

**SUPREME COURT OF PENNSYLVANIA
ORPHANS' COURT PROCEDURAL RULES COMMITTEE**

NOTICE OF PROPOSED RULEMAKING

Proposed Adoption of Pa.R.O.C.P. 1.20

The Orphans' Court Procedural Rules Committee is considering proposing to the Supreme Court of Pennsylvania the adoption of Pa.R.O.C.P. 1.20 governing advanced communication technology 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.

Any report accompanying this proposal was prepared by the Committee to indicate the rationale for the proposed rulemaking. It will neither constitute a part of the rules nor be adopted by the Supreme Court.

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

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

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All communications in reference to the proposal should be received by **December 13, 2021**. 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

**SUPREME COURT OF PENNSYLVANIA
ORPHANS' COURT PROCEDURAL RULES COMMITTEE**

PUBLICATION REPORT

Proposed Adoption of Pa.R.O.C.P. 1.20

The Orphans' Court Procedural Rules ("Committee") is considering proposing to the Supreme Court of Pennsylvania the adoption of Rule 1.20 of the Pennsylvania Rules of Orphans' Court Procedure ("Rules") in response to a rulemaking request. This proposal would add a new Rule incorporating a definition of "advanced communication technology" ("ACT") and delegating rule-making authority relative to the use of ACT to the judicial districts in the form of local rules.

Background

Currently, the Rules do not address the use of ACT in the orphans' courts. In July of 2021, the Rules Committees received a report prepared by the Administrative Office of Pennsylvania Courts and the Pennsylvania Conference of State Trial Judges concerning the "continued use" of ACT. Given that the use of ACT in other court proceedings has been governed by procedural rule, the report recommended a number of rule amendments generally enabling or expanding the use of ACT. The report describes a "continued use" because widespread ACT use was authorized by the Supreme Court of Pennsylvania pursuant to Pa.R.J.A. 1952(B)(2) as an emergency measure during the COVID-19 pandemic to maintain social distancing among participants while ensuring access to the courts. The report recommended a number of rule amendments generally enabling or expanding the use of ACT in the orphans' courts:

The Task Force recommends modest changes to the Orphans' Court Rules to assure that Orphans' Court judges may exercise broad discretion to conduct proceedings either permitting all parties and counsel to participate remotely using ACT or permitting some witnesses or parties to testify and participate remotely, while most participants are present in the courtroom. Specifically the Task Force recommends that, in the discretion of the Judge, the following types of proceedings may be conducted using ACT, either with all parties or some parties and witnesses participating remotely: status and scheduling conferences, pre-trial conferences, oral arguments on motions and petitions, relatively short record proceedings.

The Task Force also recommends that in the discretion of the local court, Orphans' Court proceedings such as calling of the Audit List and other Rule Return dates may be scheduled to be conducted either in person, partly remotely, or wholly remotely using ACT for some litigants, attorneys,

or other participants. Bench trials in the Orphans' Court, including contested guardianship matters, will contests, contested fiduciary matters, and termination of parental rights hearings will generally be best conducted in person in the courtroom. However, the Task Force recommends that the court have significant discretion to conduct such proceedings by ACT, either in whole or in part. In particular, it is expected that certain witnesses who live at a distance may be permitted to testify using ACT while proceedings are conducted in the courtroom, provided that no party is disadvantaged and all parties are able to see and hear the witness. The Task Force recommends the adoption of a definition of ACT in the Orphans' Court Rules, as a section within [R]ule 1.3, and also recommends a new Rule 1.9 granting discretion to the judge to permit the use of ACT in all types of Orphans' Court proceedings. The Task Force further recommends amendments to Orphans' Court Rules 2.5, 3.5, 14.3, 14.6, 14.9, 14.11, and 14.13, to clarify that electronic notice may be provided in appropriate circumstances and to make clear that certain guardianship proceedings may be conducted with the use of ACT.

Remote Proceedings Task Force: Continued Use of Advanced Communication Technology (ACT) Following the Termination of Judicial Emergencies, at pp. 15-16 (June 2021). Additionally, the report contained recommended rule amendments governing civil, family law, juvenile, and criminal proceedings, as well as those in magisterial district courts. Generally, those recommendations either broadly authorized the use of ACT or sought to remove present procedural restrictions. The report also recommended a uniform definition of ACT and the use of ACT for the service of orders and filings. As recommended by the report and described in greater detail below, this proposal would result in the applicability of ACT and numerous procedural and operational details being subject to the discretion of president judges and governed by local rule.

Discussion

Insofar as a significant aspect of applicability and procedures would be delegated to local rule, several observations can be made. First, the judicial districts have acquired significant experience with the use of ACT during the pandemic and, consequently, have existing local procedures and practices that work. At this juncture, there does not appear to be a need for further statewide procedures nor were further statewide procedures necessary for the use of ACT, where permitted by rule, prior to pandemic. Allowing local decision-making on the applicability of ACT accommodates resource and infrastructure limitations that may not be universal to all judicial districts. Thus, absent a demonstrated need, procedures would be left to local rule. Note, however, those practices governing the use of ACT would need to be codified into a local rule. See Pa.R.J.A. 103(d).

Second, it should be acknowledged that delegating applicability and procedures to local rule creates the opportunity for significant variation among judicial districts. This may be challenging to multi-district practitioners who must navigate not only among the various local procedures and types of proceedings that use ACT, but also the different technologies employed. If the extent of any variation imposes undue burdens on practice of law or becomes “unacceptable” to the concept of a unified judicial system, the necessity of uniform statewide applicability and procedures may be revisited. Over time, a consensus may be reached on the best practice as it relates to applicability and procedures.

The Committee proposes a definition of ACT requiring two-way simultaneous communication of image and sound. This definition in proposed Pa.R.O.C.P. 1.20 seemed apt to capture the more frequently used modern technology, *e.g.*, WebEx, Zoom, Microsoft Teams. Myriad reasons in favor of a video component include more comprehensive witness identification, reduced opportunity for contemporaneous witness coaching, assuring a modicum of decorum, providing a means to evaluate credibility and demeanor, and detecting whether a witness’s responses are based upon contemporaneous, independent recollection or whether the witness is relying upon a writing to refresh recollection. See Pa.R.E. 612. Moreover, the technology for contemporaneous audiovisual communication has greatly improved, become more accessible, and, consequently, confidence in its use has increased.

An argument against requiring a visual component within the definition of ACT is that it may limit the use of ACT. For example, there may be geographical locations where necessary bandwidth does not exist or a participant does not have the technology for audio and visual communications. The merit of these arguments is acknowledged, but the preferred alternative would be for the participant to either appear in court or appear from a location where the proponent of the testimony can provide audio and visual communications, *e.g.*, the attorney’s office. Moreover, dropping down to a form of communications that only has an audio component could be seen as a step back from the successful use of technology during the pandemic. Nonetheless, the use of audio-only technology was accepted in some circumstances prior to the pandemic.

While the report recommends that proposed rule amendments “make clear that certain guardianship proceedings may be conducted with the use of ACT,” insofar as the proposed new Rule broadly permits court proceedings to be conducted using ACT in accordance with local rule, the Committee did not find it necessary to explicitly include guardianship proceedings. Such proceedings are necessarily included within the scope of the proposed new Rule and may be included or excluded as established by local rule. The report also recommended study of the use of ACT for the service of orders and filings, other than original process. Presumably, the form of ACT for service would rely upon the report’s proffered definition of “electronic communication.” While the Guardianship Tracking System generates certain electronic notices in lieu of traditional service

methodologies, the Committee believes this is occurring outside the scope of ACT as proposed and is not addressing the electronic service of orders and filings at this time.

Proposed Rule

Proposed Rule 1.20 adds a definition of ACT for use in the orphans' courts that requires two-way simultaneous communication of image and sound. It also gives wide latitude for a judicial district to promulgate local rules for the use of ACT in the orphans' courts. The Committee invites all comments, concerns, and suggestions.

[The following text is entirely new.]

Rule 1.20. Advanced Communication Technology.

- (a) **Definition.** “Advanced Communication Technology” shall mean any communication technology providing for two-way simultaneous communication of image and sound.
- (b) **General Rule.** Court proceedings may be conducted using advanced communication technology in accordance with local rule.

Comment: For local rulemaking, see Pa.R.J.A. 103(d).