

## Proposed Amendments to Pa.Rs.Crim.P. 119 and 500

### INTRODUCTION

*The Criminal Procedural Rules Committee is planning to recommend that the Supreme Court of Pennsylvania amend Rule 119 to clarify that two-way audio-visual communications in certain court proceedings may be used absent the defendant's consent if otherwise permitted by law and to revise the Comment to Rule 500 to state that nothing in that rule prevents the taking or preservation of testimony outside the presence of the defendant, if authorized by law. This proposal has not been submitted for review by the Supreme Court of Pennsylvania.*

*The following explanatory Report highlights the Committee's considerations in formulating this proposal. Please note that the Committee's 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 explanatory Reports.*

*The text of the proposed amendments to the rule precedes the Report. Additions are shown in bold and are underlined; deletions are in bold and brackets.*

*We request that interested persons submit suggestions, comments, or objections concerning this proposal in writing to the Committee through counsel,*

*Anne T. Panfil, Counsel  
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**no later than Friday, September 2, 2011.**

June 29, 2011

BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:

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*Risa Vetri Ferman, Chair*

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*Anne T. Panfil  
Counsel*

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*Jeffrey M. Wasileski  
Counsel*

RULE 119. USE OF TWO-WAY SIMULTANEOUS AUDIO-VISUAL  
COMMUNICATION IN CRIMINAL PROCEEDINGS.

(A) The court or issuing authority may use two-way simultaneous audio-visual communication at any criminal proceeding except:

- (1) preliminary hearings;
- (2) proceedings pursuant to Rule 569(A)(2)(b);
- (3) trials;
- (4) sentencing hearings;
- (5) parole, probation, and intermediate punishment revocation hearings; and
- (6) any proceeding in which the defendant has a constitutional or statutory right to be physically present.

**(B) If otherwise authorized by law, two-way simultaneous audio-visual communications may be used in a proceeding specified in (A)(1) through (A)(6).**

**(C)** The defendant may consent to any proceeding being conducted using two-way simultaneous audio-visual communication.

**[(C)] (D)** When counsel for the defendant is present, the defendant must be permitted to communicate fully and confidentially with defense counsel immediately prior to and during the proceeding.

COMMENT: This rule was adopted in 2003 to make it clear that unless the case comes within one of the exceptions in paragraph (A), the court or issuing authority may use two-way simultaneous audio-visual communication in any criminal proceeding. Two-way simultaneous audio-visual communication is a type of advanced communication technology as defined in Rule 103.

Nothing in this rule is intended to limit any right of a defendant to waive his or her presence at a criminal proceeding in the same manner as the defendant may waive other rights. See, e.g., Rule 602 *Comment*. Negotiated guilty pleas when the defendant has agreed to the sentence, probation revocation hearings, and hearings held pursuant to Rule 908(C) and the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541 *et seq.*, are examples of hearings in which the defendant's consent to proceed using two-way simultaneous audio-visual communication would be required. Hearings on

post-sentence motions, bail hearings, bench warrant hearings, extradition hearings, and *Gagnon I* hearings are examples of proceedings that may be conducted using two-way simultaneous audio-visual communication without the defendant's consent. It is expected the court or issuing authority would conduct a colloquy for the defendant's consent when the defendant's constitutional right to be physically present is implicated.

**Notwithstanding the preclusion of the use of two-way simultaneous audio-visual communications in the proceedings listed in paragraph (A)(1) through (A)(6), there may be occasions when such communications may be used, absent the defendant's consent, when otherwise authorized by law. See, e.g., 42 Pa.C.S. §5985. See also Commonwealth v. Atkinson, 987 A.2d 743 (Pa.Super. 2009)**

Within the meaning of this rule, counsel is present when physically with the defendant or with the judicial officer conducting the criminal proceeding.

This rule does not apply to preliminary arraignments (Rule 540), arraignments (Rule 571), or to search warrant (Rule 203) and arrest warrant (Chapter 5 Part B(3)) procedures.

This rule is not intended to preclude the use of advanced communication technology for the preservation of testimony as permitted by Rules 500 and 501.

See Rule 542 for the procedures governing preliminary hearings.

See Chapter 6 for the procedures governing trials.

See Chapter 7 for the procedures governing sentencing hearings.

See Rule 708 for the procedures governing revocation of probation, intermediate punishment, and parole.

The paragraph (A)(5) reference to revocation hearings addresses *Gagnon II*-type probation (*Gagnon v. Scarpelli*, 411 U.S. 778 (1973)) and parole (*Morrissey v. Brewer*, 408 U.S. 471 (1972)) revocation hearings, and is not intended to prohibit the use of two-way simultaneous audio-visual communication in hearings to determine probable cause (*Gagnon I*).

NOTE: New Rule 118 adopted August 7, 2003, effective September 1, 2003; renumbered Rule 119 and *Comment* revised June 30, 2005, effective August 1, 2006; amended January 27, 2006, effective August 1, 2006; *Comment* revised May 4, 2009, effective August 1, 2009 [.] ; **amended 2011, effective, \_\_\_\_\_, 2011**

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**COMMITTEE EXPLANATORY REPORTS:**

**Final Report explaining new Rule 118 published with the Court's Order at 33 Pa.B. 830 (August 30, 2003).**

**Final Report explaining the June 30, 2005 renumbering of Rule 118 as Rule 119 and the revision of the second paragraph of the Comment published at 35 Pa.B 3901 (July 16, 2005).**

**Final Report explaining the January 27, 2006 amendments adding Rule 569 proceedings as a proceeding for which ACT may not be used published with the Court's Order at 36 Pa.B. 694 (February 11, 2006).**

**Final Report explaining the May 4, 2009 revision to the Comment adding PCRA hearings as a proceeding to which the defendant may consent to be held using ACT published with the Court's Order at 39 Pa.B. 2435 (May 16, 2009).**

**Report explaining the proposed amendments concerning witness testimony and allowance by law of using ACT published at 41 Pa.B. ( \_\_\_\_\_, 2011).**

RULE 500. PRESERVATION OF TESTIMONY AFTER INSTITUTION OF CRIMINAL PROCEEDINGS.

(A) BY COURT ORDER.

(1) At any time after the institution of a criminal proceeding[s], upon motion of any party, and after notice and hearing, the court may order the taking and preserving of the testimony of any witness who may be unavailable for trial or for any other proceeding, or when due to exceptional circumstances, it is in the interests of justice that the witness' testimony be preserved.

(2) The court shall state on the record the grounds on which the order is based.

(3) The court's order shall specify the time and place for the taking of the testimony, the manner in which the testimony shall be recorded and preserved, and the procedures for custody of the recorded testimony.

(4) The testimony shall be taken in the presence of the court, the attorney for the Commonwealth, the defendant(s), and defense counsel, unless otherwise ordered.

(5) The preserved testimony shall not be filed of record until it is offered into evidence at trial or other judicial proceeding.

(B) BY AGREEMENT OF THE PARTIES.

(1) At any time after the institution of a criminal proceeding, the testimony of any witness may be taken and preserved upon the express written agreement of the attorney for the Commonwealth, the defendant(s), and defense counsel.

(2) The agreement shall specify the time and place for taking the testimony, the manner in which the testimony shall be recorded and preserved, and the procedures for custody of the recorded testimony.

(3) The testimony shall be taken in the presence of the attorney for the Commonwealth, the defendant(s), and defense counsel, unless they otherwise agree.

(4) The agreement shall be filed of record.

(5) The preserved testimony shall not be filed of record until it is offered into evidence at trial or other judicial proceeding.

COMMENT: This rule is intended to provide the means by which testimony may be preserved for use at a subsequent stage in the criminal proceedings. When testimony is to be preserved by videotape recording, see also Rule 501.

This rule does not address the admissibility of the preserved testimony. All questions of admissibility must be decided by the court. See, e.g., Judicial Code § 5917, 42 Pa.C.S. § 5917 (1982); *Commonwealth v. Scarborough*, **491 Pa. 300**, 421 A.2d 147 ([Pa.] 1980); *Commonwealth v. Stasko*, **471 Pa. 373**, 370 A.2d 350 ([Pa.] 1977).

"May be unavailable," as used in paragraph (A), is intended to include situations in which the court has reason to believe that the witness will be unable to be present or to testify at trial or other proceedings, such as when the witness is dying, or will be out of the jurisdiction and therefore cannot be effectively served with a subpoena, or may become incompetent to testify for any legally sufficient reason.

Under paragraph (A)(4), a judge should preside over the taking of testimony. The court, however, may order that testimony be taken and preserved without a judge's presence when exigent circumstances exist or the location of the witness renders a judge's presence impracticable. Furthermore, nothing in this rule is intended to preclude counsel, the defendant(s), and the judge from agreeing on the record that the judge need not be present. Paragraph (B)(3) permits the attorney for the Commonwealth, the defendant(s), and defense counsel to determine among themselves whether a judge should be present during the taking of testimony. That determination should be made a part of the written agreement required by paragraph (B)(1).

Nothing in this rule is intended to preclude the defendant from waiving his or her presence during the taking of testimony.

**Nothing in this rule is intended to prevent the taking or preservation of testimony outside the presence of**

**the defendant, if authorized by law. See 42 Pa.C.S. §5984.1**

The means by which the testimony is recorded and preserved are within the discretion of the court under paragraph (A) and the parties under paragraph (B), and may include the use of electronic or photographic techniques such as videotape. There are, however, additional procedural requirements for preservation of testimony by videotape recording mandated by Rule 501.

The party on whose motion testimony is taken should normally have custody of and be responsible for safeguarding the preserved testimony. That party should also promptly provide a copy of the preserved testimony to any other party upon payment of reasonable costs.

When testimony is taken under this rule, the proceeding should be adversarial, and afford the parties full opportunity to examine and cross-examine the witness. Counsel should not reserve objections for time of trial.

Paragraphs (A)(5) and (B)(5) are intended to guard against pretrial disclosure of potentially prejudicial matters.

For definition of "court," see Rule 103.

NOTE: Rule 9015 adopted November 8, 1982, effective January 1, 1983; amended March 22, 1989, effective July 1, 1989; renumbered Rule 500 and amended March 1, 2000, effective April 1, 2001 [.] ; **Comment revised**, **2011, effective** , **2011.**

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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 Comment revision concerning witness testimony outside the presence of the defendant published at 41 Pa.B. ( \_\_\_\_\_, 2011).**

## REPORT

### *Proposed Amendments to Pa.R.Crim.P. 119 and Revision of the Comment to Pa.R.Crim.P. 500*

#### TESTIMONY USING ADVANCED COMMUNICATIONS TECHNOLOGY WHEN AUTHORIZED BY LAW

Rule 119 authorizes the use of two-way simultaneous audio-visual communications in many criminal proceedings. However, paragraph (A) of the rule lists six categories of proceedings in which such technology is not permitted. Paragraph (B) permits a defendant to consent to using this technology in any proceeding. It was suggested to the Committee that the use of this technology may be permitted even in these six types of proceedings if there is a strong public policy reason, usually codified by statute, to permit its use, and concluded that a narrow reading of Rule 119 might suggest that the use of such method of testimony would be precluded under the rules unless the defendant consented.

This concept was recognized by the Superior Court in *Commonwealth v. Atkinson*, 987 A.2d 743 (Pa.Super. 2009). *Atkinson* was a drug trafficking case in which a witness, a co-conspirator who was incarcerated, was permitted to testify at a suppression hearing via a video link to the prison in which he was being held. This was done solely due to transportation difficulties. The Superior Court found that permitting the presentation of this testimony in this manner violated the defendant's confrontation rights without being superseded by a "compelling state interest" that would warrant it.<sup>1</sup>

The Committee considered what would be an example of a "compelling state interest." The members noted that 42 Pa.C.S. §5985 provides that the court may permit the testimony of a child victim or material witness to be taken using the "contemporaneous alternative method." Under this method, a child victim may be permitted to testify before a limited number of people who are actually physically present during the child's testimony. In particular, the defendant would not be present but must be able to hear and observe the testimony, presumably by audio-visual communication technology. In order to utilize this method of testimony, it must be

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<sup>1</sup> The Superior Court further held that the error was harmless because it was cumulative of other evidence presented in the hearing.

demonstrated that the child-witness would suffer real harm if compelled to testify in the presence of the defendant; in other words, there is a compelling state interest warranting the use of audio-visual communications technology in these cases.

The Committee also examined the history of Rule 119, which was first adopted in 2003. In developing this rule, the Committee at the time focused on the use of the audio-visual communications to permit a defendant who was likely confined to participate in proceedings without the expense and transportation difficulties. The impetus for the Committee's examination of the practice was proposed legislation that provided for a defendant's appearance for proceedings to be handled electronically. Additionally, the Committee was receiving reports of a number of courts across the state that were conducting proceedings in this manner but in a piecemeal fashion. Therefore, the rule was developed to provide for more uniform procedures and prevent legislation that would have unconstitutionally impinged on Court's rulemaking authority.

While the main focus of discussion was upon the defendant's right to be present, the Committee did consider the issues related to testimony of witnesses, including the recording of witness' testimony electronically. The Committee concluded that these types of procedures were addressed adequately in Rules 500 and 501. During this discussion, the Committee also acknowledged the use of audio-visual communications to actually present testimony rather than just record it. The Committee at that time concluded that the consent of the parties would be necessary to handle testimony taken in this fashion due to the impact this procedure might have on a defendant's confrontation rights.

The *Final Report* issued when Rule 119 was adopted contains the Committee's view that, "when the criminal proceeding is one that requires rigid protection of the defendant's rights and the integrity and fairness of the judicial process, any rule addressing this type of procedure must be one capable of providing two-way simultaneous audio-visual communication, and allow for confidential communications between the defendant and defendant's counsel."<sup>2</sup> The parameters for utilizing the "contemporaneous alternative method" in 42 Pa.C.S. § 5985, in addition to meeting the "compelling state interest" standard, are consistent with these requirements. The

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<sup>2</sup> Rule 119 *Final Report*, 33 Pa.B. 830 (August 30, 2003).

Committee concluded that acknowledgement of the existence of this or similar procedures would be compatible with the Committee's original intentions for Rule 119.

The Committee therefore is proposing to add to Rule 119 a new paragraph (B) to state: "If otherwise authorized by law, two-way simultaneous audio-visual communications may be used in a proceeding specified in (A)(1) through (6)." This language is further clarified in the *Comment* along with a cross-reference to Atkinson and to 42 Pa.C.S. §5985.

In order to clarify that the same concept also applies to cases in which testimony is preserved prior to trial, the Committee is suggesting an addition to the Rule 500 *Comment* to indicate that that rule is not intended to preclude the taking of evidence outside the defendant's presence if otherwise provided by law.