

June 3, 2024

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New York, NY 10004

Submitted via e-mail at: [rulecomments@nycourts.gov](mailto:rulecomments@nycourts.gov)

**RE: Request for Public Comment on proposed amendments to Parts 623 and 680, and the addition of new Parts 825 and 1024, of the Rules of the Appellate Divisions, relating to mental health professionals panels**

Dear Mr. Nocenti,

The New York State Coalition Against Domestic Violence (NYSCADV) and the 29 undersigned domestic violence providers, survivors and attorneys are writing to you today to provide comments regarding establishment of proposed statewide rules for the use of mental health professionals in child custody and visitation proceedings.

NYSCADV was established more than 45 years ago as a statewide non-profit membership organization comprised of local domestic violence service providers and allied organizations that are committed to preventing and ending domestic violence. In New York, there are nearly 100 residential and non-residential domestic violence programs which operate at approximately 250 locations around the State.

NYSCADV is recognized by the U.S. Department of Health and Human Services and the U.S. Department of Justice as the information clearinghouse, primary point of contact and resource center on domestic violence for the State of New York. Among our roles and responsibilities, we provide education, training and technical assistance to domestic violence service providers; and support the development of policies, protocols and procedures to enhance domestic violence intervention and prevention.

We appreciate the length of time the Unified Court System's working group has been meeting to review and analyze the recommendations of the Governor's Blue-Ribbon Commission on Forensic Evaluations. However, we are unaware of any public discourse the Unified Court System or the Joint Appellate Division Committee has conducted on these proposed rules changes. While the Blue-Ribbon Commission included important stakeholders, including NYSCADV and other DV advocates, only 20 individuals were selected to participate. Instead of relying exclusively on the recommendations of this small group, the Joint Appellate Division Committee should seek input from a broader range of stakeholders. **NYSCADV and the undersigned domestic violence programs respectfully request that the Joint Appellate Division Committee hold a series of forums, workshops and listening sessions, open to all who are interested in providing testimony, to obtain verbal comments on these proposed rules changes.** Many stakeholders, particularly those who speak English as a second language, may be unable to convey their thoughts in writing and might prefer to provide comments verbally instead.

With that in mind, we appreciate your consideration of the following:

**1. Proposed Rules Changes Fail to Implement Recommendations of the Governor's Blue-Ribbon Commission**

According to the March 9, 2024, memo announcing the initial public comment period on its proposed rules changes for mental health professionals panels, an "internal Unified Court System working group" was

convened two years ago to review the recommendations of the 2021 Blue-Ribbon Commission on Forensic Custody Evaluations. The working group made certain recommendations about the mental health professionals panel to a “Joint Appellate Division Committee,” which then drafted these proposed amendments to the Appellate Division Rules.

As you may know, NYSCADV and DV advocates were selected to participate on this Blue-Ribbon Commission, along with former judges, state agency representatives, academics, attorneys who practice family and matrimonial law, children’s rights experts, psychologists, and parents. The group met frequently and in good faith, spending hours of time reviewing the literature, assessing other states’ policies with respect to the use, training and certification of forensic custody evaluators, and debating the merits, challenges and potential unintended consequences of various suggestions and recommendations.

The group created three sub-committees to facilitate these discussions; NYSCADV and DV advocates were the only Commission members to participate on all three sub-committees. As a result, we are intimately familiar with the dialogue, discussion and data review that led to issuance of the December 2021 final report, titled “Report of the Blue-Ribbon Commission on Forensic Custody Evaluations.”

This report identified 11 recommendations for the Governor, in addition to discussing elimination of forensic custody evaluations from all civil court proceedings or placing a moratorium on their use until certain system reforms were implemented. **Surprisingly, the Joint Appellate Division Committee’s proposed rules changes would not implement many of the Blue-Ribbon Commission recommendations.**

For example:

- The Blue-Ribbon Commission concluded that “changes should be made to the current environment when custody evaluations are ordered...” (Page 4) **The proposed rules changes would not in any way modify when courts order custody evaluations.**
- The Blue-Ribbon Commission supported “limiting the use and scope of forensic custody evaluations to those cases where they are necessary to assess a parent’s mental health, as it affects their behavior as a parent.” (Page 6) **The proposed rules changes would not limit the use or scope of forensic custody evaluations.**
- The Blue-Ribbon Commission recommended courts “ensure mental health evaluations are ordered equitably, without regard to the income level of litigants.” (Page 8) **The proposed rules changes would not ensure child custody evaluations are ordered equitably, nor would they stop the troubling practice of requiring child protective investigations or child welfare intervention when the parties are unable to pay for forensic evaluations.**
- The Blue-Ribbon Commission recommended expansion, with some specific exceptions, of the availability of discovery in child custody cases, as is currently the practice in the Third and Fourth Departments. Employing the use of pre-trial discovery could reduce reliance on forensic evaluations as a means of gathering information. However, discovery can also be a tool for abusive partners to further harass and intimidate their victims. (Page 10) **The proposed rules changes do not consider how pre-trial discovery might be used, instead of forensic evaluations, as an alternative means for gathering evidence.**
- The Blue-Ribbon Commission recommended forensic evaluators disclose “past or concurrent referrals by attorneys, judges, Attorneys for Children, or other professionals involved in the case for other evaluations, or other professional appointments; professional and/or personal interactions outside of

court; business dealings/interactions; and donations to campaigns.” (Page 11) **The proposed rules changes would only require very limited disclosure of a potential conflict of interest (e.g., whether, in the prior two years, the forensic evaluator was hired by a party, counsel for a party, Attorney for Children or other professionals in the case as a paid non-neutral evaluator or to conduct a peer review of an evaluation by another forensic evaluator.)**

- The Blue-Ribbon Commission recommended that, when a forensic evaluation is ordered by a judge, “all litigants should be provided with pertinent information... include[ing] the goals of the forensic evaluation, the roles and responsibilities of the evaluator, the time frame, the litigants’ rights with respect to the evaluation (noting that litigants have the ability to object via court processes to a forensic evaluation or to the selection of a particular forensic evaluator), and the process for lodging complaints about an evaluator. (Page 11) **The proposed rules changes would only require notice to litigants of the process for lodging complaints or concerns about a forensic evaluator.**

**The discrepancies between the Blue-Ribbon Commission’s recommendations and these proposed rules changes support the need for significantly more input and dialogue, with more opportunities for public comment.** We urge the Administrative Board to delay implementation of these proposed rules changes until a robust stakeholder engagement program with additional opportunities for public comment is conducted.

## **2. Proposed Rules Changes Fail to Incorporate New Training Requirements for Forensic Evaluators**

One of the Blue-Ribbon Commission’s recommendations has been signed into law. Chapter 740 of the Laws of 2022 requires forensic custody evaluators to obtain a certification of completion for completing a training program developed and provided by the NYS Office for the Prevention of Domestic Violence (OPDV) and NYSCADV. Upon appointment in a NYS court, the court must now require the forensic evaluator to show proof of certification for completing the training within the last two years to be eligible to serve.

The proposed rules changes should clearly incorporate the requirements of this new law. For example, the eligibility requirements described in §623.4, §680.4, §825.4 and §1024.4 should specifically require individuals seeking inclusion on the mental health professionals panel to show proof of certification for completing the training program within the last two years. As proposed, these sections contain only vague references to compliance with “such other statutory requirements applicable to court-ordered evaluations.”

Similarly, sections focused on training and education (e.g., §623.8, §680.8, §825.8 and §1024.8) should explicitly reference the requirements for initial training and subsequent refresher courses, as well as the training topics described in Chapter 740 of the Laws of 2022. As proposed, these sections merely require any training developed by the oversight committee to be “consistent with or in addition to any statutory continuing education requirements applicable to court-ordered evaluations.”

Further, the provision permitting, but not requiring, the oversight committee to require attendance at training sessions for continued membership on the panel of mental health professionals does not comply with the requirements of Chapter 740. If this provision was intended to apply only to training developed and offered by the oversight committee, and not the mandated training provided by OPDV and NYSCADV, the provision should be modified accordingly.

### **3. More Stakeholder Dialogue is Needed to Refine Proposed Rules Changes re: Access to Forensic Evaluation Reports**

Forensic custody evaluations are often ordered in difficult custody and visitation proceedings, such as cases involving allegations of domestic violence or child abuse. Courts expect forensic custody evaluators to be able to assess which party is perpetrating harm, which party is experiencing harm, and what impacts such violence is causing to a child. Training in the dynamics of domestic violence and child abuse is now mandated for forensic evaluators to better equip them in making such determinations and advise the court. Oftentimes, the conclusions and recommendations contained in forensic evaluation reports are accepted by courts unilaterally.

Due to the significance of these reports to custody and visitation proceedings, several Blue-Ribbon Commission members felt it is critical for all parents, their counsel and retained experts and consultants to have physical copies of these evaluations. Some Blue-Ribbon Commission members felt parties and counsel should have access to the reports but did not support providing physical copies of the reports to litigants. Still others raised safety and privacy protection concerns, particularly wary that abusers would publicize confidential medical information contained in the reports.

Despite hours of discussion, and a good faith effort to resolve differences, the Blue-Ribbon Commission could not identify a universal recommendation. It is therefore a surprise to see an approach proposed in the Unified Court System's proposed rules changes. Here, only attorneys in proceedings where all parties are represented by counsel would receive a physical copy of the report. These attorneys would be able to show their clients the report but would have to ensure their clients do not copy or photograph any part of the report. This places the attorney in the role of a monitor who supervises the activities of their client to ensure compliance. In courtrooms where this is currently the practice, attorneys have stated that they do not have the time to monitor clients in this way, nor do they have staff for this purpose. Further, some attorneys report charging their clients for this monitoring, creating pressure on the litigant to complete their review as soon as possible. Worse, in cases where litigants cannot afford to pay for such monitoring, they have no ability to review the report, in essence depriving due process to low-income litigants.

More problematic, the proposed rules changes would not allow any attorneys or litigants to obtain physical copies of the forensic evaluation report if any litigant is self-represented. In these cases, attorneys and litigants would be required to review the reports in the courthouse.

These reports are lengthy, complex and contain facts, scientific and/or other data and conclusions of the evaluator on the basis of the data. Thorough analysis of the reports, including identification of misinformation and errors, requires a lot of time and resources. The reports generally contain substantial hearsay, subjective information and biased or inaccurate statements. To challenge the accuracy of the report and report conclusions, and to prepare an effective cross-examination, self-represented parties and their counsel should have complete access to the report with the ability to share it with professionals retained to assist them, including those with expertise to help analyze the report.

Due to employment, childcare requirements or other time limitations, many litigants will not be able to sit in a courthouse for hours to review the report. It is unreasonable to think litigants – and in cases where a party is self-represented, their counsel – would be able to review a report in a courthouse, without taking notes or making copies, and be able to successfully use such report in court to support their case or challenge the report's conclusions. This requirement, if implemented, will significantly impair a litigant's right to a fair trial and limit the judge's ability to understand the full picture.

Several states (e.g., Louisiana, Michigan, New Jersey, Ohio, Utah and Wisconsin) permit litigants and counsel to obtain physical copies of forensic evaluation reports. Several more states (e.g., Colorado,

Delaware, Hawaii, Illinois, Kansas, Kentucky, Minnesota, Michigan, Missouri, North Dakota, Pennsylvania, Washington, West Virginia) permit self-represented litigants to obtain physical copies of the reports. To the best of our knowledge, court personnel and domestic violence advocates in those states have not raised any concerns and none are considering reversing their current practices.

The approach proposed in these rules changes will significantly impair the ability of litigants to obtain due process and fair and just proceedings. The Unified Court System should set this proposal aside and instead develop a plan to obtain more feedback and dialogue from stakeholders, including attorneys, judges, domestic violence advocates and parents. Only then should the Unified Court System, in consultation with domestic violence and child abuse advocates who are not employed by the Office of Court Administration or New York courts, draft a proposal regarding access to forensic evaluation reports and circulate it for public comment.

#### **4. Proposed Rules Changes Should Strengthen Oversight Committee's Evaluation of Panel Members and Process for Removal**

The proposed rules changes would extend current requirements for the periodic review of panel members statewide with little change. Specifically, the mental health professionals oversight committee would be required to “periodically evaluate the work performed by each member of the panel of mental health professionals” and to “not recommend for reappointment to the panel any member whose performance has been determined by the committee to be unsatisfactory.” (see §623.9, §680.9, §825.9 and §1024.9)

While we welcome the extension of the oversight committee's evaluation statewide, the proposed rules changes should provide more specificity regarding its evaluation of current panel members. For example, the proposed rules changes should note how often each panel member would be evaluated (e.g., twice a year, once a year, once every two years?). In addition, the committee should identify the factors to be considered in such evaluation, and what actions would be considered “unsatisfactory” resulting in the individual not being recommended for reappointment.

Regarding the Presiding Justices of the Appellate Divisions' consideration of the oversight committee's recommendation to remove an individual from the panel (see §623.10, §680.10, §825.10 and §1024.10), the proposed rules changes should 1) identify a specific timeframe for the Presiding Justices to conduct its evaluation, and 2) specify that a panel member shall not be permitted to serve as a forensic evaluator when the Justices of the Appellate Divisions are considering a recommendation to remove such individual from the panel. Further, the proposed rules changes should prohibit a forensic evaluator who has been removed from the mental health professionals panel, has offered to step down from the panel, or has negotiated a settlement to no longer serve on the panel, from appearing as an expert witness or to allow into evidence a forensic custody report prepared by such individual.

Finally, we welcome establishment of a mechanism for litigants and other members of the public to submit concerns regarding the conduct or qualifications of a forensic evaluator (see §623.9, §680.9, §825.9 and §1024.9). However, more definition to the process is needed to fully implement the recommendations of the Blue-Ribbon Commission. For example, the proposed rules changes do not:

- identify the process for submittal of concerns or complaints;
- identify a timeframe for the oversight committee's investigation into the concerns or complaints; or
- require notice to complainants that an investigation has been completed and the results of such investigation.

## **5. Proposed Rules Changes Should Expand Information Contained in Oversight Committee's Annual Report**

We recommend that the requirements for the oversight committee's annual report be modified to include:

- How many evaluations of current panel members were conducted in a given year;
- The time needed to complete each evaluation in a given year;
- The factors considered during such evaluations performed in a given year;
- The costs of child custody evaluation reports, including the lowest, median and highest fees, the number of custody evaluations funded by private individuals and the number funded by the courts, and the total fees incurred by private individuals for such custody evaluations and the total fees incurred by the courts for such custody evaluations.
- How many evaluations of panel members in a given year led to recommendations for removal;
- How many panel members in a given year were removed from the panel; and,
- How many complaints were received about how many panel members in a given year?

In addition, the proposed rules changes should require the oversight committee to post its annual report on OCA's website, with an archive for earlier annual reports.

## **6. Proposed Rules Changes Should Limit Use of Virtual Technology to Interviews with Children Living Out-of-State, as Required by Law**

Chapter 23 of the Laws of 2023 authorizes forensic custody evaluators who have a certification of completion for mandated training in domestic violence and child abuse to conduct evaluations remotely utilizing videoconferencing technology if a child is living out-of-state and is farther than 100 miles from the New York State border. The proposed rules changes should prohibit the conduct of virtual evaluations except if a child is living out-of-state and is farther than 100 miles from the New York State border.

Thank you for your consideration of these comments.

Sincerely,

New York State Coalition Against Domestic Violence

Advocacy Center of Tompkins County

Barrier Free Living

Brighter Tomorrows, Inc.

Catholic Charities of Schoharie County

Child and Family Services – Haven House

Connecting Communities in Action

Domestic Violence Project of Warren & Washington Counties, a program of Catholic Charities

Equinox, Inc.

Fearless! Hudson Valley, Inc.

Nancy S. Erickson, Esq., of Law Offices of Nancy S. Erickson

Grace Smith House Inc.

Help Restore Hope Center

Her Justice

Hope's Door

Jacqueline Franchetti, Kyra's Champions

L.I. Against Domestic Violence

Northern Manhattan Improvement Corporation  
Putnam/Northern Westchester Women's Resource Center  
RAHAMA  
Rise-NY  
Safe Horizon  
Sanctuary for Families  
Shalom Task Force  
The Family Counseling Center of Fulton County  
The Retreat  
The Safe Center LI, Inc.  
Urban Justice Center  
Wellspring  
YWCA NorthEastern NY