

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

Proposed Amendments of Pa.Rs.Crim.P. 229 and 230

The Criminal Procedural Rules Committee is planning to propose to the Supreme Court of Pennsylvania the amendment of Rules 229 (Control of Investigating Grand Jury Transcript/Evidence) and 230 (Disclosure of Testimony Before Investigating Grand Jury) 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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Criminal Procedural Rules Committee
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All communications in reference to the proposal should be received by **no later than Friday, September 14, 2017**. 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, 2017

BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:

*Charles A. Ehrlich
Chair*

RULE 229. CONTROL OF INVESTIGATING GRAND JURY
TRANSCRIPT/EVIDENCE.

Except as otherwise set forth in these rules, the **[court] supervising judge of the grand jury** shall control the original and all copies of the transcript and shall maintain their secrecy. When physical evidence is presented before the investigating grand jury, the **[court] supervising judge of the grand jury** shall establish procedures for supervising custody.

COMMENT: This rule requires that the **[court] supervising judge of the grand jury** retain control over the transcript of the investigating grand jury proceedings and all copies thereof, as the record is transcribed, until such time as the transcript is released as provided in these rules.

[Reference to the court in this rule and in Rule 230 is intended to be to the supervising judge of the grand jury.]

NOTE: Rule 261 adopted June 26, 1978, effective January 9, 1979; *Comment* revised October 22, 1981, effective January 1, 1982; renumbered Rule 229 and amended March 1, 2000, effective April 1, 2001 [.] **amended** , 2017, **effective** , 2017.

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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).

Report explaining the proposed amendment to clarify the terminology of the supervising authority published for comment at 47 Pa.B. (, 2017).

RULE 230. DISCLOSURE OF TESTIMONY BEFORE INVESTIGATING GRAND JURY.

(A) Attorney for the Commonwealth:

Upon receipt of the certified transcript of the proceedings before the investigating grand jury, the **[court] supervising judge of the grand jury** shall furnish a copy of the transcript to the attorney for the Commonwealth for use in the performance of official duties.

(B) Defendant in a Criminal Case:

(1) When a defendant in a criminal case has testified before an investigating grand jury concerning the subject matter of the charges against him or her, upon application of such defendant the **[court] supervising judge of the grand jury** shall order that the defendant be furnished with a copy of the transcript of such testimony.

(2) When a witness in a criminal case has previously testified before an investigating grand jury concerning the subject matter of the charges against the defendant, upon application of such defendant the **[court] supervising judge of the grand jury** shall order that the defendant be furnished with a copy of the transcript of such testimony; however, such testimony may be made available only after the direct testimony of that witness at trial, **unless the parties agree, with the approval of the supervising judge of the grand jury, that an earlier disclosure is in the interests of justice.**

(3) Upon appropriate motion of a defendant in a criminal case, the **[court] supervising judge of the grand jury** shall order that the transcript of any testimony before an investigating grand jury that is exculpatory to the defendant, or any physical evidence presented to the grand jury that is exculpatory to the defendant, be made available to such defendant.

(C) Other Disclosures:

Upon appropriate motion, and after a hearing into relevancy, the **[court] supervising judge of the grand jury** may order that a transcript of testimony before an investigating grand jury, or physical evidence before the investigating grand jury, may be released to another investigative agency, under such other conditions as the **[court] supervising judge of the grand jury** may impose.

COMMENT: It is intended that the "official duties" of the attorney for the Commonwealth may include reviewing investigating grand jury testimony with a prospective witness in a criminal case stemming from the investigation, when

such testimony relates to the subject matter of the criminal case. It is not intended that a copy of such testimony be released to the prospective witness.

Paragraph (B)(2) was amended in 2017 to recognize a common practice of the parties coming to an agreement on the disclosure of a trial witness' prior grand jury testimony at a point earlier than cross-examination. This practice should be encouraged where it is utilized to avoid undue trial delay.

Subparagraph (B)(3) is intended to reflect the line of cases beginning with *Brady v. Maryland*, 373 U.S. 83 (1963), and the refinements of the *Brady* standards embodied in subsequent judicial decisions.

NOTE: Rule 263 adopted June 26, 1978, effective January 9, 1979; renumbered Rule 230 and amended March 1, 2000, effective April 1, 2001; amended September 21, 2012, effective November 1, 2012 [.]; **amended _____, 2017, effective _____, 2017.**

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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 September 21, 2012 correction of a typographical error in paragraph (B)(1) published with the Court's Order at 42 Pa.B. 6247 (October 6, 2012).

Report explaining the proposed amendment regarding disclosure of testimony published for comment at 47 Pa.B. _____ (_____, 2017).

REPORT

Proposed Amendment of Pa.Rs.Crim.P. 229 and 230

DISCLOSURE OF INVESTIGATING GRAND JURY TESTIMONY

As part of the Committee's ongoing supervision of the rules, the Committee recently examined investigating grand jury procedures, particularly with regard to the disclosure of evidence adduced before an investigating grand jury. Of particular concern was Rule 230(B)(2) that provides, when a witness who is testifying in a criminal case and who has previously testified before an investigating grand jury, the testimony of that witness shall be made available upon application by the defendant but only after the direct testimony of the witness.¹ The suggestion was made that the rule should permit an earlier disclosure. The argument in favor of earlier disclosure was that providing the grand jury testimony only after direct testimony at trial often results in a delay in trial to allow for the study of the grand jury testimony before cross-examination can be conducted.

As an initial matter, the Committee discussed the question of who held the authority to make disclosure determinations. The Committee agreed that this power is vested solely in the judge supervising the investigating grand jury. This would be clarified in Rules 229 and 230 by replacing references in those rules to "the court" with the term "supervising judge." The proposal also would remove Rule 229 *Comment* language containing this definition as unnecessary.

Regarding the time limitation on disclosure, the Committee examined some of the limited case law regarding this provision. The Pennsylvania Supreme Court upheld the Rule 230(B)(2) limitation on disclosure in *Commonwealth v. Chamberlain*, 30 A.3d 381, 424 (Pa. 2011). In *Chamberlain*, the Court rejected a claim that the testimony of grand jury witnesses should have been turned over to the defense prior to trial in the interests of justice, holding that Rule 230(B)(2) is clear and that the defendant was not

¹ Paragraphs (B)(1), providing for the disclosure of grand jury testimony by the defendant, and (B)(3), providing for the disclosure of grand jury testimony that is exculpatory to the defendant, do not contain the time limitation of paragraph (B)(2).

entitled to an earlier disclosure. The Committee also examined *Commonwealth v. Hemmingway*, 13 A.3d 491 (Pa. Super. 2011) in which the Pennsylvania Superior Court held that the Commonwealth could agree to disclose grand jury testimony as part of a pretrial discovery agreement.

The Committee considered a proposal that would have permitted the supervising judge the discretion to order disclosure of the grand jury testimony of a witness who will testify at trial earlier than the conclusion of direct examination. However, there was a concern such a provision would negatively affect investigating grand jury secrecy and the Committee could not agree on how to define what potential witnesses could be subject to such a disclosure. Some members argued that no rule change should be made since the current practice is for the prosecution to turn over the material earlier to avoid delay in trial. As a compromise, it was suggested that the rules should recognize an agreement among the parties for an earlier disclosure. This would be consistent with the holding in *Hemmingway, supra*.

The proposed rule changes would add the phrase “unless the parties agree, with approval of the supervising judge of the grand jury, that an earlier disclosure is in the interests of justice” be added to Rule 230(B)(2). Also, language would be added to the *Comment* to further explain that the practice of agreeing to early disclosure.