) *Acknowledged Documents.* A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(9) *Commercial Paper and Related Documents.* Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) *Presumptions Authorized by Statute.* A signature, document, or anything else that a statute declares to be presumptively or *prima facie* genuine or authentic.

(11) *Certified Domestic Records of a Regularly Conducted Activity.* The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)—(C), as shown by a certification of the custodian or another qualified person that complies with Pa.R.C.P. No. 76. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record—and must make the record and certification available for inspection—so that the party has a fair opportunity to challenge them.

(12) *Certified Foreign Records of a Regularly Conducted Activity.* In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification rather than complying with a statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

Comment

This rule permits some evidence to be authenticated without extrinsic evidence of authentication or identification. In other words, the requirement that a proponent must present authentication or identification evidence as a condition precedent to admissibility, as provided by Pa.R.E. 901(a), is inapplicable to the evidence discussed in Pa.R.E. 902. The rationale for the rule is that, for the types of evidence covered by Pa.R.E. 902, the risk of forgery or deception is so small, and the likelihood of discovery of forgery or deception is so great, that the cost of presenting extrinsic evidence and the waste of court time is not justified. Of course, this rule does not preclude the opposing party from contesting the authenticity of the evidence. In that situation, authenticity is to be resolved by the finder of fact.

Pa.R.E. 902(1), (2), (3) and (4) deal with self-authentication of various kinds of public documents and records. They are identical to F.R.E. 902(1), (2), (3) and (4), except that Pa.R.E. 901(4) eliminates the reference to Federal law. These paragraphs are consistent with Pennsylvania statutory law. *See, e.g.* 42 Pa.C.S. § 6103 (official records within the Commonwealth); 42 Pa.C.S. § 5328 (domestic records outside the Commonwealth and foreign records); 35 P. S. § 450.810 (vital statistics); 42 Pa.C.S. § 6106 (documents filed in a public office).

Pa.R.E. 902(5), (6) and (7) are identical to F.R.E. 902(5), (6) and (7). There are no corresponding statutory provisions in Pennsylvania; however, 45 Pa.C.S. § 506 (judicial notice of the contents of the *Pennsylvania Code* and the *Pennsylvania Bulletin*) is similar to Pa.R.E. 902(5).

Pa.R.E. 902(8) is identical to F.R.E. 902(8). It is consistent with Pennsylvania law. *See Sheaffer v. Baeringer*, 346 Pa. 32, 29 A.2d 697 (1943); *Williamson v. Barrett*, 147 Pa. Super. 460, 24 A.2d 546 (1942); 21 P. S. §§ 291.1-291.13 (Uniform Acknowledgement Act); 57 P. S. §§ 147-169 (Notary Public Law). An acknowledged document is a type of official record and the treatment of acknowledged documents is consistent with Pa.R.E. 902(1), (2), (3), and (4).

Pa.R.E. 902(9) is identical to F.R.E. 902(9). Pennsylvania law treats various kinds of commercial paper and documents as self-authenticating. *See, e.g.*, 13 Pa.C.S. § 3505 (evidence of dishonor of negotiable instruments).

Pa.R.E. 902(10) differs from F.R.E. 902(10) to eliminate the reference to Federal law and to make the paragraph conform to Pennsylvania law. In some Pennsylvania statutes, the self-authenticating nature of a document is expressed by language creating a "presumption" of authenticity. *See, e.g.*, 13 Pa.C.S. § 3505.

Pa.R.E. 902(11) and (12) permit the authentication of domestic and foreign records of regularly conducted activity by verification or certification. Pa.R.E. 902(11) is similar to F.R.E. 902(11). The language of Pa.R.E. 902(11) differs from F.R.E. 902(11) in that it refers to Pa.R.C.P. No. 76 rather than to Federal law. Pa.R.E. 902(12) differs from F.R.E. 902(12) in that it requires compliance with a Pennsylvania statute rather than a Federal statute.

***Official Note*:** Adopted May 8, 1998, effective October 1, 1998; amended November 2, 2001, effective January 1, 2002; amended February 23, 2004, effective May 1, 2004; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the November 2, 2001 amendments adding paragraphs (11) and (12) published with Court's Order at 31 Pa.B. 6384 (November 24, 2001).

Final Report explaining the February 23, 2004 amendment of paragraph (12) published with Court's Order at 34 Pa.B. 1429 (March 13, 2004).

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

Rule 903. Subscribing Witness's Testimony.

A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

Comment

This rule is identical to F.R.E. 903. There are no laws in Pennsylvania requiring the testimony of a subscribing witness to authenticate a writing.

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

Committee Explanatory Reports:

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

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions That Apply to This Article.

In this article:

(a) A "writing" consists of letters, words, numbers, or their equivalent set down in any form.

(b) A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner.

(c) A "photograph" means a photographic image or its equivalent stored in any form.

(d) An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout—or other output readable by sight—if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.

(e) A "duplicate" means a copy produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Comment

This rule is identical to F.R.E. 1001, except that the word "copy" in Pa.R.E 1001(e) replaces the word "counterpart" used in F.R.E. 1001(e).

Paragraph 1001(e) defines the term duplicate. This term is important because of the admissibility of duplicates under Pa.R.E. 1003. This rule differs from the Federal Rule in that the word "counterpart" has been replaced by the word "copy." The word "counterpart" is used in paragraph 1001(d) to refer to a copy intended to have the same effect as the writing or recording itself. The word "copy" is used in paragraph 1003(e) to mean a copy that was not intended to have the same effect as the original.

Pennsylvania law has permitted the use of duplicates produced by the same impression as the original, as is the case with carbon copies. *See Brenner v. Lesher*, 332 Pa. 522, 2 A.2d 731 (1938); *Commonwealth v. Johnson*, 373 Pa. Super. 312, 541 A.2d 332 (1988); *Pennsylvania Liquor Control Bd. v. Evolo*, 204 Pa. Super. 225, 203 A.2d 332 (1964). Pennsylvania has not treated other duplicates as admissible unless the original was shown to be unavailable through no fault of the proponent. For this reason, the definition of duplicates, other than those produced by the same impression as the original, is new to Pennsylvania law. The justification for adopting the new definition is discussed in the Comment to Pa.R.E. 1003.

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

Committee Explanatory Reports:

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

Rule 1002. Requirement of the Original.

An original writing, recording, or photograph is required in order to prove its content unless these rules, other rules prescribed by the Supreme Court, or a statute provides otherwise.

Comment

Pa.R.E. 1002 differs from F.R.E. 1002 to eliminate the reference to Federal law.

This rule corresponds to the common law "best evidence rule." *See Hera v. McCormick*, 425 Pa. Super. 432, 625 A.2d 682 (1993). The rationale for the rule was not expressed in Pennsylvania cases, but commentators have mentioned four reasons justifying the rule.

(1) The exact words of many documents, especially operative or dispositive documents, such as deeds, wills or contracts, are so important in determining a party's rights accruing under those documents.

(2) Secondary evidence of the contents of documents, whether copies or testimony, is susceptible to inaccuracy.

(3) The rule inhibits fraud because it allows the parties to examine the original documents to detect alterations and erroneous testimony about the contents of the document.

(4) The appearance of the original may furnish information as to its authenticity.

5 Weinstein & Berger, *Weinstein's Evidence* § 1002(2) (Sandra D. Katz rev. 1994).

The common law formulation of the rule provided that the rule was applicable when the terms of the document were "material." The materiality requirement has not been eliminated, but is now dealt with in Pa.R.E. 1004(d). That rule provides that the original is not required when the writing, recording or photograph is not closely related to a controlling issue.

The case law has not been entirely clear as to when a party is trying "to prove the content of a writing, recording, or photograph." However, writings that are viewed as operative or dispositive have usually been considered to be subject to the operation of the rule. On the other hand, writings are not usually treated as subject to the rule if they are only evidence of the transaction, thing or event. *See Hamill-Quinlan, Inc. v. Fisher*, 404 Pa. Super. 482, 591 A.2d 309 (1991); *Noble C. Quandel Co. v. Slough Flooring, Inc.*, 384 Pa. Super. 236, 558 A.2d 99 (1989). Thus, testimony as to a person's age may be offered; it is not necessary to produce a birth certificate. *See Commonwealth ex rel. Park v. Joyce*, 316 Pa. 434, 175 A. 422 (1934). Or, a party's earnings may be proven by testimony; it is not necessary to offer business records. *See Noble C. Quandel Co., supra*.

Traditionally, the best evidence rule applied only to writings, but Pa.R.E. 1002 may be applicable to recordings or photographs. However, recordings and photographs are usually only evidence of the transaction, thing or event. It is rare that a recording or photograph would be operative or dispositive, but in cases involving matters such as infringement of copyright, defamation, pornography and invasion of privacy, the requirement for the production of the original should be applicable. There is support for this approach in Pennsylvania law. *See Commonwealth v. Lewis*, 424 Pa. Super. 531, 623 A.2d 355 (1993) (video tape); *Anderson v. Commonwealth*, 121 Pa. Cmwlth. 521, 550 A.2d 1049 (1988) (film).

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

Committee Explanatory Reports:

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

Rule 1003. Admissibility of Duplicates.

A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

Comment

This rule is identical to F.R.E. 1003.

Under the traditional best evidence rule, copies of documents were not routinely admissible. This view dated back to the time when copies were made by hand copying and were therefore subject to inaccuracy. On the other hand, Pennsylvania courts have admitted copies made by techniques that are more likely to produce accurate copies. For example, when a writing is produced in duplicate or multiplicate each of the copies is treated as admissible for purposes of the best evidence rule. *See Brenner v. Lesher*, 332 Pa. 522, 2 A.2d 731 (1938); *Pennsylvania Liquor Control Bd. v. Evolo*, 204 Pa. Super. 225, 203 A.2d 332 (1964).

In addition, various Pennsylvania statutes have treated some accurate copies as admissible. *See* 42 Pa.C.S. § 6104 (governmental records in the Commonwealth); 42 Pa.C.S. § 5328 (domestic records outside the Commonwealth and foreign records); 42 Pa.C.S. § 6106 (documents recorded or filed in a public office); 42 Pa.C.S. § 6109 (photographic copies of business and public records); 42 Pa.C.S. §§ 6151—59 (certified copies of medical records).

The extension of similar treatment to all accurate copies seems justified in light of modern practice. Pleading and discovery rules such as Pa.R.C.P. No. 4009.1 (requiring production of originals of documents and photographs etc.) and Pa.R.Crim.P. 573(B)(1)(f) and (g) (requiring disclosure of originals of documents, photographs and recordings of electronic surveillance) will usually provide an adequate opportunity to discover fraudulent copies. As a result, Pa.R.E. 1003 should tend to eliminate purely technical objections and unnecessary delay. In those cases where the opposing party raises a genuine question as to authenticity or the fairness of using a duplicate, the trial court may require the production of the original under this rule.

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

Committee Explanatory Reports:

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

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

Rule 1004. Admissibility of Other Evidence of Content.

An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

(a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;

(b) an original cannot be obtained by any available judicial process;

(c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or

(d) the writing, recording, or photograph is not closely related to a controlling issue.

Comment

This rule is identical to F.R.E. 1004.

When the proponent of the evidence alleges that it is lost, there should be evidence that a sufficient search was made. *See Hera v. McCormick*, 425 Pa. Super. 432, 625 A.2d 682 (1993).

Under Pa.R.E. 1004, when production of the original is not required, the proffering party need not offer a duplicate even if that is available; the proffering party may present any evidence including oral testimony. The normal motivation of a party to produce the most convincing evidence together with the availability of discovery to uncover fraud seems adequate to control abuse.

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

Committee Explanatory Reports:

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

Rule 1005. Copies of Public Records to Prove Content.

The proponent may use a copy to prove the content of an official record—or of a document that was recorded or filed in a public office as authorized by law—if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

Comment

This rule is identical to F.R.E. 1005.

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

Committee Explanatory Reports:

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

Rule 1006. Summaries to Prove Content.

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

Comment

This rule is identical to F.R.E. 1006.

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

Committee Explanatory Reports:

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

Rule 1007. Testimony or Statement of a Party to Prove Content.

The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

Comment

This rule is identical to F.R.E. 1007. There is no precise equivalent to Pa.R.E. 1007 under Pennsylvania law, but the rule is consistent with Pennsylvania practice. For example, Pa.R.C.P. No. 1019(h) requires a party to attach a copy of a writing to a pleading if any claim or defense is based on the writing. A responsive pleading admitting the accuracy of the writing would preclude an objection based on Rule 1002.

Similarly, Pa.R.C.P. No. 4014(a) permits a party to serve any other party with a request for admission as to the genuineness, authenticity, correctness, execution, signing, delivery, mailing or receipt of any document described in the request. Pa.R.C.P. No. 4014(d) provides that any matter admitted is conclusively established.

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

Committee Explanatory Reports:

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

Rule 1008. Functions of the Court and Jury.

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines—in accordance with Rule 104(b)—any issue about whether:

(a) an asserted writing, recording, or photograph ever existed;

(b) another one produced at the trial or hearing is the original; or

(c) other evidence of content accurately reflects the content.

Comment

This rule is identical to F.R.E. 1008.

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

Committee Explanatory Reports:

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

FINAL REPORT[1]

Restyled Rules of Evidence

On January 17, 2013, effective March 18, 2013, upon the recommendation of the Committee on Rules of Evidence, the Court rescinded the Pennsylvania Rules of Evidence, together with Comments, and adopted restyled Pennsylvania Rules of Evidence, together with relevant Comments.

Background

In 1995, the Supreme Court of Pennsylvania authorized the Ad Hoc Committee on Evidence to draft Rules of Evidence for the Court's consideration. The proposed Rules were drafted to codify Pennsylvania's common law of evidence and closely followed the format and numbering of the Federal Rules of Evidence. The Comments to the Rules were designed to identify the common law sources of Pennsylvania's Rules of Evidence, compare them to the Federal Rules of Evidence, and to explain any

[1] The Committee's Final Report 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.

differences between the two bodies of rules. Additionally, some Comments were augmented with information thought to be helpful to the bench and bar in the application of the Rules. On May 8, 1998, the Court adopted the proposed Rules, effective October 1, 1998.

On September 8, 1998, the Court established the Committee on Rules of Evidence to, *inter alia*, "assist and advise the Supreme Court of Pennsylvania in the preparation, adoption, promulgation and revision of the rules of evidence governing proceedings in the courts of the Commonwealth."

Restyled Federal Rules of Evidence

In 2007, the Advisory Committee on the Federal Rules of Evidence voted to begin a project to restyle the Federal Rules of Evidence. The style revisions were intended to make the Rules clearer and easier to read, without altering substantive meaning. This project would be similar to prior restyling projects for the Federal Rules of Appellate Procedure, Federal Rules of Criminal Procedure, and the Federal Rules of Civil Procedure.

On April 26, 2011, the Supreme Court of the United States transmitted the restyled Federal Rules of Evidence to Congress for consideration pursuant to the Rules Enabling Act, 28 U.S.C. § 2074(a), which, absent Congressional action, became effective on December 1, 2011.

Restyled Pennsylvania Rules of Evidence

The Committee monitored the progression of the Federal Rules' project and reviewed the proposed changes given that the Pennsylvania Rules of Evidence so closely mirrored significant portions of the Federal Rules of Evidence. The Committee concurred with the conclusion that the restyled Federal Rules were clearer and easier to read. The Committee also believed that maintaining consistency with the language and format of the Federal Rules, where such consistency exists, benefits the bench and bar.

Additionally, dissimilarities between the wordings of the restyled Federal Rules and the current Pennsylvania Rules may have led to confusion with the more than 60 references throughout certain Comments to the Pennsylvania Rules as being "identical" to the Federal Rule, when in fact the language would no longer be identical with the restyled Federal Rules. Further, the value of purely historical references to Pennsylvania common law of evidence in the Comments has significantly diminished since the adoption of the Rules.

Accordingly, the Committee recommended rescission of the current Pennsylvania Rules and replacement with the restyled Pennsylvania Rules to incorporate stylistic changes from the Federal Rules and to eliminate surplusage in the Comments. The Committee wishes to offer the following observations concerning the recommendation:

• None of the stylistic changes to the Rules was intended to change the substantive meaning of the Rules.

• Many prior Comments contained discussion and citation of Pennsylvania's common law of evidence. The Committee recognized the value of such references when the Pennsylvania Rules of Evidence were adopted in 1998, especially where the Federal Rules and Pennsylvania Rules differ. However, the Rules have been in existence now for more than fourteen years and have been incorporated into judicial proceedings and practice. Consequently, many references contained in the prior Comments became historical. Accordingly, the Committee proposed deletion of discussion and citation of Pennsylvania's common law of evidence in the Comments where the common law of evidence was consistent to the Pennsylvania Rule. Where a Pennsylvania Rule and the Federal Rule remained dissimilar, the Committee recommended that references to Pennsylvania's common law of evidence be retained in the Comment.

• The reader is reminded that the Comments are prepared by the Committee for the convenience of the bench and bar. The Comments were not adopted by the Court and have no precedential import.

• The "Official Notes" and citations to the "Committee Explanatory Reports" have been updated, corrected, and/or added to the Comments for all Rules.

• Additional, non-substantive changes were made to the Comments to correct errors in grammar, citations, spacing, and alignment.

[Pa.B. Doc. No. 13-171. Filed for public inspection February 1, 2013, 9:00 a.m.]

Title 234—RULES OF CRIMINAL PROCEDURE

[234 PA. CODE CHS. 1 AND 2]

Order Approving the Revisions to the Comments to Rules 100 and 231 of the Rules of Criminal Procedure; No. 423 Criminal Procedural Rules Doc.

Order

Per Curiam

And Now, this 18th day of January, 2013, upon the recommendation of the Criminal Procedural Rules Committee; the proposal having been submitted without publication in the interests of justice and efficient administration pursuant to Pa.R.J.A. No. 103(a)(3), and a Final Report to be published with this *Order*:

It Is Ordered pursuant to Article V, Section 10 of the Constitution of Pennsylvania that the revisions to the Comments to Pennsylvania Rules of Criminal Procedure 100 and 231 are approved in the following form.

This *Order* shall be processed in accordance with Pa.R.J.A. No. 103(b), and shall be effective May 1, 2013.

Annex A

TITLE 234. RULES OF CRIMINAL PROCEDURE

CHAPTER 1. SCOPE OF RULES, CONSTRUCTION AND DEFINITIONS, LOCAL RULES

Rule 100. Scope **of** Rules.

(A) These rules shall govern criminal proceedings in all courts including courts not of record. Unless otherwise specifically provided, these rules shall not apply to juvenile or domestic relations proceedings.

(B) Each of the courts exercising criminal jurisdiction may adopt local rules of procedure in accordance with Rule 105.

Comment

Under the 1974 amendment, the Pennsylvania Rules of Criminal Procedure, formerly inapplicable to summary cases in Philadelphia, now apply to such cases as specified in Chapter 10.

These rules apply to proceedings involving juveniles only to the extent that the Juvenile Act does not vest jurisdiction in the Juvenile Court, and as provided in the Rules of Juvenile Court Procedure. *See, e.g.*, Juvenile Act, 42 Pa.C.S. §§ 6302—6303, 6355; Vehicle Code, 75 Pa.C.S. § 6303, and Rules of Juvenile Court Procedure 105 (Search Warrants), 395 (Procedure to Initiate Criminal Information), and 396 (Bail). **These rules also apply to cases in which an individual under the age of 18 allegedly commits a crime but the charges are not filed until the individual is 21 and therefore outside the Juvenile Act's definition of child. *See* 42 Pa.C.S. § 6302. *See also Commonwealth v. Monaco*, 869 A.2d 1026 (Pa. Super. 2005).**

***Official Note*:** Prior rule suspended effective May 1, 1970. Present Rule 1 adopted January 31, 1970, effective May 1, 1970; amended April 26, 1972, effective immediately; amended June 28, 1974, effective July 1, 1974; amended January 28, 1983, effective July 1, 1983; Comment revised July 12, 1985, effective January 1, 1986; effective date extended to July 1, 1986; renumbered Rule 100 and amended March 1, 2000, effective April 1, 2001; Comment revised April 1, 2005, effective October 1, 2005**; Comment revised January 18, 2013, effective May 1, 2013**.

Committee Explanatory Reports:

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

Final Report explaining the April 1, 2005 Comment revision concerning Rules of Juvenile Court Procedure published with the Court's Order at 35 Pa.B. 2213 (April 16, 2005).

Final Report explaining the January 18, 2013 Comment revision concerning application of Criminal Rules to cases involving individuals under the age of 18 at time of offense and over 21 at time charges filed published with the Court's Order at 43 Pa.B. 653 (February 2, 2013).

CHAPTER 2. INVESTIGATIONS

PART B(1). Investigating Grand Juries

Rule 231. Who May be Present During Session of an Investigating Grand Jury.

* * * * *

Comment

As used in this rule, the term "witness" includes both juveniles and adults.

The 1987 amendment provides that either the attorney for the Commonwealth, or a majority of the grand jury, through their foreperson, may request that certain, specified individuals, in addition to those referred to in paragraph (A), be present in the grand jury room while the grand jury is in session. As provided in paragraph (B), the additional people would be limited to an interpreter or interpreters the supervising judge determines are needed to assist the grand jury in understanding the testimony of a witness; a security officer **[of] or** security officers the supervising judge determines are needed to escort witnesses who are in custody or to protect the members of the grand jury and the other people present during a session of the grand jury; and any individuals the supervising judge determines are required to assist the grand jurors with the presentation of evidence. This would include such people as the case agent (lead investigator), who would assist the attorney for the Commonwealth with questions for witnesses; experts, who would assist the grand jury with interpreting difficult, complex technical evidence; or technicians to run such equipment as tape recorders, videomachines, etc.

It is intended in paragraph (B) that when the supervising judge authorizes a certain individual to be present during a session of the investigating grand jury, the person may remain in the grand jury room only as long as is necessary for that person to assist the grand jurors.

Paragraph (C), added in 1987, generally prohibits the disclosure of any information related to testimony before the grand jury. There are, however, some exceptions to this prohibition enumerated in Section 4549 of the Judicial Code, 42 Pa.C.S. § 4549.

***Official Note*:** Rule 264 adopted June 26, 1978, effective January 9, 1979; amended June 5, 1987, effective July 1, 1987; renumbered Rule 231 and amended March 1, 2000, effective April 1, 2001**; Comment revised January 18, 2013, effective May 1, 2013**.

Committee Explanatory Reports:

Report explaining the June 5, 1987 amendments adding paragraphs (B)—(D) published at 17 Pa.B. 167 (January 10, 1987).

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. **[1477] 1478** (March 18, 2000).

Final Report explaining the January 18, 2013 Comment revision concerning definition of witness as used in this rule published at 43 Pa.B. 653 (February 2, 2013).

FINAL REPORT[1]

Revisions of the Comments to Pa.Rs.Crim.P. 100 and 231

On January 18, 2013, effective May 1, 2013, upon the recommendation of the Criminal Procedural Rules Committee, the Court approved the revision of the Comments to Pa.R.Crim.P. 100 (Scope of Rules), and Pa.R.Crim.P. 231 (Who May Be Present During Session of an Investigating Grand Jury) to clarify (1) when an individual is under 18 at the time of an alleged offense but the case is instituted after the individual is 21 that the case is to proceed pursuant to the Criminal Rules; and (2) that "witness" as used in the investigating grand jury rules includes juveniles and adults.

Both of the above changes were developed by the Criminal Procedural Rules Committee in response to communications from the Juvenile Court Procedural Rules Committee.

Rule 100

In a 2012 meeting, the Juvenile Court Procedural Rules Committee requested the Criminal Procedural Rules Committee to consider clarifying in the Criminal Procedural Rules in cases in which an individual is under the age of 18 at the time of an alleged offense but the case is not instituted until after the individual reaches the age of 21 that the case is to proceed pursuant to the Criminal Procedural Rules. It was reported that, although the case law is clear, there continues to be confusion about how procedurally to proceed in these cases among members of the bench and bar.

[1] 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.

The Committee noted that the Rule 100 Comment already includes provisions clarifying the application of the Criminal Procedural Rules when the defendant is a juvenile. The members concluded that the addition of clarifying language to the Rule 100 Comment as suggested by the Juvenile Court Procedural Rules Committee would be helpful to the bench and bar. The clarifying language contains a cross-reference to *Commonwealth v. Monaco*, 869 A.2d 1026 (Pa.Super. 2005), a case in which this principle was applied in a child sexual assault case in which the victim did not come forward and the defendant was not charged until after the defendant had turned 22, and a cross-reference to 42 Pa.C.S. § 6302.

Rule 231

The Criminal Procedural Rules Committee also considered a suggestion from the Juvenile Court Procedural Rules Committee that the rules should provide that, when a juvenile is the target of or a witness for an investigating grand jury, the juvenile must be advised of the right to counsel during any stage of the investigation, and counsel must be permitted into the investigating grand jury room when the juvenile testifies.

In considering the Juvenile Court Procedural Rules Committee's suggestions, the Committee observed:

• Under the provisions of 42 Pa.C.S. § 4549(c), a witness, which would include a juvenile when called to testify, must have the assistance of counsel including when before the grand jury.

• Rule of Criminal Procedure 231(A) provides that "counsel for the witness may be present as provided by law."

• The "law" in Section 4549(c)(3) is that counsel may be present during the questioning of the witness, may advise the witness, but may not make objections or arguments, *etc.*, and the supervising judge may remove counsel in the same manner as the judge would have in any court proceeding.

• The right to counsel in grand jury investigations does not attach unless an individual is called as a witness; there is no right to counsel for adults or juveniles at any phase of an investigation by a grand jury, even if that individual is a target of the investigation.

• At this stage of the proceeding, it would be inappropriate for a procedural rule to require that an individual be advised about a grand jury investigation or that the individual be advised about counsel; such a procedure potentially would constitute an expansion of the right to counsel before grand juries.

The Committee advised the Juvenile Court Procedural Rules Committee of these points and declined to recommend such changes. However, noting that Rule of Criminal Procedure 231 could be interpreted as applying only to adult witnesses' right to counsel in the investigating grand jury context, an interpretation the Committee believes is incorrect, the Committee agreed that the Rule 231 Comment should be revised to clarify that "witness" as used in the rule includes adults and juveniles.

[Pa.B. Doc. No. 13-172. Filed for public inspection February 1, 2013, 9:00 a.m.]

[234 PA. CODE CH. 4]

Order Approving the Revision of the Comments to Rules 430, 455 and 456 of the Rules of Criminal Procedure; No. 420 Criminal Procedural Rules Doc.

Order

Per Curiam

And Now, this 17th day of January, 2013, upon the recommendation of the Criminal Procedural Rules Committee; the proposal having been published before adoption at 39 Pa.B. 2318 (May 9, 2009), and in the *Atlantic Reporter* (Second Series Advance Sheets, Vol. 967), and a Final Report to be published with this Order.

It Is Ordered pursuant to Article V, Section 10 of the Constitution of Pennsylvania that the revisions to the Comments to Pennsylvania Rules of Criminal Procedure 430, 455, and 456 are approved in the following form.

This *Order* shall be processed in accordance with Pa.R.J.A. No. 103(b), and shall be effective May 1, 2013.

Annex A

TITLE 234. RULES OF CRIMINAL PROCEDURE

CHAPTER 4. PROCEDURES IN SUMMARY CASES

PART D. Arrest Procedures in Summary Cases

PART D(1). Arrests With a Warrant

Rule 430. Issuance of Warrant.

* * * * *

Comment

Personal service of a citation under paragraph (B)(1) is intended to include the issuing of a citation to a defendant as provided in Rule 400(A) and the rules of Chapter 4, Part B(1).

When the defendant is under 18 years of age, and the defendant has failed to respond to the citation, the issuing authority must issue a summons as provided in Rule 403(B)(4)(a). If the **[juvenile] defendant** fails to respond to the summons, the issuing authority should issue a warrant as provided in either paragraph (A)(1) or (B)(1). ***See also*** **the Public School Code of 1949, 24 P. S. § 13-1333(b)(2) that permits the issuing authority to allege the defendant dependent.**

* * * * *

[If] Except in cases brought pursuant to the Public School Code of 1949, 24 P. S. § 1-102 *et seq.*, in which the defendant is at least 13 years of age but not yet 17, if the defendant is under 18 years of age and has not paid the fine and costs, the issuing authority must issue the notice required by paragraph (B)(4) to the defendant and the defendant's parents, guardian, or other custodian informing the defendant and defendant's parents, guardian, or other custodian that, if payment is not received or the defendant does not appear within the 10-day time period, the issuing authority will certify notice of the failure to pay to the court of common pleas as required by the Juvenile Act, 42 Pa.C.S. § 6302, definition of "delinquent act," paragraph (2)(iv). Thereafter, the case will proceed pursuant to the Rules of Juvenile Court Procedure and the Juvenile Act instead of these rules.

If the defendant is charged with a violation of the compulsory attendance requirements of the Public School Code of 1949, 24 P. S. § 1-102, *et seq.*; has

attained the age of 13 but is not yet 17; and has failed to pay the fine, the issuing authority must issue the notice required by paragraph (B)(4) to the defendant and the defendant's parents, guardian, or other custodian informing the defendant and defendant's parents, guardian, or other custodian that, if payment is not received or the defendant does not appear within the 10-day time period, the issuing authority may allege the defendant dependent under 42 Pa.C.S. § 6303(a)(1). Pursuant to 24 P. S. § 13-1333(b)(2), the defendant's failure to pay is not a delinquent act and the issuing authority would not certify notice of the failure to pay to the common pleas court.

If the defendant is 18 years of age or older when the default in payment occurs, the issuing authority must proceed under these rules.

When contempt proceedings are also involved, see Chapter 1 Part D for the issuance of arrest warrants.

See Rule 431 for the procedures when a warrant of arrest is executed.

***Official Note*: Rule 75 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; amended July 2, 1999, effective August 1, 1999; renumbered Rule 430 and amended March 1, 2000, effective April 1, 2001; amended February 28, 2003, effective July 1, 2003; Comment revised August 7, 2003, effective July 1, 2004; Comment revised April 1, 2005, effective October 1, 2005; amended June 30, 2005, effective August 1, 2006; amended January 26, 2007, effective February 1, 2008; Comment revised September 18, 2008, effective February 1, 2009; Comment revised January 17, 2013, effective May 1, 2013**.

Committee Explanatory Reports:

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Final Report explaining the September 18, 2008 revision of the Comment concerning the United States Postal Service's return receipt electronic option published with the Court's Order at 38 Pa.B. 5428 (October 4, 2008).

Final Report explaining the January 17, 2013 revision of the Comment concerning the Public School Code of 1949 published with the Court's Order at 43 Pa.B. 656 (February 2, 2013).

PART E. General Procedures in Summary Cases

Rule 455. Trial in Defendant's Absence.

* * * * *

Comment

In those cases in which 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 trial in the defendant's absence, the issuing authority may issue a warrant for the arrest of the defendant in order to have the defendant brought before the issuing authority for the summary trial. *See* Rule 430(B). The trial would then be conducted with the defendant present as provided in these rules. *See* Rule 454.

When the defendant was under 18 years of age at the time of the offense, if a mandatory sentence of imprisonment is prescribed by statute, the issuing authority may not conduct the trial, but must **[foreward] forward** the case to the court of common pleas for disposition. *See* the Juvenile Act, 42 Pa.C.S. §§ 6302 and 6303.

Paragraph (D) provides notice to the defendant of conviction and sentence after trial *in absentia* to alert the defendant that the time for filing an appeal has begun to run. *See* Rule 413(B)(3).

[If] Except in cases under the Public School Code of 1949, 24 P. S. § 1-102, *et seq.*, in which the defendant is at least 13 years of age but not yet 17, if the defendant is under 18 years of age, the notice in paragraph (D) must inform the defendant and defendant's parents, guardian, or other custodian that, if payment is not received or the defendant does not appear within the 10-day time period, the issuing authority will certify notice of the failure to pay to the court of common pleas as required by the Juvenile Act, 42 Pa.C.S. § 6302, definition of "delinquent act," paragraph (2)(iv), and the case will proceed pursuant to the Rules of Juvenile Court Procedure and the Juvenile Act instead of these rules.

If the defendant is charged with a violation of the compulsory attendance requirements of the Public School Code of 1949, 24 P. S. § 1-102, *et seq.*; has attained the age of 13 but is not yet 17; and has failed to pay the fine, the issuing authority must issue the notice required by paragraph (B)(4) to the defendant and the defendant's parents, guardian, or other custodian informing the defendant and defendant's parents, guardian, or other custodian that, if payment is not received or the defendant does not appear within the 10-day time period, the issuing authority may allege the defendant dependent under 42 Pa.C.S. § 6303(a)(1). Pursuant to 24 P. S. § 13-1333(b)(2), the defendant's failure to pay is not a delinquent act and the issuing authority would not certify notice of the failure to pay to the common pleas court.

If the defendant is 18 years of age or older and fails to pay or appear as required in paragraph (D), the issuing authority must proceed under these rules.

For the defendant's right to counsel, see Rule 122.

For arrest warrant procedures in summary cases, see Rules 430 and 431.

***Official Note*: Rule 84 adopted July 12, 1985, effective January 1, 1986; 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; amended October 1, 1997, effective October 1, 1998; renumbered Rule 455 and Comment revised March 1, 2000, effective April 1, 2001; Comment revised August 7, 2003, effective July 1, 2004; Comment revised April 1, 2005, effective October 1, 2005; amended August 15, 2005, effective February 1, 2006; Comment revised January 17, 2013, effective May 1, 2013**.

Committee Explanatory Reports:

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Final Report explaining the August 15, 2005 amendments to paragraph (D) concerning notice of right to appeal published with the Court's Order at 35 Pa.B. 4918 (September 3, 2005).

Final Report explaining the January 17, 2013 revisions of the Comment concerning the Public School Code of 1949 published with the Court's Order at 43 Pa.B. 656 (February 2, 2013).

Rule 456. Default Procedures: Restitution, Fines, and Costs.

* * * * *

Comment

* * * * *

[If] Except in cases under the Public School Code of 1949, 24 P. S. § 1-102, *et seq.*, in which the defendant is at least 13 years of age but not yet 17, if the defendant is under 18 years of age, the notice in paragraph (B) must inform the defendant and defendant's parents, guardian, or other custodian that, if payment is not received or the defendant does not appear within the 10-day time period, the issuing authority will certify notice of the failure to pay to the court of common pleas as required by the Juvenile Act, 42 Pa.C.S. § 6302, definition of "delinquent act," paragraph (2)(iv), and the case will proceed pursuant to the Rules of Juvenile Court Procedure and the Juvenile Act instead of these rules.

If the defendant is charged with a violation of the compulsory attendance requirements of the Public School Act of 1949, 24 P. S. § 1-102, *et seq.*; has attained the age of 13 but is not yet 17; and has failed to pay the fine, the issuing authority must issue the notice required by paragraph (B)(4) to the defendant and the defendant's parents, guardian, or other custodian informing the defendant and defendant's parents, guardian, or other custodian that, if payment is not received or the defendant does not appear within the 10-day time period, the issuing authority may allege the defendant dependent under 42 Pa.C.S. § 6303(a)(1). Pursuant to 24 P. S. § 13-1333(b)(2), the defendant's failure to pay is not a delinquent act and the issuing authority would not certify notice of the failure to pay to the common pleas court.

If the defendant is 18 years or older when the default in payment occurs, the issuing authority must proceed under these rules.

* * * * *

***Official Note*: Adopted July 12, 1985, effective January 1, 1986; amended September 23, 1985, effective January 1, 1986; January 1, 1986 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; amended July 2, 1999, effective August 1, 1999; renumbered Rule 456 and amended March 1, 2000, effective April 1, 2001; Comment revised August 7, 2003, effective July 1, 2004; amended March 3, 2004, effective July 1, 2004; Comment revised April 1, 2005, effective October 1, 2005; Comment revised September 21, 2012, effective November 1, 2012; Comment revised January 17, 2013, effective May 1, 2013**.

Committee Explanatory Reports:

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Final Report explaining the September 21, 2012 Comment revision correcting the typographical error in the fourth paragraph published with the Court's Order at 42 Pa.B. 6251 (October 6, 2012).

Final Report explaining the January 17, 2013 revisions of the Comment concerning the Public School Code of 1949 published with the Court's Order at 43 Pa.B. 656 (February 2, 2013).

FINAL REPORT[1]

Revisions of the Comments to Pa.Rs.Crim.P. 430, 455, and 456

Summary Case Rules and Truancy under Public School Code of 1949

On January 17, 2013, effective May 1, 2013, upon the recommendation of the Criminal Procedural Rules Committee, the Court approved the revisions to the Comments to Pa.R.Crim.P. 430 (Issuance of Warrant), Pa.R.Crim.P. 455 (Trial in Defendant's Absence), and Pa.R.Crim.P. 456 (Default Procedures: Restitution, Fines, and Costs) to clarify the treatment under the Criminal Procedural Rules of cases involving a child, as defined in the Public School Code of 1949, 24 P. S. § 1-102 et seq., who has failed to pay fines and costs following a summary conviction for truancy.

I. *Introduction*

As part of the recent re-design of the Magisterial District Judges System (MDJS), a question arose concerning how to proceed under the Criminal Rules with cases in which a defendant fails to pay fines following a summary conviction for truancy. The confusion centers on the differences in the statutory provisions in the Juvenile Act, 42 Pa.C.S. § 6301 *et seq.*, and the Public School Code of 1949, 24 P. S. § 1-102 *et seq.* for summary offenses committed by defendants between the ages of 13 and 17. Section 6302 of the Juvenile Act defines "delinquent act," and paragraph (iv) of the definition specifically excludes "summary offenses unless the child fails to comply with a lawful sentence imposed thereunder." "Child" is defined, *inter alia*, as "an individual who is under the age of 18 years" or "is under the age of 21 years who committed an act of delinquency before reaching the age of 18 years." 42 Pa.C.S. § 6302. Section 13-1333 of the Public School Code of 1949, provides, *inter alia*, that a child, who has attained the age of 13 years but is not yet 17, who fails to comply with the provisions of the Public School Code commits a summary offense and, upon conviction, will be sentenced to pay a fine. The Code further provides that the failure to pay the fine is not a delinquent act, but the magisterial district judge may allege the child to be dependent under the Juvenile Act.

The Criminal Rules currently only provide procedures for defendants who fall within the scope of the Juvenile Act. Pursuant to these procedures, if a defendant under the age of 18 does not pay the fines and costs, the magisterial district judge must send out a notice to the defendant that, if payment is not made or the defendant does not appear within 10 days, the case will be certified to the court of common pleas. If the juvenile is 18 or older at the time of the default in payment, and the defendant fails to respond to the 10-day notice, a bench warrant is issued.

The Committee reviewed the statutes and the rules. The members agreed that, because the Public School Code creates what can be perceived as an exception to the Juvenile Act by carving out a special procedure for summary case defendants between the ages of 13 and 17 who have been found to be in violation of the Public School Code, the differences should be recognized in the rules. The Committee agreed that the Comments to the rules dealing with summary case failures to pay should be revised to clarify the differences in the treatment of a defendant who has failed to pay fines and costs and

[1] 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.

would be subject to the Juvenile Act and a defendant who has failed to pay the fine and would be subject to the Public School Code of 1949. Specifically, the revisions make it clear that the issuing authority would not certify the Public School Code cases to Juvenile Court because the failure to pay under the School Code is not a delinquent act, and that the issuing authority may allege the child dependent.

II. *Discussion of Rule Changes*

Rules 430 (Issuance of Warrant), 455 (Trial in Defendant's Absence), and 456 (Default Procedures: Restitution, Fines, and Costs) require a 10-day notice before a bench warrant may be issued when a defendant defaults in the payment of fines and costs. The Comments to all three rules include an explanation about the variation in procedure when the defendant is under the age of 18 years. A revision has been added to the beginning of each of these Comment provisions to state that "Except in cases under the Public School Code of 1949, 24 P. S. 1-102, *et seq.*, in which the defendant is at least 13 years of age but not yet 17," to make it clear that Public School Code summary cases are not treated in the same manner.

In addition, to further assist the bench and bar in understanding the procedures for Public School Code summary cases when the defendant is 13 but not yet 17 years of age, the following paragraph has be added to the Comments to Rules 430, 455, and 456.

> If the defendant is charged with a violation of the compulsory attendance requirements of the Public School Code of 1949, 24 P. S. § 1-102, et seq.; has attained the age of 13 but is not yet 17; and has failed to pay the fine, the issuing authority must issue the notice required by paragraph (B)(4) to the defendant and the defendant's parents, guardian, or other custodian informing the defendant and defendant's parents, guardian, or other custodian that, if payment is not received or the defendant does not appear within the 10-day time period, the issuing authority may allege the defendant dependent under 42 Pa.C.S. § 6303(a)(1). Pursuant to 24 P. S. § 13-1333(b)(2), the defendant's failure to pay is not a delinquent act and the issuing authority would not certify notice of the failure to pay to the common pleas court.

Rule 403(B)(4) requires the issuing authority to issue a summons rather than an arrest warrant when the defendant under the age of 18 years fails to respond to a citation. The second paragraph of Rule 430 Comment elaborates on this summons procedure. The Committee concluded that this summons procedure also would apply to Public School Code summary cases, and therefore no changes were necessary in this regard. However, in recognition of the alternative course of action the Code gives to magisterial district judges of alleging the defendant dependent, this Comment paragraph is revised to include a citation to Section 13-333 of the Public School Code of 1949 explaining this option.

A final consideration of the Committee was that the application of the Public School Code penalties section, 24 P. S. § 13-333, is limited to defendants who have attained the age of 13 but are not yet 17, while the Juvenile Act application terminates when a defendant reaches the age of 18 in general. The Committee discussed how the case would proceed when a defendant convicted of a summary offense under the Public School Code turns 17 years of age, and, therefore, no longer is subject to the Public School Code. The Committee observed that, if the defendant had an outstanding installment payment plan, the obligation to pay would remain. If that defendant then fails to pay on an installment payment plan, he or she would be subject to the Juvenile Act. If, on the other hand, the failure to pay occurs after the defendant turns 18 years of age, the case would proceed under the rules. The Committee concluded this process is clear and no changes to the rules are necessary.

[Pa.B. Doc. No. 13-173. Filed for public inspection February 1, 2013, 9:00 a.m.]

Title 249—PHILADELPHIA RULES

PHILADELPHIA COUNTY

Compensation for Conflict Capital Case Representation; Administrative Order No. 01 of 2013

Order

And now, this 14th day of January, 2013, by decision of the Administrative Governing Board of the First Judicial District of Pennsylvania, compensation of conflict counsel in capital cases is hereby modified as follows:

(1) counsel appointed in capital cases on and after February 22, 2012 shall be paid a flat fee of $10,000 (lead counsel) and $7,500 (penalty phase counsel), irrespective of whether the case is tried to verdict or otherwise disposed and resolved; and

(2) lead counsel and penalty phase counsel shall receive a per diem payment of $400 for each day of their phase representation in excess of one week (five full days), in addition to the above flat fees and regardless of the date of counsel's appointment.

This Administrative Order is issued in accordance with the March 26, 1996 order of the Supreme Court of Pennsylvania, Eastern District, No. 164 Judicial Administration, Docket No. 1, as amended, and shall become effective immediately. This Order and attachments shall be filed with the Prothonotary in a docket maintained for Orders issued by the Administrative Governing Board of the First Judicial District of Pennsylvania. One certified copy of this Order and attachments shall be submitted to the Administrative Office of Pennsylvania Courts, two certified copies and one copy on a computer diskette shall be distributed to the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*, and the Order and attachments shall also be published in *The Legal Intelligencer*. Copies of the Order and attachments shall also be posted on the First Judicial District's website at http://courts.phila.gov, and submitted to American Lawyer Media, Jenkins Memorial Law Library, and the Law Library for the First Judicial District.

By the Court

HONORABLE JOHN W. HERRON,
Chair, Administrative Governing Board of the First Judicial District of Pennsylvania
Administrative Judge, Trial Division
Court of Common Pleas, Philadelphia County

[Pa.B. Doc. No. 13-174. Filed for public inspection February 1, 2013, 9:00 a.m.]

PHILADELPHIA COUNTY

Compensation for Conflict Capital Case Representation; Administrative Order No. 01 of 2013

Order

And now, this 17th day of January, 2013, the January 14, 2013 Order is amended to read as follows:

By decision of the Administrative Governing Board of the First Judicial District of Pennsylvania, compensation of conflict counsel in capital cases is hereby modified as follows:

(1) counsel appointed in capital cases on and after February 22, 2012 shall be paid a flat fee of $10,000 (lead counsel) and $7,500 (penalty phase counsel), irrespective of whether the case is tried to verdict or otherwise disposed and resolved; and

(2) lead counsel and penalty phase counsel shall receive a per diem payment of $400 for each day of their trial representation in excess of one week (five full days), in addition to the above flat fees and regardless of the date of counsel's appointment.

This Administrative Order is issued in accordance with the March 26, 1996 order of the Supreme Court of Pennsylvania, Eastern District, No. 164 Judicial Administration, Docket No. 1, as amended, and shall become effective immediately. This Order and attachments shall be filed with the Prothonotary in a docket maintained for Orders issued by the Administrative Governing Board of the First Judicial District of Pennsylvania. One certified copy of this Order and attachments shall be submitted to the Administrative Office of Pennsylvania Courts, two certified copies and one copy on a computer diskette shall be distributed to the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*, and the Order and attachments shall also be published in *The Legal Intelligencer*. Copies of the Order and attachments shall also be posted on the First Judicial District's website at http://courts.phila.gov, and submitted to American Lawyer Media, Jenkins Memorial Law Library, and the Law Library for the First Judicial District.

By the Court

HONORABLE JOHN W. HERRON,
Chair, Administrative Governing Board of the First Judicial District of Pennsylvania
Administrative Judge, Trial Division
Court of Common Pleas, Philadelphia County

[Pa.B. Doc. No. 13-175. Filed for public inspection February 1, 2013, 9:00 a.m.]

Title 255—LOCAL COURT RULES

LAWRENCE COUNTY

Central Booking Fee; No. 90006 of 2013, A.D.

Order of Court

And Now, this 11th day of January, 2013, pursuant to the adoption and approval of a countywide booking center plan as required by 42 Pa.C.S.A. § 1725.5, it is hereby *Ordered* and *Decreed*, that effective thirty (30) days after publication in the *Pennsylvania Bulletin*, every adult person shall be assessed a central booking fee of one hundred dollars ($100.00) as follows:

1. Any person who is placed on probation without verdict pursuant to Section 17 of the Act of April 14, 1972 (P. L. 233, No. 64) known as The Controlled Substance, Drug, Device and Cosmetic Act.

2. Any person who receives Accelerated Rehabilitative Disposition for, pleads guilty to or nolo contendere to or is convicted of a crime under 18 Pa.C.S.A. § 106(a) (relating to classes of offenses), 75 Pa.C.S.A. § 3735 (relating to homicide by vehicle while driving under influence), 75 Pa.C.S.A. § 3802 (relating to driving under influence of alcohol or controlled substance), and a violation of the Controlled Substance, Drug, Device and Cosmetic Act.

3. The Central Booking Fee provided for herein shall be paid to the County of Lawrence and deposited into a special central booking center fund established and maintained by Lawrence County. Moneys in the special fund shall be used solely for the implementation of the countywide booking center plan adopted pursuant to 42 Pa.C.S.A. § 1725.5 and the start-up, operation or maintenance of a booking center.

The Lawrence County District Court Administrator is *Ordered* and *Directed* to:

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

2. File two (2) certified copies and one (1) computer diskette with the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.

3. Forward one (1) copy for publication in the *Lawrence County Law Journal*.

4. Forward one (1) copy to the Lawrence County Law Library.

5. Keep continuously available for public inspection copies of the Administrative Order in the Office of the Lawrence County Clerk of Courts.

By the Court

DOMINICK MOTTO,
President Judge

[Pa.B. Doc. No. 13-176. Filed for public inspection February 1, 2013, 9:00 a.m.]

SUPREME COURT

Reestablishment of the Magisterial Districts within the 47th Judicial District; No. 300 Magisterial Rules Doc.

Order

Per Curiam

And Now, this 18th day of January, 2013, upon consideration of the Petition to Reestablish the Magisterial Districts of the 47th Judicial District (Cambria County) of the Commonwealth of Pennsylvania, it is hereby *Ordered and Decreed* that the Petition, which provides for the elimination of Magisterial Districts 47-2-01 and 47-3-04, within Cambria County, to be effective January 1, 2014, is granted; and that the Petition, which provides for the realignment of Magisterial Districts 47-1-02, 47-1-03, 47-3-01, 47-3-03, 47-3-05 and 47-3-06, within Cambria

County, to be effective January 2, 2014, is granted; and that the Petition, which also provides for the reestablishment of Magisterial Districts 47-1-01 and 47-3-07, within Cambria County, to be effective immediately, is granted. The judgeships for Magisterial Districts 47-2-01 and 47-3-04 shall not appear on the ballot for the 2013 municipal election.

Said Magisterial Districts shall be as follows:

Magisterial District 47-1-01	City of Cambria
Magisterial District Judge	City of Johnstown (Wards 1,
Michael J. Musulin	2, 3, 4, 9, 10, 11, 12, 13,
	14, 15, 16, 18, 19, 20, and
	21)
	Conemaugh Township
Magisterial District 47-1-02	Ferndale Borough
Magisterial District Judge	Geistown Borough
John W. Barron	Scalp Level Borough
	Southmont Borough
	Westmont Borough
	Richland Township (Wards
	1, 2, 4, 5, 6, 9, 10, and 11)
	Stonycreek Township
	Upper Yoder Township
Magisterial District 47-1-03	City of Johnstown (Wards 5,
Magisterial District Judge	6, 7, 8, and 17)
Leonard J. Grecek	Daisytown Borough
	Dale Borough
	Lorain Borough
Magisterial District 47-3-01	Brownstown Borough
Magisterial District Judge	East Conemaugh Borough
Mary Ann Zanghi	Franklin Borough
	Nanty Glo Borough
	Vintondale Borough
	East Taylor Township
	Jackson Township
	Lower Yoder Township
	Middle Taylor Township
	West Taylor Township
Magisterial District 47-3-03	Ashville Borough
Magisterial District Judge	Cassandra Borough
Galen F. Decort	Chest Springs Borough
	Cresson Borough
	Gallitzin Borough
	Lilly Borough
	Loretto Borough
	Portage Borough
	Sankertown Borough
	Tunnelhill Borough
	Allegheny Township
	Cresson Township
	Gallitzin Township
	Munster Township
	Portage Township
	Washington Township
Magisterial District 47-3-05	Hastings Borough
Magisterial District Judge	North Cambria Borough
Michael Zungali	Patton Borough
	Barr Township
	Chest Township
	Clearfield Township
	Dean Township
	Elder Township
	Reade Township
	Susquehanna Township
	West Carroll Township
	White Township
Magisterial District 47-3-06	Ehrenfeld Borough
Magisterial District Judge	South Fork Borough
Rick W. Varner	Summerhill Borough
	Wilmore Borough
	Adams Township
	Conemaugh Township
	Croyle Township
	Richland Township (Wards
	3, 7, and 8)
	Summerhill Township
Magisterial District 47-3-07	Carrolltown Borough
Magisterial District Judge	Ebensburg Borough
Frederick S. Creany	Blacklick Township
	Cambria Township
	East Carroll Township

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