

SUPREME COURT OF PENNSYLVANIA

NOTICE OF PROPOSED RULEMAKING

**Proposed Amendment of Pa.R.J.A. Nos. 101 & 103, Pa.R.C.P. Nos. 51 & 129,
Pa.R.C.P.M.D.J. No. 201, and Pa. O.C. Rule 1.1**

The Supreme Court of Pennsylvania is considering the amendment of Pennsylvania Rules of Judicial Administration 101 and 103, Pennsylvania Rules of Civil Procedure 51 and 129, Pennsylvania Rule of Civil Procedure before Magisterial District Judges 201, and Pennsylvania Orphans' Court Rule 1.1 to clarify the use of commentary in rulemaking and citation format for the reasons set forth in the accompanying publication report. Pursuant to Pa.R.J.A. No. 103(a)(1), the proposal is being published in the *Pennsylvania Bulletin* for comments, suggestions, or objections prior to submission to the Supreme Court.

Any publication report accompanying the proposal has been prepared for the convenience of those using the rules. Such a report neither will constitute a part of the rules nor will be officially adopted by the Supreme Court.

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

All interested persons are invited to submit comments, suggestions, or objections in writing to:

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

All communications in reference to the proposal should be received by **November 15, 2019**. E-mail is the preferred method for submitting comments, suggestions, or objections; any e-mailed submission need not be reproduced and resubmitted via mail. Receipt of all submissions will be acknowledged.

SUPREME COURT OF PENNSYLVANIA

PUBLICATION REPORT

Proposed Amendment of Pa.R.J.A. Nos. 101 and 103, Pa.R.C.P. Nos. 51 and 129, Pa.R.C.P.M.D.J. No. 201, and Pa. O.C. Rule 1.1

The Supreme Court of Pennsylvania is considering the amendment of Pennsylvania Rule of Judicial Administration 103 and Pennsylvania Rule of Civil Procedure 129 to clarify the use of commentary in rulemaking and amendment of Pennsylvania Rule of Judicial Administration 101, Pennsylvania Rule of Civil Procedure 51, Pennsylvania Rule of Civil Procedure before Magisterial District Judges 201, and Pennsylvania Orphans' Court Rule 1.1 concerning citation format.

Restyling and Rulemaking Guide

The Supreme Court is considering a restyling of its procedural rules in order to reduce the degree of textual and formatting variation and inconsistency both among the bodies of rules and within each body of rules. Efforts have been undertaken to prepare a "Style and Rulemaking Guide" ("Guide") for the statewide procedural and evidentiary rules, similar in some aspects to the *Pennsylvania Code & Bulletin Style Manual* (5th ed. 2014). An approved Guide would be used for the complete restyling of each body of rules.

Restyling also presents an opportunity for renumbering the "domestic relations rules" in Chapters 1900-1950 of the Rules of Civil Procedure. Currently, those rules are bookended by other chapters, which limit expansion. Hence, those rules are numbered utilizing a hyphenated extension in addition to a decimal extension, e.g., Pa.R.C.P. No. 1910.16-4. It is proposed that these rules be removed and reestablished as an entirely separate body of procedural rules. The new body of rules would have a distinct citation format. Rules of Civil Procedure outside of current Chapters 1900-1950 that are used in "family law" proceedings will either be reproduced in the new body of rules or incorporated by reference. Readers are invited to submit written responses concerning the reestablishment of these rules.

Concerning the citation of rules, the number abbreviation, "No.", is proposed to be eliminated from the citation of the Rules of Civil Procedure, the Rules of Civil Procedure Governing Actions and Proceedings before Magisterial District Judges, and the Rules of Judicial Administration. The use of "No." is unique to these bodies of rules - no other procedural or evidentiary bodies of rules use that abbreviation. Its elimination will reduce variation in citation format.

Additionally, the Orphans' Court Rules' title and citation is another variation in description and citation format. Currently Pa. O.C. Rule 1.1 states: "These Rules shall be known as the Pennsylvania Orphans' Court Rules, shall be referred to individually herein as 'Rule,' and cited as 'Pa. O.C. Rule ___.'" The title of the rules is proposed to be amended to contain "procedure" to be consistent with the other bodies of procedural rules. Second, the spaces in citation format are proposed to be eliminated because it can result in a fragmented citation appearing on two lines due to a word processor's return function. As proposed, the title and citation would be amended to state: "These Rules shall be known as the Pennsylvania Rules of Orphans' Court Procedure and shall be cited as 'Pa.R.O.C.P. ___.'"

The proposed amendments to Pa.R.J.A. No. 101, Pa.R.C.P. No. 51, Pa. O.C. Rule 1.1, and Pa.R.C.P.M.D.J. 201 are set forth in the accompanying rule text. Notably, these rules illustrate the variation of phrasing among the procedural rules, even for the modest task of setting forth titles and citations.

Concerning the degree of uniformity among the bodies of rules, the Guide will address the differing numbering schemes for subparts and the use of subdivisions and paragraphs to describe subparts. It is proposed that these differences be eliminated in favor of complete uniformity. The subparts of some rules will be renumbered. For example, Pa.R.J.C.P. 1182(A)(3)(d) will be renumbered as Pa.R.J.C.P. 1182(a)(3)(iv). To aid users, tables will be developed indicating the new numbering.

Notes, Comments, and Reports

The work on the Guide also included a review of "notes," "comments," and "reports" because the usage varies significantly among the bodies of rules. Additionally, the varied use of such descriptors is a common source of confusion with readers. The cause of this confusion appears to be attributed to: 1) varied nomenclature; 2) inconsistent practices; and 3) dated understanding.

Nomenclature

A brief description of the understood meaning of "notes," "commentary," and "reports" from a drafting perspective may be helpful. First, some bodies of rules, such as the Rules of Civil Procedure, often use a "note" within rule text to refer or direct the reader to other authority helpful in applying a specific provision of a rule. The authority may be to other rules, statutes, or case law. Notes in this context may be interspersed within rule text, tend to be used sparingly, and contain little exposition apart from a citation to other authority. Yet, other bodies of rules, such as the Rules of Criminal Procedure, use a "note" to include dates of rulemaking history and citations to Rules Committees' reports.

Second, “commentary” is more expansive than a note and follows the rule text. Commentary often contains information beneficial to understanding and applying (*i.e.*, construing) a rule; it lends context to the rule text.

Third, a “report” contains statements of a Rules Committee. Reports present the rationale for rulemaking and may identify particular issues or matters the Rules Committee considered during rulemaking. Often, reports are episodic with each rulemaking effort and become historical in nature. Reports accompany proposed rulemaking published for comment and may also be filed with the Supreme Court Prothonotary when new or amended rules are adopted. Reports are separate documents from the rule and are not reviewed or approved by the Court.

To synthesize terminology, it is proposed that all bodies of rules will use “Comment” to describe commentary. This naming convention will impact the Rules of Civil Procedure, including Domestic Relations, the Rules of Appellate Procedure, and the Rules of Civil Procedure Before Magisterial District Judges; however, it will align those bodies with the current practice of the Rules of Criminal Procedure, the Rules of Juvenile Court Procedure, the Orphans’ Court Rules, and the Rules of Evidence. “Notes” currently placed within rule text are proposed to be relocated to the “Comment.”. Additionally, “Publication Report” and “Adoption Report” would be used to describe the two types of Rules Committees’ reports. This naming convention will impact all the Rules Committee, but the descriptors are more apt and intuitive.

Practices

Currently, all bodies of rules, except the Rules of Civil Procedure, include the commentary within the “rule” following the rule text.¹ It is proposed that a “rule” adopted by the Supreme Court and entered on the docket will be comprised of two parts: 1) the rule text - that part which sets forth requirements; and 2) the commentary - that part which informs the application of the rule text. Commentary would be part of the rule, but not part of the rule text.

For the Rules of Civil Procedure, this proposal would require a change from a separate “Explanatory Comment” to a “Comment” following the rule text. Existing, reported “Explanatory Comments” of a historical nature would be gleaned for information to be included in the “Comment” when the rules are restyled.

¹ The Rules of Appellate Procedure previously used a mix of commentary and reports. Beginning in 2014, reports were discontinued and commentary used exclusively.

The Rules Committees will continue with the current optional practice of filing a separate Rules Committee report containing rulemaking rationale when a proposal is adopted, *i.e.*, "Adoption Report." However, these reports are not adopted by the Court.

To facilitate all of these changes, Rule of Judicial Administration 103 is proposed to be amended as follows. In subdivision (a)(1), the first aspect is recognition that a "rule" is comprised of rule text and any commentary accompanying the rule text, which would include notes and comments. The second aspect is a requirement that each proposal be accompanied by a publication report from the Rules Committee explaining the rationale for the proposal. This latter aspect is a codification of the current rulemaking process.

In subdivision (a)(2), "written comments, suggestions or objections" would be replaced with "written responses" to avoid potential confusion with "comments" used as a part of rules. Further, references to "commentary" have been replaced with "written responses." Subdivision (b) would be amended to recognize that any Rules Committees' reports might also be filed with the rules.

Subdivision (b)(2)(ii), which requires the Prothonotary of the Supreme Court to forward a certified copy a rulemaking order and rule to the all other prothonotaries and clerks for further publication, is proposed to be deleted. Elimination of this requirement would reflect current practice.

Understanding

A uniform approach to commentary and reports should resolve confusion, as well as assist users with a consistent understanding of their utility. The Rules of Civil Procedure attempt to address the utility of "notes" and "explanatory comments," see Pa.R.C.P. No. 127 and 129, but those rules would benefit from clarification. Pa.R.C.P. No. 127 is based upon the "legislative intent controls" contained in the Statutory Construction Act of 1972. See 1 Pa.C.S. § 1921. The Act states that the objective of interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. *Id.* § 1921(a). Likewise, Pa.R.C.P. No. 127 states that the objective of interpretation and construction of rules is to ascertain and effectuate the intention of the Supreme Court. Pa.R.C.P. No. 127(a). As currently indicated, the means of determining this intent is to use notes and explanatory comments. See Pa.R.C.P. No. 129(e) & Explanatory Comment (1990).

Amendment of Pa.R.C.P. No. 129(e) is proposed to replace references to "note" and "explanatory comment" with "commentary" and to clarify that it is not part of the rule text. Additionally, the Explanatory Comment from 1990 containing, *inter alia*, quotation of *Laudenberger v. Port Auth. of Allegheny Cty.*, 436 A.2d 147, 151 (Pa. 1981) would be deleted and replaced with a new comment containing relevant information. To further

clarify the purpose and limits of commentary and reports, the existing Comment to Pa.R.J.A. No. 103 would be revised.

Implementation

The restyling of the rules will be phased throughout all bodies of rules at anticipated six-month intervals beginning in 2020. Given the breadth of some revisions, a rescission and replacement of entire bodies of rules is under consideration, but not yet definitively decided. The revisions are not intended to be substantive so publication for comment prior to adoption is not contemplated. The proposed amendments concerning citations would be implemented through the restyling.

The proposed amendments of Pa.R.J.A. No. 103 and Pa.R.C.P. No. 129, if adopted following publication, would become effective prior to the restyling effort. As indicated in its Comment, the proposed amendment to Pa.R.J.A. No. 103 would be effective for all future rulemaking, including restyled rules.

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

Pennsylvania Rules of Judicial Administration

Rule 101. Title and citation of rules.

These rules shall be known as the Pennsylvania Rules of Judicial Administration and may be cited as "Pa.R.J.A. [No.] ___."

Rule 103. Procedure for adoption, filing, and publishing rules.

(a) Notice of proposed rulemaking.

- (1) Except as provided in subdivision (a)(3), the initial **[recommendation of a proposed rule, or proposed amendment] proposal of a new or amended rule**, including **[the explanatory note] any commentary** that is to accompany the rule **text**, shall be distributed by the proposing Rules Committee to the Pennsylvania Bulletin for publication therein. The **proposal shall include a** publication **[notification] notice [shall] containing** a statement to the effect that **[comments] written responses** regarding the proposed rule or amendment are invited and should be sent directly to the proposing Rules Committee within a specified period of time, **and a publication report from the Rules Committee containing the rationale for the proposed rulemaking.**
- (2) Written **[comments, suggestions or objections] responses** relating to the **[proposed rule or amendment] proposal** shall be sent directly to the proposing Rules Committee within a specified number of days after the publication of the rule or amendment in the Pennsylvania Bulletin, and any **[such commentary] written responses** shall be reviewed by the said Committee prior to action on the proposal by the Supreme Court. Any further proposals which are based upon the **[commentary] written responses** so received need not be, but may be, published in the manner prescribed in subdivision (a)(1).
- (3) A proposed rule or amendment may be promulgated even though it has not been previously distributed and published in the manner required by subdivisions (a)(1) and (a)(2), where exigent circumstances require the immediate adoption of the proposal; or where the proposed amendment is of a typographical or perfunctory nature; or where in the discretion of the Supreme Court such action is otherwise required in the interests of justice or efficient administration.

(b) Rules adopted by the Supreme Court.

(1) Rules adopted or amended by the Supreme Court, and any adoption report of the Rules Committee, shall be filed in the office of the Prothonotary of the Supreme Court.

(2) After an order adopting a rule or amendment has been filed with the Prothonotary of the Supreme Court, the Prothonotary shall forward a certified copy of the order, **[and] rule or amendment, and any adoption report** to:

(i) The publisher of the official version of Supreme Court decisions and opinions who shall cause it to be printed in the first available volume of the State Reports.

[(ii)] (ii) The prothonotaries or clerks of all courts, which may be affected thereby, and thereupon the order and rule or amendment shall be published by such prothonotaries or clerks in the same manner as local rules adopted by such courts.]

[(iii)](ii) The Legislative Reference Bureau for publication in the Pennsylvania Bulletin.

[(iv)](iii) The Administrative Office.

* * *

[Official Note:] Comment: Effective _____, 2019, “rule” includes the rule text and any accompanying commentary such as a note or comment. Such commentary, while not binding, may be used to construe or apply the rule text. Pursuant to subdivision (a), rulemaking proposals published seeking written responses shall be accompanied by a publication report from the Rules Committee. A Rules Committee may also submit a report pursuant to subdivision (b) when the Supreme Court adopts a rulemaking proposal. Any statements contained in Rules Committees’ reports permitted by either subdivision (a) or (b) are neither part of the rule nor adopted by the Supreme Court.

* * *

Pennsylvania Rules of Civil Procedure

Rule 51. Title and Citation of Rules.

These rules shall be known as the Pennsylvania Rules of Civil Procedure and may be cited as “Pa.R.C.P. [No.] ___.”

* * *

Rule 129. Construction of Rules. Titles, Provisos, Exceptions and Headings. Use of [Notes and Explanatory Comments] Commentary.

- (a) The title or heading of a rule may be considered in construing the rule.
- (b) Provisos shall be construed to limit rather than to extend the operation of the clauses to which they refer.
- (c) Exceptions expressed in a rule shall be construed to exclude all others.
- (d) The title or heading prefixed to a chapter of rules shall not be considered to control but may be used in construing the rules.
- (e) [A note to a rule or an explanatory comment] Commentary is not a part of the rule text, but may be used in construing the rule text.

Comment: Any statements contained in a report by the Civil Procedural Rules Committee and the Domestic Relations Procedural Rules Committee is for the benefit of those using the rules, but neither constitutes part of the rule nor is adopted by the Supreme Court. See Pa.R.J.A. 103, Comment.

Pennsylvania Orphans' Court Rule

Rule 1.1. Short Title and Citation.

These Rules shall be known as the Pennsylvania Rules of Orphans' Court Procedure [Rules], shall be referred to individually herein as "Rule," and cited as "Pa.R.O.C.P. [Rule] ___."

* * *

Pennsylvania Rule of Civil Procedure for Magisterial District Judges

Rule 201. Citation of Rules.

These rules may be cited as "Pa.R.C.P.M.D.J. [No.] ___."