

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

Proposed Amendment of Pa.R.Crim.P. 231

The Criminal Procedural Rules Committee is considering proposing to the Supreme Court of Pennsylvania the amendment of Rule 231 (Who May Be Present During Session of an Investigating Grand Jury) 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, May 10, 2019**. 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.

March 20, 2019

BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:

*Brian W. Perry
Chair*

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 except as provided by law] anything that transpires in the Grand Jury room and all matters occurring before the Grand Jury, except when disclosure is authorized by law or permitted by the supervising judge of the grand jury.**

(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. **Section 4549(d) permits a witness to disclose his or her testimony before the investigating grand jury unless prohibited for cause shown in a hearing before the supervising judge. This testimony also may be disclosed by the witness' attorney with the explicit, knowing, voluntary, and informed consent of the client witness. See *In re Fortieth Statewide Investigating Grand Jury*, 191 A.3d 750 (Pa. 2018).**

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 **[.] amended _____, 2019, effective _____, 2019.**

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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 with the Court's Order at 43 Pa.B. 652 (February 2, 2013).

Report explaining the proposed amendment to paragraph (C) regarding the scope of the secrecy requirement published for comment at 49 Pa.B. (_____ , 2019).

REPORT

Proposed Amendment of Pa.R.Crim.P. 231

COUNSEL SECRECY OBLIGATION IN INVESTIGATING GRAND JURIES

The Committee, at the Court's request, has undertaken a review of the language in Rule 231(C) regarding non-disclosure of investigating grand jury testimony in light of *In Re Fortieth Statewide Investigating Grand Jury*, 191 A.3d 750 (Pa. 2018). In this case, the grand jury was investigating alleged child abuse by Roman Catholic clergy. Subpoenas were issued to the Dioceses of Harrisburg and Greensburg. Attorneys representing the Dioceses requested copies of the notice of submission that the Office of the Attorney General had submitted to the supervising judge. The supervising judge replied that this would be provided once the counsel had signed and submitted an entry of appearance. The entry of appearance required the attorneys to agree under oath "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 attorneys for the Dioceses filed a joint motion to strike the non-disclosure provision from the entry of appearance form, arguing that the statutory secrecy provisions did not apply to private attorneys or, alternatively, that the scope of the secrecy obligation contained in the oath exceeded what was mandated by the statute. The Court found that private attorneys are explicitly subject to the general requirement of secrecy under the statute.

The Court agreed with the Dioceses' attorney that the entry of appearance form's requirement to keep secret all "matters occurring before the grand jury" was broader than the secrecy requirements of Section 4549(b) of the Investigating Grand Jury Act, 42 Pa.C.S. § 4549(b). Although the Section 4549(b) terminology of "matters occurring before the grand jury" is not defined in the Act, the Court found that a proscription against disclosure of "all matters and information concerning this Grand Jury obtained in the course of the representation" was too great an impingement on counsel's ability to

effectively represent their clients and should apply only to what actually transpired in a grand jury room.

The Court, under its supervisory prerogative, ordered that the entry-of-appearance form be modified to remove the commitment to secrecy for “all matters and information concerning this Grand Jury obtained in the course of the representation” and “the syntax of the prior clauses should be adjusted, so that attorneys are bound to keep secret ‘all that transpires in the Grand Jury room and all matters occurring before the Grand Jury, except when disclosure is authorized by law or permitted by the Court.’” 191 A.3d at 762. In footnote 20 of the case, the Court provided this further direction:

To the extent that Criminal Procedural Rule 231(C) can be read to sweep more broadly in its requirement of non-disclosure of “any information pertaining to the grand jury,” Pa.R.Crim.P. 231(C), we direct that it should be construed to align with the material provisions of the Investigating Grand Jury Act. Additionally, we intend to invoke the rulemaking process to effectuate a clarifying amendment.

The Committee examined the history of Rule 231, in particular the language used in paragraph (C). This language was added to then-Rule 264 in 1987. The Publication Report from that time explains the rationale of the Committee when the rule changes were proposed. See 17 Pa.B. 167 (January 10, 1987). It would appear that the Committee at that time contemplated that the secrecy provision applied to what transpired before the grand jury. The Committee concluded that this language as originally developed was not intended to apply to everything that an attorney might learn during his or her representation of a client who is involved with the grand jury.

Therefore, the Committee is proposing a change to Rule 231(C) that would narrow the language of the secrecy obligation. Utilizing the language mandated by the Court in *In Re Fortieth Statewide Investigating Grand Jury*, the rule would describe the information covered by the secrecy obligation as “anything that transpires in the grand jury room and all matters occurring before the grand jury.”

One of the subsidiary concerns raised in the case was the seeming incongruity of a client-witness being permitted to disclose his or her testimony but the same permission not extending to his or her counsel. The Court held that this was not the case, and found the statute permits counsel to disclose such testimony when the client has consented. See 191 A.3d at 761. The Committee concluded that this point should

be noted in the rule. Therefore, clarifying language would be added to the *Comment* regarding the allowance of an attorney to disclose their client's testimony when the client has consented.