SUPREME COURT OF PENNSYLVANIA
CRIMINAL PROCEDURAL RULES COMMITTEE

NOTICE OF PROPOSED RULEMAKING

Proposed Amendment of Pa.R.Crim.P. 227, 229, 230, 231, and of the Comments to Pa.R.Crim.P. 200 and 588; and Proposed Adoption of Pa.R.Crim.P. 232, 233, 234, 235, 236, 245, 246, and 247.

The Criminal Procedural Rules Committee is considering proposing to the Supreme Court the adoption of Pa.R.Crim.P. 232-236 (relating to local, regional, and statewide investigating grand juries) and Pa.R.Crim.P. 245-247 (relating only to regional and statewide investigating grand juries) and the amendment of Pa.R.Crim.P. 227 (Administration of Oath to Witness), 229 (Control of Investigating Grand Jury Transcript/Evidence), 230 (Disclosure of Testimony before Investigating Grand Jury) and 231 (Who May be Present During Session of an Investigating Grand Jury) and of the Comments to Pa.R.Crim.P. 200 (Who May Issue) and 588 (Motion for Return of Property), for the reasons set forth in the accompanying publication report. Pursuant to Pa.R.J.A. 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 report accompanying this proposal was prepared by the Committee to indicate the rationale for the proposed rulemaking. It will neither constitute a part of the rules nor be 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 **Wednesday, January 25, 2023.** 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.

By the Criminal Procedural Rules Committee,

Aaron J. Marcus
Chair

Rule 200. Who May Issue.

A search warrant may be issued by any issuing authority within the judicial district wherein is located either the person or place to be searched.

Comment: This rule formally authorizes magisterial district judges, Philadelphia bail commissioners, and judges of the Municipal, Common Pleas, Commonwealth, Superior, and Supreme Courts to issue search warrants. This is not a departure from existing practice. *See, e.g.*, Sections 1123(a)(5) and 1515(a)(4) of the Judicial Code, 42 Pa.C.S. §§ 1123(a)(5), 1515 (a)(4). *See also* the Rules of Juvenile Court Procedure, Rule 105 (Search Warrants). Any judicial officer who is authorized to issue a search warrant and who issues a warrant is considered an "issuing authority" for purposes of this rule. The authority of a magisterial district judge to issue a search warrant outside of the magisterial district but within the judicial district is recognized in *Commonwealth v. Ryan*, 400 A.2d 1264 (Pa. 1979).

Only common pleas court judges and appellate court justices and judges may issue search warrants when the supporting affidavit(s) is to be sealed under Rule 211.

This rule is not intended to affect the traditional power of appellate court judges and justices to issue search warrants anywhere within the state.

For the issuance of search warrants by the supervising judge of an investigating grand jury, see Rule 235.

NOTE: Prior Rules 2000 and 2001 were suspended by former Rule 323, effective February 3, 1969. Present Rule 2001 adopted March 28, 1973, effective 60 days hence; amended July 1, 1980, effective August 1, 1980; *Comment* revised September 3, 1993, effective January 1, 1994; renumbered Rule 200 and *Comment* revised March 1, 2000, effective April 1, 2001; *Comment* revised April 1, 2005, effective October 1, 2005 **[.] *Comment* revised , 2022, effective , 2022.**

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COMMITTEE EXPLANATORY REPORTS:

Report *explaining the September 3, 1993 Comment revisions published at 21 Pa.B. 3681 (August 17, 1991).*

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 April 1, 2005 Comment revision concerning Rules of Juvenile Court Procedure published with the Court's Order at 35 Pa.B. 2213 (April 16, 2005).*

Report explaining the proposed Comment revision concerning search warrants issued by the supervising judge of an investigating grand jury published for comment at 52 Pa.B. (, 2022).

Rule 227. Administration of Oath to Witness.

(A) Each witness to be heard by the investigating grand jury shall be sworn **and advised of his or her rights by the supervising judge** before testifying. **Absent good cause, the witness shall be sworn individually and outside the presence of other witnesses. [The witness may elect to be sworn in camera or in open court.]**

(B) The supervising judge shall explain to each witness that witness's rights and obligations concerning grand jury secrecy, including the following:

(1) The right to counsel, including the right to confer with counsel during the witness's appearance before the grand jury;

(2) The privilege against self-incrimination;

(3) The right, absent a contrary court order, to disclose the witness's own testimony; and

(4) The obligation, absent a contrary court order, to keep secret all matters occurring before the grand jury, including matters occurring before the supervising judge, other than the witness's own testimony.

Comment: [Should the witness fail to exercise any election, it is intended that the court will determine whether the witness is to be sworn in camera or in open court.

When it is necessary to give constitutional warnings to a witness, the warnings and the oath must be administered by the court. As to warnings that the court may have to give to the witness when the witness is sworn, see, *e.g., Commonwealth v. McCloskey*, 443 Pa. 117, 277 A.2d 764 (Pa. 1971).] The oath administered by the supervising judge should be substantially in the following form:

"Do you swear or affirm that that the testimony you will give will be the truth, the whole truth, and nothing but the truth? Do you swear or affirm that you will keep secret all matters occurring before the grand jury other than your own testimony?"

NOTE: Rule 259 adopted June 26, 1978, effective January 9, 1979; renumbered Rule 227 and Comment revised March 1,

2000, effective April 1, 2001; amended September 30, 2005, effective February 1, 2006.

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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 30, 2005 amendments concerning administration of the oath published with the Court's Order at 35 Pa.B. 5679 (October 15, 2005).

Rule 229. Control of Investigating Grand Jury Transcript/Evidence.

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

Comment: This rule requires that **the supervising judge establish procedures to maintain grand jury materials. The supervising judge may designate the attorney for the Commonwealth as the entity that controls, maintains, and ensures the secrecy of such materials until their release pursuant to these rules. [the court 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.]**

Upon the expiration of a grand jury, a successor tribunal is typically impaneled, with the supervising judge of the successor grand jury being tasked with maintaining secrecy of grand jury materials generated by prior multicounty investigating grand juries. While the departing and incoming supervising judges bear the primary responsibility to effectuate the transfer of such materials, the attorney for the Commonwealth can provide practical assistance in this process.

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.

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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. 1477 (March 18, 2000).

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 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, **the supervising judge shall direct the Commonwealth to furnish the defendant with a copy of the transcript of such testimony within 30 days after arraignment. [upon application of such defendant the court 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. If a party seeks disclosure prior to the conclusion of the direct testimony of the witness, and no agreement has been reached for early disclosure, the party seeking disclosure may make an appropriate motion before the supervising judge. The supervising judge may direct any testimony not concerning the subject matter of the charges against the defendant to be redacted from a transcript furnished pursuant to this subdivision in order to preserve grand jury secrecy**.

(3) **Subdivision (B)(2) notwithstanding, the supervising judge shall direct the Commonwealth to furnish the defendant with a copy of any grand jury testimony or documentary evidence or tangible evidence presented to the grand jury that is favorable to the accused including information that tends to exculpate the defendant, mitigate the level of the defendant's culpability, or**

impeach a prosecution witness's credibility within 30 days after arraignment. If the parties disagree as to whether or when evidence should be disclosed under this paragraph, the defendant shall file a motion with the supervising judge, who shall decide the matter. [Upon appropriate motion of a defendant in a criminal case, the court 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:

(1) Upon **[appropriate]** motion, and after a hearing into relevancy, the **[court]supervising judge** may order **disclosure of [that a transcript of testimony before an investigating grand jury, or physical evidence before the investigating grand jury,]matters occurring before the grand jury [may be released]** to **[another investigating agency]local, State, other state, or Federal law enforcement or investigating agencies to assist them in investigating crimes under their investigative jurisdiction,** under such**[other]** conditions as the **[court]supervising judge** may impose.

(2) Upon motion by an attorney for the Commonwealth, a supervising judge may approve disclosure of matters occurring before the grand jury by a Commonwealth attorney to witnesses, subjects, or targets, and their counsel, provided that such disclosure is for use in the performance of the Commonwealth attorney's duties.

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.

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.

The language in subparagraph (C)(1), which permits release to other investigative agencies, has been reworded to track the language in 42 Pa.C.S. § 4549(b). *See In re Investigating Grand Jury of Philadelphia Cty. Appeal of Philadelphia Rust Proof Company, Inc.*, 437 A.2d 1128 (Pa. 1981).

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.

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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. 6251 (October 6, 2012).

Rule 231. Who May be Present During Session of an Investigating Grand Jury.

(A) The attorney for the Commonwealth, the alternate grand jurors, the witness under examination, and a stenographer may be present while the investigating grand jury is in session. Counsel for the witness under examination may be present as provided by law.

(B) The supervising judge, upon the request of the attorney for the Commonwealth or the grand jury, may order that an interpreter, security officers, and such other persons as the judge may determine are necessary to the presentation of the evidence may be present while the investigating grand jury is in session.

(C) All persons who are to be present while the grand jury is in session shall be identified in the record, shall be sworn to secrecy as provided in these rules, and shall not disclose any **[information pertaining to the grand jury] matters occurring before the grand jury** except as provided by law.

(D) No person other than the permanent grand jurors may be present during the deliberations or voting of the grand jury.

Comment: As used in this rule, the term "witness" includes both juveniles and adults.

The 1987 amendment provides that either the attorney for the Commonwealth, or a majority of the grand jury, through their foreperson, may request that certain, specified individuals, in addition to those referred to in paragraph (A), be present in the grand jury room while the grand jury is in session. As provided in paragraph (B), the additional people would be limited to an interpreter or interpreters the supervising judge determines are needed to assist the grand jury in understanding the testimony of a witness; a security officer or security officers the supervising judge determines are needed to escort witnesses who are in custody or to protect the members of the grand jury and the other people present during a session of the grand jury; and any individuals the supervising judge determines are required to assist the grand jurors with the presentation of evidence. This would include such people as the case agent (lead investigator), who would assist the attorney for the Commonwealth with questions for witnesses; experts, who would assist the grand jury with interpreting difficult, complex technical evidence; or technicians to run such equipment as tape recorders, videomachines, *etc*.

It is intended in paragraph (B) that when the supervising judge authorizes a certain individual to be present during a session of the investigating grand jury, the person may remain in the grand jury room only as long as is necessary for that person to assist the grand jurors.

[Paragraph (C), added in 1987, generally prohibits the disclosure of any information related to testimony before the grand jury. There are, however, some exceptions to this prohibition enumerated in Section 4549 of the Judicial Code, 42 Pa.C.S. § 4549.]

"The first lesson of federal precedent is that the phrase 'matter occurring before the grand jury' is a term of art." Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, 3 Crim. Proc. § 8.5(c) (4th ed. 2017), quoted in *In re Fortieth Statewide Investigating Grand Jury, Appeal of Diocese of Harrisburg and Diocese of Greenburg,* 191 A.3d 750 (Pa. 2018).

Where a secrecy oath is administered via an entry-of-appearance form, the oath should require the attorney to swear or affirm that, under penalty of contempt, they will keep secret all that transpires in the Grand Jury room and all matters occurring before the Grand Jury, except when otherwise authorized by law or permitted by the Court. *In re Fortieth Statewide Investigating Grand Jury,* 191 A.3d 750, 761-62 (Pa. 2018). Additionally, the following statement should be appended to the entry-of-appearance: "I understand that -- with the explicit, knowing, voluntary, and informed consent of my client or clients, and absent a specific prohibition by a supervising judge or circumstances implicating prohibitions arising from the Rules of Professional Conduct -- I may disclose the content of a client-witness's own testimony to the extent that the client-witness may do so under applicable law." *Id*. at 761.

NOTE: Rule 264 adopted June 26, 1978, effective January 9, 1979; amended June 5, 1987, effective July 1, 1987; renumbered Rule 231 and amended March 1, 2000, effective April 1, 2001; Comment revised January 18, 2013, effective May 1, 2013.

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COMMITTEE EXPLANATORY REPORTS:

***Report* explaining the June 5, 1987 amendments adding paragraphs (B)—(D) published at 17 Pa.B. 167 (January 10, 1987).**

***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 January 18, 2013 Comment revision concerning definition of witness as used in this rule published at 43 Pa.B. 653 (February 2, 2013).

—The following text is entirely new—

Rule 232. Guidance of an Investigation by the Commonwealth's Attorney.

(A) An investigation is commenced upon the approval of a notice of submission presented by the Commonwealth's attorney to the supervising judge.

(B) The Commonwealth's attorney may explain to the investigating grand jury the elements of the charges that could be set forth in a presentment.

(C) The Commonwealth's attorney may explain to the investigating grand jury the principles applicable to a grand jury report.

(D) The Commonwealth's attorney may summarize for the investigating grand jury the evidence that has been presented, but with the express caution that it is the investigating grand jury's recollection of the evidence, and not that of the prosecutor, which controls.

(E) The Commonwealth's attorney shall ensure that proceedings before the investigating grand jury, except for the investigating grand jury's deliberations and votes, are stenographically recorded or transcribed or both.

Comment: The Investigating Grand Jury Act specifies that proceedings before the grand jury, but for the deliberations and votes of the tribunal, are to be recorded. *See* 42 Pa.C.S. § 4549(a). While the statute is silent as to designating the entity responsible for ensuring that such recording occurs, logically the duty falls on the Commonwealth's attorney, who will be present whenever the grand jury is in session.

The unintentional failure to make such a recording should not be seen as affecting the validity of any subsequent presentment, grand jury report, or prosecution but may be relevant to evidentiary or discovery disputes. Compare Fed.R.Crim.P. 6(e)(1) (imposing a similar requirement in federal grand jury proceedings; further instructing that "the validity of a prosecution is not affected by the unintentional failure to make a recording").

—The following text is entirely new—

Rule 233. Disclosure of Grand Jury Testimony by Witnesses and Their Attorneys and Requirements for Nondisclosure Orders.

(A) **Disclosure of Grand Jury Testimony by Witnesses and Their Attorneys.**

No witness or attorney for a witness shall be prohibited from disclosing the witness's testimony before the grand jury unless, after a hearing before the supervising judge, cause is shown to justify nondisclosure by that particular witness or the witness's attorney. In no event may a witness be prevented from disclosing the witness's testimony to his or her attorney.

(B) **Request for and Conduct of Nondisclosure Hearing**.

(1) When the Commonwealth's attorney seeks an order prohibiting a witness and the witness's attorney from disclosing the witness's grand jury testimony, a hearing shall be held. The request for a nondisclosure order shall be made *exparte*, and any request to exclude the witness and the witness's attorney from the hearing, along with the reasons for excluding the witness and the witness's attorney from the hearing, shall be made contemporaneously with the nondisclosure request. Prior to granting a request to exclude the witness and the witness's attorney from the hearing, the witness shall be heard on that request.

(2) If the witness and the witness's attorney are excluded from the hearing, the witness shall be afforded the opportunity to present argument against the Commonwealth's request for nondisclosure prior to any decision by the supervising judge.

(3) The supervising judge shall support any nondisclosure order with written or on-the-record findings provided to the witness and the witness's attorney, with such redactions as the supervising judge deems necessary to protect the secrecy of matters occurring before the grand jury. The nondisclosure order shall specify the prohibitions on disclosure applicable to the witness and the witness's attorney.

Comment: Authority for a witness to disclose his or her testimony is provided by 42 Pa.C.S. § 4549(d) ("Disclosure of proceedings by witnesses.--No witness shall be prohibited from disclosing his testimony before the investigating grand jury except for cause shown in a hearing before the supervising judge. In no event may a witness be prevented from disclosing his testimony to his attorney."). The Investigating Grand Jury Act, 42 Pa.C.S. §§ 4541 *et seq*., does not define "testimony."

—The following text is entirely new—

Rule 234. Investigating Grand Jury Reports.

(A) Submission of investigating grand jury report. An investigating grand jury may, upon majority vote of the full investigating grand jury, submit to the supervising judge an investigating grand jury report.

(B) Citation to the Record. At the time the report is submitted to the supervising judge for review, the attorney for the Commonwealth shall provide the supervising judge with citations to the record in support of any factual claims or evidentiary references. These citations to the record shall not be part of the report itself.

(C) Review of Report by the Supervising Judge.

(1) The supervising judge shall examine the report to determine whether the report is based upon sufficient evidence received in the course of an investigation authorized by the Investigating Grand Jury Act. In conducting this review, the supervising judge is to determine whether discrete findings are supported by record evidence.

(2) In the event the supervising judge finds that certain discrete passages in the report are not supported by record evidence, the supervising judge shall not accept the report. Rather, the supervising judge shall return the report to the investigating grand jury for its consideration, identifying those passages the supervising judge concluded were unsupported by record evidence. In the event the investigating grand jury, by an affirmative vote of the full investigating grand jury, submits a revised version of the report, or takes additional evidence in support of the findings in the report, the supervising judge shall conduct another review pursuant to subsection (C)(1).

(3) The contents of an investigating grand jury report are subject to grand jury secrecy unless and until the supervising judge files the report as a public record.

(D) Appeal from Refusal to File. Failure of the supervising judge to accept and file as a public record a report submitted under this section, including the return of a report to the grand jury pursuant to subsection (C)(2), may be appealed by the attorney for the Commonwealth to the Supreme Court in the manner prescribed by general rules.

Comment: The supervising judge is tasked with examining the report prior to accepting it. The judge should only accept the report if it is based upon facts received by the grand jury and supported by a preponderance of the evidence. 42 Pa.C.S. § 4552(b). The supervising judge, however, does not sit through the grand jury testimony. Subsection B of this Rule requires the attorney for the Commonwealth to provide citations to the supervising judge so that the jurist can more easily identify and review the evidentiary support for the report. This subsection also specifies that citations provided by the Commonwealth for purposes of the supervising judge's review are not incorporated into the report itself. This is to ensure that, in the event the report is approved and released to the public, the record as a whole remains subject to grand jury secrecy.

—The following text is entirely new—

Rule 235. Search Warrants; Motions for Return of Property.

(A) The supervising judge of the investigating grand jury may issue a search warrant that is sought in connection with and to further an investigation of the grand jury for a person or property to be searched that are in the judicial district in which the investigating grand jury has been convened or, in the case of a statewide or regional investigating grand jury, any of the judicial districts for which the investigating grand jury has been convened.

(B) Unless otherwise specifically covered by this rule, the procedures governing search warrants as set forth in Part A (Search Warrants) of this Chapter shall be applicable to search warrants issued by the supervising judge of an investigating grand jury.

(C) Any search warrant issued pursuant to this rule shall contain the docket number of the investigating grand jury and shall identify the judicial district in which the investigating grand jury is located.

(D) Upon return of the search warrant with inventory as provided in Rule 209, the supervising judge shall file the search warrant, all supporting affidavits and the inventory with the clerk of court of the common pleas of the judicial district in which the investigating grand jury is located and which shall be entered upon the docket of the investigating grand jury.

(E) Any motion for return of property filed pursuant to Rule 588 shall be filed in the court of common pleas for the judicial district in which the investigating grand jury is located and which shall be entered on the docket of the investigating grand jury.

Comment: Regarding the issuance of search warrants by supervising judges of investigating grand juries and the adjudication of motions for return of property arising from such warrants, see *In Re: Return of Seized Property of Lackawanna County*, 212 A.3d 1 (Pa. 2019).

Investigating grand jury dockets are sealed.

—The following text is entirely new—

Rule 236. Presence of Supervising Judges of County Investigating Grand Juries.

Whenever the investigating grand jury is in session, the supervising judge of the county investigating grand jury shall either be on the premises or readily available to return to the premises.

Comment: The presence of the supervising judge while the grand jury is in session serves several important functions, including the in-person swearing of witnesses and the prompt handling of any legal issues that may arise. When the supervising judge is not physically present, the work of the grand jury may be delayed.

The supervising judge administers oaths to various individuals. *See* Pa.R.Crim.P. 223 (oath to stenographer); 224 (oath to court personnel); 225 (oath to grand jury and foreman); 227 (oath to witness); 231, Comment (oath to attorney for witness). These oaths should be administered by the supervising judge in person, although there may be instances when, due to timeliness concerns and to protect grand jury secrecy, an oath for an attorney for a witness may be administered via two-way, simultaneous audio-visual communication.

During the course of a grand jury session, various legal issues may arise. If the supervising judge is not on the premises, or readily available to return to the premises, then the issues may not be resolved in a timely manner, risking significant delay and inconvenience. While the supervising judge does not sit in the grand jury sessions themselves, and therefore need not be physically present for the entirety of a grand jury session, the judge must be readily available to return to the facility promptly should the need arise. While the meaning of readily available may vary with the circumstances, ordinarily the judge should be able to return within 30 minutes in order to ensure the efficient operation of the grand jury.

—The following text is entirely new—

Rule 245. Applications to Convene a Multicounty Investigating Grand Jury.

(A) The Attorney General shall file an application to convene a multicounty investigating grand jury in the Supreme Court's Office of the Prothonotary.

(B) In that application, the Attorney General shall state that, in his or her judgment, the convening of a multicounty investigating grand jury is necessary to:

(1) investigate organized crime, public corruption, or both, that involves more than one county of the Commonwealth;

(2) such investigation or investigations cannot be adequately performed by a county investigating grand jury; and

(3) such investigation or investigations cannot be adequately performed by another multicounty investigating grand jury.

(C) Based on information available when the application to convene a multicounty investigating grand jury is filed, the Attorney General shall indicate how many investigations he or she intends to submit to the multicounty investigating grand jury that:

(1) relate to organized crime and/or public corruption, further specifying how many of such investigations will be transferred from another grand jury and how many will be newly initiated; and

(2) are unrelated to organized crime and/or public corruption, further specifying how many of such investigations will be transferred from another grand jury and how many will be newly initiated.

(D) The Attorney General shall indicate whether the investigating grand jury is to have statewide jurisdiction or, alternatively, specify the counties for which the investigating grand jury is to be convened. The Attorney General shall also indicate the preferred location for the investigating grand jury.

(E) An order granting an application to convene a multicounty investigating grand jury shall:

(1) declare that the multicounty investigating grand jury has statewide jurisdiction or, alternatively, specify the counties over which it has jurisdiction;

(2) designate a judge of the court of common pleas as the supervising judge;

(3) designate the location of the multicounty investigating grand jury proceedings; and

(4) provide for any other incidental arrangements as may be necessary.

Comment: This rule, in large part, both tracks the pertinent sections of the Investigating Grand Jury Act, see 42 Pa.C.S. §§ 4541-4553, and memorializes existing practice with respect to applications for statewide investigating grand juries. Traditionally, such applications, and the orders disposing of them, have not been placed under seal, as the contents are general in nature and do not disclose any particulars that would implicate grand jury secrecy.

The statistical information required by this rule should be general in nature, so as to avoid disclosing any matters covered by grand jury secrecy provisions. Additionally, the statistics concern only that data available to the Attorney General at the time the application to convene is filed. As such, the statistics should not be viewed as a tally of the total number of investigations the Attorney General will ultimately conduct through the grand jury. Indeed, considering that investigating grand juries commonly operate for 24 months, any estimate given prior to impanelment as to the tribunal's full workload would be speculative.

Finally, the statistics are pertinent to the statutory criteria for impanelment. *See* 42 Pa.C.S. § 4544(a). Those Section 4544 requirements apply with respect to impanelment and do not limit the matters that the Office of Attorney General may investigate through a statewide investigating grand jury. *See In re Twenty-Fourth Statewide Investigating Grand Jury*, 907 A.2d 505, 512 (Pa. 2006).

—The following text is entirely new—

Rule 246. Filing Office for Multicounty Investigating Grand Juries.

(A) The filing office for a multicounty investigating grand jury shall be the clerk of courts for the county designated as the location of the investigating grand jury.

(B) The clerk of courts shall place all such filings on a sealed docket.

Comment: The county in which a multicounty investigating grand jury sits is specified in the order permitting the convening of that tribunal. *See* 42 Pa.C.S. § 4544(b)(3); Pa.R.Crim.P. 243(A). Unlike most other orders concerning grand juries, Supreme Court orders permitting the convening of multicounty investigating grand juries have historically not been sealed. Litigants can thus readily identify the proper clerk of courts for submitting filings relative to a particular grand jury.

—The following text is entirely new—

Rule 247. Presence of Supervising Judges of Multicounty Investigating Grand Juries.

Whenever the investigating grand jury is in session, the supervising judge of the multicounty investigating grand jury shall either be on the premises or readily available to return to the premises.

Comment: The presence of the supervising judge while the grand jury is in session serves several important functions, including the in-person swearing of witnesses and the prompt handling of any legal issues that may arise. When the supervising judge is not physically present, the work of the grand jury may be delayed.

The supervising judge administers oaths to various individuals. *See* Pa.R.Crim.P. 223 (oath to stenographer); 224 (oath to court personnel); 225 (oath to grand jury and foreman); 227 (oath to witness); 231, Comment (oath to attorney for witness). These oaths should be administered by the supervising judge in person, although there may be instances when, due to timeliness concerns and to protect grand jury secrecy, an oath for an attorney for a witness may be administered via two-way, simultaneous audio-visual communication.

During the course of a grand jury session, various legal issues may arise. If the supervising judge is not on the premises, or readily available to return to the premises, then the issues may not be resolved in a timely manner, risking significant delay and inconvenience. While the supervising judge does not sit in the grand jury sessions themselves, and therefore need not be physically present for the entirety of a grand jury session, the judge must be readily available to return to the facility promptly should the need arise. While the meaning of readily available may vary with the circumstances, ordinarily the judge should be able to return within 30 minutes in order to ensure the efficient operation of the grand jury.

Rule 588. Motion for Return of Property.

(A) A person aggrieved by a search and seizure, whether or not executed pursuant to a warrant, may move for the return of the property on the ground that he or she is entitled to lawful possession thereof. Such motion shall be filed in the court of common pleas for the judicial district in which the property was seized.

(B) The judge hearing such motion shall receive evidence on any issue of fact necessary to the decision thereon. If the motion is granted, the property shall be restored unless the court determines that such property is contraband, in which case the court may order the property to be forfeited.

(C) A motion to suppress evidence under Rule 581 may be joined with a motion under this rule.

Comment: A motion for the return of property should not be confused with a motion for the suppression of evidence, governed by Rule 581. However, if the time and effect of a motion brought under the instant rule would be, in the view of the judge hearing the motion, substantially the same as a motion for suppression of evidence, the judge may dispose of the motion in accordance with Rule 581.

For the motion for return of property arising from search warrants issued by the supervising judge of an investigating grand jury, see Rule 235.

NOTE: Rule 324 adopted October 17, 1973, effective 60 days hence; 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; renumbered Rule 588 and amended March 1, 2000, effective April 1, 2001.

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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 motions for return of property arising from search warrants issued by the supervising judge of an investigating grand jury published for comment at 52 Pa.B. (, 2022).

SUPREME COURT OF PENNSYLVANIA
CRIMINAL PROCEDURAL RULES COMMITTEE

PUBLICATION REPORT

Proposed Amendment of Pa.R.Crim.P. 227, 229, 230, 231, and of the Comments to Pa.R.Crim.P. 200 and 588; and Proposed Adoption of Pa.R.Crim.P. 232, 233, 234, 235, 236, 245, 246, and 247.

The Criminal Procedural Rules Committee is considering proposing to the Supreme Court a set of statewide procedural rules to augment the existing rules governing investigating grand juries. Proposed Pa.R.Crim.P. 232 through 235 would be applicable to local, regional, and statewide investigating grand juries, while proposed Pa.R.Crim.P. 236 would only be applicable to local investigating grand juries. These rules would be codified in Chapter 2, Part B(1) of the rules. Proposed Pa.R.Crim.P. 245 through 247 would be applicable to regional and statewide investigating grand juries and would be codified in Chapter 2, Part B(2) of the rules. The Committee is also proposing the amendment of Pa.R.Crim.P. 227, 229, 230 and 231 and of the Comments to Pa.R.Crim.P. 200 and 588.

The primary authority for investigating grand juries is the Investigating Grand Jury Act, 42 Pa.C.S. §§ 4541-4553 (hereafter "the Act"). The rules related to investigating grand juries are contained in Chapter 2 Part B of the Rules of Criminal Procedure. Part B(1) was first adopted in 1978, while Part B(2) was first adopted in 1980. In 2017, the Court formed an Investigating Grand Jury Task Force (hereafter "the Task Force") to perform a comprehensive review of investigating grand juries, centered on the judicial role in those proceedings. On November 22, 2019, the Task Force issued its report, which can be found here: https://www.pacourts.us/news-and-statistics/reports. The Task Force's Report was forwarded to the Committee for further review resulting in this proposal. Differences between the Committee's proposal and the Task Force's recommendation are noted.

Beginning with the proposed rules addressing regional and statewide investigating grand juries, proposed Rule 245 (Applications to Convene a Multicounty Investigating Grand Jury) is derived from the requirements of 42 Pa.C.S. § 4544 regarding convening a multicounty investigating grand jury. While neither the Committee nor the Task Force is aware of any problems with the current application process, the Committee, following the Task Force's lead, felt it appropriate to codify that process with a rule reflecting current practice. The required contents of an order granting an application can be found in § 4544(b) of the Act.

In addition to the requirements for convening a multicounty investigating grand jury, Rule 245 would also require the Attorney General's Office to include in the

application the number of investigations it intends to submit to the grand jury. The Committee determined that such statistics, though provisional, would aid the Court in providing for "any other incidental arrangements as may be necessary" for the convening of the grand jury as required by subdivision (E)(4). Subdivision (E) would also require the order granting an application to: declare whether the grand jury has statewide jurisdiction or jurisdiction over several counties; designate a judge of the court of common pleas as the supervising judge; and designate the location of the grand jury.

Proposed Rule 246 (Filing Office for Multicounty Investigating Grand Juries) would establish the filing office of a multicounty investigating grand jury as the clerk of courts of the county designated by the Court — pursuant to Proposed Rule 245(E)(3) — as the location of the investigating grand jury. The Committee believes, as stated in the Comment to this rule, that identifying the filing office will allow litigants to easily identify where relevant filings should be submitted, including motions for return of property when property has been seized pursuant to a search warrant issued by the supervising judge of a grand jury. Additionally, this rule would create a unified filing practice throughout the Commonwealth.

Proposed Rule 247 (Presence of Supervising Judges of Multicounty Investigating Grand Juries) would require a supervising judge to be on the premises or readily available when the grand jury is in session. While a supervising judge does not preside over the grand jury session, they are required to administer oaths and respond to legal issues that may arise. As noted in the Comment, "If the supervising judge is not on the premises, or readily available to return to the premises, then [legal issues that may arise] may not be resolved in a timely manner, risking significant delay and inconvenience." Proposed Rule 236 (Presence of Supervising Judges of County Investigating Grand Juries) would similarly require a supervising judge of a county investigating grand jury to be on the premises or readily available when the grand jury is in session.

Rule 229 (Control of Investigating Grand Jury Transcript/Evidence) currently requires the court to control the original and all copies of the grand jury transcript but permits the court to establish procedures for supervising custody of physical evidence presented to the grand jury. With the proposed amendment of this rule, the supervising judge would be permitted to establish an alternative procedure for managing custody of any transcripts as well. The Comment would be amended to indicate that the supervising judge may assign such responsibility to the attorney for the Commonwealth. Allowing the attorney for the Commonwealth to assume this responsibility recognizes that supervising judges often lack the staff, space, and security necessary to maintain physical control of, and ensure the secrecy of, transcripts. Additionally, the amended Comment would inform the reader that the attorney for the Commonwealth may assist the supervising judge in transferring materials from an expiring grand jury to a newly impaneled one. This accommodation would be particularly beneficial when the attorney for the Commonwealth is continuing their investigation with the new grand jury.

Proposed Rule 232 (Guidance of an Investigation by the Commonwealth's Attorney) would allow the attorney for the Commonwealth to provide guidance to the grand jury in preparing a presentment or a report. In particular, subdivision (B) would permit the attorney for the Commonwealth to explain to the grand jury the elements of any criminal charges that could be set forth in a presentment, and subdivision (C) would permit the attorney for the Commonwealth to explain to the grand jury the principles applicable to a grand jury report. These subdivisions are derived from 42 Pa.C.S. § 4551(a) (providing for the attorney for the Commonwealth to prepare the presentment) and 42 Pa.C.S. §§ 4548 and 4550 (permitting the attorney for the Commonwealth to define the scope of the investigation). The attorney for the Commonwealth would also be permitted to summarize for the grand jury the evidence that had been presented. But, subdivision (D) would require the attorney for the Commonwealth to remind the grand jury that the grand jury's recollection of the evidence controls. Additionally, the rule would place a duty on the attorney for the Commonwealth to ensure that the grand jury proceedings were recorded or transcribed. Informed by Fed.R.Crim.P. 6(e)(1) — which reads, in pertinent part, "the validity of a prosecution is not affected by the unintentional failure to make a recording" — the Comment to the rule as proposed by the Task Force would notify the reader that "[t]he unintentional failure to make such a recording, however, should not be seen as affecting the validity of any subsequent presentment, grand jury report, or prosecution." To this Comment, the Committee is proposing the additional clarification that the unintentional failure to make a recording "may be relevant to evidentiary or discovery disputes." Although the federal rule does not address potential evidentiary or discovery disputes, the Committee was concerned that a Comment without the proposed clarification might be read as immunizing the Commonwealth against any and all challenges arising from an unintentional failure to make a recording.

Turning to the restrictions on disclosure of matters occurring before the grand jury, subdivision (C) of Rule 231 (Who May be Present During Session of an Investigating Grand Jury) currently prohibits any person present while the grand jury is in session from disclosing "any information pertaining to the grand jury except as provided by law." Pa.R.Crim.P. 231(C). In response to the Court's decision in *In Re Fortieth Statewide Investigating Grand Jury,* 191 A.3d 750 (Pa. 2018), the Committee undertook a review of this language. At issue in *In Re Fortieth* were objections by attorneys who, in order to enter their appearance, were required to swear "to keep secret all that transpires in the Grand Jury room, all matters occurring before the Grand Jury, and all matters and information concerning this Grand Jury obtained in the course of the representation, except when authorized by law or permitted by the Court. 42 Pa.C.S. § 4549(b)." The Court found that requiring an attorney to keep secret "all matters and information concerning this Grand Jury obtained in the course of the representation" to be "too great an impingement on counsel's ability to effectively represent their clients," *In Re Fortieth*, 191 A.3d at 761, and directed removal of the offending language. The Committee is therefore proposing that the Comment to Rule 231 be amended to include the oath as

modified by the Court and to advise the reader that "[w]here a secrecy oath is administered via an entry-of-appearance form" the modified oath is to be used.

The Court also directed the following statement to be appended to the entry-of-appearance form "to the extent that [it] remains the vehicle by which private attorneys are sworn to secrecy":

> I understand that -- with the explicit, knowing, voluntary, and informed consent of my client or clients, and absent a specific prohibition by a supervising judge or circumstances implicating prohibitions arising from the Rules of Professional Conduct -- I may disclose the content of a client-witness's own testimony to the extent that the client-witness may do so under applicable law.

In Re Fortieth, 191 A.3d at 761. That language has also been added to the Comment.

While discussing the overbreadth of the nondisclosure requirement at issue in *In Re Fortieth*, the Court directed that Rule 231(C) "be construed to align with the material provisions of the Investigating Grand Jury Act" and invoked its rulemaking authority to "effectuate a clarifying amendment." *Id*. at 762, n. 20. Of concern to the Court was the extent to which "Rule 231(C) can be read to sweep more broadly [than the Act] in its requirement of non-disclosure of 'any information pertaining to the grand jury'[.]" *Id*. Accordingly, the Committee is proposing — as did the Task Force — the amendment of Rule 231(C) to replace "information pertaining to the grand jury" with "matters occurring before the grand jury." The revised language is that of the Act and can be found at 42 Pa.C.S. § 4549(b). Although the Task Force would also amend the Comment to reference federal case law construing the phrase "matters occurring before the grand jury," the Committee has chosen to defer to our courts and allow decisional law specific to the Commonwealth to develop in light of the amendment.

Rule 230 (Disclosure of Testimony before Investigating Grand Jury) governs if and when grand jury testimony can be disclosed. Currently, subdivision (A) requires disclosure to the attorney for the Commonwealth "for use in the performance of official duties." Pa.R.Crim.P. 230(A). No amendments to subdivision (A) are being proposed.

Subdivision (B) currently provides for disclosure of grand jury testimony to a defendant in a criminal case under several scenarios. First, subdivision (B)(1) allows disclosure to a defendant in a criminal case of the defendant's own grand jury testimony. Next, subdivision (B)(2) allows disclosure to a defendant of a witness's grand jury testimony "concerning the subject matter of the charges" when that witness testifies at the defendant's trial, but such disclosure may only occur after the direct testimony of that witness. Lastly, subdivision (B)(3) allows for disclosure of any exculpatory testimony or exculpatory physical evidence presented to the grand jury. Disclosure under any of

subdivisions (B)(1), (2), or (3) currently requires an application for disclosure by the defendant.

One area of discussion regarding subdivision (B) was whether the trial judge or the supervising judge should be the decision maker regarding disclosures to the defendant. Currently the rule provides for "the court" to order disclosure. While the trial judge would likely be more attuned to what was necessary for a fair trial, the supervising judge would understand the impact upon grand jury secrecy of any disclosure (such as criminal charges that have not yet been filed but were a subject of the grand jury investigation). Further in favor of directing any disclosure requests to the supervising judge would be the supervising judge's ability to quickly familiarize him/herself with the needs of the trial — something a well-drafted motion and brief could facilitate. By contrast, a trial judge, due to grand jury secrecy, would have difficulty informing themselves on the consequences of disclosure. Thus the Committee is proposing amending subdivisions (B)(1), (2), and (3) by replacing "court" with "supervising judge." The Task Force would have entrusted disclosure decisions to the trial judge, noting that the trial judge would have "the most developed insight on the criminal prosecution." Report, p. 44.

Subdivision (B)(1) would also be amended to require the supervising judge to direct the Commonwealth to provide the defendant's grand jury testimony to the defendant within 30 days of arraignment rather than requiring the defendant to make application seeking disclosure. As disclosure is currently required upon application, removing the application requirement should result in a more efficient process without impacting what is disclosed. The Committee believes an order from the supervising judge would be necessary due to the requirements of grand jury secrecy.

Disclosure pursuant to subdivision (B)(2) is currently mandatory upon application of the defendant, but disclosure may not occur prior to the witness's direct testimony at trial. While the requirement of an application from the defendant would be retained, the Committee is proposing amending this subdivision to allow the parties to agree to earlier disclosure when earlier disclosure "is in the interests of justice." Early disclosure can often prevent unnecessary delays, such as requests to postpone cross-examination so that defense counsel can familiarize themselves with the newly disclosed transcript, and thereby improve efficiency. The Task Force was similarly troubled by the "inflexible timing provision" of subdivision (B)(2), which "has complicated criminal proceedings." Report, p. 44. To avoid unnecessary delays, the Task Force recommended that disclosures pursuant to subdivision (B)(2) be governed by Pa.R.Crim.P. 573(B)(2) (Disclosure by the Commonwealth) (Discretionary With the Court). The Committee, however, was hesitant to recategorize disclosures that are currently mandatory (upon application) as discretionary and has therefore declined to do so. The Committee is also proposing that subdivision (B)(2) be amended to allow a party to file a motion for early disclosure when the parties cannot agree and to allow a supervising judge to redact testimony not concerning the subject matter of the charges in order to preserve grand jury secrecy.

Regarding the types of evidence required to be disclosed pursuant to subdivision (B)(3), the Committee is proposing language similar to its prior proposal to amend Rule 573. *See* 49 Pa.B. 7173 (Dec. 7, 2019). As proposed, subdivision (B)(3) would require "the Commonwealth to furnish the defendant with a copy of any grand jury testimony or documentary evidence or tangible evidence presented to the grand jury that is favorable to the accused including information that tends to exculpate the defendant, mitigate the level of the defendant's culpability, or impeach a prosecution witness's credibility[.]" The Task Force recommended retaining the requirement that "exculpatory" testimony and evidence be made available to the defendant.

Both the Committee and the Task Force would amend subdivision (B)(3) to require disclosure of the identified materials after arraignment. The Committee is additionally proposing that subdivision (B)(3) require the supervising judge to order the Commonwealth to provide favorable information within 30 days of arraignment. Again, the Committee believes such an order is required before information subject to grand jury secrecy can be disclosed.

Several amendments to subdivision (C) of Rule 230 are being proposed. As with subdivision (B), "court" would be replaced with "supervising judge," and subdivision (C)(1) would permit disclosure of "matters occurring before the grand jury" to "local, State, other state, or Federal Law enforcement agencies or investigating agencies to assist them in investigating crimes under their investigative jurisdiction . . . ." This amendment conforms the rule to the statute by clarifying that disclosures to investigating agencies are only permitted to assist in investigating crimes and by replacing "a transcript of testimony before an investigating grand jury, or physical evidence before the investigating grand jury" with "matters occurring before the grand jury." *See* 42 Pa.C.S. § 4549(b). By identifying what can be disclosed as "matters occurring before the grand jury," this amendment would also create consistency within these rules.

Subdivision (C) would further be amended to include a new subdivision (C)(2). This new subdivision was proposed by the Task Force and would permit a judge, upon motion of the attorney for the Commonwealth, to disclose grand jury matters "to witnesses, subjects, or targets, and their counsel, provided that such disclosure is for the use in the performance of the Commonwealth attorney's duties." Allowing such disclosures could facilitate more productive conversations between prosecutors and the individuals listed and potentially result in the early resolution of investigations.

Proposed Rule 233 (Disclosure of Grand Jury Testimony by Witnesses and Their Attorneys and Requirements for Nondisclosure Orders) was proposed by the Task Force and, pursuant to subdivision (A) of the proposed rule, would allow a witness or the witness's attorney to disclose the witness's testimony unless the supervising judge granted a request for nondisclosure after a hearing as provided for in subdivision (B).

Regardless, a witness could not be prohibited from disclosing their testimony to their attorney. Subdivision (B) would contain the procedures for requesting nondisclosure and for the conducting of a hearing on that request. The Committee has slightly modified the procedure proposed by the Task Force.

Proposed subdivision (B)(1) would provide for the Commonwealth to notify the supervising judge of its intention to seek a nondisclosure order and to request a hearing on the matter. This notification and request would be made *exparte* to avoid any unnecessary disclosure to the witness, against whom the nondisclosure order is sought, of any secret grand jury material. If the Commonwealth wishes to exclude the witness and their attorney from the nondisclosure hearing, such request would be made at the time of the *exparte* notification. Additionally, subdivision (B)(1) would require the supervising judge, prior to making a decision on the exclusion request, to afford the witness an opportunity to be heard on that request.

Per subdivision (B)(2), if the witness and their attorney are excluded from the hearing, the witness must be heard on the nondisclosure request prior to any decision by the supervising judge. If the supervising judge grants a request to prohibit a witness and their attorney from disclosing the witness's grand jury testimony, subdivision (B)(3) would require the judge to "support any nondisclosure order with written or on-the-record findings provided to the witness and the witness's attorney, with such redactions as the supervising judge deems necessary to protect the secrecy of matters occurring before the grand jury." The supervising judge would also be required to specify in the nondisclosure order "the prohibitions on disclosure applicable to the witness and the witness's attorney."

Rather than requiring a request from the attorney for the Commonwealth to exclude the witness and their attorney from the hearing, the Task Force would permit the witness and their attorney to participate in the hearing unless the supervising judge determined that exclusion was necessary to protect the secrecy of grand jury matters. As proposed by the Task Force, the witness would not be afforded an opportunity to be heard on a decision to exclude them and their attorney from the hearing.

While the Task Force's proposal would make a nondisclosure order immediately appealable, the Committee concluded that review pursuant to Pa.R.A.P. 1611(a)(3) would be sufficient and that such review did not require additional language in the rule. Finally, considering the discussion surrounding disclosure of a witness's testimony in *In Re Fortieth Statewide Investigating Grand Jury*, 191 A.3d 750 (Pa. 2018), *see In Re Fortieth*, 191 A.3d at 759-60; *id*. at 770 n. 7 (Donohue, J., concurring and dissenting), the Committee declined to include in Rule 233 the Task Force's definition of "witness's testimony." *See* Report, p. 40. Instead, the Committee is proposing that the Comment simply acknowledge that the Act does not define "testimony." Clarifying the contours of that term would then be left to our courts as disputes arise.

Rule 227 (Administration of Oath to Witness) currently requires every witness to be sworn. Whether the oath is administered *in camera* or in open court is to be decided by the witness. According to the current Comment, if the witness fails to make an election, the court should decide. Yet it was relayed to the Committee that some supervising judges, likely seeking efficiency, administer the oath to all witnesses simultaneously. Recognizing the importance of anonymity in the grand jury setting, the Committee agreed that the rule should require a witness, absent good cause, to be sworn individually, outside the presence of other witnesses. This requirement is found in the proposed amendment of subdivision (A). As amended, subdivision (A) would also require the supervising judge to inform each witness of their rights. Subdivision (B), adopted from the Task Force's recommendation, details those rights, which include: the right to counsel, the right against self-incrimination, and the right to disclose their testimony. However, subdivision (B)(3) of the Committee's proposal does not include the Task Force's characterization of testimony as including "the questions the witness is asked, the responses of the witness, and documents the witness is shown in the course of his or her testimony." Report, p. 20. As discussed above, the Committee has chosen not to define "testimony" within these rules. As proposed by the Committee, subdivision (B)(3) would simply inform the witness of their "right, absent a contrary order, to disclose [their] own testimony[.]" Subdivision (B) would also require a witness to be informed of their obligation to keep secret all matters before the grand jury. As a result of these proposed changes, the Comment would be amended by replacing the current commentary with a suggested oath to be administered by the supervising judge.

Proposed Rule 234 (Investigating Grand Jury Reports) of the Task Force's recommendation contains the procedures for the submission of a grand jury report and for the reviewing of that report by the supervising judge. Subdivision (A) would permit the submission of a report to the supervising judge upon a majority vote of the full grand jury. Subdivision (B) would require the attorney for the Commonwealth to provide the supervising judge with citations to the record in support of any factual claims or evidentiary references in the report. Subdivision (C) would address the review of the report by the supervising judge. Subdivision (C)(1) would require the judge to "examine the report to determine whether the report is based upon sufficient evidence . . . ." Per the statute, the judge "shall issue an order accepting and filing such report as a public record . . . only if the report is based upon facts received in the course of an investigation authorized by this subchapter and is supported by the preponderance of the evidence." 42 Pa.C.S. § 4552(b). The Committee proposes including the preponderance of the evidence standard in the Comment with a citation to the statute. Subdivision (C)(2) would require the supervising judge to refuse to accept the report if there are passages not supported by the record. This subdivision would also provide for resubmission of the report after correcting for the unsupported passages. Subdivision (C)(3) reminds the reader that the report is subject to grand jury secrecy until the supervising judge files the report as a public record. The last subdivision of the rule, subdivision (D), would permit the attorney

for the Commonwealth to appeal a supervising judge's refusal to accept and file a report submitted by a grand jury.

The Task Force also proposed new Rule 248 (Submission of Annual Statistics Regarding Multicounty Investigating Grand Juries), Report, pp. 27, 28, and 31, which would require "supervising judges of statewide investigating grand juries . . . to provide certain basic statistics on an annual basis." Report, 30. The rule would also require the Office of Attorney General to submit to the supervising judge the number of days the grand jurors reported for service and the number of notices of submission related to organized crime, public corruption, or both. Report, 31. After discussion, the Committee concluded that this rule was administrative rather than procedural in nature and has chosen not to include it as part of this proposal.

Prior to receipt of the Task Force's Report, the Committee had undertaken an examination of the procedures for the return of property when that property was seized pursuant to a search warrant issued by the supervising judge of an investigating grand jury. This examination was prompted by the Court's opinion in *In Re: Return of Seized Property of Lackawanna County*, 212 A.3d 1 (Pa. 2019) (hereafter "*In Re Lackawanna County*").

The 41st Statewide Investigating Grand Jury was convened in 2016 to conduct a statewide investigation into organized crime and political corruption. In September 2017, at the request of the Office of the Attorney General ("OAG"), the supervising judge of the grand jury issued two warrants for the seizure of property belonging to Lackawanna County. The warrants were executed, and various pieces of property were seized, including computers, hard drives, email servers, files, documents, and other records.

Lackawanna County filed a motion for return of property in the Court of Common Pleas of Lackawanna County, arguing, *inter alia,* that the search warrants were invalid under Pa.R.Crim.P. 200. Rule 200 states that a search warrant may be issued by an issuing authority *within the judicial district* where the person or place to be searched is located. The OAG challenged the court's jurisdiction to hear the motion for return of property, citing the order appointing the supervising judge of the 41st Statewide Investigating Grand Jury. That order stated, "all applications and motions relating to the work of the 41st Statewide Investigating Grand Jury . . . shall be presented to the Supervising Judge." *In Re Lackawanna County*, 212 A.3d at 15 (internal quotations omitted). Nevertheless, pursuant to Pa.R.Crim.P. 588, a motion for return of property "shall be filed in the court of common pleas for the judicial district in which the property was seized." Pa.R.Crim.P. 588. As all of the property seized was seized in Lackawanna County, the lower court found it had jurisdiction to adjudicate the motion. Regarding the issuance of the search warrants, the lower court noted that the Investigating Grand Jury Act does not address search warrants. Rather, as noted above, Pa.R.Crim.P. 200 requires search warrants to be issued by an issuing authority within the judicial district

where a place to be searched is located. Yet, the supervising judge who issued the challenged warrants was a judge of the Court of Common Pleas of Chester — not Lackawanna — County. The OAG appealed to the Supreme Court of Pennsylvania pursuant to Pa.R.A.P. 3331(a)(3).

A majority of the Court held "that where this Court appoints a common pleas court judge to supervise a multi-county or statewide investigating grand jury and empowers the judge to act in multiple judicial districts, that grant of authority includes the inherent power to issue search warrants in any of those districts, so long as the warrants relate to an investigation of the grand jury." *In Re Lackawanna County*, 212 A.3d at 15.

Regarding who should hear the motion for return of property, the Court found that the County's motion had to be presented to the supervising judge of the grand jury. The Court reasoned that its order appointing the supervising judge was sweeping and covered all applications and motions generally related to the work of the grand jury. Additionally, any alternative to the supervising judge addressing a motion for return of property in the first instance would likely result in unnecessary delay caused by the Commonwealth's need to obtain permission from the supervising judge to disclose otherwise-secret grand jury material. If, upon being presented with the motion, the supervising judge determines that there are no outstanding concerns for grand jury secrecy, perhaps because the term of the grand jury has expired or an indictment has already issued, the judge may decline to hear the motion and it may instead be considered in the normal course under applicable rules and procedures.

In footnote 18 of *In Re Lackawanna County*, the Court directed this Committee's attention to the question of where and on which docket a motion for return of property should be filed:

> Based on our disposition, we decline to endorse the OAG's alternative proposal to allow motions for return of property to be transferred to the docket associated with the underlying grand jury investigation. Our procedural rules do not contemplate the process envisioned by the OAG, and crafting a procedural mechanism of that scale is a function more appropriately reserved for our Criminal Procedural Rules Committee. Along those same lines, we believe it would be prudent for the Criminal Procedural Rules Committee to consider adopting a procedure requiring motions for return relative to property seized per warrants issued by a grand jury supervising judge to be filed on the docket for the grand jury investigation in the county in which the grand jury has been empaneled. In our view, such a procedure, if feasible, would most effectively facilitate this Court's intent that matters relating to grand jury proceedings be directed to the supervising judge.

Id. at 17, n. 18.

As an initial question, the Committee considered whether the rules should codify the Court's finding that a "grant of statewide jurisdiction . . . include[s] within its scope the power to issue search warrants sought in connection with and to further an investigation" of the grand jury. *Id*. at 14. The Committee concluded that such codification within Chapter 2, Part B of the rules would be beneficial.

Regarding motions for return of property, the Committee agreed with the Court that such motions should be directed to the supervising judge of the investigating grand jury for resolution. The supervising judge would be in the best position to determine the impact on the proceedings of the investigating grand jury were the seized property to be returned. Furthermore, the Committee concluded that the procedures suggested by the Court, requiring such motions to be filed on the docket of the grand jury investigation in the county where the grand jury has been impaneled, would be the most efficient procedure.

To those ends, the Committee is proposing the adoption of Rule 235 (Search Warrants; Motions for Return of Property), to be placed in Chapter 2, Part B(1), which provides general provisions for all investigating grand juries. Subdivision (A) of the proposed rule would provide for a supervising judge of an investigating grand jury to issue a search warrant for a person or property in any county in which the investigating grand jury has been convened. However, the supervising judge's authority would be limited to search warrants "sought in connection with and to further an investigation of the grand jury[.]" Subdivision (B) would notify the reader that the procedures contained in Part A (Search Warrants) of Chapter 2 would be applicable to search warrants issued by the supervising judge unless otherwise provided for in the new rule. Subdivision (C) would require the search warrant to contain the docket number of the investigating grand jury and to identify the judicial district where the grand jury is located. This information is necessary to aid a party seeking to file a motion for return of property related to property seized pursuant to a grand jury search warrant. Per subdivision (D), once the search warrant and inventory are returned pursuant to Rule 209, the supervising judge would be required to file the warrant, supporting affidavits, and inventory with the clerk of courts of the judicial district identified in subdivision (C). Notably, this might not be the clerk of courts of the judicial district where the property was seized. *Compare* Pa.R.Crim.P. 210 (Return of Papers to Clerk). Subdivision (E) would provide that motions for return of property must be filed in the court of common pleas for the judicial district in which the grand jury is located and entered on the docket of the investigating grand jury. The Comment would direct the reader to *In Re Lackawanna*.

The Committee invites all comments, concerns, and suggestions.