

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

**Proposed Amendments of Pa.R.Crim.P. 590**

The Criminal Procedural Rules Committee is planning to propose to the Supreme Court of Pennsylvania the amendment of Rules 590 (Pleas and Plea Agreements) 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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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 27, 2016*

*BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:*

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*Jeffrey A. Manning  
Chair*

## RULE 590. PLEAS AND PLEA AGREEMENTS.

### (A) GENERALLY.

- (1) Pleas shall be taken in open court.
- (2) A defendant may plead not guilty, guilty, or, with the consent of the judge, nolo contendere. If the defendant refuses to plead, the judge shall enter a plea of not guilty on the defendant's behalf.
- (3) The judge may refuse to accept a plea of guilty or nolo contendere, and shall not accept it unless the judge determines after inquiry of the defendant that the plea is voluntarily and understandingly tendered. Such inquiry shall appear on the record.

### (B) PLEA AGREEMENTS.

- (1) **At any time prior to the verdict, [W]hen** counsel for both sides have arrived at a plea agreement, they shall state on the record in open court, in the presence of the defendant, the terms of the agreement, unless the judge orders, for good cause shown and with the consent of the defendant, counsel for the defendant, and the attorney for the Commonwealth, that specific conditions in the agreement be placed on the record in camera and the record sealed.
- (2) The judge shall conduct a separate inquiry of the defendant on the record to determine whether the defendant understands and voluntarily accepts the terms of the plea agreement on which the guilty plea or plea of nolo contendere is based.
- (3) **Any local rule that is inconsistent with the provisions of this rule is prohibited, including any local rule mandating deadline dates for the acceptance of a plea entered pursuant to a plea agreement.**

### (C) MURDER CASES.

In cases in which the imposition of a sentence of death is not authorized, when a defendant enters a plea of guilty or nolo contendere to a charge of murder generally, the degree of guilt shall be determined by a jury unless the attorney for the Commonwealth elects to have the judge, before whom the plea was entered, alone determine the degree of guilt.

COMMENT: The purpose of paragraph (A)(2) is to codify the requirement that the judge, on the record, ascertain from the defendant that the guilty plea or plea of nolo contendere is voluntarily and understandingly tendered. On the mandatory nature of this practice, see *Commonwealth v. Ingram*, 316 A.2d 77 (Pa. 1974); *Commonwealth v. Campbell*, 304 A.2d 121 (Pa. 1973); *Commonwealth v. Jackson*, 299 A.2d 209 (Pa. 1973).

It is difficult to formulate a comprehensive list of questions a judge must ask of a defendant in determining whether the judge should accept the plea of guilty or a plea of nolo contendere. Court decisions may add areas to be encompassed in determining whether the defendant understands the full impact and consequences of the plea, but is nevertheless willing to enter that plea. At a minimum the judge should ask questions to elicit the following information:

- (1) Does the defendant understand the nature of the charges to which he or she is pleading guilty or nolo contendere?
- (2) Is there a factual basis for the plea?
- (3) Does the defendant understand that he or she has the right to trial by jury?
- (4) Does the defendant understand that he or she is presumed innocent until found guilty?
- (5) Is the defendant aware of the permissible range of sentences and/or fines for the offenses charged?
- (6) Is the defendant aware that the judge is not bound by the terms of any plea agreement tendered unless the judge accepts such agreement?
- (7) Does the defendant understand that the Commonwealth has a right to have a jury decide the degree of guilt if the defendant pleads guilty to murder generally?

The Court in *Commonwealth v. Willis*, 369 A.2d 1189 (Pa. 1977), and *Commonwealth v. Dilbeck*, 353 A.2d 824 (Pa. 1976), mandated that, during a guilty plea colloquy, judges must elicit the information set forth in paragraphs (1) through (6) above. In 2008, the Court added paragraph (7) to the list of areas of inquiry.

Many, though not all, of the areas to be covered by such questions are set forth in a footnote to the Court's opinion in *Commonwealth v. Martin*, 282 A.2d 241, 244-245 (Pa. 1971), in which the colloquy conducted by the trial judge is cited with approval. See also *Commonwealth v. Minor*, 356 A.2d 346 (Pa. 1976), and *Commonwealth v. Ingram*, 316 A.2d 77 (Pa. 1974). As to the requirement that the judge ascertain that there is a factual basis for the plea, see *Commonwealth v. Maddox*, 300 A.2d 503 (Pa. 1973) and *Commonwealth v. Jackson*, 299 A.2d 209 (Pa. 1973).

It is advisable that the judge conduct the examination of the defendant. However, paragraph (A) does not prevent defense counsel or the attorney for the Commonwealth from conducting part or all of the examination of the defendant, as permitted by the judge. In addition, nothing in the rule would preclude the use of a written colloquy that is read, completed, signed by the defendant, and made part of the record of the plea proceedings. This written colloquy would have to be supplemented by some on-the-record oral examination. Its use would not, of course, change any other requirements of law, including these rules, regarding the prerequisites of a valid guilty plea or plea of nolo contendere.

The "terms" of the plea agreement, referred to in paragraph (B)(1), frequently involve the attorney for the Commonwealth -- in exchange for the defendant's plea of guilty or nolo contendere, and perhaps for the defendant's promise to cooperate with law enforcement officials -- promising concessions such as a reduction of a charge to a less serious offense, the dropping of one or more additional charges, a recommendation of a lenient sentence, or a combination of these. In any event, paragraph (B) is intended to insure that all terms of the agreement are openly acknowledged for the judge's assessment. See, e.g., *Commonwealth v. Wilkins*, 277 A.2d 341 (Pa. 1971).

The 1995 amendment deleting former paragraph (B)(1) eliminates the absolute prohibition against any judicial involvement in plea discussions in order to align the rule with the realities of current practice. For example, the rule now permits a judge to inquire of defense counsel and the attorney for the Commonwealth whether there has been any discussion of a plea agreement, or to give counsel, when requested, a reasonable period of time to conduct such a discussion. Nothing in this rule, however, is intended to permit a judge to suggest to a defendant, defense counsel, or the attorney for the Commonwealth, that a plea agreement should be negotiated or accepted.

**Paragraph (B)(1) was amended and paragraph (B)(3) was added in 2016 to clarify that the intent of this rule is that a plea made pursuant to an agreement may be entered any time prior to verdict. Any local rule that places a time limit for the entry of such pleas prior to verdict is in conflict with this rule and therefore invalid.**

Under paragraph (B)(1), upon request and with the consent of the parties, a judge may, as permitted by law, order that the specific conditions of a plea agreement be placed on the record in camera and that portion of the record sealed. Such a procedure does not in any way eliminate the obligation of the attorney for the Commonwealth to comply in a timely manner with Rule 573 and the constitutional mandates of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Similarly, the attorney for the Commonwealth is responsible for notifying the cooperating defendant that the specific conditions to which the defendant agreed will be disclosed to third parties within a specified time period, and should afford the cooperating defendant an opportunity to object to the unsealing of the record or to any other form of disclosure.

When a guilty plea, or plea of nolo contendere, includes a plea agreement, the 1995 amendment to paragraph (B)(2) requires that the judge conduct a separate inquiry on the record to determine that the defendant understands and accepts the terms of the plea agreement. See *Commonwealth v. Porreca*, 595 A.2d 23 (Pa. 1991).

Former paragraph (B)(3) was deleted in 1995 for two reasons. The first sentence merely reiterated an earlier provision in the rule. See paragraph (A)(3). The second sentence concerning the withdrawal of a guilty plea was deleted to eliminate the confusion being generated when that provision was read in conjunction with Rule 591. As provided in Rule 591, it is a matter of judicial discretion and case law whether to permit or direct a guilty plea or plea of nolo contendere to be withdrawn. See also *Commonwealth v. Porreca*, 595 A.2d 23 (Pa. 1991) (the terms of a plea agreement may determine a defendant's right to withdraw a guilty plea).

For the procedures governing the withdrawal of a plea of guilty or nolo contendere, see Rule 591.

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

Paragraph (C) reflects a change in Pennsylvania practice, that formerly required the judge to convene a panel of three judges to determine the degree of guilt in murder cases in which the imposition of a sentence of death was not statutorily authorized. The 2008 amendment to paragraph (C) and the *Comment* recognizes the Commonwealth's right to have a jury determine the degree of guilt following a plea of guilty to murder generally. See Article I, § 6 of the Pennsylvania Constitution that provides that "the Commonwealth shall have the same right to trial by jury as does the accused." See also *Commonwealth v. White*, 910 A.2d 648 (Pa. 2006).

NOTE: Rule 319(a) adopted June 30, 1964, effective January 1, 1965; amended November 18, 1968, effective February 3, 1969; paragraph (b) adopted and title of rule amended October 3, 1972, effective 30 days hence; specific areas of inquiry in *Comment* deleted in 1972 amendment, reinstated in revised form March 28, 1973, effective immediately; amended June 29, 1977 and November 22, 1977, effective as to cases in which the indictment or information is filed on or after January 1, 1978; paragraph (c) added and *Comment* revised May 22, 1978, effective July 1,

1978; *Comment* revised November 9, 1984, effective January 2, 1985; amended December 22, 1995, effective July 1, 1996; amended July 15, 1999, effective January 1, 2000; renumbered Rule 590 and *Comment* revised March 1, 2000, effective April 1, 2001; amended September 18, 2008, effective November 1, 2008; *Comment* revised March 9, 2016, effective July 1, 2016 [.] ; amended \_\_\_\_\_, 2016, effective \_\_\_\_\_, 2016.

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**COMMITTEE EXPLANATORY REPORTS:**

***Final Report explaining the December 22, 1995 amendments published with the Court's Order at 26 Pa.B. 8 (January 6, 1996).***

***Final Report explaining the July 15, 1999 changes concerning references to nolo contendere pleas and cross-referencing Rule 320 published with the Court's Order at 29 Pa.B. 4057 (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 September 18, 2008 amendments to paragraph (C) concerning juries determining degree of guilt published with the Court's Order at 38 Pa.B. 5429 (October 4, 2008).***

***Final Report explaining the March 9, 2016 Comment revision concerning the Rule 705.1 restitution procedures published with the Court's Order at 46 Pa.B. ( \_\_\_\_\_, 2016).***

***Report explaining the proposed amendments concerning plea agreement deadlines published for comment at 46 Pa.B. ( \_\_\_\_\_, 2016).***

## REPORT

### *Proposed amendment of Pa.R.Crim.P. 590*

#### PLEA BARGAIN DEADLINE

It has come to the Committee's attention that several counties have local rules that contain a date after which a defendant may not enter a plea pursuant to an agreement.<sup>1</sup> These rules provide that if this date is missed, the defendant is then required to enter an open plea or take a trial.

The Committee has concluded that these provisions are in conflict with statewide Rule 590(B) that provides the procedures for the entry of pleas made pursuant to a plea agreement. Rule 590(B) provides:

(1) When counsel for both sides have arrived at a plea agreement, they shall state on the record in open court, in the presence of the defendant, the terms of the agreement, unless the judge orders, for good cause shown and with the consent of the defendant, counsel for the defendant, and the attorney for the Commonwealth, that specific conditions in the agreement be placed on the record in camera and the record sealed.

(2) The judge shall conduct a separate inquiry of the defendant on the record to determine whether the defendant understands and voluntarily accepts the terms of the plea agreement on which the guilty plea or plea of *nolo contendere* is based.

Statewide Rule 590(B) does not contain a temporal limit for the entry of a negotiated plea. The creation of such a deadline in a local rule constitutes an additional local requirement not contemplated by the statewide rule and creates an inconsistency with practice elsewhere in the Unified Judicial System.

The Committee recognizes that there is no right to a plea bargain and a trial judge has a great amount of discretion in whether to accept a plea bargain. The

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<sup>1</sup> It appears that most of these rules were in place prior to 2009 when Rule 105 was amended to require approval from the Committee prior to a local rule being adopted.

Committee also appreciates that the main rationale of these local deadlines is to more effectively administer a court's trial case load. However, from a practical standpoint, there are a number of circumstances in which a negotiated plea may be entered late in a case, even during trial. For example, the way in which the evidence develops may significantly alter the parties' positions on a negotiated plea. An absolute bar on the acceptance of post-deadline agreements is counter-productive. While some "down-time" may result when a scheduled trial is resolved by a plea, it seems far less inefficient than forcing the parties into a trial that they are willing to forego for a negotiated plea. The Committee members believe that a trial judge should exercise individualized consideration on the merits of a negotiated plea in determining whether to accept or reject it rather than reliance on a set deadline. Therefore, the Committee has concluded that the prerogative of the parties to freely enter into a negotiated disposition of a case should not be summarily refused solely because of the timing of the presentation of the agreement to the court.

Although the Committee has concluded that such local rules are already in conflict with statewide Rule 590, it was believed that some clarification of this point would be beneficial. Therefore, Rule 590(B)(1) would be amended by the addition of a prefatory statement that a plea pursuant to an agreement may be entered any time prior to the verdict. The prohibition against plea entry deadlines would be further elaborated in the *Comment*.