

**SUPREME COURT OF PENNSYLVANIA
CRIMINAL PROCEDURAL RULES COMMITTEE
NOTICE OF PROPOSED RULEMAKING**

Proposed Amendments of Pa.Rs.Crim.P. 531 and 536

The Criminal Procedural Rules Committee is planning to propose to the Supreme Court of Pennsylvania the amendment of Rule 531 (Qualifications of Surety.) and of Rule 536 (Procedures upon Violation of Conditions: Revocation of Release and Forfeiture; Bail Pieces; Exoneration of Surety.) for the reasons set forth in the accompanying explanatory report. Pursuant to Pa.R.J.A. No. 103(a)(1), the proposal is being published in the *Pennsylvania Bulletin* for comments, suggestions, or objections prior to submission to the Supreme Court.

Any reports, notes, or comments in the proposal have been inserted by the Committee for the convenience of those using the rules. They neither will constitute a part of the rules nor will be officially adopted by the Supreme Court.

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

The Committee invites all interested persons to submit comments, suggestions, or objections in writing to:

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All communications in reference to the proposal should be received by **no later than Friday, September 16, 2016**. E-mail is the preferred method for submitting comments, suggestions, or objections; any e-mailed submission need not be reproduced and resubmitted via mail. The Committee will acknowledge receipt of all submissions.

July 12, 2016

BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:

*Charles A. Ehrlich
Chair*

RULE 531. QUALIFICATIONS OF SURETY.

(A) Subject to any additional requirements prescribed by local rule of court, the following shall be qualified to act as sureties:

- (1) owners of cash or securities as provided in Rule 528;
- (2) owners of realty located in the Commonwealth as provided in Rule 528(D)(3), or owners of realty located outside the Commonwealth but within the United States as provided in Rule 528(D)(4), provided that satisfactory evidence of ownership or special approval of the court is obtained;
- (3) surety companies approved by the court and authorized to do business in the Commonwealth of Pennsylvania;
- (4) professional bondsmen licensed under the Judicial Code, 42 Pa.C.S. §§ 5741-5749;
- (5) for percentage cash bail only, the defendant or any private individual or organization.

(B) No attorney, or spouse or employee of any attorney, shall be permitted to become a surety for a client of the attorney or for a client of the attorney's office.

(C) No sheriff, employee of a sheriff, tipstaff, other employee, or official of the courts or issuing authorities of any judicial district shall be permitted to become a surety unless the defendant is a member of that person's immediate family.

(D) No person who is named in any current official list of undesirable bondsmen shall be permitted to become a surety in any case.

COMMENT: Paragraph (A)(2) is intended to require that ownership of realty anywhere within the Commonwealth qualifies a person to act as a surety in any judicial district in the Commonwealth. Local procedure may not require as an "additional requirement" that realty must be located within the county before it may be posted to satisfy a monetary condition of release.

"Professional bondsman," as defined in the Judicial Code, 42 Pa.C.S. §§ 5741-5749, includes any person who, within a 30-day period, becomes a surety or indemnifies a surety

pursuant to these rules in three or more matters not arising under the same transaction, whether or not the person charges a fee or receives compensation. See 42 Pa.C.S. § 5741.

"Surety," as defined in the Judicial Code, 42 Pa.C.S. §§ 5741-5749, includes a person who pledges security, whether or not for compensation, in exchange for the release from custody of a person charged with a crime prior to adjudication. See 42 Pa.C.S. § 5741.

Under paragraph (A)(5), either the defendant or another person, such as a relative or neighbor, may deposit the percentage cash bail. If the defendant deposits the money, he or she signs the bond, thereby becoming a surety and liable for the full amount of the monetary condition if a condition of the bail bond is violated. If someone other than the defendant deposits the money and co-signs the bond with the defendant, that person becomes a surety for the defendant and is liable for the full amount of the monetary condition if a condition of the bail bond is violated. There may be cases in which the other person does not co-sign the bond, but merely deposits the money on behalf of the defendant. In such cases, that person would not be a surety and would not be liable for the full amount of the monetary condition.

Paragraph (B) is not intended to preclude an attorney, or the spouse or employee of an attorney, from being a surety as long as the defendant is not the attorney's client or a client of the attorney's office.

"Immediate family," as used in paragraph (C), is intended to include only grandparents, parents, spouses, siblings, children, grandchildren, stepchildren, and like relatives-in-law.

NOTE: Former Rule 4011 adopted July 23, 1973, effective 60 days hence; rescinded September 13, 1995, effective January 1, 1996, and replaced by Rule 534. Present Rule 4011 adopted September 13, 1995, effective January 1, 1996. The January 1, 1996 effective dates extended to April

1, 1996; the April 1, 1996 effective dates extended to July 1, 1996; renumbered Rule 531 and amended March 1, 2000, effective April 1, 2001 [.] ; **Comment revised _____, 2016, effective _____, 2016.**

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COMMITTEE EXPLANATORY REPORTS:

Final Report explaining the provisions of the new rule published with the Court's Order at 25 Pa.B. 4116 (September 30, 1995).

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).

Report explaining the revision to the Comment regarding the statutory definition of "surety" published for comment at 46 Pa.B. (_____, 2016).

RULE 536. PROCEDURES UPON VIOLATION OF CONDITIONS:
REVOCATION OF RELEASE AND FORFEITURE; BAIL PIECES;
EXONERATION OF SURETY.

(A) SANCTIONS

(1) *Revocation of Release*

(a) A person who violates a condition of the bail bond is subject to a revocation of release and/or a change in the conditions of the bail bond by the bail authority.

(b) When a violation of a condition occurs, the bail authority may issue a bench warrant for the defendant's arrest. When the bench warrant is executed, the bench warrant proceedings shall be conducted pursuant to Rule 150.

(c) The bail authority also may order the defendant or the defendant's surety to explain why the defendant's release should not be revoked or why the conditions of release should not be changed. A copy of the order shall be served on the defendant and the defendant's surety, if any.

(d) When the bail authority changes the conditions of the bail bond and/or revokes the defendant's release, the bail authority shall state in writing or on the record the reasons for so doing.

(2) *Forfeiture*

(a) When a monetary condition of release has been imposed and the defendant has violated a condition of the bail bond, the bail authority may order the cash or other security forfeited and shall state in writing or on the record the reasons for so doing. **When the surety is a third party, the cash or other security may be ordered forfeited only when the condition of the bail bond violated is that the defendant has failed to appear for a scheduled court proceeding.**

(b) Written notice of the forfeiture shall be given to the defendant and any surety, either personally or by both first class and certified mail at the defendant's and the surety's last known addresses.

(c) The forfeiture shall not be executed until **[20] 90** days after notice of the forfeiture order.

(d) The bail authority may direct that a forfeiture be set aside or remitted **as provided by law or** if justice does not require the full enforcement of the forfeiture order.

(e) When a magisterial district judge orders bail forfeited pursuant to this rule, the magisterial district judge shall generate a check in the amount of the bail monies he or she has on deposit in the case, and shall send the check and a copy of the docket transcript to the clerk of courts for processing and disbursement as provided by law.

(B) BAIL PIECES

(1) A surety or bail agency may apply to the court for a bail piece.

(2) If the court is satisfied that a bail piece is required, it may issue a bail piece authorizing the surety or bail agency to apprehend and detain the defendant, and to bring the defendant before the bail authority without unnecessary delay.

(C) EXONERATION

(1) A bail authority, **[in his or her discretion, may] as provided by law, shall** exonerate a surety who deposits cash in the amount of any forfeiture ordered or who surrenders the defendant in a timely manner.

(2) When the conditions of the bail bond have been satisfied, or the forfeiture has been set aside or remitted, the bail authority shall exonerate the obligors and release any bail.

COMMENT: This rule does not apply when a defendant has been arrested pursuant to extradition proceedings. See *generally* Uniform Criminal Extradition Act, 42 Pa.C.S. §§ 9121-9148, and particularly Section 9139 concerning forfeiture proceedings in such cases. See *also* the Crimes Code, 18 Pa.C.S. § 5124, which imposes criminal sanctions for failing to appear in a criminal case when required.

Paragraph (A)(1)(b) was amended and former paragraph (A)(1)(d) was deleted in 2005 to make it clear that a warrant for the arrest of the defendant for failure to comply with a condition of bail is a bench warrant. For the procedures when a paragraph (A)(1)(b) bench warrant is

executed, see Rule 150 (Bench Warrants). For the procedures for issuing a bench warrant when a defendant fails to appear for a preliminary hearing, see paragraph (D) of Rule 543 (Disposition of Case at Preliminary Hearing).

Nothing in this rule is intended to preclude the issuance and service of the notice of revocation of release under paragraph (A)(1) and the notice of forfeiture of security under paragraph (A)(2) to be performed simultaneously.

Nothing in this rule is intended to preclude a judicial district from utilizing the United States Postal Service's return receipt electronic option, or any similar service that electronically provides a return receipt, when using certified mail, return receipt requested.

Once bail has been modified by a common pleas judge pursuant to Rule 529, only the common pleas judge subsequently may change the conditions of release, even in cases that are pending before a magisterial district judge. See Rules 543 and 529.

This rule was amended in 2016 following the enactment of Section 5747.1 of the Judicial Code, 42 Pa.C.S. §5747.1, that limits the grounds for which bail might be forfeited by a third party surety to the defendant's failure to appear for a court proceeding. For all other violations of the conditions of bail, all other remedies remain available, including but not limited to, forfeiture by the defendant when he or she is the surety, revocation of bail, modification of bail, and indirect criminal contempt.

Whenever the bail authority is a judicial officer in a court not of record, pursuant to paragraph (A)(2)(a), that officer should set forth in writing his or her reasons for ordering a forfeiture, and the written reasons should be included with the transcript.

Paragraph (A)(2)(c) provides an automatic **[20] 90-day** stay on the execution of the forfeiture to give the surety

time to produce the defendant or the defendant time to appear and comply with the conditions of bail.

"Conditions of the bail bond" as used in this rule include the conditions set forth in Rule 526(A) and the conditions of release defined in Rules 524, 527, and 528.

Section 5747.1(b)(5) of the Judicial Code requires the bail authority to grant specific remittances to sureties if the defendant is produced within specified time periods. See 42 Pa.C.S. §5747.1(b)(5). Otherwise, remittance or exoneration of the surety is within the discretion of the bail authority.

NOTE: Former Rule 4016 adopted July 23, 1973, effective 60 days hence, replacing prior Rule 4012; *Comment* revised January 28, 1983, effective July 1, 1983; rescinded September 13, 1995, effective January 1, 1996, and replaced by Rule 4016. Present Rule 4016 adopted September 13, 1995, effective January 1, 1996. The January 1, 1996 effective dates extended to April 1, 1996; the April 1, 1996 effective dates extended to July 1, 1996; renumbered Rule 536 and *Comment* revised March 1, 2000, effective April 1, 2001; amended March 2, 2004, effective July 1, 2004; *Comment* revised August 24, 2004, effective August 1, 2005; amended December 30, 2005, effective August 1, 2006; *Comment* revised May 1, 2007, effective September 4, 2007, and May 1, 2007 Order amended May 15, 2007; *Comment* revised September 18, 2008, effective February 1, 2009 [.] ; **amended _____, 2016, effective _____, 2016.**

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COMMITTEE EXPLANATORY REPORTS:

Final Report explaining the provisions of the new rule published with Court's Order at 25 Pa.B. 4116 (September 30, 1995).

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 March 3, 2004 rule changes deleting "show cause" published with the Court's Order at 34 Pa.B. 1561 (March 20, 2004).

Final Report explaining the August 24, 2004 Comment revision published with the Court's Order at 34 Pa.B. 5025 (September 11, 2004).

Final Report explaining the December 30, 2005 amendments concerning bench warrants published with the Court's Order at 36 Pa.B. 184 (January 14, 2006).

Final Report explaining the May 1, 2007 Comment revision concerning bench warrants following a failure to appear at a preliminary hearing published with the Court's Order at 37 Pa.B. 2503 (June 2, 2007).

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. 5425 (October 4, 2008).

Report explaining the proposed amendments necessitated by statutory changes related to bail forfeitures published for comment at 46 Pa.B. (, 2016).

BAIL FORFEITURES

For some time, the Committee had been discussing bail forfeitures. Initially, this was as a result of the Pa. Supreme Court's opinion in *Commonwealth v. Hann*, 81 A.3d 57 (2013). This case was used by the Court to clarify that a "totality of the circumstances" analysis be used when a bail authority is faced with a request for the forfeiture of the bail bond. Specifically, the Court held that forfeiture could be awarded for the violation of non-monetary conditions of bail and that there need be no showing of financial loss to the Commonwealth. Initially, the Committee was considering adding a cross-reference to *Hann* to the bail rules, but also was examining whether the rules should provide some type of hearing procedure in which the analysis required under *Hann* could be conducted.

While the Committee was considering this issue, the Legislature enacted Act 16 of 2015 that is intended to provide uniformity to the regulation of professional bail bondsmen in Pennsylvania. The Governor signed the Act into law on July 2, 2015. Much of the Act deals with licensing and regulation of professional bail bondsmen. However, there are provisions in the Act that affect the forfeiture provisions of Rule 536 and some of these provisions were explicitly enacted to modify the provision in *Hann*. In particular, the Act creates new 42 Pa.C.S. §5747.1 that provides procedures for bail forfeiture. Several of the provisions of new Section 5747.1 differ from the existing bail forfeiture procedures contained in Rule 536.

The Committee discussed whether aspects of the Act unconstitutionally impinged on the Court's exclusive procedural rule-making authority. Prior to this Act, the Legislature had deferred most aspects relating to bail to the Court's rulemaking authority in 42 Pa.C.S. §5702 that states:

§ 5702. Bail to be governed by general rules

Except as otherwise provided by this title and the laws relating to the regulation of surety companies, all matters relating to the fixing, posting, forfeiting, exoneration and distribution of bail and recognizances shall be governed by general rules.

As a result, the bail rules contain some elements that might be more substantive than purely procedural. Additionally, Section 5702 contains the prefatory phrase, “Except as otherwise provided in this title...” that reserves the right of the Legislature to act in these areas so long as it does not interfere with the Court’s constitutional rulemaking authority. Ultimately, the Committee concluded that some of the provisions in Act 16 related to forfeiture, particularly the grounds for which forfeiture may be ordered, did not impinge on the Court’s rulemaking authority and represented the Legislature exercising the right reserved in this area to act on the substantive aspects of bail that it had left to the Court under §5702. The Committee discussed which specific aspects of the Act might constitute procedural conflicts and those that were of a substantive nature and represented a “taking back” by the Legislature of authority over certain aspects of bail. The Committee concluded that, while some aspects of new Section 5747.1 are procedural in nature, many of the provisions of Section 5747.1 address substantive aspects of bail forfeiture and, therefore, fall within the Legislature’s authority.

With regard to those portions of the Act that raise potential procedural conflicts, the Committee recognized that the Court has not always exercised the right to suspend statutes that impinged on the Court’s constitutional rulemaking authority. The Committee therefore examined the areas of potential conflict to determine if rule changes could be made that would reconcile the bail rules with the Act. The Committee initially identified five areas where there are differences between Section 5747.1 and the forfeiture procedures contained in Rule 536.

First, Rule 536 treats revocation of bail and forfeiture of surety as separate decisions and provides for two separate actions to notify the defendant of these actions. Rule 536(A)(1) provides that, upon violation of a bail condition, the bail authority may issue a bench warrant for the defendant and may issue an order to the surety to provide an explanation as to why the defendant’s release should not be revoked. Paragraph (A)(2) contemplates that a separate notice of forfeiture be provided to the defendant and the surety with 20 days to respond. Section 5747.1(a) provides that, upon a defendant’s failure to appear for a proceeding, the bail authority may issue a notice of bail revocation that shall also serve as a notice of the intent to forfeit the bail. Ninety days after the service of this notice of revocation, the revocation shall become a judgment of forfeiture.

In examining whether Rule 536 should be changed to reflect the statutory procedure, the Committee concluded that the procedure in Section 5747.1(a), *i.e.* having the notice of bail revocation act as the notice of intent to forfeit, is problematic since not every bail revocation will involve forfeiture. The Committee strongly believes that some additional notice must be provided to the defendant and the surety that forfeiture as well as revocation was being sought.

The Committee is therefore proposing to retain the notice provisions of Rule 536 but the *Comment* would be revised to state that the two notices may be served simultaneously. These two notices could be combined in a single document and therefore would be an effectuation of the Act from a procedural stand-point, providing appropriate, complete notice to the defendant and the surety.

The second potential conflict, related to the foregoing, is that Rule 536(A)(2)(c) provides 20 days from the service of the notice of forfeiture before the forfeiture order is finalized. Section 5747.1(b)(1) provides that the notice of revocation will become a judgment of forfeiture 90 days after the revocation order, presumably allowing the surety time in which to respond to the forfeiture action. After reviewing the practice in other jurisdictions, the Committee concluded that an increase to the time limit to respond to a notice of forfeiture would not be unreasonable. Therefore the time for a response to the notice of forfeiture would be increased to 90 days in paragraph (A)(2)(c) of Rule 536.

The third potential conflict concerns the provisions in Rule 536 (A)(1)(a) that permit forfeiture for violation of any bail condition. Paragraph (b)(6) of Section 5747.1 specifically limits the forfeiture exposure of third party sureties to the situation where the defendant has failed to appear and provides that any violation of “performance conditions by a defendant other than appearance” shall be treated as an indirect criminal contempt.

The Committee first examined whether this limitation on the grounds for which the bail bond may be forfeited is procedural or substantive. The Committee ultimately concluded that the definition of the grounds for forfeiture represent a regulation of the right of a surety to the recovery of the pledged property and therefore is substantive in nature, falling within the authority of the Legislature to define. Therefore, a second sentence would be added to Rule 536(A)(2)(a) stating the limitation when the surety is a

third party. Language would be added to the *Comment* that further details this limitation.

Fourth, Section 5747.1(a) states that service of the notice to the surety must be by certified mail, return receipt requested while Rule 536 requires that the notice of forfeiture be served either personally or by both first class and certified mail at the defendant's and the surety's last known addresses. The Committee concluded that there is not a conflict here between the service provisions of the rule and the statute since the rule simply adds another procedural step for further assurance that service has been made.

Fifth, Rule 536(C) provides broad discretion to the courts to provide exoneration and remittance to a surety. Section 5747.1(b)(5) provides very specific relief for third party sureties that the bail authority is required to grant in certain circumstances. For example, if the defendant is returned between the 91st day and 6 months after the issuance of the forfeiture order, the surety is entitled to recover the full amount of the forfeited bail. If the defendant is returned between 6 months and 1 year, the surety is entitled to 80% of the forfeited bail and 50% if the defendant is returned between 1 and 2 years.

The Committee considered whether these provisions are procedural or substantive and concluded that these provisions are substantive. Rather than incorporate these specific provisions into the rule, the Committee is proposing to remove the terminology regarding the bail authorities' discretion and use the term "as provided by law" in paragraphs (A)(2)(d) and (C)(1) as well as adding a cross-reference to the statute in the *Comment*. The phrase "in a timely manner" currently contained in paragraph (C)(1) now would be referring back to the time provisions within Section 5747.1(b)(5).

The Committee is also proposing a revision to the *Comment* to Rule 531(Qualifications of Surety). Since the Act now includes a definition of surety, the Committee believes it would be helpful to include a cross-reference to the statutory definition in the Rule 531 *Comment*.