

RULE 40. ASSIGNMENT OF CASES FOR TRIAL; CONTINUANCES

(a) Definitions.

(1) “Continuance Order” is defined as an order entered by a judge that effectively removes a case from a trial list or date certain court event in response to a written motion. Absent the entry of a continuance order, a case is subject to being called for trial throughout the trial list period or for a court event on the designated date certain.

(2) “Effectively removes a case from a trial list” includes the unavailability for essential dates or when the number of days necessary for trial of the case, based on the parties’ good faith estimate of the time for trial, is more than the difference between (i) the number of days remaining on a trial list at the time a motion for a continuance or a request for protection is made, and (ii) the number of days sought in the motion for a continuance or the request for protection.

(3) “Essential Dates” include jury selection days, case management days, and other dates essential to the completion of trial on the list at issue.

(4) “Request for Protection” is defined as an informal, non-docketed written request that a case not be called for trial on one or more specified days of a trial list and which, if allowed, would not effectively remove a case from a trial list. A request for protection shall only be acted upon by a judge and shall not take the place of or be treated as a motion for continuance.

(5) “Scheduled” is defined as follows: (i) For trial list cases, “scheduled” means a case has been assigned to a trial list as that term is defined in this rule; (ii) for all other cases, “scheduled” means that a date certain has been identified for a hearing or trial.

(6) “Trial list” means the list of a group of cases assigned to an actual, discrete period of time. A trial list is not simply a list of cases ready for trial. Rather, it is a list for a trial session that has beginning and ending dates, consists primarily of consecutive court days, and realistically exposes all of the assigned cases to trial.

(b) Assignment for Trial.

(1) *Jury Trial List.* In those actions in which a jury trial has been properly demanded, the clerk of the Superior Court shall maintain a Jury Trial List and a Nonjury Trial List of actions in the chronological order in which they are transferred from the Pre-Trial List by direction of the court under Rule 16. Scheduling of actions for trial from the lists shall be at the direction of the court.

(2) *Nonjury Trial List.* The court may by order provide for the setting of cases for trial upon the calendar, the order in which they shall be heard and the resetting thereof. All actions, except those otherwise governed by statute or court orders shall be in order for trial at a time set by the court on such notice as it deems reasonable, but not less than 10 days after service of the last required pleading.

(c) Continuances. A motion for a continuance order shall be made immediately after the cause or ground becomes known. The motion must specify (1) the cause or ground for the request, (2) when the cause or ground for the request became known, and (3) whether the motion is opposed. If the position of the other party or parties cannot be ascertained, notwithstanding reasonable efforts, that shall be explained. Telephonic or other oral notice of the motion shall be given immediately to all other parties. The fact that a motion is unopposed does not assure that the requested relief will be granted. Continuances should only be granted for substantial reasons.

(d) Unavailable Witness or Evidence. The court need not entertain any motion for a continuance based on the absence of a material witness unless supported by an affidavit which shall state the name of the witness, and, if known, that witness' residence, a statement of that witness' expected testimony and the basis of such expectation, and the efforts which have been made to procure that witness' attendance or deposition. The party objecting to the continuance shall not be allowed to contradict the statement of what the absent witness is expected to testify but may disprove any other statement in such affidavit. Such motion may, in the discretion of the court, be denied if the adverse party will admit that the absent witness would, if present, testify as stated in the affidavit, and will agree in writing, signed by that party or that party's attorney, that the same shall be received and considered as evidence at the trial as though the witness were present and so testified. The same rule shall apply, with necessary changes, when the motion is grounded on the want of any material document, thing or other evidence. In all cases, the grant or denial of a continuance shall be discretionary whether the foregoing provisions have been complied with or not.

(e) Protections. A request for a protection from a trial list shall be made immediately after the cause or ground becomes known, and shall be submitted in a written Uniform Request for Protection Form or in a writing containing substantially the same information.

**Advisory Committee's Note
January 1, 2006**

The amendments to the rule are designed to promote greater uniformity and predictability with respect to court event scheduling. A key determinant of event certainty in the courts is the application of uniform and predictable approaches to continuances and protections. The absence of uniformity and predictability results in more frequent postponements of scheduled court events that increase the time, expense, and clerical work associated with the resolution of disputes. The revised rule is intended to make the public and the courts more mindful of the long-term negative consequences that event uncertainty has on the public, judicial resources and, ultimately, the administration of justice.

The rule provides clear guidance as to when an informal request for protection should be submitted in lieu of a formal motion for a continuance. A request for protection is an important feature of active trial list management by the court. A conflict during a trial list should be addressed by way of a request for protection, rather than a motion for a continuance order, if the granting of the request will not “effectively remove a case from a trial list” as that term is defined by the rule. The revised rule should encourage the public and the bar to make greater use of protections in lieu of continuances, and cause judges, when responding to requests for protection, to actively manage the scheduling of cases prior to and during a defined trial list period.

The definition of “Trial list” corresponds with the Judicial Branch’s effort to adopt effective practices surrounding the organization and judicial management of trial lists. Trial list periods and the assignment of cases to trial lists will be made in accordance with standards established by the Judicial Branch for the various case types.

The revised rule provides that continuances may be granted for substantial reasons so that the judicial process does not become unnecessarily onerous or unduly burdensome to the public and the bar. Substantial reasons may include, but are not limited to, conflicts arising from (1) another scheduled court event that is a higher priority case as determined by the priority of cases established by the

Supreme Judicial Court; (2) another scheduled court event in another jurisdiction; (3) long-standing travel or vacation plans of a party or attorney; (4) unforeseen witness unavailability; (5) unexpected family-care responsibilities; and (6) other unforeseeable reasons such as illness or death.

**Advisory Committee's Note
January 1, 2001**

P.L. 1999, Chapter 731, §§ ZZZ-2 *et seq.* unified the Superior Court and the District Court civil jurisdiction, with certain stated exceptions. The amendments to Rule 40 reflect that jury trials shall continue to be tried in the Superior Court, while nonjury trials may be tried in either court.

**Advisory Committee's Notes
May 1, 2000**

The only change involves a change in the title, but not the text, of subdivision (c). The new title, replacing “Affidavit in Support of Motion” with “Unavailable Witness or Evidence” more accurately reflects the substance of the subdivision.

**Advisory Committee's Note
September 1, 1973**

Rules 40(a) and (b) are rewritten simultaneously with a substantial revision of Rule 16. These revisions are intended to clarify and make uniform for all Superior Court Justices and for the clerks in all counties the procedural mechanics for moving a case forward through pretrial conference to trial. The amendments to Rule 16 require pre-trial memoranda in all cases and also require pre-trial conferences except when specifically dispensed with by the court. The scheduling of pre-trial conferences is done completely under the supervision of a Superior Court Justice. Revised Rule 40(a) requires that under the court's direction the clerk maintain both a Jury Trial List and a Nonjury Trial List. It is only by order of a Superior Court Justice that a case is moved from the Pre-Trial List maintained under Rule 16(a)(2) to one of the trial lists maintained pursuant to Rule 40(a). A different Superior Court Judge coming into the county to hold a term of court will be able readily upon examination of these lists to know in what cases he can set specific dates for commencement of trial. *See* Advisory Committee's Note (September 1, 1973) to Rule 16.

Rule 40(b) is also substantially revised. Since the date of commencement of a term of court now has little or no relation to the date fixed for trial of a case, the deadline for a motion for a continuance is changed to be tied in with the scheduled trial date. The four-day period is picked by way of compromise between the needs of the attorney seeking the continuance and those of the attorneys for the other parties. In addition to the written notice by service of the motion under Rule 5(a), the moving party is required to give prompt telephonic or other oral notice to the other parties. Obviously the moving party, particularly on a motion made close to the deadline, must act promptly to have his motion heard by the judge assigned to try the case.

The present last sentence of Rule 40(b), relating to assessment of costs, is eliminated as inappropriate in light of the other changes in this subdivision. It in any event was a sanction of dubious effectiveness.

Advisory Committee's Note
December 31, 1967

Rule 16 as revised specifies the procedure by which a party moves a case forward to being placed on the trial calendar. Rule 40(a) is amended merely to provide that the clerk shall maintain a trial calendar showing the cases which are ready for trial and the order in which they will be tried. Although the court will of course maintain control over the trial calendar, it appears well to specify in the rules that the clerk in each county will maintain a trial calendar.

Reporter's Notes
December 1, 1959

This rule is not taken from the Federal Rules. At present cases are assigned for trial by different procedures in different counties. Rule 40(a) permits the presiding justice to continue to accommodate himself to the established practice in each county. The second sentence of Rule 40(a) provides that actions shall ordinarily be in order for trial at the first term of court held not less than 10 days after completion of the pleadings. This will replace Revised Rules of Court 28 under which the plaintiff can get a trial at the return term by giving notice 30 days before the sitting and the defendant by giving such notice 10 days before the sitting. The abolition of the concept of return terms necessitates a change, but the result will be fairly to approximate the present time limits. An action for divorce will not be in order for hearing until 60 days after service of the complaint. *See* Rule 80(g).

Rule 40(b) and (c) are taken from Revised Rules of Court 14 and 15 with some changes. Rule 40(c) expressly makes discretionary with the court the requirement of an affidavit in support of a motion for a continuance and the further requirement that the continuance will be denied if the adversary admits that the affidavit may be considered as evidence. The present rule in terms makes the action of the court mandatory, but it is believed that the change not only produces a more equitable result but also accords with the actual existing practice.