

SUPREME COURT OF PENNSYLVANIA
COMMITTEE ON RULES OF EVIDENCE

Title 225 - Rules of Evidence
[225 Pa. Code ART I – ART X]

Proposed Rescission of Rules of Evidence 101-1008 & Comments and
Promulgation of Restyled Rules of Evidence 101-1008 & Comments

The Committee on Rules of Evidence is planning to recommend that the Supreme Court of Pennsylvania that the current Rules of Evidence be rescinded and replaced with restyled Rules of Evidence and Comments thereto, as more fully discussed in the accompanying Report. This proposal has not been submitted to the Supreme Court of Pennsylvania for review.

We request that interested persons submit suggestions, comments, or objections concerning this proposal to the Committee through counsel:

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Committee on Rules of Evidence
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no later than August 1, 2011.

By the Committee on Rules of Evidence,

BRIDGET E. MONTGOMERY, ESQ. – CHAIR

REPORT

Proposed Rescission of Rules of Evidence 101-1008 & Comments and
Promulgation of Restyled Rules of Evidence 101-1008 & Comments

RESTYLED RULES OF EVIDENCE

Background

In 1995, the Supreme Court of Pennsylvania authorized the Ad Hoc Committee on Evidence to draft Rules of Evidence for the Court's consideration. The proposed Rules were drafted to codify Pennsylvania's common law of evidence and closely followed the format and numbering of the Federal Rules of Evidence. The Comments to the Rules were designed to identify the common law sources of Pennsylvania's Rules of Evidence, compare them to the Federal Rules of Evidence, and to explain any differences between the two bodies of rules. Additionally, some Comments were augmented with information thought to be helpful to the bench and bar in the application of the Rules. On May 8, 1998, the Court adopted the proposed Rules, effective October 1, 1998.

On September 8, 1998, the Court established the Committee on Rules of Evidence to, *inter alia*, "assist and advise the Supreme Court of Pennsylvania in the preparation, adoption, promulgation and revision of the rules of evidence governing proceedings in the courts of the Commonwealth."

Restyled Federal Rules of Evidence

In, 2007, the Advisory Committee on the Federal Rules of Evidence voted to begin a project to restyle the Federal Rules of Evidence. The style revisions were intended to make the Rules clearer and easier to read, without altering substantive meaning. This project would be similar to prior restyling projects for the Federal Rules of Appellate Procedure, Federal Rules of Criminal Procedure, and the Federal Rules of Civil Procedure.

On April 26, 2011, the Supreme Court of the United States transmitted the restyled Federal Rules of Evidence to Congress for consideration pursuant to the Rules Enabling Act, 28 U.S.C. § 2074(a). If Congress does not enact legislation to reject, modify, or defer the Rules, then the Rules will become effective on December 1, 2011.

Proposed Amendment of the Pennsylvania Rules of Evidence

The Committee has monitored the progression of the Federal Rules' project and reviewed the proposed changes given that the Pennsylvania Rules of Evidence so closely mirror significant portions of the Federal Rules of Evidence. The Committee

concur with the conclusion that the restyled Federal Rules are clearer and easier to read. The Committee believes that maintaining consistency with the language and format of the Federal Rules, where such consistency exists, benefits the bench and bar.

Additionally, dissimilarities between the wordings of the restyled Federal Rules and the current Pennsylvania Rules may lead to confusion with the more than 60 references throughout certain Comments of Pennsylvania Rules being “identical” to the Federal Rule, when in fact the language would no longer be identical when the restyled Federal Rules become effective. Further, the value of purely historical references to Pennsylvania common law of evidence in the Comments has significantly diminished since the adoption of the Rules.

Accordingly, the Committee intends to recommend rescission of the current Pennsylvania Rules and replacement with the restyled Pennsylvania Rules to incorporate stylistic changes from the Federal Rules and to eliminate surplusage in the Comments. The Committee wishes to offer the following observations concerning the proposed action:

- ◆ None of the stylistic changes to the Rules is intended to change the substantive meaning of the Rules. The Committee has adopted the criteria used by the Advisory Committee on the Federal Rules of Evidence to determine whether a proposed change was substantive:

A proposed change is deemed “substantive” if:

(1) Under existing practice, it could lead to a different result on a question of admissibility (e.g., a change that requires a court to provide either a less or more stringent standard in evaluating the admissibility of a certain piece of evidence); or

(2) Under existing practice, it could lead to a change in the procedure by which an admissibility decision is made (e.g., a change in the time in which an objection must be made, or a change in whether a court must hold a hearing on the admissibility question); or

(3) It changes the structure of a rule or method of analysis in a manner that fundamentally changes how courts and litigants have thought about, or argued about, the rule (e.g., merging Rules 104(a) and 104(b) into a single subdivision); or

(4) It changes a “sacred phrase” a phrase that has become so familiar in practice that to alter it would be unduly disruptive to practice and expectations (e.g., “unfair prejudice” or “truth of the matter asserted”).

- ◆ Many Comments contain discussion and citation of Pennsylvania’s common law of evidence. The Committee recognized the value of such references when the Pennsylvania Rules of Evidence were adopted in 1998, especially where the Federal Rules and Pennsylvania Rules differ. However, the Rules have been in existence now for more than twelve years and incorporated into judicial proceedings and practice. The Committee believes that many references contained in the Comments have become historical. Accordingly, the Committee proposes deletion of discussion and citation of Pennsylvania’s common law of evidence in the Comments where the common law of evidence was consistent to the Pennsylvania Rule. Where a Pennsylvania Rule and the Federal Rule is dissimilar, the Committee recommends that references to Pennsylvania’s common law of evidence be retained in the Comment.

The reader is reminded that the Comments are prepared by the Committee for the convenience of the bench and bar. The Comments were not adopted by the Court and have no precedential import.

- ◆ The Comment to Pa.R.E. 604 was amended to reflect a pending recommendation before the Court.
- ◆ The Comment to Pa.R.E. 804 was updated to reflect the recent amendment of F.R.E. 804.
- ◆ The “Introductory Comment” to Article VIII has been moved to the Comment to Pa.R.E. 802.
- ◆ The “Official Notes” and citations to the “Committee Explanatory Reports” have been updated, corrected, and/or added to the Comments for all Rules.
- ◆ Additional, non-substantive changes were made to the Comments to correct errors in grammar, citations, spacing, and alignment.

Side-By-Side Format

The Committee has also prepared a presentation of this recommendation in a side-by-side format with the current Rule and Comment appearing in the left column and the proposed Rule and Comment appearing in the right column. This side-by-side format is intended to facilitate comparison of the original and restyled Rules and any additions or deletions from the Comments.

The recommendation in this format is available at the Committee's website at <http://www.aopc.org/T/BoardsCommittees/ComRulesEvid/>. The side-by-side presentation will be available on the website during the comment period.