

**SUPREME COURT OF PENNSYLVANIA
CIVIL PROCEDURAL RULES COMMITTEE**

NOTICE OF PROPOSED RULEMAKING

Proposed Amendment of Pa.R.Civ.P. 1033

The Civil Procedural Rules Committee is considering proposing to the Supreme Court of Pennsylvania the amendment of Pa.R.Civ.P. 1033 for the reasons set forth in the accompanying publication 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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Civil Procedural Rules Committee
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Pennsylvania Judicial Center
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All communications in reference to the proposal should be received by **September 26, 2022**. 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 Civil Procedural Rules Committee,

Kathleen D. Bruder
Chair

Rule 1033. Amendment.

- (a) **General Rule.** A party, either by filed consent of the adverse party or by leave of court, may at any time change the form of action, add a person as a party, correct the name of a party, or otherwise amend the pleading. The amended pleading may aver transactions or occurrences which have happened before or after the filing of the original pleading, even though they give rise to a new cause of action or defense. An amendment may be made to conform the pleading to the evidence offered or admitted.
- (b) **Relation Back.** An amendment correcting the name of a party against whom a claim has been asserted in the original pleading relates back to the date of the commencement of the action if, within 90 days after the period provided by law for commencing the action, the party received notice of the institution of the action such that it will not be prejudiced in maintaining a defense on the merits and the party knew or should have known that the action would have been brought against the party but for a mistake concerning the identity of the proper party.
- (c) **John Doe Defendants.** An amendment substituting the actual name of a defendant for a Doe designation as provided in Rule 2005 relates back to the date of the commencement of the action if, within the time provided by Rule 401 for service, the defendant named by the amendment has received actual or constructive notice of the commencement of the action such that it will not be prejudiced in maintaining a defense on the merits and the defendant knew or should have known that the action would have been brought against it but for lack of knowledge of the defendant's actual name.
- (d) **Highlighting of Amendments.** **A party filing a motion to amend a pleading shall attach a copy of the proposed amended pleading, which shows by striking through or enclosing in brackets the material to be deleted and by underlining or setting forth in bold-face type the material to be added.**

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PUBLICATION REPORT

Proposed Amendment of Pa.R.Civ.P. 1033

The Civil Procedural Rules Committee is considering proposing to the Supreme Court the amendment of Pennsylvania Rule of Civil Procedure 1033 governing the amendment of pleadings to require the attachment of the proposed amended pleading to the motion to amend and for the attachment to indicate the amendments through textual indicators.

The Committee received a request to consider amending Pa.R.Civ.P. 1033 to require the attachment of a proposed amended pleading to a motion to amend. The requester suggested such a requirement would curb a problem encountered with opposing counsel, who had asked for the requester's consent to an amendment of a complaint, but refused to provide any substantive information about the amendment. In turn, the attorney seeking amendment filed a motion to amend that likewise did not provide any information on the specific amendment nor was the proposed amended pleading attached to the motion on the basis that Pa.R.Civ.P. 1033 does not expressly so require.

The Committee initially observed that Pa.R.Civ.P. 1033 does not expressly provide for the content for a motion to amend a pleading. Pa.R.Civ.P. 208.2 generally governs the content of motions, but does not specifically require the attachment of documents that may support the motion.

Noting the silence of requirements in the Rules of Civil Procedure, the Committee then examined local rules addressing the amendment of pleadings. Research revealed a handful of local rules governing amendments. These rules focused on the filing of amended pleadings, rather than the content of the motion to amend. McKean County Local Rule 1033 and Potter County Local Rule 1033 both require "[t]he amendment pleading [to] clearly indicate that it is an amended pleading, the paragraphs [to] be renumbered, and the new portion [to] be underlined." Clarion County Local Rule 1033, Franklin/Fulton Counties Local Rule 39-1033.1, Jefferson County Local Rule 1033, Mercer County Local Rule 1033, and Schuylkill County Local Rule 1033 are similar to the McKean and Potter County Local Rules except they do not require the underlining of the new portion of the pleading.

The Committee also examined procedural rules from other jurisdictions. Research revealed a relative dearth of procedural rules governing the requirements for the content of a motion to amend. New Jersey, Utah, and Puerto Rico all require the proposed

amended pleading to be attached to the motion to amend. See N.J.R. 4:9-1 (“A motion for leave to amend shall have annexed thereto a copy of the proposed amended pleading.”); U.R.C.P. Rule 15(a)(2) (“The party must attach its proposed amended pleading to the motion to permit an amended pleading.”); P.R.R.C.P. 13.1 (“The entire amended pleading shall be attached to the motion for leave to amend the pleadings.”). New York is the most comprehensive in that it requires the proposed amended pleading to accompany the motion to amend and to show the changes to be made to the pleading. See N.Y.C.P.L.R. 3025(b) (“Any motion to amend ... pleadings shall be accompanied by the proposed amended ... pleading clearly showing the changes or additions to be made to the pleading.”)

The Committee also examined rules from Delaware and Maryland. Del. Sup. Ct. R. 15(aa) is similar to the McKean and Potter County Local Rules described above in that it applies to the filing of amended pleadings and requires the amended pleading to indicate how it differs from the original pleading. Md.R.C.P. 2-341(e) also applies to the filing of amended pleadings and requires the filing of the amended pleading together with a comparison copy showing through specified textual indicators the text to be deleted and the text to be added.

In developing the proposed amendment to Rule 1033, the Committee favored the approach taken by New York to require the attachment of the proposed amended pleading the motion to amend and for the proposed amended pleading to explicitly show the changes to be made. This will ensure that both parties and the court will be certain of the exact text being amended in a pleading. In addition, the Committee modified this language slightly to include explicit provisions, as found in the Maryland Rule, to specify that the proposed amended pleading show through textual indicators, either by striking through or bracketing deletions, or by underlining or bolding additions, the text to be amended.

Relatedly, the Committee also considered whether pleadings amended by consent should be required to show the changes in the amended pleading, and concluded it was not necessary to expand the rule in this circumstance. It is highly unlikely an attorney would agree to an amendment without first reviewing the proposed amendment. In addition, the party seeking the amendment would then have to file a motion. The rule, as amended, would require the attachment of the proposed amended pleading and thus automatically disclose the nature of the amendment. The Committee concluded that it did not seem necessary to include a provision in the rule to police this conduct, and that the operation of the rule itself would resolve any gamesmanship.

The Committee invites all comments, concerns, and suggestions.