

# **2017 Legal Aid University**

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**The Kentucky Bar Association  
Young Lawyers Division  
presents:**

**2017 Legal Aid University  
CLE Seminar**



**This program has been approved in  
Kentucky for 5.00 CLE credits.**

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## 2017 Legal Aid University CLE Seminar

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**2017 Legal Aid University CLE Seminar**  
**March 14, 2017**  
**University of Kentucky College of Law**  
**Lexington, KY**

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8:45-9:00 a.m.	<b>Registration</b>
9:00-10:00 a.m.	<b>Criminal Expungement</b> (1.00 CLE credit) <i>Sarah E. Henry</i> <i>Kentucky Department of Public Advocacy</i>
10:00-10:15 a.m.	<b>Break</b>
10:15-11:15 a.m.	<b>Kentucky Protective Orders: Aiding Victims of Violence and Stalking</b> (1.00 CLE credit) <i>Erica Stacy-Stegman</i> <i>Legal Aid of the Bluegrass</i>
11:15 a.m.-12:15 p.m.	<b>Basic Estate Planning</b> (1.00 CLE credit) <i>Joshua T. Fain</i> <i>Legal Aid of the Bluegrass</i>
12:15-12:45 p.m.	<b>Lunch</b> (provided)
12:45-1:45 p.m.	<b>Divorce 101</b> (1.00 CLE credit) <i>Ross T. Ewing</i> <i>McBrayer, McGinnis, Leslie &amp; Kirkland, PLLC</i>
1:45-2:45 p.m.	<b>Social Security Disability</b> (1.00 CLE credit) <i>Brian J. Dufresne</i> <i>Legal Aid of the Bluegrass</i>



## SPEAKERS

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Erica Stacy-Stegman is a staff attorney with Legal Aid of the Bluegrass. She received her bachelor's degree from Morehead State University and her J.D. from the Northern Kentucky University Salmon P. Chase College of Law. Ms. Stacy-Stegman is a member of the Kentucky Bar Association.

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Ross Ewing is an associate with McBrayer, McGinnis, Leslie & Kirkland, PLLC in Lexington, where he concentrates his practice in family law, divorce, child custody, prenuptial agreements, and property division. He received his B.A., *with honors*, from the University of Kentucky and his J.D. from the University of Kentucky College of Law, where he was a member of the National Moot Court Team. Mr. Ewing is AV Peer-Review Rated by Martindale-Hubbell® and was named a Kentucky Super Lawyer Rising Star in 2015. In 2010, he was named the Fayette County Pro Bono Program Attorney of the Year. He participates as a volunteer attorney for the Fayette County Bar Association Pro Bono Program, the Kentucky Grandparents as Parents Conference, the Bluegrass Domestic Violence Program, and AIDS Volunteers, Inc. Mr. Ewing is a member of the Kentucky Bar Association and served as the inaugural Chair of the KBA LGBT Law Section in 2015-16.

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Brian Dufresne is a staff attorney with Legal Aid of the Bluegrass in Lexington, where he focuses his practice in healthcare insurance benefits, public benefits, social security law and domestic relations. He received his bachelor's degree from Transylvania University, his master's degree from the University of Louisville Kent School of Social Work, and his J.D. from the University of Louisville Louis D. Brandeis School of Law. Mr. Dufresne is a member of the American, Kentucky and Fayette County Bar Associations.

**I. GENERAL EXPUNGEMENT RULES IN KENTUCKY**

- A. Misdemeanor, violation, or traffic infraction convictions may be expunged if:
1. Client does not have any felony or misdemeanor charges currently pending;
  2. Client has not had any felony or misdemeanor convictions in the *five years prior* to filing;
  3. *Five years* have passed *since* completion of sentence or probation for conviction client is trying to expunge;
  4. The offense was not a sex offense or crime against a child; and
  5. The offense is not enhanceable or time period for enhancement has passed. See [KRS 431.078](#).
- B. Certain non-violent, Class D felony convictions may be expunged if:
1. The conviction is for an eligible felony offense listed in [KRS 431.073](#), or the client has been granted a full pardon in the case;
  2. Client does not have any felony or misdemeanor charges currently pending;
  3. Client has not had any felony or misdemeanor convictions in the *five years prior* to filing;
  4. *Five years* have passed since completion of sentence, probation, or parole (whichever is latest) in the case client wants to expunge; and
  5. Client has not previously vacated and expunged a felony conviction. See [KRS 431.073](#).
- C. Dismissed charges may be expunged if:
1. There are no charges currently pending in the case;
  2. The charges were dismissed *with prejudice*;

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\* **Disclaimer of liability:** This information is offered only as guidance for legal practitioners. It does not constitute legal advice or representation.

3. Dismissal was not in exchange for a guilty plea for another offense (*i.e.* dismissed charges were not "merged" with a guilty plea);
  4. Sixty days have passed since dismissal with prejudice prior to filing. See [KRS 431.076](#).
- D. Acquitted charges may be expunged if:
1. There are no charges currently pending in the case;
  2. Client was acquitted of the charges in the case; and
  3. Sixty days have passed since acquittal prior to filing. See [KRS 431.076](#).
- E. Charges sent to the Grand Jury that fail to produce an indictment may be expunged if:
1. There are no charges currently pending in the case; and
  2. At least one year has passed since the District Court sent the charges to the Grand Jury prior to filing. See [KRS 431.076](#).

## II. EXPUNGEMENT PROCEDURES (JEFFERSON COUNTY)

- A. Misdemeanor, Violation, or Traffic Infraction Convictions
1. First, obtain a \$40 KSP Expungement Eligibility Certification.
    - a. Order by mail or online at: <http://courts.ky.gov/expungement>.
    - b. Request may take up to sixty days to be processed.
    - c. Valid for only thirty days – you must file before it expires.
  2. District Court.
    - a. File in Expungement Office – Hall of Justice, Room 2045.  
Required forms:
      - i. [AOC-496.2](#) (petition) & AOC-496 (order).
      - ii. Copy of KSP certification for each eligible case.
      - iii. \$100 per case filing fee→ \$50 per case refundable if petition denied.
    - b. Clerks will send notice to County Attorney.

- c. Hearing – Criminal/Traffic Motion Hour.
    - i. Conference with prosecutor prior to hearing – they may object.
    - ii. Judge will decide.
3. Circuit Court.
- a. File in Circuit Criminal Clerk’s Office – Judicial Center, Room 331.
    - i. Required forms:
      - a) [AOC-496.2](#) (petition) & AOC-496 (order).
      - b) Copy of KSP certification for each eligible case.
    - ii. \$100 filing fee per case→ \$50 per case refundable if petition denied.
  - b. Clerks will send notice to Commonwealth’s Attorney.
    - If response (or after sixty days), case is sent to judge.
  - c. Judge may set hearing or decide hearing is unnecessary (if no objections).
- B. Felony Convictions
- 1. First, obtain a \$40 KSP Expungement Eligibility Certification.
    - a. Order by mail or online at: <http://courts.ky.gov/expungement>.
    - b. Request may take up to sixty days to be processed.
    - c. Valid for only thirty days – you must file before it expires.
  - 2. File in Circuit Criminal Clerk’s Office – Judicial Center, Room 331.
    - a. Required forms:
      - i. [AOC-496.3](#) (application) – clerks will generate order form.
      - ii. Copy of KSP certification.
    - b. \$500 filing fee→ \$450 is refundable if request denied.

3. Clerks will send notice to Commonwealth's Attorney.
    - a. Commonwealth's Attorney has sixty days to respond.
    - b. May be extended up to 120 days for good cause.
  4. If objections, judge will set for hearing.
  5. If no objections or no response after 120 days, court may grant without a hearing.
- C. Dismissals, Acquittals, & Failure to Indict
1. First, obtain a \$40 KSP Expungement Eligibility Certification.
    - a. Order by mail or online at: <http://courts.ky.gov/expungement>.
    - b. Request may take up to sixty days to be processed.
    - c. Valid for only thirty days – you must file before it expires.
  2. District Court.
    - a. File in EIP Office – Hall of Justice, Room 2045.
      - i. Required forms:
        - a) [AOC-497.2](#) (petition) & AOC-497 (order).
        - b) Copy of KSP certification for each eligible case.
      - ii. No filing fee!
    - b. Clerks will send notice to County Attorney.
    - c. Hearing – Criminal/Traffic Motion Hour.
      - i. Conference with prosecutor prior to hearing – they may object.
      - ii. Judge will decide.
  3. Circuit Court.
    - a. File in Circuit Criminal Clerk's Office – Judicial Center, Room 331.
      - i. Required forms:

- a) [AOC-497.2](#) (petition) & AOC-497 (order).
      - b) Copy of KSP certification for each eligible case.
    - ii. No filing fee!
  - b. Clerks will send notice to Commonwealth's Attorney.
    - If response or after sixty days, case is sent up to the judge.
  - c. Judge may set hearing or decide without hearing.
  - d. Note: If charges were dismissed without prejudice, you will first need to file a written motion for dismissal with prejudice.
    - i. If granted, you may request expungement sixty days after the dismissal order is entered.
    - ii. Call Jenn Pence at (502) 614-3169 for more details.
4. "Partial" expungements are possible when eligible dismissed charges in case, but conviction is ineligible.
- a. Make sure dismissed charges were not "merged" with a guilty plea to another offense.
  - b. Write/type \*PARTIAL\* at the top of [AOC-497.2](#) (petition) & AOC-497 (order) & indicate the charge(s) you are requesting be expunged.
- D. Successfully Completed Pre-Trial Diversion
- 1. If a person completes their court ordered pre-trial diversion, those charges may be dismissed as diverted. See [KRS 533.258\(1\)](#).
    - a. Sometimes this happens automatically, but other times you must first request dismissal before you can expunge those charges.
    - b. You can request dismissal as diverted by filing a written notice-motion-order in the court where the diversion was granted.

2. If the court dismisses the charges as diverted, then the person may request expungement sixty days after the dismissal order is entered using the usual expungement procedure for dismissals discussed above.
3. Call Jenn Pence at (502) 614-3169 for more details.

### III. VOIDING & SEALING FIRST TIME DRUG POSSESSION CONVICTIONS

- A. A client's first time drug possession conviction may be voided, and all records related to the conviction may be sealed if:
  1. The conviction was client's first-time conviction for possession of a controlled substance, marijuana, or certain synthetic drugs;\* and
  2. Client satisfactorily completed his or her court ordered treatment, probation, or other sentence.
- B. Remember:
  1. This type of relief is only available for first time drug possession convictions.
    - It does not apply to drug trafficking, cultivation, or other drug related offenses.
  2. Expungement rules do not apply!
  3. Required forms:
    - a. Written motion with exhibits in court where conviction was entered.
    - b. [AOC-334](#) order form.
  4. No filing fee or expungement eligibility certification required!

\* [KRS 218A.275\(8\)](#) addresses voiding and sealing convictions for possession of controlled substances, and [KRS 218A.276\(8\)](#) addresses voiding and sealing convictions for first-time possession of marijuana, salvia, and other synthetic drugs.

### IV. MISDEMEANOR OR VIOLATION CONVICTIONS

- A. Does the client have any misdemeanor or felony charges currently pending?
  1. YES→ Client's convictions are not currently eligible for expungement.

2. NO→ Client's conviction(s) *may* be eligible – continue to question B.
- B. Has the client been convicted of any misdemeanor or felony charges in the five years prior to filing?
1. YES→ Client's convictions are not currently eligible for expungement.
  2. NO→ Client's conviction(s) *may* be eligible – continue to question C.
- C. Have five years passed since the completion of the client's sentence in the case(s) the client wants to expunge?
1. YES→ Client's conviction(s) *may* be eligible – continue to question D.
  2. NO→ Client's convictions are not currently eligible for expungement.
- D. Does the client want to expunge a conviction for a sex offense or an offense against a child?
1. YES→ That conviction is not eligible for expungement, but other convictions may still be eligible.
  2. NO→ Client's conviction(s) *may* be eligible – continue to question E.
- E. Was the offense client wants to expunge subject to enhancement for a second or subsequent offense?
1. YES→ That conviction is not eligible for expungement until the enhancement period ends, but other convictions may still be eligible.
  2. NO→ The client is eligible for expungement (if all other conditions above are met).

## V. FELONY CONVICTIONS

- A. Does client's Class D felony appear on the list of eligible offenses OR were they granted a full pardon in their case?
1. YES (to either)→ Client's felony conviction *may* be eligible for expungement – continue to question B.
  2. NO (to both)→ Client's felony conviction is not eligible.



- B. Does the client have any misdemeanor or felony charges currently pending?
1. YES→ Client's conviction is not currently eligible for expungement.
  2. NO→ Client's conviction *may* be eligible – continue to question C.
- C. Has the client been convicted of any misdemeanor or felony charges in the five years prior to filing?
1. YES→ Client's conviction is not currently eligible for expungement.
  2. NO→ Client's conviction *may* be eligible – continue to question D.
- D. Have five years passed since the completion of the client's sentence in the case the client wants to expunge?
1. YES→ Client's conviction *may* be eligible – continue to question E.
  2. NO→ Client's conviction is not currently eligible for expungement.
- E. Has the client previously expunged a felony conviction from their record?
1. YES→ Client is not eligible to expunge any additional felony convictions, but they may still expunge any eligible misdemeanor convictions, dismissed or acquitted charges, or failures to indict.
  2. NO→ Client is eligible to expunge their felony conviction (if all other conditions above are met).

## VI. DISMISSED CHARGES

- A. Are there any charges currently pending related to the case the client wants to expunge?
1. YES→ Client's charges are not *yet* eligible for expungement (must wait until pending charges are resolved).
  2. NO→ Client's charges *may* be eligible for expungement – continue to question B.
- B. Were the client's charges dismissed at least sixty days ago?
1. YES→ Client's charges *may* be eligible for expungement – continue to question C.
  2. NO→ Client's charges are not yet eligible for expungement (must wait at least sixty days after dismissal *with* prejudice before filing).

- C. Were the client's charges dismissed *with prejudice*?
1. YES→ Client's dismissed charges *may* be eligible for expungement – continue to question D.
  2. NO→ Client's dismissed charges are not eligible for expungement (unless the court will first agree to dismissal with prejudice – contact Legal Aid for more info).
- D. Were the client's charges *merged, i.e.* dismissed in exchange for the client's guilty plea in that case or any other case?
1. YES→ Client may only expunge the dismissed charges if the conviction the charges were merged with is also eligible for expungement.
  2. NO→ Client's dismissed charges are eligible for expungement (if all other conditions are met).

## VII. ACQUITTED CHARGES

- A. Are there any charges currently pending related to the case the client wants to expunge?
1. YES→ Client's charges are not *yet* eligible for expungement (must wait until pending charges are resolved).
  2. NO→ Client's charges *may* be eligible for expungement – continue to question B.
- B. Was the client acquitted, *i.e.* found not guilty, of all charges in the case they want to expunge?
1. YES→ Client's charges *may* be eligible for expungement – continue to question C.
  2. NO→ Client's charges may still be eligible for expungement, but only if they meet the requirements for expunging a conviction or dismissal.
- C. Have at least sixty days passed since the client was acquitted of all charges in the case?
1. YES→ Client's acquitted charges are eligible for expungement (if all other conditions are met).
  2. NO→ Client's charges are not yet eligible for expungement (must wait at least sixty days after acquittal before filing).

## VIII. GRAND JURY FAILURE TO INDICT

- A. Are there any charges currently pending related to the case the client wants to expunge?
1. YES→ Client's charges are not *yet* eligible for expungement (must wait until pending charges are resolved).
  2. NO→ Client's charges *may* be eligible for expungement – continue to question B.
- B. Has at least one year passed since the District Court sent the charges to the Grand Jury?
1. YES→ Client's charges are eligible for expungement (if all other conditions are met).
  2. NO→ Client's charges are not yet eligible for expungement (must wait at least one year from the date the District Court decided to hold the matter to the Grand Jury before filing).

## IX. VOIDING & SEALING FIRST TIME DRUG POSSESSION CONVICTIONS

- A. Was this conviction client's first conviction for possession of a controlled substance, marijuana, salvia, or other eligible synthetic drugs?
1. YES→ Client's conviction may be eligible to be voided and sealed – continue to question B.
  2. NO→ Client's conviction is not eligible to be voided and sealed.
- B. Did the client satisfactorily complete their court ordered treatment, probation, or other sentence?
1. YES→ Client's conviction is eligible to be voided and sealed.
  2. NO→ Client's conviction is not eligible to be voided and sealed.

## EPO/TIPO Eligibility

- The court shall review ...immediately upon its filing. If the review indicates that domestic violence and abuse exists, the court shall summons the parties to an evidentiary hearing not more than fourteen (14) days in the future. If the review indicates that such a basis does not exist, the court may consider an amended petition or dismiss the petition without prejudice.

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## EPO/TIPO Eligibility

- Service of the summons and hearing order under this subsection shall be made upon the adverse party personally and may be made in the manner and by the persons authorized to serve subpoenas under [Rule 45.03](#) of the Rules of Civil Procedure. A summons may be reissued if service has not been made on the adverse party by the fixed court date and time

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## DVO Eligibility

- "Domestic violence and abuse" means physical injury, serious physical injury, stalking, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple;
- "Family member" means a spouse, including a former spouse, a grandparent, a grandchild, a parent, a child, a stepchild, or any other person living in the same household as a child if the child is the alleged victim;

### cont.

- If the review under this section also indicates the presence of an immediate and present danger of domestic violence and abuse, the court shall, upon proper motion, issue *ex parte* an emergency protective order that: (1) Authorizes relief appropriate to the situation utilizing the alternatives set out in [KRS 403.740](#), other than awarding temporary support or counseling; (2) Expires upon the conclusion of the evidentiary hearing required by this section unless extended or withdrawn by subsequent order of the court; and (3) Does not order or refer the parties to mediation unless requested by the petitioner, and the court finds that: (a) The petitioner's request is voluntary and not the result of coercion; and (b) Mediation is a realistic and viable alternative to or adjunct to the issuance of an order sought by the petitioner

## IPO Eligibility

### [KRS 456](#)

"Dating relationship" means a relationship between individuals who have or have had a relationship of a romantic or intimate nature. It does not include a casual acquaintanceship or ordinary fraternization in a business or social context. The following factors may be considered in addition to any other relevant factors in determining whether the relationship is or was of a romantic or intimate nature: (a) Declarations of romantic interest; (b) The relationship was characterized by the expectation of affection;

IPO Eligibility

[KRS 456](#)

(c) Attendance at social outings together as a couple;  
(d) The frequency and type of interaction between the persons, including whether the persons have been involved together over time and on a continuous basis during the course of the relationship; (e) The length and recency of the relationship; and (f) Other indications of a substantial connection that would lead a reasonable person to understand that a dating relationship existed;

(1) A petition for an interpersonal protective order may be filed by: (a) A victim of dating violence and abuse; (b) A victim of stalking; (c) A victim of sexual assault; or (d) An adult on behalf of a victim who is a minor otherwise qualifying for relief under this subsection. (2) The petition may be filed in the victim's county of residence or a county where the victim has fled to escape dating violence and abuse, stalking, or sexual assault. (3) The petition shall be verified and contain: (a) The name, age, address, occupation, residence, and school or postsecondary institution of the petitioner;

(b) The name, age, address, occupation, residence, and school or postsecondary institution of the person or persons who have engaged in the alleged act or acts complained of in the petition; (c) The facts and circumstances which constitute the basis for the petition; and (d) The names, ages, and addresses of the petitioner's minor children, if applicable.

(6) (a) Jurisdiction over petitions filed under this chapter shall be concurrent between the District Court and Circuit Court.

### Changes to EPO/DVO provisions

- [KRS 403.715 – KRS 403.785](#)

### TIPO/IPO provisions

- [KRS 456](#)

### Changes to EPO/DVO provisions

- Definition of Domestic Violence under [KRS 403.720](#)
  - "Domestic violence and abuse" means physical injury, serious physical injury, ***stalking***, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple

## Changes to EPO/DVO provisions

- What is Stalking?

- We look to [KRS 508.130](#) for the definition of stalking, which states in pertinent part:
- (1) (a) To "stalk" means to engage in an intentional course of conduct: 1. Directed at a specific person or persons; 2. Which seriously alarms, annoys, intimidates, or harasses the person or persons; and 3. Which serves no legitimate purpose. (b) The course of conduct shall be that which would cause a reasonable person to suffer substantial mental distress. (2) "Course of conduct" means a pattern of conduct composed of two (2) or more acts, evidencing a continuity of purpose.

## Changes to EPO/DVO provisions

- One (1) or more of these acts may include the use of any equipment, instrument, machine, or other device by which communication or information is transmitted, including computers, the Internet or other electronic network, cameras or other recording devices, telephones or other personal communications devices, scanners or other copying devices, and any device that enables the use of a transmitting device. Constitutionally protected activity is not included within the meaning of "course of conduct." If the defendant claims that he was engaged in constitutionally protected activity, the court shall determine the validity of that claim as a matter of law and, if found valid, shall exclude that activity from evidence.

## Changes to EPO/DVO provisions

- What does this mean? How do I prove stalking?

- Must show a "course of conduct"
  - A pattern of at least two incidents.
  - The incidents must show a continuity of purpose
- The Conduct must be directed at specific person(s)
- The Conduct must seriously alarm, annoy, intimidate or harass
- The Conduct must serve no legitimate purpose
- The Conduct must be such that it would cause a reasonable person to suffer substantial mental distress



## Changes to EPO/DVO provisions

- What does this mean? How do I prove stalking?
  - Always have clients who are the victims of stalking keep a log of each incident
    - Keep the log contemporaneously
    - Identify dates, times, and locations of each incident
    - Describe what happened in detail
    - Keep track of any witnesses or tangible evidence
    - Write down how the incident made victim feel in order to establish the subjective element – alarm, annoyance, intimidation, harassment

## Changes to EPO/DVO provisions

- Definition of Family Member under [KRS 403.720](#)
  - "Family member" means a spouse, including a former spouse, a grandparent, ***a grandchild***, a parent, a child, a stepchild, or any other person living in the same household as a child if the child is the alleged victim;

## Changes to EPO/DVO provisions

- Obtaining an Emergency Protective Order
  - [KRS 403.725](#) provides a streamlined vision of the process for filing a petition for an EPO. (revising and consolidating language formerly found in KRS 403.725, 403.730, & 403.735)
  - Subsections (3)(a) and (3)(b) now require that the "school or postsecondary institution" of the parties be identified as part of the petition
    - This language also appears under the corresponding IPO chapter ([456.030](#)) and seems designed to give the judge issuing an emergency order notice of potential issues relating to contact between parties who attend the same school.

Changes to EPO/DVO provisions

- Obtaining an Emergency Protective Order
  - In Jefferson County, the petition will then be delivered to the on duty judge, who will determine whether or not to issue a protective order.
  - In Jefferson County, the reviewing judge determines whether the petition is placed on an EPO/DVO track or a TIPO/IPO track.
    - The DVIC and the Petitioner will not be permitted to select between the two venues.
    - If the petitioner is a "member of an unmarried couple" as defined by [KRS 403.720\(5\)](#) and also in a "dating relationship" as defined by [456.010\(1\)](#) (e.g. a dating couple who have a child in common), the duty judge will assign the case to the family courts on the EPO/DVO track.

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Changes to EPO/DVO provisions

- Mediation
  - Under the existing [KRS 403.725\(5\)](#) no court may require mediation, conciliation, or counseling as a condition of issuing an EPO or DVO.
  - Under the new [KRS 403.730\(2\)\(a\)\(3\)](#), mediation is available in in EPO/DVO cases, but *only by request of the petitioner.*
  - If the Petitioner requests mediation, the court may order it if it finds that "the request is voluntary and not the result of coercion," and mediation is a "realistic and viable alternative to *or adjunct to* the issuance of an order..." (emphasis added)

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Changes to EPO/DVO provisions

- Consideration of Respondent's Criminal History and Protective Order History
  - Formerly, under KRS 403.741, the Petitioner, Respondent, or the Court could request that the Respondent's Criminal History and Protective Order history be reviewed prior to the hearing on the petition.
  - Following such a request it was *mandatory* that the court then review the histories and consider them.

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Changes to EPO/DVO provisions

- Consideration of Respondent’s Criminal History
- Consideration of Respondent’s Protective Order History
  - KRS 403.741 has been repealed and replaced by a new version of [KRS 403.735\(a\)](#) which reads:
  - ***The court may obtain the respondent's Kentucky criminal and protective order history and utilize that information to assess what relief and which sanctions may protect against danger to the petitioner or other person for whom protection is being sought, with the information so obtained being provided to the parties in accordance with the Rules of Civil Procedure***

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Changes to EPO/DVO provisions

- Consideration of Respondent’s Criminal History
- Consideration of Respondent’s Protective Order History
  - The plain language of the statute indicates that consideration of the Respondent’s history by the court is now *discretionary*.
  - Possible argument that only the court can initiate the review under the current language, but this was probably not the intent of the language.

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Changes to EPO/DVO provisions

- Court to be informed of school situation
  - [KRS 403.735\(b\)](#) adds the following language:
    - ***If the petitioner or respondent is a minor, the court shall inquire whether the parties attend school in the same school system to assist the court in imposing conditions in the order that have the least disruption in the administration of education to the parties while providing appropriate protection to the petitioner.***
    - As part of the introduction of the dating violence statute, the legislature appears to be asking all courts that hear any type of protective order cases to fashion their orders with schooling issues in mind.

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## Changes to EPO/DVO provisions

- Available Relief

- [KRS 403.740](#) replaces KRS 403.750 outlining the relief available to a successful petitioner.
- [KRS 403.740](#) generally adds a wider degree of discretion to the court in terms of restricting the Respondent from initiating contact with the petitioner, *or others*, and approaching specified locations.
- The court may still order a Respondent to vacate a shared residence [403.740\(1\)\(d\)\(1.\)](#), order temporary custody [403.740\(1\)\(d\)\(2.\)](#), and/or order temporary child support [403.740\(1\)\(d\)\(3\)](#) where applicable.

## Changes to EPO/DVO provisions

- Available Relief – Contact

- [KRS 403.740\(1\)\(a\)\(1.\)](#) empowers the court to prohibit "Any unauthorized contact or communication with the petitioner *or any other person specified by the court.*"
- [KRS 403.740\(1\)\(a\)\(3.\)](#) also empowers the court to prohibit the Respondent from approaching with a specified distance (up to 500 ft.) of the Petitioner "*or other person specified by the court*"

## Changes to EPO/DVO provisions

- Available Relief – Specified Locations

- [KRS 403.740\(1\)\(a\)\(4.\)](#) allows the court to restrain the Respondent from "[g]oing to or within a specified distance of a specifically described residence, school, or place of employment *or area where such a place is located*"
- Note that unlike [KRS 403.750\(1\)\(d\)](#), the revised statute does *not* limit the residences, schools, or places of employment to those "of the petitioner, family member, or member of an unmarried couple protected in the order."

## Changes to EPO/DVO provisions

- Available Relief – Specified Locations
  - [KRS 403.740\(2\)](#) addresses the steps the court must take before it may restrain the Respondent from approaching a specified location.
    - [403.740\(2\)\(a\)](#) requires the court to afford the parties an opportunity to testify on this issue.
    - [403.740\(2\)\(b\)](#) requires there to be a "specific, demonstrable danger to the petitioner or other person protected by the order."
    - [403.740\(2\)\(d\)](#) requires the court to "consider structuring a restriction so as to allow the respondent transit through an area if the respondent does not interrupt his or her travel to harass, harm, or attempt to harass or harm the petitioner."

## Changes to EPO/DVO provisions

- Available Relief – Catchall
  - [KRS 403.740\(1\)\(b\)](#) is added as a catchall provision. Under this section the court's orders may include instructions:
    - ***"Directing or prohibiting any other actions that the court believes will be of assistance in eliminating future acts of domestic violence and abuse, except that the court shall not order the petitioner to take any affirmative action."*** (e.g. The court can't order the Petitioner to vacate nor order the petitioner not to contact the Respondent.)

## Changes to EPO/DVO provisions

- Expungement
  - [KRS 403.745\(10\)\(a\)](#) allows Respondents to expunge Domestic Violence cases now.
    - Motion to expunge is heard in the court that heard the petition.
    - Expungement is discretionary.
    - Expungement is not available in cases where a DVO is entered - just dismissals.
    - Six months must elapse from the date of dismissal before the motion can be made.
    - During the six months preceding the motion, the movant must not have been bound by any other protective order (including IPO) filed by any person.

TIPO/IPO provisions – [KRS CH. 456](#)

- Who can file for a TIPO/IPO? – [KRS 456.030\(1\)](#)
  - (a) A victim of dating violence and abuse;
  - (b) A victim of stalking;
  - (c) A victim of sexual assault; or
  - (d) An adult on behalf of a victim who is a minor otherwise qualifying for relief under this subsection.

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TIPO/IPO provisions – [KRS CH. 456](#)

- Dating Violence – Subject Matter Jurisdiction
  - The definition for dating violence and abuse is found at [456.010\(2\)](#) and largely mirrors the definition of domestic violence in [KRS Ch. 403](#), except that the conduct must occur between persons who are, or have been, in a dating relationship.
  - [KRS 456.010\(1\)](#) defines a dating relationship as "a relationship between individuals who have or have had a relationship of a romantic or intimate nature. It does not include a casual acquaintanceship or ordinary fraternization in a business or social context."

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TIPO/IPO provisions – [KRS CH. 456](#)

- Dating Violence – Subject Matter Jurisdiction
  - [KRS 456.010\(1\)](#) outlines six factors that *may* be considered in determining whether the parties are or were in a dating relationship:
    - (a) Declarations of romantic interest;
    - (b) The relationship was characterized by the expectation of affection;
    - (c) Attendance at social outings together as a couple;

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TIPO/IPO provisions – [KRS CH. 456](#)

- (d) The frequency and type of interaction between the persons, including whether the persons have been involved together over time and on a continuous basis during the course of the relationship;
  - (e) The length of the relationship and how recent the relationship; and
  - (f) Other indications of a substantial connection that would lead a reasonable person to understand that a dating relationship existed
- The statute also indicates that this list is not exhaustive.

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TIPO/IPO provisions – [KRS CH. 456](#)

- Dating Violence – Subject Matter Jurisdiction
  - When dealing with a dating violence case you will want to address jurisdiction at the outset of your direct examination – to the extent it is not already addressed in the affidavit for a TIPO.
    - How long have you known the Respondent?
    - Do you hold yourselves out as a dating couple?
    - Do your peers consider you to be a dating couple?
    - Do you engage in acts of romantic affection?
    - Do you go places together? Do things together?
    - How long has the relationship had this level of intimacy?

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TIPO/IPO provisions – [KRS CH. 456](#)

- Dating Violence – Subject Matter Jurisdiction
- Notes:
  - It does not appear necessary that the relationship be exclusive. The length and consistency of the relationship seems to be more important than whether or not the parties date other people as well.
  - It may be wise to discuss the use of slang with your client when prepping their direct, and if slang is used in court make sure its meaning is clarified. Subtle nuances in the type of relationship may have great significance.

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TIPO/IPO provisions – [KRS CH. 456](#)

- Dating Violence – Subject Matter Jurisdiction
- Notes:
  - You may also find an excellent jurisdictional tool built right into Facebook.



In a relationship

Yesterday

TIPO/IPO provisions – [KRS CH. 456](#)

- The Hearing
  - After you have established jurisdiction in a dating violence case you will need to show, by a preponderance of the evidence, that the violence has occurred and may occur again.
  - In stalking and sexual assault cases you can go straight to the facts because no evidence as to the relationship is required for jurisdiction. It is not necessary that victims of stalking or sexual assault have any sort of relationship with the perpetrator in order for them to receive an IPO.

TIPO/IPO provisions – [KRS CH. 456](#)

- As in EPO/DVO cases, the court *may* consider the Respondent's criminal history and history of protective orders. [KRS 456.050\(1\)\(a\)](#)
- By statute, convictions for stalking, rape, sodomy, and sexual abuse will automatically provide sufficient evidence for the entry of an IPO. [KRS 508.155](#) and [KRS 510.037](#).



TIPO/IPO provisions – [KRS CH. 456](#)

- Stalking/Sexual Assault
  - Stalking defined in [KRS 508.130](#)
  - Sexual Assault "refers to conduct prohibited as any degree of rape, sodomy, or sexual abuse under [KRS Chapter 510](#) or incest under [KRS 530.020](#)." [KRS 456.010\(6\)](#)
  - In Kentucky the crimes of rape, sodomy, and sexual abuse are all characterized by a lack of consent to a sexual act. This can be by forcible compulsion or because the victim is incapable of consent.

TIPO/IPO provisions – [KRS CH. 456](#)

- Sexual Assault - Lack of Consent
  - Forcible compulsion can be present as a result of the use of physical force or the threat of physical force – express or implied.
  - It is **not** necessary that the victim physically resist their attacker in order for forcible compulsion to be present.

TIPO/IPO provisions – [KRS CH. 456](#)

- Even where there is no forcible compulsion, sexual assault may occur where the victim is incapable of consent.
  - Too young to consent
  - Intellectually disabled – significantly sub-average intellectual functioning
  - Mentally incapacitated – unable to function normally due to nonconsensual intoxication
  - Unconscious or otherwise physically incapable of communicating consent

TIPO/IPO provisions – [KRS CH. 456](#)

- Available Relief
  - Once it has been shown, by a preponderance of the evidence, that dating violence, stalking, or sexual assault has occurred and *may* occur again, the court may restrain the perpetrator from contacting the victim.
  - Language used mirrors the DVO language
  - An IPO may be issued for up to three years and is renewable for additional three year periods.
    - Where the IPO is issued as a result of a stalking or sexual assault conviction, the order is good for up to ten years.

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TIPO/IPO provisions – [KRS CH. 456](#)

- Safety Concerns
  - Where the parties attend the same school, safety planning needs to include what to do should the parties cross paths (assuming they remain at the same school).
  - Victims of stalking are at a higher risk of being subjected to continued misconduct by the perpetrator even after the entry of a protective order.
  - Unlike a DVO, the entry of an IPO, as a result of a dating relationship, does **NOT** prohibit the perpetrator from purchasing or possessing a firearm. [KRS 456.020\(2\)](#)

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TIPO/IPO provisions – [KRS CH. 456](#)

- Procedure in Jefferson County
  - Dockets are heard twice a week – Mondays and Thursdays.
  - The court mirrors the intimacy of the EPO/DVO courtrooms.
  - JCPS representatives are on hand where a scheduled case involves parties who attend the same school.

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## Questions/Concerns

If you have questions, concerns, or just want to talk strategy for one of your cases, do not hesitate to contact me:

Josephine Layne Buckner – 502-614-3121  
[jbuckner@laslou.org](mailto:jbuckner@laslou.org)

Sign up for dockets online at <http://laslou.org/dvapcalendar>

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## Capacity

- The law presumes all adults are competent and that competency must be rebutted by clear and convincing evidence of a lack of mental capacity.
- Planning can allow a client to maintain some degree of control in the event of incapacity by leaving directions to be followed if incapacity occurs.

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## Determining if a client has capacity

- Person, Time, Place, and Property
- Mini exam:
  - Ask questions.
  - Do they know who they are and why they are there?
  - Do they know the "object of their bounty"?
  - Are they coherent and lucid?

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## Documents

- Last Will and Testament
- Power of Attorney for financial issues
- Power of Attorney for medical issues
- Living Will/Appointment of Health Care Surrogate
- DNR form

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## Last Will and Testament

- Will-..."a last will or testament, codicil, appointment by will, writing in the nature of a will in exercise of a power, and any other testamentary disposition." [KRS 394.010](#)
- Bequest-a gift of personal property in a will
- Devise-a gift of real property in a will

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## Requirements of a Valid Will

- Requirements of a Valid Will
  - Writing
  - Testamentary Intent and Capacity
  - Execution-Signature and Witnesses
  - Holographic Wills

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## Definitions

- Testator/Testatrix
- Bequest
- Residue
- Executors and Guardians
- Estate-Probate Assets
- Types of Ownership of Property

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## Practical Considerations-Wills

- All adults should have a will, even if only to name a guardian for a minor child or dependent.
- Wills are usually probated after the funeral. Any directives associated with the funeral should be made in advance with a funeral home or similar entity.
- Co-executors, if living in different states or areas, can become a logistical nightmare.

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## Trusts

- Trust- "means an express trust established by a trust instrument, including a will, whereby a trustee has the duty to administer a trust asset for the benefit of a named or otherwise described income or principal beneficiary, or both. This definition includes oral trusts." [KRS 386B.1-010\(19\)\(a\)](#)
- Can be testamentary or separate document

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## Formalities of a Valid Trust

- Intent to establish
- A writing is required
- A permitted purpose
- Trustee-corporate or individual/alternate or successor
- Beneficiary

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## Practical Considerations-Trusts

- Who should be the trustee may depend on who the beneficiary is
- If the beneficiary has special needs, what are those needs, does the beneficiary receive any government benefits, and how can you protect those benefits?
- Is an advisory committee appropriate?

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## Power of Attorney

- Tool to help clients leave instructions for managing their day-to-day affairs
- Durable or Springing
- Limited or general
- Power to make gifts
- Recording a POA
- Primary and alternate named
- Financial or health care

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## Practical Considerations-Power of Attorney

- Discuss gifting with clients. Not all individuals want to grant that power.
- Be specific about the sale of real estate; include it if it is a possibility.
- Consider who should serve and if the same individual would serve as guardian if an appointment is needed.
- Co-attorneys-in-fact-logistics again!

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## Living Will

- "Any document that provides directions relative to health care to be provided to the person executing the document." [KRS 311.621\(2\)](#)
- Name a surrogate health care decision maker who will follow the directions contained in the Living Will
- Direct withholding or withdrawal of "life prolonging treatment" or not authorize such withholding or withdrawal
- Direct the withholding or withdrawal of artificially provided nutrition and hydration or not authorize such withholding or withdrawal
- Directs the making of gifts to medical science or organ donation

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## Living Will Definitions

- Life prolonging treatment is "any means or medical procedure, treatment, or intervention which: utilizes mechanical or other artificial means to sustain, prolong, restore, or supplant a spontaneous vital function **AND** when administered to the patient would only serve to prolong the dying process." [KRS 311.621\(11\)](#)
- Life prolonging treatment does not include treatment for the relief of pain. [KRS 311.621\(11\)](#)

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## Living Will Definitions

- Terminal Condition means any condition caused by injury, disease, or illness which, to a reasonable degree of medical probability, as determined solely by the patient's attending physician and one other physician, is incurable and irreversible and will result in death within a relatively short time, and where treatment will only prolong the dying process. [KRS 311.621\(16\)](#)
- Health care surrogate can only act when the grantor lacks decisional capacity. [KRS 311.629\(2\)](#)

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## Requirements for a Living Will

- Individual must be eighteen years or older
- Must be in writing
- Signed and dated by individual
- Two qualified witnesses or a notary public
- Qualified witnesses are not blood relatives, beneficiaries, attending physicians, employees of the health care facility where patient is located
- Not applicable if pregnant

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## Practical Considerations-Living Wills

- Living wills only apply when the grantor is unable to make informed decisions for themselves.
- Copies of the living will should be given to the grantor's physician, surrogate, and anyone likely to assist the grantor with medical issues.
- Living wills are not a "Do not resuscitate" form and will not be honored as one by EMS or similar emergency personnel.
- Co-surrogates have the same problems as any co-fiduciary.

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## Do Not Resuscitate Forms

- Only form that EMS personnel will recognize and honor.
- Must be properly completed and prominently displayed.
- Advise client that family should be advised of their wishes and family should know that a DNR form has been signed.
- Form is available in English and Spanish.

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**I. INITIATING THE CASE**

A. Initial Documents

Contents of Verified Petition – [KRS 403.150](#):

1. Required information.
  - a. Age, residence, occupation & Social Security numbers (redacted) of both parties.
  - b. Can substitute Attorney's address for party if party is victim of domestic violence.
  - c. The existence of any protective orders.
    - List DVO cases in petition.
  - d. Date of marriage.
  - e. Location where marriage registered (e.g. Jefferson County, Kentucky).
  - f. Date of separation.
    - i. Parties must have been separated sixty days in order to be granted a divorce. However, may file case prior to being separated sixty days.
    - ii. Additional waiting period for parties with minor children – the Court cannot hear testimony (other than in reference to temporary orders) in the case until sixty days have passed from the date the respondent was served, the date the respondent entered his appearance or the date a warning order attorney was appointed. [KRS 403.044](#)
  - g. Names, ages and Social Security numbers of minor children of marriage.
  - h. A statement as to whether a party is pregnant. [KRS 403.150\(2\)\(d\)](#) & [403.150\(7\)](#).
  - i. Any arrangements already in place regarding parenting time, custody, child support and maintenance.

- j. Addresses where children have resided during past five years and with whom.
2. Substantive matters.
- a. Marriage is irretrievably broken (No-fault divorce [KRS 403.150\(5\)](#)).
    - Irretrievably broken means there is no reasonable prospect of reconciliation. [KRS 403.170\(3\)](#)
  - b. Residency requirement [KRS 403.140](#).
    - i. At least one party must have resided in Kentucky 180 days next preceding the filing of the petition; OR
    - ii. One party is stationed in the state while a member of the armed services and the residence or military presence has been maintained for 180 days.
  - c. Custody (designate client's request – joint, sole, primary residential, split, etc.).
  - d. Parenting time.
  - e. Child support.
  - f. Maintenance.
  - g. Request for restoration of former name [KRS 403.230](#).
3. Case heading.
- A Kentucky divorce case is styled "In re the Marriage of Jane Doe and John Doe."
4. Redaction.
- a. Personal identifiers must be redacted either by substitution of XXXXX or by marking out [KRS 403.135](#).
  - b. Personal identifiers – and redacted versions.
    - i. Social Security number (XXX-XX-XXXX).
    - ii. Name of minor child (Jane Doe – J.D.).
    - iii. Date of birth (XX/XX/1902).
    - iv. Financial account number (XXXXXXXXXX).

- c. Unredacted documents may be filed under seal.
- d. Redacted documents must be filed for the public record.
- e. Burden of redaction is on the filing party, not the clerk.

B. Other Initial Documents

1. Certificate of Divorce (VS-300) – Draft online – must be printed on paper with watermark. (<https://kvets.chfs.ky.gov/Divorce/Details.aspx>)
2. Case Data Information Sheet.  
<http://courts.ky.gov/resources/legalforms/LegalForms/FC3.pdf>

ADC-FC-3  
Rev. 11-11  
Commonwealth of Kentucky  
Court of Justice www.courts.ky.gov

Minor Children Involved  
 Protective Order Issued For:  
 Petitioner  
 Respondent

CIRCUIT  DISTRICT  
 FAMILY COURT  
CASE DATA INFORMATION SHEET

**For Office Use Only**  
Case #: \_\_\_\_\_  
County: \_\_\_\_\_  
Division: \_\_\_\_\_

**PETITIONER:**  
Name: \_\_\_\_\_  
Address: \_\_\_\_\_  
Telephone: ( ) \_\_\_\_\_  
DOB: \_\_\_\_\_  
SSN: \_\_\_\_\_  
Relationship to Respondent: \_\_\_\_\_

**RESPONDENT:**  
Name: \_\_\_\_\_  
Address: \_\_\_\_\_  
Telephone: ( ) \_\_\_\_\_  
DOB: \_\_\_\_\_  
SSN: \_\_\_\_\_  
Relationship to Petitioner: \_\_\_\_\_

**OTHER PARTIES / CHILDREN:**  
Name: \_\_\_\_\_  
Address: \_\_\_\_\_  
Telephone: ( ) \_\_\_\_\_  
DOB: \_\_\_\_\_  
SSN: \_\_\_\_\_  
Relationship to Petitioner: \_\_\_\_\_  
Name: \_\_\_\_\_  
Address: \_\_\_\_\_  
Telephone: ( ) \_\_\_\_\_  
DOB: \_\_\_\_\_  
SSN: \_\_\_\_\_  
Relationship to Petitioner: \_\_\_\_\_

For ALL OTHER PARTIES to this case, please list below the name, current address, date of birth (DOB), social security number (SSN), and relationship to the Petitioner, of any other parties to this action, or children of the Petitioner or Respondent. If there is not enough room below, please attach a separate sheet with all the information requested.

3. Summons.

<http://courts.ky.gov/resources/legalforms/LegalForms/105.pdf>

AOC-105 Rev. 1-07 Page 1 of 1  
Commonwealth of Kentucky  
Court of Justice www.courts.ky.gov  
CR 4.02; CR Official Form 1

Doc. Code: CI

CIVIL SUMMONS

Case No.  leave blank if unknown

Court  Circuit  District  Reset

County

Reset  Individual  Other  PLAINTIFF

VS.

Reset  Individual  Other  DEFENDANT

Service of Process Agent for Defendant:  Individual  Other  Reset

4. Preliminary Verified Disclosure.

a. For cases involving assets/income under \$100,000.00.

[http://courts.ky.gov/resources/legalforms/LegalForms/238239\\_1.pdf](http://courts.ky.gov/resources/legalforms/LegalForms/238239_1.pdf)

Save Print Reset Form

AOC-238.1 Doc. Code DSPV  
 AOC-239.1 Doc. Code DSFV  
Rev. 1-14  
Page 1 of 5  
Commonwealth of Kentucky  
Court of Justice www.courts.ky.gov  
FCRPP 2 and FCRPP 3

SIMPLIFIED PRELIMINARY VERIFIED DISCLOSURE STATEMENT\*

\*FOR PARTIES WITH COMBINED INCOME LESS THAN \$100,000 AND COMBINED ASSETS LESS THAN \$100,000

IN RE THE MARRIAGE OF:

PETITIONER

and

RESPONDENT

Petitioner  Respondent submits under oath the following Verified Disclosure Statement pursuant to FCRPP 2 OR FCRPP 3, which requires full and prompt disclosure of the following information:

NOTE: A response of "see attached" is not appropriate for any portion of this statement. Attach documents requested herein only.

I. IDENTIFYING INFORMATION OF BOTH PARTIES

- b. For cases over \$100,000.00.

<http://courts.ky.gov/resources/legalforms/LegalForms/238.pdf>

5. Motion to Proceed *In Forma Pauperis* (when applicable).

C. Initial Client Meeting

1. Gathering relevant information.
2. Discerning client expectations.
3. Setting achievable goals.

D. Serving the Respondent

1. Certified mail from Family Court Clerk's Office.
2. Sheriff.
3. Warning order attorney.
  - Request appointment pursuant to Kentucky Rule of Civil Procedure (CR).
4. Secretary of State – To serve out-of-state residents pursuant to Kentucky's Long Arm Statute, [KRS 454.210](#). Instructions to request this type of service of process can be found at Secretary of State web site. <http://www.sos.ky.gov/admin/Pages/Summonses.aspx>

## II. ADDRESSING IMMEDIATE NEEDS

Temporary Orders – *Pendente Lite* Orders – [KRS 403.160](#):

- A. May be filed following service upon the respondent spouse
- B. Temporary Maintenance
  1. Affidavit supporting the motion – factual basis for maintenance.
  2. Amount requested.
  3. Parties' income information.
  4. Living expense schedule (located in Verified Disclosure Document).



- C. Temporary Child Support
  - 1. Affidavit supporting motion [KRS 403.160](#).
    - a. Number of minor children.
    - b. Information required to calculate combined adjusted parental gross income.
    - c. Social Security numbers of all parties subject to the motion.
  - 2. Child Support Worksheet.
  - 3. Proof of income.
  - 4. Court shall order temporary support based upon the guidelines as provided by law within fourteen days of the filing of the motion. Support shall be retroactive to the date the motion was filed. [KRS 403.160\(2\)\(a\)](#)
- D. Temporary Custody [KRS 403.280](#)
  - 1. Affidavit required per [KRS 403.350](#). Adequate cause must be established by the affidavits to secure a hearing.
  - 2. Same standard as applied in custody determination [KRS 403.270](#) – best interests of the child considering the factors in [KRS 403.270\(2\)\(a-i\)](#).
- E. Temporary Parenting Schedule
  - 1. Some courts will utilize a standard schedule. Review local rules for county.
  - 2. Can be submitted by agreement or requested by motion.
- F. Restraining Order – Either party can request a temporary injunction or restraining order pursuant to the Rules of Civil Procedure. [KRS 403.160\(3\)](#)
- G. Temporary orders terminate with the final divorce decree is entered, when the case is dismissed or when a subsequent contradictory order is entered.
- H. Like a Decree, a temporary order is enforceable pursuant to the Court's inherent contempt powers. [KRS 403.240](#)
- I. [KRS 403.240\(3\)](#) – Good cause for failure to comply with visitation – mutual consent or possibility of endangerment to the physical, mental, moral, or emotional health of the child, or endangerment to the physical

safety of either party, or extraordinary circumstances as determined by the Court.

### III. MINOR CHILDREN OF THE MARRIAGE

#### A. Custody and Parenting Time

1. Parenting time.
  - a. Establishing a written schedule.
  - b. By agreement of the parties.
  - c. Method of exchange.
  - d. Holidays.
  - e. Birthdays.
2. Custody [KRS 403.270](#).
  - a. Joint.
  - b. Sole.
  - c. Distinguishing the concepts of custody and parenting time for clients.
  - d. Primary residential parent.
  - e. Custody determined by the best interest of the child.
  - f. Best interest factors to be considered by Court [KRS 403.270](#).
    - i. Wishes of the child's parents and any *de facto* custodian.
    - ii. Wishes of the child.
    - iii. Relationship of child with parent and siblings.
    - iv. Child's adjustment to home, school and community.
    - v. Mental and physical health of all individuals involved.
    - vi. Domestic violence.
    - vii. Care by a *de facto* custodian.

- viii. Intent of parents when child was placed with *de facto* custodian and the circumstances that led to the child's being allowed to remain with a *de facto* custodian.
- 3. Custodial evaluation [KRS 403.290](#).
  - a. Court may interview child in chambers.
  - b. Court may seek advice of professional personnel [KRS 403.290\(2\)](#) and order an investigation and report as to custodial arrangements for the child(ren) [KRS 403.300](#).
  - c. Entitled to report ten days prior to hearing [KRS 403.300\(3\)](#).
- 4. Supervised visitation.
  - a. Parenting time may be limited.
  - b. Entitled to reasonable visitation (parenting time) unless it "would endanger seriously the child's physical, mental, moral, or emotional health." [KRS 430.320\(1\)](#).
  - c. Domestic violence is relevant to decisions regarding visitation and Court must order visitation in a manner that will not "endanger seriously the child's **or the custodial parent's** physical, mental, or emotional health." [KRS 403.320\(2\)](#).
- 5. Parenting coordinators (can request appointment) – Court will apportion fees.
- 6. Families in Transition Program (Jefferson County) – Required parenting class in all divorce cases involving minor children. Order will be issued at time of filing. Must be completed in order to receive a decree of divorce. \$ Fee – can request sliding scale – client must bring proof of income to first class. Schedule online: <http://courts.ky.gov/courts/Jefferson/FamilyCourt/divorceeducation/Documents/JeffersonFITSchedule.pdf>
- 7. Safe Exchange Program (Jefferson County – Home of the Innocents – court referral required).
- 8. The Family Place (Jefferson County – supervised visitation – court referral required) \$ Fee – usually ordered to be paid by person who is being supervised.
- 9. Ace's Place (Jefferson County – supervised visitation, will do off site).

10. Custody modification – [KRS 403.340](#).
  - Can move to modify after two years; earlier if endangerment to child(ren).

B. Child Support

1. Ordered pursuant to Kentucky Child Support Guidelines.
2. Guidelines are a rebuttable presumption.
3. May deviate from guidelines – specific reason must be noted in agreement or made in court's findings that application would be unjust.
4. Form available online: <http://chfs.ky.gov/dis/cse.htm#calculate>.
5. Completed worksheet must be filed with court.
6. Wage assignment –  
  
<http://chfs.ky.gov/NR/rdonlyres/ADC96F55-301D-4719-9AD0-5F0000EB5212/286083/FederalIWO1.pdf>  
  
Non IV-D cases will need an Income Withholding Order –  
  
[https://www.flcourts.org/core/fileparse.php/533/urlt/Income\\_Witholding\\_Order\\_Updated.pdf](https://www.flcourts.org/core/fileparse.php/533/urlt/Income_Witholding_Order_Updated.pdf)
7. Information needed to complete the form:
  - a. Income of both parties.
  - b. Maintenance paid to other party in the action.
  - c. Child support paid for prior born children.
  - d. Child care costs.
  - e. Health insurance costs.
8. Allocation of extraordinary medical expenses [KRS 403.211\(9\)](#).
9. Payment of money received by a child as a result of a parental disability shall be credited against the child support obligation of the parent. [KRS 403.211\(15\)](#).
10. To be paid by wage assignment.

#### IV. SPOUSAL SUPPORT

##### A. Maintenance

1. Statutory factors [KRS 403.200](#).
  - a. Spouse seeking maintenance needs support to provide for reasonable needs and lacks sufficient property and/or income to meet needs.
  - b. Spouse seeking maintenance is unable to support him/herself through appropriate employment OR is the custodian of a child whose condition makes it inappropriate to require the custodian to seek employment outside the home.
2. Amount and duration must be just taking factors into consideration [KRS 403.200](#).
  - a. Financial resources of the parties.
  - b. Marital property apportioned to the parties.
  - c. Ability to meet needs independently.
  - d. Education/training and ability to acquire same.
  - e. Standard of living during marriage.
  - f. Duration of marriage.
  - g. Age, physical and emotional condition of spouse seeking maintenance.
  - h. Ability of other spouse to pay maintenance while meeting his/her own needs.
3. Effect on Social Security benefits and other benefits (SNAP, daycare subsidies, other means-based benefits).
4. Termination upon death of either party or remarriage of recipient [KRS 403.250](#).
5. Tax implications.
6. Modification.

- B. Health Insurance
  - 1. COBRA.
  - 2. Address in decree/mediated agreement.
  - 3. Affordable Care Act.
    - a. Is your client insured?
    - b. Are they eligible for a subsidy or policy at no cost?
    - c. Tax implications of not being covered.

## V. DIVISION OF ASSETS & DEBTS

- A. [KRS 403.190](#) Marital property to be divided in just proportions considering the following factors:
  - 1. Contribution of spouse to the acquisition of the property, including contribution of a spouse as homemaker;
  - 2. Value of the property set apart to each spouse;
  - 3. Duration of the marriage;
  - 4. Economic circumstances of each spouse when the division of property becomes effective;
  - 5. Desirability of awarding the family home or the right to live in the family home to the spouse having the custody of the children.
- B. Marital Property & Non-Marital Property

Includes all property acquired by either spouse subsequent to the marriage except ([KRS 403.190\(2\)\(a\)](#)):

  - 1. Property acquired by gift, bequest, devise or descent.
  - 2. Property that can be traced to property acquired by gift, bequest, devise or descent.
  - 3. Property acquired after a decree of legal separation.
  - 4. Property excluded by agreement of the parties.
  - 5. Increase in value of property owned prior to the marriage.
  - 6. Property acquired during marriage is presumed to be marital property. Presumption is overcome by proof that property meets an exception.

- C. Retirement Accounts
  - 1. Qualified Domestic Relation Order (QDRO) must be drafted to accomplish division/transfer.
  - 2. Offsetting other assets.
  - 3. Exempted retirements – if one spouse has a retirement that cannot be divided by law, the other spouse's retirement may be exempted up to the value of the other spouse's retirement.
- D. Division must be equitable.

## VI. REACHING AN AGREEMENT

- A. Settlement Agreements
  - 1. Settlement may be reached via negotiation between attorneys or through mediation, or prior to filing by the parties.
  - 2. Must provide for maintenance, disposition of property, custody, child support and visitation. [KRS 403.180\(1\)](#).
  - 3. Agreements are binding unless Court finds agreement unconscionable. [KRS 403.180\(2\)](#).
  - 4. If approved by Court, agreement is incorporated by reference in the decree, and the decree should order parties to carry out the terms of the agreement. [KRS 403.180\(4\)\(b\)](#).
  - 5. Enforceable pursuant to the Court's inherent contempt powers.
  - 6. Child support enforceable via contempt powers and can be prosecuted as a criminal offense (misdemeanor or felony depending upon severity of offense and amount of arrearage).
  - 7. Submitting proof by interrogatories – Deposition.
- B. Mediation
  - 1. All contested cases referred to mediation.
  - 2. Domestic violence exception – [KRS 403.036](#) mandates that the Court not order mediation in cases where a finding of domestic violence and abuse is found (pursuant to [KRS 403.036](#)) unless requested by the victim and the court makes a finding that the request is (1) voluntary – not the result of coercion; and (2) mediation is a realistic and viable alternative.
  - 3. Preparing for mediation.

4. Preparing your client.
5. Expectations.
6. Procedure.
7. Agreements at mediation.
  - a. Cost of mediation & Sliding Scale.
  - b. Generally \$180 per hour divided between parties 50/50 percent or according to income by agreement or by order of the court.
  - c. Sliding Scale available for lower income; must request; worksheet available in Family Court Local Rules.

## **VII. GOING TO COURT**

### **A. Court Dates**

1. Motion hour.
  - a. Address temporary issues (maintenance, child support, custody, etc.).
  - b. Schedule hearings.
  - c. Request mediation & CMC date.
  - d. Address issues that will not wait for trial without detriment to the parties (loss of property due to failure to pay debt, marital residence, etc.).
  - e. Restraining orders.
2. Case Management Conference ("CMC").
  - a. Similar to pretrial conference.
  - b. Attorneys advise court of issues (what is agreed and what is contested).
  - c. Can address temporary issues so long as sufficient time has been scheduled.
3. Default hearing.
  - a. Client must be present.
  - b. Testimony will be taken (court will "take proof").



- c. If Judge wants you to prepare decree – ask them to make findings on the record.
- d. Not divorced until decree signed by judge and entered by clerk.

**B. Trial**

- 1. Trial Memorandum.
- 2. Updated Verified Disclosure/Final Disclosure.
- 3. Witness list.
- 4. Subpoena witnesses.
- 5. Rules of Evidence apply.
- 6. Fact finder – Judge.
- 7. Submitting a proposed decree.
- 8. Preservation of error.
  - a. Objections pursuant to Rules of Evidence.
  - b. Avowal.

**VIII. CONCLUDING REPRESENTATION**

Following Entry of Decree:

- A. Motion to Withdraw.
- B. Closure Letter to Client with Decree.
- C. If Legal Aid case, Case Outcome Form to Legal Aid noting number of hours spent on case and outcome.

## BASICS OF SOCIAL SECURITY DISABILITY PRACTICE

Brian J. Dufresne

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### I. WHAT TYPES OF SOCIAL SECURITY CASES DO LEGAL AID ORGANIZATIONS TYPICALLY HANDLE?

- A. Most Legal Aid organizations do not handle initial disability applications. We do not take cases that the private bar will handle on a contingency basis.
- B. Overpayments
- C. Cessations
- D. Wrongful reduction in benefits, etc.

### II. WHAT IS THE DIFFERENCE BETWEEN SSI AND SSDI?

#### A. SSI

Supplemental Security Income, also known as Title 16, is a needs-based entitlement program for disabled adults and children based on financial need. [42 U.S.C. §1381 et seq.](#); [20 C.F.R. Part 416](#).

- 1. Non-medical requirements are listed at [20 C.F.R. §416.1204 through §416.1266](#).
  - a. Resources – Maximum of \$2,000 for an individual and \$3,000 for a couple.  
  
Not all resources are considered, such as the first automobile, \$2,000 worth of household goods and personal effects, or burial space. See [20 C.F.R. §416.1201](#).
  - b. Income limits – \$733/\$1,100 income limits for individuals/couples. The first \$20 of unearned income is excluded, and the first \$65 and half of earned income is excluded. See [20 C.F.R. §416.1100](#).
- 2. Entitlement starts the first full month after filing. Benefits can only go back to the first full month following the application. [20 C.F.R. §416.335](#).
- 3. If approved for SSI, the individual is automatically eligible for Medicaid coverage.
- 4. In 2017, the maximum monthly SSI benefit is \$735 for an individual. The couple rate is \$1,103.

- B. SSDI – Social Security Disability Insurance Benefits, also known as Social Security Disability Income, DIB, or Title II. [42 U.S.C. §401 et seq.](#); [20 C.F.R. Part 404.](#)
1. An adult must be both insured for disability insurance purposes and disabled in order to be eligible for SSDI. [42 U.S.C §423](#); [20 C.F.R. §404.315.](#)
  2. Benefits can be approved for up to twelve months preceding the filing of the application. [42 U.S.C §423\(b\)](#); [20 C.F.R. §404.315\(a\)\(4\).](#)
  3. See [42 U.S.C §404.130](#) for the rules used in determining disability insured status.

### III. HOW DO YOU DETERMINE IF SOMEONE IS DISABLED?

A. Definition of Disability

The inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months. [42 U.S.C. §423\(d\)](#); [20 C.F.R. §§404.1505\(a\), 416.905\(a\).](#)

An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

B. Five Step Sequential Evaluation of Disability. [20 C.F.R. §§404.1520, 416.920.](#)

1. **Step 1:** Is the claimant engaging in substantial gainful activity (SGA)? [20 C.F.R. §§404.1571 et. seq., 416.971 et. seq.](#)
  - a. In 2017, the SGA amount is \$1,170 per month for non-blind individuals (\$1,950 blind).
  - b. Things to consider:
    - i. Unsuccessful work attempts, impairment related work expenses, subsidized work. [20 C.F.R. §§404.1574, 416.974.](#)

- ii. Self-employment – Three part test. See [SSR 83-34](#).
2. **Step 2: Severe impairment.**
- The claimant must have a severe impairment or combination of impairments which significantly limits his ability to do basic work activities without regard to his age, education, or work experience. If there is no severe impairment found, the claim will be denied. [20 C.F.R. §§404.1508, 416.908; 404.1528, 416.928](#).
- a. The impairment(s) must result from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques. [§§404.1508, 416.908](#).
  - b. Must be established by medical evidence consisting of signs, symptoms, and laboratory findings. [20 C.F.R. §§404.1508, 416.908; 404.1528, 416.928](#).
- Acceptable evidence: [20 C.F.R. §§404.1512; 416.912; 404.1503; 416.913; 404.1527; 416.927](#).
3. **Step 3: Does the claimant's impairment(s) meet or equal a listing?**
- a. The adjudicator must decide whether the claimant has an impairment (or combination of impairments) which meets or equals a listing in "The Listing of Impairments" in Appendix I. [20 C.F.R. §§404.1525, 416.925](#).
  - b. If the claimant meets or equals a listing, she will be found to be disabled at Step 3. If not, the inquiry will move on to Step 4.
4. **Step 4: Can he perform his past relevant work (PRW)?** [20 C.F.R. §§404.1565, 416.965, SSR 82-61](#).
- a. PRW is defined as work that was performed within the fifteen years prior to the date of adjudication. The work has to have been performed long enough for the worker to have learned the job. [20 C.F.R. §§404.1565, 416.965, SSR 82-61](#). The work also must be performed at SGA in order to count.
  - b. The adjudicator will consider whether the claimant retains the Residual Functional Capacity (RFC) to perform the PRW. [20 C.F.R. §§404.1545\(a\)\(1\), 416.945\(a\)\(1\), SSR 96-8p](#).
    - i. Exertional limitations. [SR 83-10](#).

- ii. Non-exertional limitations. [SSRs 83-10](#), [83-12](#), [83-14](#), [85-15](#).
  - iii. Pain and other symptoms. [20 C.F.R. §§404.1529](#), [416.929](#), [SSRs 96-7p](#),<sup>1</sup> [82-61](#).
5. **Step 5:** If she cannot do her PRW, are there other jobs in the national economy that she can do?
- a. Does she possess the RFC, considering her age, education and PRW to perform other work which exists in the national economy? The burden shifts to the Commissioner at Step 5 to demonstrate that there are jobs that exist in the national economy that the claimant retains the RFC to perform.
  - b. Dictionary of Occupational Titles (DOT). SSA takes administrative notice of job data from the DOT. [20 C.F.R. §§404.1567-8](#), [416.967-8](#).
  - c. Vocational factors: Medical-Vocational Guidelines "The Grids" see 20 C.F.R. Part 404, Subpart P, Appendix II.<sup>2</sup>
    - i. Age.
    - ii. Education.
    - iii. Work experience.
    - iv. Physical exertion levels. [20 C.F.R. §§404.1567](#), [416.967](#); [SSR 83-14](#), [96-9p](#).
    - v. Skill levels. [SSRs 82-11](#), [00-4p](#).
      - a) Unskilled (DVP 1-2).  
Needs little or no judgment to do simple duties that can be learned on the job in a short period of time (thirty days or less).
      - b) Semiskilled (SVP 3-4).  
Needs some skills but does not require doing more complex work duties.
      - c) Skilled (SVP 5-9).

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<sup>1</sup> Superseded by [SSR 16-3p](#) effective March 28, 2016.

<sup>2</sup> Available online at [http://www.ssa.gov/OP\\_Home/cfr20/404/404-app-p02.htm](http://www.ssa.gov/OP_Home/cfr20/404/404-app-p02.htm).

Requires qualifications in which a person uses judgment, makes sophisticated adjustments and deals with people, facts, figures, or abstract ideas at a high level of complexity. [20 C.F.R. §§404.1568, 416.968, SSRs 82-41, 00-4p.](#)

d) Transferability of skills.

Applying work skills which the claimant has demonstrated in vocationally relevant past jobs to meet the requirements of other skilled or semi-skilled jobs. [SSR 82-41.](#) Skills can be transferred among jobs where:

- i) The same or lesser degree of skill is required.
- ii) The same or similar tools and machines are used.
- iii) The same or similar raw materials, products, processes, or services are involved.

vi. You will usually have Vocational Expert Testimony. You will need to prepare questions in advance that you expect to ask the Vocational Expert.

vii. If the Commissioner cannot meet her burden at Step 5, the claimant should be found disabled.

6. Drug Addiction and Alcoholism Cases (DAA).

a. Benefits cannot be paid if drug addiction and/or alcoholism (DAA) is material to a finding of disability. [20 C.F.R. §§404.1535, 416.935.](#)

b. [SSR 13-2p](#) – Evaluating Cases Involving Drug Addiction and Alcoholism.

i. DAA is not material to the determination that the claimant is under a disability if the claimant would still meet the definition of disability if she were not using drugs or alcohol.

ii. DAA is material to the determination of disability if the claimant would not meet the definition of disability if she were not using drugs or alcohol.

#### **IV. HOW DO YOU APPLY FOR DISABILITY?**

- A. A claimant can file an application for disability online or by paper. The claimant can also schedule a telephone appointment or go into the local SSA office.
- B. The claimant should have a list of all medical providers seen one year prior to the onset date, list of medications, list of severe impairments, date last worked, work history for the last fifteen years, and other information listed on Social Security's website:  
<https://www.ssa.gov/pubs/EN-05-10550.pdf>.
- C. Once the application is filed the case is transferred to the State Disability Determination Agency for record development. A disability examiner is assigned to the case to order the medical records and send out questionnaires to the individual and third parties who know about his/her conditions.

If you are assisting a claimant with an initial application it is important that you assist with completing these questionnaires to validate they are completed correctly.

- D. After all of the medical records and questionnaires are completed/returned, the disability examiner forwards the information to a non-examining medical doctor and/or psychologist to review the file and give an opinion about the claimant's RFC. They will then complete RFC forms or Mental Residual Functional Capacity forms outlining the claimant's work limitations.
- E. It is important to stay in contact with the examiner to make sure they have all of the important medical records.

#### **V. WHAT ARE THE LEVELS OF APPEAL?**

- A. Request for Reconsideration

When a claimant is denied at the initial level they can file a Request for Reconsideration within sixty days of the claimant receiving the denial. The Social Security Administration assumes that the claimant received the denial five days after the date stamped on the denial due to mailing time. (They essentially have sixty-five days to file an appeal).

After the request for reconsideration is received, the SSA will send the case back to a new disability examiner and they will order new medical records or send out new questionnaires if needed.

- B. Request for an Administrative Law Judge Hearing

A claimant denied at the reconsideration stage must file a request for a hearing within sixty-five days of the date stamped on the reconsideration request.

1. This is the level where many clients seek out attorney representation. The average waiting time for a hearing is a year from this point.
2. It is best practice to order new medical records every three to four months so you will not have to rush getting a large amount of medical records a month prior to the hearing.
3. Submit the medical evidence electronically by using electronic record express. <http://www.ssa.gov/ere>. The local Office of Disability Adjudication and Review (ODAR) can assist you in getting an account set up so you can view the disability file online through the appointed representative services at <https://www.ssa.gov/ar/>.

C. Appeals Council

If the claimant is denied at the administrative law judge hearing, the claimant can file an appeal. At a minimum they must file a "Request for Review of Hearing Decision/Order." [20 C.F.R. §404.968\(a\)](#).

1. The appeal must be filed within sixty days of the date of decision. In addition to filing the "Request for Review of Hearing Decision/Order," draft a brief with an assignment of errors and legal arguments.
2. Standards of review at the Appeals Council.

The Appeals Council will review a case if:

- a. There is an abuse of discretion by the administrative law judge;
  - b. There is an error of law;
  - c. The ALJ's findings are not supported by substantial evidence; or
  - d. There is a broad policy or procedural issue that may affect the general public interest. [20 C.F.R. §404.970\(a\)\(1\)-\(4\)](#).
3. Relief that can be granted at the Appeals Council:
    - a. Reverse.
      - i. Fully favorable.
      - ii. Partially favorable.
      - iii. New Denial Decision.



- b. Remand.
  - c. Deny.
- D. Federal Court Appeal
  - 1. A claimant can file a complaint in federal district court within sixty days of the Appeals Council's letter stating the claimant's request for review is denied and stating that the ALJ's decision is the Commissioner's final decision.
  - 2. The standard of review at the federal district court is whether the decision is supported by substantial evidence and/or whether the Commissioner committed legal error. [42 U.S.C. §405\(g\)](#).

## VI. PRACTICE TIPS

- A. Before agreeing to take a case, be sure to thoroughly analyze the case. Once you agree to take the case and submit your 1696, it is not easy to withdraw representation as it can harm a client if you withdraw your representation right before the hearing takes place. It takes a long time to prepare for a disability case, and you want to make sure the cases you accept are likely to be found disabled. If you don't win, you don't get paid.
- B. The SSA/ODAR is required to give you twenty days' notice prior to your hearing date. Typically a scheduler for the judge will call you to schedule the hearing date.
- C. Meet with your client to complete the new forms the judge wants completed prior to the hearing and go over the medical record to verify you have all updated medical records.
- D. Draft a prehearing memo outlining the procedural history, your theory of the case, an analysis of the five step sequential evaluation, and a summary of the important medical exhibits. This will allow the judge an opportunity to understand your arguments for the case.
- E. Prepare, prepare, prepare. You should know the file inside and out. You should have a full understanding of the entire record. It is helpful to prepare a summary of all exhibits that you can easily reference when preparing for the hearing.
- F. Advise your clients to always be truthful and to not exaggerate their conditions. Meet with them prior to the hearing and ask them all of the possible questions a judge may ask.
- G. Evaluate the case to see if the client would benefit from an onset date amendment.

- H. Be sure your client objects to a video teleconference hearing if they want to have an in-person hearing. The ODAR office will send the client a form that can be used to object to a video teleconference hearing.
- I. The hearing notice will list if there is going to be a Medical Expert or Vocational Expert. Do your research on the experts to determine if they are qualified. If you have a pediatrician as a medical expert for an adult mental health case you have grounds to object to the qualifications of the medical expert.
- J. The ALJ will give the Vocational Expert a hypothetical. Be prepared to add additional factors to the judge's hypothetical. Many cases are won at Step 5 of the SEP, and your ability to question the VE is very important.
- K. If you feel like your client has an incredibly strong case, you can request an On the Record Decision. Contact your local ODAR office to find out who the contact is to send this request to.
- L. Get to know the local SSA office staff and the ODAR office staff, including the security guards. Having a positive relationship with all parties will help you navigate this confusing process and will also benefit you when you have an emergency come up and you need a continuance for the hearing or some other odd issue with a case.

## VII. RESOURCES

- A. Social Security Act, U.S.C., [Title 42, Chapter 7](#)
  - [42 U.S.C.§405\(g\)](#)
- B. Code of Federal Regulations
  - 1. [20 C.F.R., parts 404](#) (DIB) and [416](#) (SSI).
  - 2. [20 C.F.R., §404.968\(a\)](#).
- C. Social Security Rulings (SSRs)
  - 1. [https://www.ssa.gov/OP\\_Home/rulings/rulings.html](https://www.ssa.gov/OP_Home/rulings/rulings.html).
  - 2. [SSR 82-62](#).
  - 3. [SSR 13-1p](#).
- D. Hearings, Appeals, and Litigation Law Manual (HALLEX)
  - [https://www.ssa.gov/OP\\_Home/hallex/hallex.html](https://www.ssa.gov/OP_Home/hallex/hallex.html)
- E. Program Operations Manual Systems (POMS)
  - <https://secure.ssa.gov/poms.nsf/home!readform>

- F. Thomas E. Bush, Social Security Disability Practice
- G. <https://www.ssa.gov/>
- H. SSA, Electronic Records Express <http://www.ssa.gov/ere/>
- I. SSA, Appointed Representative Services, <http://www.ssa.gov/ar>
- J. <http://www.ssa.gov/appeals/>
- K. Be sure to join NOSSCR, [www.nosscr.org](http://www.nosscr.org)
- L. Join your local bar association's Social Security section.
- M. The Cincinnati Bar Association Social Security Section always puts on a great CLE seminar usually around May 1st of each year.

**SOCIAL SECURITY INTERVIEW FORM**

Name \_\_\_\_\_ SSN \_\_\_\_\_

Address \_\_\_\_\_

\_\_\_\_\_

DO \_\_\_\_\_ Phone \_\_\_\_\_

County \_\_\_\_\_ Place of Birth \_\_\_\_\_

Mother's Maiden Name \_\_\_\_\_

Persons Accompanying \_\_\_\_\_

Referrer \_\_\_\_\_

Procedural History \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

DOB \_\_\_\_\_ Age \_\_\_\_\_ Last Grade \_\_\_\_\_

Special Ed. – Yes or No: \_\_\_\_\_

1. Employer \_\_\_\_\_

FDW \_\_\_\_\_ LDW \_\_\_\_\_

Description \_\_\_\_\_

---

Lift \_\_\_\_\_ Stand \_\_\_\_\_

Bend/Dust/Manip./Production \_\_\_\_\_

Time to Train \_\_\_\_\_

Reason Left \_\_\_\_\_

2. Employer \_\_\_\_\_

FDW \_\_\_\_\_ LDW \_\_\_\_\_

Description \_\_\_\_\_

---

Lift \_\_\_\_\_ Stand \_\_\_\_\_

Bend/Dust/Manip./Production \_\_\_\_\_

Time to Train \_\_\_\_\_

Reason Left \_\_\_\_\_

3. Employer \_\_\_\_\_

FDW \_\_\_\_\_ LDW \_\_\_\_\_

Description \_\_\_\_\_

---

Lift \_\_\_\_\_ Stand \_\_\_\_\_

Bend/Dust/Manip./Production \_\_\_\_\_

Time to Train \_\_\_\_\_

Reason Left \_\_\_\_\_

4. Employer \_\_\_\_\_

FDW \_\_\_\_\_ LDW \_\_\_\_\_

Description \_\_\_\_\_

---

Lift \_\_\_\_\_ Stand \_\_\_\_\_

Bend/Dust/Manip./Production \_\_\_\_\_

Time to Train \_\_\_\_\_

Reason Left \_\_\_\_\_

Impairments \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Appearance \_\_\_\_\_

Height \_\_\_\_\_ Weight \_\_\_\_\_ Hand R L

Change in Wt. \_\_\_\_\_

Smoke: Y N Amt. \_\_\_\_\_ Drink: Y N Amt. \_\_\_\_\_

	Good	Fair	Poor
Appetite			
Concentration			
Memory			
Sleep			

ACTIVITY	Used to	Less than before	With Help	Never Did	Still Do
Bathe					
Dress					
Cook					
Sweep					
Wash					
Clothes					
Beds					
Shop					
Mow					
Garden					
Trash					
Drive					
Fish					
Hunt					
Church					
Visit					
Clubs					
Movies					
Go to Town					

Things Missed \_\_\_\_\_

Hobbies \_\_\_\_\_

Exercise \_\_\_\_\_

Average Day \_\_\_\_\_

Hours Lying Down \_\_\_\_/24

Leave House \_\_\_\_\_ Times per Week

Alternate Names Used \_\_\_\_\_

Sponsor Name & SSN \_\_\_\_\_

1. Doctor \_\_\_\_\_ Spec. \_\_\_\_\_

Address \_\_\_\_\_

\_\_\_\_\_

Phone \_\_\_\_\_ First Treated \_\_\_\_\_

Last Treated \_\_\_\_\_ Frequency of treatment \_\_\_\_\_

Clinic # \_\_\_\_\_

Comments \_\_\_\_\_

\_\_\_\_\_

2. Doctor \_\_\_\_\_ Spec. \_\_\_\_\_

Address \_\_\_\_\_

\_\_\_\_\_

Phone \_\_\_\_\_ First Treated \_\_\_\_\_

Last Treated \_\_\_\_\_ Frequency of treatment \_\_\_\_\_

Clinic # \_\_\_\_\_

Comments \_\_\_\_\_

\_\_\_\_\_

3. Doctor \_\_\_\_\_ Spec. \_\_\_\_\_

Address \_\_\_\_\_

\_\_\_\_\_

Phone \_\_\_\_\_ First Treated \_\_\_\_\_

Last Treated \_\_\_\_\_ Frequency of treatment \_\_\_\_\_

Clinic # \_\_\_\_\_

Comments \_\_\_\_\_

\_\_\_\_\_

1. Hospital \_\_\_\_\_

a. Date \_\_\_\_\_ Illness \_\_\_\_\_

Comments \_\_\_\_\_

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b. Date \_\_\_\_\_ Illness \_\_\_\_\_

Comments \_\_\_\_\_

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c. Date \_\_\_\_\_ Illness \_\_\_\_\_

Comments \_\_\_\_\_

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2. Hospital \_\_\_\_\_

a. Date \_\_\_\_\_ Illness \_\_\_\_\_

Comments \_\_\_\_\_

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b. Date \_\_\_\_\_ Illness \_\_\_\_\_

Comments \_\_\_\_\_

---

c. Date \_\_\_\_\_ Illness \_\_\_\_\_

Comments \_\_\_\_\_

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Medicine:

1. Name \_\_\_\_\_ Dr. \_\_\_\_\_

Dose \_\_\_\_\_

2. Name \_\_\_\_\_ Dr. \_\_\_\_\_

Dose \_\_\_\_\_



3. Name \_\_\_\_\_ Dr. \_\_\_\_\_

Dose \_\_\_\_\_

4. Name \_\_\_\_\_ Dr. \_\_\_\_\_

Dose \_\_\_\_\_

5. Name \_\_\_\_\_ Dr. \_\_\_\_\_

Dose \_\_\_\_\_

Income:

Sources: Spouse \_\_\_\_\_ Monthly Amt. \$ \_\_\_\_\_

\_\_\_\_\_ Monthly Amt. \$ \_\_\_\_\_

\_\_\_\_\_ Monthly Amt. \$ \_\_\_\_\_

Spouse's Name \_\_\_\_\_

Children: Name \_\_\_\_\_ Age \_\_\_\_\_

\_\_\_\_\_ Age \_\_\_\_\_

\_\_\_\_\_ Age \_\_\_\_\_

Veteran Y N \_\_\_\_\_

Medical Insurance Y N \_\_\_\_\_

Medicaid Y N \_\_\_\_\_

Afford Exam Y N \_\_\_\_\_

Private Pension or Insurance Not Granted Y N \_\_\_\_\_

Comp. Offset Y N \_\_\_\_\_

Certain Disabled Not Granted Y N \_\_\_\_\_

Food Stamps Not Granted Y N \_\_\_\_\_

LTD Involvement Y N \_\_\_\_\_

**MEDICAL OPINION RE:  
ABILITY TO DO WORK-RELATED ACTIVITIES (PHYSICAL)**

NAME: \_\_\_\_\_ SSN: \_\_\_\_\_

To determine your patient's ability to do *work-related activities on a day-to-day basis in a regular work setting*, please give us your opinion – **based on your examination** – of how your patient's physical capabilities are affected *by the impairment(s)*. Do not consider your patient's age, sex or work experience. Consider the medical history, the chronicity of findings (or lack thereof), symptoms (*including differing individual tolerances for pain, etc.*), and the expected duration of any work-related limitations.

For each activity shown below:

- (1) Indicate your patient's ability to perform the activity; and
- (2) Identify the particular medical findings (*e.g.* physical examination findings, x-ray findings, laboratory test results, history, symptoms (including pain), etc.) which support your opinion regarding any limitations.

**It is important that you relate particular medical findings to any reduction in capacity; the usefulness of your opinion depends on the extent to which you do this.**

1. Maximum ability to lift and carry on an *occasional* basis (no more than 1/3 of an eight-hour day).

No limitation    100#    50#    20#    10#    less than 10#

2. Maximum ability to lift and carry on a *frequent* basis (1/3 to 2/3 of an eight-hour day).

No limitation    50#    25#    10#    less than 10#

3. Maximum ability to stand and walk (with normal breaks) during an eight-hour day.

No limitation    about 6 hrs.    about 4 hrs.    about 3 hrs.    about 2 hrs.    less than 2 hrs.

4. Maximum ability to sit (with normal breaks) during an eight-hour day.

No limitation    about 6 hrs.    about 4 hrs.    about 3 hrs.    about 2 hrs.    less than 2 hrs.

5. If your patient must periodically alternate sitting, standing or walking to relieve discomfort:

How long can your patient *sit* before changing position?

0      5      10      15      20      30      45      60      90  
\_\_\_\_\_ Minutes

How long can your patient stand before changing position?

0      5      10      15      20      30      45      60      90  
Minutes

How *often* must your patient *walk* around? Frequency:

0      5      10      15      20      30      45      60      90  
Minutes

How *long* must your patient *walk* each time? Duration:

0      5      10      15      20      30      45      60      90  
Minutes

Does your patient need the opportunity to shift *at will* from sitting or standing/walking?

Yes    No

6. Will your patient sometimes need to lie down at unpredictable intervals during a work shift?

Yes    No

If yes, how often do you think this will happen? \_\_\_\_\_

7. What medical findings support the limitations described above?

\_\_\_\_\_  
\_\_\_\_\_

8. How often can your patient perform the following postural activities? What medical findings support this?

\_\_\_\_\_  
\_\_\_\_\_

	Continuously (over 2/3 of 8-hour day)	Frequently (1/3 to 2/3 of 8-hour day)	Occasionally (up to 1/3 of 8- hour day)	Never
Twist				
Stoop (bend)				
Crouch				
Climb stairs and ramps				
Climb ladders or scaffolds				
Balance				
Kneel				
Crawl				

9. Are the following *Physical Functions* affected by the impairment?

Reaching (including overhead)	Yes	No	A. How are these physical functions affected?
Handling (gross manipulation)	Yes	No	
Fingering (fine manipulation)	Yes	No	B. What medical findings support this?
Feeling	Yes	No	
Pushing/pulling	Yes	No	

10. Do any of the impairments affect the claimant's hearing or vision?

No  Yes  Not Evaluated

If "Yes" please complete the following questions (where appropriate)

1) If a **hearing impairment** is present

a. Does the individual retain the ability to hear and understand simple oral instructions and to communicate simple information?

Yes  No

b. Can the individual use a telephone to communicate?

Yes  No

2) If a **visual impairment** is present

a. Is the individual able to avoid ordinary hazards in the workplace, such as boxes on the floor, doors ajar, or approaching people or vehicles?

Yes  No

- b. Is the individual able to read very small print?  
 Yes  No
- c. Is the individual able to read ordinary newspaper or book print?  
 Yes  No
- d. Is the individual able to view a computer screen?  
 Yes  No
- e. Is the individual able to determine differences in shape and color of small objects such as screws, nuts or bolts?  
 Yes  No

Identify the particular medical or clinical findings (*i.e.* physical exam findings, x-ray findings, laboratory test results, history, and symptoms including pain etc.) which support your assessment or any limitations and why the findings support the assessment.

11. Use of Feet

Indicate how often the individual can perform the following activities:

**RIGHT FOOT**

ACTIVITY: Operation of Foot Controls

- Never  Occasionally (up to 1/3)  Frequently (1/3 to 2/3)
- Continuously (over 2/3)

**LEFT FOOT**

ACTIVITY: Operation of Foot Controls

- Never  Occasionally (up to 1/3)  Frequently (1/3 to 2/3)
- Continuously (over 2/3)

12. Please place a check in the appropriate boxes based solely on the Claimant's physical impairments.

<b>ACTIVITY</b>	<b>YES</b>	<b>NO</b>
Can the individual perform activities like shopping?		
Can the individual travel without a companion for assistance?		
Can the individual ambulate without using a wheelchair, walker, or 2 canes or 2 crutches?		
Can the individual walk a block at a reasonable pace on rough or uneven surfaces?		
Can the individual use standard public transportation?		
Can the individual climb a few steps at a reasonable pace with the use of a single hand rail?		

Can the individual prepare a simple meal & feed himself/herself?		
Can the individual care for personal hygiene?		
Can the individual sort, handle, use paper/files?		

Please identify the medical findings that support this assessment and why the finding supports the assessment (unless a narrative report is attached).

13.

<b>ENVIRONMENTAL RESTRICTIONS:</b>	<b>NO RESTRICTION</b>	<b>AVOID CONCENTRATED EXPOSURE</b>	<b>AVOID EVEN MODERATE EXPOSURE</b>	<b>AVOID ALL EXPOSURE</b>
Extreme cold				
Extreme heat				
Wetness				
Humidity				
Noise				
Fumes, odors, dusts, poor ventilation, etc.				
Hazards (machinery heights, etc.)				
Operating a motor vehicle				
Vibrations				
Others: (Identify)				

Describe how these environmental factors impair activities and identify hazards to be avoided. Also explain what medical findings support these limitations.

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14. State any other work-related activities which are affected by the impairment such as need for assistive device for ambulation, need to elevate leg, limits on kneeling, crawling, balancing, seeing, hearing or speaking or limitations related to a mental impairment. What medical findings support this?

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15. On average, how often do you anticipate that your patient's impairments or treatment would cause your patient to be absent from work?
- Never
  - Less than once a month
  - About once a month
  - About twice a month
  - About three times a month
  - More than three times per month
16. Have the limitations you found above lasted or will they last for 12 consecutive months?  Yes  No

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SIGNATURE

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DATE

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Print Name, Title and Medical Specialty (Legibly Please)

**MEDICAL ASSESSMENT OF ABILITY TO DO WORK-RELATED ACTIVITIES  
(MENTAL)**

NAME OF INDIVIDUAL \_\_\_\_\_

SOCIAL SECURITY NUMBER \_\_\_\_\_

To determine this individual's ability to do work related activities on a day-to-day basis in a regular work setting, please give us an assessment – BASED ON YOUR EXAMINATION – of how the individual's mental/emotional capabilities are affected by the impairment(s). Consider the medical history, the chronicity of findings (or lack thereof), and the expected duration of any work-related limitations, but not the individual's age, sex, work experience.

For each activity shown below:

- 1) Describe the individual's ability to perform the activity according to the following terms:

Unlimited or Very Good: Ability to function in this area is more than satisfactory.

Good: Ability to function in this area is limited but satisfactory.

Fair: Ability to function in this area is seriously limited, but not precluded.

Poor or None: No useful ability to function in this area.

- 2) Identify the particular medical or clinical findings (i.e., mental status examination, behavior, intelligence test results, symptoms) which support your assessment of any limitations.

IT IS IMPORTANT THAT YOU RELATE PARTICULAR MEDICAL FINDINGS TO ANY ASSESSED LIMITATION IN CAPACITY: THE USEFULNESS OF YOUR ASSESSMENT DEPENDS ON THE EXTENT TO WHICH YOU DO THIS.

I. MAKING OCCUPATIONAL ADJUSTMENTS

Check the blocks representing the individual's ability to adjust to a job, and complete item #9.

		Unlimited/ Very Good	Good	Fair	Poor or None
1.	Follow Work Rules.	_____			
2.	Relate to Co-Workers.	_____			
3.	Deal with the Public.	_____			



		<u>Unlimited/ Very Good</u>	<u>Good</u>	<u>Fair</u>	<u>Poor or None</u>
4.	Use Judgment.				
5.	Interact with Supervisor(s).				
6.	Deal with Work Stresses.				
7.	Function Independently.				
8.	Maintain Attention/ Concentration.				
9.	Describe any limitations and include the medical/clinical findings that support this assessment.				

II. MAKING PERFORMANCE ADJUSTMENTS

Check the blocks representing the individual's ability to adjust to a job, and complete item #4.

		<u>Unlimited/ Very Good</u>	<u>Good</u>	<u>Fair</u>	<u>Poor or None</u>
1.	Understand, remember and carry out complex job instructions.				
2.	Understand, remember and carry out detailed, but not complex job instructions.				
3.	Understand, remember and carry out simple job instructions.				
4.	Describe any limitations and include the medical/clinical findings that support this assessment; e.g., intellectual ability, thought organization, memory, comprehension, etc.				

III. MAKING PERSONAL-SOCIAL ADJUSTMENTS

Check the blocks representing the individual's ability to adjust personally and socially:

	<u>Unlimited/ Very Good</u>	<u>Good</u>	<u>Fair</u>	<u>Poor or None</u>
1. Maintain personal appearance.	_____			
2. Behave in an emotionally Stable manner.	_____			
3. Relate predictably in social situations.	_____			
4. Demonstrate reliability.	_____			
5. Describe any limitations and include the medical/clinical findings that support this assessment.				

IV. OTHER WORK-RELATED ACTIVITIES

State any other work-related activities which are affected by the impairment, and indicate how the activities are affected. What are the medical/clinical findings that support this assessment?

V. CAPABILITY TO MANAGE BENEFITS

Can the individual manage benefits in his or her own best interest?

Yes ( )      No ( )

\_\_\_\_\_  
SIGNATURE/TITLE

\_\_\_\_\_  
DATE



**PSYCHIATRIC EVALUATION**

PATIENT: \_\_\_\_\_ SOCIAL SECURITY #: \_\_\_\_\_

Enter the time period(s) in which you have provided treatment to this patient; if currently treating, please note.

\_\_\_\_\_

DIAGNOSIS (per DSM-IV-TR):

Axis I: \_\_\_\_\_

Axis II: \_\_\_\_\_

Axis III: \_\_\_\_\_

Axis IV: \_\_\_\_\_

Axis V: \_\_\_\_\_

Treatment, including medication with a specification of dosage and side effects:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

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

Name Printed: \_\_\_\_\_

Agency/Hospital: \_\_\_\_\_ Telephone #: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

The following disorder is recognized by the Social Security Administration as a psychiatric impairment which may impose varying degrees of limitations on an individual's ability to work. Please check if your patient has shown any manifestations, either continuous or intermittent, of the following disorder:

A. AFFECTIVE DISORDER, characterized by a disturbance of mood:

\_\_\_\_\_ 1. DEPRESSIVE SYNDROME, either continuous or intermittent. Note the following clinical features, which may also be either continuous or intermittent:

\_\_\_\_\_ Anhedonia or pervasive loss of interest in almost all activities

\_\_\_\_\_ Appetite disturbance with change in weight

\_\_\_\_\_ Psychomotor agitation or retardation

\_\_\_\_\_ Decreased energy

\_\_\_\_\_ Feelings of guilt or worthlessness

\_\_\_\_\_ Difficulty concentrating or thinking

\_\_\_\_\_ Thoughts of suicide

\_\_\_\_\_ Hallucinations, Delusions or Paranoid thinking

\_\_\_\_\_ Sleep Disturbance

\_\_\_\_\_ 2. MANIC SYNDROME, either continuous or intermittent. Note any of the following clinical features, which may also be continuous or intermittent:

\_\_\_\_\_ Hyperactivity

\_\_\_\_\_ Pressures of speech

\_\_\_\_\_ Flight of ideas

\_\_\_\_\_ Inflated self-esteem

\_\_\_\_\_ Decreased need for sleep

\_\_\_\_\_ Easy distractibility

\_\_\_\_\_ Involvement in activities that have a high probability of painful consequences which are not recognized.

\_\_\_\_\_ Hallucinations, delusions or paranoid thinking

- \_\_\_\_\_ 3. BIPOLAR SYNDROME, episodic periods manifested by the fully symptomatic picture of both manic and depressive syndromes (and currently characterized by either or both syndromes). If diagnosis is Bipolar Disorder, please make a note of the clinical features of either or both syndromes above.

The following disorder is recognized by the Social Security Administration as a psychiatric impairment which may impose varying degrees of limitations on an individual's ability to work. Please check if your patient has shown any manifestations, either continuously or intermittently, of the following disorder:

ANXIETY RELATED DISORDERS

Does your patient experience Anxiety as the predominant disturbance, or when he/she attempts to master symptoms (e.g. confronting the dreaded object or situation in a Phobic disorder or resisting the obsessions or compulsions in obsessive compulsive disorders)? Please explain:

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A. Please identify any of the following features which you can medically document to exist in your patient's clinical picture:

- \_\_\_\_\_ 1. Generalized persistent anxiety accompanied by the following signs or symptoms:
- \_\_\_\_\_ Motor tension
  - \_\_\_\_\_ Autonomic hyperactivity
  - \_\_\_\_\_ Apprehensive expectation
  - \_\_\_\_\_ Vigilance and scanning
- \_\_\_\_\_ 2. A persistent irrational fear of a specific object, activity or situation which results in a compelling desire to avoid the dreaded object, activity, or situation.
- \_\_\_\_\_ 3. Recurrent severe panic attacks manifested by a sudden unpredictable onset of intense apprehension, fear, terror and sense of impending doom occurring on average of at least once a week.
- \_\_\_\_\_ 4. Recurrent obsessions or compulsions which are a source of marked distress.
- \_\_\_\_\_ 5. Recurrent and intrusive recollections of a traumatic experience, which are a source of marked distress.

- B. The following is a list of common functional limitations associated with psychiatric impairments. Please check only those limitations which characterize your patient's illness. Check only those where the limitation is "marked." "Marked" in this form is used to describe a degree of restrictions which is more than moderate but less than extreme or total.

1. Restriction of Daily Living Activities

Please check any area in which your patient has exhibited marked difficulty, either continuously or intermittently, in functioning independently, appropriately and/or effectively:

- grooming
- personal hygiene maintenance
- shopping
- cooking
- cleaning
- using telephone
- paying bills
- using public transportation
- planning daily activities
- initiating and participating in activities independent of supervision or direction

2. Difficulties in maintaining social functioning:

Please check any area in which your patient has exhibited marked difficulty, either continuously or intermittently, in functioning independently, appropriately and/or effectively:

- communicating clearly and effectively
- getting along with family
- getting along with friends
- getting along with neighbors
- showing consideration of others
- displaying awareness of others' feelings
- cooperating with others
- exhibiting social maturity
- cooperating with coworkers
- responding to supervisors
- responding to those in authority
- responding without fear to strangers
- establishing interpersonal relationships
- holding a job
- avoiding altercations
- avoiding evictions
- interacting and actively participating in group activities

3. Task performance difficulties and concentration difficulties:

Please check any deficiencies, either continuous or intermittent, in the following areas which have resulted or would result in impaired functioning in work, work-like settings, or elsewhere:

- Independent functioning (requires much support and assistance)
- Concentration
- Persistence in tasks
- Ability to complete tasks in a timely manner
- Pace
- Ability to assume increased mental demands associated with competitive work

Please note whether any of the above deficiencies seriously interfere, either continuously or intermittently, with your patient's ability to function in these areas in an independent, appropriate and/or effective manner: YES: \_\_\_\_\_ NO: \_\_\_\_\_

4. Repeated episodes of deterioration or decompensation in work, work-like settings or elsewhere (*i.e.*, school, job-training, or stressful settings typified by the need for decision making, adequate attendance, punctuality, and etc.).

Has your patient, either continuously or intermittently, in stressful circumstances displayed the following:

- Inability to appropriately accept supervision
- Withdrawal from situations
- Exacerbation of signs of illness
- Exacerbation of symptoms of illness
- Deterioration from level of functioning
- Decompensation Poor Attendance
- Superficial or inappropriate interaction with peers
- Inability to cope with schedules
- Poor decision making
- Inability to adapt to changing demands of context

Please indicate whether your patient's psychiatric impairment has lasted, or can be expected to last, for a continuous period of not less than 12 months:

YES: \_\_\_\_\_  
NO: \_\_\_\_\_

Summary or additional comments:



