

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

Proposed Amendment of Pa.R.Crim.P. 644

The Criminal Procedural Rules Committee is considering proposing to the Supreme Court of Pennsylvania the amendment of Rule 644 (Note Taking by Jurors) 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, 2020**. 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 7, 2020

BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:

/ s / Margherita Patti-Worthington

*Margherita Patti-Worthington
Chair*

RULE 644. NOTE TAKING BY JURORS.

(A) **[When a jury trial is expected to last for more than two days, j]Jurors shall be permitted to take notes during [the trial] opening statements, the presentation of evidence, and closing arguments for their use during deliberations. [When the trial is expected to last two days or less, the judge may permit the jurors to take notes.]**

(1) The jurors shall not take notes during the judge's charge at the conclusion of the trial.

(2) The court shall provide materials to the jurors that are suitable for note taking. These are the only materials that may be used by the jurors for note taking.

(3) The court, the attorney for the Commonwealth, and the defendant's attorney, or the defendant if unrepresented, shall not request or suggest that jurors take notes, comment on the jurors' note taking, or attempt to read any notes.

(4) The notes of the jurors shall remain in the custody of the court at all times.

(5) The jurors may have access to their notes and use their notes only during the trial and deliberations. The notes shall be collected or maintained by the court at each break and recess, and at the end of each day of the trial.

(6) The notes of the jurors shall be confidential and limited to use for the jurors' deliberations.

(7) Before announcing the verdict, the jury shall return their notes to the court. The notes shall be destroyed by court personnel without inspection upon the discharge of the jury.

(8) The notes shall not be used as a basis for a request for a new trial, and the judge shall deny any request that the jurors' notes be retained and sealed pending a request for a new trial.

(B) The judge shall instruct the jurors about taking notes during the trial. At a minimum, the judge shall instruct the jurors that:

(1) the jurors are not required to take notes, and those jurors who take notes are not required to take extensive notes;

- (2) note taking should not divert jurors from paying full attention to the evidence and evaluating witness credibility, **or the opening statements, or closing arguments;**
- (3) the notes merely are memory aids, not evidence or the official record;
- (4) the jurors who take few or no notes should not permit their independent recollection of the evidence to be influenced by the fact that other jurors have taken notes;
- (5) the jurors may not show their notes or disclose the contents of the notes to other jurors until deliberations begin, but may show the notes or disclose the contents during deliberations;
- (6) the jurors may not take their notes out of the courtroom except to use their notes during deliberations; and
- (7) the jurors' notes are confidential, will not be reviewed by the court or anyone else, will be collected before the verdict is announced, and will be destroyed immediately upon discharge of the jury.

COMMENT: [This rule was adopted in 2005 to permit the jurors to take notes during the course of any trial that is expected to last more than two days. Pursuant to this rule, except for trials expected to last two days or less, the jury may take notes as a matter of right without the permission of the court. See, e.g., ABA Standards for Criminal Justice, Second Edition, Standard 15-3.2 (Note taking by jurors) (1980). This rule was originally adopted as a temporary rule for the purpose of assessing whether juror note taking in criminal cases is beneficial to the system of justice in Pennsylvania. As the rule has found favor with the bench, bar, and public, the sunset provision of paragraph (C) has been rescinded and the rule has been made permanent.]

The judge must instruct the jurors concerning the note taking. Paragraph (B) sets forth the minimum information the judge must explain to the jurors. The judge also must emphasize the confidentiality of the notes.

It is strongly recommended the judge instruct the jurors along the lines of the following:

We will distribute notepads and pens to each of you in the event you wish to take notes during the trial. You are under no obligation to take notes and it is entirely up to you whether you wish to take notes to help you remember what witnesses said and to use during your deliberations.

If you do take notes, remember that one of your responsibilities as a juror is to observe the demeanor of witnesses to help you assess their credibility. Do not become so involved with note taking that it interferes with your ability to observe a witness or distracts you from hearing the questions being asked the witness and the answers being given by the witness.

You may also take notes while the attorneys' present their opening statements and when they will make their closing arguments about the evidence at the end of the trial. Again, if you do take notes, do not become so involved with note taking that it distracts from paying attention to the remainder of the opening statement or hearing all of the closing argument.

Your notes may help you refresh your recollection of the **[testimony] evidence as well as the attorneys' opening statements and closing arguments.** **[and] Your notes** should be treated as a supplement to, rather than a substitute for, your memory. Your notes are only to be used by you as memory aids and should not take precedence over your independent recollection of the facts.

Those of you who do not take notes should not be overly influenced by the notes of other jurors. It is just as easy to write something down incorrectly as it is to remember it incorrectly and your fellow jurors' notes are entitled to no greater weight than each juror's independent memory. Although you may refer to your notes during deliberations, give no more or no less weight to the view

of a fellow juror just because that juror did or did not take notes. Although you are permitted to use your notes for your deliberations, the only notes you may use are the notes you write in the courtroom during the proceedings on the materials distributed by the court staff.

Each time that we adjourn, your notes will be collected and secured by court staff. Your notes are completely confidential and neither I nor any member of the court's staff will read your notes, now or at any time in the future. After you have reached a verdict in this case, your notes will be destroyed immediately by court personnel. Pennsylvania Bar Association Civil Litigation Update, *Juror Note-taking in Civil Trials: An Idea Whose Time Has Come*, Volume 5, No. 2 (Spring 2002), at 12.

Pursuant to paragraph (B)(6), the jurors are not permitted to remove the notes from the courtroom during the trial.

Pursuant to paragraph (A)(7), the judge must ensure the notes are collected and destroyed immediately after the jury renders its verdict. The court may designate a court official to collect and destroy the notes.

NOTE: Rule 1113 adopted January 24, 1968, effective August 1, 1968; renumbered Rule 644 and *Comment* revised March 1, 2000, effective April 1, 2001. Rule 644 rescinded June 30, 2005, effective August 1, 2005. New Rule 644 adopted June 30, 2005, effective August 1, 2005; amended August 7, 2008, effective immediately **[.] amended , 2020, effective , 2020.**

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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).

Final Report explaining the provisions of new Rule 644 allowing note taking by jurors published with the Court's Order at 35 Pa.B. 3917 (July 16, 2005).

Final Report explaining the August 7, 2008 amendments making permanent the provisions of Rule 644 allowing note taking by jurors published with the Court's Order at 38 Pa.B. 4606 (August 23, 2008).

Report explaining the proposed amendments clarifying that note taking by jurors is permitted during the presentation of evidence and closing arguments published comment at 50 Pa.B. (, 2020).

REPORT

Proposed Amendment of Pa.R.Crim.P. 644

JUROR NOTE TAKING DURING OPENINGS AND CLOSINGS

The Committee had been examining a question presented to both the Civil Procedural Rules Committee (“Civil Rules Committee”) and Criminal Procedural Rules Committees (“Criminal Rules Committee”) regarding whether note taking by jurors is permitted during closing arguments. Pa.R.Crim.P. 644 (Note Taking by Jurors) was adopted in 2005 and was based heavily on the language contained in Pa. Rule of Civil Procedure 223.2 (Conduct of the Jury Trial. Juror Note Taking), which was adopted in 2003. Pa.R.C.P. 223.2 states that the jurors may take notes during “the proceedings” for use during deliberations while Pa.R.Crim.P. 644 uses the phrase “during trial.” The question is whether “proceeding” and “trial” includes closing arguments. Both Pa.R.Crim.P. 644 and Pa.R.C.P. 223.2 contain prohibitions against note taking during the judge’s charge but are silent as to openings or closings. Pa.R.Crim.P. 644 provides that the judge is required to allow jurors to take notes in trials lasting more than two days, while it is in the judge’s discretion to permit note taking in trials of shorter duration. Pa.R.C.P. No. 223.2 provides that a judge has the discretion to permit note taking in trials lasting more than two days.

Following the work of a joint subcommittee formed from members of both Committees, the Civil Rules Committee published for comment a proposal to amend Pa.R.C.P. No. 223.2.¹ Under this proposal the rule would be amended to require the trial judge to allow juror note taking in trials lasting more than two days, as is already provided in Pa.R.Crim.P. 644. The amendments would also specifically permit note-taking during closing arguments. The proposed amendments would preclude note-taking during opening statements. As stated in the *Explanatory Comment* in the

¹ See 49 Pa.B. 3885 (July 27, 2019).

published proposal, the Civil Rules Committee “believes that note taking during opening statements, during which information that may ultimately not be supported by evidence or even entered into evidence, could lead to confusion for jurors. Note taking during closing arguments would help jurors with their deliberations.”

The Committees reconvened the joint subcommittee to review the results of the Civil Rules Committee’s publication. As described in more detail below, the joint subcommittee recommended changes to the note taking rules in two regards: (1) that the two-day trial time limitation on the jurors’ right to take notes be removed from the rules; and (2) that the rules should be clarified that note taking is permitted during opening statements and closing arguments. The Criminal Rules Committee accepted the recommendations of the joint subcommittee and is now publishing a proposal incorporating these recommendations as changes to Pa.R.Crim.P. 644

Based on the members experience with jurors’ feedback following trial, the Committee observed that jurors liked being able to take notes during opening statements because it gave them the opportunity to become familiar with the theories that were going to be presented to them and to organize their thoughts. Similarly, jurors reported satisfaction with taking notes during closing arguments because it made it easier to remember those arguments. In addition, it was clear that jurors had no trouble distinguishing the difference between evidence and arguments. Note taking throughout the trial offers several benefits. It shows respect and trust in the jurors to do their job. It also keeps attorneys accountable; if jurors take notes, a discrepancy has the potential to harm the litigant. To the concern that opening statements may include references to evidence that may be ultimately precluded, it was pointed out that there are instances during the presentation of evidence when testimony can be stricken. Allowing note taking during openings would give jurors the chance to note what the attorneys have suggested were important items of evidence for which the jurors should be looking. Finally, it was observed that the federal courts permit jurors to take notes with no limitation to any part of the trial.²

² Note taking by jurors in federal court is permitted at the discretion of each judge. The directive appears to be set forth in pattern jury instructions and not pursuant to rule.

As a result of these discussions, the Committee concluded that note taking should be permitted during both openings and closings in addition to the presentation of evidence. Note taking still would be precluded during the judge's charge.

Second, the Committee discussed the extent of the trial judge's discretion in allowing juror note taking. As originally published, the proposed amendment of Pa.R.C.P. Rule 223.2(a) would remove the discretionary aspect for note taking in trials lasting more than two days. Pa.R.Crim.P. 644 currently requires the judge to permit note taking in trials lasting more than two days but allowing the judge discretion in trials lasting less than that. The Committee questioned why this time limit was chosen and whether it was an arbitrary limitation. In reviewing the history of Pa.R.Crim.P. 644, it was noted that when the juror note taking rules were first adopted, there was some skepticism that note taking by jurors was necessary or beneficial. As a result, it was reasoned that trials lasting less than two days would be more simple and not necessitate note taking; longer trials were deemed more complicated and thus jurors could benefit from the ability to take notes if they so desired.³ The Committee noted that courts have become more accustomed to juror note taking, recognizing the benefits while observing that few of the problems originally feared with the practice have been realized. The Committee agreed that regardless of the length of the trial or its complexity, jurors should be allowed to take notes and that the two-day limitation should be eliminated.

Therefore, it is proposed that Pa.R.Crim.P. 644 be changed to add "opening statements" and "closing arguments" to the text of the rule and the provision limiting mandatory note taking to trials more than two days be removed. Similar revisions are made to the *Comment* to the rule.

³ In addition, when Pa.R.C.P. 223.2 was initially adopted in 2003, it was done so on a trial basis and included a two-year sunset provision. The success of the rule resulted in it becoming permanent in 2005. When Pa.R.Crim.P. 644 was adopted in 2005, it contained a similar sunset provision that was removed in 2008.