

**SUPREME COURT OF PENNSYLVANIA
MINOR COURT RULES COMMITTEE**

NOTICE OF PROPOSED RULEMAKING

Proposed Amendment of Pa.R.Civ.P.M.D.J. 202 and 215

The Minor Court Rules Committee is considering proposing to the Supreme Court of Pennsylvania the amendment of Pa.R.Civ.P.M.D.J. 202 and 215 governing advanced communication technology for the reasons set forth in the accompanying explanatory report. Pursuant to Pa.R.J.A. 103(a)(1), the proposal is being published in the *Pennsylvania Bulletin* for comments, suggestions, or objections prior to submission to the Supreme Court.

Any report accompanying this proposal was prepared by the Committee to indicate the rationale for the proposed rulemaking. It will neither constitute a part of the rules nor be adopted by the Supreme Court.

Additions to the text of the proposal are bolded and underlined; deletions to the text are bolded and bracketed.

The Committee invites all interested persons to submit comments, suggestions, or objections in writing to:

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All communications in reference to the proposal should be received by **December 13, 2021**. E-mail is the preferred method for submitting comments, suggestions, or objections; any e-mailed submission need not be reproduced and resubmitted via mail. The Committee will acknowledge receipt of all submissions.

By the Minor Court Rules Committee,

Hon. Margaret A. Hunsicker
Chair

**SUPREME COURT OF PENNSYLVANIA
MINOR COURT RULES COMMITTEE**

PUBLICATION REPORT

Proposed Amendment of Pa.R.Civ.P.M.D.J. 202 and 215

The Minor Court Rules Committee (“Committee”) is considering proposing to the Supreme Court of Pennsylvania the amendment of Rules 202 and 215 of the Pennsylvania Rules of Civil Procedure Governing Actions and Proceedings Before Magisterial District Judges (“Rules”) in response to a rulemaking request. This proposal would update the definition of “advanced communication technology” (“ACT”) and delegate rule-making authority relative to the use of ACT to the judicial districts in the form of local rules.

Background

The current definition of ACT applicable to civil matters in magisterial district courts is “any communication equipment that is used as a link between parties in physically separate locations.” See Pa.R.Civ.P.M.D.J. 202. Wide discretion is given to the magisterial district judges in the use of ACT in the magisterial district courts – “Magisterial district judges may authorize the use of [ACT] during any civil proceeding or action governed by the Rules of Civil Procedure for Magisterial District Judges.” See Pa.R.Civ.M.D.J. 215. These Rules have been in effect since 2008.

In July of 2021, the Committee received a report prepared by the Administrative Office of Pennsylvania Courts and the Pennsylvania Conference of State Trial Judges concerning the “continued use” of ACT. Given that the use of ACT in magisterial district court proceedings has been governed by procedural rule, the report recommended a number of rule amendments generally enabling or expanding the use of ACT:

The Task Force reviewed the civil and criminal procedural rules implicated in matters before the minor judiciary to determine where it may be appropriate to recommend expanded authorization to use ACT in conducting court proceedings. As with other procedural rules, continued and expanded use of ACT is recommended in virtually all proceedings.

The Rules governing civil proceedings in the minor judiciary already permit the use of ACT. Pa.R.C.P.M.D.J. 215. For proceedings conducted in whole or in part using ACT, it may be necessary to compel witnesses to attend and testify or to produce documents virtually. For this reason, it is

recommended that Pa.R.C.P.M.D.J 213-214 be amended to authorize service of subpoenas, and to compel testimony or the production of documents, via ACT or electronic communications in minor court civil proceedings. It is similarly recommended that authorization be given to file and serve original civil process and to conduct actions for the recovery of possession of real property using ACT or electronic communications in minor court proceedings. To facilitate this authorization, amendments would be needed to Pa.R.C.P.M.D.J. 303-305, 307-314, 502(B), 506, 508, and 515-517. Electronic service should also be authorized in appeals. Pa.R.C.P.M.D.J. 1005(E).

Remote Proceedings Task Force: Continued Use of Advanced Communication Technology (ACT) Following the Termination of Judicial Emergencies, at pp. 16-17 (June 2021).¹ The report also referenced the use of ACT in emergency protection from abuse matters.

Discussion

Insofar as a significant aspect of applicability and procedures would be delegated to local rule, several observations can be made. First, the judicial districts have acquired significant experience with the use of ACT during the pandemic and, consequently, have existing local procedures and practices that work. At this juncture, there does not appear to be a need for further statewide procedures nor were further statewide procedures necessary for the use of ACT, prior to pandemic. Thus, absent a demonstrated need, procedures would be left to local rule. Note, however, those practices governing the use of ACT would need to be codified into a local rule. See Pa.R.J.A. 103(d).

Second, it should be acknowledged that delegating applicability and procedures to local rule creates the opportunity for significant variation among judicial districts. This may be challenging to multi-district practitioners who must navigate not only among the various local procedures and types of proceedings that use ACT, but also the different technologies employed. If the extent of any variation imposes undue burdens on practice of law or becomes “unacceptable” to the concept of a unified judicial system, the necessity of uniform statewide applicability and procedures may be revisited. Over time, a

¹ While the Task Force’s report discusses the use of ACT in criminal matters before the minor judiciary, this proposal is limited in scope to civil proceedings. The report also recommended the use of ACT for the service of orders and filings. Presumably, the form of ACT for service would rely upon the report’s proffered definition of “electronic communication.” The Committee is not addressing the electronic service of orders and filings at this time.

consensus may be reached on the best practice as it relates to applicability and procedures.

Regarding a uniform definition of ACT, discussion arose whether the definition should include both an audio and video component, *i.e.*, “sound and sight.” The current ACT definition set forth at Pa.R.Civ.P.M.D.J. 202 is broad and permits communication by audio only. Reasons in favor of a video component include:

- It provides a more comprehensive form of witness identification.
- It reduces the opportunity for contemporaneous witness coaching.
- It reinforces witness sequestration.
- It assures a modicum of decorum.
- It provides a means to evaluate credibility and demeanor.
- It ensures that non-verbal communication is observable.
- It detects whether a witness’s responses are based upon contemporaneous, independent recollection or whether the witness is relying upon a writing to refresh recollection. See Pa.R.E. 612.

Moreover, the technology for contemporaneous audiovisual communication has greatly improved, become more accessible, and confidence in its use has increased.

An argument against requiring a visual component within the definition of ACT is that it may limit the use of ACT. For example, there may be geographical locations where necessary bandwidth does not exist or a participant does not have the technology for audio and visual communications. The merit of these arguments is acknowledged, but the preferred alternative would be for the participant to either appear in court or appear from a location where the proponent of the testimony can provide audio and visual communications, *e.g.*, the attorney’s office.

Moreover, retaining a form of communication that only has an audio component could be seen as a step back from the successful use of technology during the pandemic. Nonetheless, the use of audio-only communication technology has been permitted in the magisterial district courts since 2008.

Proposed Rule Amendments

The proposed amendments delete the definition of ACT from Pa.R.Civ.P.M.D.J. 202 and add a revised definition of ACT to Pa.R.Civ.P.M.D.J. 215. The revised definition of ACT requires “two-way simultaneous communication of image and sound” for the reasons discussed *supra*. Moreover, the proposed rule shifts discretion for the use of ACT from individual magisterial district judges to local rules promulgated by the judicial district. The proposed amendments also include stylistic changes and updates to statutory references. The Committee invites all comments, concerns, and suggestions.

Rule 202. Definitions.

As used in these rules, the following words and phrases shall have the following meanings unless the context clearly indicates otherwise or the particular word or phrase is expressly defined in the chapter in which the particular rule is included:

["advanced communication technology" is any communication equipment that is used as a link between parties in physically separate locations.]

[Note] Comment: [Justices of the peace are now statutorily known as “magisterial district judges.”] Previously, magisterial district judges were statutorily known as “justices of the peace” and “district justices.” See 42 Pa.C.S. § 102 and 42 P.S. § 20003(d). As to magisterial district judges’ civil jurisdiction, [see] see 42 Pa.C.S. § 1515(a). The definitions of “sheriff” and “constable” include their deputies. As to deputy sheriffs, [see] see 16 P.S. §§ 1202-A and 4202. As to deputy constables, [see 13 P.S. §§ 21-23] see 44 Pa.C.S. § 7122. As to certification of constables and deputy constables, [see 42 Pa.C.S. § 2942] see 44 Pa.C.S. § 7142.

Rule 215. Advanced Communication Technology.

[Magisterial district judges may authorize the use of advanced communication technology during any civil proceeding or action governed by the Rules of Civil Procedure for Magisterial District Judges.]

(a) Definition. “Advanced Communication Technology” shall mean any communication technology providing for two-way simultaneous communication of image and sound.

(b) General Rule. Proceedings may be conducted using advanced communication technology in accordance with local rule.

[Note:] Comment: [This rule was adopted in 2008 to specify that] A magisterial district judge[s] may use advanced communication technology in [their] the courtroom[s] during an adversarial proceeding[s. In] or an *ex parte* proceeding, such as an action pursuant to the Protection From Abuse Act, 23 Pa.C.S. §§ 6101-6122, or 42 Pa.C.S. §§ 62A01-62A20 (providing for protection of victims of sexual violence or intimidation), in accordance with local rule [magisterial district judges also may permit the use of advanced communication technology. Limited technology available in some magisterial district courts may preclude the use of certain advanced communication technology options]. *Compare* Pa.R.Crim.P. 119. For local rulemaking, see Pa.R.J.A. 103(d).