

Proposed Amendments to Pa.Rs.Crim.P. 571 and 602

INTRODUCTION

The Supreme Court of Pennsylvania is considering amendments to Rules of Criminal Procedure 571 and 602 to clarify the procedures when a defendant fails to appear without cause for a court proceeding.

The following explanatory Report highlights the considerations in formulating this proposal. Please note that this Report should not be confused with the official Comments to the rules. Also note that the Supreme Court does not adopt the Comments or the contents of the explanatory Reports.

The text of the proposed changes to the rules precedes the Report. Additions are shown in bold and are underlined; deletions are in bold and brackets.

The Court requests that interested persons submit suggestions, comments, or objections concerning this proposal in writing to the Criminal Procedural Rules Committee through counsel,

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Criminal Procedural Rules Committee
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no later than Monday, October 8, 2012.

RULE 571. ARRAIGNMENT.

(A) Except as otherwise provided in paragraph (D), arraignment shall be in such form and manner as provided by local court rule. Notice of arraignment shall be given to the defendant as provided in Rule 114 or by first class mail. Unless otherwise provided by local court rule, or postponed by the court for cause shown, arraignment shall take place no later than 10 days after the information has been filed.

(B) In the discretion of the court, the arraignment of the defendant may be conducted by using two-way simultaneous audio-visual communication. When the counsel for the defendant is present, the defendant must be permitted to communicate fully and confidentially with defense counsel immediately prior to and during the arraignment.

(C) At arraignment, the defendant shall be advised **[of]**:

(1) **of** the right to be represented by counsel;

(2) **of** the nature of the charges contained in the information **[: and]**

(3) **of** the right to file motions, including a Request for a Bill of Particulars, a Motion for Pretrial Discovery and Inspection, and an Omnibus Pretrial Motion, and the time limits within which the motions must be filed **[: and]**

(4) that, if the defendant fails to appear without cause at any proceeding for which the defendant's presence is required, including trial, the defendant's absence may be deemed a waiver of the right to be present, and the proceeding may be conducted in the defendant's absence.

If the defendant or counsel has not received a copy of the information(s) pursuant to Rule 562, a copy thereof shall be provided.

(D) A defendant may waive appearance at arraignment if the following requirements are met:

(1) the defendant is represented by counsel of record and counsel concurs in the waiver; and

(2) the defendant and counsel sign and file with the clerk of courts a waiver of appearance at arraignment that acknowledges the defendant:

(a) understands the nature of the charges;

(b) understands the rights and requirements contained in paragraph (C) of this rule; and

(c) waives his or her right to appear for arraignment.

COMMENT: The main purposes of arraignment are: to ensure that the defendant is advised of the charges; to have counsel enter an appearance, or if the defendant has no counsel, to consider the defendant's right to counsel; and to commence the period of time within which to initiate pretrial discovery and to file other motions. Although the specific form of the arraignment is not prescribed by this rule, judicial districts are required to ensure that the purposes of arraignments are accomplished in all court cases.

Concerning the waiver of counsel, see Rule 121.

Nothing in this rule is intended to preclude judicial districts from providing written notice of the arraignment to the defendant at the conclusion of the preliminary hearing when a case is held for court. See Rule 543.

Under paragraph (A), in addition to other instances of "cause shown" for delaying the arraignment, the arraignment may be delayed when the defendant is unavailable for arraignment within the 10-day period after the information is filed.

Within the meaning of paragraph (B), counsel is present when physically with the defendant or with the judicial officer presiding over the arraignment.

Under paragraph (B), the court has discretion to order that a defendant appear in person for the arraignment.

Under paragraph (B), two-way simultaneous audio-visual communication is a form of advanced communication technology.

Paragraph (C)(4) requires that the defendant be advised of the consequences of failing to appear for any court proceeding. See Rule 602 concerning a defendant's failure to appear for trial.

Paragraph (D) is intended to facilitate, for defendants represented by counsel, waiver of appearance at arraignment through procedures such as arraignment by mail. For the procedures to provide notice of court proceedings requiring the defendant's presence, see Rule

114.

NOTE: Formerly Rule 317, adopted June 30, 1964, effective January 1, 1965; paragraph (b) amended November 22, 1971, effective immediately; paragraphs (a) and (b) amended and paragraph (e) deleted November 29, 1972, effective 10 days hence; paragraphs (a) and (c) amended February 15, 1974, effective immediately. Rule 317 renumbered Rule 303 and amended June 29, 1977, amended and paragraphs (c) and (d) deleted October 21, 1977, and amended November 22, 1977, all effective as to cases in which the indictment or information is filed on or after January 1, 1978; *Comment* revised January 28, 1983, effective July 1, 1983; amended October 21, 1983, effective January 1, 1984; amended August 12, 1993, effective September 1, 1993; rescinded May 1, 1995, effective July 1, 1995, and replaced by new Rule 303. New Rule 303 adopted May 1, 1995, effective July 1, 1995; renumbered Rule 571 and amended March 1, 2000, effective April 1, 2001; amended November 17, 2000, effective January 1, 2001; amended May 10, 2002, effective September 1, 2002; amended March 3, 2004, effective July 1, 2004; amended August 24, 2004, effective August 1, 2005; amended May 1, 2007, effective September 4, 2007, and May 1, 2007 Order amended May 15, 2007 [.] ; **amended _____, 2012, effective _____, 2012.**

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the August 12, 1993 amendments published at 22 Pa.B. 3826 (July 25, 1992).

Final Report explaining the May 1, 1995 changes published with the Court's Order at 25 Pa.B. 1944 (May 20, 1995).

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 November 17, 2000 amendments concerning a defendant's waiver of appearance at arraignment published with the Court's Order at 30 Pa.B. 6184 (December 2, 2000).

Final Report explaining the May 10, 2002 amendments concerning advanced communication technology published with the Court's Order at 32 Pa.B. 2591 (May 25, 2002).

Final Report explaining the March 3, 2004 amendments updating the cross-references correlative to the March 2, 2004 changes to the motions rules published with the Court's Order at 34 Pa.B. 1561 (March 20, 2004).

Final Report explaining the August 24, 2004 addition of paragraph (E) and the correlative Comment provisions published with the Court's Order at 34 Pa.B. 5025 (September 11, 2004).

Final Report explaining the May 1, 2007 deletion of paragraph (E) and the correlative Comment provisions published with the Court's Order at 37 Pa.B. 2503 (June 2, 2007).

Report explaining the proposed changes to paragraph (C)(4) concerning notice of consequences of failing to appear published for comment at 42 Pa.B. (, 2012).

RULE 602. PRESENCE OF THE DEFENDANT.

(A) The defendant shall be present at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule. The defendant's absence without cause shall not preclude proceeding with the trial, including the return of the verdict and the imposition of sentence. **If the defendant fails to appear without establishing cause for the failure, the judge may conduct the trial in the defendant's absence and shall conduct the trial upon request of the Commonwealth.**

(B) A corporation may appear by its attorney for all purposes.

COMMENT: The 2012 amendment to paragraph (A) requires the trial judge to conduct the trial in the defendant's absence upon the request of the Commonwealth when the defendant fails to appear without cause. To the extent that the case law makes the judge's decision completely discretionary, that case law is superseded by this rule.

Nothing in this rule is intended to preclude a defendant from affirmatively waiving the right to be present at any stage of the trial, see, e.g., *Commonwealth v. Vega*, 719 A.2d 227 (Pa. 1998) (plurality) (requirements for a knowing and intelligent waiver of a defendant's presence at trial includes a full, on-the-record colloquy concerning consequences of forfeiture of the defendant's right to be present) or from waiving the right to be present by his or her actions, see, e.g., *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (“**[A] defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom**”).

A defendant's presence may be deemed waived by the defendant intentionally failing to appear at any stage of the trial. See *Commonwealth v. Wilson*, 551 Pa. 593, 712 A.2d 735 ([Pa.] 1998) (defendant, who fled courthouse after jury was impaneled and after subsequent plea negotiations failed, was deemed to have knowingly and voluntarily waived the right to be present); *Commonwealth v. Sullens*, 533 Pa. 99, 619 A.2d 1349 (1992) (when a defendant is absent

without cause at the time his or her trial is scheduled to begin, the defendant may be tried *in absentia*.

[Former Rule 1117(c) was moved to Rule 642 (Trial *de novo*) in 2000 as part of the reorganization of the rules.]

NOTE: Rule 1117 adopted January 24, 1968, effective August 1, 1968; amended October 28, 1994, effective as to cases instituted on or after January 1, 1995; renumbered Rule 602 and amended March 1, 2000, effective April 1, 2001; amended December 8, 2000, effective January 1, 2001 **[.] ; amended , 2012, effective 2012.**

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COMMITTEE EXPLANATORY REPORTS:

Final Report explaining the October 28, 1994 amendments published with the Court's Order at 24 Pa.B. 5841 (November 26, 1994).

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 December 8, 2000 amendments published with the Court's Order at 30 Pa.B. 6546 (December 23, 2000).

Report explaining the proposed amendments concerning trials in the defendant's absence published for comment at 42 Pa.B. (, 2012).

REPORT

Proposed amendments to Pa.Rs.Crim.P. 571 and 602

TRIAL *IN ABSENTIA*

This proposal is intended to address the concern that the number of cases in which a defendant, after receiving notice of a court proceeding, fails to appear without cause thus leading to unnecessary and lengthy delays. These delays have resulted in witnesses becoming unavailable.

One recommended solution has been to make changes to the rules to clarify that, when a defendant who has received notice of a trial proceeding fails to appear for a court proceeding without cause, the court may conduct the court proceeding in the defendant's absence. Also, when the attorney for the Commonwealth requests that the trial be conducted in the defendant's absence, the judge would be required to conduct the trial.

The Sixth Amendment of the United States Constitution, Article 1, § 9 of the Pennsylvania Constitution, and Rule of Criminal Procedure 602(A) guarantee the right of the accused to be present in court at every stage of a criminal trial, including the empaneling of the jury, the return of the verdict, and the imposition of sentence. However, a defendant may waive this right, expressly or by his or her actions. *See, e.g. Illinois v. Allen*, 397 U.S. 337, 343 (1970) (“[A] defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.”)

While the Commonwealth must prove by a preponderance of the evidence that the defendant waived the Constitutional right to be present, *Commonwealth v. Tizer*, 454 Pa.Super. 1, 684 A.2d 597 (1996), it is the defendant's burden to establish that his absence was “with cause.” *Commonwealth v. Bond*, 693 A.2d 220 (Pa.Super.1997), citing *Commonwealth v. Doleno*, 406 Pa.Super. 286, 594 A.2d 341 (1991).

This concept has been codified in Rule 602(A) since its adoption as then-Rule 1117(A) in 1967. A clarification was added to the *Comment* in 1998 following the decision in *Commonwealth v. Wilson*, 712 A.2d 735 (Pa. 1998), a case in which the defendant was deemed to have knowingly and voluntarily waived by his actions the right to be present when he fled the courthouse after the jury was impaneled.

However, when a defendant is unaware of the charges against him, unaware of the establishment of his trial date or is absent involuntarily, he is not absent “without cause” and therefore cannot be tried *in absentia*. *Commonwealth v. Bond*, 693 A.2d 220 (Pa.Super. 1997) (citing *Commonwealth v. Sullens*, 533 Pa. 99, 619 A.2d 1349 (1992)). See also *Commonwealth v. Hill*, 737 A.2d 255, (Pa.Super.,1999).

Therefore, in view of this caselaw, to provide further clarification in the rules, the proposed amendments would add the requirement to Rule 571 that, at arraignment, the defendant would be advised of the consequences, i.e. trial in absentia, for failing to appear for proceedings as required. This is comparable to the notice provided to the defendant under Rule 540 (Preliminary Arraignment) regarding the similar consequence to a defendant for failing to appear without cause for proceedings before an issuing authority.

Additionally Rule 602(A) would be amended to explicitly state that when a defendant fails to appear without cause, the judge may conduct the trial in the defendant’s absence. However, if the judge determines that the defendant’s absence was without cause and the Commonwealth requests that the trial proceed, the trial must be conducted.