

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

Proposed Rescission of Rule 107 and Adoption of New Rule 107

The Criminal Procedural Rules Committee is planning to propose to the Supreme Court of Pennsylvania the rescission of current Rule 107 (Contents of Subpoenas) and the adoption of new Rule 107 (Subpoenas) 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, February 24, 2017***. 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.

January 3, 2017

BY THE CRIMINAL PROCEDURAL RULES COMMITTEE

*Charles A. Ehrlich
Chair*

[RULE 107. CONTENTS OF SUBPOENA.]

[A subpoena in a criminal case shall order the witness named to appear before the court at the date, time, and place specified, and to bring any items identified or described. The subpoena shall also state on whose behalf the witness is being ordered to testify and the identity, address, and phone number of the attorney, if any, who applied for the subpoena.]

[COMMENT: The form of subpoena was deleted in 1985 because it is no longer necessary to control the specific form of subpoena by rule.

It is intended that the subpoena shall be used not only for trial but also for any other stage of the proceedings when a subpoena is issuable, including preliminary hearings, hearings in connection with pretrial and post-trial motions, etc.

When the subpoena is for the production of documents, records, or things, these should be specified.]

NOTE: Previous Rule 9016 adopted January 28, 1983, effective July 1, 1983; rescinded November 9, 1984, effective January 2, 1985. Present Rule 9016 adopted November 9, 1984, effective January 2, 1985; renumbered Rule 107 and amended March 1, 2000, effective April 1, 2001 [.] ; rescinded _____, 2017, effective _____, 2017, and replaced by new Rule 107.

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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 Pa.B. (_____, 2000).

Report explaining the rescission of Rule 107 and the adoption of new Rule 107 establishing procedures for the issuance, service, and content of subpoenas published for comment at 47 Pa.B. _____ (_____, 2017).

[This is a completely new rule.]

RULE 107. SERVICE AND CONTENTS OF SUBPOENAS.

(A) ISSUANCE OF SUBPOENA BY MINOR JUDICIARY

Upon the request of a party, the issuing authority may issue a subpoena.

- (1) The individual requesting the subpoena shall provide the issuing authority with the information required in paragraph (C).
- (2) If the subpoena is to be issued, the issuing authority shall fill in the information provided.
- (3) The subpoena shall be signed by and under the seal of the issuing authority.

(B) SERVICE OF SUBPOENA

(1) Subpoenas in criminal proceedings shall be served:

(a) by a competent adult personally delivering the subpoena to a witness; or

(b) by certified, registered, or first class mail to a witness; or

(c) by carrier service delivering the subpoena to a witness; or

(d) when the witness is an officer of a law enforcement agency that has filed the statement of consent provide in paragraph (B)(2), by electronically transmitting a copy of the subpoena, acknowledgement of receipt requested, to the electronic address designated for receipt of electronic service of subpoenas by the law enforcement agency to which the officer is assigned.

(2) In order to utilize electronic service of subpoenas for its officers as permitted under paragraph (B)(1)(d), a law enforcement agency shall file a statement of consent to this form of service with the clerk of courts and the issuing authorities from which the agency consents to accept this form of service. The consent shall include the electronic address to be used for service of subpoenas.

(3) If a subpoenaed witness is under the age of 18, a parent or guardian of the witness shall be served a copy of the subpoena. A subpoena may be served on a witness under the age of 18 without the requirement of serving a parent or guardian if permitted by the judge for good cause shown.

(4) The party requesting the subpoena shall be responsible for the service of the subpoena.

(C) CONTENTS OF SUBPOENA

(1) A subpoena in a criminal proceeding shall:

(a) order the witness named to appear before the court at the date, time, and place specified to give testimony and to bring any records, books, papers, documents, data, or other items identified or described in the subpoena;

(b) state on whose behalf the witness is being ordered to testify;

(c) state the name, address, and phone number of the individual who applies for the subpoena; and

(d) inform the witness that the failure to comply with the subpoena may be considered by the court as grounds for contempt and that a bench warrant may be issued for the witness' arrest.

(2) The contents of a subpoena, including the identity of the subpoenaed person, are not public records.

COMMENT: It is intended that the subpoena will be used not only for summary trials or trials in the courts of common pleas and the Philadelphia Municipal Court, but also for any other stage of the proceedings before the minor judiciary, Philadelphia Municipal Court, or common pleas court when a subpoena is issuable, including preliminary hearings, hearings in connection with pretrial and post-trial motions, *etc.* For the procedures governing investigating grand jury subpoenas, see 42 Pa.C.S. § 4548.

Paragraph (A) provides the procedures for the issuance of subpoenas by the minor judiciary. Nothing in this rule is intended to change the current subpoena practice for the issuance of subpoenas by the courts of common pleas.

When issuing a subpoena, the issuing authority may limit the scope of the subpoena to persons, documents, or things that are relevant to the cause of action before the issuing authority.

A subpoena is not to be used for the production of materials or information required or requested to be produced pursuant to rules 573 or 574.

All issued subpoenas must be signed by a judge of the court issuing the subpoena. The signature may be in any of the forms of signature authorized in the Rule 103 definition of "signature."

The service provisions in paragraph (B) apply to subpoenas issued by the judges of the courts of common pleas, the magisterial district courts, the Philadelphia Municipal Court, and the Pittsburgh Municipal Court.

Paragraph (B)(1)(d) permits service by electronic means when the witness is a law enforcement officer. This method of service may be utilized for subpoenas issued by a judge of the court of common pleas or the minor judiciary. When a law enforcement agency files the certification in paragraph (B)(2) consenting to electronic service, the agency is assuming the responsibility of accepting electronically-served subpoenas and ensuring that the correct member of the agency is notified to appear as required by subpoenas.

It is intended under paragraph (B)(3) that parties subpoenaing witnesses under the age of 18 are responsible for any additional costs for the service of the subpoena on a parent or guardian.

Nothing in paragraph (B)(3) gives the parent or guardian of a witness under the age of 18 legal standing in the matter being heard or creates a right for the minor witness to have his or her parent or guardian present. In addition, lack of required notice to a parent or guardian does not prevent the minor witness from appearing and testifying.

As noted in paragraph (B)(4), service is the responsibility of the party requesting the subpoena not the court.

Concerning service of subpoenas by first class mail and proof of service, see 42 Pa.C.S. § 5904.

Paragraph (C) sets forth the mandatory contents of the subpoena. Although this paragraph does not require that the address of the person being subpoenaed be included on the subpoena, this is not intended to prohibit inclusion of the address on the subpoena for purposes of service. When the subpoena is for the production of records, books, papers, documents, photographs, data, or other items, these must be specified in the subpoena. Concerning subpoenas for medical records, see 42 Pa.C.S. §§ 6151-6160.

Although paragraph (C)(1)(a) requires the name of the witness to be included in the subpoena, in cases in which a specific name is not known, for example when the subpoena is for records from a hospital and the name of the record keeper is not available at the time the subpoena is issued, this requirement may be satisfied by providing a description of the person to receive the subpoena such as "records custodian."

Pursuant to paragraph (C)(2), the contents of subpoenas are not public records and not accessible by the public.

Before issuing a bench warrant for failure to obey the subpoena, the judge or issuing authority must ensure that the subpoenaed person has received sufficient notice of the proceeding. The requesting party has the burden of presenting proof of service. If the judge determines the person did not have sufficient notice, the judge may grant a continuance and order that the person be served the subpoena either in person or by certified mail, return receipt requested.

For the procedures following the execution of a bench warrant, see Rules 150 and 151.

The scope of an issuing authority's authority to enforce a subpoena is limited by statute. See 42 Pa.C.S. § 4137(d), that provides, *inter alia*, issuing authorities "shall have the power to issue an attachment by means of a warrant" to have the witness brought before the issuing authority for a hearing on the failure to comply with the subpoena. See *also*, Rule 140(B)(1).

NOTE: Previous Rule 9016 adopted January 28, 1983, effective July 1, 1983; rescinded November 9, 1984, effective January 2, 1985. Present Rule 9016 adopted November 9, 1984, effective January 2, 1985; renumbered

Rule 107 and amended March 1, 2000, effective April 1, 2001 [.] ; rescinded _____, 2017, effective _____, 2017, and replaced by new Rule 107. New Rule 107 adopted _____, 2017, effective _____, 2017.

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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 rescission of Rule 107 and the adoption of new Rule 107 establishing procedures for the issuance, service, and content of subpoenas published for comment at 47 Pa.B. _____ (_____, 2017).

REPORT

Proposed Rescission of Pa.R.Crim.P. 107 and Adoption of New Pa.R.Crim.P. 107

PROCEDURES FOR ISSUANCE AND SERVICE OF SUBPOENAS

BACKGROUND

The Committee at various times since 2004 has worked on developing procedures that would govern subpoenas. After extensive study into the different procedures governing subpoenas in Pennsylvania, including the formulation of a subcommittee, study of the various rules and statutes governing subpoenas in other forums,¹ and the publication of several prior versions of this proposal,² as well as discussion with the Court regarding the proposal, the Committee concluded that the rules would benefit from providing more clarity as to the procedures for the issuance and service of subpoenas, particularly in the magisterial district courts. The proposed rule changes would create a new Rule 107 that would set forth the procedures for the issuance and service of subpoenas in addition to the provisions contained in current Rule 107 regarding content.

A. Issuance

Paragraph (A) would provide the procedures for the issuance of a subpoena in cases pending before the minor judiciary. The issuing authority would be given some discretion in paragraph (A) comparable to the discretion given magisterial district judges in civil cases pursuant to MDJ Rule 214. Additionally, the requesting individual would be required to provide the information required by paragraph (C) for the contents of the subpoena, and the issuing authority is required to fill in the subpoena with this

¹ See, e.g., the Rules of Criminal Procedure (Criminal Rules) (Rule 107), the Rules of Civil Procedure (Civil Rules) (Rules 234.1, 234.2, 234.5, and 234.6), and the Rules of Civil Procedure Governing Actions and Proceedings Before Magisterial District Judges (MDJ Rules) (Rules 213 and 214), and 42 Pa.C.S. §§ 5904 (Subpoena of Witnesses) and 5905 (Subpoenas).

² See 35 Pa.B. 1556 (March 5, 2005), 35 Pa.B. 5676 (October 15, 2005), and 45 Pa.B. 2140 (May 2, 2015).

information. All subpoenas issued by a member of the minor judiciary must be signed by the issuing authority. Given the diversity of practice in the courts of common pleas, the proposed rule does not provide specific procedures for the issuance of subpoenas by the courts of common pleas but language would be added to the *Comment* to the new rule that no change to existing practice is intended.

B. Service

Paragraph (B) would set forth the requirements for service of the subpoena. The proposed service provisions in paragraph (B) are a combination of provisions from Rule 576(B) and from Minor Court Rule 214, and provide for personal service by a competent adult; service by certified, registered, or first class mail; or service by a carrier service.

In response to the most recent prior publication, the Committee received a suggestion that a provision be added permitting the electronic service of subpoenas to law enforcement agencies due to the large number of subpoenas issued to these entities. It was suggested that this practice is already in place in many jurisdictions and that it has resulted in significant savings of time, money and labor for prosecutors' offices. The Committee therefore incorporated this suggestion into paragraph (B)(1)(d) and (B)(2) of the new rule. In order to utilize this form of service, a written consent to be served with subpoenas electronically must be filed by the law enforcement agency with the clerk of courts and any issuing authorities from whom the agency is willing to accept e-service. Language would be added to the *Comment* that explains, when a law enforcement agency files a consent to be served electronically, the agency assumes the responsibility of accepting electronically-served subpoenas and ensuring the correct member of the agency is notified to appear as required by the subpoena.

Provisions concerning parental notification when the subpoenaed witness is under the age of 18 are included in paragraph (B)(3). The Committee recognized that not all individuals under the age of 18 are under the supervision or control of a parent or guardian and some are emancipated. In view of this, a provision similar to Juvenile Rule 123(E)(2) that would provide an exception to the service requirement when permitted by a judge for good cause shown has been added as the second sentence of paragraph (B)(2). Additionally, the *Comment* explains that the party subpoenaing the minor bears the responsibility for the costs of service on the parent, that the service

provision does not provide legal standing or give the parent or guardian any right to be present, and that lack of the required notice does not prevent the minor witness from appearing and testifying.

Paragraph (B)(4) would provide that the party requesting the subpoena shall be responsible for the service of the subpoena. This provision was added in response to the report of the practice in some jurisdictions that the police were insisting that MDJs be responsible for serving subpoenas requested by the police.

C. Contents

Paragraph (C) sets forth the contents of the subpoena, incorporating the provisions in current Rule 107. Additionally, paragraph (C)(1)(c) requires that the subpoena include the name and address for service on the person applying for the subpoena. Paragraph (C)(1)(d) provides that the subpoena shall “inform the witness that the failure to comply with the subpoena may be considered by the court as grounds for contempt and that a bench warrant may be issued for the witness’ arrest.”

The Committee considered the concern that as a judicially signed document, a subpoena would be part of the public record. There was a concern such disclosure potentially could expose the witness to privacy invasion or intimidation or retribution. The Committee concluded that such concerns were valid and agreed that the rule should state that the contents of the subpoena, including to whom the subpoena was issued, should be not be considered a public record. This provision would be contained in the new rule as paragraph (C)(2).

D. Comment Provisions

In addition to the provisions noted above, the *Comment* to new Rule 107 would include an explanation that subpoenas issued by Philadelphia Municipal Court judges are to be issued as provided in this rule. In addition, the *Comment* emphasizes that the subpoenas must be signed by a judge of the issuing court (common pleas court, Philadelphia Municipal, or magisterial district courts), and includes a cross-reference to the Criminal Rule 103 definition of “signature” to make it clear that the subpoena may be signed using any of the forms of signature set forth in Rule 103. The *Comment* also includes cross-references to 42 Pa.C.S. § 4137 and Pa.R.Crim. P. 140 to make it clear

that subpoenas issued pursuant to paragraph (A) are subject to the minor court contempt powers.