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

Proposed Revision of the *Comment* to Rule 500

The Criminal Procedural Rules Committee is planning to propose to the Supreme Court of Pennsylvania the revision of the *Comment* to Rule 500 (Preservation of Testimony After Institution of Criminal Proceedings) 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:

Jeffrey M. Wasileski, Counsel
Supreme Court of Pennsylvania
Criminal Procedural Rules Committee
601 Commonwealth Avenue, Suite 6200
Harrisburg, PA 17106-2635
fax: (717) 231-9521
e-mail: criminalrules@pacourts.us

All communications in reference to the proposal should be received by **no later than Friday, September 4, 2015.** 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.

July 6, 2015 *BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:*

Paul M. Yatron
Chair

RULE 500. PRESERVATION OF TESTIMONY AFTER INSTITUTION OF CRIMINAL PROCEEDINGS.

(A) BY COURT ORDER.

(1) At any time after the institution of a criminal proceedings, upon motion of any party, and after notice and hearing, the court may order the taking and preserving of the testimony of any witness who may be unavailable for trial or for any other proceeding, or when due to exceptional circumstances, it is in the interests of justice that the witness' testimony be preserved.

(2) The court shall state on the record the grounds on which the order is based.

(3) The court's order shall specify the time and place for the taking of the testimony, the manner in which the testimony shall be recorded and preserved, and the procedures for custody of the recorded testimony.

(4) The testimony shall be taken in the presence of the court, the attorney for the Commonwealth, the defendant(s), and defense counsel, unless otherwise ordered.

(5) The preserved testimony shall not be filed of record until it is offered into evidence at trial or other judicial proceeding.

(B) BY AGREEMENT OF THE PARTIES.

(1) At any time after the institution of a criminal proceeding, the testimony of any witness may be taken and preserved upon the express written agreement of the attorney for the Commonwealth, the defendant(s), and defense counsel.

(2) The agreement shall specify the time and place for taking the testimony, the manner in which the testimony shall be recorded and preserved, and the procedures for custody of the recorded testimony.

(3) The testimony shall be taken in the presence of the attorney for the Commonwealth, the defendant(s), and defense counsel, unless they otherwise agree.

(4) The agreement shall be filed of record.

(5) The preserved testimony shall not be filed of record until it is offered into evidence at trial or other judicial proceeding.

COMMENT: This rule is intended to provide the means by which testimony may be preserved for use at a subsequent stage in the criminal proceedings. When testimony is to be preserved by videotape recording, see also Rule 501.

This rule does not address the admissibility of the preserved testimony. All questions of admissibility must be decided by the court. *See, e.g.*, Judicial Code § 5917, 42 Pa.C.S. § 5917 (1982); *Commonwealth v. Scarborough*, 421 A.2d 147 (Pa. 1980); *Commonwealth v. Stasko*, 370 A.2d 350 (Pa. 1977).

"May be unavailable," as used in paragraph (A), is intended to include situations in which the court has reason to believe that the witness will be unable to be present or to testify at trial or other proceedings, such as when the witness is dying, or will be out of the jurisdiction and therefore cannot be effectively served with a subpoena, **or is elderly, frail, or demonstrates the symptoms of mental infirmity or dementia,** or may become incompetent to testify for any **other** legally sufficient reason.

Under paragraph (A)(4), a judge should preside over the taking of testimony. The court, however, may order that testimony be taken and preserved without a judge's presence when exigent circumstances exist or the location of the witness renders a judge's presence impracticable. Furthermore, nothing in this rule is intended to preclude counsel, the defendant(s), and the judge from agreeing on the record that the judge need not be present. Paragraph (B)(3) permits the attorney for the Commonwealth, the defendant(s), and defense counsel to determine among themselves whether a judge should be present during the taking of testimony. That determination should be made a part of the written agreement required by paragraph (B)(1).

Nothing is this rule is intended to preclude the defendant from waiving his or her presence during the taking of testimony.

The means by which the testimony is recorded and preserved are within the discretion of the court under paragraph (A) and the parties under paragraph (B), and may include the use of electronic or photographic techniques such as videotape. There are, however, additional procedural requirements for preservation of testimony by videotape recording mandated by Rule 501.

The party on whose motion testimony is taken should normally have custody of and be responsible for safeguarding the preserved testimony. That party should also promptly provide a copy of the preserved testimony to any other party upon payment of reasonable costs.

When testimony is taken under this rule, the proceeding should be adversarial, and afford the parties full opportunity to examine and cross-examine the witness. Counsel should not reserve objections for time of trial.

Paragraphs (A)(5) and (B)(5) are intended to guard against pretrial disclosure of potentially prejudicial matters.

For definition of "court," see Rule 103.

NOTE: Rule 9015 adopted November 8, 1982, effective January 1, 1983; amended March 22, 1989, effective July 1, 1989; renumbered Rule 500 and amended March 1, 2000, effective April 1, 2001**[.] ; *Comment* revised , 2015, effective , 2015.**

* * * * * *

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 proposed Comment revisions refining the definition of "unavailable" to include the elderly published for comment at 45 Pa.B. (, 2015).

REPORT

Proposed Revision of the Comment to Pa.R.Crim.P. 500

AVAILABILITY OF THE ELDERLY TO TESTIFY

Recently, the Committee was asked by the Court to consider the recommendations of Elder Law Task Force related to criminal procedure. In April 2013, the Court created the Elder Law Task Force to study the issues of access to justice being faced by older Pennsylvanians. In November 2014, the Task Force issued a report with a number of recommendations intended to enhance the way Pennsylvania elders interact with the state court system and are protected in cases involving abuse, neglect, guardianship, conservatorship and other matters.[1] Based on the recommendation of the Task Force, the Court established an Office of Elder Justice in the Courts to implement many of the recommendations in the report as well as an Advisory Council on Elder Justice in the Courts to serve as the judiciary's liaison to the executive and legislative branches.

One of the Task Force's recommendations related to criminal procedural issues is the suggestion that the *Comment* to Pa.R.Crim.P. 500 (Preservation of Testimony) be revised "to help ensure the testimony of elder victims and witnesses in criminal cases can be preserved."[2] Rule 500 provides procedures for the pre-trial preservation of testimony of those witnesses who may be unavailable to testify for trial or other proceedings or where, due to exceptional circumstances, it is in the interests of justice to preserve the witness' testimony. Consistent with the Task Force's recommendation, the Advisory Council suggested to the Court that the Rule 500 *Comment* be revised to further define the phrase "exceptional circumstances" to include the circumstances where the victim is an elder, is frail, or demonstrates the symptoms of mental infirmity or dementia, creating the risk that they will not be able to testify in the future. The Advisory Council also suggested that persons 60 or older be presumed to be elders for purposes of preserving testimony.

---

[1] *See Elder Law Task Force Report,* http://www.pacourts.us/courts/supreme-court/committees/supreme-court-boards/elder-law-task-force.

[2] See Recommendation 36, *Elder Task Force Report*, page 236.

The Committee considered that the language of the *Comment* already is broad enough to cover the situation where a victim/witness would be unavailable to testify due to age-related incapacity such as frailty or dementia. However, the Committee concluded that it would be helpful to explicitly state in the *Comment* that these conditions are contemplated by the rule. Therefore, the language of the third paragraph of the *Comment* would be revised as follows:

> "May be unavailable," as used in paragraph (A), is intended to include situations in which the court has reason to believe that the witness will be unable to be present or to testify at trial or other proceedings, such as when the witness is dying, or will be out of the jurisdiction and therefore cannot be effectively served with a subpoena, **or is elderly, frail or demonstrating symptoms of mental infirmity or dementia**, or may become incompetent to testify for any **other** legally sufficient reason.

The proposed revision also added the word "other" before "legally sufficient reason" to the final phrase of the paragraph since mental infirmity and dementia are also "legally sufficient reasons" for determining unavailability. The Committee reviewed the suggestion that there be a presumption for that those "age 60 and over" fall within the definition of "elderly" for purposes of constituting "exceptional circumstances," and concluded such a presumption was unnecessary under the criminal rules. It appears that the Advisory Council, in making this suggestion, was attempting to maintain uniformity of its definition of "elderly" with the various state and federal statutes that provide for assistance to the elderly. However, the purpose of the definition under those statutes, e.g. for the provision of services or prohibition of age-based discrimination, is qualitatively different from the purpose of Rule 500 which seeks to provide for the recording of testimony of a witness who would be unavailable at trial. The Committee concluded that this particular age-based presumption was not consistent with a general competency to testify.

The Task Force also recommended that "Rule 504 (Contents of the Complaint) be amended to include either the date of birth of the victim, or including a check box (to be marked) that identified the individual as an elder (age 60 or over)." The rationale for this change was that this information would be used to obtain statistics of the incidents of elder abuse occurring in the Commonwealth, "and thus further efforts to address the extent of physical and financial abuse against elderly victims." The Committee, after

considering the recommended change, agreed not to propose this recommendation. The Committee noted that the purpose of the criminal complaint is as a charging document intended to put the defendant on notice of the charges against him or her and is not a suitable a means of gathering statistical information which could be obtained by other methods. Furthermore, the members expressed concern about the potential for identity theft from including this requirement in a public document. While perhaps not as dangerous as requiring a Social Security Number, the date of birth is a critical personal identifier and requiring it to be placed on a public record is not be advisable. It should be noted that nothing in this proposal is intended to preclude the inclusion of a victim age in the complaint's description of the acts of the defendant when the victim's age is an element of the offense charged.