

INTRODUCTION

The Criminal Procedural Rules Committee is planning to recommend that the Supreme Court of Pennsylvania adopt new Rules 151 and 152 and amend Rules 107, 517, and 1101, to provide procedures for the issuance of orders to detain and orders for the temporary transfer of prisoners. This proposal has not been submitted for review by the Supreme Court of Pennsylvania.

The following explanatory Report highlights the Committee's considerations in formulating this proposal. Please note that the Committee's Report 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 explanatory Reports.

The text of the proposed new Rules 151 and 152 and the changes to Rules 107, 517, and 1101 precedes the Report. Additions are shown in bold and are underlined; deletions are in bold and brackets.

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

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Criminal Procedural Rules Committee
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no later than Friday, November 13, 2009.

September 29, 2009

BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:

D. Peter Johnson, Chair

Anne T. Panfil
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Staff Counsel

RULE 107. CONTENTS OF SUBPOENA.

A subpoena in a criminal case shall order the witness named to appear before the court at the date, time, and place specified, and to bring any items identified or described. The subpoena shall also state on whose behalf the witness is being ordered to testify and the identity, address, and phone number of the attorney, if any, who applied for the subpoena.

COMMENT: The form of subpoena was deleted in 1985 because it is no longer necessary to control the specific form of subpoena by rule.

It is intended that the subpoena shall be used not only for trial but also for any other stage of the proceedings when a subpoena is issuable, including preliminary hearings, hearings in connection with pretrial and post-trial motions, etc.

When the subpoena is for the production of documents, records, or things, these should be specified.

For the procedures for the temporary transfer of prisoners to law enforcement, see Rule 152.

NOTE: Previous Rule 9016 adopted January 28, 1983, effective July 1, 1983; rescinded November 9, 1984, effective January 2, 1985. Present Rule 9016 adopted November 9, 1984, effective January 2, 1985; renumbered Rule 107 and amended March 1, 2000, effective April 1, 2001[.]; **Comment revised _____, 2009, effective _____, 2009.**

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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. 1477 (March 18, 2000).

Report explaining proposed Comment revision referencing the new Rule 152 procedures for orders for the temporary transfer of prisoners published at 39 Pa.B. (, 2009).

(This is a new rule.)

RULE 151. ORDERS TO DETAIN.

(A) When a defendant is being confined in a place of incarceration in the Commonwealth on matters unrelated to a pending case, a judge in a pending summary or court case, upon an oral or written request or *sua sponte*, may issue an order to detain to be lodged with the place of incarceration.

(B) The order to detain:

(1) shall order the place of incarceration to detain a defendant after the defendant has completed his or her obligation to the place of incarceration;

(2) shall include the reason for which the order to detain the defendant has been issued;

(3) shall set forth, if a court case, any bail or conditions of release and, if a summary case, the conditions upon which the order may be lifted;

(4) shall designate the name and contact information of the person the place of incarceration must inform when the defendant is about to be released; and

(5) may be lodged with the place of incarceration by use of advanced communications technology.

(C) The place of incarceration shall inform the defendant when an order to detain is lodged against him or her and provide a copy of that order.

(D) In a court case, when bail has been set for a defendant in the pending case or, in a summary case, when there are conditions the defendant may meet to have the order to detain lifted, if the defendant posts bail and meets the conditions of release, the defendant shall not be held under the order to detain and shall be released from that order immediately.

(E) When the place of incarceration becomes aware of the date upon which a defendant, against whom one or more orders to detain have been lodged, will complete his or her obligation to the place of incarceration, the place of incarceration shall inform any detaining authority of the date and time of release and of any other orders to detain lodged against the defendant.

(F) Duration of the Order to Detain

(1) The place of incarceration shall allow a reasonable time, not to exceed three business days from the time when the defendant is scheduled to be released from the place of incarceration, for the detaining authority to take custody of the defendant.

(2) Except as provided in paragraph (F)(3), if the detaining authority does not take custody of the defendant within the three-day time period following the scheduled release, then the order to detain shall expire by operation of law at the conclusion of the three-day time period and the place of incarceration shall not hold the defendant pursuant to the order to detain beyond the expiration.

(3) If the order to detain is lodged against a defendant who has been convicted or sentenced in the present case, the order to detain shall not expire by operation of law. The detaining authority promptly shall take custody of defendant.

(G) When more than one order to detain is lodged against a defendant,

(1) the detaining authorities shall enter into an agreement as to which authority will take custody of the defendant first.

(2) Following the resolution of each order to detain, the place of incarceration or detaining authority shall notify all the remaining detaining authorities.

(3) Except as provided in paragraph (G)(4), if none of the detaining authorities take custody of the defendant within the three-day period following release or the three-day period following resolution of an order to detain, then the order to detain shall expire by operation of law at the conclusion of the three-day time period and the place of incarceration shall release the defendant.

(4) If the order to detain is lodged against a defendant who has been convicted or sentenced in the present case, the order to detain shall not expire by operation of law. The detaining authority to whom priority had been agreed pursuant to paragraph (G)(1) promptly shall take custody of defendant.

(H) If a defendant is transferred to a different place of incarceration or to a detaining authority, the original place of incarceration shall insure that any orders to detain are lodged with the new place of incarceration or detaining authority.

COMMENT: New Rule 151 was adopted in 2009 to provide procedures for the issuance of orders to detain in summary

and court cases. The concept of an “order to detain,” or more colloquially a “detainer,” is a document filed with a prison or jail directing that a defendant be held after the original release date pending resolution of other court matters, has been known in Pennsylvania practice but is without firm statutory or rule authority. The purpose of this rule is to provide procedures for the use of orders to detain as well as protections to the defendant subject to an order to detain.

For purposes of this rule, the term “judge” includes common pleas judges, Philadelphia Municipal Court judges, Philadelphia Traffic Court judges, and magisterial district judges.

A defendant may be subject to more than one order to detain at a time. The orders to detain may be issued by judges of the courts of common pleas or minor court judges in summary and court cases.

As used in this rule, “detaining authority” is the individual judge who issued the order to detain and the proper issuing authority if the issuer is unavailable.

The term "lift" is used in the rule because it was the term used in the previously undefined detainer practice. To "lift" or the "lifting" of an Order to Detain has the same operative effect as would an Order vacating the Order to Detain

This rule is not applicable to probation and parole detainers or detainers issued pursuant to the Interstate Agreement on Detainers, 42 Pa.C.S. §9101 *et sec.*

Reasons for which an order to detain may be issued include, but are not limited to, the following:

- (a) an arrest warrant has been issued against the defendant in the pending court case;
- (b) an arrest warrant in the pending case has been executed against the defendant, the defendant has been preliminarily arraigned pursuant to Rule 517,

and the defendant is returned to the original place of incarceration;

(c) the pending case has been held for court after a preliminary hearing and the defendant is returned to the original place of incarceration;

(d) a bench warrant has been filed against the defendant in the pending case pursuant to Rule 150;

(e) a bench warrant has been executed against the defendant, a bench warrant hearing held pursuant to Rule 150, and the defendant has been returned to the original place of incarceration;

(f) the defendant has pled guilty or been convicted in the pending case but not yet sentenced;

(g) the defendant has been sentenced in the pending case but the execution of the sentence has not yet begun as a result of the defendant having received a sentence in the pending case that is consecutive to a sentence already being served in the place of incarceration;

(h) the defendant has been sentenced in the pending case but the service of the sentence has not yet begun;

(i) the defendant has begun serving a sentence in the pending case but before the sentence is complete, and the defendant has been released to another jurisdiction; and

(j) an arrest warrant or bench warrant has been issued pursuant to Rules 430 or 150 in the pending summary case.

An unexecuted arrest or bench warrant may form the basis for requesting an order to detain; the warrant itself may not serve as an order to detain. When an unexecuted arrest warrant is the basis for an order to detain, the out-of-county arrest procedures in Rules 517 and 518 may be used to

execute the warrant. For the procedures when a bench warrant is executed, see Rule 150. If the place of incarceration determines that there is an outstanding warrant for an individual about to be released but no order to detain has been lodged, the provisions of Rule 517 should be followed in cases involving an arrest warrant and the provisions of Rule 150 should be followed in cases involving a bench warrant before the defendant may be released.

Orders to detain may be used for circumstances in which a defendant has already completed some of the procedures in one case while still serving a sentence in another case. For example, when an arrest warrant has been executed, the defendant preliminarily arraigned pursuant to Rule 517 and returned to the original place of incarceration, an order to detain may be lodged to ensure the return of the defendant to the issuing jurisdiction for completion of any pending procedures. Similarly, a defendant serving a sentence in one jurisdiction could be brought to another jurisdiction to enter a guilty plea on a new charge. The defendant is then returned to the first jurisdiction to serve the remainder of the original sentence and an order to detain is filed to ensure the defendant's return to the jurisdiction in which the plea was entered.

In summary cases, orders to detain may be issued in any of the circumstances listed in Rule 430 for which an arrest warrant or bench warrant are issued, including the defendant's failure to respond to a citation or failure to pay the fine and costs on a summary case.

Under Rule 430, there are several means by which a defendant may avoid being taken into custody in some summary cases, particularly those in which only a fine or collateral is owed. When an order to detain is placed upon a defendant, he or she has the same right to purge himself or herself of the order to detain as the defendant would have if he or she were at liberty and an arrest warrant was executed against him or her as provided in Rule 431.

Paragraph (C) is intended to ensure that the defendant receives notice of what steps may be taken to be released from the order to detain, such as by posting bail.

Paragraph (F) emphasizes that an order to detain may not be used as an unfettered means of continuing the incarceration of a defendant beyond the time when he or she would otherwise be released by placing a 3-day limit on the detention following expiration of the incarceration. When an order to detain is lodged well in advance of a defendant's release from the place of incarceration, the detaining authority should make arrangements in advance of the defendant's release for the defendant's return to the detaining county. Under no circumstances may an order to detain be permitted to hold the defendant longer than three business days solely on the basis of the order to detain. Even this length of time may be avoided in court cases if the defendant meets the bail conditions and in summary cases if the defendant meets the conditions for lifting the order to detain.

The rule contemplates that, when there are multiple orders to detain placed on a defendant, all of the detaining authorities, who have been notified of the defendant's impending release pursuant to paragraph (G), are required to consult with each other to determine who will be first to take custody of the defendant. This process of notification and consultation shall be continued until all orders to detain have been resolved. In other words, after each order to detain is resolved, notice must be given to the remaining detaining authorities to act on their respective orders to detain. At each occasion when the defendant is made available to multiple detaining authorities, those detaining authorities have no more than three business days in which to act upon their order to detain.

"Advanced Communications Technology" as defined in Rule 103 includes the use of facsimile or electronic mail.

Sections 9161 through 9165 of the Act of July 11, 1991, P.L. 76, No. 13§1, 42 Pa.C.S. §§ 9161-9165, are suspended by Rule 1101(E) in so far as the statute is inconsistent with Rules 151 and 517. This suspension is intended to insure that Rule 151 provides the exclusive procedure for inter-county detention and that Rule 517 provides the exclusive

procedures for the execution of an arrest warrant outside of the county of issuance.

NOTE: New Rule 151 adopted _____, 2009, effective _____, 2009.

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COMMITTEE EXPLANATORY REPORTS:

Report explaining proposed new Rule 151 establishing procedures for orders to detain published at 39 Pa.B. (_____, 2009).

(This is a new rule.)

RULE 152. ORDERS FOR TEMPORARY TRANSFER OF CUSTODY OF PRISONER TO LAW ENFORCEMENT.

(A) A judge, upon request of counsel or *sua sponte*, may order the custodian of the person confined in a place of incarceration in the Commonwealth to temporarily transfer custody of that person to a designated law enforcement officer or agency.

(B) The order for temporary transfer shall:

(1) designate the law enforcement officer or agency to whom the custody is to be transferred;

(2) specify the purpose for which the transfer is being ordered;

(3) permit the designated law enforcement officer or agency to lodge the person transferred in a suitable place of incarceration for the duration of the event or proceeding for which the order has been issued.

(4) act as an order to detain upon any other place of incarceration in which the person has been placed pursuant to the order for temporary transfer; and

(5) direct the law enforcement officer or agency at the conclusion of the event or proceeding for which the order to transfer had been issued to ensure the return of the person to the place of incarceration from whose custody the person was acquired.

(C) A copy of the order shall be given to the person who is the subject of the order and to the designated law enforcement agency. A copy of the order also shall be given to the original place of incarceration and to any other place of incarceration in which the person is lodged during the event or proceeding for which the order has been issued.

COMMENT: New Rule 152 was adopted in 2009 to provide for the issuance of orders for the temporary transfer of a person in custody for the purpose to be specified in the order. This purpose ordinarily will be for the person to appear for a court proceeding, either as a witness or as a defendant. The procedures contained in this rule replace the traditional practice of writs of *habeas corpus ad prosequendum* and of *habeas corpus ad*

testificandum or other writs used to compel appearance before the judge of a person in custody.

For purposes of this rule, the term “judge” includes common pleas judges, Philadelphia Municipal Court judges, Philadelphia Traffic Court judges, and magisterial district judges

The rule recognizes that often a law enforcement agency such as a county’s Sheriff’s Office may have primary responsibility for the transfer of prisoners. An order issued pursuant to this rule may designate the agency in general rather than designating a specific officer to whom custody is transferred.

Nothing in this rule is intended to preclude the continued use of other local procedures to obtain the intra-county release of prisoners, such as the use of “transport lists” used for transporting prisoners from a county jail to the same county’s courthouse.

In addition to the transfer of a prisoner for a court proceeding, the rule also may be used to transfer the custody of a prisoner to law enforcement for purposes of interrogation or discussion of cooperation. In such circumstances, the request for the order is required to be made by the attorney for the Commonwealth.

Prior to the actual transfer of the prisoner, it is highly recommended that the issuing authority or the designated law enforcement officer or agency contact the place of incarceration to coordinate the actual transfer.

For orders to detain, see Rule 151.

NOTE: New Rule 152 adopted _____, 2009, effective _____, 2009.

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COMMITTEE EXPLANATORY REPORTS:

**Report explaining proposed new Rule 152 establishing procedures
for orders for the temporary transfer of prisoners published at 39
Pa.B. (, 2009).**

RULE 517. PROCEDURE IN COURT CASES WHEN WARRANT OF ARREST IS EXECUTED OUTSIDE JUDICIAL DISTRICT OF ISSUANCE

(A) When a defendant has been arrested in a court case, with a warrant, outside the judicial district where the warrant of arrest was issued, the defendant shall be taken without unnecessary delay to the proper issuing authority in the judicial district of arrest for the purpose of posting bail, as permitted by law.

(B) Such issuing authority shall advise the defendant of the right to post bail. If bail is posted, the defendant shall be admitted to bail, conditioned upon the defendant's appearance for the preliminary arraignment before the proper issuing authority in the judicial district where the warrant was issued, at a date certain not less than 5 nor more than 10 days thereafter.

(C) When a defendant fails to post bail, the arresting person shall:

(1) return the defendant to the judicial district where the warrant was issued, without unnecessary delay, for preliminary arraignment by the proper issuing authority ; or

(2) lodge the defendant in a suitable place of detention in the judicial district of arrest, and forthwith notify the proper issuing authority in the judicial district where the warrant was issued of the defendant's detention, and the place of such detention. Upon receipt of this notice, the issuing authority shall, without unnecessary delay, cause the defendant to be brought to the judicial district where the warrant was issued for preliminary arraignment by the proper issuing authority.

(D) When a defendant has been held for 48 hours or more without preliminary arraignment, in a place of detention outside the judicial district where the warrant was issued, because of the inability to post bail, the defendant shall be discharged from custody upon application of any interested person to a judge of a court of the judicial district of detention; provided that, upon cause shown the judge may grant one or more extensions of the defendant's detention to an early date, fixed in the order, but if the defendant remains in custody and has not been removed to the judicial district where the warrant was issued at the end of the extended detention period, the defendant shall be discharged from custody.

(E) When a defendant who has posted bail and been released from custody before preliminary arraignment thereafter fails to appear at the time fixed, the proper issuing authority in the judicial district where the warrant was issued shall forthwith cause the bail to be forfeited according to law, and issue a bench warrant. If the defendant is

thereafter arrested outside the judicial district where the bench warrant was issued, the defendant shall not be entitled to post bail in the judicial district where arrested, but shall be taken as soon as practicable to the judicial district where the bench warrant was issued for preliminary arraignment by the proper issuing authority.

(F) When, upon application of any interested person, it is shown to the satisfaction of a judge of a court in the judicial district where the warrant of arrest was issued, that the defendant was returned to that judicial district without being given the opportunity to post bail, as provided in paragraphs (A) and (B), and that had such opportunity been given, the defendant would have been able to post such bail, the judge shall have the discretion to:

(1) discharge the defendant from custody; or

(2) release the defendant on bail, conditioned upon the defendant's appearance at the preliminary hearing; and

(3) forfeit all costs, including mileage and transportation charges, of the arresting and transporting person, in order that such costs and charges shall not be taxed in the case.

(G) All recognizances accepted under this rule shall forthwith be transmitted to the proper issuing authority in the judicial district where the warrant was issued.

COMMENT: Nothing in this rule prevents a defendant from consenting to dispense with the procedures in paragraph (A) if the defendant is afforded a preliminary arraignment without unnecessary delay in the judicial district where the warrant was issued.

See Rule 518 for using advanced communication technology following execution of arrest warrant outside the judicial district of issuance.

For preliminary hearing procedures, see Rules 540 and 541.

Section 8953 of the Judicial Code, 42 Pa.C.S. § 8953, provides for the execution of warrants of arrest beyond the territorial limits of the police officer's primary jurisdiction. See also *Commonwealth v. Mason*, 507 Pa. 396, 490 A.2d 421 (1985).

Paragraph (E) originally used the term “alias warrant” to describe the type of warrant issued when a defendant is arrested outside the judicial district of issuance, is released on bond by a magisterial district judge in the judicial district of arrest conditioned on the defendant's appearance at a preliminary arraignment in the judicial district of issuance, and then fails to appear. Because the term “alias warrant” is an archaic term that refers to the reissuance of a warrant when the original purpose of the warrant has not been achieved, and the warrant issued in paragraph (E) is issued for the failure to appear as contemplated by Rule 536(A)(1)(b), paragraph (E) was amended in 2005 by changing the terminology to “bench warrant.”

Sections 9161 through 9165 of the Act of July 11, 1991, P.L. 76, No. 13§1, 42 Pa.C.S. §§ 9161-9165, are suspended by Rule 1101(E) in so far as the statute is inconsistent with Rules 151 and 517. This suspension is intended to insure that Rule 151 provides the exclusive procedure for inter-county detention and that Rule 517 provides the exclusive procedures for the execution of an arrest warrant outside of the county of issuance.

NOTE: Original Rule 117 adopted June 30, 1964, effective January 1, 1965; suspended January 31, 1970, effective May 1, 1970. New Rule 117 adopted January 31, 1970, effective May 1, 1970; renumbered Rule 123 September 18, 1973, effective January 1, 1974; amended January 28, 1983, effective July 1, 1983; renumbered Rule 124 and amended August 9, 1994, effective January 1, 1995; amended December 27, 1994, effective April 1, 1995; renumbered Rule 517 and amended March 1, 2000, effective April 1, 2001; *Comment* revised May 10, 2002, effective September 1, 2002; amended October 19, 2005, effective February 1, 2006 [.] ; **Comment revised ,2009, effective , 2009.**

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the August 9, 1994 amendments published at 22 Pa.B. 6 (January 4, 1992); Final Report published with the Court's Order at 24 Pa.B. 4342 (August 27, 1994).

Report explaining the December 27, 1994 amendments published at 24 Pa.B. 1673 (April 2, 1994); Final Report published with the Court's Order at 25 Pa.B. 142 (January 14, 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 May 10, 2002 Comment revision concerning advanced communication technology published with the Court's Order at 32 Pa.B. 2582 (May 25, 2002).

Final Report explaining the October 19, 2005 amendments to paragraph (E) changing "alias warrant" to "bench warrant" published with the Court's Order at 35 Pa.B. 6089 (November 5, 2005).

Report explaining the proposed Comment revision regarding the suspension of Sections 9161 through 9165 of the Act of July 11, 1991, P.L. 76, No. 13§1, 42 Pa.C.S. §§ 9161-9165 published 39 Pa.B. (_____, 2009).

RULE 1101. SUSPENSION OF ACTS OF ASSEMBLY.

This rule provides for the suspension of the following Acts of Assembly:

(1) The Act of June 15, 1994, P.L. 273, No. 45, § 1, 42 Pa.C.S. §§ 4137, 4138, and 4139, which provides, *inter alia*, that any punishment imposed for contempt will be “automatically stayed for a period of 10 days from the date of the imposition of the punishment during which time an appeal of the action” of a district justice, a Pittsburgh Magistrates Court judge, or a Philadelphia Traffic Court judge “may be filed with the court of common pleas of the judicial district,” and which is implemented by Rules 140, 141, and 142, is suspended *only* insofar as the Act is inconsistent with the 30-day appeal period and 30-day automatic stay period set forth in Rule 141.

(2) The Act of April 29, 1959, P.L. 58, § 1209, 75 P.S. § 1209, repealed by Act of June 17, 1976, P.L. 162, No. 81, § 7 and replaced by Sections 6322, 6323, 6324, and 6325 of the Vehicle Code (75 Pa.C.S. §§ 6322-6325), are suspended insofar as these sections are inconsistent with Rule 470.

(3) The Act of July 1, 1987, P.L. 180, No. 21, § 2, 42 Pa.C.S. § 1520, is suspended insofar as the Act is inconsistent with Rules 300, 301, 302, and Rules 310 through 320.

(4) The Public Defender Act, Act of December 2, 1968, P.L. 1144, No. 358, § 1 *et seq.* as amended through Act of December 10, 1974, P.L. 830, No. 277, § 1, 16 P.S. § 9960.1 *et seq.*, is suspended *only* insofar as the Act is inconsistent with Rule 122.

(5) Section 5720 of the Wiretapping and Electronic Surveillance Control Act, Act of October 4, 1978, P.L. 831, No. 164, 18 Pa.C.S. § 5720, is suspended as inconsistent with Rule 573 only insofar as the section may delay disclosure to a defendant seeking discovery under Rule 573(B)(1)(g); and Section 5721(b) of the Act, 18 Pa.C.S. § 5721(b), is suspended *only* insofar as the time frame for making a motion to suppress is concerned, as inconsistent with Rules 579 and 581.

(6) Sections 9731, 9732, 9733, 9734, 9735, 9736, 9751, 9752, and 9759 of the Sentencing Code, 42 Pa.C.S. §§ 9731, 9732, 9733, 9734, 9735, 9736, 9751, 9752, and 9759 are suspended as being inconsistent with the rules of Chapter 7.

(7) The Act of November 21, 1990, P.L. 588, No. 138, § 1, 42 Pa.C.S. § 8934, which authorizes the sealing of search warrant affidavits, and which is

implemented by Rule 211, is suspended ***only*** insofar as the Act is inconsistent with Rules 205, 206, and 211.

(8) Sections 9161 through 9165 of the Act of July 11, 1991, P.L. 76, No. 13§1, 42 Pa.C.S. §§ 9161-9165, which authorize procedures for arrest prior to requisition, are suspended *only* insofar as the sections are inconsistent with Rules 151 and 517.

COMMENT: This rule is derived from former Rules 39, 159, 340, 1415, and 2020, the rules previously providing for the suspension of legislation.

NOTE: Former Rule 39 adopted October 1, 1997, effective October 1, 1998; rescinded March 1, 2000, effective April 1, 2001, and replaced by Rule 1101. Former Rule 159 adopted September 18, 1973, effective January 1, 1974; amended January 28, 1983, effective July 1, 1983; amended February 1, 1989, effective July 1, 1989; amended April 10, 1989, effective July 1, 1989; amended January 31, 1991, effective July 1, 1991; rescinded March 1, 2000, effective April 1, 2001, and replaced by Rule 1101. Former Rule 340 combined previous Rules 321 and 322, which were the prior suspension rules, and was adopted June 29, 1977, effective September 1, 1977; amended April 24, 1981, effective June 1, 1981; amended January 28, 1983, effective July 1, 1983; rescinded March 1, 2000, effective April 1, 2001, and replaced by Rule 1101. Former Rule 1415 adopted July 23, 1973, effective 90 days hence; paragraph (g) added March 21, 1975, effective March 31, 1975; amended August 14, 1995, effective January 1, 1996; rescinded March 1, 2000, effective April 1, 2001, and replaced by Rule 1101. Former Rule 2020 adopted September 3, 1993, effective January 1, 1994; rescinded March 1, 2000, effective April 1, 2001, and replaced by Rule 1101. New Rule 1101 adopted March 1, 2000, effective April 1, 2001 **[.] ; amended _____, 2009, effective _____, 2009.**

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COMMITTEE EXPLANATORY REPORTS:

FORMER RULE 39:

Final Report explaining the provisions of new Rule 39 published with the Court's Order at 27 Pa.B. 5401 (October 18, 1997).

FORMER RULE 159:

Report explaining the January 31, 1991 amendments to former Rule 159 published at 20 Pa.B. 4788 (September 15, 1990); Supplemental Report published at 21 Pa.B. 621 (February 16, 1991).

FORMER RULE 1415:

Final Report explaining the August 14, 1995 amendments to former Rule 1415 published with the Court's Order at 25 Pa.B. 3472 (August 26, 1995).

FORMER RULE 2020:

Report explaining the provisions of former Rule 2020 published at 21 Pa.B. 3681 (August 17, 1991).

NEW RULE 1101:

Final Report explaining the reorganization and renumbering of the rules and the provisions of Rule 1101 published at 30 Pa.B. 1477 (March 18, 2000).

Report explaining the proposed amendments regarding the suspension of Sections 9161 through 9165 of the Act of July 11, 1991, P.L. 76, No. 13§1, 42 Pa.C.S. §§ 9161-9165, published at 39 Pa.B. (, 2009)

REPORT

Proposed New Pa.Rs.Crim.P. 151 and 152; amendments to Pa.R.Crim.P. 1101; and revisions to the Comments to Pa.Rs.Crim.P. 107 and 517.

ORDERS TO DETAIN AND ORDERS FOR THE TEMPORARY TRANSFER OF PRISONERS

As a result of reports of wide variations in practice across Pennsylvania, the Committee has been studying the issues of intrastate orders for the detention of incarcerated individuals, or more colloquially “detainers,” in summary and court cases. As a result of this examination, including an extensive survey of the courts, county prisons, and the Bureau of Corrections in Pennsylvania, the Committee concluded that: (1) the use of intrastate detainers is widespread; (2) there is considerable divergence in practice across the state, especially with regard to what document will be accepted as a detainer; the procedures for lodging detainers; and the length of time an individual is held solely on the basis of a detainer; and (3) there is no authority for the use of such orders intrastate either by rule or by statute.¹ .

The Committee also has been examining the issue of orders to release or transfer prisoners for court proceedings. As with detainer practice, there is wide variation in practice regarding the release or transfer of prisoners.

In our earliest discussions, the Committee considered order to detain or transfer as separate issues. As the development of these procedures progressed, the Committee determined that there is some overlap of procedures between these two types of orders, especially in the area of ensuring the return of a prisoner from one jurisdiction to another. The Committee considered that a consolidated approach might be a better approach to address the question of how to hold, release, and transfer prisoners. The Committee therefore is proposing two complimentary rules that would

¹ There is statutory authority for interstate detainers, contained in the Interstate Agreement on Detainers, 42 Pa.C.S. §9101 *et sec.*, regulatory authority for probation and parole detainers, 37 Pa. Code §71.1. The term “detainer” also is used in juvenile practice and domestic relations matters.

provide uniformity of procedures for orders to detain and for orders to temporarily transfer prisoners.

Orders to Detain

The concept of an “order to detain,” or a “detainer,” is that of a document filed with a prison or jail directing that a defendant be held after the original release date pending resolution of other court matters. The purpose of proposed Rule 151 is to provide procedures for the use of these orders to detain, as well as protections to the defendant subject to an order to detain. The order to detain would be available for both intra- and inter-county use within Pennsylvania. Interstate detainers, which are covered by the Interstate Agreement on Detainers, 42 Pa.C.S. §9101 et sec., and probation and parole detainers, which are addressed in 37 Pa. Code §71.1, are specifically excluded from the provisions of this rule.

As noted above, there currently is wide divergence in what jurisdictions will accept as a “detainer,” from formal judicial orders to simple phone calls. The purpose of the rule is to provide structure and uniformity to these procedures. Since the order to detain, in effect, places a restriction upon an individual’s liberty, the rule requires some judicial review before this is permitted. However, the idea is not to create a difficult or lengthy process. For this reason, the order to detain may be issued by any judge including a judge of the court of common pleas, a magisterial district judge, and the judges of the Philadelphia Municipal and Traffic Courts. An order to detain may be issued upon an oral or written request or *sua sponte*.

Originally, the Committee considered a rule that contained an exclusive list of all of the circumstances for which an order to detain could be issued. This idea ultimately was rejected since it would be difficult to be sure all the circumstances were covered by the rule. Rather, the *Comment* contains a non-exclusive list of examples of the types of situations for which detainers could be issued.

As part of the discussion of the situations for which an order to detain may be issued, the Committee debated whether or not unexecuted bench and arrest warrants should be excluded since Rule 517 provides for the execution of arrest warrants outside of the judicial district of issuance and Rule 150 provides for similar procedures in the

execution of bench warrants. However, the Committee was aware that reliance upon unexecuted warrants to act as detainers is a widespread practice and that forbidding the use of unexecuted warrants as a basis for a detainer was too radical a departure at this time. Under the proposed rules, however, an unexecuted warrant may not act in and of itself as an order to detain without any judicial review. Therefore, as described in the *Comment* to proposed New Rule 151, the preferred method in such situations is to accomplish the execution of the warrant using the provisions of Rules 150 or 517, whichever is applicable. If this would be too burdensome, then an unexecuted warrant may be used as the grounds for requesting an order to detain.

Additionally, there may be occasions in which law enforcement become aware of an outstanding warrant shortly before a defendant is to be released and there is not sufficient time to obtain an order to detain. In such cases, the procedures in Rules 150 or 517 could be utilized once a defendant is released from incarceration.

One of the main concerns in the development of this rule was the danger that, due to the current lack of defined rule procedures, an individual could be held for long periods of time solely on the basis of a detainer without any sort of review. Part of the protection against the potential of this type of abuse is to require that the order to detain state, in court cases, any conditions of bail, or in summary cases, any circumstances, that the defendant might meet to obtain his or her release. In these cases, when the defendant's period of incarceration ends, the defendant must be released subject to the conditions of bail or release stated in the order to detain.

To further protect the defendant from languishing in prison for lengthy periods of time following the completion of his or her incarceration, the Committee agreed that the rule should include a time limit on the order to detain and on the time the detaining authority has to take the defendant into custody. After extensive discussions during which numerous time frames were examined, the Committee reasoned that providing the detaining authority with a maximum of three days after the original scheduled release date to make arrangements to take custody of the defendant did not impose a hardship on the detaining authority and protected the defendant from unreasonable detention. As a further safe guard, the Committee is recommending that the three-day time limit expires by operation of law if the defendant has not been taken into custody

by the detaining authority. However, Rule 151 specifically excludes from this expiration provision an order to detain issued to hold a defendant who already has been convicted or sentenced. This provision is intended to ensure that an already convicted or sentenced defendant would not be inappropriately released. In these situations, the detaining authority must make arraignments to take custody of the defendant promptly.

The Committee also considered the situation in which there are multiple orders to detain for the same defendant. The Committee rejected formulating an “order of priority” procedure in which, for example, the first order to detain lodged is the first order to detain on which the defendant would be released, as being too restrictive and having the possibility of causing a defendant to be held multiple times past his or her release date on consecutive detaining orders. Those members of the Committee who work regularly with such situations reported that the current practice is to have all detaining authorities agree to which one will take custody of the defendant first. Proposed Rule 151 codifies this practice by requiring that all detaining authorities be informed of a defendant’s impending release and placing the burden on all the detaining authorities to come to an agreement as to who has priority to take custody of the defendant. If the parties do not agree or fail to take custody of defendant in a timely fashion, the orders to detain would expire by operation of law.

A final issue considered by the Committee is whether the rule should provide a mechanism for the defendant to challenge the order to detain. Ultimately, the members concluded that the existing procedures for challenging orders to detain, such as the procedures for motions for writs of habeas corpus, are well established and afford the necessary protections. Therefore, the new rule does not include specific procedures for challenging the order to detain.

Orders for the Temporary Transfer of Prisoners

At about the same time that the Committee began examining orders to detain, the Committee received reports from several judges concerning problems with obtaining the release of defendants being held in other counties for proceedings in their courts. Of particular concern was a report that one county’s policy was that, in the absence of any rule or statute related to the release of prisoners for court proceedings, it would rely

solely upon the common law practice of requiring writs of habeas corpus *ad prosequendum* or *ad testificandum* for releasing prisoners to another jurisdiction. The Committee's concern was that the reliance on these common law writs might preclude their issuance by magisterial district justices.

The Committee concluded that this was another area that requires clarification and statewide uniformity of procedures. Proposed New Rule 152 provides a single procedure by which a person who is incarcerated may be ordered released into the custody of law enforcement for a proceeding, either as a defendant or as a witness. The new rule also specifically provides for the subsequent return of the prisoner when the proceeding is completed, a procedure as important as providing for the release of a prisoner.

One issue that frequently was raised with the Committee was whether magisterial district judges have the authority to issue orders for temporary transfer of prisoners. The Committee examined the various criminal proceedings conducted by magisterial district judges and agreed that the judges should be given authority to require the presence of prisoners at proceedings in their courts in the interests of justice and to promote judicial economy. Proposed Rule 152 provides that the temporary transfer order may be issued by any judge. "Any judge," as used in this rule, includes judges of the court of common pleas, magisterial district judges, and judges of the Philadelphia Municipal and Traffic Courts.

The new rule would replace the current varied procedures, such as the various writs, "release orders," and subpoenas. The order is intended to be the sole document required to ensure the presence of an incarcerated person for a court proceeding. Correlative to proposing New Rule 152, the Committee also is proposing that a cross-reference to the new rule be added to the subpoena rule, Rule 107, explaining that the transfer order is the means of obtaining the release of a prisoner to transfer for a proceeding.

To effectuate this process, the order for temporary transfer of prisoners is designed to accomplish four things. First, the order directs the warden or other authority who is originally holding the prisoner to transfer custody to a law enforcement officer or agency. Second, the order permits the law enforcement officer or agency to

lodge the prisoner temporarily at a different place of incarceration for the duration of the event for which the order has been issued. Third, the order instructs the warden or other authority of the new place of incarceration to hold the prisoner until he or she can be returned to the original jurisdiction. Fourth, the order directs the law enforcement officer or agency to return the prisoner to the original place of incarceration when the event for which the order had been issued is completed. In addition to these four things, to ensure that all the parties are aware of the reason for the transfer, the rule requires that the order specify the reason for the release in the order itself.

The new Rule 152 *Comment* addresses two other points. First, the *Comment* explains that, in addition to releasing a prisoner for a court proceeding, the transfer order could be used to obtain the release of a prisoner for interrogation or discussion of cooperation with law enforcement/prosecution. This provision, however, may not be used to interfere with a defendant's right to counsel.

The *Comment* also makes it clear that the current practice of using less formal procedures for intra-county transfers, such as the use of transfer lists, is permitted under the new rule. The Committee agreed this is one area where the local practices should not be prohibited.

Arrest Prior to Requisition Statute

Finally, the Committee examined the statutory provisions for intrastate arrest prior to requisition, 42 Pa.C.S. §§ 9161-9165, that provide procedures comparable to the procedures in Rules 517, 518, and proposed New Rule 151.² 42 Pa.C.S. §9161 provides that an issuing authority may issue a warrant for any person that has been charged, anywhere in Pennsylvania, with the commission of a crime, with having fled from justice, having been convicted of a crime and having escaped from confinement, or

² It is not clear why this statute was deemed necessary since it was enacted subsequent to the promulgation of Rule 515 that provides for statewide execution of warrants and Rule 517 that provides the procedures to be followed when a warrant is executed outside of the jurisdiction of issuance.

having broken the terms of his bail, probation or parole, or is the subject of a complaint made before any issuing authority, or have a complaint filed on the basis of information received electronically that the individual is charged with a crime, has fled justice, or has escaped from confinement or has broken the terms of bail, probation, or parole after conviction. 42 Pa.C.S. §9162 provides for the arrest without warrant of any person charged with a crime the penalty of which is death or imprisonment greater than one year and the subsequent filing a complaint pursuant to Section 9161. 42 Pa.C.S. §9163 provides that an issuing authority may commit to the county jail for up to five days any person who has been charged under Section 9161. Bail may be set for this individual under Section 9164. 42 Pa.C.S. § 9165 provides for the costs of these procedures to be borne by the county in which the charges of the alleged crime were filed.

During the development of New Rule 151, the Committee received reports that the commitment to await requisition provisions of Section 9163 occasionally are being used as detainers. After reviewing the statute, the Committee concluded this use does not seem to be the intent of this statute. Rather, the procedures in this statutory provision appear to be an application to **intra-state** arrest warrants of the provisions of the Interstate Agreement on Detainers.

The Committee concluded that this statute conflicts with existing statewide procedural rules, particularly Rule 517, since the statute provides for acting upon a warrant outside the judicial district of issuance at variance with the procedures in Rule 517. These statutory procedures would also be at variance with the proposed New Rule 151 governing the procedures for orders to detain. The Committee concluded that the statute therefore impinges on the Pennsylvania Supreme Court's exclusive rule-making authority. Accordingly, the Committee is proposing an amendment to Rule 1101 (Suspension of Acts of Assembly) that adds a paragraph suspending Sections 9161 through 9165 of the Act of July 11, 1991, P.L. 76, NO. 13§1, 42 PA.C.S. §§ 9161-9165, only in so far as they are inconsistent with Rules 151, 152, AND 517. Correlative explanatory provisions have been added to the *Comments* to Rules 151, 152, and 517