

**IN THE
SUPREME COURT OF PENNSYLVANIA**

IN RE: Amendment of Rule of	:	No. 292
Civil Procedure 4010;	:	Civil Procedural Rules
Promulgation of New Rule 4010.1	:	Docket No. 5
	:	

O R D E R

PER CURIAM:

AND NOW, this 24th day of April, 1998, the Pennsylvania Rules of Civil Procedure are amended as follows:

1. Rules 4010 is amended to read as attached hereto.
2. New Rule 4010.1 is promulgated to read as attached hereto.

This Order shall be processed in accordance with Pa.R.J.A. 103(b) and shall be effective July 1, 1998.

NOTE:

Underscored material is added.
Bracketed material is deleted.
New rules are not underscored.

Rule 4010. Physical and Mental Examination of Persons

(a)(1) As used in this rule, "examiner" means a licensed physician, licensed dentist or licensed psychologist.

(2) When the mental or physical condition [(including blood group)] of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by [a physician] an examiner or to produce for examination the person in [his] the party's custody or legal control.

NOTE: The examination may include blood or genetic testing.

(3) The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.

(4)(i) The person to be examined shall have the right to have counsel or other representative present during the examination. The examiner's oral interrogation of the person to be examined shall be limited to matters specifically relevant to the scope of the examination.

NOTE: Ordinarily, the facts giving rise to liability are not germane to an examination and the information which the examiner seeks should be limited to facts of liability germane to the issue of damages.

(ii) Subdivision (a)(4)(i) shall not apply to actions for custody, partial custody and

visitation of minor children.

(5)(i) The party who is being examined or who is producing for examination a person in the party's custody or legal control may have made upon reasonable notice and at the party's expense a stenographic or audio recording of the examination. Upon request and payment of reasonable cost, the party who caused the recording to be made shall provide each other party with a copy of the recording.

(ii) Subdivision (a)(5)(i) shall not apply to actions for custody, partial custody and visitation of minor children.

(b)(1) If requested by the party against whom an order is made under this rule or the person examined, the party causing the examination to be made shall deliver to [him] the requesting party or person a copy of a detailed written report of the [examining physician] examiner setting out [his] the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows [that he is unable] inability to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if [a physician] an examiner fails or refuses to make a report the court shall exclude [his] the examiner's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by

taking the deposition of the examiner, the party examined waives any privilege [he] the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine [him] the party in respect of the same mental or physical condition.

(3) Subdivision (b) applies to an examination made by agreement of the parties, unless the agreement expressly provides otherwise. It does not preclude discovery of a report of an [examining physician] examiner or the taking of a deposition of the [physician] examiner in accordance with the provisions of any other rule.

Rule 4010.1 Evaluation of Earning Capacity

(a) When the earning capacity of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to an evaluation by a suitably licensed or certified evaluator or to produce for evaluation the person in the party's custody or legal control.

(b) The evaluation shall be subject to the provisions of Rule 4010(a)(3) through (b)(3) inclusive.

(c) The evaluator may testify as a witness on the issue of damages only and not as a witness on the issue of liability.

EXPLANATORY COMMENT

Rule 4010. Physical and Mental Examination of Persons

Rule 4010 is revised in four respects.

1. Examiner

Rule 4010 previously provided that only a physician may perform physical and mental examinations of persons. However, it had been suggested that the provision was too narrow and that the category of persons authorized to perform examinations should be expanded.

The amendment revises the rule to refer to an "examiner." An examiner is defined as "a licensed physician, licensed dentist or licensed psychologist."

2. Examination

The rule previously gave no guidance with respect to the conduct of the examination. New subdivisions (a)(4) and (5) add certain protections for the person being examined. The protections under subdivision (a)(4)(i) include the right to have counsel or another representative present at the examination and a limitation upon the examiner's interrogation of the person to be examined. New subdivision (a)(5)(i) gives the party who is being examined or who is producing a person to be examined the right to make a stenographic or audio recording of the examination "upon reasonable notice and at the party's expense."

These new provisions, however, will not apply to an action for custody, partial custody or visitation of minor children.

3. Blood or Genetic Testing

Rule 4010(a) previously made reference to "blood group". The revised rule deletes that reference from the rule but adds a note stating that the "examination may include blood or genetic testing."

4. Gender Neutral

Additional revisions to the language make Rule 4010 gender neutral. However, these revisions do not affect practice and procedure.

Rule 4010.1 Evaluation of Earning Capacity

Rule 4010 is entitled "Physical and Mental Examination of Persons." Subdivision (a)(2) provides that the rule may be invoked when "the *mental or physical* condition of a party, or of a person in the custody or under the legal control of a party, is in contro-versy."

In many cases, however, there may be no dispute as to physical or mental condition, but, given that condition, there is a dispute as to the ability of the party or person under the party's control to function in an employment setting. One party may seek an "evaluation" to gauge the effect of the condition upon another party's work-life or "evaluate" the other party's ability to be gainfully employed. Rule 4010.1 provides for such an evaluation "by a suitably licensed or certified evaluator."

The provisions governing the evaluation are the same as those governing physical and mental examinations since the procedure of Rule 4010 is incorporated by reference. However, subdivision (c) accords the party to be evaluated one additional protection: the

evaluator "may testify as a witness on the issue of damages only and not as a witness on the issue of liability."

**By the Civil Procedural
Rules Committee**

**Edwin L. Klett
Chairman**