

# THE COURTS

## Title 204—JUDICIAL SYSTEM GENERAL PROVISIONS

### PART V. PROFESSIONAL ETHICS AND CONDUCT [ 204 PA. CODE CH. 81 ]

#### Proposed Amendments to the Comments to Pennsylvania Rules of Professional Conduct Relating to Competence and Confidentiality to Reference the Public Access Policy of the Unified Judicial System

Notice is hereby given that The Disciplinary Board of the Supreme Court of Pennsylvania is planning to recommend to the Supreme Court of Pennsylvania that it adopt amendments to the comments to Pennsylvania Rules of Professional Conduct (“Rules”) 1.1 and 1.6 relating to competence and confidentiality, as set forth in Annex A.

By Order of January 6, 2017, the Supreme Court approved the Public Access Policy of the Unified Judicial System (“policy”) for case records filed in and maintained by the appellate and trial courts, which makes such records open and accessible to the public.<sup>1</sup> This policy takes effect on January 6, 2018, and represents a significant move to create a uniform standard for treatment of documents containing confidential and sensitive information about parties. Consequently, attorneys must familiarize themselves with and abide by the new policy, which places responsibility upon attorneys to safeguard confidential information in the documents they file with the courts. Specifically, policy sections 7.0(D) and 8.0(D) require parties and their attorneys to certify their compliance with the policy. Additionally, sections 7.0(F) and 8.0(F) provide that a court may sanction non-compliant parties.

Following the Court’s adoption of the policy, the Board analyzed the Rules to consider whether changes are required to conform to the policy’s requirements. We concluded that the black letter language of the Rules need not be amended to reference the policy. However, as the Board recognized the important and significant changes that the policy brings to the practice of law, we determined that reference to the policy should be made in the commentary to RPC 1.1 and RPC 1.6.

RPC 1.1 requires a lawyer to provide competent representation to a client, which entails the legal knowledge, skill, thoroughness and preparation reasonably necessary for representation. Current comment (8) to RPC 1.1 explains that in order to maintain the requisite knowledge and skill, the lawyer should keep abreast of changes in the law and its practice. The proposed amendment advises a lawyer that competent representation includes familiarity with the policies of courts in which the lawyer practices, including the Public Access Policy of the Unified Judicial System.

RPC 1.6(d) provides that a lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. Such reasonable

efforts would include knowledge of the policy and compliance with the directives contained therein. Proposed amendment to comment (25) provides that, pursuant to paragraph (d), a lawyer should act in accordance with court policies governing disclosure of sensitive or confidential information, including the Public Access Policy of the Unified Judicial System.

Interested persons are invited to submit written comments by mail or facsimile regarding the proposed amendments to the Office of the Secretary, The Disciplinary Board of the Supreme Court of Pennsylvania, 601 Commonwealth Avenue, Suite 5600, PO Box 62625, Harrisburg, PA 17106-2625, Facsimile number (717-231-3382), Email address [Dboard.comments@pacourts.us](mailto:Dboard.comments@pacourts.us) on or before October 23, 2017.

*By the Disciplinary Board of the  
Supreme Court of Pennsylvania*

JULIA FRANKSTON-MORRIS, Esq.,  
*Secretary*

#### Annex A

### TITLE 204. JUDICIAL SYSTEM GENERAL PROVISIONS

#### PART V. PROFESSIONAL ETHICS AND CONDUCT

##### Subpart A. PROFESSIONAL RESPONSIBILITY

#### CHAPTER 81. RULES OF PROFESSIONAL CONDUCT

##### Subchapter A. RULES OF PROFESSIONAL CONDUCT

#### § 81.4. Rules of Professional Conduct.

The following are the Rules of Professional Conduct:

#### CLIENT-LAWYER RELATIONSHIP

##### Rule 1.1. Competence.

\* \* \* \* \*

##### Comment:

\* \* \* \* \*

##### *Maintaining Competence*

(8) To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. **To provide competent representation, a lawyer should be familiar with policies of the courts in which the lawyer practices, which include the Public Access Policy of the Unified Judicial System.**

##### Rule 1.6. Confidentiality of Information.

\* \* \* \* \*

##### Comment:

\* \* \* \* \*

##### *Acting Competently to Preserve Confidentiality*

(25) **Pursuant to paragraph (d), a lawyer should act in accordance with court policies governing disclosure of sensitive or confidential information, including the Public Access Policy of the Unified Judicial System.** Paragraph (d) requires a lawyer to act

<sup>1</sup> <http://www.pabulletin.com/secure/data/vol46/46-49/2063.html>

competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (d) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments (3)-(4).

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[Pa.B. Doc. No. 17-1568. Filed for public inspection September 22, 2017, 9:00 a.m.]

## PART V. PROFESSIONAL ETHICS AND CONDUCT [ 204 PA. CODE CH. 81 ]

### Proposed Amendments to Pennsylvania Rule of Professional Conduct 7.3 Relating to Solicitation of Clients in Domestic Relations Actions

Notice is hereby given that The Disciplinary Board of the Supreme Court of Pennsylvania is planning to recommend to the Supreme Court of Pennsylvania that it adopt amendments to Pennsylvania Rule of Professional Conduct ("Rule") 7.3 relating to solicitation of clients in domestic relations actions, as set forth in Annex A.

Pennsylvania RPC 7.3 currently permits direct solicitation of clients through written communications, unless:

- (1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer;
- (2) the person has made known to the lawyer a desire not to receive communications from the lawyer; or
- (3) the communication involves coercion, duress, or harassment.

In November 2016, a legal practitioner in the Commonwealth alerted the Supreme Court and the Disciplinary Board to a troubling practice engaged in by some practitioners. Certain domestic relations attorneys have begun to monitor the court dockets and review county

legal journals to discover recently filed divorce actions. With this information, they promptly mail solicitation letters to the named defendants, informing the prospective client that a divorce has been filed against the defendant and offering legal counsel. In some situations, solicitations are sent and received before the complaint has been served. This practice has the potential for violent and even deadly consequences, where, for example, an abusive spouse, newly aware of the impending domestic action, is able to confront the plaintiff spouse, who has not yet served the action and has not yet taken safety precautions. Anecdotally, the Pennsylvania lawyer reported that she represented a woman who was a victim of abuse and who had planned her move from the marital home for the day after she filed the complaint in divorce. The defendant spouse, however, received a solicitation letter within 24 hours of the filing of the complaint, and on the evening before the plaintiff was to leave the marital home, the defendant spouse assaulted the plaintiff in front of their children.

The timing of domestic relations complaints and the details contained therein can be sensitive in nature; therefore, the service of such complaints is often strategically timed, with consideration for the plaintiff to take necessary protective steps. According to the Pennsylvania Coalition Against Domestic Violence, the time immediately after an individual leaves an abusive partner is the most dangerous time. Further, statistics show that more than half of domestic violence homicides occur during estrangement or while the victim is planning to leave the abuser.<sup>1</sup> In fact, "the extant research literature shows that women experience an increased risk of lethal violence when they leave intimate relationships with men."<sup>2</sup>

After this issue was brought to the Board's attention, the Board discussed the unfortunate role that legal practitioners may play in the escalation of violence and explored steps to address attorney conduct. Upon our review, Pennsylvania is not alone in experiencing this problem and is not alone in seeking a method to prevent escalation of domestic violence due to certain legal practices through regulation of attorney conduct.

The Ohio Rules of Professional Conduct permit targeted solicitation letters to prospective clients; however, pursuant to Rule 7.3(d), if a spouse files for divorce, a solicitation letter may not be sent to the defendant in divorce until the lawyer or law firm verifies that service is effectuated. Similarly, Tennessee Rule of Professional Conduct 7.3(b)(3) provides that in divorce or legal separation actions, an attorney must wait 30 days after the filing of the cause of action to solicit potential clients. Tennessee's comment to 7.3 explains that the prohibition against any solicitation within thirty (30) days of the filing of a complaint for divorce or legal separation is intended to reduce the risk of domestic violence and to allow the plaintiff spouse to take appropriate steps to seek shelter, obtain an order of protection, and/or pursue other relief.

Florida's Rule of Professional Conduct 4-7.18(b)(1)(G) is more limited in scope than the rules in Ohio and Tennessee. A Florida attorney is prohibited from sending an unsolicited written communication to a prospective client if the communication concerns a request for an injunction for protection against any form of physical violence; the communication is addressed to the

<sup>1</sup> Campbell, Jacqueline C., et al, "Accessing Risk Factors for Intimate Partner Homicide," *NIJ Journal* 250 (2003): 16. NCJ 196547.

<sup>2</sup> Websdale, Neil. *Understanding Domestic Homicide*. Boston, MA: Northeastern University Press (1999).

respondent in the injunction petition; and the lawyer knows or has reason to know that the respondent named in the injunction petition has not yet been served with notice of process in the matter.

Following consideration of the approaches taken in other jurisdictions, the Disciplinary Board proposes an amendment to 7.3 which, in effect, prohibits attorneys from soliciting defendants or respondents in domestic relations matters until 30 days have passed since the action was filed. The proposed amendment adds new paragraph (4) to provide that a lawyer may contact, or send written communication to, the target of the solicitation for the purpose of obtaining professional employment unless the communication is a solicitation to a party who has been named as a defendant or respondent in a domestic relations action. In such cases, the lawyer shall wait 30 days from the filing of the action before communicating with the named defendant or respondent. The Board proposes amending the commentary by adding new comment (8) to explain the reason for the 30-day prohibition against solicitation in domestic relations actions, specifically noting that the risk of violent confrontations may increase in these matters if a defendant or respondent is solicited prior to service of the action.

Interested persons are invited to submit written comments by mail or facsimile regarding the proposed amendments to the Office of the Secretary, The Disciplinary Board of the Supreme Court of Pennsylvania, 601 Commonwealth Avenue, Suite 5600, PO Box 62625, Harrisburg, PA 17106-2625, Facsimile number (717-231-3382), Email address Dboard.comments@pacourts.us on or before November 22, 2017.

*By the Disciplinary Board of the  
Supreme Court of Pennsylvania*

JULIA FRANKSTON-MORRIS, Esq.,  
*Secretary*

**Annex A**

**TITLE 204. JUDICIAL SYSTEM GENERAL PROVISIONS**

**PART V. PROFESSIONAL ETHICS AND CONDUCT**

**Subpart A. PROFESSIONAL RESPONSIBILITY**

**CHAPTER 81. RULES OF PROFESSIONAL CONDUCT**

**Subchapter A. RULES OF PROFESSIONAL CONDUCT**

**§ 81.4. Rules of Professional Conduct.**

The following are the Rules of Professional Conduct:

**INFORMATION ABOUT LEGAL SERVICES**

**Rule 7.3. Solicitation of Clients.**

\* \* \* \* \*

(b) A lawyer may contact, or send a written communication to, the target of the solicitation for the purpose of obtaining professional employment unless:

(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer;

(2) the person has made known to the lawyer a desire not to receive communications from the lawyer; [ or ]

(3) the communication involves coercion, duress, or harassment[ . ]; or

**(4) the communication is a solicitation to a party who has been named as a defendant or respondent in a domestic relations action. In such cases, the lawyer shall wait 30 days from the filing of the action before communication with the named defendant or respondent.**

**Comment:**

\* \* \* \* \*

(7) This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third-parties for the purposes informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

**(8) Some domestic relations matters, including but not limited to: divorce, custody, protection from abuse, involve either an alleged history of domestic violence or a potential for domestic violence. In such cases, a defendant/respondent party's receipt of a lawyer's solicitation prior to being served with the complaint can increase the risk of a violent confrontation between the parties. The prohibition in RPC 7.3(b)(4) against any solicitation within thirty (30) days is intended to reduce any such risk and allow for the plaintiff to take any appropriate steps.**

[Pa.B. Doc. No. 17-1569. Filed for public inspection September 22, 2017, 9:00 a.m.]

**Title 231—RULES OF CIVIL PROCEDURE**

**PART I. GENERAL**

**[ 231 PA. CODE CH. 1910 ]**

**Proposed Amendment of Pa.R.C.P. No. 1910.16-4**

The Domestic Relations Procedural Rules Committee is planning to propose to the Supreme Court of Pennsylvania the amendment of Pa.R.C.P. No. 1910.16-4 for the reasons set forth in the accompanying publication report. Pursuant to Pa.R.J.A. No 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 reports, notes, or comments in the proposal have been inserted by the Committee for the convenience of those using the rules. They neither will constitute a part of the rules nor will be officially adopted by the Supreme Court.

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

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

Bruce J. Ferguson, Counsel  
 Domestic Relations Procedural Rules Committee  
 Supreme Court of Pennsylvania  
 Pennsylvania Judicial Center  
 PO Box 62635  
 Harrisburg, PA 17106-2635  
 Fax: 717-231-9531  
 domesticrules@pacourts.us

All communications in reference to the proposal should be received by November 9, 2017. 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 Domestic Relations  
 Procedural Rules Committee*

DAVID J. SLESNICK, Esq.,  
*Chair*

**Annex A**

**TITLE 231. RULES OF CIVIL PROCEDURE**

**PART I. GENERAL**

**CHAPTER 1910. ACTIONS FOR SUPPORT**

**Rule 1910.3. Parties. Obligor. Obligee.**

(a) An action may be brought:

\* \* \* \* \*

(b) The trier of fact shall enter an appropriate order based upon the evidence presented, without regard to which party initiated the support action, filed a modification petition, or filed a petition for recovery of support overpayment. The **[ determination of which party will be the obligee and which will be the obligor will be made by the ]** trier of fact shall determine the party based upon the respective **monthly net** incomes of the parties, consistent with the support guidelines and existing law, and the custodial arrangements at the time of the initial or subsequent conference, hearing or trial. If supported by the evidence, the party named as the defendant in the initial pleading may be deemed to be the obligee, even if that party did not file a complaint for support. The provisions of this subdivision do not apply to parties seeking spousal support or alimony *pendente lite*. Parties seeking spousal support or alimony *pendente lite* must assert a claim in an appropriate pleading with proper notice served upon the other party.

(1) In general, the party who has primary custody of the children shall be the obligee of a child support order.

(2) **[ When ]** If the parties share custody of the children equally, the party with the higher income shall be the obligor as provided in **[ Rule 1910.16-4(c)(2) ] Pa.R.C.P. No. 1910.16-4(c)(3).**

\* \* \* \* \*

**Rule 1910.16-4. Support Guidelines. Calculation of Support Obligation, Formula.**

(a) The following formula shall be used to calculate the obligor's share of basic child support, either from the schedule in **[ Rule ] Pa.R.C.P. No. 1910.16-3** or the

formula in **[ Rule ] Pa.R.C.P. No. 1910.16-3.1(a)**, as well as spousal support and alimony *pendente lite* obligations. In **[ high income ] high-income** cases, Part IV shall be used as a preliminary analysis in the calculation of spousal support or alimony *pendente lite* obligations[ : ].

\* \* \* \* \*

(c) *Substantial or Shared Physical Custody.* **For purposes of this subdivision, the trier of fact shall calculate a party's percentage of time with the children by the number of overnights the children spend with the party during the year.**

(1) **[ When ]** If the children spend 40% or more of their time during the year with the obligor, a rebuttable presumption arises that the obligor is entitled to a reduction in the basic support obligation to reflect this time. This rebuttable presumption also applies in **[ high income ] high-income** cases decided pursuant to **[ Rule ] Pa.R.C.P. No. 1910.16-3.1**. Except as provided in subsection (2) below, the reduction shall be calculated pursuant to the formula set forth in Part II of subdivision (a) of this rule. **[ For purposes of this provision, the time spent with the children shall be determined by the number of overnights they spend during the year with the obligor. ]**

*Example.* If the obligor and the obligee have monthly net incomes of \$5,000 and \$2,300, respectively, their combined child support obligation is \$1,701 for two children. Using the income shares formula in Part I, the obligor's share of this obligation is 68%, or \$1,157. If the children spend 40% of their time with the obligor, the formula in Part II applies to reduce his or her percentage share of the combined support obligation to 58%, or \$987. If the children spend 45% of their time with the obligor, his or her percentage share of the combined obligation is reduced to 53%, or \$902. If the children spend equal time with both parents, the obligor's percentage share is reduced to 48%, or \$816.

(2) **If the obligor has little or no contact with the children, which for purposes of this rule is 10% or less of the children's time annually with the obligor, the trier of fact shall consider an upward deviation that increases the obligor's basic support obligation. In determining the amount of the upward deviation, the trier of fact shall consider substantial expenditures (e.g., meals, clothing, activities) incurred by the obligor for the benefit of the children. An upward deviation provided by this subdivision shall comply with Pa.R.C.P. No. 1910.16-5(a).**

**[ (2) ] (3)** Without regard to which parent initiated the support action, **[ when ]** if the children spend equal time with their parents, the Part II formula cannot be applied unless the obligor is the parent with the higher income. An order shall not be entered requiring the parent with the lower income to pay basic child support to the parent with the higher income. However, this subdivision shall not preclude the entry of an order requiring the parent with less income to contribute to additional expenses pursuant to Pa.R.C.P. No. 1910.16-6. Based upon the evidence presented, the trier of fact may enter an order against either party without regard to which party initiated the action. If the parties share custody equally and the support calculation results in the obligee receiving a larger share of the parties' combined **monthly net** income, then the court shall adjust the support obligation

so that the combined monthly net income is allocated equally between the two households. In those cases, spousal support or alimony *pendente lite* shall not be awarded.

\* \* \* \* \*

## PUBLICATION REPORT

### Recommendation 167

The Domestic Relations Procedural Rules Committee (Committee) is proposing an amendment to Pa.R.C.P. No. 1910.16-4 as the rule relates to the calculation of child support. Specifically, the proposed amendment will provide for an upward deviation in the amount of child support when an obligor has little or no contact with the child, which the proposed rule text defines.

Currently, the Explanatory Comment to Pa.R.C.P. No. 1910.16-4 suggests that an upward deviation is appropriate in certain circumstances; however, the rule text is silent on this issue. As a result, the practice of awarding an upward deviation is inconsistent across the Commonwealth. The support schedule includes the basic assumptions that the obligor has 30% of the overnights with the child and during the custodial time, the obligor makes direct expenditures on behalf of the child. The Committee proposes requiring an upward deviation if the trier of fact makes a finding that (1) an obligor has 10% or less custody of the child; and (2) the obligor does not provide direct expenditures on behalf of the child.

The Committee's proposed rule provides that the trier of fact shall have the discretion to award an appropriate amount for an upward deviation based on the facts of the case rather than including a formulaic method for determining the amount of the deviation. As with other deviations, the trier of fact would be required to state the reasons for and identify the facts justifying the deviation in writing consistent with Pa.R.C.P. No. 1910.16-5.

[Pa.B. Doc. No. 17-1570. Filed for public inspection September 22, 2017, 9:00 a.m.]

## PART II. ORPHANS' COURT RULES

### [ 231 PA. CODE PART II ]

#### Proposed Adoption of New Pa. O.C. Rule 14.3, Form G-05 and Amendment of Index to Appendix

The Orphans' Court Procedural Rules Committee is planning to propose to the Supreme Court of Pennsylvania the adoption of new Pennsylvania Orphans' Court Rule 14.3 and Expert Report Form (G-05), together with the amendment of the Index to the Appendix, for the reasons set forth in the accompanying explanatory report. Pursuant to Pa.R.J.A. No. 103(a)(1), the proposal is being published in the *Pennsylvania Bulletin* for comments, suggestions, or objections prior to submission to the Supreme Court.

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

Orphans' Court Procedural Rules Committee  
Supreme Court of Pennsylvania  
Pennsylvania Judicial Center  
PO Box 62635  
Harrisburg, PA 17106-2635  
FAX: (717) 231-9551  
orphanscourtproceduralrules@pacourts.us

All communications in reference to the proposal should be received by October 23, 2017. 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 Orphans' Court  
Procedural Rules Committee*

JOHN F. MECK, Esq.,  
*Chair*

### Explanatory Report

The Orphans' Court Procedural Rules Committee (the "Committee") proposes the adoption of new Pennsylvania Orphans' Court Rule 14.3 and Expert Report Form (G-05), together with the amendment of the Index to the Appendix.

#### *Background*

In 2013, the Court constituted a 38-member Elder Law Task Force ("Task Force") to formulate a plan for substantive improvements in the way Pennsylvania's court system interacts with elders, including the topics of guardianship, elder abuse, and neglect, and overall access to justice. In 2014, the Task Force delivered a comprehensive 284-page report detailing 130 specific recommendations to help lay the foundation for improvements in the courts and by other government entities relating to elder issues. The report contained a number of specific recommendations for amendment of the Orphans' Court Rules.

The report also proposed modification of existing statewide forms for guardianship matters and the addition of several new forms, including a form for the written deposition of an expert in uncontested guardianship proceedings. The goal of the form was to relieve the expert of the burden of testifying in person, as well as avoiding unnecessary expert fees in uncontested cases. Moreover, the need for one less witness to appear would ease scheduling difficulties and shorten proceedings.

#### *Prior Proposals*

In 2015, the Committee published for comment the Task Force's proposed form entitled "Deposition by Written Interrogatories of Physician or Licensed Psychologist" as part of a larger package of forms. *See* 45 Pa.B. 1070 (March 7, 2015). Notably, the form was not accompanied with procedural rules governing the use and admissibility of the form. The Committee received four comments related to the proposed form. The Committee reviewed these comments and formed a subcommittee, which included a physician and experienced practitioners, to formulate and recommend responsive revisions to the form. Ultimately, the subcommittee submitted a revised form to the Committee.

The Committee also considered whether the form should be self-executing or require an enabling rule. The Committee believed a rule was necessary to govern the circumstances in which the form may be used and to provide commentary guiding its intended use. Therefore, the Committee developed a new rule to implement the form.

In 2016, the Committee published proposed new Rule 14.6 and a revised form for comment. *See* 46 Pa.B. 2306 (May 7, 2016). Retitled "written deposition," the proposed form was intended to be completed by the evaluator and reflect the evaluator's assessment of the capacity of the alleged incapacitated person ("AIP"). *See also* 20 Pa.C.S.

§ 5518. In uncontested matters, the form could be submitted to the court in lieu of live testimony. The Committee received eight comments.

The form-related comments were provided to the subcommittee for further assessment. To assist the subcommittee, a physician undertook a review of the comments and authored feedback from a physician's perspective. Further, there was one particular aspect of the form (Question 9) addressing the AIP's ability to perform various listed functions that received specific comments from four commenters. The Chair invited several of those commenters to supplement their comments by providing proposed revisions for the subcommittee's consideration. Those proposed revisions were then considered by the subcommittee and then by the Committee.

Regarding the proposed rule text, a significant question arose as to the procedure for using the form. The sole precondition that incapacity be uncontested lacked the necessary structure to provide for the orderly and timely use of the form. If uncontested capacity was a precondition for the use of the form, then the Rule must establish a point earlier in the process of knowing whether incapacity will be contested—learning of a contest at the time of hearing defeats the purpose of the form.

#### *Current Proposal*

Tasked with devising a procedural mechanism to establish that precondition prior to the hearing and recognizing that incapacity is infrequently contested and customary procedural devices only add time to an already time sensitive matter, the Committee considered methods in other procedural bodies. Upon review, Pa.R.Crim.P. 574, which permits the admission of a certified forensic laboratory report in lieu of expert testimony, offered a framework for consideration. Here, instead of criminal defendant's exercising his/her right under the Confrontation Clause, the proposed Rule would be based upon whether an alleged incapacitated person seeks to exercise his/her right of cross-examination pursuant to 20 Pa.C.S. § 5518.1 ("Testimony as to the capacity of the alleged incapacitated person shall be subject to cross-examination by counsel for the alleged incapacitated person.").

Embracing this approach, the Committee eliminated "uncontested" as a pre-condition for use of the form by the petitioner, relying instead on 20 Pa.C.S. § 5518.1. A "cross-examination" trigger arguably sets a lower threshold for live testimony than a "contest" trigger because cross-examination does not necessarily translate into a contest; however, the statute requires that testimony be subject to cross-examination.

Preliminarily, the Committee concluded that, to make a knowing, intelligent, and voluntary decision whether to demand the testimony of an expert witness, the completed form must first be provided to the alleged incapacitated person or his/her counsel. However, this consensus led to a searching discussion about whether a notice and demand approach may lead to the routine appointment of counsel for the alleged incapacitated person to assist in making the decision to demand testimony. Members from higher volume counties and those counties with institutional care facilities expressed concern about the financial burden associated with appointment of counsel in every case, especially when their experience suggested that a large majority of petitions involve uncontested incapacity. Ultimately, the Committee found that the notice and demand approach provided the necessary procedural device to trigger the admission of

the form in lieu of testimony notwithstanding the potential impact on those counties that do not routinely appoint counsel.

Regarding the name of the form and title of the Rule, it has been changed from "written deposition" to "expert report" to better reflect its substance.

The Committee discussed whether the Rule should address if the form may be used for emergency petitions. Members thought that the timeline for emergency petitions was too abbreviated to provide for a notice and demand procedure in those circumstances. Rather than entirely foreclose the use of the form in emergency petitions, the Committee believed it was best to leave its use to judicial discretion. This approach, as reflected in paragraph (a), permits the judge to determine on an *ad hoc* basis whether the form can be used for an emergency petition. The Committee did not consider this a burden on the judge because these cases are closely managed as a matter of practice.

Following the contours of Pa.R.Crim.P. 574, the Rule reflects a "notice and demand" approach at paragraphs (b) and (c). In order to provide timely notice, paragraph (b)(1) contains a ten-day notice in which a copy of the completed form must be served upon the alleged incapacitated person or his/her counsel, if counsel has been appointed, and all other counsel of record. The Committee deliberated on whether the other counsel of record should receive a copy of the completed form or whether notice of this form was sufficient. The Committee believed that if counsel had entered an appearance, then counsel should be served the same documents as the alleged incapacitated person. To ensure timely service upon the alleged incapacitated person, paragraph (b)(1) requires personal service by a competent adult as the alleged incapacitated person would be less likely to have access to email or a facsimile in order to benefit from the full penumbra of service options under Rule 4.3.

As set forth in paragraph (b)(2), other persons entitled to notice of the petition and hearing would only receive notice that the petitioner intends to proceed with a form rather than in-person testimony or a deposition. The notice-only language was intended to address privacy concerns about wider dissemination of the report.

Paragraph (c) provides for a rather expeditious five-day turnaround for filing a demand for live testimony at the hearing. However, this expedited requirement is necessary to ensure a timely hearing. If a demand is filed, then the petitioner must either present the expert at the hearing or conduct a deposition where the expert would be subject to cross-examination. A demand is likely going to require a continuance of the hearing unless the expert is unexpectedly available on short notice. Please note that the demand provision does not extend to those who are entitled to service of the notice of the petition and hearing. If anyone other than the alleged incapacitated person wishes to object, then he/she should seek permission to intervene rather than file a demand.

The Committee considered an alternative where there was no established deadline to file a demand. This concept reflected the practicality that a judge would not permit the use of a form in lieu of live testimony if the alleged incapacitated person contested incapacity and demanded the presence of an expert at the hearing, but either did not file a demand or filed an untimely demand. However, the Committee rejected this alternative believing the procedural rule should establish a requirement for

a timely demand, albeit aspirational, so that the petitioner may rely upon the absence of a timely demand in preparing for the hearing.

The Committee is cognizant that circumstances so differ among alleged incapacitated persons and guardianship proceedings that creating one rule and one form to be used in all proceedings may be challenging, especially for the timing and service requirements. The Committee proposed paragraph (e) to provide the court with flexibility in applying the requirements for notice and demand. While the "interest of justice" standard may escape precise definition, it is not a foreign concept in procedural rules. See, e.g., Pa.R.Crim.P. 567(B)(1) (failure of criminal defendant to file a notice of alibi). The Committee believes the phrase is sufficiently fluid to permit the judge to exercise his or her discretion to ensure a fair, just, and efficient proceeding.

On August 19, 2017, the Committee republished for comment a revised proposal that would rescind and replace Chapter XIV of the Pennsylvania Orphans' Court Rules, Pa. O.C. Rules 14.1—14.5, together with related forms. See 47 Pa.B. 4815 (August 19, 2017). The intention of that proposal was to respond to Elder Law Task Force recommendations and to provide more comprehensive statewide rules establishing uniformity and consistency for guardianship proceedings. Within that proposal is Rule 14.3 (Written Deposition). This proposal would replace Rule 14.3 and Form G-05 when both proposals are integrated and submitted to the Court.

The Committee invites all comments, concerns, and suggestions regarding this proposal.

**Annex A**

**TITLE 231. RULES OF CIVIL PROCEDURE**

**PART II. ORPHANS' COURT RULES**

**CHAPTER XIV. GUARDIANSHIPS OF INCAPACITATED PERSONS**

**Rule 14.3 Alternative Proof of Incapacity: Expert Report in Lieu of In-Person or Deposition Testimony of Expert.**

(a) A petitioner may seek to offer into evidence an expert report for the determination of incapacity in lieu of testimony, in-person or by deposition, of an expert using the form provided in the Appendix to these rules. In an emergency guardianship proceeding, an expert report may be offered into evidence if specifically authorized by the court.

(b) *Notice.*

(1) If a petitioner seeks to offer an expert report permitted under paragraph (a), the petitioner shall serve a copy of the completed report upon the alleged incapacitated person's counsel and all other counsel of record pursuant to Rule 4.3 or, if unrepresented, upon the alleged incapacitated person, pursuant to Pa.R.C.P. No. 402(a) by a competent adult no later than ten (10) days prior to the hearing on the petition.

(2) If a petitioner seeks to offer an expert report, as permitted under paragraph (a), the petitioner shall serve pursuant to Rule 4.3 a notice of that fact upon those entitled to notice of the petition and hearing no later than ten (10) days prior to the hearing on the petition.

(3) The petitioner shall file a certificate of service with the court as to paragraphs (b)(1) and (b)(2).

(c) *Demand.*

(1) Within five (5) days of service of the completed report provided in paragraph (b)(1), the alleged incapacitated person's counsel or, if unrepresented, the alleged incapacitated person, may file with the court and serve upon the petitioner pursuant to Rule 4.3 a demand for the testimony of the expert.

(2) If a demand for testimony is filed and served as provided herein, then the expert report may not be admitted and the expert must provide testimony at the hearing.

(d) Unless otherwise demanded pursuant to paragraph (c)(2), in the sole discretion of the court, incapacity may be established through the admission of an expert report prepared in compliance with the form provided in the Appendix to these rules. The expert must be qualified by training and experience in evaluating individuals with incapacities of the type alleged in the petition. The expert must sign, date, and verify the completed interrogatories.

(e) In the interest of justice, the court may excuse the notice and demand requirements set forth in paragraphs (b) and (c).

**Explanatory Comment:** This rule is intended to permit the alleged incapacitated person to exercise the right to cross-examine testimony as to the capacity of the alleged incapacitated person. See 20 Pa.C.S. § 5518.1. Permitting the use of an expert report in compliance with this rule replaces the requirement of testimony, in-person or by deposition, of an expert. See 20 Pa.C.S. § 5518. The rule is permissive; whether an expert report is admitted in lieu of testimony is in the sole discretion of the court. Nothing in this rule is intended to preclude the court from requiring testimony from the expert or otherwise requiring supplementation.

**INDEX TO APPENDIX**

**ORPHANS' COURT AND REGISTER OF WILLS FORMS ADOPTED BY SUPREME COURT PURSUANT TO Pa. O.C. Rule 1.8**

Available as Fill-in Forms on Website of Administrative Office of Pennsylvania Courts <http://www.pacourts.us/Forms/OrphansCourtForms.htm>

**Orphans' Court and Administration Forms**

\* \* \* \* \*

**B. Guardianship Forms**

\* \* \* \* \*

6. Guardianship of Minor: Petition for Adjudication/Statement of Proposed Distribution Pursuant to Pa. O.C. Rule 2.4 ..... OC-04\*\*

**7. Expert Report..... G-05**

**C. Abortion Control Act Forms**

\* \* \* \* \*

\*\* Form OC-4 is not reprinted here and is located under Audit and Administration Forms at No. 4.

**INSTRUCTIONS FOR SUBMITTING AN EXPERT REPORT**

To establish incapacity, the petitioner must present testimony from an individual qualified by training and experience in evaluating person with incapacities of the type alleged by the petitioner. As an accommodation to such expert witnesses, the court may accept a complete and legible expert report in accordance with the attached form in lieu of expert testimony, whether in person or by deposition, unless otherwise required by rule or order of court.

G-05 created XX-XX-XX



COURT OF COMMON PLEAS OF  
 \_\_\_\_\_ COUNTY PENNSYLVANIA  
 ORPHANS' COURT DIVISION

**EXPERT REPORT**

RE: \_\_\_\_\_  
*An Alleged Incapacitated Person (AIP)*

No. \_\_\_\_\_

**PART I: PROFESSIONAL BACKGROUND** (You may attach your curriculum vitae, if it provides answers to Questions 1 through 5. Please answer those questions not covered by curriculum vitae.)

1. Name: \_\_\_\_\_ Title: \_\_\_\_\_

2. Professional Address: \_\_\_\_\_

3. Complete education information:

	Name of Institution	Type of Degree Received	Date Completed
Undergraduate			
Graduate			
Post-Graduate			

4. Do you have any active professional licenses?  Yes  No

If **yes**, indicate in what state or states you are licensed as well as the date(s) issued.

\_\_\_\_\_  
 \_\_\_\_\_

List any board certifications: \_\_\_\_\_

5. An Incapacitated Person is legally defined as: An adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he/she is partially or totally unable to manage his/her financial resources or to meet essential requirements for his/her physical health and safety.

Do you have experience evaluating whether or not an individual is incapacitated?  Yes  No

If **yes**, indicate the basis of your experience.

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**PART II: ALLEGED INCAPACITATED PERSON (AIP)**

6. a. Have you previously treated, assessed, or evaluated the AIP?

Yes     No

b. Indicate the date(s) and location of any treatment, assessment, or evaluation you have provided or made over the last two (2) years:

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c. If 6a. is yes, what tests have you or others administered, e.g., mini mental status exam (MMSE), Montreal Cognitive Assessment (MOCA), St. Louis University Mental Status Exam (SLUMS), etc.? List dates administered and the score. (Attach test results, not just the score.)

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7. What is the present condition of the AIP? List all known medical and psychiatric diagnoses and current symptoms. (You may attach a list from your records.)

<u>Diagnosis</u>	<u>Symptoms/Manifestations</u>

8. List all known medications, including over-the-counter, that the AIP is taking. For each known medication, indicate, if known, the prescribing physician and the diagnosis for which the medication was prescribed or the reason for taking. (You may attach a list from your records.)

<u>Medication</u>	<u>Diagnosis/Reason Taken</u>	<u>Prescribing Physician</u>

9. Indicate the AIP’s ability to perform the following functions:

	Unimpaired	Needs Some Help (Explain in #10 )	Totally Impaired	Not Assessed or Not Enough Information
Receiving and evaluating information effectively				
Communicating decisions				
Ability to give informed consent				
Short-term memory				
Long-term memory				
Activities of daily living				
Managing finances (including paying bills, making deposits, withdrawals and working with financial institutions)				
Managing health care (including following doctor’s orders and managing/taking medications)				
Providing for physical safety				
Responding to emergency situations				
Ability to resist scams				

10. For any response in Question 9 where the AIP “needs some help,” please describe the type and extent of assistance needed.

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11. What recommendations have you made or would you make concerning services necessary to meet the essential requirements for the AIP’s physical health and safety?

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12. What recommendations have you made or would you make concerning management of the AIP’s finances?

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

13. As indicated in Question 5, an Incapacitated Person is legally defined as: An adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he/she is partially or totally unable to manage his/her financial resources or to meet essential requirements for his/her physical health and safety.

In your expert opinion, within a reasonable degree of professional certainty and based on your knowledge, skills, experience, and education, is the AIP incapacitated?

- Yes, totally impaired       Yes, partially impaired       No

14. In your opinion, the most appropriate, least restrictive living situation for the AIP is (check one):

- The AIP can be left alone without supervision
- Home ( with part-time home health aide or  24/7 assistance)
- Independent living facility (room and board provided, emergency services readily available)
- Assisted living facility (room and board provided, assistance with some activities of daily living)
- Secure facility (Alzheimer’s/Mental Health for safety and basic needs)
- Skilled nursing facility

15. If your responses in Question 9 indicated that the AIP is totally impaired or “needs some help”, do you expect the AIP’s abilities in the next 6 months to (Check best estimate):

- Stay the same       Improve       Decline

Please explain:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**PART III: GUARDIANSHIP AND SERVICES**

16. Are you aware of any circumstances, medical or otherwise, that create a need for the appointment of an emergency guardian for the AIP?

- Yes       No

If yes, indicate reasons:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

17. The AIP is required to be at the hearing, absent circumstances that could cause harm to the AIP. Putting aside whether the court proceeding may be moderately upsetting to, confusing to or not understood by the AIP, do you believe that the AIP's presence at the hearing would cause harm to the AIP's physical or mental condition?

Yes             No

Indicate reason for response:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

18. Please provide any additional information that could assist the court in determining incapacity.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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I verify that the foregoing information is correct to the best of my knowledge, information and belief; and that this verification is subject to the penalties of 18 Pa.C.S. § 4904 relative to unsworn falsification to authorities.

\_\_\_\_\_  
*Date*

\_\_\_\_\_  
*Signature*

\_\_\_\_\_  
*Name (type or print)*

\_\_\_\_\_  
*Address*

\_\_\_\_\_  
*City, State, Zip*

\_\_\_\_\_  
*Telephone*

\_\_\_\_\_  
*Email*

# DISCIPLINARY BOARD OF THE SUPREME COURT

## Notice of Suspension

Notice is hereby given that Deborah Steincolor (# 34086), having been suspended from the practice of law by Order of the Supreme Court of New Jersey dated November 17, 2016, the Supreme Court of Pennsylvania issued an Order dated September 8, 2017 placing Deborah Steincolor on temporary suspension from the practice of law in the Commonwealth of Pennsylvania, consistent with the Order of the Supreme Court of New Jersey, effective October 8, 2017. In accordance with Rule 217(f), Pa.R.D.E., since this formerly admitted attorney resides outside the Commonwealth of Pennsylvania, this notice is published in the *Pennsylvania Bulletin*.

JULIA M. FRANKSTON-MORRIS, Esq.,  
*Secretary*  
*The Disciplinary Board of the*  
*Supreme Court of Pennsylvania*

[Pa.B. Doc. No. 17-1572. Filed for public inspection September 22, 2017, 9:00 a.m.]

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