

FINAL REPORT¹

Amendment of Pa.Rs.Crim.P. 646 and 647

WRITTEN JURY INSTRUCTIONS

On October 16, 2009, effective February 1, 2010, upon the recommendation of the Criminal Procedural Rules Committee, the Court approved the amendment of Rules 646 (Material Permitted in Possession of the Jury) and 647 (Request for Instructions, Charge to the Jury, and Preliminary Instructions) to permit the trial judge to provide written copies of the portion of the charge on the elements of the offenses, lesser included offenses, and any defense upon which the jury has been charged.

As part of its ongoing research and examination of the manner in which jury trials are conducted, the Committee examined the question of whether juries should be permitted written copies of the jury instructions for use during deliberations. The Committee began its most recent review of this issue at the direction of the Court. The Committee was instructed to “consider the issue of sending written instructions out with the jury during deliberations.”

Prior to the present rule change, Pennsylvania law prohibited jurors from having any form of written instructions during deliberations. See *Commonwealth v. Baker*, 353 A.2d 406 (Pa. 1976) (plurality opinion); *Commonwealth v. Oleynik*, 568 A.2d 1238 (Pa. 1990); and *Commonwealth v. Karaffa*, 709 A.2d 887 (Pa. 1998). This was consistent with what had been the traditional practice.

In recent years, however, most states and the federal courts have relaxed the prohibition of providing written instructions during deliberations.² The Committee conducted an extensive review of the experiences of these courts and concluded that

¹ The Committee's *Final Reports* should not be confused with the official Committee *Comments* to the rules. Also note that the Supreme Court does not adopt the Committee's *Comments* or the contents of the Committee's explanatory *Final Reports*.

² Among the majority of states that permit written jury instructions are Alabama, Arizona, California, Colorado, Illinois, Massachusetts, Texas, and Virginia.

the fears that most associate with this practice, such as misinterpretation of the law or undue weight being placed on the written instructions, have not been demonstrated in these jurisdictions.³

At the same time, interest in permitting the practice in Pennsylvania has increased. For example, at several meetings in 2005-2007, the Committee invited a number of judges of the courts of common pleas to address the Committee on procedural issues in which they were interested. A number of these judges requested that the Committee consider permitting the elements of the offense to be provided in writing to the jury during deliberations. They reported that the majority of questions received from jurors during deliberations would be eliminated by providing this limited information. Popular interest in this practice has remained high as well; several pieces of legislation have been introduced that urged the Court to reconsider the prohibition.⁴

Based upon the foregoing, the Committee concluded that permitting the use of written jury instructions in some form would be a beneficial practice. The question then became how extensive the scope of allowance should be.

The Committee considered a proposal that the entire instructions should be provided in writing. The Committee believed that the logistical difficulties in preparing what would need to be verbatim transcripts of the charge would be prohibitive, at least under current technology. Further, the Committee did not want to squelch the individual initiative that many judges employ to provide “off-the-cuff” elaboration and example. If anything less than the entire charge would be permitted, however, it should be clearly defined and should not favor one party over another.

³ See, e.g., *The State-Of-The-States Survey of Jury Improvement Efforts: A Compendium Report* by Hon. Gregory E. Mize (ret.), Paula Hannaford-Agor, J.D. & Nicole L. Waters, Ph.D. published by the National Center for State Courts; *Recent Evaluative Research on Jury Trial Innovations* by Judge B. Michael Dann and Professor Valerie P. Hans in *Court Review*, Spring 2004, volume 41, pages 12-19.

⁴ See HR 559 of 2008 and House Resolution 128 of 2009, both requesting the Pennsylvania Supreme Court to modify the rules in this area. See *also* HB 190 of 2007, HB 612 of 2007, and HB 1085 of 2009, all of which propose amendments to Title 42 to allow the submission of written jury instructions to the jury.

The amendments to Rules 646 and 647 therefore limit what may be provided to the jury in writing to written copies of the elements of the offense, lesser included offenses, and defenses upon which the jury had been orally charged. This limited practice has the benefit of clear definition and even-handed application as well as being more practically manageable. It also is consistent with the input received from the common pleas judges and the Legislature. Therefore, a new paragraph (B) has been added to Rule 646 that would permit the judge to provide this portion of the charge to the jury in writing.

Recognizing that a jury's need for written instructions will vary from case to case, the Court believes that the decision whether to provide written instructions should be discretionary. However, in order to ensure fairness in the process of providing these instructions, once a judge decides to provide written instructions, he or she must send out the elements of the offenses and defenses in their entirety. This requirement has been added to paragraph (B)(1).

To address the concern that the jury would emphasize the importance of the written portion of the instructions if only partial written instructions are provided, paragraph (B)(2) requires mandatory instructions that must include language that the entire instructions, written and oral, should be given equal weight and that the jury should feel free to ask questions regarding any portion of the instructions. These points are elaborated upon in the *Comment* and a sample instruction is provided.

Additionally, the intention of the amendments is not to create greater burdens on the trial courts that utilize this procedure and therefore the *Comment* to Rule 646 includes some practical suggestions on how the written instructions may be produced. For example, in order that there be no mistaken belief that a transcript of the instructions is required, the *Comment* suggests that the instructions do not have to be contemporaneously transcribed but can be a version of previously prepared instructions that the judge reads and is then provided to the jury.

Finally, a cross reference to the new procedures in Rule 646 has been added to the *Comment* to Rule 647 (Request for Instructions, Charge to the Jury, and Preliminary Instructions).

The Court recognizes that these amendments represent a significant change in the current jury trial practice. On the other hand, the scope of what is permitted to be provided to the jury in writing is of a limited nature. Therefore, these changes should be viewed only as part of an ongoing examination of jury charge procedures. The Court has directed the Committee to monitor the effect these amendments have on jury trial practice, and to report back to the Court after two years from the effective date of these changes.