



NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL
COUNSEL

MEMORANDUM

April 24, 2019

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on Proposed Amendment of 22 NYCRR § 122.10 to Restrict the Service of Judicial Hearing Officers as Neutrals in Matters Pending Before a Court and County Where They Concurrently Serve on the JHO Panel

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The Administrative Board of the Courts is seeking public comment on a proposed amendment of 22 NYCRR § 122.10(c), addressing the appointment of Judicial Hearing Officers (JHOs) as referees, mediators, arbitrators or similar officers in cases pending before a court where they concurrently serve on the JHO panel (Exh. A).

22 NYCRR §122.10 currently permits the appointment of neutrals in matters pending before the court where the appointee concurrently serves on the JHO panel; moreover, such appointees are eligible to receive compensation at rates greatly in excess of normal JHO rates (currently \$400 per day [22 NYCRR § 122.8]). In contrast, section 36.2(c)(2) of the Rules of the Chief Judge bars the appointment of any JHO to a Part 36 position in any matter pending before a court and county where the appointee concurrently serves on the JHO panel.¹ This rule recognizes the appearance of conflict that is created when a judicial appointee concurrently serves or is eligible to serve as a quasi-judicial colleague of the appointing judge. To avoid the similar appearance of conflict in the appointment of neutrals, the proposed amendment of section 122.10(c) will only allow appointment of JHOs as neutrals in contested matters in a court in a county where they serve on the JHO panel when their compensation is no greater than the normal JHO rate (Exh. A).

Persons commenting on this proposal might wish to review Opinion 12-123 of the Advisory Committee on Judicial Ethics (Exh. B) and CPLR 4321(2) (addressing payment of fees and expenses of referees who are JHOs).

¹ 22 NYCRR §36.2[c][2] provides that:

No person serving as a judicial hearing officer pursuant to Part 122 of the Rules of the Chief Administrator shall be appointed in actions or proceedings in a court in a county where he or she serves on a judicial hearing officer panel for such court.

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Persons wishing to comment on the proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York, 10004. Comments must be received no later than July 2, 2019.

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT A

Proposed Amendment of 22 NYCRR 122.10(c)
March 5, 2019

(New matter bolded and underlined)

Section 122.10 Conflicts

(a) A judicial hearing officer shall not preside over any matter in which he or she has represented any party or any witness in connection with that matter, and he or she shall not participate as an attorney in any matter in which he or she has participated as a judge or judicial hearing officer.

(b) A judicial hearing officer shall not preside over a matter in which any party or witness is presented by an attorney who is a partner or associate in a law firm or of counsel to a law firm with which the judicial hearing officer is affiliated in any respect.

(c) A judicial hearing officer shall not participate as an attorney **or, unless appointed by the court on terms including receipt of compensation pursuant to section 122.8 of this Part, as a referee, mediator, arbitrator, or similar officer,** in any contested matter in a court in a county where he or she serves on a judicial hearing officer panel for such court.

(d) A judicial hearing officer shall not appear as an attorney before any other judicial hearing officer in any county in which he or she serves as a judicial hearing officer.

EXHIBIT B

Opinion 12-123

September 13, 2012

Digest: Unless prohibited by law, a former judge who is designated as a judicial hearing officer in a particular court may also accept an appointment as a special referee to supervise discovery in a matter pending in the same court and may accept compensation for the fair value of services rendered.

Rules: 22 NYCRR Part 36; 36.1(a)(9); Part 100; 100.3(B)(1); 100.3(C)(3); 100.6(A); 100.6(B)(4); 101.1; Part 122; 122.10; Opinions 09-178; 07-215; 07-101; 06-132; CPLR 4312(1), 4321;
<http://www.nycourts.gov/ip/gfs/Part36ExplanatoryNotes.pdf>.

Opinion:

A retired judge, designated as a Judicial Hearing Officer (JHO) in a particular court, asks whether he/she may accept "an appointment as a special referee by [a] [j]udge of that same court." The inquiring JHO's role as special referee would be to supervise discovery in a particular matter pending before the appointing judge. The inquiring JHO indicates that his/her compensation as special referee would be set by the appointing judge and paid for equally by all parties.

JHOs, like others who perform judicial functions within the judicial system, must comply with the Rules Governing Judicial Conduct ("the Rules") "in the performance of their judicial functions and otherwise must so far as practical and appropriate use such rules as guides to their conduct" (22 NYCRR 100.6[A]). Thus, a JHO must, among other things, "be faithful to the law and maintain professional competence in it" (22 NYCRR 100.3[B][1]). Like a part-time judge, a JHO "may accept private employment or public employment in a federal, state, or municipal department or agency, provided that such employment is not incompatible with his/her quasi-judicial office and does not conflict or interfere with the proper performance of [his/her] [quasi-]judicial duties" (22 NYCRR 100.6[B][4]; *see e.g.* Opinion 06-132 [for most purposes, JHO is held to same standard of ethical conduct as a judge]).

The Committee notes, preliminarily, that nothing in Part 100 of the Rules explicitly bars an appointment of a JHO as a special referee (*see e.g.* 22 NYCRR 100.3[C][3] [setting forth ethical limitations pertaining to judicial appointments]). Indeed, the word "referee" does not appear in Part 100. Moreover, although the Committee has not previously considered whether the quasi-judicial duties of a special referee would inherently conflict or be ethically incompatible with the quasi-judicial duties of a JHO (*see* 22 NYCRR 100.6[B][4]), the Committee notes that a part-time judge's judicial duties in a town court do not appear to be incompatible with his/her judicial duties in another municipal court (*see e.g.* Opinion 07-101).

On these facts, the Committee sees no reason to assume that performing quasi-judicial duties on behalf of the Unified Court System in two different capacities (such as JHO and special referee) would inherently conflict or be ethically incompatible, as neither position is

subject to the other's jurisdiction, review, or approval (*compare* Opinion 07-215 [part-time town justice may serve as hearing officer for a local housing authority, where the authority "is not subject to the town court's jurisdiction"] *with* Opinion 09-178 [part-time town justice may not serve as administrator of assigned counsel program, where he/she would approve attorneys' vouchers as both the presiding judge and as program administrator]).

Thus, it appears that the inquiring JHO may accept an appointment as special referee unless otherwise prohibited by law or rule (*see* 22 NYCRR 100.3[B][1]). The next question is whether Part 36 (22 NYCRR pt 36) applies to appointment of a special referee to supervise discovery. The Committee concludes that it does not. Although "referee" appointments are generally governed by Part 36 of the Rules, "special masters and those otherwise performing judicial functions in a quasi-judicial capacity" are exempt (22 NYCRR 36.1[a][9]). In the Committee's view, a special referee is, in essence, a special master who supervises disclosure in a case, by the designation of the judge handling the case and, thus, is exempt from Part 36 because he/she is "performing judicial functions in a quasi-judicial capacity" (*id.*).¹ The Committee also notes that Part 122, the section specifically authorizing and governing JHOs, also does not preclude JHOs from appointment as special referees (*see e.g.* 22 NYCRR 122.10 [discussing conflicts]). Accordingly, as long as it is lawful for the inquiring JHO to accept the appointment, a question on which the Committee cannot comment (*see* 22 NYCRR 101.1), it is also ethically permissible.²

The Committee thus concludes that a former judge, designated as JHO in a particular court may also accept an appointment as a special referee to supervise discovery in a matter in the same court, unless prohibited by law, and unless the specific appointment will conflict or interfere with his/her responsibilities as JHO (*see generally* 22 NYCRR 100.6[B][4]). Moreover, the Rules Governing Judicial Conduct do not prohibit the inquiring JHO from accepting a fee set by the appointing judge, as long as the compensation is not "beyond the fair value of services rendered" (22 NYCRR 100.3[C][3]; *but see also* CPLR Rule 4321).

¹ Section G of the Explanatory Note to Part 36 supports this conclusion, noting that "[r]eferees are treated differently under Part 36 depending on the purpose for which they are appointed." Specifically, "[n]o matter what their title," when referees are "used in a quasi-judicial capacity to supervise discovery or conduct trials in civil actions or proceedings, ... they are exempt from Part 36" (<http://www.nycourts.gov/ip/gfs/Part36ExplanatoryNotes.pdf>, *citing* 22 NYCRR 36.1[a][9]).

² The Committee notes that the Civil Practice Law and Rules, on its face, appears to contemplate that a judge may appoint a JHO to serve as referee (*see* CPLR 4312[1] ["A court may designate either one or three referees; provided, however, a judicial hearing officer may be designated a referee, in which case there shall be only one referee"]). However, the legal significance of this or other potentially relevant statutory provisions or case law is beyond the Committee's jurisdiction.