

RULE 122. APPOINTMENT OF COUNSEL.

(A) Counsel shall be appointed:

- (1) in all summary cases, for all defendants who are without financial resources or who are otherwise unable to employ counsel when there is a likelihood that imprisonment will be imposed;
- (2) in all court cases, prior to the preliminary hearing to all defendants who are without financial resources or who are otherwise unable to employ counsel;
- (3) in all cases, by the court, on its own motion, when the interests of justice require it.

(B) When counsel is appointed,

- (1) the judge shall enter an order indicating the name, address, and phone number of the appointed counsel, and the order shall be served on the defendant, the appointed counsel, the previous attorney of record, if any, and the attorney for the Commonwealth pursuant to Rule 114 (Orders and Court Notices: Filing; Service; and Docket Entries); and
- (2) the appointment shall be effective until final judgment, including any proceedings upon direct appeal.

(C) A motion for change of counsel by a defendant for whom counsel has been appointed shall not be granted except for substantial reasons.

COMMENT: This rule is designed to implement the decisions of *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and *Coleman v. Alabama*, 399 U.S. 1 (1970), that no defendant in a summary case be sentenced to imprisonment unless the defendant was represented at trial by counsel, and that every defendant in a court case has counsel starting no later than the preliminary hearing stage.

No defendant may be sentenced to imprisonment or probation if the right to counsel was not afforded at trial. See *Alabama v. Shelton*, 535 U.S. 654 (2002) and *Scott v. Illinois*, 440 U.S. 367 (1979). See Rule 454 (Trial in Summary Cases) concerning the right to counsel at a summary trial.

Appointment of counsel can be waived, if such waiver is knowing, intelligent, and voluntary. See *Faretta v. California*, 422 U.S. 806 (1975). Concerning the appointment of standby counsel for the defendant who elects to proceed *pro se*, see Rule 121.

In both summary and court cases, the appointment of counsel to represent indigent defendants remains in effect until all appeals on direct review have been completed.

Ideally, counsel should be appointed to represent indigent defendants immediately after they are brought before the issuing authority in all summary cases in which a jail sentence is possible, and immediately after preliminary arraignment in all court cases. This rule strives to accommodate the requirements of the Supreme Court of the United States to the practical problems of implementation. Thus, in summary cases, paragraph (A)(1) requires a pretrial determination by the issuing authority as to whether a jail sentence would be likely in the event of a finding of guilt in order to determine whether trial counsel should be appointed to represent indigent defendants. It is expected that the issuing authorities in most instances will be guided by their experience with the particular offense with which defendants are charged. This is the procedure recommended by the ABA Standards Relating to Providing Defense Services § 4.1 (Approved Draft 1968) and cited in the United States Supreme Court's opinion in *Argersinger, supra*. If there is any doubt, the issuing authority can seek the advice of the attorney for the Commonwealth, if one is prosecuting the case, as to whether the Commonwealth intends to recommend a jail sentence in case of conviction.

In court cases, paragraph (A)(2) requires counsel to be appointed at least in time to represent the defendant at **the** preliminary hearing. Although difficulty may be experienced in some judicial districts in meeting the *Coleman* requirement, it is believed that this is somewhat offset by the prevention of many post-conviction proceedings that would otherwise be brought based on the denial of the right to counsel. However, there may be cases in which counsel has not been appointed prior to the preliminary hearing

stage of the proceedings [;] , e.g., counsel for the preliminary hearing has been waived, or a then-ineligible defendant subsequently becomes eligible for appointed counsel. In such cases it is expected that the defendant's right to appointed counsel will be effectuated at the earliest appropriate time.

An attorney may not be appointed to represent a defendant in a capital case unless the attorney meets the educational and experiential requirements set forth in Rule 801 (Qualifications for Defense Counsel in Capital Cases).

Paragraph (A)(3) retains in the issuing authority or judge the power to appoint counsel regardless of indigency or other factors when, in the issuing authority's or the judge's opinion, the interests of justice require it.

Pursuant to paragraph (B)(2), counsel retains his or her appointment until final judgment, which includes all avenues of appeal through the Supreme Court of Pennsylvania. In making the decision whether to file a petition for allowance of appeal, counsel must (1) consult with his or her client, and (2) review the standards set forth in Pa.R.A.P. 1114 (Considerations Governing Allowance of Appeal) and the note following that rule. If the decision is made to file a petition, counsel must carry through with that decision. See *Commonwealth v. Liebel*, **573 Pa. 375**, 825 A.2d 630 ([Pa.] 2003). Concerning counsel's obligations as appointed counsel, see *Jones v. Barnes*, 463 U.S. 745 (1983). See also *Commonwealth v. Padden*, 783 A.2d 299 (Pa. Super. [Ct.] 2001).

See *Commonwealth v. Alberta*, 601 Pa. 473, 974 A.2d 1158 (2009), in which the Court stated that “[a]ppointed counsel who has complied with *Anders* [*v. California*, 386 U.S. 738 (1967),] and is permitted to withdraw discharges the direct appeal obligations of counsel. Once counsel is granted leave to withdraw per *Anders*, a necessary consequence of that decision is that the right to appointed counsel is at an end.”

For suspension of Acts of Assembly, see Rule 1101.

NOTE: Rule 318 adopted November 29, 1972, effective 10 days hence, replacing prior rule; amended September 18, 1973, effective immediately; renumbered Rule 316 and amended June 29, 1977, and October 21, 1977, effective January 1, 1978; renumbered Rule 122 and amended March 1, 2000, effective April 1, 2001; amended March 12, 2004, effective July 1, 2004; *Comment* revised March 26, 2004, effective July 1, 2004; *Comment* revised June 4, 2004, effective November 1, 2004; amended April 28, 2005, effective August 1, 2005 [.]; **Comment revised February 26, 2010, effective April 1, 2010.**

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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 March 12, 2004 editorial amendment to paragraph (C)(3), and the Comment revision concerning duration of counsel's obligation, published with the Court's Order at 34 Pa.B. 1672 (March 27, 2004).

Final Report explaining the March 26, 2004 Comment revision concerning *Alabama v. Shelton* published with the Court's Order at 34 Pa.B. 1931 (April 10, 2004).

Final Report explaining the April 28, 2005 changes concerning the contents of the appointment order published with the Court's Order at 35 Pa.B. 2859 (May 14, 2005).

Final Report explaining the February 26, 2010 revision of the Comment adding a citation to *Commonwealth v. Alberta* published at 40 Pa.B. (, 2010).