

THE COURTS

Title 204—JUDICIAL SYSTEM GENERAL PROVISIONS

PART V. PROFESSIONAL ETHICS AND CONDUCT [204 PA. CODE CH. 83]

Amendment of Rule 402 of the Pennsylvania Rules of Disciplinary Enforcement; No. 59 Disciplinary Rules; Doc. No. 1

Order

Per Curiam:

And Now, this 23rd day of May, 2007, Rule 402 of the Pennsylvania Rules of Disciplinary Enforcement is amended to read as follows.

This Order shall be processed in accordance with Rule 103(b) of the Pennsylvania Rules of Judicial Administration. The amendments adopted hereby shall take effect upon publication in the *Pennsylvania Bulletin* and shall govern all matters thereafter commenced and, insofar as just and practicable, matters then pending.

Annex A

TITLE 204. JUDICIAL SYSTEM GENERAL PROVISIONS

PART V. PROFESSIONAL ETHICS AND CONDUCT

Subpart B. DISCIPLINARY ENFORCEMENT

CHAPTER 83. PENNSYLVANIA RULES OF DISCIPLINARY ENFORCEMENT

Subchapter D. MISCELLANEOUS PROVISIONS

Rule 402. Access to Disciplinary Information and Confidentiality.

(a) Except as provided in subdivisions (b) [**and**], (d) **and** (k), all proceedings under these rules shall be open to the public after:

* * * * *

(c) Until the proceedings are open under subdivision (a) or (b), all proceedings involving allegations of misconduct by or disability of an attorney shall be kept confidential unless:

* * * * *

(3) in matters involving alleged disability, the Supreme Court enters its order transferring the respondent-attorney to inactive status pursuant to Enforcement Rule 301 (relating to proceedings where an attorney is declared to be incompetent or is alleged to be incapacitated); or

(4) [**the proceeding is based upon allegations that have become generally known to the public; or**

(5)] there is a need to notify another person or organization, including the Lawyers' Fund for Client Security, in order to protect the public, the administration of justice, or the legal profession.

* * * * *

(k) If a formal proceeding results in the imposition of private discipline or dismissal of all the charges, the proceeding shall cease to be open to

the public when the decision to impose private discipline or dismiss the charges becomes final, unless the respondent-attorney requests that the record of the proceeding remain open to the public.

Official Note: Paragraph (d)(2) is based on 18 Pa.C.S. § 5108 (relating to compounding). Otherwise Disciplinary Counsel may be in the anomalous position of violating Rule 8.4 of the Pennsylvania Rules of Professional Conduct.

Although subdivision (k) provides that a formal proceeding that becomes open to the public under subdivision (a) will subsequently be closed if it results in the imposition of private discipline or dismissal of all the charges, the closing of the proceeding cannot change the fact that the proceeding was open to the public for a period of time. Thus, subdivision (k) makes clear that the respondent-attorney may request that the record of the proceeding remain open to demonstrate that the charges were dismissed or only private discipline was imposed.

[Pa.B. Doc. No. 07-1005. Filed for public inspection June 8, 2007, 9:00 a.m.]

Title 231—RULES OF CIVIL PROCEDURE

PART I. GENERAL

[231 PA. CODE CH. 1915]

Order Amending Rules 1915.8 and 1915.18; No. 476 Civil Procedural Rules; Doc. No. 5

Order

Per Curiam:

And Now, this 23rd day of May, 2007, Rules 1915.8 and 1915.18 of the Pennsylvania Rules of Civil Procedure are amended as follows.

This order shall be processed in accordance with Pa.R.J.A. 103(b) and shall be effective August 1, 2007.

Mr. Justice Fitzgerald did not participate in the consideration or decision of this matter.

Annex A

TITLE 231. RULES OF CIVIL PROCEDURE

PART I. GENERAL

CHAPTER 1915. ACTIONS FOR CUSTODY, PARTIAL CUSTODY AND VISITATION OF MINOR CHILDREN

Rule 1915.8. Physical and Mental Examination of Persons.

(a) The court may order the [**child or a party**] **child(ren) and/or any party** to submit to **and fully participate in** an evaluation by an appropriate expert or experts. The order, **which shall be substantially in the form set forth in Rule 1915.18**, may be made upon the court's own motion [**or on**], **upon the motion of a party** with reasonable notice to the person to be examined,

[and] or by agreement of the parties. The order shall specify the place, manner, conditions and scope of the examination and the person or persons by whom it [is to] shall be made and to whom distributed. In entering an order directing an evaluation pursuant to this rule, the court shall consider all appropriate factors including the following, if applicable:

(1) the allocation of the costs, including insurance coverage, if any, attendant to the undertaking of the evaluation and preparation of the resultant report and court testimony of any appointed expert;

(2) the execution of appropriate authorizations and/or consents to facilitate the examination;

(3) any deadlines imposed regarding the completion of the examination and payment of costs;

(4) the production of any report and of underlying data to counsel and/or any unrepresented party upon the completion of the examination; and

(5) any additional safeguards that are deemed appropriate as a result of the alleged presence of domestic violence and/or child abuse.

(b) [Where the expert is appointed upon the court's motion] Unless otherwise directed by the court, the expert shall deliver to the court [and], to the attorneys of record [, or to the parties if there are no attorneys of record] and to any unrepresented party, copies of [a detailed written report] any reports arising from the evaluation setting out the findings, results of all tests made, diagnosis and conclusions [within the time provided in subdivision (d) of this rule]. No reports shall be filed of record or considered evidence unless and until admitted by the court. Any report which is prepared at the request of a party, with or without a court order, and which a party intends to introduce at trial, must be delivered to the court and the other party at least thirty days before trial. If the report or any information from the evaluator is provided to the court, the evaluator shall be subject to cross-examination by all counsel and any unrepresented party without regard to who obtains or pays for the evaluation.

(c) [Where the expert evaluation is obtained upon motion of a party, the expert shall deliver to that party a detailed written report setting out the findings, results of all tests made, diagnosis and conclusions within the time provided in subdivision (d) of this rule.

(d) Each expert's report shall be filed and/or served

(1) within sixty days of the entry of the order where the county pays the expert, or

(2) within sixty days after full payment of the expert fee(s) where one or both parties are directed to pay.

(e) The court may assess the cost of the examination and report on any or all of the parties or as otherwise permitted by law.

(f) The order shall require that payment be made within twenty days of the date of the order.

(g)] If a party refuses to obey an order of court made under subdivision (a) of this rule, the court may make an order refusing to allow the disobedient party to support or oppose designated claims or defenses, [or] prohibiting the party from introducing in evidence designated documents, things or testimony, [or] prohibiting the party from introducing evidence of physical or mental condition, or making such other order as is just. The willful failure or refusal of a party to comply with an order entered pursuant to this rule may also give rise to a finding of contempt and the imposition of such sanctions as may be deemed appropriate by the court, including, but not limited to, an adverse inference against the non-complying party.

[(h)] (d) A petition for contempt alleging failure to comply with an order entered pursuant to subdivision (a) of this rule shall be treated in an expedited manner.

[(i) Any report which is prepared at the request of a party, with or without a court order, and upon which a party intends to rely at trial, must be served upon the court and the opposing party thirty days before trial.

Explanatory Comment—1981

A child custody determination may often involve consideration of the mental and physical condition of both the parties to the proceeding and the child. Rule 1915.8 provides a procedure for the mental and physical examination of persons, similar to that provided by Discovery Rule 4010. One major difference between this rule and the Discovery Rule is the express statement that "the order may be made upon the court's own motion or on motion of a party. . . ."

The power of the court to order a physical or mental examination on its own motion is a concrete example of the direction which custody law has taken. As expressed by Judge Lawrence W. Kaplan, "The Child Advocate in Custody Litigation," in PBI publication No. 1980-140, p. 86, supra:

The Superior Court, in exercising its actual adjudicative responsibility and perceived administrative stewardship over the custody law of Pennsylvania, has taken the unprecedented step of requiring the trial judge to develop the record where it is deficient for the parties' failure to fully explore the relevant issues. *Lewis v. Lewis*, 267 Pa. Super. 235, 406 A.2d 781 (1979). By imposing this requirement, Pennsylvania's custody law challenges bench and bar in a fashion unmatched in other areas of the law.

This challenge was noted by the editors of the *Pennsylvania Family Lawyer*, Vol. 1, No. 1, p. 3 (January 1980):

An increased substantial burden is being placed upon judges and attorneys to develop a custody case to its fullest potential to insure that a proper award will be made. There is an affirmative duty to develop a record and to conduct a thorough investigation with the aid of outside agencies.

The reason for the challenge imposed by the Superior Court is clearly stated by the *Pennsylvania Family Lawyer*, p. 7:

Custody cases are not akin to most other cases in the adversary process. The focus is not on parental rights but unrepresented children's rights.

The Superior Court has placed litigants to a custody dispute on notice that the court is bound to explore all facets of the action to determine the best interest of the child. Physical and mental condition of the parties and of the child is but one facet to be explored.

There are two additional points to be noted. First, subdivision (b) provides that the examining physician or psychologist is to deliver a copy of his report to both the court and the parties. Second, subdivision (b) provides sanctions which may be imposed upon a party who refuses to obey an order to submit to an examination.

Explanatory Comment—1994

In order to make a proper determination in a child custody case, the court often requires information which can only be supplied by an expert evaluation of the parties and the subject child. Rule 1915.8 provides a procedure for expert evaluation of persons. Unlike the civil discovery rule (R.C.P. 4010), Rule 1915.8 provides that expert evaluations may be ordered upon the court's own motion as well as the motion of a party.

The proposed revisions to Rule 1915.8 add definite time limits during which the cost of evaluations must be paid, the evaluation themselves completed, and the reports provided to the court and counsel. The time limits are imposed in response to complaints of unreasonable delays in the completion of evaluations. The rule also provides a range of sanctions which the court may impose for failure to comply with an order directing evaluations, and provides that a petition for contempt for failure to comply with an order entered under this rule is to be treated in an expedited fashion.]

Explanatory Comment—2007

This rule addresses the process for any number of expert evaluations a court may order in a custody case, including, but not limited to, physical, mental health, custody and/or drug and alcohol evaluations, and/or home studies. Since the initial promulgation of this rule in 1981, the frequency of utilizing professionals as expert witnesses in child custody litigation has increased considerably. In appropriate cases, evaluations have served as a means to provide the court with a full and complete record and to facilitate settlement of the litigation.

The proposed revisions to Rule 1915.8 are intended to afford the trial court and the parties a more flexible and case-sensitive means of determining the scope and parameters of a physical and/or mental examination, including deadlines, costs, underlying data, and access. In many instances, the previous sixty-day deadline was impractical and ignored. While some cases demanded that the evaluation be completed in less than 60 days, others demanded far more time than that. The revisions to this rule also specifically permit the trial court to draw an adverse inference from one party's failure to comply with an order pursuant to this rule.

Rule 1915.18. Form of Order Directing Expert Examination and Report.

The order of court directing expert evaluation in a custody matter pursuant to Rule 1915.8 shall be in substantially the following form:

(Caption)
ORDER OF COURT

AND NOW, this ____ day of ____, [19] 20__, it is hereby ORDERED, that:

[1) Home evaluations will be conducted by _____. The cost of the home evaluations shall be \$ _____.

2) Psychological evaluations will be conducted by _____. The cost of the psychological evaluation shall be \$ _____, but may increase if the issues are especially complex or numerous individuals must be interviewed.

Note: Alternatives are provided for paragraph 3) to accommodate local practice.

3) The cost of the evaluations shall be borne by _____, subject to the Court's right to allocate later. Payment to the evaluator(s) shall be made within twenty (20) days of the date of this order. Upon receipt of payment, the evaluator(s) shall contact the parties for appointments. The evaluations shall be completed and delivered to the (Court) (counsel of record or the parties, if they are unrepresented) within sixty days of receipt of full payment.

OR

3) The cost of the evaluations shall be borne by the county, subject to reimbursement by _____. Upon receipt of a copy of this order, the evaluator(s) shall contact the parties for appointments. The evaluations shall be completed and delivered to the (Court) (counsel of record or the parties, if they are unrepresented) within sixty days of the date of this order.

4) Upon completion of the evaluation reports, either party may schedule a (CONCILIATION/PRETRIAL CONFERENCE) before the undersigned.]

1. The evaluator shall be _____ or will be selected by the parties.

2. The evaluator shall conduct a

Physical Evaluation

Psychological Evaluation

Custody Evaluation

Drug and/or Alcohol Evaluation

Home Study

Other (Specify) _____

3. The evaluator shall shall not make specific recommendations for legal and physical custody. If the evaluator makes specific recommendations, the evaluator shall state the specific reasons for the recommendations.

4. The parties shall participate fully with the evaluator on a timely basis, including retaining the evaluator upon appropriate terms, scheduling appointments, paying promptly, participating in all sessions and in appropriate testing recommended by the evaluator and executing any reasonable consents relating to themselves and their children.

5. Both parties shall promptly cooperate to maximize the use of available insurance coverage, if any, and to notify the other party of the result. The plaintiff defendant shall submit the costs

to his or her insurance first. The cost of the unreimbursed portion of the evaluation shall preliminarily be allocated between the parties with the plaintiff paying _____% and the defendant paying _____% without prejudice to the ultimate apportionment of such costs by subsequent agreement of the parties or order of court.

6. The cost of the evaluation shall be borne by the county, subject to reimbursement by _____.

7. The cost for the evaluator's time for depositions and/or testimony for hearing shall be allocated _____% to the plaintiff and _____% to the defendant or paid by the party seeking the testimony.

8. The evaluator may consult with and/or interview any person the evaluator reasonably believes can provide relevant information, including other experts and/or fact witnesses.

9. The evaluator may utilize the services of another qualified professional (e.g. to perform additional services) without court approval.

10. Subject to the applicable rules of evidence, the evaluator's file (including notes, exhibits, correspondence, test interpretations and, to the extent it is not a violation of copyright law or applicable professional rules, raw test data) shall promptly be made available to counsel for the parties.

11. Provided that the parties cooperate on a timely basis, the evaluator shall deliver his or her report to counsel for the parties, any

unrepresented party, the guardian ad litem, if any, and to the court at least _____ days prior to the first day of trial. The report shall not be filed of record.

12. Prior to and/or subsequent to the submission of the evaluator's written report, counsel for the parties shall not be permitted to communicate with the evaluator as to substantive issues, without the consent or direct participation of counsel for the other party.

13. If the report or any information from the evaluator is provided to the court, the evaluator shall be subject to cross examination by all counsel and any unrepresented party regardless of who obtains or pays for the services of the evaluator.

14. The evaluator shall be provided with a copy of this order.

15. The evaluator's report shall not be inappropriately disseminated.

16. Other provisions: _____

FAILURE TO COMPLY WITH THE TERMS OF THIS ORDER MAY RESULT IN FINES, IMPRISONMENT OR OTHER SANCTIONS.

BY THE COURT:

J.

[Pa.B. Doc. No. 07-1006. Filed for public inspection June 8, 2007, 9:00 a.m.]
