Comments on Proposed Probate Rule Changes

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The revision of the Court's Probate Rules is extensive for many reasons, including new legislation and recommendations by the Court's Probate Oversight Committee. In addition to Rules of Probate, this process is also requiring revision to Rules of the Supreme Court regarding the practice of law and the Arizona Code of Judicial Administration § 7-202. Changing Court rules is not a quick and easy process and once promulgated, any change to the new rules or addendums may only be made by beginning the process again.

There is no question standardization of forms will assist both the court and the participants in the probate process. Currently the rules are not set and in all likelihood will go through more changes in the next few weeks before this existing process is complete. In my opinion, the proposed forms need revisions and almost certainly will need more changes once the rules are finalized. I have pointed out discrepancies in how forms are used in comments to Rule 38. As an example of where I believe the forms need revision are the proposed forms for the accounting process. I believe these forms lack the wherewithal to prevent true accountability of assets, receipts and disbursements. In their current structure the forms do little to assist in increasing a *pro pers* in understanding of their role and responsibilities as a fiduciary.

With this in mind, I respectfully ask the Court's indulgence to: (1) wait until all the new rules are finalized; (2) not include forms as addendums to the Rules; and (3) once revised, have the forms be adopted by the Court through an Administrative Order.

The Probate Oversight Committee and staff of the Administrative Office of the Courts are to be commended for their diligence demonstrated by their efforts and resulting work product.

It is noted by this writer there are several places in the new proposed rules and addendums where the term used is "must" or "will". The writer believes the appropriate term used in Court Rules, Administrative Code sections and other documents, is "shall" and not "must" or "will". While the writer points out this discrepancy of term usage in some of the new proposed rules, this notation is made here and suggests a word search of the new proposed rules and fee guidelines be done to address this issue.

Rule 5(C) Captions on Documents Filed with the Court

Comment/Question: *Does this change create any issue for the Clerks' Offices or Court Administrators to capture the change in database for statistical purposes – Is this critical data for statistical purposes?*

Rule 7(A)(1)(c) – Good Faith Estimates & Budgets

Comment: *The concept of "good faith estimate" is great in theory but is somewhat lacking in the reality of how processes work courtside the courtroom. Every fiduciary would love to be able to file a petition with all the projected costs and good faith estimates. The fact which seems to consistently escape the thought behind this idea is, unless and until, the petitioner is appointed they have NO legal authority to inquire as to the assets and expenses of their potential client. While a family member who is petitioning may have all access necessary to provide a full estimate and budget, a professional or financial institution does not. If there is a government agency involved, such as Adult Protective Services they may have the information and can assist in providing the information to the petitioner. If the requirement of the good faith estimate in the Petition for Appointment remains in the Rules, the court and those willing to serve should all be patient and try to limit any increased court or fiduciary billable time until the process has been in place for a while and the "bugs" can be worked out.*

Rule 8(B) – Service of Court Papers.

A rather run on sentence for the concept.

Suggestion. Put a period after "specified time" rather than a semicolon with a new sentence. …A SPECIFIED TIME~~;~~. ~~PROVIDED THAT~~ IF THE PETITIONER OR APPLICANT SHOWS GOOD CAUSE FOR THE FAILURE TO PROVIDE SERVICE PRIOR TO THE EXPIRATION OF TIME ALLOWED FOR SERVCE, THE COURT SHALL EXTEND THE TIME FOR THE SERVICE FOR AN APPROPRIATE PERIOD.

Question: *what ill is it this new Rule 8(B) trying to fix?*

Rule 10(C)(1)(b) – DUTIES OF COURT APPOINTED FIDUCIARIES

C. Duties of Court-Appointed Fiduciaries.
1. A court-appointed fiduciary shall
a. review all documents filed with the court that are prepared on the fiduciary's behalf;
b. REFRAIN FROM CHARGING TO ATTEND COURT PROCEEDINGS, INCLUDING DEPOSITIONS, UNLESS SUCH ATTENDANCE IS REQUIRED BY LAW, COURT ORDER, OR OTHER CIRCUMSTANCES SUCH THAT THE FIDUCIARY'S ATTENDANCE IS NECESSARY;

Comment: *This new section appears to only concern itself about whether or not the fiduciary is charging a fee for attendance at court proceedings and does not take into account the principle of an appointed fiduciary's responsibility to act and make decisions for another. This particular new rule seems to be directed at professional fiduciaries who are charging a fee for their services. A reminder, these rules apply to <u>all</u> fiduciaries, including family members, friends, non-profit organizations, or financial institutions.*

When appointed as fiduciary, the appointed fiduciary whether professional, family member, etc., becomes that person to act in that person's stead. This is an established concept in the probate community.

For professional fiduciaries ACJA §7-202(J) establishes the minimum standards by which professionals are judged and held to account. ACJA §7-202(J)(1) speaks to exercising caution when making decisions but requires the <u>fiduciary to be the ultimate decision maker</u>, not the attorney, other legal staff, doctor, or accountant. If during a deposition, court appearance or any other decision making scenario a fiduciary is absent and either information is required only the fiduciary may have or a decision is needed by the fiduciary, does this provide grounds for a complaint against the fiduciary? As a fiduciary you have a duty of loyalty to the person and in most cases have been given the responsibility to make decisions in the best interest of the person.

Who determines what the "other circumstances" are under which a fiduciary's attendance is not necessary? Will it be necessary to have a court proceeding to determine what the "other circumstance" are? – thereby increasing costs for administration of the estate?

What is the problem this new rule is trying to cure? *Attendance at a legal proceeding, deposition or other meeting should be left to the discretion of the fiduciary making the ultimate decision and not based on whether or not there may be fees involved. If this rule remains in the newly adopted changes, then there needs to be an addition to the rule stating any party or interested person may <u>not</u> file a complaint with the AOC if the licensed fiduciary did not attend a court proceeding or deposition indicating the fiduciary was negligent in their duties under statute or ACJA.*

C. Duties of Court-Appointed Fiduciaries.

1. A court-appointed fiduciary shall

a. review all documents filed with the court that are prepared on the fiduciary's behalf;

b. REFRAIN FROM CHARGING TO ATTEND COURT PROCEEDINGS, INCLUDING DEPOSITIONS, UNLESS SUCH ATTENDANCE IS REQUIRED BY LAW, COURT ORDER, OR OTHER CIRCUMSTANCES SUCH THAT THE FIDUCIARY'S ATTENDANCE IS NECESSARY;

c. <u>ANY INTERESTED PERSON OR PARTY MAY NOT FILE A COMPLAINT WITH THE ADMINISTRATIVE OFFICE OF THE COURTS AGAINST A LICENSED FIDUCIARY, IF THE FIDUCIARY DOES NOT ATTEND A COURT PROCEEDING OR DEPOSITION PURSUANT TO THIS RULE;</u>

The remainder of the section would then need to be re-alphabetized.

Rule 10(C)(4) – DUTIES REGARDING MINOR'S DEATH, ADOPTION, MARRIAGE OR EMANCIPATION.

The new rule states a fiduciary has a duty regarding a minor's death but the following paragraph does not address what this duty is. The cure would seem to be: . . . A MINOR WARD WHO IS ADOPTED, MARRIES, **DIES** OR BECOMES . . .

Rule 10(D)(1) Duties Relating to Counsel for Fiduciaries

The term "beneficiary" is used and is confusing as the term is normally associated with trust administration.

Suggestion: Strike ~~INCURRED BY THE BENEFICIARY OF THE FIDUCIARY RELATIONSHIP~~ as this does not change the concept.

Comment: *In this new rule, if the fiduciary cannot perform the duties competently, then the question becomes why was the fiduciary appointed in the first place? Does this mean if the fiduciary does perform a duty and later it is determined the fiduciary should have sought legal advice, will this then result in sanctions against the appointed fiduciary?*

Rule 10(E) Duties of Counsel for Subject Person of Guardianship/Conservatorship Proceeding.

Rule 10(E)(1) INITIAL TRAINING

The term normally used in court rules and administrative rules for an action or a requirement is "shall" and not "must" or "will".

In addition regarding usual content of court or administrative rules the verb should be active and not passive avoiding the actor being something.

Suggestion: review all new rules and change the musts and wills to shalls.

Comment: *A proposal of a training course development and institution by the Court for court appointed attorneys had been suggested to the Court before in reports submitted by the Fiduciary Advisory Committee's Final Report to the Arizona Judicial Council in June 2001 and in the Fiduciary Advisory Commission's 2004 Annual Report. It is unfortunate these proposals were not acted on. A training program developed and instituted by the Court may have assisted in prevention of some of the perceived mishandling of some recent highly publicized cases.*

Suggestion: *In the proposed rule, there is a requirement for the attorney to file a copy of the certificate received for completion of the training with the AOC or the Supreme Court's designee no later than 10 days after the entry of the appointment order. So this would require the court appointed attorney to continually file the same certificate for each case where the attorney is appointed? For expedience sake would it not be more efficient if the AOC or designee maintains a list of those attorneys who have completed the course and filed their certificate? If the*

attorney has not completed the course why would the court even appoint the attorney as this would be a violation of the rule?

Suggestion: *The new rule addresses those currently serving as court appointed attorneys. Those serving would need to complete the training as soon as practicable. This of course will depend on how quickly the course can be readily available. The rule assumes all those who are required to complete the training would comply with the new rule in timely fashion. Should there be a time limit for completion? If the attorney has not completed the training and filed their certificate with the AOC or designee within 6 months after the training is implemented, then should the attorney be allowed to continue to be appointed by the court or continue acting in those cases already appointed on prior to the Rule's effect? This leads to another issue – who will develop the course? If the course is not developed and sanctioned by the Court then the issue becomes a point of contention as to an attorney "trained" in Apache County or one "trained" in Yuma County. Without standardized development and sanctioning of a course by the Court, sooner rather than later a party or interested person will find an issue with a court appointed attorney lacking in some knowledge or process if he or she did not receive the same training course as every other court appointed attorney.*

Rule 10(E)(2) SUBSEQUENT TRAINING

Suggestion: ~~AFTER COMPLETING THE INITIAL TRAINING COURSE PRESCRIBED BY THE SUPREME COURT, ANY~~

Comment: *Why do you need this opening statement, if the attorney has not completed the initial training course why would they need to have subsequent training?*

AN ATTORNEY WHO CONTINUES TO SERVE . . . ~~MUST~~ SHALL COMPLETE. . . AS SET FORTH IN …

Comment: *There is no time limit for when the attorney has to complete the subsequent training. If the attorney has not completed the subsequent or renewal of their certificate how long past the expiration date does the attorney have? The AOC or designee will be responsible for maintaining the list. Will the AOC or designee have the responsible to send out notice a certificate is about to expire? How will this be processed - via letter, email, website? This new rule appears to add tasks to AOC staff or the designee's staff and will need to be fleshed out in some type of administrative process.*

Rule 10(F) DUTIES OF INVESTIGATORS

Comment: *This section has the same issues as those in Rule 10(E)(1) and (2), including the use of the term "must" rather than "shall".*

The issues of the investigators regarding who is developing and providing the training are the same for court appointed attorneys. If the Supreme Court is issuing the certificate and is not the provider of the course does the person have to notify the Court and then receive the certificate or does the course provider notify the Court? Not unlike what is noted for the court appointed attorney – if the idea is only those of any profession, attorney or investigator, GAL, be trained

and to continue to have training shouldn't the process be developed and sanctioned by the Court so no question of cohesiveness is raised?

Rule 10(Ef(2) SUBSEQUENT TRAINING

Suggestion: ~~AFTER COMPLETING THE INITIAL TRAINING COURSE PRESCRIBED BY THE SUPREME COURT, ANY~~

Comment: *Why do you need this opening statement, if the investigator has not completed the initial training course why would they need to have subsequent training?*

A PERSON WHO CONTINUES TO SERVE . . . ~~MUST~~ SHALL COMPLETE. . . AS SET FORTH IN

Rule 10.1 FIDUCIARY'S AUTHORITY TO FILE . . .

Comment: *The current draft of Rule 10.1 does not appear to make any distinction between a licensed fiduciary, financial institution or lay fiduciary. If that is the case why is this rule here? This rule should be under Rule 10(C) as that rule lays out the duties of a fiduciary. If the underlying reasoning behind this rule is to reduce legal costs incurred by the estate why couldn't a fiduciary also file their petitions for inventory, accounts and annual G reports? Is there concern a licensed fiduciary or financial institution is less capable than the majority of pro pers who go through most of the process without legal representation and who file most of these documents using the forms they download from a court's website. If the fiduciary is capable and believe they can file these documents, especially with all the new forms and moving towards electronic filing, why has this restriction been included?*

New Rule:

Rule 10(C)(2): NOTWITHSTANDING AN ATTORNEY HAVING APPEARED IN A PROBATE CASE ON HAVING REPRESENTED A FIDUCIARY, A FIDUCIARY MAY:

a. SIGN OR FILE DIRECTLY WITH THE COURT ANY DOCUMENT ~~EXCEPT~~ <u>INCLUDING</u> A MOTION, PETITION, APPLICATION OR CLOSING STATEMENT; AND
b. APPEAR IN COURT WITHOUT LEGAL REPRESENTATION IN A PARTICULAR COURT PROCEEDING AND COMMUNICATE WITH ANY OPPOSING COUNSEL IN CONNECTION WITH THAT PROCEEDING IF THE FIDUCIARY'S ATTONEY OF RECORD HAS FILED A MOTION AND THE COURT HAS AUTHORIZED SUCH AN APPEARANCE BY THE FIDUCIARY.

3. IF A FIDUCIARY FILES A DOCUMENT DIRECTLY WITH THE COURT PURSUANT TO RULE 10(c)(2), THE FIDUCIARY SHALL SERVE A COPY OF SUCH DOCUMENT UPON THOSE PERSONS WHO, BY STATUTE, COURT RULE, OR COURT ORDER ARE ENTITLED TO RECEIVE A COPY OF THE DOCUMENT. THE FIDUCIARY SHALL PROVIDE THE FIDUCIARY'S ATTORNEY WITH A COPY OF ANY DOCUMENT FILED DIRECTLY WITH THE COURT.

Comment: *The comment section to this Rule would need to make a change to the rule number if changes are adopted. In addition the comments should also include a notation <u>any</u> actions under this new rule would not violate the Court's Rules regarding the unauthorized practice of law on the part of a licensed fiduciary or be grounds for filing a complaint against a licensed fiduciary.*

Rule 10.2: PRUDENT MANAGEMENT OF COSTS

IN A PROCEEDING BROUGHT PURSUANT TO TITLE 14:

A. THE FIDUCIARY MUST PRUDENTLY MANAGE COSTS, PRESERVE THE ASSETS OF THE WARD OR PROTECTED PERSON FOR THE BENEFIT OF THE WARD OR PROTECTED PERSON, AND PROTECT AGAINST INCURRING ANY COSTS THAT EXCEED PROBABLE BENEFITS TO THE WARD, PROTECTED PERSON, DECEDENT'S ESTATE OR TRUST, EXCEPT AS OTHERWISE DIRECTED BY A GOVERNING INSTRUMENT OR COURT ORDER.
B. THE GUARDIAN AD LITEM, FIDUCIARY, FIDUCIARY'S ATTORNEY, ATTORNEY FOR THE WARD OR PROTECTED PERSON MUST TIMELY DISCLOSE TO THE COURT AND ALL PERSONS ENTITLED TO NOTICE IF THE PERSON HAS A REASONABLE BELIEF THAT PROJECTED COSTS OF COMPLYING WITH A COURT ORDER MAY EXCEED THE PROBABLE BENEFITS TO THE WARD, PROTECTED PERSON, DECEDENT'S ESTATE OR TRUST. IF APPROPRIATE, CONSISTENT WITH DUE PROCESS, THE COURT SHALL ENTER OR MODIFY THE ORDERS AS MAY PROTECT OR FURTHER THE BEST INTEREST OF THE WARD, PROTECTED PERSON, DECEDENT'S ESTATE OR TRUST AGAINST PROJECTED COSTS THAT EXCEED PROBABLE BENEFITS.

C. MARKET RATES FOR GOODS AND SERVICES ARE A PROPER, ONGOING CONSIDERATION FOR THE FIDUCIARY AND THE COURT DURING THE INITIAL COURT APPOINTMENT OF A FIDUCIARY OR ATTORNEY, A HEARING ON A BUDGET OBJECTION AND A REQUEST TO SUBSTITUTE A COURT-APPOINTED FIDUCIARY OR ATTORNEY. AT ANY STAGE OF THE PROCEEDINGS, THE COURT MAY ORDER THAT COMPETITIVE BIDS FOR GOODS OR SERVICES BE OBTAINED.

Comment: *This new rule is a repetition of the new statutory requirements and other procedural rules and adds little to the overall probate process. If the rule is kept, it imposes a duty on the fiduciary and should be included under the Rule 10(C) as it does not provide for discretion but an affirmative action by the fiduciary; a "shall" rather than a "may". This is the first time there is mention for the fiduciary to perform a cost benefit analysis. Again these are duties <u>any</u> fiduciary is required to do, not just the licensed professional. Did the committee consider a family member representing them self, seeking bids from 3 different doctors or psychiatrists in performing an assessment of their loved one to meet the requirement under statute for competitive bids for goods and services? What happens to the doctor's report, when a sibling may disagree with the choice made by the family member?*

Section C is unclear as to exactly what the Committee was trying to accomplish. Do these "market rates for goods and services" include shopping for a new petitioner, court appointed attorney, care facility, doctor? This new rule appears to gear itself for the lowest bid and does not take into consideration the level of needs a potential client may have and whether those services are available from a broad spectrum of providers, especially in an outlying county. This new rule could easily be used to constantly challenge the day to day operational decision <u>any</u> fiduciary will be making.

If kept, this rule should be restructured as Rule 10.1 and be included under the duties imposed on <u>all</u> court appointed fiduciaries in the current Rule 10(C). In addition, if kept there needs to be a period after ATTORNEY. before A HEARING ON A BUDGET . . .

Rule 15.1 APPOINTMENT OF GUARDIAN AD LITEM

Comment: *Even though the rules states in section C the appointed GAL shall be given immediate access to ALL MEDICAL AND FINANCIAL RECORDS, and goes on to say the CUSTODIAN OF ANY RELEVANT RECORD shall provide access, please add ACCESS TO ALL COURT RECORDS, EXCEPT THOSE UNDER COURT SEAL. On more than one occasion when appointed by the superior court, in more than one county, the Clerk of the Court would not grant access to court records, especially those records listed as confidential by these probate rules even though the Clerk's Office was given a certified copy of an appointment as a GAL or Special Master.*

Rule 15.2 INVOLUNTATRY TERMINATION . . .

Comment: *In the new rule there should be an "OR" and the end of Rule 15.2(A)(1)(c).*

In 15.2(A)(2)(a), for clarification purposes a notation should be added at the end of the sentence . . .DESCRIBED ABOVE IN 15.2(A)(1)(d).

In the new rule there should be an "OR" and the end of Rule 15.2(A)(2)(c).

In 15.2(C), the first paragraph ends with INCLUDING but the actions or verbiage of the paragraph and the listed items 1 – 7 appears to be off in its grammar and syntax. For example 15.2(C)(1) says "ORDER" and then (2) says "ISSUE AN ORDER", (7) says "ENTER SUCH OTHER ORDER" and in the paragraph it already states . . . THE COURT MAY ENTER ANY ORDER APPROPRIATELY . . .

If the word INCLUDING is left in the new rule then it is suggested as an example 15.2(C)(1) should read 'ORDERING" rather than "ORDER" and (3) would read "APPOINTING" rather than "APPOINT" and so on.

In 15.2(D) and (E)

Suggestions:

D. GENERAL INVOLUNTARY TERMINATION. IF NO ACTION OR HEARING OCCURS FOR A PERIOD OF SIX MONTHS AFTER A CASE IS INITATED UNDER A.R.S. TITLE 14, THE COURT SHALL ISSUE A NOTICE ~~THAT~~ THE CASE ~~WILL~~ SHALL BE ADMINISTRATIVELY TERMINATED IN 90 DAYS WITHOUT HEARING, UNLESS BEFORE THAT DATE THE INITIATING PARTY FILES WITH THE COURT A REQUEST FOR ACTION OR A STATUS REPORT THAT DESCRIBES MATTERS REMAINING FOR RESOLUTION. THE NOTICE SHALL BE PROVIDED TO ALL PARTIES, PERSONS ENTITLED TO NOTICE OF THE COMMENCEMENT OF THE CASE, AND ANY PERSON WHO FILED A DEMAND FOR NOTICE.

E. **EFFECT OF DISMISSAL.** UNLESS OTHERWISE ORDERED BY THE COURT, THE ENTRY OF AN ORDER DISMISSING A CASE SERVES TO DISMISS ALL PENDING MATTERS IN THE CASE WITHOUT PREJUDICE, BUT DOES NOT DISMISS, VACATE, OR SET ASIDE ANY FINAL ORDER APPROVING ACCOUNTINGS OR ~~APPROVING~~ OTHER ACTIONS OF A PERSON APPOINTED PURSUANT TO A.R.S TITLE 14.

Rule 18. Motions

A. Generally. A motion shall be filed with the court when a party seeks procedural rather than substantive relief.

B. Motions for Appointment of ~~Guardian Ad Litem or~~ Counsel. A party requesting the appointment of ~~a guardian ad litem or~~ counsel shall make such request in a motion that sets forth why the appointment is necessary or advisable and what, if any, special expertise is required of ~~the guardian ad litem or~~ counsel.

C. IF A PARTY HAS A GOOD FAITH BELIEF THAT AN INTERESTED PERSON HAS FILED A MOTION OR PETITION THAT REQUESTS THE SAME OR SUBSTANTIALLY SIMILAR RELIEF TO THE RELIEF REQUESTED IN AN EARLIER MOTION OR PETITION FILED BY THE SAME INTERESTED PERSON WITHIN THE PRECEDING TWELVE MONTHS, AND IF THE LATER FILED MOTION OR PETITION DOES NOT DESCRIBE IN DETAIL A CHANGE IN FACT OR CIRCUMSTANCE THAT SUPPORTS THE REQUESTED RELIEF, THE PARTY MAY FILE A NOTICE OF REPETITIVE FILING. THIS NOTICE SHALL BE FILED NO LATER THAN THE RESPONSE OR OBJECTION DEADLINE FOR THE ALLEGEDLY REPETITIVE FILING AND SHALL INCLUDE THE TITLE AND DATE OF THE ALLEGED REPETITIVE FILING, THE TITLE AND DATE OF THE EARLIER FILING, AND THE DATE OF THE COURT'S RULING ON THE EARLIER FILING. A NOTICE OF REPETITIVE FILING SHALL HAVE THE EFFECT OF STAYING THE DEADLINE TO RESPOND OR OBJECT TO THE ALLEGED REPETITIVE FILING UNTIL FURTHER ORDER OF THE COURT. THE COURT MAY SUMMARILY STRIKE A REPETITIVE MOTION, WITHOUT HEARING, ON ITS OWN INITIATIVE OR FOLLOWING RECEIPT OF A NOTICE OF REPETITIVE FILING.

COMMENT

ARIZONA REVISED STATUTES SECTION 14-1109 PERMITS THE COURT TO SUMMARILY DENY A REPETITIVE MOTION OR PETITION, AS DESCRIBED IN THE STATUTE. RULE

18(C) PROVIDES A COST-EFFECTIVE MECHANISM FOR A PARTY TO INFORM THE COURT OF A GOOD FAITH BELIEF THAT A MOTION OR PETITION IS REPETITIVE WITHOUT WAIVING THE RIGHT TO FILE A RESPONSE OR OBJECTION SHOULD THE COURT ULTIMATELY DETERMINE THAT THE MOTION OR PETITION IS NOT REPETITIVE. NOTHING IN THIS RULE IS INTENDED TO PRECLUDE THE COURT ON ITS OWN MOTION FROM SUMMARILY DENYING A

Comment and/or Suggestions

The title of Rule 18 is "Motions" and Section 18(B) speaks to the appointment of counsel by motion. Rule 18(C) describes not only a "Motion" of the same or similar relief but a "Petition" as well. Frankly as the writer is not an attorney there may be legal reasoning behind this, but because these rules are not only to assist attorneys who may not practice in the field of probate, but the pro pers, does there need to be some more distinction made because of the definition in Rule 18(A) as this new rule deals with "Motions and "Petitions" and not just "Motions". Are motions and petitions the same thing in all civil matters? – the writer does not know. Also these Probate Rules were promulgated to assist the pro pers and if someone is trying to read and understand what their options may be, this new portion of Rule 18 will lead to confusion.

As the writer is not an attorney there is not specific suggested language changes to this section but shall leave any changes to be drafted by in-house counsel at the AOC.

Rule 19 No suggestions or additions.

Rule 22. ORDERS APPOINTING CONSERVATORS, GUARDIANS, AND PERSONAL REPRESENTATIVES; Bonds and Bond Companies; RESTRICTED ASSETS

C. RESTRICTED ACCOUNTS
1. EVERY ORDER APPOINTING A CONSERVATOR OR PERSONAL REPRESENTATIVE, OR THAT AUTHORIZES A SINGLE TRANSACTION OR OTHER PROTECTIVE ARRANGEMENT PURSUANT TO A.R.S. §14-5409, SHALL PLAINLY STATE ANY RESTRICTIONS ON THE FIDUCIARY'S AUTHORITY TO MANAGE MONETARY ASSETS OF THE ESTATE.

2. IF THE RESTRICTION AFFECTS THE FIDUCIARY'S ABILITY TO MANAGE MONETARY ASSETS OF THE ESTATE, THE ORDER AND, UNLESS OTHERWISE ORDERED BY THE COURT, ANY LETTERS THAT ISSUE SHALL CONTAIN THE FOLLOWING LANGUAGE: "FUNDS SHALL BE DEPOSITED INTO AN INTEREST-BEARING, FEDERALLY INSURED RESTRICTED ACCOUNT AT A FINANCIAL INSTITUTION ENGAGED IN BUSINESS IN ARIZONA. NO WITHDRAWALS OF PRINCIPAL OR INTEREST MAY BE MADE WITHOUT CERTIFIED ORDER OF THE SUPERIOR COURT. UNLESS OTHERWISE ORDERED BY THE COURT, REINVESTMENT MAY BE MADE WITHOUT FURTHER COURT ORDER SO LONG AS FUNDS REMAIN INSURED AND RESTRICTED IN THIS INSTITUTION AT THIS BRANCH."

Comment: Rule 22(C)(2). *There is concern for accounts not held in a federally insured financial institution. Funds may be held in a brokerage account and part of the estate plan designed and put into place by the conservatee prior to the involvement of a fiduciary. There needs to be an addition to this section indicating if such a circumstance of a brokerage account or other element of an estate plan exists, the funds do not have to be placed in a federal insured institution and the fiduciary will not be accused of a breach of duty. This in all likelihood may have to be addressed on a case by case basis and will require specifics in the order of appointment and in the letters issued.*

Rule 22(C)(3). UNLESS OTHERWISE ORDERED BY THE COURT, THE FIDUCIARY SHALL FILE A PROOF OF RESTRICTED ACCOUNT FOR EVERY ACCOUNT ORDERED RESTRICTED BY THE COURT WITHIN 30 DAYS AFTER THE ORDER OR LETTERS, WHETHER TEMPORARY OR PERMANENT, ARE FIRST ISSUED

Comment: Rule *22(C)(3). There is no concern regarding the filing of a proof of a restricted account except for the time limit of 30 days. The current status of the banking industry is not known for its expedience or willingness in signing off on the proof of restricted account required by any court's order. That being said, it is suggested that the phrase " EXCEPT FOR GOOD CAUSE" be added to this rule so no fiduciary, professional or otherwise, may be held liable or in contempt if the 30 day time limit is not strictly adhered to due to no fault of the fiduciary.*

Rule 22(D)(1) and (2).

D. RESTRICTED REAL PROPERTY

1. EVERY ORDER APPOINTING A CONSERVATOR OR A PERSONAL REPRESENTATIVE, OR THAT AUTHORIZES A SINGLE TRANSACTION OR OTHER PROTECTIVE ARRANGEMENT PURSUANT TO A.R.S. §14-5409, SHALL PLAINLY STATE ANY RESTRICTIONS ON THE AUTHORITY TO SELL, LEASE, ENCUMBER OR CONVEY REAL PROPERTY OF THE ESTATE. NEITHER LETTERS OF CONSERVATOR NOR PERSONAL REPRESENTATIVE OR THAT AUTHORIZES OR RATIFIES THE TRANSACTION SHALL BE ISSUED BY THE CLERK OF THE COURT TO ANY PERSON UNLESS THE LANGUAGE RESTRICTING THE FIDUCIARY'S AUTHORITY IS CONTAINED IN THE LETTERS.

2. IF THE RESTRICTION LIMITS THE FIDUCIARY'S AUTHORITY TO MANAGE REAL PROPERTY, THE ORDER APPOINTING THE CONSERVATOR OR PERSONAL REPRESENTATIVE, OR THAT AUTHORIZES OR RATIFIES THE TRANSACTION SHALL CONTAIN THE FOLLOWING LANGUAGE: "NO REALTY SHALL BE LEASED FOR MORE THAN ONE YEAR, SOLD, ENCUMBERED OR CONVEYED WITHOUT PRIOR COURT ORDER."

Comment/Suggestions: *It appears the authorization of a single transaction concept is covered in (2) but is not addressed in (D)(1). The appropriate language is suggested in (D)(1) in red and underlined.*

Rule 26. Issuance AND RECORDING of Letters

A. If the appointment of a fiduciary is limited in time by statute or court order, the letters issued shall reflect the termination date of the appointment.

B. Any restrictions on the authority of the fiduciary to act shall be reflected in the letters issued. IF THE COURT RESTRICTS THE AUTHORITY OF A CONSERVATOR, GUARDIAN OR PERSONAL REPRESENTATIVE, THE CLERK OF THE COURT SHALL NOT ISSUE LETTERS OF CONSERVATOR, GUARDIAN, OR PERSONAL REPRESENTATIVE UNLESS THE LANGUAGE RESTRICTING THE FIDUCIARY'S AUTHORITY IN THE COURT'S ORDER IS CONTAINED IN THE LETTERS OF APPOINTMENT.

Comment/Suggestions: *There is no concern with Rule 26(B) language. The concern is how will the Clerk of the Court know there are restrictions if the Clerk does not have the order? While this may be an administrative processing issue and can be handled through administrative processes the issue is raised here for clarification.*

E. PURSUANT TO A.R.S. § 14-5421, A CONSERVATOR SHALL FILE AND RECORD A CERTIFIED COPY OF THE LETTERS WITH THE OFFICE OF THE COUNTY RECORDER IN ALL COUNTIES WHERE THE ESTATE OWNS REAL PROPERTY. THE CONSERVATOR SHALL ALSO FILE A COPY OF THE RECORDED LETTERS WITH THE COURT WITHIN 30 DAYS AFTER ISSUANCE OF THE CONSERVATOR'S LETTERS.

Comment/ Suggestions: *There is confusion in this section (E). Is the intent to restrict filing of letters only in counties in Arizona? There are many times a fiduciary deals with a client who may have multiple properties in Arizona but also out of state. Is the intent of the rule to only require the appointed conservator to file letters in Arizona counties?*

The second sentence indicates the conservator shall file the certified copy of the recorded letters with the court. While the professional fiduciary or a banking institution may understand this would be the court of jurisdiction where the conservator was appointed, a pro per may interpret this as the court in the county where the property is located.

The intent of the second sentence is, the writer believes, to require the conservator file the recorded letters regarding real property within 30 days after the recordation and not 30 days after the initial issuance of the conservator's letters of appointment. This time element is also questioned as the conservator may not have become aware of all real property within 30 days of their appointment. Real property may be discovered some time later, especially if the property is located out of the state or country.

Current Rule draft:

E. PURSUANT TO A.R.S. § 14-5421, A CONSERVATOR SHALL FILE AND RECORD A CERTIFIED COPY OF THE LETTERS WITH THE OFFICE OF THE COUNTY RECORDER IN ALL COUNTIES WHERE THE ESTATE OWNS REAL PROPERTY. THE CONSERVATOR SHALL ALSO FILE A COPY OF THE RECORDED LETTERS WITH THE COURT WITHIN 30 DAYS AFTER ISSUANCE OF THE CONSERVATOR'S LETTERS.

Suggestion:

E. PURSUANT TO A.R.S. § 14-5421, A CONSERVATOR SHALL FILE AND RECORD A CERTIFIED COPY OF THE LETTERS WITH THE OFFICE OF THE COUNTY RECORDER IN ALL COUNTIES IN ANY STATE, WHERE THE ESTATE OWNS REAL PROPERTY. THE CONSERVATOR SHALL ~~ALSO~~ FILE A COPY OF THE RECORDED LETTERS WITH THE COURT IN WHICH THE CONSERVATOR WAS APPOINTED WITHIN 30 DAYS AFTER THE COUNTY RECORDER HAS ISSUED THE RECORDED ~~ISSUANCE OF THE~~ CONSERVATOR'S LETTERS.

RULE 26.1: WRITTEN FINDINGS ON APPOINTMENT

FOLLOWING A WRITTEN REQUEST BY A PERSON WITH HIGHER PRIORITY FOR APPOINTMENT AS A GUARDIAN OR CONSERVATOR BUT WHO WAS PASSED OVER BY THE COURT IN FAVOR OF APPOINTING A PERSON WITH LOWER PRIORITY, THE COURT SHALL MAKE A SPECIFIC FINDING REGARDING THE COURT'S DETERMINATION OF GOOD CAUSE AND WHY THE PERSON WAS NOT APPOINTED. THE REQUEST MUST BE MADE WITHIN TEN DAYS AFTER THE ENTRY OF THE ORDER.

Comment/Suggestions *This rule seems to be poorly placed within the rules and may have been placed here so there was less reshuffling of the rules coming after. Rule 20 deals with the requirement of filing the affidavit pursuant to A.R.S. § 14-5106 – would that be a more appropriate place in the rules?*

RULE 27.1. TRAINING FOR NON-LICENSED FIDUCIARIES.

A. ANY PERSON WHO IS NEITHER A LICENSED FIDUCIARY UNDER A.R.S. § 14-5651 NOR A FINANCIAL INSTITUTION SHALL COMPLETE A TRAINING PROGRAM APPROVED BY THE SUPREME COURT BEFORE LETTERS TO SERVE AS A GUARDIAN, CONSERVATOR, OR PERSONAL REPRESENTATIVE ARE ISSUED UNLESS THE APPOINTMENT WAS MADE PURSUANT TO SECTIONS 14-5310(A), 14-5401.01(A) OR 14-5207(C).

Comment/Suggestions: *This rule seems to be poorly placed within the rules as the current Rule 27 addresses contested matters. This new rule deals with the training requirements for a non-licensed fiduciary and as such would seem to be more appropriately placed under Rule 10(C) as that rule addresses other duties and requirements for fiduciaries appointed by the court.*

Rule 28 Pretrail Procedures ***No suggestions or comments.***

Rule 29. Arbitration ALTERNATIVE DISPUTE RESOLUTION

Suggestions or comments: The suggestions for this rule are only in the change of the placement of the work "HOWEVER" in (A), striking the second "UPON" in (B), the proper drafting style of numerical references in THIRTY and (15) in (C) and (D); and the addition of "AND" at the end of (D)(1).

A. THE PARTIES TO A CONTESTED MATTER ARE NOT SUBJECT TO COMPULSORY ARBITRATION AS SET FORTH IN RULES 72 THROUGH 77, ARIZONA RULES OF CIVIL PROCEDURE. **HOWEVER,** THE COURT IS AUTHORIZED BY ARIZONA REVISED STATUTES SECTION 14-1108, ~~**HOWEVER**~~, TO ORDER ALTERNATIVE DISPUTE RESOLUTION, INCLUDING ARBITRATION. IF THE COURT ORDERS ARBITRATION, THE ARBITRATION SHALL BE GOVERNED BY RULES 73 THROUGH 77, ARIZONA RULES OF CIVIL PROCEDURE.

B. UPON MOTION OF ANY PARTY OR ~~**UPON**~~ ITS OWN INITIATIVE, THE COURT MAY DIRECT THE PARTIES TO PARTICIPATE IN ONE OR MORE ALTERNATIVE DISPUTE RESOLUTION PROCESSES, INCLUDING BUT NOT LIMITED TO ARBITRATION, MEDIATION, SETTLEMENT CONFERENCE, OPEN NEGOTIATION, OR A PRIVATE DISPUTE RESOLUTION PROCESS AGREED UPON BY THE PARTIES.

C. NO LATER THAN ~~THIRTY~~ ~~(~~30~~)~~ DAYS AFTER A PROBATE PROCEEDING BECOMES CONTESTED AS DEFINED BY RULE 27, THE PARTIES SHALL CONFER, EITHER IN PERSON OR BY TELEPHONE, ABOUT:

1. THE POSSIBILITIES FOR A PROMPT SETTLEMENT OR RESOLUTION OF THE CASE; AND
2. WHETHER THE PARTIES MIGHT BENEFIT FROM PARTICIPATION IN SOME ALTERNATIVE DISPUTE RESOLUTION PROCESS, THE TYPE OF PROCESS THAT WOULD BE MOST APPROPRIATE IN THEIR CASE, THE SELECTION OF AN ALTERNATIVE DISPUTE RESOLUTION SERVICE PROVIDER, AND THE SCHEDULING OF THE PROCEEDINGS

D. THE PARTIES ARE RESPONSIBLE FOR ATTEMPTING IN GOOD FAITH TO AGREE ON AN ALTERNATIVE DISPUTE RESOLUTION PROCESS AND FOR REPORTING THE OUTCOME OF THEIR CONFERENCE TO THE COURT. WITHIN FIFTEEN ~~**(15)**~~ DAYS AFTER THEIR CONFERENCE, THE PARTIES SHALL INFORM THE COURT OF THE FOLLOWING:

1. IF THE PARTIES HAVE AGREED TO USE A SPECIFIC ALTERNATIVE DISPUTE RESOLUTION PROCESS, THE TYPE OF ALTERNATIVE DISPUTE RESOLUTION PROCESS TO BE USED, THE NAME AND ADDRESS OF THE ALTERNATIVE

DISPUTE RESOLUTION SERVICE PROVIDER THEY WILL USE, AND THE DATE BY WHICH THE ALTERNATIVE DISPUTE RESOLUTION PROCEEDINGS ARE ANTICIPATED TO BE COMPLETED; **AND**

2. IF THE PARTIES HAVE NOT AGREED TO USE A SPECIFIC ALTERNATIVE DISPUTE RESOLUTION PROCESS, THE POSITION OF EACH PARTY AS TO THE TYPE OF ALTERNATIVE DISPUTE RESOLUTION PROCESS APPROPRIATE FOR THE CASE OR, IN THE ALTERNATIVE, WHY ALTERNATIVE DISPUTE RESOLUTION IS NOT APPROPRIATE; AND

3. IF ANY PARTY REQUESTS THAT THE COURT CONDUCT A CONFERENCE TO CONSIDER ALTERNATIVE DISPUTE RESOLUTION.

RULE 29.2: REMEDIES FOR VEXATIOUS CONDUCT; DEFINITIONS

A. IF THE COURT FINDS THAT A PERSON ENGAGED IN VEXATIOUS CONDUCT IN CONNECTION WITH A PROBATE CASE, THE COURT MAY DO EITHER OR BOTH OF THE FOLLOWING:

Comment/Suggestions

This rule seems to be out of place. The current Rule 29 is listed under Contested Matters. The new change to Rule 29 changes the title of the rule to Alternative Dispute Resolution. The change in title does not seem to indicate the title change has made any change to the substance of Rule 29. The rule under the general heading of Contested Matters makes sense because you are trying to address a dispute through alternatives.

This again may be a matter of not understanding legal procedures, terms of legalese, but this placement of the new rule dealing with vexatious conduct under Contested Matters does not seem to fit well and has struck the "it just don't feel right" elbow. Should this rule say for instance be included with Rule 10 outlying duties of parties? A fiduciary may be appointed and there are not issues before the court and suddenly a disgruntled family member, creditor or unknown party may begin demanding responses from the court appointed fiduciary. Is this a valid concern, a lack of insight, or "it doesn't fit well with the writer's world" but is OK in the world of vexatious conduct and therefore should always be associated with contested matters and remain as such. A review by AOC in house counsel or Staff Attorney's Office may be warranted to add a something in the comment to the rule to address the writer's concerns.

2. ORDER THAT A FIDUCIARY, FIDUCIARY'S ATTORNEY, COURT-APPOINTED ATTORNEY**,** GUARDIAN AD LITEM,

Comment and/or Suggestions *There appears to be a comma missing in 29.2(A)(2) after the word court appointed attorney in the listing.*

29.2(C). FOR THE PURPOSES OF THIS SECTION:

2. FIDUCIARY" MEANS AN AGENT UNDER A DURABLE POWER OF ATTORNEY, AN AGENT UNDER A HEALTH CARE POWER OF ATTORNEY, A GUARDIAN, A CONSERVATOR, A PERSONAL REPRESENTATIVE, A TRUSTEE, a person acting under a single transaction pursuant to A.R.S. § 14-5409 OR A GUARDIAN AD LITEM,

***Comment and/or Suggestions*:** *In all the new rule changes there has been an acknowledgement of a person acting under a single transaction authority pursuant to ARS § 14-5409 and it would appear this classification of fiduciary should also be included in the section of Rule 29.2(C)(2).*

Rule 30. Guardianships/Conservatorships-Specific Procedures

B. CONSERVATOR'S ACCOUNTS ~~Accountings~~

3. UNLESS OTHERWISE ORDERED BY THE COURT, THE CONSERVATOR'S ACCOUNT SHALL BE FILED IN THE FORMAT SET FORTH IN THE APPROPRIATE FORM CONTAINED IN RULE 38 OF THESE RULES.

Comment and/or Suggestions. *While it is understood the standardization of forms filed with the superior court in any county may provide improvement in the process of inventory, accounting and guardianship oversight by the courts, and assist fiduciaries practicing in multiple jurisdictions, having forms as part of court rules is not good practice.*

With the promulgation of the first Probate Rules it was recognized by the committee members and staff to the committee, there was a need to provide statewide consistency with some of the functions of court probate processes, simultaneously making it clear to those appointed what the statutes and court require an appointed fiduciary to do. After much debate it was decided the most effective manner in which to accomplish this was providing orders of appointment for the 4 most common types of fiduciary court appointments. These standard orders encompass the duties of the 4 types of appointments so no matter the parties or facts of the case, the duties and responsibilities are spelled out in detail. These orders had been developed at the superior court level and were supported by the committee members and staff along with members of the fiduciary community. The proposed rule changes and adoption of multiple forms by these new rules go far beyond those 4 original forms.

The concern is adoption of all new forms developed for many process will take a period of time to work out the "bugs". If there are changes to the forms needed then a new set of forms will have to be processed through a Rule petition and again and again if changes are necessary. These forms are "activity" forms and are unlike the current 4 forms of procedure. Rule change for the Court is not simple and takes staff time, effected parties' time, and must run a gamut of processes and time periods, i.e., Public comment. The Court is moving towards electronic filing of documents and records. While electronic filing may be down the road, by the time the "bugs" are worked out of the new proposed forms the system may be capable of electronic filing.

Once all changes to the proposed new rules are completed and the rules adopted it would be an easier process to then make sure all new forms are in sync with the newly adopted rules. While there is no opposition of standardized of forms it is strongly urged for the Court not to include any new forms in this current Rules process. The Court may issue an Administrative Order adopting new forms and still have the same effect.

OR *VERSION 1-TRIAGE PROGRAM A

D. INDEPENDENT CASE REVIEW
1. DURING A PRE-APPOINTMENT INVESTIGATION OF A SUBJECT PERSON PURSUANT TO A.R.S. § 14-5308(B), AN INVESTIGATOR SHALL ASSESS THE NEED FOR POST-APPOINTMENT MONITORING THROUGH USE OF RISK ASSESSMENT CRITERIA ESTABLISHED BY THE SUPREME COURT AND SET FORTH IN A FORM. THE INVESTIGATOR SHALL FILE THE RISK ASSESSMENT FORM WITH THE COURT UPON COMPLETION OF THE INVESTIGATION.

Comment and/or Suggestions. *In the second sentence the Investigator is to file the form with the "COURT". Is the intent for the Investigator to file the assessment form with the Supreme Court or the Superior Court in the jurisdiction where the subject person has been adjudicated? In both versions of the triage program, the distinction between Supreme Court and Superior Court should be made clear to ensure there is not confusion as to which court has the jurisdiction over the process and where the assessment form should be filed.*

Example: It would seem the addition of "SUPERIOR" should be added before "COURT" in the second sentence of (D)(1).

RULE 30.1: GOOD FAITH ESTIMATE

A. PETITION TO APPOINT A CONSERVATOR SHALL BE ACCOMPANIED BY A GOOD FAITH ESTIMATE OF ALL PROJECTED MONTHLY AND ANNUAL COSTS THAT SHALL BE INCURRED BY A CONSERVATOR, EXCEPT MEDICAL COSTS, TO THE EXTENT THE INFORMATION CAN BE REASONABLY KNOWN OR PROJECTED AT THE TIME A PETITION IS FILED.

B. THE GOOD FAITH ESTIMATE SHALL BE MADE IN FORM 5 SET FORTH IN RULE 38 (FORMS) AND SHALL CONFORM TO THE INSTRUCTIONS PROVIDED WITH FORM 5.

C. IF THE PETITIONER IS UNABLE TO PROVIDE ALL OR PART OF THE GOOD FAITH ESTIMATE AT THE TIME THE PETITION IS FILED, THE PETITIONER MUST STATE IN THE PETITION ALL EFFORTS MADE BY THE PETITIONER TO OBTAIN THE ESTIMATES, AND THE PETITIONER SHALL UPDATE THE GOOD FAITH ESTIMATE FIVE DAYS BEFORE THE HEARING ON THE PETITION IF FURTHER INFORMATION BECOMES KNOWN.

Comment and/or Suggestions: *The concept of "good faith estimates" was debated at length during meetings with legislative staff and legislators during this past year's (2011) legislative session. While some information may be known because of contact with government agencies or family and friends of the subject person prior to a court proceeding, the staff and legislators finally understood that until an appointment is made, the fiduciary, especially the professional fiduciary, has NO legal authority to gain information regarding a person's medical information assets, receipts, disbursements, etc.*

During these legislative meetings, and in meetings of the Probate Oversight Committee, comparisons were made to mechanics or contractors providing good faith estimates to provide a service. This type of comparison is the inevitable "apples to oranges". Cars and bathroom tile are inanimate objects which do not require basic necessities of food, clothing, shelter and medical treatment. To equate people and their needs and rights to quality of life to deciding between tumbled marble tiles versus natural stone is offensive.

The idea of good faith estimates to assist the court and interested parties in understanding what may be the costs of seeing to a person's needs is reasonable because in day to day activities we all want to know what we are in for and how much it will costs to get there. In addition the court is looking for as much transparency as possible in probate proceedings. The difference between the day to day world outside a probate proceeding is access to the information and the ability for the petitioner, be they family members or professional fiduciary, to make informed decisions. The world of a potential court appointed fiduciary is not so lucky as to have the ability to access information.

If the rule is adopted then the efforts made by a potential fiduciary is time spent and would be a cost of administration and billable to the estate. It is more than likely most petitioners will state in the petition for appointment, "Efforts to obtain information to provide a good faith estimate where unsuccessful do to the fact the petitioner has no legal authority to request information".

At least by the time the inventory is filed the conservator will have had an opportunity to present their letters of appointment to financial institution, doctors and service providers to gain accurate information of the true costs of a person's needs. Therefore it is then suggested this Rule 30.1 <u>not be adopted by the Court</u>, but address providing information on costs in the budgeting process at the time the inventory is filed in the Rule 30.4.

RULE 30.2: FINANCIAL ORDER

A. FOLLOWING THE APPOINTMENT OF A CONSERVATOR, A CONSERVATOR FOR AN ADULT SHALL INSTITUTE AND FOLLOW A BUDGET, AS SET FORTH IN RULE 30.4, UNLESS OTHERWISE ORDERED BY THE COURT, AND THE COURT MAY ENTER ONE OR MORE OF THE FOLLOWING ORDERS:

   1. LIMIT EXPENDITURES FROM THE ESTATE OF THE PROTECTED PERSON AS THE COURT FINDS IS IN THE PROTECTED PERSON'S BEST INTEREST; OR,
   2. REQUIRE THE CONSERVATOR TO PROCEED IN ANY OTHER LAWFUL MANNER THE COURT FINDS IS IN THE PROTECTED PERSON'S BEST INTEREST.

B. AFTER A CONSERVATOR IS APPOINTED, THE COURT MAY DISCHARGE THE PROTECTED PERSON'S ATTORNEY IF THE COURT FINDS THAT THE COST OF THE CONTINUED REPRESENTATION EXCEEDS THE PROBABLE BENEFIT TO THE PROTECTED PERSON. UNTIL DISCHARGED, THE PROTECTED PERSON'S ATTORNEY HAS A CONTINUING DUTY TO REVIEW THE CONSERVATOR'S INVENTORY, BUDGETS AND ACCOUNTS AND TO NOTIFY THE COURT OF ANY OBJECTIONS OR CONCERNS THE ATTORNEY IDENTIFIES WITH RESPECT TO THE CONSERVATOR'S INVENTORY, BUDGETS AND ACCOUNTS.

COMMENT

A.R.S. § 14-5408(A)(3) AUTHORIZES THE COURT, AFTER IT DETERMINES THAT A BASIS FOR THE APPOINTMENT OF A CONSERVATOR EXISTS WITH RESPECT TO A PERSON FOR REASONS OTHER THAN MINORITY, TO ENTER SUCH ORDERS AS ARE NECESSARY FOR THE BENEFIT OF THE PROTECTED PERSON AND MEMBERS OF THAT PERSON'S HOUSEHOLD. A.R.S. § 14-5426(A) AUTHORIZES THE COURT TO LIMIT THE POWERS OF A CONSERVATOR. CONSISTENT WITH THOSE STATUTES, THIS RULE IS INTENDED TO ENSURE THAT THE PROTECTED PERSON'S ESTATE IS PROPERLY MANAGED, PROTECTED, AND PRESERVED.

Comment and/or Suggestions *This new rule deals with conservatorship only appointments but does not address the case where the appointment is for a guardianship and conservatorship. The Court or Committee may want to re-visit the ability of the court to discharge a court appointed attorney in those cases where the person has also been adjudicated as incapacitated.*

RULE 30.3: SUSTAINABILITY OF CONSERVATORSHIP

A. THE CONSERVATOR SHALL DISCLOSE WHETHER THE ANNUAL EXPENSES OF THE CONSERVATORSHIP EXCEED INCOME AND, IF SO, WHETHER THE ASSETS AVAILABLE TO THE CONSERVATOR LESS LIABILITIES ARE SUFFICIENT TO SUSTAIN THE CONSERVATORSHIP DURING THE PROJECTED LIFESPAN OF THE PROTECTED PERSON. IF THE ASSETS ARE NOT SUFFICIENT, THE CONSERVATOR SHALL ALSO DISCLOSE THE MANAGEMENT PLAN FOR THE NON-SUSTAINABLE CONSERVATORSHIP. UNLESS OTHERWISE ORDERED BY THE COURT, THE CONSERVATOR SHALL DISCLOSE THE INFORMATION REQUIRED BY THIS RULE, INCLUDING THE CONSERVATOR'S ASSUMPTIONS AND CALCULATION, WHEN FILING AN INVENTORY, ANY CONSERVATOR'S ACCOUNT, AND FOLLOWING ANY MATERIAL CHANGE OF CIRCUMSTANCES.

B. THE INFORMATION REQUIRED BY THIS RULE SHALL BE A GOOD FAITH PROJECTION BASED UPON THE INFORMATION THAT IS REASONABLY AVAILABLE TO THE CONSERVATOR CONCERNING THE SUBJECT PERSON. THIS INFORMATION MAY BE CONSIDERED BY THE COURT WHEN ENTERING ORDERS.

C. THE CONSERVATORSHIP IS DEEMED SUSTAINABLE IF THE FOLLOWING EQUATION IS PROJECTED TO BE TRUE:

$$\frac{\text{(AVAILABLE ASSETS MINUS LIABILITIES OF THE ESTATE)}}{\text{(ANNUAL EXPENDITURES MINUS ANNUAL INCOME)}} \quad \text{PROJECTED LIFESPAN}$$

D. THE DISCLOSURE REQUIRED BY THIS RULE IS NOT REQUIRED IN THE CONSERVATORSHIP FOR A MINOR UNLESS OTHERWISE ORDERED BY THE COURT.

E. UNLESS OTHERWISE ORDERED BY THE COURT, THE SUSTAINABILITY DISCLOSURE SHALL BE FILED IN THE FORMAT SET FORTH IN THE APPROPRIATE FORM CONTAINED IN RULE 38 OF THESE RULES.

COMMENT

THE PURPOSE OF THE DISCLOSURE REQUIRED BY THIS RULE IS TO PROVIDE THE COURT AND PARTIES WITH A GENERAL IDEA AS TO WHETHER THE ASSETS AND INCOME OF THE CONSERVATORSHIP ESTATE ARE SUFFICIENT TO PAY FOR THE PROTECTED PERSON'S EXPENSES DURING THAT PERSON'S PROJECTED LIFE EXPECTANCY. THUS, THE DISCLOSURE REQUIRED BY THIS RULE IS INTENDED TO SERVE SOLELY AS A MANAGEMENT TOOL; THE COURT DOES NOT INTEND THAT A GOOD FAITH PROJECTION WILL FORM THE BASIS FOR A CLAIM OF LIABILITY AGAINST THE CONSERVATOR.

THE FOLLOWING EXAMPLE DESCRIBES HOW THE REQUIRED DISCLOSURE IS CALCULATED: ASSUME A PROTECTED PERSON'S ESTATE CONSISTS OF $20,000 IN BANK ACCOUNTS AND A RESIDENCE WITH A FAIR MARKET VALUE OF $120,000 AND A $65,000 MORTGAGE. FURTHER ASSUME THAT SAME PROTECTED PERSON HAS AN ANNUAL INCOME OF $20,000 AND ANNUAL EXPENSES (INCLUDING FIDUCIARY AND ATTORNEY FEES) OF $45,000. THE CONSERVATORSHIP'S SUSTAINABILITY IS CALCULATED AS FOLLOWS:

$$\frac{(\$120{,}000+20{,}000-65{,}000)}{(\$45{,}000-20{,}000))} \geq \text{PROJECTED LIFESPAN}$$

$$\$75{,}000\$25{,}000 \geq \text{PROJECTED LIFESPAN}$$

3 YEARS UNTIL ASSETS ARE DEPLETED $\geq$PROJECTED LIFESPAN

THUS, IF THE CONSERVATOR ESTIMATES THAT THE PROTECTED PERSON'S LIFESPAN IS THREE YEARS OR LESS, THE CONSERVATORSHIP IS SUSTAINABLE. ON THE OTHER HAND, IF THE CONSERVATOR ESTIMATES THAT THE PROTECTED PERSON'S LIFESPAN IS MORE THAN THREE YEARS, THE CONSERVATORSHIP IS NOT SUSTAINABLE AND THE CONSERVATOR MUST EXPLAIN HOW THE PROTECTED PERSON'S EXPENSES WILL BE MANAGED AFTER THREE YEARS.

Comment and/or Suggestions *The first suggestion is a restatement of a previous concern, i.e., the Court NOT adopt any forms in the new rules, but after the final version of the rules are developed and adopted, have the Court issue an Administrative Order adopting any new forms.*

While this new Rule may have had the intention of assisting the court and interested parties in understanding the future financial viability of a protected person's lifestyle, it has a broad undercurrent of the macabre as well. Projecting life spans is an art not a science and actuaries have a difficult time doing it and yet the rule expects the fiduciary, family or professional, to do what is difficult for an expert. In addition to the impracticality of the process, it offends this writer's "ick" bone.

The circumstances of an incapacitated or protected person are susceptible to change on a daily basis. A medical incident, from a stroke to a fall, or a case of the flu may affect the person on a continuum of little or no change in lifestyle to one of catastrophic proportions. Upon appointment on many cases the writer has had, the person was physically in extremely poor condition and in a hospital or nursing home. After involvement and advocating for the person to receive appropriate care the person improved and was able to resume some activities of daily life, in some instances, a return home. Part of the "ick" bone feeling in this case is this rule removes the human element and puts it down to nothing more than "what is it going to cost". This rule undermines some of the most basic fundamental ideas of fiduciary work, including but not limited to: protecting the person and their estate to foster independence and self-reliance; maintaining the person in the least restrictive environment; or maintaining the person in their own home or other non-institutional setting; "conserve" the estate for the benefit of the person.

These rules apply to all fiduciaries, including family members. If the conservatorship is "not deemed sustainable" is the court's real concern the fiduciary is going to drop and run? The court's role in probate matters is very different than the usual arbiter in an adversarial process. There is no one denying the court needs accurate information on costs of a conservatorship and if there are sufficient funds to maintain the person in a lifestyle as close to what the person had for as long as the person may have. The fiduciary is the party or person who is able to make this happen through the administration of the estate. The court appoints the fiduciary to do the day to day decision making in its place. The court has the ability to ask anything, at any time, of any fiduciary, in other words –please let the court and fiduciary carry out their respective roles in the process under the statutes we now have.

Viability of an estate in covering all costs of a conservatee's life is a constant in the day to day decision making process for any fiduciary. If there is a need for information regarding the ability of the conservatorship to be sustained, or when necessary to make alternative plans, then let it be done through the budgeting process in Rule 30.4.

RULE 30.4: CONSERVATORSHIP ESTATE BUDGET

A. UNLESS OTHERWISE ORDERED BY THE COURT, THE CONSERVATOR SHALL FILE A BUDGET NOT LATER THAN THE DATE THE INVENTORY IS DUE AND WITH THE CONSERVATOR'S ACCOUNT FILED THEREAFTER, FOLLOWING CONSULTATION WITH ANY ATTORNEY OR GUARDIAN AD LITEM FOR THE PROTECTED PERSON. THE FIRST BUDGET SHALL COVER THE DATE OF THE CONSERVATOR'S INITIAL APPOINTMENT THROUGH AND INCLUDING THE END DATE OF THE CONSERVATOR'S FIRST ACCOUNT.

B. UNLESS OTHERWISE ORDERED BY THE COURT, THE BUDGET SHALL BE FILED IN THE FORMAT SET FORTH IN THE APPROPRIATE FORM CONTAINED IN RULE 38 OF THESE RULES.

C. THE CONSERVATOR MUST PROVIDE A COPY OF THE BUDGET TO ALL PERSONS ENTITLED TO NOTICE OF THE CONSERVATOR'S ACCOUNTS PURSUANT TO ARIZONA REVISED STATUTES SECTION 14-5419(C).

D. THE CONSERVATOR SHALL FILE AN AMENDMENT TO THE BUDGET AND PROVIDE NOTICE IN THE SAME MANNER AS THE INITIAL BUDGET WITHIN THIRTY DAYS AFTER REASONABLY PROJECTING THAT THE EXPENDITURES FOR ANY SPECIFIC CATEGORY WILL EXCEED THE APPROVED BUDGET BY MORE THAN TEN PER CENT OR TWO THOUSAND DOLLARS, WHICHEVER IS GREATER, UNLESS A DIFFERENT THRESHOLD FOR AMENDMENT IS PRESCRIBED BY THE COURT.

E. AN INTERESTED PERSON MAY FILE A WRITTEN OBJECTION TO THE BUDGET OR AMENDMENT WITHIN FOURTEEN DAYS AFTER THE FILING DATE OF THE BUDGET OR AMENDMENT. ON THE FILING OF A WRITTEN OBJECTION, THE COURT MAY OVERRULE ALL OR PART OF THE OBJECTION, ORDER A REPLY BY THE CONSERVATOR OR SET A HEARING ON THE OBJECTION. THE COURT MAY ALSO SET A HEARING IN THE ABSENCE OF AN OBJECTION. AT A HEARING, THE CONSERVATOR HAS THE BURDEN TO PROVE THAT A CONTESTED BUDGET ITEM IS REASONABLE, NECESSARY AND IN THE BEST INTEREST OF THE PROTECTED PERSON. IF AN INTERESTED PERSON FAILS TO OBJECT TO A BUDGET ITEM WITHIN FOURTEEN DAYS AFTER THE FILING DATE OF THE BUDGET OR AMENDMENT, HOWEVER, THE BUDGET ITEM SHALL BE DEEMED PRESUMPTIVELY REASONABLE AT THE TIME OF THE CONSERVATOR'S ACCOUNT.

F. THE COURT MAY ORDER THAT A BUDGET IS ACCEPTED IN THE ABSENCE OF AN OBJECTION. ON THE COURT'S OWN MOTION OR UPON THE FILING OF A WRITTEN OBJECTION, THE COURT SHALL APPROVE, DISAPPROVE OR MODIFY THE BUDGET TO FURTHER THE PROTECCTED PERSON'S BEST INTEREST.

Comment and/or Suggestions: *Why is there a specific affirmative duty the conservator shall consult with any attorney or GAL in section (A)? A fiduciary in his or her discretion should be permitted to consult with any professional in determining the appropriate budget for their client. The requirement for consultation with any attorney or GAL should be struck and instead a "may" duty to consult with anyone be included in the rule.*

A. UNLESS OTHERWISE ORDERED BY THE COURT, THE CONSERVATOR SHALL FILE A BUDGET NOT LATER THAN THE DATE THE INVENTORY IS DUE AND WITH THE CONSERVATOR'S ACCOUNT FILED THEREAFTER~~,~~. THE FIDUCIARY MAY CONSULT WITH ANY PROFESSIONAL IN PREPARING THE BUDGET, INCLUDING BUT NOT LIMITED TO ~~FOLLOWING CONSULTATION WITH~~ ANY ATTORNEY OR GUARDIAN AD LITEM FOR THE PROTECTED PERSON. THE FIRST BUDGET SHALL COVER THE DATE OF THE CONSERVATOR'S INITIAL

APPOINTMENT THROUGH AND INCLUDING THE END DATE OF THE CONSERVATOR'S FIRST ACCOUNT.

B. UNLESS OTHERWISE ORDERED BY THE COURT, THE BUDGET SHALL BE FILED IN THE FORMAT SET FORTH IN THE APPROPRIATE FORM APPROVED BY THE SUPREME COURT ~~CONTAINED IN RULE 38 OF THESE~~ ~~RULES~~.

Comment and/or Suggestions: *Section 30.4(B) should be redrafted so there is not a specific form associated with the rules but one approved by the Court. This refers back to previous comments and suggestions regarding not adopting all the newly proposed forms by rule process.*

D. THE CONSERVATOR SHALL FILE AN AMENDMENT TO THE BUDGET AND PROVIDE NOTICE IN THE SAME MANNER AS THE INITIAL BUDGET WITHIN THIRTY DAYS AFTER REASONABLY PROJECTING THAT THE EXPENDITURES FOR ANY SPECIFIC CATEGORY WILL EXCEED THE APPROVED BUDGET BY MORE THAN TEN PER CENT OR TWO THOUSAND DOLLARS, WHICHEVER IS GREATER, UNLESS A DIFFERENT THRESHOLD FOR AMENDMENT IS PRESCRIBED BY THE COURT.

Comment and/or Suggestions: *The concern over Rule 30.4(D) is one of cost of administration for the conservator to file amendments and to have interested parties object to the amendments. Fiduciary work, especially in the beginning of the administration of a case, is unpredictable at best. Emergencies, be they medical incidents or unforeseen recovery of assets are part of the landscape. Medical incidents can lead to a huge increase in costs if placement is needed or in home support is required. If you are conservator and guardian for a person, and have the ability to place a client in treatment, the costs can fluctuate greatly if your client begins to have behaviors necessitating in patient treatment and the revolving door of placement can go on for some time until the client is stable.*

Again it is understood large increases of costs could be viewed as a "red flag" in administration of a case. If a budget is set at $50,000.00 a 10% increase would be $5,000.00; but if that $5,000.00 is due to a new roof for a home or HVAC system, then the requirement to file an amendment to the budget would cost additional funds due to payments to the fiduciary, fiduciary's lawyer and the court appointed counsel in preparation of a petition and court appearance

If the section remains in the rule, then it is suggested the dollar amount for requirement of an amendment be increased to FIFTEEN PERCENT OR FIVE THOUSAND DOLLARS WHICHEVER IS GREATER, . . .

E. AN INTERESTED PERSON MAY FILE A WRITTEN OBJECTION TO THE BUDGET OR AMENDMENT WITHIN FOURTEEN DAYS AFTER THE FILING DATE OF THE BUDGET OR AMENDMENT. ON THE FILING OF A WRITTEN OBJECTION, THE COURT MAY OVERRULE ALL OR PART OF THE OBJECTION, ORDER A REPLY BY THE CONSERVATOR OR SET A HEARING ON THE OBJECTION. THE COURT MAY ALSO SET A HEARING IN THE ABSENCE OF AN OBJECTION. AT A HEARING, THE CONSERVATOR HAS THE BURDEN TO PROVE THAT A CONTESTED BUDGET ITEM

IS REASONABLE, NECESSARY AND IN THE BEST INTEREST OF THE PROTECTED PERSON. IF AN INTERESTED PERSON FAILS TO OBJECT TO A BUDGET ITEM WITHIN FOURTEEN DAYS AFTER THE FILING DATE OF THE BUDGET OR AMENDMENT, HOWEVER, THE BUDGET ITEM SHALL BE DEEMED PRESUMPTIVELY REASONABLE AT THE TIME OF THE CONSERVATOR'S ACCOUNT.

Comment and/or Suggestions: *Rule 30.4(E) deals with an interested person filing a written objection to an amendment, but midway through the paragraph the sentence is: THE COURT MAY ALSO SET A HEARING IN THE ABSENCE OF AN OBJECTION. This sentence does not make sense here as the paragraph concerns itself with an interested person filing a written objection. The section continues and gives the court the authority to overrule part or all of the objections, order a reply by the conservator or set a hearing. In Rule 30.4(F) the court may order a budget accepted in the absence of an objection. It would seem the ability of the court to set a hearing in the absence of an objection would be more appropriate in Rule 30.4(F) rather than in (E).*

Rule 33. Compensation for Fiduciaries and Attorney's Fees Attorneys; STATEWIDE FEE GUIDELINES

A. A GUARDIAN, CONSERVATOR, ATTORNEY OR GUARDIAN AD LITEM WHO INTENDS TO BE COMPENSATED BY THE ESTATE OF A WARD OR PROTECTED PERSON SHALL GIVE WRITTEN NOTICE OF THE BASIS OF ANY COMPENSATION AS REQUIRED BY ARIZONA REVISED STATUTES SECTION 14-5109.

Comment and/or Suggestions*: Discussion at Probate Oversight Committee meetings and committees of the past have always referenced issues relating to the listing of any fees in a document as "guidelines" and not "standards". Once in a Court Rule the concept will inevitably no longer be viewed as "guidelines" but court sanctioned thereby shifting the thinking to not merely "guidelines" but to "standards". The discussion has been fees in the private sector, whether fiduciary or attorney should be market driven and not based on an abstract list of fees established by court standards. While there may be standard tasks and duties, there should not be standard fees.*

Therefore it is <u>strongly urged</u> to strike the title of "~~STATEWIDE FEE GUIDELINES~~" *from Rule 33 and leave the current rule title as is. Retention of the current title of Rule 33 in no way affects the substance of the rule.*

Rule 38. Appendix to Forms

A. The forms Forms 1 THROUGH 4 included in Appendix A are the preferred forms and meet the requirements of these rules. Whenever these rules require the use of a form that is "substantially similar" to a form contained in this rule, such language means that the content of these forms may be adapted to delete information that does not apply to a particular case or add other relevant information, provided that all information contained in the preferred

form and applicable to the case is included. The deletion of information contained in the preferred form or the failure to complete a portion of the preferred form constitutes a representation to the court and adverse parties that the omitted or unanswered questions or items are not applicable. Any form may be modified for submission at times and under circumstances provided for by an Administrative Order of the Supreme Court of Arizona.

~~The forms~~ Forms 1 THROUGH 4 in Appendix A shall not be the exclusive method for presenting such matters in the superior court.

B. FORMS 5 THROUGH 10 INCLUDED IN APPENDIX A MEET THE REQUIREMENTS OF THESE RULES. UNLESS OTHERWISE ORDERED BY THE COURT, FORMS 5 THROUGH 9 SHALL BE THE EXCLUSIVE METHOD FOR PRESENTING SUCH MATTERS IN THE SUPERIOR COURT. FORM 10 CAN BE USED BY A CONSERVATOR ONLY IF AUTHORIZED BY THE COURT TO DO SO. THE INSTRUCTIONS INCLUDED WITH FORMS 5 THROUGH 10 SUPPLEMENT THE RULES AND HAVE THE SAME FORCE AND EFFECT AS THE RULES.

Comment and/or Suggestions *Paragraph A states forms 1 through 4 in Appendix A are the preferred forms for use, and may be adapted for use. New section B says ONLY FORMS 5 THROUGH 9 SHALL BE USED. . . It would appear there are different rules for different forms. This confusion will only lead to more delays on the part of fiduciaries, attorneys, interested persons and pro pers in administration of cases and costs of administration.*

This lack of clear understanding of which forms "may" be used versus those that "shall" be used is another example in support of why the Court should not include forms in Court Rules. Once the new rules are finally agreed upon and subsequently all forms have been finalized then the Court may adopt the forms by Administrative Order designating which forms "may" be used versus those that "shall" be used.

Proposed Amendments to the *Arizona Rules of the Supreme Court*

OPTION 1:
Rule 31. Regulation of the Practice of Law
(a) **Supreme Court Jurisdiction Over the Practice of Law.**

OPTION 2:
Rule 31. Regulation of the Practice of Law

Comment and/or Suggestions: *In option 1 the assumption made under section 30 is the fiduciary is acting as an officer, member, or employee of a corporation, etc. Option 2 goes to the*

heart of the matter and simply identifies a licensed fiduciary, in any capacity, whether employee of a pubic fiduciary's office or in a limited liability company may perform the services. For practicality it appears Option 2's section 30 would be preferred and addresses the problem most expeditiously. The inclusion of section 31 from Option 1 should probably be added as section 31 in Option 2.

Proposed Amendments to the *Arizona Code of Judicial Administration*

OPTION 1:
Arizona Code of Judicial Administration
Section 7-202: Fiduciaries
. . . .
J. Code of Conduct. . . .
1. [unchanged]
2. Ethics. The fiduciary shall exhibit the highest degree of trust, loyalty and fidelity in relation to the ward, protected person, or estate.
a. – f. [unchanged]
g. The fiduciary shall only prepare powers of attorney or other legal document, if also certified as a legal document preparer pursuant to ACJA § 7-208, except PERMITTED BY RULE 10.1, ARIZONA RULES OF PROBATE PROCEDURE, OR as ordered by the court. This provision does not apply to the Arizona Department of Veterans Services pursuant to A.R.S. § 41-603(A).

OPTION 2:
Arizona Code of Judicial Administration
Section 7-202: Fiduciaries
F. Role and Responsibilities of Fiduciaries. In addition to the requirements of ACJA § 7-201(F), the following requirements apply:
1. – 9. [unchanged]
10. A LICENSED FIDUCIARY IS AUTHORIZED TO:
A. PREPARE LEGAL DOCUMENTS WITHOUT THE SUPERVISION OF AN ATTORNEY, AS AUTHORIZED BY RULE 10.1, ARIZONA RULES OF PROBATE PROCEDURE, OR
B. REPRESENT THE**,** LICENSED FIDUCIARY BUSINESS, OFFICE OF THE PUBLIC FIDUCIARY**,** ~~OR~~ THE ARIZONA DEPARTMENT OF VETERANS' SERVICES **OR THEMSELF** BEFORE THE SUPERIOR COURT IN PROBATE PROCEEDINGS IF THE BUSINESS, OFFICE OR DEPARTMENT IS NOT REPRESENTED BY COUNSEL OR TO THE EXTENT PERMITTED BY RULE 10.1, ARIZONA RULES OF PROBATE PROCEDURE, IF ALL THE FOLLOWING CONDITIONS ARE SATISFIED:
1. THE ENTITY AUTHORIZES THE LICENSED FIDUCIARY TO REPRESENT IT IN THE PROCEEDINGS;
2. THE FIDUCIARY IS NOT RECEIVING SEPARATE OR ADDITIONAL COMPENSATION (OTHER THAN REIMBURSEMENT FOR COSTS) FOR SUCH REPRESENTATION;SUCH REPRESENTATION IS NOT THE OFFICER'S, MEMBER'S, OR EMPLOYEE'S PRIMARY

DUTY TO THE ENTITY BUT SECONDARY OR INCIDENTAL TO OTHER DUTIES RELATED TO THE MANAGEMENT OR OPERATION OF THE ENTITY.

J. Code of Conduct. . . . .

1. [unchanged]

2. Ethics. The fiduciary shall exhibit the highest degree of trust, loyalty and fidelity in relation to the ward, protected person, or estate.

a. – f. [unchanged]

g. The fiduciary shall only prepare powers of attorney or other legal documents, if also certified as a legal document preparer pursuant to ACJA § 7-208, except PERMITTED BY RULE 10.1, ARIZONA RULES OF PROBATE PROCEDURE, OR as ordered by the court. This provision does not apply to the Arizona Department of Veterans Services pursuant to

Comment and/or Suggestions: *The preference would be for Option 2 as the more specificity outlined in authorization will provide better guidelines for fiduciaries in actions undertaken in preparation of legal documents and court appearances associated with their role and responsibilities. However there should be inclusion in ACJA § 7-202(F)(10)(B) for an individual fiduciary who is a licensed fiduciary but is not representing a business, public office of the Department of Veterans' Services and so* OR THEMSELF *has been placed in the above draft.*

For the following section on the new proposed fee guidelines, the writer has copied the entire section from the Court's website and will proceed to indicate changes by legislative format whenever possible. As this section is all new and is currently in all capital letters, new verbiage by the writer will appear in **bold and underlined** and in small letters. Any word with a ~~strike~~ through indicates the writer believes word or phrase should be deleted.

While the Probate Oversight Committee members and AOC staff may have participated in the drafting of these guidelines there is a sense by this writer most of the drafting was done by persons working from a legal perspective; and therefore, used this background as their reference for drafting these fee guidelines. The idea a fiduciary office is run similarly to a legal office is not true. While there may be similar levels of personnel the duties an attorney is required to perform under their professional guidelines is vastly different from those under which a fiduciary performs. This is more specifically addressed when commenting on Sections 2(G) and (H).

Proposed Statewide Fee Guidelines
STATEWIDE FEE GUIDELINES
FOR ASSESSING THE REASONABLENESS OF
FIDUCIARY, GUARDIAN *AD LITEM*,
AND ATTORNEY COMPENSATION
IN TITLE 14 PROCEEDINGS

INTRODUCTION:

THESE GUIDELINES ARE INTENDED TO ASSIST THE COURT, FIDUCIARIES, GUARDIANS *AD LITEM*, ATTORNEYS, PARTIES, AND INTERESTED PERSONS IN EVALUATING WHETHER COMPENSATION IS REASONABLE~~,~~. ~~SINCE~~ PROFESSIONAL SERVICES ~~MUST~~ **should** BE TAILORED TO THE SPECIFIC CIRCUMSTANCES OF EACH ENGAGEMENT~~,~~. ~~AND~~ A ONE-SIZE-FITS-ALL REGULATORY APPROACH TO PROFESSIONAL SERVICES AND COMPENSATION IS NOT PRACTICAL AND NOT IN THE BEST INTEREST OF EACH UNIQUE WARD, PROTECTED PERSON, ESTATE, AND TRUST. ALTHOUGH SUCH REGULATORY APPROACHES HAVE THE ATTRACTION OF APPARENT SIMPLICITY, THE RESULT CAN BE INCREASED ADMINISTRATIVE COSTS, DIMINISHED QUALITY OF PROFESSIONAL SERVICES, OR UNDERSERVED POPULATIONS~~,~~. ~~SUCH~~ ~~THAT~~ REASONABLE COMPENSATION IS BEST DETERMINED ON A CASE-BY-CASE BASIS, WHILE APPLYING CONSISTENT COMPENSATION GUIDELINES.

Comment: *This paragraph of the introductory had what this writer believed to be several long sentences. When drafting the original the writer of this section was in all likelihood typing while thinking and drafting and this is not meant as a criticism, but rather an understanding by this writer; as this writer has drafted many documents, including Court Rules and code sections.*

~~SINCE~~ EVERY CASE IS DIFFERENT~~,~~ ~~HOWEVER,~~ AND BECAUSE EVERY FIDUCIARY, GUARDIAN *AD LITEM*, AND ATTORNEY HAS UNIQUE QUALIFICATIONS, THESE FEE GUIDELINES SET FORTH ~~COMPULSORY~~ BILLING STANDARDS, POINTS OF REFERENCE**,** AND GENERAL COMPENSATION FACTORS~~,~~**.** ~~BUT~~ **These guidelines do** NOT **set out to establish** PREDETERMINED TIMES TO PERFORM SPECIFIC TASKS, PREDETERMINED RATE SCHEDULES, OR FEES AS A PERCENT OF AN ESTATE. **Under section 3, Points of Reference, the guidelines only provide a list which the court may considered when reviewing fees.** THEREFORE, FOLLOWING COMPLIANCE WITH ~~COMPULSORY~~ BILLING STANDARDS, THE COURT SHALL WEIGH THE TOTALITY OF THE CIRCUMSTANCES AND, IN ITS DISCRETION, ASSIGN MORE OR LESS WEIGHT TO ANY GIVEN POINTS OF REFERENCE OR COMPENSATION FACTORS AS IT DEEMS JUST AND REASONABLE.

Comment: *The original drafter uses the phrase "COMPULSORY BILLING STANDARDS". If the new Rule adopts "billing standards" does the drafter believe the professionals these standards apply to don't recognize these standards are what must be complied with? The use of the word "compulsory" offends this writer and believes striking the word from the draft rules does not affect the underlying principles these guidelines are addressing.*

Comment: *While the original intent of the drafter may have been not to imply the predetermined items etc where written in stone, the impression is this section means the rules are such that there is a predetermined time for certain fiduciary tasks.*

Example: The time listed in Guideline 3(D)(5) for preparation of an annual guardian report is 2 hours per year. The majority of fiduciaries can prepare the guardianship form and include most of the required statutory items and updates in probably less than 2 hours. The problem is not the time it takes the guardian to do their job but is in securing a current doctor's statement. The fiduciary may spend days or weeks of faxes and calls with no results. While it is incumbent on the fiduciary to provide time sheets or entries supporting time taken for this task, the impression given by these Points of Reference can be deceiving to anyone unfamiliar with actually performing the task.

SCOPE: THESE GUIDELINES ONLY APPLY TO THE COMPENSATION OF COURT-APPOINTED FIDUCIARIES, SPECIFICALLY GUARDIANS, CONSERVATORS, AND PERSONAL REPRESENTATIVES, LICENSED AND UNLICENSED, AS WELL AS GUARDIANS *AD LITEM* AND ATTORNEYS WHO ARE PAID BY A WARD, PROTECTED PERSON, ESTATE, OR TRUST (COLLECTIVELY REFERRED TO IN THE *GUIDELINES* AS AN "ESTATE")~~,~~**.** ~~BUT~~ **These guidelines** SHALL NOT APPLY TO COMPENSATION PAID BY A TRUST OR DECEDENT'S ESTATE, IF COMPENSATION IS SPECIFIED OR SET FORTH IN THE RELEVANT TRUST OR TESTAMENTARY INSTRUMENT. THESE FEE GUIDELINES DO NOT APPLY WHEN THE FEES ARE NOT PAID BY THE ESTATE, SUCH AS COURT-APPOINTED COUNSEL WHO ARE PAID BY THE COURT.

GUIDELINES:

1. REASONABLE COMPENSATION. FIDUCIARIES, GUARDIANS *AD LITEM*, AND ATTORNEYS (COLLECTIVELY REFERRED TO IN THE *GUIDELINES* AS A "PROFESSIONAL") ARE ENTITLED TO REASONABLE COMPENSATION FOR THE SERVICES ~~THEY~~ RENDER**ed** IN FURTHERANCE OF THE BEST INTEREST OF THE ESTATE~~,~~**.** WHICH RESULTS IN COMPENSATION THAT IS FAIR, PROPER, JUST, MODERATE, SUITABLE UNDER THE CIRCUMSTANCES, FIT, APPROPRIATE TO THE END IN VIEW, AND TIMELY PAID, CONSISTENT WITH THE FOLLOWING GUIDELINES. THE RIGHT TO RECEIVE COMPENSATION MAY BE LIMITED BY APPLICABLE STATUTES.

Comment/Suggestion: *The first sentence is run on and frankly beginning with WHICH RESULTS does not make sense to this writer. The intent of the drafter is lost in translation and the list of items after COMPENSATION THAT IS appears repetitive and confusing. The following is suggested as an alternative to the current second half of the first sentence:*

Consistent with the following guidelines compensation for professionals shall be fair, suitable under the circumstances, appropriate to the end in view and timely paid.

2. COMPULSORY BILLING STANDARDS. UNLESS OTHERWISE ORDERED BY THE COURT, COMPENSATION AND REIMBURSEMENT SHALL MEET THE FOLLOWING STANDARDS:

   A. ALL FEE PETITIONS SHALL COMPLY WITH RULE 33 OF THE *ARIZONA RULES OF PROBATE PROCEDURE*.

   B. ALL HOURLY BILLING SHALL BE IN AN INCREMENT TO THE NEAREST 1/10 OF AN HOUR, WITH NO MINIMUM BILLING UNIT IN EXCESS OF 1/10 OF AN HOUR. NO "VALUE BILLING" FOR SERVICES RENDERED IS PERMITTED, RATHER THAN THE ACTUAL TIME EXPENDED.

Comment/Suggestion: There are no comments or suggestion of changes for Sections (A) and (B).

   C. "BLOCK BILLING" IS NOT PERMITTED~~,~~**.** BLOCK BILLING ~~OCCURS WHEN A TIMEKEEPER PROVIDES ONLY~~ **is** A TOTAL AMOUNT OF TIME SPENT WORKING ON MULTIPLE TASKS, RATHER THAN AN ITEMIZATION OF THE TIME EXPENDED ON ~~A~~ **each** SPECIFIC TASK.

   Comment/Suggestion: The suggestion changes are included in the above section (C) in drafting format.

   D. NECESSARY TRAVEL TIME AND WAITING TIME MAY BE BILLED AT 100% OF THE NORMAL HOURLY RATE, EXCEPT FOR TIME SPENT ON OTHER

BILLABLE ~~ACTIVITY,~~ **activities.** ~~AND IN STATE MILEAGE IS NOT REIMBURSED;~~ **Billable time, including travel and waiting time that benefits multiple clients, shall be appropriately apportioned among the clients.** TRAVEL TIME AND WAITING TIME ARE NOT NECESSARY WHEN THE SERVICE CAN BE MORE EFFICIENTLY RENDERED BY CORRESPONDENCE OR ELECTRONIC COMMUNICATION, E.G. TELEPHONIC COURT HEARINGS. **In state mileage shall not be reimbursed.**

Comment/Suggestion: *Section (D) discusses travel time and waiting time spent by the professional. The non reimbursement of in-state mileage, while related to travel time, should be included after discussion of what travel and wait time encompasses.*

~~E. BILLABLE TIME THAT BENEFITS MULTIPLE CLIENTS, INCLUDING TRAVEL AND WAITING TIME, SHALL BE APPROPRIATELY APPORTIONED BETWEEN EACH CLIENT.~~

Comment/Suggestion: *Section (D) discusses travel time and waiting time spent by the professional. Section (E) follows up with how to apportion the travel and waiting time "among" and not "between" multiple clients. Would it not be more efficient to combine the two sections as the substance would be affected*?

F. BILLABLE TIME DOES NOT INCLUDE TIME SPENT ON BILLING OR ACCOUNTS RECEIVABLE ACTIVITIES, INCLUDING TIME SPENT PREPARING ITEMIZED STATEMENTS OF WORK PERFORMED, COPYING, OR DISTRIBUTING STATEMENTS; HOWEVER, TIME SPENT DRAFTING THE ADDITIONAL DOCUMENTS THAT ARE REQUIRED BY COURT ORDER, RULE, OR STATUTE, INCLUDING ANY RELATED HEARING, IS BILLABLE TIME. THE COURT SHALL DETERMINE THE REASONABLE COMPENSATION, IF ANY, IN ITS SOLE DISCRETION, CONCERNING ANY CONTESTED LITIGATION OVER FEES OR COSTS.

Comment/Suggestion: *Section (F) is confusing and again the writer believes the essence of what is trying to be discussed here is lost in translation and is unclear exactly what is meant by account receivable activities. Was the drafter trying to say the professional could not bill for processing accounts receivable for the fees a professional receives or all types of account receivable activities, i.e., processing mail and income for clients? Below is the suggested re-write of Section (F) based on the writer's interpretation of the section:*

Billable time does not include time spent by the professional in activities related to the professional's personal business accounts receivable. This would include time spent preparing itemized statements, time sheets, or invoices of billable activities performed, copying or distributing statements, time sheets or invoices. However time spent drafting additional documents required by statute, court rule or court order, including any related hearing, is billable time. The court shall determine the

reasonable compensation, if any, in it's sole discretion, concerning any contested litigation over fees or costs.

~~G. BILLABLE TIME DOES NOT INCLUDE INTERNAL BUSINESS ACTIVITIES OF THE PROFESSIONAL, INCLUDING CLERICAL OR SECRETARIAL SUPPORT TO THE PROFESSIONAL.~~

~~H. THE HOURLY RATE CHARGED FOR ANY GIVEN TASK SHALL BE AT THE AUTHORIZED RATE, COMMENSURATE WITH THE TASK PERFORMED, REGARDLESS OF WHO ACTUALLY PERFORMED THE WORK, BUT CLERICAL AND SECRETARIAL ACTIVITIES ARE NOT SEPARATELY BILLABLE FROM THE PROFESSIONAL.~~

EXAMPLE: AN ATTORNEY ~~CAN~~ **MAY** *ONLY BILL AN ATTORNEY RATE WHEN PERFORMING SERVICES THAT REQUIRE AN ATTORNEY, ~~BUT~~ A PARALEGAL RATE WHEN PERFORMING PARALEGAL SERVICES, A FIDUCIARY RATE WHEN PERFORMING FIDUCIARY SERVICES,* **BUT** NO *CHARGE WHEN PERFORMING SECRETARIAL OR CLERICAL SERVICES, ETC.*

EXAMPLE: A FIDUCIARY ~~CAN~~ **MAY** *ONLY BILL A FIDUCIARY RATE WHEN PERFORMING SERVICES THAT REQUIRE THE SKILL LEVEL OF THE FIDUCIARY, ~~BUT~~ A COMPANION RATE WHEN PERFORMING COMPANION SERVICES, A BOOKKEEPER RATE WHEN PERFORMING BOOKKEEPING AND BILL-PAYING SERVICES FOR A CLIENT, AND AN APPROPRIATE LESSER RATE ~~NO CHARGE~~ WHEN PERFORMING SECRETARIAL OR CLERICAL SERVICES, ETC.*

Comment/Suggestion: *The first issue with Sections (G) and (H) is the concept of clerical or secretarial work performed by a fiduciary. As the sole person in my office I have to perform clerical and secretarial work. This includes going to the Post Office to retrieve my mail, opening the mail, scheduling appointments, entering data for clients, generating letters, responding to emails, etc. My fee schedule is set up in 3 different categories: (A) work done under a POA, court appointment and trust; (B) Mentoring, Investigations & Auditing; (C) Consulting and Expert Witness Fees. The skill set, level of expertise and difficulty of tasks is different for each of the 3 categories and in line with that, my so called "secretarial" work is listed as the lowest fee charged in each category. In all scenarios, as a sole person, I still have to answer the phone or do data entry.*

Under the Arizona Code of Judicial Administration §§ 7-201 and 202 (ACJA) a licensed fiduciary, is subject to a compliance audit. Fiduciaries are held to a set of attributes which is a list of every "shall" and "must" in the statutes, Court Rules and ACJA. In order to comply with the "shall" and "must' attributes, documentation of processes is critical. This documentation begins the moment the mail is opened and date stamped received until the final document is filed with the court and approved. During discussions and meetings with legislative staff and at Probate Oversight Committee meetings there was a barrage of questioning as to why fiduciaries charged to open mail and stamp a bill as paid from court appointed attorneys and members of the public. Examples of the critical step of opening the mail provided in response to these questions included the documentation of the fiduciary's responsibility to marshal assets identified through letters or notices from banks or brokerages houses, correspondence from insurance companies for health or life policies, or an annual 1099 tax form indicating a previously unidentified asset. During the time this writer was an employee of the Maricopa County Public Fiduciary's Office, the opening and distribution of all mail was considered such a critical process, the Manager of the Estate Operations Department opened and distributed all mail not the receptionist, a legal secretary or a file clerk, the Manager.

Comment/Suggestion: *Current Sections (G) and (H) are dealing with the same issue: Not billing for clerical or secretarial activities by a professional. It would be more efficient to combine these sections as was previously done for sections (D) and (E). In addition, throughout these guidelines the terms "task", "work" and "activity" are used interchangeably. For clarification and consistency the same term should be used throughout these guidelines so as not to confuse the reader or user of these guidelines. The examples listed after the new section (G)*

should remain the same with the writer's suggested changes and adopted changes will require re-alphabetizing the list.

G. BILLABLE TIME DOES NOT INCLUDE INTERNAL BUSINESS ACTIVITIES OF THE PROFESSIONAL, INCLUDING CLERICAL OR SECRETARIAL SUPPORT TO THE PROFESSIONAL. THE HOURLY RATE CHARGED FOR ANY GIVEN ~~TASK~~ ACTIVITY SHALL BE AT THE AUTHORIZED RATE, COMMENSURATE WITH THE ~~TASK~~ ACTIVITY PERFORMED, REGARDLESS OF WHO ACTUALLY PERFORMED THE ~~WORK,~~ ACTIVITY. ~~BUT~~ CLERICAL AND SECRETARIAL ACTIVITIES ~~ARE~~ SHALL NOT BE SEPARATELY BILLABLE FROM THE PROFESSIONAL~~.~~, **EXCEPT WHEN A LICENSED FIDUCIARY IS PERFORMING CLERICAL OR SECRETARIAL DUTIES SUCH AS MAIL PROCESSING, APPOINTMENT SCHEDULING OR DATA ENTRY AND AT A REDUCED RATE.**

I. REASONABLE COSTS ~~THAT ARE~~ INCURRED IN FURTHERANCE OF THE BEST INTEREST OF THE ESTATE ARE REIMBURSABLE AT ACTUAL COST, WITHOUT "MARK-UP". REIMBURSABLE COSTS DO NOT INCLUDE ANY COST NOT SPECIFICALLY OR DIRECTLY ASSOCIATED WITH THE DELIVERY OF GOODS OR SERVICES TO AN IDENTIFIED ESTATE, I.E. OVERHEAD. EXAMPLES OF REIMBURSABLE COSTS INCLUDE, BUT ARE NOT LIMITED TO:

1. GOODS OR SERVICES OBTAINED FOR OR CONSUMED BY THE ESTATE;
2. POSTAGE AND SHIPPING FEES;
3. DEPOSITION AND TRANSCRIPT COSTS;
4. FEES CHARGED BY A PROCESS SERVER;
5. PUBLICATION ~~FEES;~~ **OR** EXPERT WITNESS FEES;
6. MESSENGER COSTS;
7. CASE SPECIFIC BONDS; AND
8. ELECTRONIC DATABASE FEES CHARGED BY AN OUTSIDE VENDOR (E.G., WESTLAW, LEXISNEXIS, PACER, ETC.) EXCEPT FOR CHARGES TO RESEARCH ARIZONA STATUTES, CASE LAW, AND REGULATIONS. ~~REIMBURSABLE COSTS DO NOT INCLUDE ANY COST NOT SPECIFICALLY OR DIRECTLY ASSOCIATED WITH THE DELIVERY OF GOODS OR SERVICES TO AN IDENTIFIED ESTATE, I.E. OVERHEAD.~~

Comment/Suggestion: *The drafting style would seem to indicate the listing for easier reading and comprehension of what costs are reimbursable in Section I and the former last sentence should be placed in the opening paragraph before listing what reimbursable costs are.*

J. ~~TIME AND EXPENSES FOR ANY MISFEASANCE OR MALFEASANCE ARE NOT COMPENSABLE~~.

Comment/Suggestion: *Who's mis or malfeasance is not compensable?; and if there is an issue of mis or malfeasance shouldn't that be determined by a court and addressed in its final order? This section should be stricken in its entirety. If left in these guidelines*

then please ask the original drafter to add whomever's mis or malfeasance the guideline is addressing.

K. TIME AND EXPENSES TO CORRECT OR MITIGATE ERRORS CAUSED BY THE PROFESSIONAL, OR THEIR STAFF, ARE NOT BILLABLE TO THE ESTATE.

L. TIME OR EXPENSES TO RESPOND OR DEFEND AGAINST A REGULATORY COMPLAINT AGAINST THE PROFESSIONAL **OR THEIR STAFF** ARE NOT BILLABLE TO THE ESTATE.

Comment/Suggestion: *The addition of "OR THEIR STAFF" in Section (L) is consistent with the language in section (K).*

M. A PROFESSIONAL MAY ONLY CHARGE INTEREST ON THEIR UNPAID COMPENSATION OR UNPAID REIMBURSEMENT WITH COURT APPROVAL.

Comment/Suggestion: *There are no comments or suggestions for section M*

3. POINTS OF REFERENCE. THE COURT SHALL CONSIDER POINTS OF REFERENCE WHEN CONSIDERING HOURLY RATES AND CHARGES, AS NON-BINDING BUT INFORMATIVE AND PERSUASIVE CONSIDERATIONS, INCLUDING:

Comment/Suggestion: *3 different versions of consider in on sentence? A new version of 3 is as follows:*

POINTS OF REFERENCE. THE COURT SHALL CONSIDER POINTS OF REFERENCE WHEN ~~CONSIDERING~~ **TAKING INTO ACCOUNT** HOURLY RATES AND CHARGES, AS NON-BINDING BUT INFORMATIVE AND PERSUASIVE ~~CONSIDERATIONS~~ **REVELANT FACTORS**, INCLUDING:

A. THE USUAL AND CUSTOMARY FEES CHARGED IN THE RELEVANT PROFESSIONAL COMMUNITY FOR SUCH SERVICES AS PERIODICALLY REPORTED BY THE ADMINISTRATIVE OFFICE OF THE COURTS. SEE EXHIBIT A.

B. TO THE EXTENT AUTHORIZED BY LAW, A NON-LICENSED FIDUCIARY WHO IS RELATED TO A PROTECTED PERSON, WARD, OR DECEDENT, MAY RECEIVE REASONABLE COMPENSATION FOR SERVICES AS A CONSERVATOR, GUARDIAN, OR PERSONAL REPRESENTATIVE, RESPECTIVELY, COMMENSURATE WITH THE SERVICES PERFORMED.

Comment/Suggestion: *Does this non-licensed fiduciary include banks or other financial institutions who by law are not required to be licensed or merely relations?*

C. THE NUMBER OF BILLABLE HOURS AND SERVICES RENDERED IN COMPARABLE CASES BEFORE THAT JUDICIAL OFFICER.

Comment/Suggestion: *The writer has the greatest of respect for the judicial branch and her officers but should the judicial officer be the sole person making the comparison? Court staff, other judicial officers, court appointed attorneys, court accountants or investigators may be able to provide insight and comparison to the deciding judicial officers. As part of the Court's move to a more transparent probate process at every step, it would seem there should be an addition to this section the judicial officer has the discretion to consult with other members of the judiciary, court staff or members of the probate community.*

D. AS ONLY A GENERAL BENCHMARK, THE COMMON FIDUCIARY SERVICES RENDERED IN A ROUTINE GUARDIANSHIP OR CONSERVATORSHIP ENGAGEMENT ARE AS FOLLOWS (THE FIDUCIARY SHOULD BE PREPARED TO PROVIDE A REASONABLE EXPLANATION FOR EXCEEDING THESE BENCHMARKS, UPON REQUEST BY THE COURT):

Comment/Suggestion: *In section 3(A) the term used is "usual and customary fees" and here in 3(D) the terms are "general benchmark" and "the common fiduciary services" or "charges". There needs to be consistency in the use of terms throughout these guidelines. As previously noted the terms "task" activities" and "time" are used almost interchangeably but do not mean the same thing. Are common "fiduciary services" the same as "fiduciary activities"? – are "routine" bookkeeping services/activities the same as "usual and customary fees"*

1. ROUTINE BOOKKEEPING, FOUR ~~(4)~~ HOURS PER MONTH, AT A COMMENSURATE RATE FOR SUCH SERVICES ~~SUCH AS~~ **including, but not limited to:**
   a. **receipts and** DISBURSEMENTS;
   b. BANK RECONCILIATION~~,~~**;**
   c. DATA ENTRY OF INCOME AND EXPENDITURES~~,~~**;** ~~AND~~ **or**
   d. MAIL PROCESSING~~.~~**.**

2. ROUTINE SHOPPING, AT A COMMENSURATE RATE FOR SUCH SERVICES:
   a. SIX ~~(6)~~ HOURS PER MONTH IF ~~WARD~~ **the client** IS AT HOME~~,~~**;** AND
   b. TWO ~~(2)~~ HOUR**s** PER MONTH IF ~~WARD~~ **the client is** IN A FACILITY~~,~~ **.**

3. ONE ROUTINE PERSONAL VISIT PER MONTH BY THE FIDUCIARY TO THE **the client**~~WARD OR PROTECTED PERSON~~.

4. PREPARATION OF CONSERVATOR'S ACCOUNT AND BUDGET: FIVE (5) HOURS PER YEAR.

5. PREPARATION OF ANNUAL GUARDIANSHIP REPORT: TWO (2) HOURS PER YEAR.

6. MARSHALLING OF ASSETS AND PREPARATION OF INITIAL INVENTORY: EIGHTY (80) HOURS.

7. NOT MORE THAN ONE ATTORNEY MAY BILL FOR ATTENDING HEARINGS, DEPOSITIONS, AND OTHER COURT PROCEEDINGS ON BEHALF OF A CLIENT, NOR BILL FOR STAFF TO ATTEND, ABSENT GOOD CAUSE.

Comment/Suggestion: *This "benchmark" is unclear. Does this mean only one attorney may bill for each hearing, when in attendance at the hearing is the court appointed attorney, the fiduciary's attorney, the GAL. Does it mean if the fiduciary is represented by a legal firm with 2 attorneys involved in the case only one of the attorneys may attend and/or bill at the hearing, deposition, etc.?*

8. EACH FIDUCIARY AND GUARDIAN *AD LITEM* SHALL NOT BILL FOR MORE THAN ONE PERSON TO ATTEND HEARINGS, DEPOSITIONS, AND OTHER COURT PROCEEDINGS ON BEHALF OF AN ESTATE, ABSENT GOOD CAUSE. THIS PROVISION DOES NOT PRECLUDE AN ATTORNEY, WHO REPRESENTS A FIDUCIARY OR GUARDIAN AD LITEM, FROM SUBMITTING A SEPARATE BILL.

9. THE TOTAL AMOUNT OF ALL ANNUAL EXPENDITURES, INCLUDING REASONABLE PROFESSIONALS FEES, *MAY* NOT DEPLETE THE ESTATE DURING THE ANTICIPATED LIFESPAN OF THE WARD OR PROTECTED PERSON, UNTIL AND UNLESS THE CONSERVATOR HAS DISCLOSED ~~THAT THE~~ ~~CONSERVATORSHIP~~ ~~HAS~~ AN ALTERNATIVE OBJECTIVE, SUCH AS PLANNED TRANSITION TO PUBLIC ASSISTANCE OR ASSET RECOVERY, AS SET FORTH IN THE DISCLOSURE REQUIRED BY RULE OF PROBATE PROCEDURE 30.3.

Comment/Suggestion: *The source and basis of the time allotted for the above tasks is unclear. Are these times based on any local or national statistical information from the Court, AARP, the National Guardianship or Geriatric Care Managers Associations, the National Center for State Courts? Did the legislature or the Probate Oversight Committee, its workgroups, or the AOC conduct surveys to determine this was the average time expended, the minimum/maximum? Is this time based on hours the members "believe" it takes to complete certain tasks"? Without clear documentation of how these times were determined, and any source of the random time elements selected, the times are guesstimates at best and will inevitably lead to questions about why the professionals is outside the "standards" of these guidelines which will lead to more time spent justifying the fees charges, and so on and so forth..*

4. COMPENSATION FACTORS. THE COURT SHALL CONSIDER THE FOLLOWING FACTORS, AS GENERAL PRINCIPLES, ~~NOT RIGID RULES~~, WHEN DETERMINING WHAT CONSTITUTES REASONABLE COMPENSATION:

Comment/Suggestion: *Are these to be considered "rules" when there are listed in a document known as "guidelines". Does striking the "NOT RIGID RULES" detract from the meaning of this section?*

A. THE REQUEST FOR COMPENSATION IN COMPARISON TO THE PREVIOUSLY DISCLOSED BASIS FOR FEES, ANY PRIOR ESTIMATE BY THE PROFESSIONAL, AND ANY COURT ORDER; [REFINE AFTER LEGISLATION IS ADOPTED]

Comment/Suggestion: *So this would not require any prior disclosure by non-professionals in compensation? If the intent of the Committee was not to bind the professional to what their good faith estimate of costs and fees, then why is this section included? While the Committee's intent may not to have bound the professional to the prior estimate, this section appears to contradict that intent.*

B. THE EXPERTISE, TRAINING, EDUCATION, EXPERIENCE, AND SKILL OF THE PROFESSIONAL IN TITLE 14 PROCEEDINGS;

C. WHETHER AN APPOINTMENT IN A PARTICULAR MATTER PRECLUDED OTHER EMPLOYMENT;

Comment/Suggestion*: The writer is stymied as to what the drafter was trying to say by this section – more clarification is needed.*

D. THE CHARACTER OF THE WORK TO BE DONE, INCLUDING DIFFICULTY, INTRICACY, IMPORTANCE, NECESSITY, TIME, SKILL OR LICENSE REQUIRED, OR RESPONSIBILITY UNDERTAKEN;

E. THE CONDITIONS OR CIRCUMSTANCES OF THE WORK, INCLUDING EMERGENCY MATTERS (REQUIRING URGENT ATTENTION), SERVICES PROVIDED OUTSIDE REGULAR BUSINESS HOURS, POTENTIAL DANGER (E.G., HAZARDOUS MATERIALS, CONTAMINATED REAL PROPERTY, OR DANGEROUS PERSONS), OR OTHER EXTRAORDINARY CONDITIONS;

F. THE WORK ACTUALLY PERFORMED, INCLUDING THE TIME ACTUALLY EXPENDED, AND THE ATTENTION AND SKILL-LEVEL REQUIRED FOR EACH TASK, INCLUDING WHETHER A DIFFERENT PERSON COULD HAVE RENDERED BETTER, FASTER OR LESS EXPENSIVE SERVICE;

Comment/Suggestion: *This section can be <u>very</u> subjective and should not be used as the one element which may tip the scales towards denial of fees or requesting a lengthy explanation of a task or activity performed. In addition, there are court rules and*

administrative codes which require attorneys and fiduciaries conduct delegation of duties to other staff under specific guidelines. While a judicial officer or family member may question why a professional charged for a task, the professional may have been required to perform the task or part of the task based on their professional standards.

G. THE RESULT, SPECIFICALLY WHETHER BENEFITS WERE DERIVED FROM THE EFFORTS, AND WHETHER PROBABLE BENEFITS EXCEEDED COSTS;

H. WHETHER THE PROFESSIONAL TIMELY DISCLOSED THAT A PROJECTED COST WAS LIKELY TO EXCEED THE PROBABLE BENEFIT, AFFORDING THE COURT AN OPPORTUNITY TO MODIFY ITS ORDER IN FURTHERANCE OF THE BEST INTEREST OF THE ESTATE~~,~~**;**

I. THE FEES CUSTOMARILY CHARGED AND TIME CUSTOMARILY EXPENDED FOR PERFORMING LIKE SERVICES IN THE COMMUNITY;

Comment/Suggestion: *Here is where we get back into the use of terms, are these the "CUSTOMARILY" fees, the usual and customarily fees or tasks as described previously and is the "TIME CUSTOMARILY" expended the same as the tasks, activities or billable time as before?*

J. THE DEGREE OF FINANCIAL OR PROFESSIONAL RISK AND RESPONSIBILITY ASSUMED;

Comment/Suggestion: *Assumed by whom, the fiduciary, the client, the estate, the attorney, a clearer meaning by the drafter would have helped. It would seem the degree of risk would be that of the professional, but the drafter needs to be contacted for their interpretation.*

K. THE FIDELITY AND LOYALTY DISPLAYED BY THE PROFESSIONAL, INCLUDING WHETHER THE PROFESSIONAL PUT THE BEST INTEREST OF THE ESTATE BEFORE THE ECONOMIC INTEREST OF THE PROFESSIONAL; AND,

Comment/Suggestion: *Here again this factor may be very subjective when interpreted and is interpreted by this professional as a question or slur on whether I understand what my duties and responsibilities to my client are.*

L. THE "POINTS OF REFERENCE", AS SET FORTH ABOVE **in Section 3**.

5. NON-TRADITIONAL COMPENSATION ARRANGEMENTS.

A. FLAT-FEE: UNLESS OTHERWISE PROHIBITED BY LAW OR RULE, FLAT-FEE COMPENSATION IS PERMISSIBLE~~,~~ AND MAY INCLUDE ALL OR PART OF AN ENGAGEMENT, IF THE PREDICTABILITY OF COSTS IS ENHANCED AND IF

THE ECONOMIC INTERESTS OF THE PROFESSIONAL ARE THEREBY BETTER ALIGNED WITH THE ESTATE. THE BASIS FOR ANY FLAT FEE COMPENSATION SHALL BE DISCLOSED IN ADVANCE, IN WRITING, SPECIFYING IN DETAIL THE SERVICES INCLUDED IN ANY FLAT-FEE, THE UNITS OF EACH SERVICE, AND THE USUAL HOURLY RATE FOR SUCH SERVICES. THE ACTUAL DELIVERY OF SERVICES INCLUDED WITH THE FLAT FEE SHALL BE DOCUMENTED.

Comment/Suggestion: *The new statute A.R.S. § 14-1201(3) uses the term "fixed fee" as opposed to "flat fee". It would seem appropriate to be consistent with the new statutory term. The term "ENGAGEMENT" has not been previously used of defined in these guidelines and is unclear what the drafter meant by this term. Is this another term for contract for services? How will this new section affect Public Fiduciary Office's or the Department of Veterans' Services who generally have flat or fixed fees for certain tasks such as annual accountings or guardianships or a % basis for charging clients based on statute or other authority.*

B. CONTINGENT FEE**:** UNLESS OTHERWISE PROHIBITED BY LAW OR RULE, NOTHING IN THESE GUIDELINES SHALL PROHIBIT A CONTINGENT FEE ENGAGEMENT WITH AN ATTORNEY, PROPERLY EXECUTED IN WRITING, E.G. REPRESENTATION ON A PERSONAL INJURY CLAIM.

Comment/Suggestion: *Does this prohibit a "trade-off" compensation? An example would be a family member offsetting their care of a family member by charging fees for service including room and board or companionship costs?*