

# **Affidavit of Service of Original Process by Mail**

Service Form 1

Service Form 1  
Original Process by Mail  
Instructions

**Affidavit of Service of Original Process by Mail**

*The numbers on these instructions correspond with the numbers in the boxes on the form. Use the form with the boxes to guide you through filling out the blank form.*

- Box 1: Print the name of the county in which you filed.
- Box 2: Print your name exactly as you wrote it on the Complaint.
- Box 3: Print the docket number assigned by the office where legal pleadings are filed.
- Box 4: Print the name of the defendant exactly as is appears on the Complaint.
- Box 5: Print the date you mailed the court documents.
- Box 6: Print your name.
- Box 7: If you filed a divorce case, check here making sure you sent everything listed.
- Box 8: If you filed a custody case, check here making sure you sent everything listed.
- Box 9. Print the date the defendant signed the postal service "green card."
- Box 10: Print today's date.
- Box 11: Sign your name.

**On a separate piece of paper, tape the green card, with the date and signature side showing, attach the paper to the Affidavit and file it with the office where legal pleadings are filed.**

IN THE COURT OF COMMON PLEAS OF 1 COUNTY, PENNSYLVANIA  
 CIVIL ACTION

2  
 Plaintiff

4 vs.  
 Defendant

No. 3

**AFFIDAVIT OF SERVICE BY PERSONAL SERVICE**  
 Pursuant to 1930.4

I, 5, hereby depose and say that I am 18 years or older, and am not a 6 to the action, nor an employee or a relative of a party.

On 7 I personally served the defendant by handing to him or her 8 Complaint in Divorce, Notice to Defend and Claim Rights, and Notice of availability of Counseling, 8 Custody Complaint, Notice to Defend, and blank Criminal Record / Abuse History.

I verify that the statements in this document are true and correct to the best of my knowledge, information, and belief. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

Date: 9

Respectfully Submitted,

10  
 Signature of Person who Served Defendant (not Plaintiff)

IN THE COURT OF COMMON PLEAS OF \_\_\_\_\_ COUNTY, PENNSYLVANIA  
CIVIL ACTION

\_\_\_\_\_  
Plaintiff

vs.

\_\_\_\_\_  
Defendant

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

**AFFIDAVIT OF SERVICE BY PERSONAL SERVICE**  
**Pursuant to 1930.4**

I, \_\_\_\_\_, hereby depose and say that I am 18 years or older, and am not a party to the action, nor an employee or a relative of a party.

On \_\_\_\_\_ I personally served the defendant by handing to him or her a:

- \_\_\_\_\_ Complaint in Divorce, Notice to Defend and Claim Rights, and Notice of availability of Counseling,
- \_\_\_\_\_ Custody Complaint, Notice to Defend, and blank Criminal Record/Abuse History.

I verify that the statements in this document are true and correct to the best of my knowledge, information, and belief. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

Respectfully Submitted,

Date: \_\_\_\_\_

\_\_\_\_\_  
Signature of Person who Served Defendant  
(not Plaintiff)

# **Affidavit of Personal Service**

Service Form 2

## **Affidavit of Personal Service**

*The numbers on these instructions correspond with the numbers in the boxes on the form. Use the form with the boxes to guide you through filling out the blank form.*

Box 1: Print the name of the county in which you filed.

Box 2: Print your name exactly as you wrote it on the Complaint.

Box 3: Print the docket number assigned by the office where legal pleadings are filed.

Box 4: Print the name of the defendant exactly as it appears on the Complaint.

Box 5: Print the name of the person who is serving the court papers.  
Pa. R.C.P. 76 "Competent Adult".

Box 6: Print the date the papers were given to the Defendant.

Box 7: If you are filing for divorce, check this line.

Box 8: If you are filing for custody, check this line.

**THE PERSON SERVING THE PAPERS MUST COMPLETE THE FORM.**

**HE OR SHE MUST READ THE STATEMENT BEFORE SIGNING.**

Box 9: Print today's date.

Box 10: The person who served the Defendant must sign his or her name.

**File this form in the office where legal pleadings are filed.**

IN THE COURT OF COMMON PLEAS OF 1 COUNTY, PENNSYLVANIA  
CIVIL ACTION

2  
Plaintiff

No. 3

4 vs.  
Defendant

**AFFIDAVIT OF SERVICE BY MAIL**  
Pursuant to Pa. R.C.P. 1930.4

I, On 5, (date documents mailed) I 6, Plaintiff

7 within action, mailed a copy of the:

8 **Divorce:** Divorce Complaint, Notice to Defend and Claim Rights, and Notice of Availability of Counseling

**Custody:** Custody Complaint, Notice to Defend, and Criminal Record / Abuse History Verification

to the Defendant by Certified Mail, Return Receipt Requested, Deliver to Addressee Only and regular mail at Defendant's last known address, as indicated on the attached mailing receipt. 9

2. On \_\_\_\_\_, (date of defendant's signature on green return card), Defendant received the aforesaid Complaint. The mailing receipt and return receipt card evidencing the same are attached hereto and made a part hereof.

I verify that the statements in this document are true and correct to the best of my knowledge, information, and belief. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

Respectfully Submitted,

Date: 10

11  
Plaintiff's Signature

IN THE COURT OF COMMON PLEAS OF \_\_\_\_\_ COUNTY, PENNSYLVANIA  
CIVIL ACTION

\_\_\_\_\_  
Plaintiff

vs.

\_\_\_\_\_  
Defendant

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

**AFFIDAVIT OF SERVICE BY MAIL**  
Pursuant to Pa. R.C.P. 1930.4

I. On \_\_\_\_\_, (date documents mailed) I \_\_\_\_\_, Plaintiff  
in the within action, mailed a copy of the:

\_\_\_ **Divorce:** Divorce Complaint, Notice to Defend and Claim Rights, and Notice  
of Availability of Counseling

\_\_\_ **Custody:** Custody Complaint, Notice to Defend, and Criminal Record / Abuse  
History Verification

to the Defendant by Certified Mail, Return Receipt Requested, Deliver to Addressee Only  
and regular mail, at Defendant's last known address, as indicated on the attached mailing  
receipt.

2. On \_\_\_\_\_, (date of defendant's signature on green return card), Defendant  
received the aforesaid Complaint. The mailing receipt and return receipt card evidencing  
the same are attached hereto and made a part hereof.

I verify that the statements in this document are true and correct to the best of my knowledge,  
information, and belief. I understand that false statements herein are made subject to the penalties  
of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

Respectfully Submitted,

Date: \_\_\_\_\_

\_\_\_\_\_  
Plaintiff's Signature



# **Acceptance of Service**

Service Form 3

### **Acceptance of Service**

*The numbers on these instructions correspond with the numbers in the boxes on the form. Use the form with the boxes to guide you through filling out the blank form.*

Box 1. Print the name of the county in which you filed.

Box 2: Print the name of the plaintiff exactly as it appears on the Complaint.

Box 3. Print the docket number assigned by the office where legal pleadings are filed.

Box 4: Print the name of the defendant exactly as is appears on the Complaint.

**THE DEFENDANT MUST COMPLETE THE FORM.**

**File this form in the office where legal pleadings are filed.**

1  
 IN THE COURT OF COMMON PLEAS OF \_\_\_\_\_ COUNTY, PENNSYLVANIA  
 CIVIL ACTION

2  
 \_\_\_\_\_  
 Plaintiff

:  
 :  
 :  
 :  
 :

3  
 Case No. \_\_\_\_\_

4 s.  
 \_\_\_\_\_  
 Defendant

**ACCEPTANCE OF SERVICE**

I accept service of the:

\_\_\_ **Divorce:** Divorce Complaint, Notice to Defend and Claim Rights, and  
 Notice of Availability of Counseling

\_\_\_ **Custody:** Custody Complaint, Notice to Defend, and Criminal Record / Abuse  
 History Verification

Date: \_\_\_\_\_

\_\_\_\_\_  
 Defendant's Signature

IN THE COURT OF COMMON PLEAS OF \_\_\_\_\_ COUNTY, PENNSYLVANIA  
CIVIL ACTION

\_\_\_\_\_  
Plaintiff

vs.

\_\_\_\_\_  
Defendant

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

**ACCEPTANCE OF SERVICE**

I accept service of the:

\_\_\_ **Divorce:** Divorce Complaint, Notice to Defend and Claim Rights, and  
Notice of Availability of Counseling

\_\_\_ **Custody:** Custody Complaint, Notice to Defend, and Criminal Record / Abuse  
History Verification

Date: \_\_\_\_\_

\_\_\_\_\_  
Defendant's Signature

# **Certificate of Service of Legal Papers Other than Original Process**

Service Form 4

**Certificate of Service of Legal Papers Other than Original Process**  
**Pursuant to Pa. R.C.P. 440**

*The numbers on these instructions correspond with the numbers in the boxes on the form. Use the form with the boxes to guide you through filling out the blank form.*

- Box 1. Print the name of the county in which you filed.
- Box 2: Print the name of the plaintiff's name exactly as is appears on the Complaint.
- Box 3. Print the docket number that the office where legal pleadings are filed wrote on the Complaint at the time of filing.
- Box 4: Print the name of the defendant exactly as is appears on the Complaint.
- Box 5: Print your name and check whether you are the Plaintiff or the Defendant.
- Box 6: Print name of pleading served, i.e., Petition for Modification.
- Box 7. Print the date the legal paper was filed.
- Box 8: Print the name of the person being served, and check whether it is the Plaintiff or the Defendant.
- Box 9. Print the address where the legal paper was served.
- Box 10: Check the manner of service, i.e., by first class mail, and the date sent. If not sent by first class mail, explain how the legal paper was delivered to the other party.
- Box11: Print your name, sign and date.

**File this completed form in the office where legal pleadings are filed.**

IN THE COURT OF COMMON PLEAS OF 1 COUNTY, PENNSYLVANIA  
CIVIL ACTION

2  
Plaintiff

No. 3

4 vs.  
Defendant

**CERTIFICATE OF SERVICE  
OF LEGAL PAPERS OTHER THAN ORIGINAL PROCESS  
Pursuant to Pa. R.C.P. 440**

I, 5 6, (Plaintiff)(Defendant) in this matter, certify  
that 7 of 8 filed on  
9 is sent to 9 (Plaintiff)( Defendant) at:

10  
By \_\_\_\_\_ first class mail on \_\_\_\_\_

\_\_\_\_\_ other: \_\_\_\_\_ on \_\_\_\_\_

11  
Print Name

Signature

Date





## Ethical Issues When Dealing With A Self-Represented Party – Judicial Perspective

1. **Rule 1.2 – Promoting Confidence in the Judiciary:** A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

*Comment 2:* A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens and must accept the restrictions imposed by the Code.

2. **Rule 2.2 – Impartiality and Fairness:** A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

*Comment 4:* It is not a violation of this Rule for a judge to make reasonable accommodations to ensure *pro se* litigants the opportunity to have their matters heard fairly and impartially.

3. **Rule 2.3 – Bias, Prejudice, and Harassment:** A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice or harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

4. **Rule 2.4 – External Influences on Judicial Conduct:** A judge shall not be swayed by public clamor or fear of criticism. A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment. A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

5. **Rule 2.6 – Ensuring the Right to be Heard:** A judge shall accord to every person or entity who has a legal interest in a proceeding, or that person or entity's lawyer, the right to be heard according to law. A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

6. **Rule 2.8 – Decorum, Demeanor, and Communication with Jurors:** A judge shall require order and decorum in proceedings before the court. A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.

7. **Rule 2.9 – Ex Parte Communications:** A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except for scheduling, administrative, or emergency purposes when the judge (i) reasonably believes that no party will gain a procedural, substantive, or tactical advantage and (ii) promptly notifies all parties as to the communication and provides an opportunity to respond.

A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

A judge may also initiate, permit, or consider any *ex parte* communication when expressly authorized by law to do so. Upon receipt of unauthorized *ex parte* communications, a judge shall promptly notify the parties of the communication and provide an opportunity to respond.

8. **Rule 2.11 – Disqualification:** A judge shall disqualify him or herself in any proceeding in which:
- (1) A judge's impartiality might reasonably be questioned, including but not limited to:
    - (i) a judge's personal bias or prejudice toward a party or lawyer, or personal knowledge of facts in dispute;
    - (ii) judge's knowledge that a person within the third degree of relationship to him or her is a party to the proceeding, acting as a lawyer in the proceeding, has a *de minimis* interest in the proceedings, or is likely to be a material witness.

2010 WL 1988403 (Pa.Com.Pl.)  
Court of Common Pleas of  
Pennsylvania, Berks County.

Kerns

v.

Chiodo

No. 07-8445.

February 23, 2010

**Attorneys and Law Firms**

\*191 *Scott Kerns*, pro se.

*Gail M. Chiodo*, pro se defendant.

*Alexa S. Antanavage*, for defendant Reed.

SCHMEHL, J.L., P.J.

**I. FACTUAL AND  
PROCEDURAL BACKGROUND**

Plaintiff Scott Kerns is proceeding in this matter pro se, and is a prisoner at the State Correctional Institution \*192 at Mahonoy in Frackville, Pennsylvania. Plaintiff commenced this civil action on August 2, 2007 by filing a complaint with this court. The action was originally filed with five listed defendants, which consisted of: plaintiff's public defender at his criminal proceeding, Richard A. Joyce; the district attorney from the same proceeding, Tonya Helaine Tharp; the Muhlenberg Police Department; Gail M. Chiodo, Esquire, and Jamie L. Reed. Plaintiff's action was, at its core, premised on an ineffectiveness of counsel claim, attempting to overturn his criminal conviction. Plaintiff was sentenced pursuant to a guilty plea, after being charged with involuntary deviate sexual intercourse with a person less than 13 years of age and related charges as a result of numerous instances of sexual abuse of a minor.

Defendants Richard A. Joyce and Tonya Helaine Tharp filed preliminary objections, and a brief in support thereof, on May 19, 2008. Moving defendants objected based upon: plaintiff's failure to serve the complaint; failure to state a claim, preclusion of the cause of action due to tolling of the statute of limitations and the bar on

a collateral attack on an underlying conviction; and, prosecutorial immunity. A judgment of nonpros was entered in favor of defendant Joyce on May 30, 2008. Then on June 23, 2008, the preliminary objections of Joyce and Tharp were granted, and moving defendants were dismissed from the action with prejudice. On October 23, 2009, defendant Gail Chiodo, Esq. filed a response to plaintiff's request to enter judgment by default, wherein defendant Chiodo asserted that she had never been served with the complaint.

Defendant Muhlenberg Police Department filed preliminary objections to plaintiff's complaint on October \*193 24, 2008 for failure to serve the complaint, failure to set forth a viable claim, and for the cause of action being barred as a collateral attack on plaintiff's own criminal conviction. Defendant Muhlenberg Police Department's preliminary objections were granted on December 1, 2008, and this defendant was dismissed from the action with prejudice.

Defendant Jamie L. Reed filed preliminary objections to the plaintiff's complaint on July 1, 2009, for plaintiff's failure to effectuate service of the complaint, and for legal insufficiency of the complaint itself. By order of August 6, 2009, this court scheduled argument for September 21, 2009 regarding defendant's preliminary objections to plaintiff's complaint. On August 17, 2009, plaintiff filed a petition for writ of habeas corpus ad testificandum, which this court declined to grant.

On August 25, 2009, this court entered an order which denied as moot plaintiff's motion for judgment by default against defendant Jamie L. Reed, due to plaintiff's failure to file a certification that a written notice of intention to file the praecipe was mailed or delivered to the parties against whom judgment was to be entered.

At argument on September 21, 2009, the only parties present were moving defendant Jamie L. Reed and the other then-remaining defendant, Gail Chiodo. After argument held, this court entered an order which sustained defendant Jamie L. Reed's preliminary objections, and dismissed with prejudice plaintiff's complaint against defendant Jamie L. Reed. Further, at argument, defendant Gail Chiodo, Esq. made oral motion to this court that she be dismissed from the action, based upon plaintiff's \*194 failure to effectuate service. On December 3, 2009, this court entered an order granting

defendant Gail Chiodo's request made by oral application at hearing on September 21, 2009 to be dismissed from the case. With no defendants then remaining in the action, the order further dismissed the action with prejudice.

Plaintiff filed notice of appeal on December 23, 2009, appealing this court's order which dismissed the action with prejudice. On January 8, 2010, this court entered an order directing plaintiff/appellant to file his concise statement within 21 days of the date of the order, following which plaintiff/appellant filed a timely statement.

## II. DISCUSSION

In plaintiff/appellant's statement of matters complained of on appeal, dated January 24, 2010, plaintiff/appellant complained of the following matters:

"(1) Plaintiff was denied due process when this honorable court held hearing for defendants in the above-captioned case without plaintiff being present. Plaintiff is incarcerated and denied his right to be heard in court.

"(2) Defendants were dismissed from the complaint with prejudice after not answering the allegations set forth in complaint. Therefore waiving any right to answer allegations that are deemed true [sic].

"(3) This honorable court accepted excuses as to why the allegations were not answered. Rule 1029 (a), (b), (e) states that all allegations are to be answered specifically or will be deemed true.

\*195 "(4) Rule 1028 preliminary objections are for facts on complaint that are not true, not excuses.

"(5) This honorable court dismissed all defendants with prejudice from the complaint knowing that they admitted to doing all the allegations and putting an innocent person in prison.

"(6) The plaintiff's allegations still stand since they were never answered and can never be answered since defendants waived right to answer them.

"(7) Plaintiff respectfully requests that this honorable court not allow this injustice to continue to go on, and revoke the defendants order for dismissal and make the

defendants accountable for their actions by granting the plaintiff's complaint."

We address the first matter complained of on appeal individually, and then collectively address the six others, which six are largely based on the same allegation.

As to plaintiff/appellant's first matter complained of on appeal, plaintiff/appellant was not deprived of his constitutional rights when arrangements were not made for him to be present at a hearing of his own initiation. To the contrary, it was incumbent upon plaintiff/appellant to make arrangements to attend the hearing, which was a civil proceeding commenced by plaintiff/appellant, and thus did not raise any deprivation of due process rights. This court does not have a duty to make arrangements for an incarcerated plaintiff/appellant to be present to pursue a civil lawsuit. The plaintiff/appellant additionally could have sought an appearance by videoconference to pursue this action commenced by him. As it stood, \*196 this court reviewed all pleadings on their merits, and finding that no party had been properly served with the complaint at any point, found it appropriate this past December to dismiss the action altogether.

As to plaintiff/appellant's second matter complained of on appeal, this court found that the defendants in this action were never properly served with the complaint, and that it was appropriate for the action to be dismissed. It is axiomatic that the rules regarding proper service of process, set forth in the Pennsylvania Rules of Civil Procedure, must be strictly followed. *Township of Lycoming v. Shannon*, 780 A.2d 835 (Pa. Commw. 2001). While the courts may be willing to liberally construct materials filed by a **pro se litigant**, it does not become the duty of a court to ensure that a **pro se litigant** is following the proper procedure; a **pro se litigant** takes upon himself the risk that his lack of legal training will be his undoing. *Branch Banking and Trust v. Gesiorski*, 904 A.2d 939 (Pa. Super. 2006). Further, a trial court has no duty to either effectuate service for a pro se inmate, nor to notify an inmate that it will not effectuate service on the pro se civil litigant's behalf. *Fraisar v. Gillis*, 892 A.2d 74 (Pa. Commw. 2006). With proper service never having been effectuated, all defendants were dismissed from the case.

For the above-stated reasons, this court respectfully recommends that the instant appeal be denied.

The prothonotary shall forward the remainder of the file to the Superior Court.

**All Citations**

2010 WL 1988403, 11 Pa. D. & C. 5th 191

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End of Document

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

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.

(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another;
- (3) to prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used; or
- (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (5) to secure legal advice about the lawyer's compliance with these Rules; or
- (6) to effectuate the sale of a law practice consistent with Rule 1.17; or
- (7) to detect and resolve conflicts of interest from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(d) 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.

(e) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

#### **Comment:**

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Pennsylvania



### **Rule 3.3. Candor Toward the Tribunal.**

(a) A lawyer shall not knowingly:

(1) make a false statement of material 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 before a tribunal or in an ancillary proceeding conducted pursuant to a tribunal's adjudicative authority, such as a deposition, 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 paragraphs (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 that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

#### **Comment:**

(1) This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

(2) This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with

**Rule 3.4. Fairness to Opposing Party and Counsel.**

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness' testimony or the outcome of the case; but a lawyer may pay, cause to be paid, guarantee or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying,

(2) reasonable compensation to a witness for the witness' loss of time in attending or testifying, and

(3) a reasonable fee for the professional services of an expert witness;

(c) when appearing before a tribunal, assert the lawyer's personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but the lawyer may argue, on the lawyer's analysis of the evidence, for any position or conclusion with respect to the matters stated herein; or

(d) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information and such conduct is not prohibited by Rule 4.2.

**Comment:**

(1) The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

(2) Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural



The  
Pennsylvania



### **Rule 3.5. Impartiality and Decorum of the Tribunal.**

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
- (c) communicate with a juror or prospective juror after discharge of the jury if:
  - (1) the communication is prohibited by law or court order;
  - (2) the juror has made known to the lawyer a desire not to communicate; or
  - (3) the communication involves misrepresentation, coercion, duress or harassment; or
- (d) engage in conduct intended to disrupt a tribunal.

#### **Comment:**

(1) Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Code of Judicial Conduct and/or the Rules Governing Standards of Conduct for Magisterial District Judges, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

(2) During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

(3) A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

(4) The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

The  
Pennsylvania



PREVIOUS • NEXT • CHAPTER  
TOP LOC TITLE LOC BROWSE SEARCH HOME

### **Rule 3.7. Lawyer as Witness.**

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case;  
or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

#### **Comment:**

(1) Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

#### *Advocate-Witness Rule*

(2) The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

(3) To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

(4) Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that



## TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

### Rule 4.1. Truthfulness in Statements to Others.

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

#### Comment:

##### *Misrepresentation*

(1) A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

##### *Statements of Fact*

(2) This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

##### *Crime or Fraud by Client*

(3) Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer



## **Rule 4.2. Communication with Person Represented by Counsel.**

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

### **Comment:**

(1) This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

(2) This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

(3) The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

(4) This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

(5) Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a

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### **Rule 4.3. Dealing with Unrepresented Person.**

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

(b) During the course of a lawyer's representation of a client, a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the lawyer knows or reasonably should know the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.

(c) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding.

#### **Comment:**

(1) An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

(2) The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.