**POLICY DIRECTIVE 07-229**

**(First Supplement – 2014)**

**TO: ALL JUSTICES OF THE PEACE**

 **ALL CRIMINAL COURT MANAGERS**

**FROM: ALAN G. DAVIS**

#  CHIEF MAGISTRATE

**DATE: APRIL 3, 2014**

**RE: PROCESS FOR ENTERING A GUILTY PLEA WITHOUT THE APPEARANCE OF THE DEFENDANT – ATTORNEY REPRESENTATION**

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**Scope:**

This supplement clarifies the basic policy directive concerning the process by which a judge may allow a plea *in absentia*. The 2007 policy directive did not adequately account for cases in which the defendant is represented by counsel; this supplement provides for those circumstances.

**Justice of the Peace Court Policy:**

As justice requires, pleas *in absentia* may be taken by this court, with judicial officer approval. Pleas *in absentia* initiated by Delaware attorneys should be allowed as a matter of course in offenses not involving a potential sentence of incarceration where the attorney has represented to the Court that a client has a legitimate reason for appearing solely through counsel, that the attorney has explained the consequences of the plea to his or her client and that the plea *in absentia* paperwork has been completed properly by the client. Counsel need not appear before the Court in person at any point in the process unless there is some complication in the case or a compelling reason for the Court, in its discretion, to require the attorney to appear.

**Policy Directives/Legal Memoranda Affected:**

This supplements the process set forth for pleas *in absentia* in PD 07-229.

**Effective Date:**

This policy supplement shall take effect immediately upon issuance and shall continue until further notice. If the underlying policy is rescinded at any time, this supplement shall also be rescinded.

**Discussion:**

***Counsel as Officers of the Court***

 By benefit of their admission to the Delaware Bar by the Delaware Supreme Court, attorneys in this state enjoy a position of trust in the Delaware Courts. They become “officers of the court” and are bound by an ethical duty of candor to all Delaware tribunals pursuant to The Delaware Lawyer’s Rules of Professional Conduct.[[1]](#footnote-1) While an attorney certainly maintains a duty to his or her client, Delaware attorneys have also sworn an oath to act “with all good fidelity as well to the Court as to the client.” In fact, the Delaware Supreme Court has noted that this responsibility to the Court takes precedence over the responsibility to the client because as Officers of the Court, members of the Delaware Bar must represent their clients zealously *within* the bounds of the law and ethics.[[2]](#footnote-2) Because of this relationship between members of the Bar and the Courts, attorneys may be afforded a fair degree of autonomy in dealing with the more mundane processes of the Court, so long as such allowance does not treat other litigants unfairly or otherwise mar the tenets of procedural fairness. Pleas *in absentia* in low-level cases present one of those situations where effective representation by counsel can be trusted by the Court and do not place unfair burdens on unrepresented litigants.

 The original PD 07-229 was written to provide persons a process to avoid appearance before the Court where procedural assurances could be built in to meet our statutory and rule-based obligations with regard to recording an informed and voluntary guilty plea. This process was written with self-represented defendants in mind, as the vast majority of persons coming before the Court did not have counsel. With the advent of the police prosecution model and the subsequent passage of legislation that gave this Court exclusive jurisdiction over most traffic offenses, the number and frequency of attorney representations in traffic cases has risen in the recent past.

***Plea* in Absentia *Process for Attorneys***

 The process set forth in PD 07-229 is admittedly a bit cumbersome for both court personnel and defendants, but it is necessary to ensure that self-represented persons are aware of the consequences of a guilty plea and that that plea is properly recorded. However, these concerns are not as prevalent in cases where a defendant is represented by counsel. The Court may, and – barring evidence to the contrary – should be able to rely with confidence upon the representations of counsel that the consequences of a plea have been fully explained to their client, and that the plea paperwork has been freely and fully endorsed by their client.

As such, Delaware attorneys should be given significant latitude to, without prior authorization, engage in the plea in absentia procedure without overwhelming Court management of that process. Attorneys should be able to negotiate a plea with the police or the Attorney General’s office, memorialize that plea and provide counsel to their client in regards to filling out the plea *in absentia* paperwork. Once fully packaged, that attorney should alert the Court that they wish to enter a plea *in absentia* on behalf of their client. This is to be treated as a motion to allow the defendant to engage in a plea *in absentia*. The attorney should, at the time of filing, represent to the Court the legitimate reason for their client being unable to appear, provide assurances that they have fully explained the process and the consequences of the plea to their client, and attest that their client has completed the paperwork knowingly, voluntarily and intelligently.

Upon receiving this motion, the Court should review the paperwork for completeness, any legal or procedural complications and adequacy of the reason for the defendant not appearing. If satisfied by the representations of counsel, the judge should accept the plea, without requiring further appearance or communication from counsel. The Court may, in its discretion, require the appearance of counsel if any irregularities are apparent on the face of the filing or the records regarding the case. For instance, if the plea agreement asks for the imposition of probation before judgment but there is a meaningful question in the mind of the judge, after reviewing the defendant’s record, whether the defendant is eligible for PBJ, the Court may require an in-person appearance of counsel to resolve the issue. In a case where there are significant issues of concern to the judge, the judge may always deny this motion for the plea *in absentia* and require both counsel and client to appear at an appropriate date. The requirement of in-person appearances under either of these circumstances should be rare.

 Judges who become aware of any repeated inconsistencies or incomplete filings by an individual attorney should attempt to resolve those issues with the lawyer. Upon continuing substantive errors by counsel or alleged abuse of this process, judges should report those matters to the office of the Chief Magistrate for follow-up.

**Conclusion:**

Pleas *in absentia* are permissible in this Court, and are a matter of judicial discretion under Justice of the Peace Court Criminal Rule 43(c)(2). Delaware attorneys representing clients in low-level offenses not involving the threat of a sentence of jail time, should be permitted to engage in this process freely, as long as the court is satisfied by the attorney’s representation that there is a legitimate reason for the defendant not to appear, that the consequences of the plea have been explained to the client, and that the client has completed the required paperwork. No personal appearance of the attorney is necessary, though the Court retains the discretion to require an appearance where there is some question regarding the circumstances of the case.

cc: Honorable Leo Strine, Jr.

 Honorable James T. Vaughn, Jr.

 Honorable Alex J. Smalls

 Honorable Chandlee Johnson Kuhn

 All Justice of the Peace Criminal Courts

 Marianne Kennedy, Justice of the Peace Court Administrator

 H. John Betts, Kent & Sussex Operations Manager

 Mark Hitch, NCC Operations Manager

 Law Libraries: New Castle County, Kent County, Sussex County,

 Widener University School of Law

 Public Defender

 Attorney General

 All Police Agencies

 Defense Bar representatives

1. Specifically, Delaware Lawyer’s Rules of Professional Conduct Rule 3.3 states:

 (a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraph (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse. [↑](#footnote-ref-1)
2. *In re Abbott*, 925 A.2d 482, 487-488 (Del. 2007). [↑](#footnote-ref-2)