

**Proposed New Pa.Rs.Crim.P. 626 and 627
Proposed Amendments to Pa.Rs.Crim.P.112, 631, and 647
Proposed Renumbering of Pa.R.Crim.P.630**

INTRODUCTION

The Criminal Procedural Rules Committee is planning to recommend that the Supreme Court of Pennsylvania adopt new Rules 626 and 627, amend Rules 631, and 647, and renumber Rule 630 to provide for instructions to prospective and selected jurors concerning the use of personal communications devices during their service. The proposal also amends Rule 112 to clarify that the prohibition against broadcasting from the courtroom includes the use of cellphones and other similar electronic communications devices. 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,

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no later than Friday, April 6, 2012.

January 10, 2012

BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:

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RULE 112. PUBLICITY, BROADCASTING, AND RECORDING OF PROCEEDINGS.

(A) The court or issuing authority shall:

(1) prohibit the taking of photographs, video, or motion pictures of any judicial proceedings or in the hearing room or courtroom or its environs during the judicial proceedings; and

(2) prohibit the transmission of communications by telephone, radio, television, or advanced communication technology **including but not limited to cellular telephones, or other electronic devices with communication capabilities,** from the hearing room or the courtroom or its environs during the progress of or in connection with any judicial proceedings, whether or not the court is actually in session.

The environs of the hearing room or courtroom is defined as the area immediately surrounding the entrances and exits to the hearing room or courtroom.

(B) **A court or issuing authority may permit the attorneys in a proceeding, their employees and agents, to make reasonable and lawful use of an electronic device in connection with the proceeding.**

(C) The court or issuing authority may permit the taking of photographs, or radio or television broadcasting, or broadcasting by advanced communication technology, of judicial proceedings, such as naturalization ceremonies or the swearing in of public officials, which may be conducted in the hearing room or courtroom.

[(C)] (D) Except as provided in paragraph (D), the stenographic, mechanical, or electronic recording, or the recording using any advanced communication technology, of any judicial proceedings by anyone other than the official court stenographer in a court case, for any purpose, is prohibited.

[(D)] (E) In a judicial proceeding before an issuing authority, the issuing authority, the attorney for the Commonwealth, the affiant, or the defendant may cause a recording to be made of the judicial proceeding as an aid to the preparation of the written record for subsequent use in a case, but such recordings shall not be publicly played or disseminated in any manner unless in a court during a trial or hearing.

[(E)] (F) If it appears to the court or issuing authority that a violation of this rule has resulted in substantial prejudice to the defendant, the court or issuing authority, upon application by the attorney for the Commonwealth or the defendant, may:

- (1) quash the proceedings at the preliminary hearing and order another preliminary hearing to be held before the same issuing authority at a subsequent time without additional costs being taxed;
- (2) discharge the defendant on nominal bail if in custody, or continue the bail if at liberty, pending further proceedings;
- (3) order all costs of the issuing authority forfeited in the original proceedings; or
- (4) adopt any, all, or combination of these remedies as the nature of the case requires in the interests of justice.

COMMENT: This rule combines and replaces former Rules 27 and 328.

"Recording" as used in this rule is not intended to preclude the use of recording devices for the preservation of testimony as permitted by Rules 500 and 501.

The prohibitions under this rule are not intended to preclude the use of advanced communication technology for purposes of conducting court proceedings.

Paragraph (A) was amended in 2011 to clarify that the prohibition against transmitting from the courtroom or environs includes transmission by cellular phone, personal communications device, computer, or any other electronic device that has communications capabilities or internet connectivity.

New paragraph (B) was added in 2011 to recognize that the court may allow use of electronic technology by the attorneys during the proceedings when such use is lawful and practicable.

Nothing in this rule is intended to preclude the use of cameras or other equipment operated by court personnel for the purpose of ensuring security in the courtroom.

NOTE: Former Rule 27, previously Rule 143, adopted January 31, 1970, effective May 1, 1970; renumbered Rule

27 September 18, 1973, effective January 1, 1974; amended February 15, 1974, effective immediately; *Comment* revised March 22, 1989, effective July 1, 1989; amended June 19, 1996, effective July 1, 1996; rescinded March 1, 2000, effective April 1, 2001, and replaced by Rule 112. Former Rule 328 adopted January 25, 1971, effective February 1, 1971; amended June 29, 1977 and November 22, 1977, effective as to cases in which the indictment or information is filed on or after January 1, 1978; *Comment* revised March 22, 1989, effective July 1, 1989; rescinded March 1, 2000, effective April 1, 2001, and replaced by Rule 112. New Rule 112 adopted March 1, 2000, effective April 1, 2001; amended May 10, 2002, effective September 1, 2002 [.] ; amended , 2012, effective , 2012.

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COMMITTEE EXPLANATORY REPORTS:

FORMER RULE 27:

Final Report explaining the June 19, 1996 amendments to former Rule 27 published with the Court's Order at 26 Pa.B. 3128 (July 6, 1996).

NEW RULE 112:

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules, and the provisions of Rule 112, published with the Court's Order at 30 Pa.B. 1478 (March 18, 2000).

Final Report explaining the May 10, 2002 amendments published with the Court's Order at 32 Pa.B. ().

Report explaining the proposed amendments regarding the use of electronic devices for transmitting from the courtroom published for comment at 42 Pa.B. (2012).

RULE [630] 625. JUROR QUALIFICATION FORM, LISTS OF TRIAL JURORS, AND CHALLENGE TO THE ARRAY.

(A) JUROR QUALIFICATION FORM AND LISTS OF TRIAL JURORS.

- (1) The officials designated by law to select persons for jury service shall:
 - (a) devise, distribute, and maintain juror qualification forms as provided by law;
 - (b) prepare, publish, and post lists of the names of persons to serve as jurors as provided by law;
 - (c) upon the request of the attorney for the Commonwealth or the defendant's attorney, furnish the list containing the names of prospective jurors prepared pursuant to paragraph (A)(1)(b); and
 - (d) make available for review and copying copies of the juror qualification forms returned by the prospective jurors.
- (2) The information provided on the juror qualification form shall be confidential and limited to questions of the jurors' qualifications.
- (3) The original and any copies of the juror qualification form shall not constitute a public record.

(B) CHALLENGE TO THE ARRAY.

- (1) Unless opportunity did not exist prior thereto, a challenge to the array shall be made not later than 5 days before the first day of the week the case is listed for trial of criminal cases for which the jurors have been summoned and not thereafter, and shall be in writing, specifying the facts constituting the ground for the challenge.
- (2) A challenge to the array may be made only on the ground that the jurors were not selected, drawn, or summoned substantially in accordance with law.

COMMENT: The qualification, selection, and summoning of prospective jurors, as well as related matters, are generally dealt with in Chapter 45, Subchapters A-C, of the Judicial Code, 42 Pa.C.S. §§ 4501-4503, 4521-4526, 4531-4532. "Law" as used in paragraph (B)(2) of this rule is intended to include these Judicial Code provisions. However,

paragraphs (B)(1) and (2) of this rule are intended to supersede the procedures set forth in Section 4526(a) of the Judicial Code and that provision is suspended as being inconsistent with this rule. See PA. CONST. art. V., § 10; 42 Pa.C.S. § 4526(c). Sections 4526(b) and (d)-(f) of the Judicial Code are not affected by this rule.

Paragraph (A) was amended in 1998 to require that the counties use the juror qualification forms provided for in Section 4521 of the Judicial Code, 42 Pa.C.S. § 4521. It is intended that the attorneys in a case may inspect and copy or photograph the jury lists and the qualification forms for the prospective jurors summoned for their case. The information on the qualification forms is not to be disclosed except as provided by this rule or by statute. This rule is different from Rule 632, which requires that jurors complete the standard, confidential information questionnaire for use during *voir dire*.

NOTE: Adopted January 24, 1968, effective August 1, 1968; *Comment* revised January 28, 1983, effective July 1, 1983; amended September 15, 1993, effective January 1, 1994; September 15, 1993 amendments suspended December 17, 1993 until further Order of the Court; the September 15, 1993 Order amending Rule 1104 is superseded by the September 18, 1998 Order, and Rule 1104 is amended September 18, 1998, effective July 1, 1999; amended May 14, 1999, effective July 1, 1999; renumbered Rule 630 March 1, 2000, effective April 1, 2000; amended March 28, 2000, effective July 1, 2000 **[.] ; renumbered Rule 625, 2012, effective _____, 2012.**

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the September 15, 1993 amendments published at 21 Pa.B. 150 (January 12, 1991). Order suspending, until further Order of the Court, the September 15, 1993 amendments concerning juror information questionnaires published at 24 Pa.B. 333 (January 15, 1994).

Final Report explaining the September 18, 1998 amendments concerning juror information questionnaires published with the Court's Order at 28 Pa.B. 4887 (October 3, 1998).

Final Report explaining the May 14, 1999 amendments placing titles in paragraphs (A) and (B) published with the Court's Order at 29 Pa.B. 2778 (May 29, 1999).

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 28, 2000 amendments concerning availability and confidentiality of the juror qualification forms published with the Court's Order at 30 Pa.B. (, 2000).

Report explaining the proposed renumbering of Rule 630 to Rule 625 published for comment at 42 Pa.B. (, 2011).

(This is an entirely new rule.)

RULE 626. PRELIMINARY INSTRUCTIONS TO PROSPECTIVE JURORS.

(A) For purposes of this rule, the term “prospective jurors” means those persons who have been chosen to be part of the panel from which the trial jurors and alternate jurors will be selected. The term “selected jurors” means those members of the panel who have been selected to serve as trial jurors or alternate jurors.

(B) Persons selected for jury service, upon their arrival for this service, shall be instructed in their duties while serving as prospective jurors and selected jurors.

(C) At a minimum, the persons selected for jury service shall be instructed that until their service as prospective or selected jurors is concluded, they shall not:

(1) discuss any case in which they have been chosen as prospective jurors or selected jurors with others, including other jurors, except as instructed by the court;

(2) read or listen to any news reports about any such case;

(3) use a computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberation. These devices may be used during breaks or recesses but may never be used to obtain or disclose information prohibited in paragraph (C)(4);

(4) use a computer, cellular phone, or other electronic device with communication capabilities, or any other method, to obtain or disclose any information about any case in which they have been chosen as prospective or selected jurors. Information about the case includes, but is not limited to, the following:

(i) information about a party, witness, attorney, judge, or court officer;

(ii) news accounts of the case;

(iii) information on any topics raised or testimony offered by any witness;

(iv) information on any other topic the juror might think would be helpful in deciding the case.

(D) These instructions shall be repeated:

(1) to the prospective jurors at the beginning of *voir dire*;

(2) to the selected jurors at the commencement of the trial;

(3) to the selected jurors prior to deliberations; and

(4) to the selected jurors during trial as the trial judge deems appropriate.

COMMENT: This rule was adopted in 2011 in recognition of the fact that the proliferation of personal communications devices has provided individuals with an unprecedented level of access to information. This access has the potential for abuse by prospective jurors who might be tempted to perform research about a case for which they may be selected. Therefore, the rule requires that prospective jurors be instructed at the earliest possible stage as to their duty to rely solely on information presented in a case and to refrain from discussion about the case, either in person or electronically.

It is recommended that the juror summons also contain the language.

It also is recommended, as an additional means of ensuring adherence, that the judge explain to the prospective jurors the reason for these restrictions. This explanation should include a statement that, in order for the jury system to work as intended, absolute impartiality on the part of the jurors is necessary. Such impartiality is achieved by restricting the information upon which the jurors will base their decision to that which is presented in court.

NOTE: Adopted _____, 2012, effective _____, 2012.

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COMMITTEE EXPLANATORY REPORTS:

Report explaining new Rule 626 regarding instructions to prospective jurors published for comment at 42 Pa.B. (_____, 2012).

(This is an entirely new rule.)

RULE 627. SANCTIONS FOR USE OF PROHIBITED COMMUNICATIONS DEVICES.

Any individual who violates the provisions of Rule 112(A) prohibiting recording or broadcasting during a judicial proceeding or who violates the provisions of Rule 626 regarding the use of electronic devices by jurors or who violates any reasonable limitation imposed by a local rule or by the trial judge regarding the prohibited use of electronic devices during court proceedings:

(1) may be found in contempt of court and sanctioned in accordance with 42 Pa.C.S. §4132 *et seq.*; and

(2) may be subject to sanctions deemed appropriate by the trial judge, including, but not limited to, the confiscation of the electronic device that is used in violation of these rules.

COMMENT: This rule was adopted in 2011 to make clear that in addition to the penalties for contempt that may be imposed upon an individual who violates these rules or a court-imposed restriction on the use of electronic devices during court proceedings, such devices may be temporarily or permanently confiscated by the court.

NOTE: Adopted _____, 2012, effective _____, 2012.

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COMMITTEE EXPLANATORY REPORTS:

Report explaining new Rule 627 regarding sanctions for use of prohibited communications devices published for comment at 42 Pa.B. (_____, 2012).

RULE 631. EXAMINATION AND CHALLENGES OF TRIAL JURORS.

(A) *Voir dire* of prospective trial jurors and prospective alternate jurors shall be conducted, and the jurors shall be selected, in the presence of a judge, unless the judge's presence is waived by the attorney for the Commonwealth, the defense attorney, and the defendant, with the judge's consent.

(B) This oath shall be administered **by the judge** individually or collectively to the prospective jurors:

"You do solemnly swear by Almighty God (or do declare and affirm) that you will answer truthfully all questions that may be put to you concerning your qualifications for service as a juror."

(C) Upon completion of the oath, the judge shall instruct the prospective jurors upon their duties and restrictions while serving as jurors, including those provided in Rule 626(C).

[(C)] (D) *Voir dire*, including the judge's ruling on all proposed questions, shall be recorded in full unless the recording is waived. The record will be transcribed only upon written request of either party or order of the judge.

[(D)] (E) Prior to *voir dire*, each prospective juror shall complete the standard, confidential juror information questionnaire as provided in Rule 632. The judge may require the parties to submit in writing a list of proposed questions to be asked of the jurors regarding their qualifications. The judge may permit the defense and the prosecution to conduct the examination of prospective jurors or the judge may conduct the examination. In the latter event, the judge shall permit the defense and the prosecution to supplement the examination by such further inquiry as the judge deems proper.

[(E)] (F) In capital cases, the individual *voir dire* method must be used, unless the defendant waives that alternative. In non-capital cases, the trial judge shall select one of the following alternative methods of *voir dire*, which shall apply to the selection of both jurors and alternates:

(1) INDIVIDUAL *VOIR DIRE* AND CHALLENGE SYSTEM.

(a) *Voir dire* of prospective jurors shall be conducted individually and may be conducted beyond the hearing and presence of other jurors.

(b) Challenges, both peremptory and for cause, shall be exercised alternately, beginning with the attorney for the Commonwealth, until all jurors are chosen. Challenges shall be exercised immediately after the

prospective juror is examined. Once accepted by all parties, a prospective juror shall not be removed by peremptory challenge. Without declaring a mistrial, a judge may allow a challenge for cause at any time before the jury begins to deliberate, provided sufficient alternates have been selected, or the defendant consents to be tried by a jury of fewer than 12, pursuant to Rule 641.

(2) LIST SYSTEM OF CHALLENGES.

(a) A list of prospective jurors shall be prepared. The list shall contain a sufficient number of prospective jurors to total at least 12, plus the number of alternates to be selected, plus the total number of peremptory challenges (including alternates).

(b) Prospective jurors may be examined collectively or individually regarding their qualifications. If the jurors are examined individually, the examination may be conducted beyond the hearing and presence of other jurors.

(c) Challenges for cause shall be exercised orally as soon as the cause is determined.

(d) When a challenge for cause has been sustained, which brings the total number on the list below the number of 12 plus alternates, plus peremptory challenges (including alternates), additional prospective jurors shall be added to the list.

(e) Each prospective juror subsequently added to the list may be examined as set forth in paragraph ~~[(E)(2)(b)]~~ (F)(2)(b).

(f) When the examination has been completed and all challenges for cause have been exercised, peremptory challenges shall then be exercised by passing the list between prosecution and defense, with the prosecution first striking the name of a prospective juror, followed by the defense, and alternating thereafter until all peremptory challenges have been exhausted. If either party fails to exhaust all peremptory challenges, the jurors last listed shall be stricken. The remaining jurors and alternates shall be seated. No one shall disclose which party peremptorily struck any juror.

COMMENT: This rule applies to all cases, regardless of potential sentence. Formerly there were separate rules for capital and non-capital cases.

If Alternative **[(E)(1)] (F)(1)** is used, examination continues until all peremptory challenges are exhausted or until 12 jurors and 2 alternates are accepted. Challenges must be exercised immediately after the prospective juror is questioned. In capital cases, only Alternative **[(E)(1)] (F)(1)** may be used unless affirmatively waived by all defendants and the Commonwealth, with the approval of the trial judge.

If Alternative **[(E)(2)] (F)(2)** is used, sufficient jurors are assembled to total 12, plus the number of alternates, plus at least the permitted number of peremptory challenges (including alternates). It may be advisable to assemble additional jurors to encompass challenges for cause. Prospective jurors may be questioned individually, out of the presence of other prospective jurors, as in Alternative **[(E)(1)] (F)(1)**; or prospective jurors may be questioned in the presence of each other. Jurors may be challenged only for cause, as the cause arises. If the challenges for cause reduce the number of prospective jurors below 12, plus alternates, plus peremptory challenges (including alternates), new prospective jurors are called and they are similarly examined. When the examination is completed, the list is reduced, leaving only 12 jurors to be selected, plus the number of peremptories to be exercised; and sufficient additional names to total the number of alternates, plus the peremptories to be exercised in selecting alternates. The parties then exercise the peremptory challenges by passing the list back and forth and by striking names from the list alternately, beginning with counsel for the prosecution. Under this system, all peremptory challenges must be utilized. Alternates are selected from the remaining names in the same manner. Jurors are not advised by whom each peremptory challenge was exercised. Also, under Alternative **[(E)(2)] (F)(2)**, prospective jurors will not know whether they have been chosen until the challenging process is complete and the roll is called.

This rule requires that prospective jurors be sworn before questioning under either Alternative.

The words in parentheses in the oath shall be inserted when any of the prospective jurors chooses to affirm rather than swear to the oath.

Unless the judge's presence during *voir dire* and the jury selection process is waived pursuant to paragraph (A), the judge must be present in the jury selection room during *voir dire* and the jury selection process.

Pursuant to paragraph **[(D)] (E)**, which was amended in 1998, and Rule 632, prospective jurors are required to complete the standard, confidential juror information questionnaire prior to *voir dire*. This questionnaire, which facilitates and expedites *voir dire*, provides the judge and attorneys with basic background information about the jurors, and is intended to be used as an aid in the oral examination of the jurors.

The point in time prior to *voir dire* that the questionnaires are to be completed is left to the discretion of the local officials. Nothing in this rule is intended to require that the information questionnaires be mailed to jurors before they appear in court pursuant to a jury summons.

See Rule 103 for definitions of "capital case" and "*voir dire*."

NOTE: Adopted January 24, 1968, effective August 1, 1968; amended May 1, 1970, effective May 4, 1970; amended June 30, 1975, effective September 28, 1975. The 1975 amendment combined former Rules 1106 and 1107. *Comment* revised January 28, 1983, effective July 1, 1983; amended September 15, 1993, effective January 1, 1994. The September 15, 1993 amendments suspended December 17, 1993 until further Order of the Court; amended February 27, 1995, effective July 1, 1995; the September 15, 1993 Order amending Rule 1106 is superseded by the September 18, 1998 Order, and Rule 1106 is amended September 18, 1998, effective July 1, 1999; renumbered Rule 631 and amended March 1, 2000, effective April 1, 2001[.] ; **amended** , **2012, effective** , **2012.**

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the September 15, 1993 amendments published at 21 Pa.B. 150 (January 12, 1991). Order suspending, until further Order of the Court, the September 15, 1993 amendments concerning juror information questionnaires published at 24 Pa.B. 333 (January 15, 1994).

Final Report explaining the February 27, 1995 amendments published with the Court's Order at 25 Pa.B. 948 (March 18, 1995).

Final Report explaining the September 18, 1998 amendments concerning juror information questionnaires published with the Court's Order at 28 Pa.B. 4887 (October 3, 1998).

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 regarding instructions to the prospective jurors published for comment at 42 Pa.B. (, 2012).

RULE 647. REQUEST FOR INSTRUCTIONS, CHARGE TO THE JURY, AND PRELIMINARY INSTRUCTIONS.

(A) Any party may submit to the trial judge written requests for instructions to the jury. Such requests shall be submitted within a reasonable time before the closing arguments, and at the same time copies thereof shall be furnished to the other parties. Before closing arguments, the trial judge shall inform the parties on the record of the judge's rulings on all written requests and which instructions shall be submitted to the jury in writing. The trial judge shall charge the jury after the arguments are completed.

(B) No portions of the charge nor omissions from the charge may be assigned as error, unless specific objections are made thereto before the jury retires to deliberate. All such objections shall be made beyond the hearing of the jury.

(C) After the jury has retired to consider its verdict, additional or correctional instructions may be given by the trial judge in the presence of all parties, except that the defendant's absence without cause shall not preclude proceeding, as provided in Rule 602.

(D) **The trial judge shall give instructions to the jurors as provided in Rule 626 before the taking of evidence.**

(E) The trial judge may give any **other** instructions to the jury before the taking of evidence or at anytime during the trial as the judge deems necessary and appropriate for the jury's guidance in hearing the case.

COMMENT: Paragraph (A), amended in 1985, parallels the procedures in many other jurisdictions which require that the trial judge rule on the parties' written requests for instructions before closing arguments, that the rulings are on the record, and that the judge charge the jury after the closing arguments. See, e.g., Fed.R.Crim.P. 30; ABA Standards on Trial by Jury, Standard 15-3.6(a); Uniform Rule of Criminal Procedure 523(b).

Pursuant to Rule 646 (Material Permitted in Possession of the Jury), the judge must determine whether to provide the members of the jury with written copies of the portion of the judge's charge on the elements of the offenses, lesser included offenses, and any defense upon which the jury has been instructed for use during deliberations.

Paragraph (D) was added in 2011 to require trial judges to instruct jurors that they are prohibited from using computers or cell phones at trial or during deliberation, and are prohibited from using a computer or other electronic device or any other method to obtain or disclose information about the case when they are not in the courtroom. The amendment prohibits jurors from reading about or listening to news reports about the case and prohibits discussion among jurors until deliberation.

Paragraph ~~[(D)]~~ **(E)**, added in 1985, recognizes the value of jury instructions to juror comprehension of the trial process. It is intended that the trial judge determine on a case by case basis whether instructions before the taking of evidence or at anytime during trial are appropriate or necessary to assist the jury in hearing the case. The judge should determine what instructions to give based on the particular case, but at a minimum the preliminary instructions should orient the jurors to the trial procedures and to their duties and function as jurors. In addition, it is suggested that the instructions may include such points as note taking, the elements of the crime charged, presumption of innocence, burden of proof, and credibility. Furthermore, if a specific defense is raised by evidence presented during trial, the judge may want to instruct on the elements of the defense immediately after it is presented to enable the jury to properly evaluate the specific defense. *See also* Pennsylvania Suggested Standard Criminal Jury Instructions, Chapter II.

It is also strongly recommended that the trial judge include general instructions on the appropriate procedures to be followed during deliberations.

NOTE: Rule 1119 adopted January 24, 1968, effective August 1, 1968; amended April 23, 1985, effective July 1, 1985; renumbered Rule 647 and amended March 1, 2000, effective April 1, 2001; *Comment* revised June 30, 2005, effective August 1, 2005; amended October 16, 2009,

effective February 1, 2010[.] amended _____, 2012,
effective _____, 2012.

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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 June 30, 2005 Comment revision concerning the note taking instruction published with the Court's Order at 35 Pa.B. 3917 (July 16, 2005).

Final Report explaining the October 16, 2009 changes adding to the Comment a cross-reference to Rule 646 published with the Court's Order at 39 Pa.B. (_____, 2009).

Report explaining the proposed amendment regarding the use of personal communications devices and computers by the jurors published for comment at 42 Pa.B. (_____, 2012).

REPORT

Proposed New Pa.Rs.Crim.P. 626, and 627
Proposed Amendments to Pa.Rs.Crim.P. 112, 631, and 647
Proposed Renumbering of Pa.R.Crim.P.630

PERSONAL COMMUNICATIONS DEVICES IN THE COURTROOM

I. INTRODUCTION

The Committee, in conjunction with the Civil Procedural Rules Committee, is planning to recommend that the Supreme Court of Pennsylvania adopt new Rules 626 (Preliminary Instructions to Prospective Jurors) and 627 (Sanctions for Use of Prohibited Communications Devices), amend Rules 631 (Examination and Challenges of Trial Jurors), and 647 (Request for Instructions, Charge to the Jury, and Preliminary Instructions), and renumber Rule 630 (Juror Qualification Form, Lists of Trial Jurors, and Challenge to the Array) to provide for instructions to prospective and selected jurors concerning the use of personal communications devices during their service. The proposal also amends Rule 112 (Publicity, Broadcasting, and Recording of Proceedings) to clarify that the prohibition against broadcasting from the courtroom includes the use of cellphones and other similar electronic communications devices.¹

II. BACKGROUND

The increased use of personal communications devices, often with internet access, such as the iPhone and iPad, has raised new issues regarding their use in the courtroom. In July 2010, the Chief Justice wrote to the chairs of the Civil Procedural Rules Committee and the Criminal Procedural Rules Committee, noting a complaint received from a common pleas court judge of the problems arising from jurors' inappropriate use of electronic devices during their service as jurors. The Chief Justice requested both Committees consider whether any rule changes are warranted to address these problems.

Additionally, the Committees received reports of other problems arising from the use of these devices during trial. The most challenging of these arose from the

¹ The Civil Procedural Rules Committee proposal would create new Civil Rules 220.1 and 220.2, amend and renumber current Civil Rule 220.1, and amend current Civil Rule 223.1.

proliferation in the use of the devices accessing social media, such as microblogs like Twitter, that encourage the posting of “real-time” commentary, by audience members including members of the press and even trial participants.

Finally, recent cases have raised issues of the use of these devices by audience members for purposes of witness intimidation, such as the taking of witness photographs or posting of witness information on the internet to encourage fear of retaliation.

As a result, a Joint Subcommittee of the Civil and Criminal Rules Committees was formed to examine the issues that have arisen and determine if any procedural rules changes are needed to address these issues.² The Joint Subcommittee examined two aspects of this issue: (1) use of this technology by jurors; and (2) use by others. As described in more detail below, the Subcommittee recommended certain rules changes to address both of these areas. Both Committees approved the recommendations of the Joint Subcommittee for this joint publication.

III. USE OF PERSONAL COMMUNICATIONS DEVICES BY JURORS

The problems that arise with juror use of these devices are two-fold. The first danger is that a juror will use the device to conduct independent research during a trial. The second problem is the use of these devices to communicate with parties outside the courtroom, either by revealing the nature of the deliberations or other information that a juror should not divulge.

The Committees concluded that the best way to approach to this problem is through specially tailored jury instructions. Specific warnings should be provided to the prospective and selected jurors at the earliest possible stage of their interaction with the court with frequent repetitions. These warnings would prohibit conducting independent research and discussion of the case outside the deliberation room generally but also would contain specific warnings against the use of the Internet by means of cell phone or other electronic device for these prohibited activities.

² The Joint Subcommittee was comprised of representatives from both Committees and included a common pleas judge, two prosecutors, and several private practitioners.

Originally, the Subcommittee considered a simple elaboration in the juror instruction rules. However, given the ease of access to information that these devices provide, waiting until a juror is actually seated may be too late in the process. This conclusion was coupled with anecdotal reports that some jurors found to have misused these devices, when confronted, expressed surprise that a ban on outside information included “looking things up on the Internet.” The Subcommittee therefore concluded that intervention, in the form of clear instructions, should be at the earliest stage possible.

The Committees agreed with this approach and are proposing rules to provide that prospective jurors be advised upon their first interaction with the courts with frequent repetition concerning the prohibited activity. This would include initial instructions when they first arrive as prospective jurors together with instructions on the juror summons itself. These instructions would be reiterated when they are selected as part of a jury “pool” and finally when they are impaneled jurors. There would also be encouragement to the trial judge to issue warnings at recesses to reinforce the restrictions.

The restriction on jurors would include a ban on the use of communications devices during court proceedings and in the deliberation room as well as specific instructions not to conduct research on the Internet.

Under this proposal, the most logical placement for new criminal rules would be in Chapter 6, Part C, Jury Procedures. In order to provide for sufficient room for the new rules, existing Rule 630 would be renumbered as Rule 625 and the new rules placed after it.

The major substantive provisions of this proposal would be included in a new criminal rule, Rule 626, that would describe the type of initial instructions to be given upon a prospective juror’s first interaction with the courts and thereafter. Correlative amendments to Criminal Rule 631 would require that these warning would be repeated at the beginning of *voir dire* and amendments to Criminal Rule 647 would require the warnings to be repeated at the start of trial.³

³ As described in more detail in the companion publication report from the Civil Rules Committee, there would also be changes to the Civil Rules that require similar (continued...)

IV. USE OF PERSONAL COMMUNICATIONS DEVICES BY OTHERS

The other aspect of this proposal is intended to address the use of personal communications devices by other participants in the trial or by members of the audience including members of the press.

As noted above, the Committees have received reports of the use of personal communications devices to broadcast messages from the courtroom during proceedings. The press has increasingly sought to use these new technologies, especially for microblogs such as “Twitter,” to provide continuous, simultaneous reports while a court proceeding is in progress.

Even though this type of activity would seem to fall within the Rule 112 prohibition on broadcasting, there has been considered confusion and a divergence among several counties. For example, Westmoreland County forbids “tweeting” from the courtroom in criminal cases as a violation of Criminal Rule 112’s prohibition of broadcasting during judicial proceedings while a Dauphin County trial judge permitted reporters’ “tweeting” during a public corruption trial. Most recently, two orders from Centre and Dauphin County permitted texting and “tweeting” from the preliminary hearings arising a child sexual abuse case.

There have been cases in other jurisdictions in which judges had “tweeted” during certain proceedings that resulted in challenges being raised because of the alleged prejudice demonstrated by the “tweets.” There also are reports of parties to cases “tweeting” during the trial.

Far less benign is the use of these devices by audience members for the purpose of intimidating witnesses. Reported use of cameras on cell phones to record a witness as well as the posting of other identifying information has become a problem. While this occurs most frequently in criminal cases, there is a potential for it to occur in the civil context such as in a domestic relations case.

The Criminal Rules Committee understands, appreciates, and is supportive of the constitutional imperative of having court proceedings open to the public. However,

(...continued)

instructions to be provided civil jurors and are meant to mirror the proposed Criminal Rules.

a balance must be struck between the public's right to observe and be informed of court proceedings and the equally important rights of the participants in the proceedings as well as the orderly administration of justice.

The original ban on broadcasting from court proceedings, presently contained in Rule 112, was established in then-Rules 27 and 328 as part of the original promulgation of the Rules of Criminal Procedure. Among the concerns that prompted the development of this restriction were the disruptive effect that broadcasting would have on the proceedings, the potential for biasing jurors, the potential to influence witness testimony, the possibility of "grandstanding" by the trial judge and/or other participants, and the threat to dignity and decorum of the process of justice in which individuals' liberty and even life are in the balance.⁴

⁴ This is consistent with Canon 3.7 of the Pennsylvania Code of Judicial Conduct that states:

(7) Unless otherwise provided by the Supreme Court of Pennsylvania, judges should prohibit broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record or for other purposes of judicial administration;

(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;

(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) the means of recording will not distract participants or impair the dignity of the proceedings; and

(ii) the parties have consented; and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproductions; and

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

(d) the use of electronic broadcasting, televising, recording and taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions of any trial court nonjury civil proceeding, however, for the purposes of this subsection 'civil proceedings' shall not be construed to mean a support, custody or divorce proceeding. Subsection

(continued...)

The Committee is aware that the trend in the United States has been to allow a wide scope of broadcasting of court proceedings. Observation of recent experiences from jurisdictions where broadcasting, in a variety of forms, was permitted has not diminished the concerns that led to Rule 112 and its predecessors.

The Committee examined with particularity whether the use of the new technology falls within the existing language of Rule 112. Rule 112 currently prohibits “the transmission of communications by telephone, radio, television, or advanced communications technology.” The term “advance communications technology”⁵ was added to Rule 112 in 2002 in an attempt to anticipate new developments in technology and is defined in Rule 103 as:

...any communication equipment that is used as a link between parties in physically separate locations, and includes, but is not limited to: systems providing for two-way simultaneous communication of image and sound; closed-circuit television; telephone and facsimile equipment; and electronic mail.

The Committee concluded that there is no other interpretation than that the use of personal communications devices during court proceedings falls within the existing language of Rule 112. The Committee believes that any interpretation that excludes technology such as “tweeting” or other microblogging or other similar technology from Rule 112’s prohibition of broadcasting is a misinterpretation.

The Joint Subcommittee and the Criminal Rules Committee also examined the arguments that have been raised in favor of the allowing the use of this new form of

(...continued)

(iii) and (iv) shall not apply to nonjury civil proceedings as heretofore defined. No witness or party who expresses any prior objection to the judge shall be photographed nor shall the testimony of such witness or party be broadcast or telecast. Permission for the broadcasting, televising, recording and photographing of any civil nonjury proceeding shall have first been expressly granted by the judge, and under such conditions as the judge may prescribe in accordance with the guidelines contained in this Order.

⁵ It should be noted that the Criminal Rules make a distinction between “advanced communication technology” and “two-way audio-visual communication.” The first term is a much broader in scope while the latter term is used more specifically and usually in the context of a defendant’s participation in court proceedings from a remote location.

technology as an exception to the general ban on broadcasting. It has been argued that this technology is qualitatively different from traditional broadcasting, being less disruptive or intrusive in effect.

The Committee rejected this argument, noting that there are other reasons for the ban on broadcasting, including fair trial and privacy concerns. Furthermore, an exception for this particular form of technology would undermine the clear delineation currently existing in Rule 112 while being difficult to police against abuse.

Therefore, the Committee is proposing that an amendment should be added to Criminal Rule 112 clarifying that “broadcasting” includes the use of personal communications devices and activities such as texting and “tweeting” would fall within its prohibition.⁶

As stated in the *Comment*, Rule 112 is not intended to prohibit the use of advanced communications technology for purposes of conducting court proceedings. The Committee did not want to restrict the use of this technology by attorneys who were trying cases in courtrooms that accommodated these technologies, for example to obtain information while examining witnesses or during the *voir dire* of jurors. This concept would be added as new paragraph (B) to Rule 112.

Finally, included in the Rule 112 *Comment* would be a clarification that the prohibition on broadcasting would not include the use of cameras or other devices for security purposes.

V. SANCTIONS

Another area that the Committees considered was what types of sanctions would be available against those who violate this rule, both jurors and others. It was concluded that the most likely enforcement mechanism would be the contempt of court process with the associated sanctions. However, the Committees wanted to make it clear that the judge has power to confiscate a device that was used to violate the

⁶ In the companion publication report from the Civil Rules Committee, there is no equivalent to the proposed amendments to Criminal Rule 112. That is because the Civil Rules were amended in 1975 to remove the civil equivalent of Rule 112. The reason for its removal at that time was the conclusion that the prohibition was already covered in the Judicial Canon 3.7 and the Civil Rule unnecessary.

restrictions. Accordingly, the Criminal Rules Committee is proposing new Criminal Rule 627 to authorize the judge to hold someone in contempt for violation of the rules and to confiscate a device that is used to violate the rules.⁷

⁷ As contained in the companion publication report from the Civil Rules Committee is proposing new Civil Rule 220.2 that would allow for any person who violates Rule 220.1 to be found in contempt of court and sanctioned in accordance with Section 4132 of the Judicial Code. In addition, the trial judge may also sanction a violator as appropriate including confiscation of the electronic device.