

**Proposed New Pa.R.Crim.P. 705.1, Proposed Amendments to Pa.R.Crim.P. 454,
and Proposed Revisions to the *Comments* to Pa.Rs.Crim.P. 455 and 704**

INTRODUCTION

The Criminal Procedural Rules Committee is considering recommending that the Supreme Court of Pennsylvania adopt new Rule 705.1 (Restitution), amend Rule 454 (Trial in Summary Cases), and revise the Comments to Rules 455 (Trial in Defendant's Absence) and 704 (Procedure at Time of Sentencing) to standardize the procedures by which restitution is awarded in criminal cases. This proposal has not been submitted for review by the Supreme Court of Pennsylvania.

The following explanatory Report highlights the Committee's considerations in formulating this proposal. Please note that the Committee's Reports should not be confused with the official Committee Comments to the rules. Also note that the Supreme Court does not adopt the Committee's Comments or the contents of the explanatory Reports.

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

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

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no later than Friday, May 30, 2014.

April 9, 2014

BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:

Thomas P. Rogers, Chair

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RULE 454. TRIAL IN SUMMARY CASES.

(A) Immediately prior to trial in a summary case:

(1) the defendant shall be advised of the charges in the citation or complaint;

(2) if, in the event of a conviction, there is a reasonable likelihood of a sentence of imprisonment or probation, the defendant shall be advised of the right to counsel and

(a) upon request, the defendant shall be given a reasonable opportunity to secure counsel, or

(b) if the defendant is without financial resources or is otherwise unable to employ counsel, counsel shall be assigned as provided in Rule 122; and

(3) the defendant shall enter a plea.

(B) If the defendant pleads guilty, the issuing authority shall impose sentence. If the defendant pleads not guilty, the issuing authority shall try the case in the same manner as trials in criminal cases are conducted in the courts of common pleas when jury trial has been waived; however, in all summary cases arising under the Vehicle Code or local traffic ordinances, the law enforcement officer observing the defendant's alleged offense may, but shall not be required to, appear and testify against the defendant. In no event shall the failure of the law enforcement officer to appear, by itself, be a basis for dismissal of the charges against the defendant.

(C) The attorney for the Commonwealth may appear and assume charge of the prosecution. When the violation of an ordinance of a municipality is charged, an attorney representing that municipality, with the consent of the attorney for the Commonwealth, may appear and assume charge of the prosecution. When no attorney appears on behalf of the Commonwealth, the affiant may be permitted to ask questions of any witness who testifies.

(D) The verdict and sentence, if any, shall be announced in open court immediately upon the conclusion of the trial, except as provided in paragraph (E).

(E) If the defendant may be sentenced to intermediate punishment, the issuing authority may delay imposing sentence pending confirmation of the defendant's eligibility for intermediate punishment.

(F) At the time of sentencing, the issuing authority shall:

(1) if the defendant's sentence includes restitution, a fine, or costs, state:

(a) the amount of the fine and costs;

(b) the amount of restitution ordered, including

(i) the identity of the payee(s),

(ii) to which officer or agency the restitution payment shall be made,

(iii) any ongoing victim expenses that may need to be reviewed at a future time, and

(iv) whether any restitution has been paid and in what amount,

(c) the date on which payment is due.

If the defendant is without the financial means to pay the amount in a single remittance, the issuing authority may provide for installment payments and shall state the date on which each installment is due;

(2) advise the defendant of the right to appeal within 30 days for a trial *de novo* in the court of common pleas, and that if an appeal is filed:

(a) the execution of sentence will be stayed and the issuing authority may set bail or collateral; and

(b) the defendant must appear for the *de novo* trial or the appeal may be dismissed;

(3) if a sentence of imprisonment has been imposed, direct the defendant to appear for the execution of sentence on a date certain unless the defendant files a notice of appeal within the 30-day period, and advise that, if the defendant fails to appear on that date, a warrant for the defendant's arrest will be issued; and

(4) issue a written order imposing sentence, signed by the issuing authority. The order shall include the information specified in paragraphs (F)(1) through (F)(3), and a copy of the order shall be given to the defendant.

COMMENT: No defendant may be sentenced to imprisonment or probation if the right to counsel was not afforded at trial. See *Alabama v. Shelton*, 535 U.S. 654 (2002), *Scott v. Illinois*, 440 U.S. 367 (1979), and *Argersinger v. Hamlin*, 407 U.S. 25 (1972). See Rules 121 and 122.

The affiant may be permitted to withdraw the charges pending before the issuing authority. See Rule 457 (Withdrawal of Charges in Summary Cases).

Paragraph (F)(2)(b) is included in the rule in light of *North v. Russell*, 427 U.S. 328 (1976). For the procedures for taking, perfecting, and handling an appeal, see Rules 460, 461, and 462.

As the judicial officer presiding at the summary trial, the issuing authority controls the conduct of the trial generally. When an attorney appears on behalf of the Commonwealth or on behalf of a municipality pursuant to paragraph (C), the prosecution of the case is under the control of that attorney. When no attorney appears at the summary trial on behalf of the Commonwealth, or a municipality, the issuing authority may ask questions of any witness who testifies, and the affiant may request the issuing authority to ask specific questions. In the appropriate circumstances, the issuing authority may also permit the affiant to question Commonwealth witnesses, cross-examine defense witnesses, and make recommendations about the case to the issuing authority.

Although the scheduling of summary trials is left by the rules to the discretion of the issuing authority, it is intended that trial will be scheduled promptly upon receipt of a defendant's plea or promptly after a defendant's arrest. When a defendant is incarcerated pending a summary trial, it is incumbent upon the issuing authority to schedule trial for the earliest possible time.

When the defendant was under 18 years of age at the time of the offense and is charged with a summary offense that would otherwise carry a mandatory sentence of imprisonment as prescribed by statute, the issuing

authority is required to conduct the summary trial but may not sentence the defendant to a term of imprisonment. See 42 Pa.C.S. §§ 6302 and 6303 and 75 Pa.C.S. §6303(b).

Under paragraph (F)(2)(a), the issuing authority should explain to the defendant that if an appeal is filed, any sentence, including imprisonment, fines, or restitution, will be stayed.

When setting the specific date for the defendant to appear for execution of a sentence of imprisonment pursuant to paragraph (F)(3), the issuing authority should set the earliest possible date for sentencing after the appeal period expires.

When a defendant has waived the stay of the sentence of imprisonment pursuant to Rule 461, the issuing authority may fix the commencement date of the sentence to be the date of conviction, rather than after the 30-day stay period has expired. The defendant, of course, still would be able to pursue an appeal under Rules 460-462.

For the statutory authority to sentence a defendant to pay a fine, see 42 Pa.C.S. § 9726.

For the statutory authority to sentence a defendant to pay restitution, see 42 Pa.C.S. § 9721(c) and 18 Pa.C.S. § 1106(c). See *also* 18 Pa.C.S. § 1106(c)(2)(iii), which prohibits the court from ordering the incarceration of a defendant for failure to pay restitution if the failure results from the defendant's inability to pay.

Before imposing both a fine and restitution, the issuing authority must determine that the fine will not prevent the defendant from making restitution to the victim. See 42 Pa.C.S. §§ 9726(c)(2) and 9730(b)(3).

Paragraph (E) permits an issuing authority to delay imposing sentence in summary cases in order to investigate a defendant's eligibility for intermediate punishment. For example, under 42 Pa.C.S. § 9763 and § 9804, defendants may be sentenced to intermediate punishment for certain offenses, including summary violations of 75 Pa.C.S. § 1543(b) (driving while license is under a DUI-related

suspension) but only if they meet certain eligibility requirements, such as undergoing a drug and alcohol assessment. Often this information will not be available to the issuing authority at the time of sentencing.

See Rule 456 for the procedures when a defendant defaults in the payment of restitution, fines, or costs.

For the procedures concerning sentences that include restitution in court cases, see Rule 705.1.

A defendant should be encouraged to seek an adjustment of a payment schedule for restitution, fines, or costs before a default occurs. See Rule 456(A).

NOTE: Rule 83 adopted July 12, 1985, effective January 1, 1986; amended September 23, 1985, effective January 1, 1986; January 1, 1986 effective dates extended to July 1, 1986; amended February 2, 1989, effective March 1, 1989; amended October 28, 1994, effective as to cases instituted on or after January 1, 1995; *Comment* revised April 18, 1997, effective July 1, 1997; amended October 1, 1997, effective October 1, 1998; *Comment* revised February 13, 1998, effective July 1, 1998; renumbered Rule 454 and *Comment* revised March 1, 2000, effective April 1, 2001; amended February 28, 2003, effective July 1, 2003; *Comment* revised August 7, 2003, effective July 1, 2004; amended March 26, 2004, effective July 1, 2004; amended January 26, 2007, effective February 1, 2008; *Comment* revised July 17, 2013, effective August 17, 2013 **[.] ; amended _____, 2014, effective _____, 2014.**

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COMMITTEE EXPLANATORY REPORTS:

Final Report explaining the October 28, 1994 amendments published with the Court's Order at 24 Pa.B. 5841 (November 26, 1994).

Final Report explaining the April 18, 1997 Comment revision cross-referencing new Rule 87 published with the Court's Order at 27 Pa.B. 2119 (May 3, 1997).

Final Report explaining the October 1, 1997 amendments to paragraph (E) and the Comment concerning the procedures at the time of sentencing published with the Court's Order at 27 Pa.B. 5414 (October 18, 1997).

Final Report explaining the February 13, 1998 Comment revision concerning questioning of witnesses published with the Court's Order at 28 Pa.B. 1127 (February 28, 1998).

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

Final Report explaining the February 28, 2003 amendments published with the Court's Order at 33 Pa.B. 1326 (March 15, 2003).

Final Report explaining the August 7, 2003 changes to the Comment concerning defendants under the age of 18 published with the Court's Order at 33 Pa.B. 4293 (August 30, 2003).

Final Report explaining the March 26, 2004 changes concerning Alabama v. Shelton published with the Court's Order at 34 Pa.B. 1929 (April 10, 2004).

Final Report explaining the January 26, 2007 amendments adding paragraph (E) concerning intermediate punishment published with the Court's Order at 37 Pa.B. 752 (February 17, 2007).

Final Report explaining the July 17, 2013 Comment revision concerning mandatory incarceration offenses and juveniles published with the Court's Order at 43 Pa.B. (, 2013).

Report explaining the proposed amendments to paragraph (F) concerning required elements of the sentence published for comment at 44 Pa.B. (, 2014).

RULE 455. TRIAL IN DEFENDANT'S ABSENCE.

(A) If the defendant fails to appear for trial in a summary case, the trial shall be conducted in the defendant's absence, unless the issuing authority determines that there is a likelihood that the sentence will be imprisonment or that there is other good cause not to conduct the trial in the defendant's absence. If the trial is not conducted in the defendant's absence, the issuing authority may issue a warrant for the defendant's arrest.

(B) At trial, the issuing authority shall proceed to determine the facts and render a verdict.

(C) If the defendant is found not guilty, any collateral previously deposited shall be returned.

(D) If the defendant is found guilty, the issuing authority shall impose sentence, and shall give notice by first class mail to the defendant of the conviction and sentence, and of the right to file an appeal within 30 days for a trial *de novo*. In those cases in which the amount of collateral deposited does not satisfy the fine and costs imposed or the issuing authority imposes a sentence of restitution, the notice shall also state that failure within 10 days of the date on the notice to pay the amount due or to appear for a hearing to determine whether the defendant is financially able to pay the amount due may result in the issuance of an arrest warrant.

(E) Any collateral previously deposited shall be forfeited and applied only to the payment of the fine and costs. When the amount of collateral deposited is more than the fine and costs, the balance shall be returned to the defendant.

(F) If the defendant does not respond within 10 days to the notice in paragraph (D), the issuing authority may issue a warrant for the defendant's arrest.

COMMENT: In those cases in which the issuing authority determines that there is a likelihood that the sentence will be imprisonment or that there is other good cause not to conduct the trial in the defendant's absence, the issuing authority may issue a warrant for the arrest of the defendant in order to have the defendant brought before the issuing authority for the summary trial. See Rule 430(B). The trial would then be conducted with the defendant present as provided in these rules. See Rule 454.

When the defendant was under 18 years of age at the time of the offense and is charged with a summary offense that would otherwise carry a mandatory sentence of imprisonment as prescribed by statute, the issuing authority is required to conduct the summary trial but may not sentence the defendant to a term of imprisonment. See 42 Pa.C.S. §§ 6302 and 6303 and 75 Pa.C.S. § 6303(b).

Paragraph (D) provides notice to the defendant of conviction and sentence after trial *in absentia* to alert the defendant that the time for filing an appeal has begun to run. See Rule 413(B)(3).

See Rule 454(F) for what information must be included in a sentencing order when restitution is included in the sentence.

Except in cases under the Public School Code of 1949, 24 P.S. § 1-102, *et seq.*, in which the defendant is at least 13 years of age but not yet 17, if the defendant is under 18 years of age, the notice in paragraph (D) must inform the defendant and defendant's parents, guardian, or other custodian that, if payment is not received or the defendant does not appear within the 10-day time period, the issuing authority will certify notice of the failure to pay to the court of common pleas as required by the Juvenile Act, 42 Pa.C.S. § 6302, definition of "delinquent act," paragraph (2)(iv), and the case will proceed pursuant to the Rules of Juvenile Court Procedure and the Juvenile Act instead of these rules.

If the defendant is charged with a violation of the compulsory attendance requirements of the Public School Code of 1949, 24 P.S. § 1-102, *et seq.*; has attained the age of 13 but is not yet 17; and has failed to pay the fine, the issuing authority must issue the notice required by paragraph (B)(4) to the defendant and the defendant's parents, guardian, or other custodian informing the defendant and defendant's parents, guardian, or other custodian that, if payment is not received or the defendant does not appear within the 10-day time period, the issuing authority may allege the defendant dependent under 42 Pa.C.S. § 6303(a)(1). Pursuant to 24 P.S. § 13-1333(b)(2), the defendant's failure to pay is not a

delinquent act and the issuing authority would not certify notice of the failure to pay to the common pleas court.

If the defendant is 18 years of age or older and fails to pay or appear as required in paragraph (D), the issuing authority must proceed under these rules.

For the defendant's right to counsel, see Rule 122.

For arrest warrant procedures in summary cases, see Rules 430 and 431.

NOTE: Rule 84 adopted July 12, 1985, effective January 1, 1986; January 1, 1986 effective date extended to July 1, 1986; amended February 1, 1989, effective July 1, 1989; amended April 18, 1997, effective July 1, 1997; amended October 1, 1997, effective October 1, 1998; renumbered Rule 455 and *Comment* revised March 1, 2000, effective April 1, 2001; *Comment* revised August 7, 2003, effective July 1, 2004; *Comment* revised April 1, 2005, effective October 1, 2005; amended August 15, 2005, effective February 1, 2006; *Comment* revised January 17, 2013, effective May 1, 2013; *Comment* revised July 17, 2013, effective August 17, 2013 [.] ; **Comment revised _____, 2014, effective _____, 2014.**

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COMMITTEE EXPLANATORY REPORTS:

Final Report explaining the April 18, 1997 amendments mandating a summary trial in absentia with certain exceptions published with the Court's Order at 27 Pa.B. 2117 (May 3, 1997).

Final Report explaining the October 1, 1997 amendments to paragraphs (D) and (E) published with the Court's Order at 27 Pa.B. 5414 (October 1, 1997).

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 August 7, 2003 changes to the Comment concerning failure to pay and juveniles published with the Court's Order at 33 Pa.B. 4293 (August 30, 2003).

Final Report explaining the April 1, 2005 Comment revision concerning application of the Juvenile Court Procedural Rules published with the Court's Order at 35 Pa.B. 2213 (April 16, 2005).

Final Report explaining the August 15, 2005 amendments to paragraph (D) concerning notice of right to appeal published with the Court's Order at 35 Pa.B. 4918 (September 3, 2005).

Final Report explaining the January 17, 2013 revisions of the Comment concerning the Public School Code of 1949 published with the Court's Order at 43 Pa.B. 654 (February 2, 2013).

Final Report explaining the July 17, 2013 Comment revision concerning mandatory incarceration offenses and juveniles published with the Court's Order at 43 Pa.B. (, 2013).

Report explaining the proposed Comment revision cross-referencing the sentencing provision in Rule 454(F) published for comment at 44 Pa.B. (, 2014).

RULE 704. PROCEDURE AT TIME OF SENTENCING.

(A) TIME FOR SENTENCING.

(1) Except as provided by Rule 702(B), sentence in a court case shall ordinarily be imposed within 90 days of conviction or the entry of a plea of guilty or *nolo contendere*.

(2) When the date for sentencing in a court case must be delayed, for good cause shown, beyond the time limits set forth in this rule, the judge shall include in the record the specific time period for the extension.

(3) In a summary case appeal, sentence shall be imposed immediately following a determination of guilt at a trial *de novo* in the court of common pleas.

(B) ORAL MOTION FOR EXTRAORDINARY RELIEF.

(1) Under extraordinary circumstances, when the interests of justice require, the trial judge may, before sentencing, hear an oral motion in arrest of judgment, for a judgment of acquittal, or for a new trial.

(2) The judge shall decide a motion for extraordinary relief before imposing sentence, and shall not delay the sentencing proceeding in order to decide it.

(3) A motion for extraordinary relief shall have no effect on the preservation or waiver of issues for post-sentence consideration or appeal.

(C) SENTENCING PROCEEDING.

(1) At the time of sentencing, the judge shall afford the defendant the opportunity to make a statement in his or her behalf and shall afford counsel for both parties the opportunity to present information and argument relative to sentencing.

(2) The judge shall state on the record the reasons for the sentence imposed.

(3) The judge shall determine on the record that the defendant has been advised of the following:

(a) of the right to file a post-sentence motion and to appeal, of the time within which the defendant must exercise those rights, and of the right to assistance of counsel in the preparation of the motion and appeal;

(b) of the rights,

(i) if the defendant is indigent, to proceed *in forma pauperis* and to proceed with appointed counsel as provided in Rule 122, or,

- (ii) if represented by retained counsel, to proceed with retained counsel unless the court has granted leave for counsel to withdraw pursuant to Rule 120(B);
 - (c) of the time limits within which post-sentence motions must be decided;
 - (d) that issues raised before or during trial shall be deemed preserved for appeal whether or not the defendant elects to file a post-sentence motion; and
 - (e) of the defendant's qualified right to bail under Rule 521(B).
- (4) The judge shall require that a record of the sentencing proceedings be made and preserved so that it can be transcribed as needed. The record shall include:
- (a) the record of any stipulation made at a pre-sentence conference; and
 - (b) a verbatim account of the entire sentencing proceeding.

COMMENT: The rule is intended to promote prompt and fair sentencing procedures by providing reasonable time limits for those procedures, and by requiring that the defendant be fully informed of his or her post-sentence rights and the procedural requirements which must be met to preserve those rights.

Rule 708 (Violation of Probation, Intermediate Punishment, or Parole: Hearing and Disposition) governs sentencing procedures after a revocation of probation, intermediate punishment, or parole.

TIME FOR SENTENCING

As a general rule, the date for sentencing should be scheduled at the time of conviction or the entry of a plea of guilty or *nolo contendere*.

Under paragraph (A)(1), sentence should be imposed within 90 days of conviction or the entry of a plea of guilty or *nolo contendere*, unless the court orders a psychiatric or psychological examination pursuant to Rule 702(B). Such an order should extend the time for sentencing for only as much time as is reasonably required, but in no event should sentencing be extended for more than 30 days beyond the original 90-day limit. In summary appeal cases, however,

sentence must be imposed immediately at the conclusion of the *de novo* trial.

Paragraph (A)(2) is not intended to sanction *pro forma* requests for continuances. Rather, it permits the judge to extend the time limit for sentencing under extraordinary circumstances only. For example, additional pre-sentence procedures may be required by statute. See 42 Pa.C.S. §§ 9791-9799.5 for pre-sentence assessment and hearing procedures for persons convicted of sexually violent offenses. See also 42 Pa.C.S. § 9714(c) for hearing to determine high risk dangerous offender status.

Because such extensions are intended to be the exception rather than the rule, the extension must be for a specific time period, and the judge must include in the record the length of the extension. A hearing need not be held before an extension can be granted. Once a specific extension has been granted, however, some provision should be made to monitor the extended time period to insure prompt sentencing when the extension period expires.

Failure to sentence within the time specified in paragraph (A) may result in the discharge of the defendant. See *Commonwealth v. Anders*, 555 Pa. 467, 725 A.2d 170 (1999) (discharge is appropriate remedy for violation of Rule 1405 time limits, but only if the defendant can demonstrate that the delay in sentencing was prejudicial to the defendant).

ORAL MOTION FOR EXTRAORDINARY RELIEF

Under paragraph (B), when there has been an error in the proceedings that would clearly result in the judge's granting relief post-sentence, the judge should grant a motion for extraordinary relief before sentencing occurs. Although trial errors may be serious and the issues addressing those errors meritorious, this rule is intended to allow the trial judge the opportunity to address only those errors so manifest that immediate relief is essential. It would be appropriate for counsel to move for extraordinary relief, for example, when there has been a change in case law, or, in a multiple count case, when the judge would probably grant a motion in arrest of judgment on some of the counts post-sentence. Although these examples are not all-inclusive, they illustrate the basic purpose of the rule: when there has been an

egregious error in the proceedings, the interests of justice are best served by deciding that issue before sentence is imposed. Because the relief provided by this section is extraordinary, boilerplate motions for extraordinary relief should be summarily denied.

Under paragraph (B)(2), the motion must be decided before sentence is imposed, and sentencing may not be postponed in order to dispose of the motion. The judge may summarily deny the motion or decide it on the merits.

Paragraph (B)(3) is intended to make it clear that a motion for extraordinary relief is neither necessary nor sufficient to preserve an issue for appeal. The failure to make a motion for extraordinary relief, or the failure to raise a particular issue in such a motion, does not constitute a waiver of any issue. Conversely, the making of a motion for extraordinary relief does not, of itself, preserve any issue raised in the motion, nor does the judge's denial of the motion preserve any issue.

SENTENCING PROCEDURES

Paragraph (C)(1) retains the former requirement that the judge afford the defendant an opportunity to make a statement and counsel the opportunity to present information and argument relative to sentencing. The defendant's right to allocution at sentencing is well established, and the trial judge must inform the defendant of that right. See *Commonwealth v. Thomas*, 520 Pa. 206, 553 A.2d 918 (1989).

The duty of the judge to explain to the defendant the rights set forth in paragraph (C)(3) is discussed in *Commonwealth v. Wilson*, 430 Pa. 1, 5, 241 A.2d 760, 763 (1968), and *Commonwealth v. Stewart*, 430 Pa. 7, 8, 241 A.2d 764, 765 (1968).

The judge should explain to the defendant, as clearly as possible, the timing requirements for making and deciding a post-sentence motion under Rule 720. The judge should also explain that the defendant may choose whether to file a post-sentence motion and appeal after the decision on the motion, or to pursue an appeal without first filing a post-sentence motion.

Paragraph (C)(3) requires the judge to ensure the defendant is advised of his or her rights concerning post-sentence motions and appeal, and the right to proceed with counsel. See, e.g., *Commonwealth v. Librizzi*, 810 A.2d 692 (Pa. Super. 2002).

The rule permits the use of a written colloquy that is read, completed, signed by the defendant, and made part of the record of the sentencing proceeding. This written colloquy must be supplemented by an on-the-record oral examination to determine that the defendant has been advised of the applicable rights enumerated in paragraph (C)(3) and that the defendant has signed the form.

Other, additional procedures are required by statute. See, e.g., 42 Pa.C.S. § 9756(b)(3) that imposes requirements on the judge when a defendant may be eligible to participate in a re-entry plan and 42 Pa.C.S. § 9756(b.1) that imposes requirements on the judge when a defendant may be eligible for a recidivism risk reduction incentive (RRRI) minimum sentence; 42 Pa.C.S. § 9795.3 that requires the judge to inform certain offenders of the duty to register; and 42 Pa.C.S. § 9813 that imposes requirements on the judge when a defendant may be eligible for work release.

After sentencing, following a conviction in a trial *de novo* in a summary case, the judge should advise the defendant of the right to appeal and the time limits within which to exercise that right, the right to proceed *in forma pauperis* and with appointed counsel to the extent provided in Rule 122(A), and of the qualified right to bail under Rule 521(B). See paragraphs (C)(3)(a), (b), and (e). See also Rule 720(D) (no post-sentence motion after a trial *de novo*).

After sentencing, the judge should inquire whether the defendant intends to file a post-sentence motion or to appeal, and if so, should determine the defendant's bail status pursuant to paragraph (C)(3)(e) and Rule 521. It is recommended, when a state sentence has been imposed, that the judge permit a defendant who cannot make bail to remain incarcerated locally, at least for the 10-day period during which counsel may file the post-sentence motion. When new counsel has been appointed or entered an appearance for the purpose of pursuing a post-sentence motion or appeal, the judge should consider permitting the defendant to remain incarcerated locally for a longer period to allow new counsel time to confer with the defendant and

become familiar with the case. See also Rule 120 (Attorneys -- Appearances and Withdrawals).

It is difficult to set forth all the standards that a judge must utilize and consider in imposing sentence. It is recommended that, at a minimum, the judge look to the standards and guidelines as specified by statutory law. See the Judicial Code, 42 Pa.C.S. § 9701 *et seq.* See also *Commonwealth v. Riggins*, 474 Pa. 115, 377 A.2d 140 (1977) and *Commonwealth v. Devers*, 519 Pa. 88, 546 A.2d 12 (1988). The judge also should consider other preexisting orders imposed on the defendant. See 18 Pa.C.S. § 1106(c)(2)(iv). And see 42 Pa.C.S. § 9728.

[In all cases in which restitution is imposed, the sentencing judge must state on the record the amount of restitution, if determined at the time of sentencing, or the basis for determining an amount of restitution. See 18 Pa.C.S. § 1106 and 42 Pa.C.S. §§ 9721, 9728.]

For procedures in cases in which restitution is imposed, see Rule 705.1.

For the right of a victim to have information included in the pre-sentence investigation report concerning the impact of the crime upon him or her, see 71 P.S. § 180-9.3(1) and Rule 702(A)(4).

For the duty of the sentencing judge to state on the record the reasons for the sentence imposed, see *Commonwealth v. Riggins*, 474 Pa. 115, 377 A.2d 140 (1977) and *Commonwealth v. Devers*, 519 Pa. 88, 546 A.2d 12 (1988). If the sentence initially imposed is modified pursuant to Rule 720(B)(1)(a)(v), the sentencing judge should ensure that the reasons for the ultimate sentence appear on the record. See also Sentencing Guidelines, 204 PA. CODE §§ 303.1(b), 303.1(h), and 303.3(2).

In cases in which a mandatory sentence is provided by law, when the judge decides not to impose a sentence greater than the mandatory sentence, regardless of the number of charges on which the defendant could be sentenced consecutively, and when no psychiatric or psychological examination is required under Rule 702(B), the judge may immediately impose that sentence. *But see* Rule 702(A)(2), which requires that the court state on the record the reasons for dispensing with a pre-sentence report under the

circumstances enumerated therein. See also 42 Pa.C.S. § 9721 *et seq.*

No later than 30 days after the date of sentencing, a Pennsylvania Commission on Sentencing Guideline Sentence Form must be completed at the judge's direction and made a part of the record. In addition, a copy of the form must be forwarded to the Commission on Sentencing. 204 PA. CODE § 303.1(e).

With respect to the recording and transcribing of court proceedings, including sentencing, see Rule 115.

NOTE: Previous Rule 1405 approved July 23, 1973, effective 90 days hence; *Comment* amended June 30, 1975, effective immediately; *Comment* amended and paragraphs (c) and (d) added June 29, 1977, effective September 1, 1977; amended May 22, 1978, effective as to cases in which sentence is imposed on or after July 1, 1978; *Comment* amended April 24, 1981, effective July 1, 1981; *Comment* amended November 1, 1991, effective January 1, 1992; rescinded March 22, 1993, effective as to cases in which the determination of guilt occurs on or after January 1, 1994, and replaced by present Rule 1405. Present Rule 1405 adopted March 22, 1993, effective as to cases in which the determination of guilt occurs on or after January 1, 1994; amended January 3, 1995, effective immediately; amended September 13, 1995, effective January 1, 1996. The January 1, 1996 effective date extended to April 1, 1996. *Comment* revised December 22, 1995, effective February 1, 1996. The April 1, 1996 effective date extended to July 1, 1996. *Comment* revised September 26, 1996, effective January 1, 1997; *Comment* revised April 18, 1997, effective immediately; *Comment* revised January 9, 1998, effective immediately; amended July 15, 1999, effective January 1, 2000; renumbered Rule 704 and amended March 1, 2000, effective April 1, 2001; *Comment* revised March 27, 2003, effective July 1, 2003; amended April 28, 2005, effective August 1, 2005; *Comment* revised March 15, 2013 effective May 1, 2103 [.]; ***Comment* revised , 2014 effective , 2104.**

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COMMITTEE EXPLANATORY REPORTS:

Final Report explaining the provisions of the new rule published with the Court's Order at 23 Pa.B. 1699 (April 10, 1993).

Report explaining the 1995 amendment to paragraph (C)(3) published with the Court's Order at 25 Pa.B. 236 (January 21, 1995).

Final Report explaining the September 13, 1995 amendments concerning bail published with the Court's Order at 25 Pa.B. 4116 (September 30, 1995).

Final Report explaining the December 22, 1995 Comment revision on restitution published with the Court's Order at 26 Pa.B. 13 (January 6, 1996).

Final Report explaining the September 26, 1996 Comment revision on Rule 1409 procedures published with the Court's Order at 26 Pa.B. 4900 (October 12, 1996).

Final Report explaining the April 18, 1997 Comment revisions published with the Court's Order at 27 Pa.B. 2122 (May 3, 1997).

Final Report explaining the January 9, 1998 Comment revisions concerning Guideline Sentence Forms, and summary case appeal notice, published with the Court's Order at 28 Pa.B. 481 (January 31, 1998).

Final Report explaining the July 15, 1999 amendments concerning the time for sentencing published with the Court's Order at 29 Pa.B. 4059 (July 31, 1999).

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

Final Report explaining the March 27, 2003 Comment revision adding cross-references to 18 Pa.C.S. § 1106 and 42 Pa.C.S. § 9728 published with the Court's Order at 33 Pa.B. 1928 (April 19, 2003).

Final Report explaining the April 28, 2005 amendments to paragraph (C)(3)(b) concerning retained counsel's obligations published with the Court's Order at 35 Pa.B. 2855 (May 14, 2005).

Final Report explaining the March 15, 2013 revision of the Comment adding citations to the Sentencing Code published with the Court's Order at 43 Pa.B. (, 2013).

Report explaining the revision of the Comment adding a cross-reference to Rule 705.1 concerning restitution published for comment at 44 Pa.B. (, 2014).

(This is an entirely new rule.)

RULE 705.1. RESTITUTION.

(A) At the time of sentencing, the judge shall determine what restitution, if any, shall be imposed.

(B) In any case in which restitution is imposed, the judge shall state in the sentencing order:

- (1) the amount of restitution ordered;
- (2) the details of any payment plan, including when payment is to begin;
- (3) the identity of the payee(s);
- (4) to which officer or agency the restitution payment shall be made;
- (5) any ongoing victim expenses that may need to be reviewed at a future time;
- (6) whether any restitution has been paid and in what amount; and
- (7) whether the restitution has been imposed as a part of the sentence or as a condition of probation.

(C) In any case in which restitution is imposed, a judge shall hold a hearing no later than 30 days prior to the expiration of any period of probation if there is any amount of restitution outstanding.

COMMENT: This rule is intended to provide procedures for the statutory requirement for the judge to impose restitution. In all cases in which restitution is imposed, the sentencing judge must state on the record the amount of restitution at the time of sentencing. See 18 Pa.C.S. § 1106 and 42 Pa.C.S. §§ 9721, 9728.

The extent of restitution may also be provided by statute. See, e.g., 18 Pa.C.S. § 1107 (restitution for timber theft); § 1107.1 (restitution for identity theft); and § 1110 (restitution for cleanup of clandestine labs).

The amount of restitution may change after sentence is imposed. A sentencing judge may amend a restitution order more than 30 days after sentencing if the court states its reasons and conclusions as a matter of record. *Commonwealth v. Dietrich*, 601 Pa. 58, 970 A.2d 1131 (2009). See also 18 Pa.C.S. §1106(c)(3).

When imposing restitution, the sentencing judge should consider whether the defendant has received notice of the intention to seek restitution prior to the hearing and whether the defendant intends to object to the imposition of restitution. The sentencing hearing may need to be continued as a result.

Paragraph (B)(7) requires that the sentencing order make clear whether any restitution is being imposed as a part of the sentence pursuant to 18 Pa.C.S. § 1106 or as a condition of probation pursuant to 42 Pa.C.S. § 9754. Unlike restitution imposed under §1106 that is penal in nature, restitution imposed as a condition of probation is primarily aimed at rehabilitation. Sentences of probation give a trial court the flexibility to determine all the direct and indirect damages caused by a defendant. *Commonwealth v. Harner*, 533 Pa. 14, 617 A.2d 702 (1992); *Commonwealth v. Hall*, ___ Pa. ___, 80 A.3d 1204 (2013). Because a term of probation may not exceed the maximum term for which the defendant could be confined, and a court cannot enforce a restitution sentence past the statutory maximum date, a court may not require that restitution imposed as a condition of probation be paid beyond the statutory maximum date. *Commonwealth v. Karth*, 994 A.2d 606 (Pa. Super. 2010). For this reason, paragraph (C) imposes the requirement that a hearing be held prior to the expiration of a defendant's probation to determine the status of the restitution payments and whether the conditions of probation have been violated.

NOTE: New Rule 704.1 adopted _____, 2014, effective _____, 2014.

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COMMITTEE EXPLANATORY REPORTS:

Report explaining proposed new Rule 705.1 concerning sentences of restitution published for comment at 44 Pa.B. (_____, 2014).

REPORT

Proposed New Pa.Rs.Crim.P. 705.1, Proposed Amendments to Pa.Rs.Crim.P. 454, and Proposed Revisions to the Comments to Pa.Rs.Crim.P. 454 and 704

SENTENCES OF RESTITUTION

BACKGROUND

Recently, the Committee reviewed the February 2013 report of the Restitution in Pennsylvania Task Force. The Task Force had been convened by the Pennsylvania Office of the Victim Advocate to study “solutions to increase the quality of restitution services at the state and county levels.” The Task Force included representatives from a wide spectrum of agencies involved in the justice system. Two of the Task Force’s recommendations are directed to the Rules of Criminal Procedure. One was to encourage “AOPC and/or the Court Rules Committee to standardize a restitution order for use at sentencing/disposition” and included suggested elements for such an order. The other recommendation was for the Committee to examine other jurisdictions “to consider whether any rules should be amended or new rules adopted to improve the collection of restitution.”¹

The Committee established a subcommittee to examine in depth what procedural rule changes might be recommended to standardize and clarify the manner in which restitution is awarded. The subcommittee reviewed the report of the Restitution in Pennsylvania Task Force as well as the statutes that provide for the award of restitution and the practice in this area in several other jurisdictions. Subsequently, the subcommittee recommended the proposed rule changes above and the Committee accepted these recommendations with minor changes. The proposed rule changes are now being published for public comment.

DISCUSSION

The Committee concluded that it would be a good idea to have a general rule stating the requirement to order restitution as part of sentencing. The Committee

¹ *Restitution in Pennsylvania Task Force Final Report*, <http://www.center-school.org/Restitution/index.html>, pgs 30 and 42.

considered it anomalous that Rule 706 addresses fines and costs but no rule mentions restitution. Too often restitution is an afterthought during sentencing. This has resulted in one of the problems that the Task Force identified -- that, although under Pennsylvania law, a sentencing court must specify the amount of restitution at the time of sentencing and may not simply state that the amount of restitution will be determined by the probation office, this latter practice is regularly followed. In addition to highlighting the need to order restitution, the rule would also provide guidance to the court in the contents of the order.

This new rule would be numbered 705.1, designed to follow Rule 705 which provides specifics regarding sentences that include incarceration. The Committee believes it is more logical to follow this latter rule with one dealing with restitution.

The text of the proposed rule is a statement reminding the sentencing judge to impose restitution. It acknowledges that some cases may not have restitution to impose. Originally, the subcommittee considered including discussion of an award of fines and costs. However, the text of the rule and the *Comment* was directed primarily to restitution and it seemed to detract from the purpose of the rule to include detailed provisions for fines and costs.

The Committee also considered the proposal to include a list of elements that the judge should include in the sentencing order to identify the restitution award details and assist in its collection. Originally, this was contained in the *Comment*. It seemed that it would be more effective in the rule itself. However, a concern was expressed that by placing this in the rule itself, unwarranted challenges might be raised based on a technical failure to include all the listed elements. Ultimately, the Committee concluded that it should be contained in the rule text to ensure compliance.

One of the problems discussed was that the nature of a restitution sentence varies depending on how the sentence was imposed. If awarded as part of the sentence, under 18 Pa.C.S. §1106, the award is punitive in nature while if it is added as a condition of probation, it is rehabilitative in nature. As a result, the extent to which the sentence can be enforced varies. It was decided that this issue should be described in the *Comment* and that the rule should require that the sentencing judge make clear in the sentencing order which of the two sentencing concepts were applicable to any

restitution award. Therefore, this has been added to the list of items required to be in the sentencing order with a detailed explanation contained in the *Comment*.

Related to this, the rule provides that a hearing or review be held prior to the expiration of probation when there is outstanding restitution owed. This would enable the court to decide whether to hold the defendant in violation for failure to pay before the court loses jurisdiction by the completion of the probation.

There was discussion regarding procedures to challenge a restitution sentence but it was ultimately decided that any challenge would occur at the sentencing hearing. The Committee agreed that there should be some notice to the defendant prior to sentencing. However, the Committee also acknowledged that in the majority of cases there will not be a dispute as to restitution and did not want to create a burdensome notice requirement. Therefore, language would be included in the *Comment* that the judge should consider the notice provided to the defendant and the defendant's desire to challenge the restitution before it is awarded.

Another issue that the Committee discussed was a later modification of the restitution order. Currently, the *Comment* to Rule 704 contains one brief paragraph about restitution:

In all cases in which restitution is imposed, the sentencing judge must state on the record the amount of restitution, if determined at the time of sentencing, or the basis for determining an amount of restitution. See 18 Pa.C.S. § 1106 and 42 Pa.C.S. §§ 9721, 9728.

This language suggested that the trial court had a fair amount of flexibility in later amending the restitution sentence. At first, this seemed inconsistent with some of the strict language of the statutes. However, the Committee examined the history of Rule 704 (then-Rule 1405) when the *Comment* was revised to specifically note that the sentencing judge has to set restitution at sentencing. In the Committee's *Final Report* at the time, 26 *Pa.B.* 13 (March 30, 1996), the Committee mentioned that this language represented a compromise to balance the statutory requirement that restitution be imposed at sentencing and the limited time limits in Rule 704 for imposition of sentencing which could create issues if the amount of restitution is not determined at the time of sentencing.

Additionally, case law suggests that there is some flexibility in this area. For example, *Commonwealth v. Dietrich*, 601 Pa. 58, 970 A.2d 1131 (2009), held that a court may not alter or amend a restitution order more than 30 days after the order was entered unless it states its reasons and conclusions as a matter of record for any changes to any previous order. Therefore, the proposed *Comment* to Rule 705.1 contains language reflecting the holding in *Dietrich*. Additionally, the above-mentioned paragraph regarding restitution would be deleted from the Rule 704 *Comment* since new Rule 705.1 is intended to specifically address restitution. A cross-reference to Rule 705.1 would be added to the Rule 704 *Comment*.

Another question raised was whether the proposal should include similar requirements for summary cases. The Committee agreed that it should and so paragraph (F) of Rule 454 (Trial in Summary Cases) would be amended to provide guidance as to what should be included in a restitution sentence similar to that which is provided for court cases in proposed new Rule 705.1. A cross-reference to this provision would be added to the *Comment* to Rule 455 (Trial in Defendant's Absence).