David Nocenti

From: David Nocenti
Sent: Friday, July 5, 2024 8:42 AM
To: rulecomments
Subject: FW: Request for public comment

Categories: Red category, Green category, Yellow category

From: GM hr- Self <n467fl@gmail.com>
Sent: Friday, July 5, 2024 3:57 AM
To: [redacted]
Subject: Request for public comment

To David Nocenti, Esq.

Mr. Nocenti:

I have reviewed the request for public comment concerning the three items set out below and support their adoption for the reasons advanced by the Office Of Court Aministration.

I am neither a candidate for nor an applicant subject to said provisions of 22 NYCRR were they to be so amended.

Very truly your,

Harvey Randall, Esq.
7070 Lake Road
Appleton, NY, 14008
518-330-3963

- Proposal to amend 22 NYCRR § 36.2(d) relating to compensation limits for Part 36 appointees
- Proposal to amend 22 NYCRR § 202.5 to permit redaction of personal information from filings in Article 81 guardianship proceedings
- Proposed amendments to Rule 1.10 and Rule 3.4 of the Rules of Professional Conduct

David Nocenti

From: Edward Virshup <edvirshup@gmail.com>
Sent: Monday, July 8, 2024 3:10 PM
To: rulecomments
Subject: Compensation Limits for Part 36 Appointees

Categories: Red category

Please be advised that as a Court Examiner (a Part 36 appointee) I am in favor of increasing the limits of compensation for Part 36 appointees. Most Part 36 fees awarded are below what the practitioner normally charges and increasing the limit might give one a chance to make a fair living b y having another matter on which to earn fees.
Respectfully submitted,
Edward Virshup

David Nocenti

From: Barbara Lerman, Esq. <lermanesq@gmail.com>
Sent: Thursday, July 18, 2024 11:43 AM
To: rulecomments
Subject: Proposal to Amend 22 NYCRR § 36.2 (d) Relating to Compensation Limits for Part 36 Appointees

Categories: Red category

Good morning,

Thanks for your efforts with regard to this important issue re: Part 36 appointees.

I would increase the limits in §36.2(d) to $150,000; it's more realistic and does not penalize practitioners who have served the Court system for many years and receive appointments from many different Courts.

Barbara Lerman

David Nocenti

From: Hon. Rachel Freier
Sent: Tuesday, July 23, 2024 12:02 PM
To: rulecomments
Cc: Aviva Love; Taylor Trefger; Janice Chen
Subject: Proposal to amend 22 NYCRR § 36.2(d) relating to compensation limits for Part 36 appointees

Categories: Red category

To Whom This May Concern,

Please be advised that as a judge assigned to the Kings County Guardianship Part, I strongly support the proposal to increase the annual compensation limit for persons appointed by judges pursuant to Part 36 of the Rules of the Chief Judge. While the proposed increase is from $100,000 to $125,000, I believe that amount does not accurately conform to the increased cost of living from 2018, which is the last time the limit was increased.

I would be in favor of an increase at least to $175,000. The need to track the appointees, so that appointments are fair and evenly distributed is more important in my opinion than to place financial caps. The placement of these financial caps has created a disincentive for good, qualified professionals to put themselves on the Part 36 list.

Thank you for giving me the opportunity to share my opinion.

Hon. Rachel E. Freier
Supreme Court Justice
Kings County Supreme Court Civil Term
360 Adams Street
Brooklyn, New York 11201
347-296-1588

NEW YORK CITY BAR

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July 26, 2024

Submitted via email
David Nocenti
Counsel
NYS Office of Court Administration
25 Beaver Street, 10th Floor
New York, NY 10004
[redacted]

Re: Proposals to Amend 22 NYCRR § 202.5 and § 36.2(d)

Dear Mr. Nocenti:

The Council on Judicial Administration ("CJA") and State Courts of Superior Jurisdiction Committee ("State Courts Committee") of the New York City Bar Association appreciate the opportunity to comment on proposed Unified Court System rule amendments to (i) 22 NYCRR § 202.5 to permit redaction of personal information from filings in Article 81 guardianship proceedings and (ii) 22 NYCRR § 36.2(d) relating to compensation limits for Part 36 appointees.

Support for proposal to amend 22 NYCRR § 202.5

The CJA and State Courts Committee support amending 22 NYCRR § 202.5(e) removing the present exclusion of Article 81 proceedings from the general requirement that confidential personal information ("CPI") be redacted from court filings. The proposed amendment furthers the efficient administration of justice.

Redaction under the Rule provides assurance to litigants that their personal information is not being subject to unnecessary scrutiny or dissemination. The fear of misuse or embarrassment in disclosing this information is a potent force that may incline litigants to not be as forthcoming with such intimate and material information. By way of example, the law has already acknowledged this sensitivity to unnecessarily publicizing personal information in matrimonial actions through the protections afforded by Domestic Relations Law § 235 and 22 NYCRR § 202.5(e)(1)(v). On the other hand, Article 81 proceedings are unjustifiably left out.

By their nature, guardianship proceedings are extremely sensitive and personal. The disclosure of financial, medical and intimate information is required for the proper administration of these proceedings. Litigants seeking judicial intervention under Article 81 should not be fearful that these essential personal disclosures to the court will be misused or otherwise cause embarrassment. This amendment provides security against that concern to litigants and prevents its detrimental impacts on judicial economy.

Of course, if § 202.5(e) is amended as proposed, needed access to CPI by the court will still be available in filings under seal and/or upon camera inspection. Presumably court examiners requiring access to CPI will be afforded access to such information when needed to fulfill their court examiner responsibilities. Similarly, Guardianship Clerk's offices should continue to have information needed to maintain their databases with due protection of confidential information in those databases.

Support for proposal to amend 22 NYCRR § 36.2(d)

In regard to the proposed amendment to 22 NYCRR § 36.2(d), the CJA and State Courts Committee support the proposal to increase the annual compensation limit for persons appointed by judges pursuant to Part 36 from $100,000 to $125,000. Indeed, some of our members would support increasing the "cap" beyond $125,000. Part 36 governs the appointment of, inter alia, guardians, attorneys for minors (not paid by public funds), court evaluators, attorneys for allegedly incapacitated persons, court examiners, supplemental needs trustees, receivers, referees (other than those acting in a quasi-judicial capacity) and persons serving as attorneys or subsidiary fiduciaries on behalf of guardians and receivers such as accountants, appraisers, property managers, real estate brokers, auctioneers, etc. At present, if a person has been awarded more than an aggregate of $100,000 in compensation by all courts in any calendar year, that person is not eligible for compensated appointments by any court during the next calendar year. The purpose of the limitation is to broaden the pool of qualified individuals from which judges can appoint fiduciaries. The memorandum offered by the UCS Guardianship Advisory Committee ("memorandum") recommends that the annual aggregate compensation limit for court examiners be increased to $125,000, which seems entirely reasonable to the CJA and State Courts Committee.

As we know, court examiners are appointed by the Presiding Judges of the Appellate Division to examine annual accountings of fiduciaries. So the status of court examiners is an institutional one. The memorandum provides background information about the limitation and a rationale for an increase with respect to court examiners. It neither addresses whether the limitation should be increased with respect to other fiduciaries covered by Part 36, nor explains its failure to do so, but the CJA and State Courts Committee believe the increase proposed should apply to all Part 36 appointments.

The CJA and State Courts Committee understand that in New York County, for example, because of the present $100,000 cap, the court is having difficulty appointing guardians, court evaluators, counsel to Alleged Incapacitated Persons and court examiners. We understand that the majority of court examiners in New York County are presently "capped" and of the 33 court examiners appointed to serve in that county less than 10 are presently able to accept new cases, the others having reached the $100,000 limit for appointment this year.

Respectfully,

Fran Hoffinger

Fran Hoffinger, Chair
Council on Judicial Administration

Amy D. Carlin

Amy D. Carlin, Chair
State Courts of Superior Jurisdiction

NEW YORK STATE BAR ASSOCIATION
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August 15, 2024

David Nocenti, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 10th Floor
New York, NY 10004
Email: rulecomments@nycourts.gov

RE: Proposal to Increase the Limit for Compensation Awarded to Part 36 Appointees

Dear Mr. Nocenti:

The Elder Law and Special Needs Section of the New York State Bar Association (the "Section") has prepared this memo in response for public comment requested by the Office of Court Administration in relation to the proposed amendment to 22 NYCRR 36.2(d) relating to compensation limits for Part 36 appointees.

We commend OCA for its consideration of raising the annual compensation limit (hereinafter "cap") on awards to appointees under Part 36 of the Rules of the Chief Judge (hereinafter "Part 36") before they are disqualified from receiving any Part 36 appointments the following year. The Section believes that the cap should be raised from the current cap - *$100,000.00 received in a single year* - to *$300,000.00 received over two consecutive years*. In addition, the cap should be *indexed for inflation.*

There is a serious and ongoing crisis in the guardianship parts particularly in the downstate regions of New York State. Specifically, there has been a dearth of individuals who are willing to accept Part 36 appointments, as the present *$100,000.00* cap impedes judges from finding qualified appointees in many cases. In this respect, the basis for our recommendation of raising the cap to a total of *$300,000.00* awarded over two consecutive years is the unfortunate frequency of Part 36

appointees working on multiple cases over multiple years without receiving *any* compensation – likely the result of court backlogs. As a result, compensation awards for multiple cases of work over several years are often made in one year – causing many appointees to exceed a single-year cap and, thereby, become disqualified for appointments the following year. This result is likely an unintended one - particularly in those cases where one Part 36 appointment is necessary over multiple years for case continuity.

Guardianship courts - particularly downstate – are currently examining 2021 and 2022 annual accountings, and the 2023 annual accountings were due to be filed in May 2024. This is the basis for the statement that appointees not being paid for upwards of two years, and often results in fees earned over the course of several years in multiple cases being awarded during one calendar year. Moreover, the typical Judgments rendered by Guardianship courts, at least downstate, prevent Guardians from taking commissions until the accounting is approved and affirmatively prohibit payment of legal fees without the appointees' submission of an affirmation of services / time records and approval by the appointing court. A sample of the restrictive decretal paragraphs in these respects that are used in the Judgments is annexed. Even if this is only a downstate phenomenon, it requires consideration, since guardianships processed in Bronx, Kings, Nassau, New York, Orange, Queens, Richmond, Rockland, Suffolk, and Westchester Counties account for the vast majority of the guardianship cases heard in New York State.

Moreover, any request for intermediate fee (by motion) is not only unusual, but also will likely result in further delay or may be deemed a "frivolous" application under the Part 130 Rules. For the foregoing reasons, stand-alone interim fee applications are rarely made by Part 36 appointees. While there may be extenuating circumstances wherein any appointee is permitted to submit an application for interim compensation, the practicality of any such submission may depend upon the applicant's (and the court's) knowledge as to the breadth / extent of the (A)IP's assets. In essence, if the extent of the (A)IP's assets is unknown or uncertain, any interim fee application would be delayed.

We also have learned that if a court approves compensation to any court appointee over the sum of $5,000.00, the court must provide a written justification for the award. In this respect, since the May 2023 increase of the 18-b County Law hourly rate enabling Mental Hygiene Legal Service – the agency routinely used by Guardianship courts as Court Evaluator and/or Attorney for (A)IP - to now charge $158.00 per hour, we imagine this has created significant challenges to the speed at which courts can issue compensation orders in the first instance.

Finally, in many cases, despite an application for compensation being granted, the (A)IP's estate may not have funds sufficient to satisfy the award in whole or in part. For example, when a

court grants the initial Guardianship petition, it may award a reasonable amount of compensation to the Court Evaluator, payable from the assets of the AIP (see, MHL §81.09(f)). However, the same statute is silent about the source of compensation where the AIP ultimately lacks sufficient assets to pay the awarded compensation. Unfortunately, OCA does not factor collectability into these awards, and any compensation awarded, despite never being paid to the appointee, counts toward the appointee's Part 36 cap.

The last increase in the income cap under Part 36 was in 2018, when it was raised from $75,000 per year to $100,000 per year. Prior to 2018, cap had not been raised since 2008. We appreciate the CPI analysis and the recommendation that the cap is tied to inflation, but respectfully submit that the increase to $125,000 is insufficient to address the problem of retaining qualified candidates to serve, and that the indexing must be done on a yearly basis.

Guardianship compensation generally is not commensurate with the amount of time, effort and expertise expended over the lifetime of a case. This is not a complaint, as there is intrinsic and unquantifiable value to service in this arena that the majority of practitioners willingly embrace. However, if the Courts are to attract and retain talent, particularly as the guardianship cases grow more complex in terms of Medicaid plans, family disputes, turnover proceeds and discharge planning, the Court requires those with special knowledge to help the incapacitated person navigate those issues. Few practitioners can sustain a business model of non-payment of fees over the span of two or more years, only to receive orders in one year which disqualify them from the following year's list.

Moreover, MHL §81.28(a) and (b) make clear that the compensation of a guardian must be **reasonable** and that the Court retains discretion as to the award.

> MHL §81.28(a) states:
> The court shall establish, and may from time to time modify, a plan for the *reasonable* compensation of the guardian or guardians. The plan for compensation of such guardian must take into account the specific authority of the guardian or guardians to provide for the personal needs and/or property management for the incapacitated person, and the services provided to the incapacitate person by such guardian.
> MHL §81.28(b) states:
> If the court finds that the guardian has failed to discharge his or her duties satisfactorily in any respect, the court may deny or reduce the compensation which would otherwise be allowed.

In view of the statute, a raise in the Part 36 income cap cannot and will not result in higher awards per case—as reasonableness is always required. It will, however, allow those practitioners who change the lives of their wards daily to continue to provide these necessary services, both legal and non, and further permit the Court have a fuller pool of available candidates in the face of increasing caseloads. Three Hundred Thousand ($300,000.00) over two years as an income cap is therefore the recommended amount.

As to issue of indexing, the Guardianship Advisory Committee Memorandum (GAC) dated June 4, 2024 cites the Budget Economic Outlook: 2024 to 2034, dated February 2024, page 43. www.cbo.gov/system/files/2024-02-59710-Outlook-2024.pdf in support of its position that inflation will be 2.2% in 2025, 2.1% in 2026 and level to 2% through 2034. However, the Budget Economic Outlook's projections are based on, "what the federal budget and economy could look like in the current year and over the next 10 years *if current laws governing taxes and spending remain unchanged.*" www.cbo.gov/publication/57950. (emphasis added). This assumption takes a simplistic view of our present economic and political climate, and it is for this reason that real-time year for year indexing is critical.

In sum, the ELSN requests that the cap is increased from $100,000 to $300,000 over two years, indexed yearly. We hope the aforementioned analysis is helpful, and we thank OCA for its solicitation of our further input.

ORDERED AND ADJUDGED, that a guardian appointed pursuant to Part 36 of the Rules of the Chief Judge **may not** act as her own attorney or retain counsel **without prior court approval**; and it is further

ORDERED AND ADJUDGED, that the Guardian **shall not** have the authority to pay counsel fees from guardianship assets **without prior court approval**; and it is further

ORDERED AND ADJUDGED, that any appointee herein shall comply with Judiciary Law Section 35-a and Part 36 of the Rules of the Chief Judge and **no fee** shall be paid to such appointee until such appointee has filed the Notice of Appointment and Certification of Compliance form USC 872 with the Court; and it is further

ORDERED AND ADJUDGED, that the compensation to be paid to the Guardian from the estate of the Incapacitated Person shall be fixed by the Court not to exceed that allowed as the compensation provided for a Guardian pursuant to MHL '81.28, **subject to approval of the Court, for services actually rendered**; and it is further

ORDERED AND ADJUDGED, that the Guardian shall take no annual commissions and compensation for any year until that year's annual account is filed, reviewed by the Court Examiner, and approved by the Court; and it is further

COMMENTS ON PROPOSED AMENDMENT TO 22 NYCRR SECTION 36.2(d) RELATING TO COMPENSATION LIMITS FOR PART 36 APPOINTEES

Submitted by Nancy S. Erickson, Esq.
nancyserickson@gmail.com
And
Karen Winner, Esq.
Karen@Karenwinner.com

August 16, 2024

THE REQUEST FOR PUBLIC COMMENT

On July 2, 2024, the Administrative Board of the Courts circulated a Memorandum [the Memorandum] requesting "public comment on a proposal to increase, from $100,000 to $125,000, the annual compensation limit for persons appointed by judges pursuant to Part 36 of the Rules of the Chief Judge.

The undersigned are unable to support the proposed amendment in its present form. The Request for Public Comment does not set forth the whole rule, which is complex, which applies to many different categories of appointees, and which already contains a significant exception to the $100K yearly limit.

The undersigned urge that the July 2 Request for Public Comment not be acted upon and that a new Request for Public Comment be prepared seeking comments not only on the increase in the yearly limit but also on possible amendments to the exception.

BACKGROUND TO THE PROPOSED AMENDMENT

Part 36 of the Rules of the Chief Judge deals with Appointments by the Court. It applies to many different categories of appointees, including but not limited to attorneys for the child who are not paid from public funds ("private AFCs"), guardians, court evaluators, attorneys for alleged incapacitated persons, and many others. Rule 36.1.

Currently, Rule 36.2 (d) places a limitation on appointments based on compensation. Namely, "If a person has been awarded more than an aggregate of $100,000 in compensation by all courts during any calendar year, the person shall not be eligible for compensated appointments by any court during the next calendar year."

The proposed amendment would increase, from $100,000 to $125,000, the annual compensation limit for persons appointed by judges pursuant to Part 36.

The proposed amendment was requested by the Guardianship Advisory Committee, which was concerned about the category of appointees known as Court Examiners. That Committee indicated that "a significant number of experienced and capable court examiners have been rendered ineligible to serve due to awards that exceed the Part 36.2(d)2) [limit]." See page 2 of the Memorandum from the Guardianship Advisory Committee attached as Exhibit A to the Request for Public Comment.

CONCERNS ABOUT THE PROPOSED AMENDMENT

The increase from $100,000 to $125,000 appears on the surface to be reasonable and innocent. However, even now, Rule 36.2(d)(4) contains an important exception to that limitation, which is noted but not discussed in the Proposed Amendment. Namely, the limitation "shall not apply where the appointment is necessary to maintain continuity of representation of or service to the same person or entity in further or subsequent proceedings."

Question 22 of the Questions and Answers relating to Part 36 explains and gives examples of how the exception works:

> "Question 22: Are there any exceptions to the $15,000 and $100,000 Rules?
>
> ANSWER: Yes, there is one exception for "continuity of representation or service." (section 36.2[d][4]) If the same appointee must be reappointed to ensure a continuity of representation or service for the same benefited person..., the reappointment will not be prohibited, notwithstanding that the appointment would otherwise violate the $15,000 or $100,000 rule. For example, a ... attorney for the child in a divorce action may be reappointed as attorney for the child for the same [child] in a post-judgment proceeding."

The undersigned have concerns regarding how the current exception to the limitation may be incentivizing some private AFCs to increase their incomes by encouraging one party to a finalized divorce (in which the private AFC was appointed) to commence a post-judgment proceeding. In that event, the private AFC could be reappointed and the $100,000 limitation would not apply. The undersigned suspect that a certain private AFC may have encouraged such additional litigation in a particular case.

Consequently, the undersigned have particular concerns regarding how the proposed amendment might increase the incentive for private AFCs to engage in such inappropriate and unethical behavior.

In other words, the problem is with the exception to the limitation, and the undersigned strongly suggest that changes to the exception should be considered prior to or in conjunction with any increase to the $100,000 limitation.

The undersigned have an additional concern about payments made to private pay AFCs – the rules do not require disclosure of amounts paid by a parent or parents to private pay AFCs during their representation of a child, because reporting only occurs at the conclusion of the representation. At that point, the amount is finally disclosed, and the judge is asked to approve (or, presumably, to disapprove) what was already paid! See Question 21 and the answer thereto in the Questions and Answers Relating to Part 36. An AFC is an attorney, and all matrimonial attorneys must bill clients every 60 days at a minimum, so AFCs should be required to do the same and to provide the bills to the judge for approval (or disapproval) at the same time.

Additionally, if the AFC is being paid by only one parent, the rules should provide for the bills to be sent at the same time to the parent who is not required to pay, so that the non-paying parent is aware of what time is being spent on the case and what the time is being spent for. Many parents who are not paying the AFC believe that the AFC will become biased in favor of the parent who pays. If the bills are sent to both parents, the fear of bias may be assuaged.

The undersigned would strongly suggest that a Commission be set up to investigate whether there are private AFCs who may be getting unusually high numbers of re-appointments. Part 36 appointment and compensation forms are public records. See Section 36.5. Thus, such an investigation could be done without great difficulty. Additionally, public hearings could be set up in which litigants, attorneys, and other professionals could have input on whether changes to the exception to the $100,000 limitation should be made.

The undersigned have only one possible specific recommendation concerning potential changes to the exception in Section 36.2[d][4]. That recommendation is that if a post-judgment custody proceeding is commenced, the judge should not automatically appoint the attorney who was the AFC during the divorce but should allow the litigants to express their views first on whether that AFC should be reappointed.

The undersigned recognize that the concerns of the Guardianship Advisory Committee are not addressed by our Comments, but perhaps those concerns should be addressed in a different way, geared toward the problem being described by that Committee.

CONCLUSION

The undersigned urge that the July 2 Request for Public Comment not be acted upon and that a new Request for Public Comment be prepared seeking comments not only regarding an increase in the yearly limit but also regarding possible amendments to the exception and to the Part 36 billing and reporting requirements.

Sincerely,

Nancy S. Erickson, Esq.

Karen Winner, Esq.