

Comments on Proposed Amendments to Part 36 of the Rules of the Chief Judge

ELDER LAW AND SPECIAL NEEDS SECTION

Elder # 24

November 10, 2016

The Elder Law and Special Needs Section of the New York State Bar Association submits the following response to a Proposal¹ to Amend Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36-Appointment by the Court) and Related Forms:

The Section felt there are many positive changes proposed to Part 36, such as:

1. Developing a new “record everything” statewide automated fiduciary system that captures all appointments, certifications and compensation orders;
2. Bringing the Part 36 system online and using email (and possibly texting) to communicate with appointees;
3. Promulgating a model order to set forth and clarify the scope of the appointee’s authority with particular focus as to when an action by an appointee requires prior Court approval, e.g, that prior court approval is required to hire a secondary appointee (counsel, accountant, appraiser, property manager or real estate broker); and
4. Linking secondary appointees’ appointments with the primary appointee’s appointment record to improve compliance with rules as to secondary appointments; and
5. Amending Part 36 to clarify that appointees may utilize attorneys and/or support staff from their firm, except with respect to court appearances and preparation of reports, without an additional appointment by the Court.

And there are other proposed changes regarding which the Section has the following comments:

6. The proposal includes a recommendation that all applicants be required to attach current “resumes” to their biennial registration. Since the purpose of this requirement is to educate judges and court staff about all potential appointees on the list, the regulations should specify the type of information sought, as a traditional “resume” may not necessarily accomplish the goal of education of

¹ September 12, 2016 Request for Public Comment, issued by John W. McConnell, Esq., Counsel, Office of Court Administration.

judges and court staff. Instead, a detailed description of recent appointments, complex issues dealt with by the appointee, experience in guardianship outside of Part 36, and other specific experience/background that makes someone qualified to be an effective appointee, should be submitted. It may be more effective to require that a “statement of experience to act as an appointee” be filed with a biennial registration, rather than a “resume”.

7. Education and Training Issues/Recommendations are prominent in the proposed amendments and that is a positive development. More specifically, the proposed amendments target “specialized training” for Counsel to Guardian, Foreclosure Referees and Counsel to Receiver and “refresher” biennial training for all categories of appointees.

The Section has received consistent feedback from the guardianship Bar that a lack of training has resulted in increased occasions of the Alleged Incapacitated Person (AIP) not receiving effective representation and the AIP, the courts and Article 81 practitioners, not having the benefit of effective Court Evaluators.

There is a definite need for ongoing and more sophisticated training, but the difficult issue is determining what type of training will be effective to address these various problems. Simply repeating the initial training will not address these issues and will be an enormous waste of time and money for most appointees. It seems clear there needs to be targeted training for the roles of counsel for the AIP and for Court Evaluators. In addition, “refresher” training should include substantive training on topics such as complex and contested guardianships, specialized proceedings such as sale of real property or turnover proceedings, foreign guardianships or end of life decision making, and elder abuse, just to name a few possibilities. As to specialized training for Counsel to Guardians, such training, to be effective, might include fiduciary responsibility, accountings, financial management and the prudent investment standard, estate and Medicaid planning, medical issues facing IPs, and elder abuse, just to name a few.

Further, if possible, the required “refresher” training should be targeted to at least a few different levels based upon the appointees’ experience and number of court appointments, perhaps basic, intermediate and advanced. There should also be an exempt category for those seasoned guardianship practitioners who can demonstrate that they have had significant experience as court appointees within the last three to five years and regularly lecture and/or participate in CLEs related to guardianship.

Lastly, with these additional Part 36 training requirements, the availability of affordable online training is essential.

We appreciate the consideration of The Administrative Board of the Courts, the Office of Court Administration and the Office of Court Administration's Second Special Commission on Fiduciary Appointments with respect to our comments. We hope that you find our comments helpful to the process of promulgating regulations to implement the proposed amendments to Part 36. Again, we look forward to an opportunity to review and comment on the draft regulations.

Respectfully submitted on behalf of the Elder Law and Special Needs Section.

CONTACT

POLICY DEPARTMENT

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REPORT BY THE COUNCIL ON JUDICIAL ADMINISTRATION

**COMMENTS ON THE OFFICE OF COURT ADMINISTRATION'S
PROPOSED AMENDMENTS TO PART 36 OF THE RULES OF THE CHIEF JUDGE
(22 NYCRR PART 36 – APPOINTMENTS BY THE COURT) AND RELATED FORMS**

We write on behalf of the Council on Judicial Administration of the New York City Bar Association, in response to the request of the Administrative Board of the Courts seeking public comment on proposals by the OCA Special Commission on Fiduciary Appointments (the “Commission”) to amend Part 36 of the Rules of the Chief Judge (Appointments by the Court). We offer our comments in two parts. First, we comment on the language proposed for the Part 36 rules. Second, we comment on the Commission’s 19-page Executive Summary, which summarizes the underlying issues and the Commission’s recommendations.

I. Proposed Part 36 Rule Changes:

- A. The Executive Summary describes the appointment of the Hon. Michael V. Coccoma as a new “Statewide Administrative Judge for Fiduciary Matters,” an appointment we endorse. We further note:
1. The Rules refer to the “Chief Administrator” and in other places to an “administrator” (Rule 36.1(b)(2)(v)) and “Administrative Judge” (e.g., p. 3, Issue (B), Rec. (3)). “Chief Administrator” is a position established by the constitution (N.Y. Const. Art. 6 § 28) and is used in § 212 of the Judiciary Law and in 22 NYCRR § 1.0 of the Rules of the Chief Judge.¹ We believe references to administrator or Administrative Judge should be clarified to indicate whether they refer to the Chief Administrator or to the Administrative Judge of a County or Judicial District.
 2. Further, it appears that the intention of the Chief Judge, as set forth in the first paragraph of the Summary, was to establish a permanent position of Statewide Administrative Judge for Fiduciary Matters, and we believe consideration should be given to changing Part 36 references to the Chief Administrator to this new Administrative Judge.

¹ The title “Chief Administrative Judge” appears to be an administrative enhancement of the statutory term.

B. For the reasons stated below, we do not agree with the proposed paragraph (f) to Rule 36.3.

1. The current Rule 36.3(e) provides that a person or entity may be removed from a list established for a category of appointment for “any conduct incompatible with appointment from that list,” but *conditions removal on providing the person or entity with an opportunity to respond after receipt of a written statement*. The proposed Rule 36.3(f) would empower the Chief Administrator to “temporarily suspend” the person or entity “upon a showing of probable cause.”
2. Our first concern is that the proposed rule does not state who is to provide the “showing of probable cause”. The accompanying statement suggests the intent is to provide for temporary suspension if the person or entity is “under investigation by the Managing Inspector General for Fiduciary Appointments (MIGFA).” However, there is no reference in Part 36 to such an Inspector General. At a minimum, any reference to a probable cause determination should describe the process for determining such cause, particularly where the determination is being made without notice and an opportunity to be heard.
3. The more serious concern to us is that the proposed rule would label the person or entity as being the subject of a probable cause determination *before* having an opportunity to be heard. A determination of “probable cause,” using a term common largely to criminal law, also could be damaging to the person’s or entity’s reputation, even if later found not to be warranted.
4. Our Committee believes that the current Rule 36.3(e) provides satisfactory authority to the Chief Administrator (or Fiduciary Judge). In the event that the Commission has concluded, based on the experience of judges and other court officials, that authority is necessary for the Chief Administrator, we believe the rule should be clear that the action is at the Chief Administrator’s discretion rather than a probable cause finding. We propose the following language for the new Rule 36.3(f):

(f) Notwithstanding section 36.3(e), pending a final determination on the issue of removal, the Chief Administrator may temporarily suspend any person or entity from any list if the Chief Administrator determines, in his or her discretion after consultation with the appointing judge, that the conduct of the person or entity presents an immediate threat of financial or other harm to clients or wards or to the public.

We believe this proposed language is appropriate to make clear that the Chief Administrator has taken the action *sua sponte* and without a formal determination of misconduct.

II. Comments on the Executive Summary:

We provide the following comments on the Commission's findings and recommendations in the Executive Summary.

- A. Page 3, Recommendation 3, relating to appointments under Part 36, recommends that the rules should "[r]equire a report of fiduciary appointments to the Administrative Judge and OCA each quarter copying the Fiduciary Clerk."
 - 1. Clarification is needed as to who is to receive this report, the Administrative Judge of the county or Judicial District, the Chief Administrator, or the new Statewide Administrative Judge for Fiduciary Matters.
 - 2. For courts within New York City, we recommend that this Report be distributed to all guardianship judges citywide, which would enable the guardianship judges to see which attorneys have received appointments.

- B. Issue H (on pages 7-8) states that "judges are often unaware of a potential appointee's qualifications and experience." We believe two related reforms could benefit both the courts and potential appointees, and could be accomplished by amending § 36.3(b) of the Part 36 Rules, prescribing Qualifications for Appointment.
 - 1. If the Rules provided appointees with greater guidance on particular skills useful for each of the appointment categories, they could provide more detail on their qualifications in the registration & qualification process.
 - 2. At the same time, with more specific and recognized language, courts might find it easier to find potential appointees whose qualifications and experience are what is needed for the particular task.
 - 3. The use of recognized terms in the application process would facilitate electronic searching. For example, a judge can search for a Spanish speaking fiduciary if the data base were updated to contain searchable resumes of persons on the eligible fiduciary list.

- C. Issue J (on page 8) concerns appointments for indigent and low income individuals. The Commission recommends utilizing senior attorneys and newer attorneys seeking additional experience for assignments with limited or no funds available for fees.
 - 1. We are concerned that this approach may result in a presumption that certain categories of lawyers get the uncompensated work while other categories get the work for which compensation is available. While a formal "rotation" may not be feasible, we believe the guidelines for appointments in compensated cases should encourage the appointing court to consider the potential appointee's prior service on pro bono matters.

2. We realize this may be controversial as it infringes on the autonomy of the appointing judge. However if the appointing judge deems a person qualified to serve for an indigent or low income person, the person should be qualified to serve where substantial assets are involved as well.
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- D. We disagree with the Commission's conclusion stated in Issue Q on pages 12-13, regarding not permitting a winning bidder to assign right to purchase to a 3rd party. The report states this is a "disruption in the chain of title." It does not appear to be a disruption, however, since the title is not transferred from the referee to the successful bidder at the sale--title is transferred at the closing. There are instances where the successful bidder at the auction seeks to obtain title in the name of a corporation or LLC, or other business entity. Yet the recommendation (on page 13), provides that the referee shall transfer title only to the successful bidder. We suggest the referee may transfer title to a business entity owned by the successful bidder, e.g., an LLC in which the successful bidder is the majority or sole member or a corporation in which the successful bidder is the sole or controlling shareholder.
 - E. In Part 2 of the Executive Summary, on Education and Training Issues and Recommendations, Item C (at pages 13-14) recommends that biennial refresher training be required as a condition of biennial recertification. Refresher training should be tailored specifically to each appointment category, with confirmation that refresher training is needed for the particular category.

We hope these comments will be helpful.

Council on Judicial Administration
Carolyn E. Demarest, Chair

November 2016

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By Email and Interoffice Mail

John W. McConnell, Esq.
Counsel, Unified Court System
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25 Beaver Street, 11th Floor
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Dear Mr. McConnell:

Thank you for seeking comment on the possible amendment of the rules governing appointments by the court (22 NYCRR Part 36). We support the Unified Court System's efforts to establish clear rules against nepotism and favoritism in judicial appointments.

In June 2005, this Committee and the New York State Magistrates Association proposed removing the prohibition against part-time judges of the Unified Court System (and their relatives by blood or marriage) from receiving Part 36 appointments. The Committee asks again that the Administrative Board of the Courts consider this matter.

Rule 36.2(c)(1) says: "No person shall be appointed who is a judge or housing judge of the Unified Court System of the State of New York, or who is a relative of, or related by marriage to a judge or housing judge of the Unified Court System within the fourth degree of relationship."

We believe that the rule is overbroad. It requires, for example, the discontinuation of able service by attorneys as court-appointed guardians upon a subsequent appointment or election to part-time service as a judge. This does not seem to advance the purpose of avoiding nepotism and favoritism, nor does it serve the interests of the public or of the individual to whom the fiduciary duty is owed. The prohibition on appointments of part-time

judges' relatives by blood and marriage strikes us as similarly unfair. These attorneys can quite possibly have no significant relationship with, and no geographical proximity to, either the appointing judge or the part-time judge whose service mandates their disqualification.

Part-time judges in the NYS Unified Court System who are authorized to practice law include judges of the city, town and village courts. However, their practice is significantly restricted by various rules and statutes including but not limited to 22 NYCRR Part 100, 22 NYCRR Part 36 and the Judiciary Law.¹ Generally speaking, part-time judges in town and village courts are minimally compensated for their service. The restrictions on their practice of law, plus the extension of the disqualifications listed in Part 36 to the law practices of their relatives and spouses' relatives, frequently dissuade qualified attorneys from seeking part-time judicial office.

Kindly consider the following inconsistencies as well. A judge may not appoint a part-time judge, part-time judge's relative or part-time judge's spouse's relative to a fiduciary position specified within Part 36, but the judge may appoint such a person to serve as an attorney for a child in family court - although not in supreme court - and as assigned counsel pursuant to section 18-b of the County Law, as well as to various referee and decedent estate positions and, indeed, to any other appointment not specifically listed in Part 36.

We note that, independently of Part 36, judges are bound "to exercise the power of appointment impartially and on the basis of merit [and to] avoid nepotism and favoritism." 22 NYCRR 100.3(C)(3). The Rules Governing Judicial Conduct additionally state, "a judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment." 22 NYCRR 100.2(B). In fact, in 1980 the Commission on Judicial Conduct observed, "Even in the absence of a specific rule prohibiting nepotism, a judge should know that nepotism is wrong... The first Canons of Judicial Ethics, adopted in 1909 by the New York Bar Association, more than 70 years ago, outrightly condemned nepotism. Respondent was obliged to know that

¹ See Appendix for text of selected provisions.

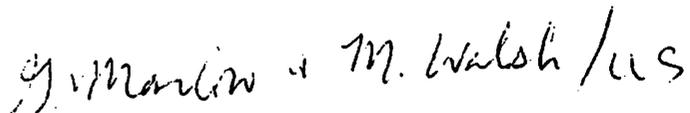
nepotism was wrong.” *Matter of James L. Kane*, 1980 Ann Rep of NY Commn on Jud Conduct 135, 144, *aff’d*, 50 NY2d 360, 363 (1980) (accepting determination of removal and noting “Nepotism has long been condemned in the judiciary, as it should be, and it borders on the incredible for a Judge to say in defense of his misconduct that he was unfamiliar with the Canons of Judicial Ethics…”).

We therefore request that the language of Rule 36.2(c)(1) be revised in light of the existing prohibitions concerning nepotism and favoritism in judicial appointments. For example, to cover all part-time judges, the rule could say:

No person shall be appointed who is a full-time judge or housing judge of the Unified Court System of the State of New York, or who is a relative of, or related by marriage to, a full-time judge or housing judge of the Unified Court System within the fourth degree of relationship.

Thank you for the opportunity to comment on the rules governing appointments by the court. We are available to discuss the matter at your convenience.

Very truly yours,

Handwritten signature in cursive script, appearing to read "G. Marlow & M. Walsh / us".

George D. Marlow, Assoc. Justice
Appellate Division, First Dept. (Ret.)
Committee Co-Chair

Hon. Margaret T. Walsh
Family Court Judge
Acting Justice of the Supreme Court
Committee Co-Chair

Appendix - Other Limitations on a Part-Time Judge's Legal Practice

For example, 22 NYCRR 100.6(B)(2)-(4) provides that a part-time judge:

(2) shall not practice law in the court on which the judge serves, or in any other court in the county in which his or her court is located, before a judge who is permitted to practice law, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto;

(3) shall not permit his or her partners or associates to practice law in the court in which he or she is a judge, and shall not permit the practice of law in his or her court by the law partners or associates of another judge of the same court who is permitted to practice law, but may permit the practice of law in his or her court by the partners or associates of a judge of a court in another town, village or city who is permitted to practice law;

(4) may accept private employment or public employment in a federal, state or municipal department or agency, provided that such employment is not incompatible with judicial office and does not conflict or interfere with the proper performance of the judge's duties.

The Judiciary Law also contains several restrictions on a part-time judge's legal practice, such as:

§ 16. Judge prohibited from practicing law in his court.

A judge shall not practice or act as an attorney or counsellor in a court of which he is, or is entitled to act as a member, or in an action, claim, matter, motion or proceeding originating in that court.

§ 17. Judge prohibited from practicing in cause which has been before him.

A judge or surrogate or former judge or surrogate shall not act as attorney or counsellor in any action, claim, matter, motion or proceeding, which has been before him in his official character.

§ 471. Attorney who is judge's partner or clerk prohibited from practicing before him or in his court.

The law partner or clerk of a judge shall not practice before him, as attorney or counsellor in any cause, or be employed in any cause which originated before him. A law partner of, or person connected in law business with a judge, shall not practice or act as an attorney or counsellor, in a court, of which the judge is, or is entitled to act as a member, or in a cause originating in that court; except where the latter is a member of a court, ex officio, and does not officiate or take part, as a member of that court, in any of the proceedings therein.

Supreme Court
of the
State of New York



JUSTICES' CHAMBERS
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HON. JEFFREY S. SUNSHINE

November 15, 2016

John W. McConnell, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Fl,
New York, NY 10004

Re: Request for Public Comment on a
Proposal to Amend Part 36 of the Rules of
the Chief Judge

Dear Mr. McConnell:

In response to your September 12, 2016 request for comment related to the Proposal to Amend Part 36 of the Rules of the Chief Judge we are concerned that the requirement in the Recommendations on page 12 that a case not be closed until an Attorney for the Children has filed the necessary forms and the court has signed a final order approving the compensation. Our concern is that this amendment could be interpreted that a judgment of divorce not be signed until the appointed attorney has complied (thereby allowing the court to sign the final order approving compensation). Such an interpretation would place an undue burden upon litigants who would be prevented from re-marrying, seeking enforcement or opening Support Collection Unit accounts until the attorney for the child is in compliance. Such an interpretation might also cause uncertainty about the effective date of the divorce, impact the time to appeal the judgment of divorce, and in some cases affect the efficient disposition of cases.

I believe an alternative should be considered that the fiduciary clerk request the assigned judge to calendar a matter for a post-dispositional hearing if the attorney for the child has not filed the appropriate forms after a uniform period of time established by court rule.

Thank you and I am of course available if I can be of any further assistance.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jeffrey S. Sunshine". The signature is written over a circular stamp or mark.

Jeffrey S. Sunshine, J.S.C.
Chair, Chief Administrative Judge's
Matrimonial Practice Advisory and Rules Committee

JSS/mjs
cc: Susan Kaufman, Esq.

John W. McConnell

From: Sol Wachtler [REDACTED]
Sent: Wednesday, October 12, 2016 2:53 PM
To: rulecomments
Subject: Amendments to Part 36 of the Rules of Chief Judge

To: John W. McConnell, Counsel, Office of Court Administration:

I thank you for the opportunity to comment on the Proposal to Amend Part 36 of the Rules of the Chief Judge (22NYCRR-Appointments by the Court). At the outset, I express my gratitude to Deputy Chief Administrative Judge Michael V. Coccoma and the members of the Special Commissions on Fiduciary Appointments for their extraordinary effort and excellent recommendations -- all of which I endorse.

In 1985, Part 36 was enacted and approved by the New York Court of Appeals. I was Chief Judge at the time, and I along with the Judges on the Court, as well as the Presiding Judges of the Appellate Divisions, were concerned about apparent abuses by some judges in their appointment of referees and guardians. Part 36 was an effort to eliminate those abuses. As noted in the preamble to the Part: "public trust in the judicial process demands that appointments by judges be fair, impartial and beyond reproach," Although the Rule had many safeguards, isolated abuses continued. The reasons for those abuses were outlined by Leonard K. Marks, now the Chief Administrative Judge, who once served in your position. He noted in a St. Johns Law review Article (2012) that:

"In light of the money-making potential of these appointments, they have long been the subject of close public scrutiny. This scrutiny, in turn, has led to widespread criticism that judges' fiduciary appointments are influenced by inappropriate factors such as political favoritism and personal connections, particularly in cases involving substantial fees " in tracing Chief Judge Kay's strengthening of Part 36, Judge Marks concludes: "Scrutiny of fiduciary appointments in New York, however, is ongoing. The court system's Special Inspector General's Office has been established as a permanent watchdog, and with easier access to enhanced information, the press's keen interest in this subject is sure to continue."

Indeed the scrutiny by the press has continued – as it should. Some recently published allegations indicate that Part 36 provisions have been ignored by some. I believe, in this regard, it is essential that the press be informed in almost all cases, as to how the Court System and its inspector general are dealing with certain allegations of abuse. For this reason, the recommendations concerning transparency are extraordinarily important as is the ability to administratively suspend a fiduciary's activities and actions for due cause. Public transparency is essential to public confidence and I commend the committee's concern in this regard.

I was a New York State Judge for almost 25 years and can attest to the fact that the overwhelming majority of our judges exemplify integrity and a commitment to adhere to their own sense of morality and to the rules established for appropriate conduct. It is also a fact that some judges are subject to undeserved criticism; however, when a judge purposefully or through ignorance acts in such a way as to violate rules relating to Fiduciary Appointments – rules which should be enforced – the public should not be led to believe that the Office of Court Administration is either indifferent or is not taking measures to insure corrective action.

Sol Wachtler

John W. McConnell

From: [REDACTED]
Sent: Tuesday, November 1, 2016 2:05 PM
To: rulecomments; [REDACTED]
Subject: Pt. 36 biannual refresher training

Hi.
I'm a court-appointed Court Evaluator and GAL in a number of cases. If the refresher courses you propose for every two years will have refreshing new information, that's great. If not I request that you convene a panel of practitioners to hear what would be beneficial to them.

Thank you.
Sincerely,

Stephanie S. Goldstone, Esq.
[REDACTED]

Sent from my T-Mobile 4G LTE Device
Sent from my T-Mobile 4G LTE Device