

## 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 Proposal<sup>1</sup> 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

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<sup>1</sup> 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.