

SUPREME COURT OF WISCONSIN

NOTICE

This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 03-03

In the matter of the creation of Supreme Court Rules Chapter 36 - Eligibility for Appointment as Guardian Ad Litem for an Adult

FILED

JAN 8, 2004

Cornelia G. Clark
Clerk of Supreme Court
Madison, WI

On October 1, 2003, the court held a public hearing on the petition filed on April 2, 2003, by the Judicial Council, seeking creation of Supreme Court Rules Chapter 36 relating to required training for guardians ad litem for adults.

IT IS ORDERED that, effective July 1, 2004, Supreme Court Rules Chapter 36 is created to read:

36.01 **Eligibility to accept an appointment.** Commencing on July 1, 2004, a lawyer may not accept an appointment by a court as a guardian ad litem for an adult in an action or proceeding under chs. 51, 55, or 880, stats., unless any of the following conditions have been met:

(1) The lawyer has attended 30 hours of guardian ad litem education approved under SCR 36.03.

(2) The lawyer has attended 6 hours of guardian ad litem education approved under SCR 36.03 during the combined current

reporting period specified in SCR 31.01 (7) at the time he or she accepts an appointment and the immediately preceding reporting period.

(3) The appointing court has made a finding in writing or on the record that the action or proceeding presents exceptional or unusual circumstances for which the lawyer is otherwise qualified by experience or expertise to represent the best interests of the adult.

36.02 **Effect of acceptance.** A lawyer's acceptance of appointment as a guardian ad litem for an adult in an action or proceeding under chs. 51, 55, or 880, stats., constitutes the lawyer's representation to the appointing court that the lawyer is eligible to accept the appointment under SCR 36.01 and is governed by SCR 20:3.3.

36.03 **Approval of guardian ad litem education.** (1) The board of bar examiners shall approve courses of instruction at a law school in this state and continuing legal education activities that the board determines to be on the subject of the role and responsibilities of a guardian ad litem for an adult or on the subject matter of proceedings under chs. 51, 55, or 880, stats., and that are designed to increase the attendee's professional competence to act as guardian ad litem for an adult in those proceedings. The board of bar examiners may only approve courses of instruction or continuing legal education activities that are conducted after January 1, 1995.

(2) The board of bar examiners shall designate, under SCR 31.05 (3) and 31.07, the number of hours applicable to

SCR 36.01 (1) and (2) for each approved course of instruction and continuing legal education activity.

(3) Approval of a course of instruction or continuing legal education activity under sub. (1) constitutes approval of that course or activity for purposes of continuing legal education under SCR ch. 31.

(4) The procedure for obtaining approval of courses of instruction and continuing legal education activities is specified in SCR 31.08.

IT IS FURTHER ORDERED that notice of this amendment of Supreme Court Rules chapter 36 be given by a single publication of a copy of this order in the official state newspaper and in an official publication of the State Bar of Wisconsin.

Dated at Madison, Wisconsin, this 8th day of January, 2004.

BY THE COURT:

Cornelia G. Clark
Clerk of Supreme Court

¶1 PATIENCE D. ROGGENSACK, J. (*dissenting*). I write in dissent because I would not adopt SCR ch. 36 as it has the capacity to require different legal education requirements for lawyers doing the same work, depending on the county in which lawyers practice and the judge before whom they appear. Additionally, I am concerned that Chapter 36 is another step toward a specialized bar, when this court has not considered the effects of specialization on the public interest.

¶2 Presently attorneys who are licensed to practice in Wisconsin must attend a minimum of thirty hours of approved continuing legal education (CLE) during each two-year reporting period. SCR 31.02. The Board of Bar Examiners (BBE) determines the number of hours each approved program receives.

¶3 In 1994, we adopted a CLE requirement that a minimum of three hours of each reporting period must be obtained in legal ethics and professional responsibility. SCR 31.02(2). In 1997, we adopted another specifically focused CLE requirement for those who represent children as guardians ad litem (GALs) in chs. 48, 767, and 938 proceedings. SCR 35.01. Chapter 35 was amended in 2001 and requires either completion of thirty hours of GAL education approved by BBE or at least six hours of such education within the reporting period, as well as further education under SCR 35.03(1m). SCR 35.015. These requirements can be set aside under circumstances similar to those described below for Chapter 36.

¶4 On October 1, 2003, this court voted to adopt Rule Petition 03-03 as Chapter 36. It imposes a similar, but separate, six-hour CLE requirement for those who serve as GALs for adults in chs. 51, 55 and 880 proceedings, as is required of GALs for children. SCR 36.01(1), (2). An attorney may be appointed as a GAL for an adult without meeting the educational requirements, if the appointing court finds, in writing or on the record, that the "action or proceeding presents exceptional or unusual circumstances for which the lawyer is otherwise qualified by experience or expertise to represent the best interests of the adult." SCR 36.01(3). This permits the appointing court to select an attorney who has not complied with Chapter 36 education requirements.

¶5 At conference, it was accepted by the majority that in sparsely populated counties where a circuit court may not have enough lawyers who have obtained and maintained the CLE courses required by Chapter 36, the appointing court may set aside the CLE requirement. SCR 36.01(3). This flexibility gives Chapter 36 the potential to create different CLE requirements for lawyers acting as GALs in populous counties from those CLE requirements for lawyers who perform the same services in less populated counties. I question the wisdom of this type of structure for our unified bar association.

¶6 Furthermore, attorneys who serve as GALs for adults may also accept appointments as GALs for children. These attorneys are now required to comply with Chapters 35 and 36, as well as the ethics requirement. Therefore, such an attorney

must attend twelve hours of education in a reporting period, focused solely on GAL-related topics, as well as three hours on ethics. Accordingly, fifteen hours of the CLE such lawyers would be required to receive are specialized credits. This leaves general practice attorneys little time for education in other areas of importance or interest, yet the amount of practice devoted to GAL work may be quite small. Additionally, Attorney Timothy L. Vocke, who is also a reserve judge, voiced economic concerns about the burden this will place on attorneys because the payment for an appointed GAL "doesn't even begin to cover [his or her] overhead as an attorney in private practice." Letter from T. Vocke to Ruth Bachman, Judge James Mason and Jay Grenig, 9/24/02.

¶7 Furthermore, my research shows only three other states have adopted separate, mandatory CLE requirements for attorneys who wish to serve as GALs for adults: Colorado, Kansas, and New York. In both Colorado and Kansas, the same educational requirements cover GALs for both children and adults. 3 Colo. Prac., Methods of Practice § 97.86; 66 Oct. J. Kan. B.A. 15. Therefore, the approach we have taken is hardly a national trend.

¶8 The supporters of Chapter 36 stressed the vulnerability of incompetent adults and the possibility that they may be at greater risk for inadequate legal representation. See Letter from Crawford to the Wisc. Supreme Court, 8/13/03, at 1. While incompetent adults are a vulnerable group, they are not unique in their vulnerability as they come before the

courts. For example, parents who are involved in a bitter child custody dispute are often so torn by emotion and fear of losing their child that they, too, are very vulnerable. They need well-trained lawyers to assist them. So, too, does the 75-year-old widow who was induced to buy worthless securities with her life's savings or the person permanently injured by a defective product. Few areas of the law are more complex than securities litigation and products liability litigation.

¶9 However, because a GAL's representation is done through court appointment, the court acts as a gatekeeper. No court would appoint an attorney as a GAL without determining whether the attorney was qualified to handle the representation. See Letter from T. Vocke, 9/24/02 at 3; Letter from Charles G. Norseng, 3/3/03. Indeed, even the petition drafters acknowledge this role, as they refer to Chapter 36's "opt-out" provision described above. SCR 36.01(3). Attorney Charles Norseng, on behalf of the more than 2,000 members of the State Bar's General Practice Section, opposed additional mandatory CLE requirements for GALs, pointing out that judges "certainly can screen lawyers and do screen lawyers for these appointments." Letter from C. Norseng, 3/3/03.

¶10 Finally, in my view, Chapter 36 is yet another step toward a specialized bar, yet specialization was not discussed by this court. With the law's increasing complexity, it could be that we will want to require attorneys to obtain area-specific training for certain types of cases.¹ However, we had

¹ Other states have created boards of legal specialization

no information presented to us about specialization when the court approved the rule change. Nor did we discuss whether a specialized bar would better serve the public interest. If we decide to permit a specialized bar, either on a voluntary or mandatory basis, we must not do so without a thorough discussion of the many facets of this very complex issue. To do otherwise is an abdication of our role in this important area of lawyer regulation to special interest groups who do not have our overarching responsibility to the public, the bench and the bar.

¶11 For the foregoing reasons, I would not adopt SCR 36 and accordingly, I respectfully dissent from the adoption of Petition 03-03, Chapter 36, SCR.

¶12 I am authorized to state that Justices JON P. WILCOX and DAVID T. PROSSER join in this dissent.

and have adopted comprehensive programs to “board certify” lawyers in specific areas of law. See State Status Report on Lawyer Specialty Certification at www.abanet.org/legalservices/specialization. Specialized attorneys may be held to higher standards and are often required to take more CLE credits than they would if they chose not to be certified. However, these programs are voluntary, and an attorney is not required to become board certified to practice in a certifiable area of law. See e.g. Rules and Regulations of the Arizona Board of Legal Specialization (rev. May 21, 1999), State Bar of Arizona Board of Legal Specialization website at www.azbar.org/AttorneyResources/legalspec.asp; State Bar of California Board of Legal Specialization web pages at www.calbar.ca.gov; Florida State Bar Rule 6 - Legal Specialization and Education Programs at www.flabar.org; Louisiana State Bar Association Plan of Legal Specialization at www.lsba.org/specialization/html/plan_of_legal_specialization.html; New Mexico MCLE at www.nmmcle.org/links/specialization.asp and www.nmmcle.org/rules/index.asp; North Carolina Board of Legal Specialization at www.nclawspecialists.org; and Standards for Attorney Certification of the Texas Board of Legal Specialization (rev. Feb. 2003) and www.tbls.org.

