

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

Proposed New Pa.R.Crim.P. 791

The Criminal Procedural Rules Committee is planning to propose to the Supreme Court of Pennsylvania the adoption of new Rule 791 (Procedure for Obtaining Order for Limited Access in Court Cases; Order for Limited Access.) for the reasons set forth in the accompanying explanatory report. Pursuant to Pa.R.J.A. No. 103(a)(1), the proposal is being published in the *Pennsylvania Bulletin* for comments, suggestions, or objections prior to submission to the Supreme Court.

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

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

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

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

June 23, 2016

BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:

*Jeffrey A. Manning
Chair*

(This is an entirely new rule.)

RULE 791. PROCEDURE FOR OBTAINING ORDER FOR LIMITED ACCESS IN COURT CASES; ORDER FOR LIMITED ACCESS.

(A) PETITION FOR ORDER FOR LIMITED ACCESS

(1) Pursuant to 18 Pa.C.S. § 9122.1, an individual who satisfies the statutory requirements for obtaining an order for limited access may request an order that limits the dissemination of his or her criminal history record information by filing a petition with the clerk of the courts of the judicial district in which the charges were disposed.

(2) The petition shall set forth:

(a) the petitioner's name and any aliases that the petitioner has used, address, date of birth, and social security number;

(b) the name and address of the judge of the court of common pleas, magisterial district judge, or Philadelphia Municipal Court judge who accepted the guilty plea or heard the case;

(c) the name and mailing address of the affiant as shown on the complaint, if available;

(d) the court of common pleas docket number, magisterial district court docket number; or the Philadelphia Municipal Court docket number, whichever applies;

(e) the offense tracking number (OTN);

(f) the date on the complaint, or the date of arrest, and, if available, the criminal justice agency that made the arrest;

(g) the specific charges, as they appear on the charging document, to be subject to limited access;

(h) the disposition and, if the sentence includes a fine, costs, or restitution, whether the amount due has been paid;

(i) the reason(s) for the order for limited access;

(j) a statement that the case qualifies for a limited access order and none of the exceptions under 18 Pa.C.S. § 9122.1(b) are applicable; and

(k) a verification by the petitioner that facts set forth in the petition are true and correct to the best of the petitioner's personal knowledge or information and belief. The verification may be by a sworn affidavit or by an unsworn written statement that the facts are verified subject to the penalties for unsworn falsification to authorities under the Crimes Code § 4904, 18 Pa.C.S. § 4904.

Additional information shall not be required by local rule or practice.

(3) Unless the attorney for the Commonwealth agrees in writing to waive this requirement, a current copy of the petitioner's Pennsylvania State Police criminal history report shall be attached to the petition. The copy shall be obtained from the Pennsylvania State Police within 60 days before filing the petition.

(4) A copy of the petition shall be served on the attorney for the Commonwealth concurrently with filing.

(B) OBJECTIONS; HEARING

(1) Within 60 days after service of the petition, the attorney for the Commonwealth shall file a consent or objection to the petition or take no action. The attorney for the Commonwealth's consent or objection shall be filed with the clerk of courts, and copies shall be served on the petitioner's attorney, or the petitioner if unrepresented.

(2) Upon receipt of the attorney for the Commonwealth's response, or no later than 14 days after the expiration of the 60-day period in paragraph (B)(1), the judge of the court of common pleas shall grant or deny the petition or shall schedule a hearing.

(3) At the hearing, if any, the parties shall be afforded an opportunity to be heard. Following the hearing, the judge promptly shall enter an order granting or denying the petition.

(4) If the judge grants the petition for limited access, the judge shall enter an order directing that the defendant's criminal record history information that is subject to the limited access order shall not be disseminated to an individual, a noncriminal justice agency or an internet website and that dissemination of the defendant's criminal record history be limited only to a criminal justice agency or government agency as provided in 18 Pa.C.S. § 9122.1.

(a) The order shall contain the information required in paragraph (C).

(b) Except when the attorney for the Commonwealth has filed a consent to the petition pursuant to paragraph (B)(1), the order shall be stayed for 30 days pending an appeal. If a timely notice of appeal is filed, the order

for limited access is stayed pending the disposition of the appeal and further order of court.

(5) If the judge denies the petition for an order of limited access, the judge shall enter an order denying the petition and stating the reasons for the denial.

(6) If the judge grants the petition for an order of limited access, the petition and order are subject to limited access.

(C) ORDER

(1) Every order for limited access shall include:

(a) the petitioner's name and any aliases that the petitioner has used, address, date of birth, and social security number;

(b) the name and address of the judge of the court of common pleas, magisterial district judge, or Philadelphia Municipal Court judge who accepted the guilty plea or heard the case;

(c) the name and mailing address of the affiant as shown on the complaint, if available;

(d) the Philadelphia Municipal Court docket number or the court of common pleas docket number, whichever applies;

(e) the offense tracking number (OTN);

(f) the date on the complaint, or the date of arrest, and, if available, the criminal justice agency that made the arrest;

(g) the specific charges, as they appear on the charging document, to be expunged;

(h) the disposition and, if the sentence includes a fine, costs, or restitution, whether the amount due has been paid;

(i) the reason(s) for the order for limited access;

(j) a statement that the case qualifies for a limited access order and none of the exceptions under 18 Pa.C.S. § 9122.1(b) are applicable; and

(j) the criminal justice agencies upon which certified copies of the order shall be served.

Additional information shall not be required by local rule or practice.

(2) The clerk of courts shall serve a certified copy of the Order to each criminal justice agency identified in the court's Order.

COMMENT: Section 9122.1 of the Criminal Code, provides for an order limiting dissemination of a record of a criminal conviction for a misdemeanor of the second degree, a misdemeanor of the third degree, or an ungraded misdemeanor which carries a maximum penalty of no more than two years only to a criminal justice agency or government agency. This rule, adopted in 2016, provides the procedures for requesting and ordering an order for limited access as provided in the statute.

This rule sets forth the only information that must be included in every petition and order for limited access.

The petition must be filed with the clerk of courts of the judicial district in which the charges that are the subject of the petition were disposed. The petition must be decided by a judge of the court of common pleas, even if the charges that are the subject of the petition were disposed by a magisterial district judge or Philadelphia Municipal Court judge.

Paragraph (A)(3) requires the petitioner to attach a copy of his or her criminal record to the petition. The attorney for the Commonwealth may waive the requirement that the criminal record be attached to the petition. The rule anticipates that, in such a case, the petitioner and the attorney for the Commonwealth will reach an agreement prior to the submission of the petition to the court that the petitioners' criminal history has been confirmed by means other than the Pennsylvania State Police criminal history report. The copy of the written waiver signed by the attorney for the Commonwealth must be attached to the petition in lieu of the Pennsylvania State Police criminal history report.

A form petition and form order for limited access has been created by the Administrative Office of Pennsylvania Courts, in consultation with the Committee, and is available at the following website: <http://www.pacourts.us/forms/for-the-public>.

“Petition” as used in this rule is a “motion” for purposes of Rules 575, 576, and 577.

The "reason for the order for limited access" in paragraph (A)(2)(i) and (C)(1)(i) means, for example, the defendant's freedom from arrest or prosecution for 10 years.

For the procedures for filing and service of petitions, see Rule 576.

For the procedures for filing and service of orders, see Rule 114.

When a summons instead of an arrest warrant is issued pursuant to Rule 519, the date of the summons constitutes the "date of arrest" for purposes of paragraph (A)(2)(f).

For purposes of this rule, "criminal justice agency" includes police departments, county detectives, and other law enforcement agencies. See *also* 18 Pa.C.S. § 9102. For the definition of “government agency,” see 18 Pa.C.S. § 9121 (b.1) and (b.2).

Nothing in this rule is intended to alter procedures regarding expungement. See Rule 320 for the procedures for expungement following the successful completion of an ARD program in a court case, Rule 490 for summary case expungement procedures, Rule 790 for court case expungement, and 35 P.S. § 780-119 for expungement procedures under the Controlled Substance, Drug, Device, and Cosmetic Act.

Concerning standing, see *In Re Administrative Order No. 1-MD-2003*, 936 A.2d 1 (Pa. 2007); *Commonwealth v. J.H.*, 759 A.2d 1269 (Pa. 2000).

NOTE: Adopted _____, 2016, effective _____, 2016

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COMMITTEE EXPLANATORY REPORTS:

Report explaining proposed new Rule 791 providing the procedures for orders for limited access in court cases published for comment at 46 Pa.B. (_____, 2016).

REPORT

Proposed new Pa.R.Crim.P. 791

ORDERS FOR LIMITED ACCESS

Background

On February 16, 2016, the Governor signed into law Act 5 of 2016 (originally SB 166 of 2016). The Act originated from a proposal for an expansion of the current expungement statute to cover second and third degree misdemeanors but was subsequently modified to introduce a new concept, a petition for limited access. The Act added new Section 9122.1 to the Crimes Code, 18 Pa.C.S. § 9122.1, that provides that a qualified defendant may petition for an order that would allow only certain entities access to criminal history record information, primarily criminal justice or other government agencies. The offenses in question are, with certain exceptions, misdemeanors of the second and third degree and ungraded offenses carrying a maximum penalty of no more than two years. The Act also includes an amendment to Section 9122 of the Crimes Code, 18 Pa.C.S. § 9122, that provides that a court or the Administrative Office of Pennsylvania Courts may not disseminate criminal case information that is subject to “a court order for limited access as provided in Section 9122.1 (relating to order for limited access).” Act 5 will become effective on November 14, 2016.

Proposed New Rule 791

Because the Act requires a petition to be filed with the court and subsequent order to be produced, there is a need for procedural rules implementing the Act. Given the history of the Act, the Committee believes that the concept of limiting access to a conviction record is closely related to expungement. Therefore, the Committee concluded that the procedures should be similar. The procedures for obtaining a limited access order contained in proposed new Rule 791 are derived from the existing court case expungement procedures in Rule 790. These new procedures would be placed in a separate rule rather than an addition to the expungement rule since the nature and purpose of this procedure is different from expungement and placing it in the same rule

as expungement procedures might lead to confusion. The new rule would immediately follow the court case expungement procedures.

In terms of information required in the petition and order, the same concern, that of correctly identifying the criminal record, would be applicable to limited access procedures as it is for expungement. Therefore, the required contents of the petition, contained in paragraph (A), and the contents of the order, contained in paragraph (C), are virtually identical to those required in Rule 790 for expungement petitions and orders.

Proposed paragraph (A)(3) contains the requirement that the Pennsylvania State Police criminal history report shall be attached to the petition. This is currently required by Rule 790 for expungement petitions and the Committee believes that this is the best means of verifying the defendant's criminal history. However, the Committee is also aware that, in several jurisdictions, the prosecution has a practice of agreeing to a waiver of this requirement and verifying the defendant's criminal history by other means. The Committee intends to recommend an amendment to the expungement rules to recognize this practice and also incorporates this provision in proposed Rule 791(A)(3). See 45 Pa.B. 5913 (October 3, 2015).

Paragraph (B) describes the procedures to be followed once the petition is filed. Section 9122.1(c) provides that the court notify the district attorney of the petition within 10 days of filing and the district attorney then has 30 days to respond. The current procedure for court case expungement in Rule 790 requires that the petition be served on the prosecution concurrent with filing. The Committee believes that simultaneous service is a more efficient procedure and one that would help in the prosecution reaching a quicker decision on whether to oppose the petition or not. The Committee intends that this is an additional procedural step being added to make the process more efficient and ensure proper and timely notice to the prosecution.

The Act allows 30 days for the prosecution to respond to a petition for limited access. Several members expressed concern that this period is an inadequate amount of time in which the prosecution has to evaluate whether to oppose the petition. It is anticipated that the number of limited access petitions will be substantial, particularly in the larger counties. The district attorneys' offices may be hard-pressed to properly evaluate the defendant's record in that time, resulting in opposition to petitions as a

matter of course. It was noted that Rule 790 gives the prosecution 60 days to respond to a court case expungement petition. The Committee concluded that a 60-day period for response is more reasonable and will likely result in more unopposed petitions. Even though the Act provides the 30-day time limit for response, the Committee concluded that this is a purely procedural provision, falling within the Court's exclusive rule-making authority. Therefore, paragraph (B)(1) requires the prosecution's response within 60 days following service of the petition.

The Act requires a petition to be filed requesting the issuance of the order, similar to expungement procedures. Section 9122.1 describes the effect of the order as permitting the criminal record to be disseminated "only to a criminal justice agency or a governmental agency...." However, the language that is added to Section 9121, which directly states the applicability of the statute to the courts and AOPC, uses the terminology that they "may not disseminate to an individual, a noncriminal justice agency or an internet website any information" relating to information that is subject to a limited access order. In the proposed paragraph (B)(4), the terminology in both selections is used to describe the order granting the petition so that there is no confusion concerning the order's effects.

Rule 790 provides for a 30-day stay on any granted petition to provide time for the prosecution to appeal. A similar provision is included in Rule 791(B)(4)(b) when the petition for limited access is granted. However, this stay is waived when the prosecution agrees to the petition. This is similar to a provision that the Committee is intending to recommend as an amendment to Rule 790. See 45 Pa.B. 3978 (July 25, 2015).

The Committee also considered several other suggestions for this proposal but ultimately declined to add them. This included a suggestion for specific procedures for cases where some charges will be able to be subject to limited access and others will be able to be expunged. The Committee concluded that these are two separate procedures with separate eligibility requirements. Since Rule 790 already provides expungement procedures while proposed Rule 791 would provide limited access order procedures, the Committee concluded that no additional rule changes would be necessary.

The Committee discussed a suggestion to incorporate procedures for obtaining *in forma pauperis* status. However, the procedures for an *in forma pauperis* request are well known and a regular part of expungement practice. Therefore, the Committee concluded that including specific provisions in the limited access order procedures was unnecessary.

The Committee also considered suggestions regarding the manner in which the exclusory provision of the Act and the statutory fees for the petitions should be defined. The Committee concluded that these provisions were substantive in nature and should not be defined in a procedural rule.