



NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

HON. JOSEPH A. ZAYAS
CHIEF ADMINISTRATIVE JUDGE

HON. NORMAN ST. GEORGE
FIRST DEPUTY CHIEF ADMINISTRATIVE JUDGE

DAVID NOCENTI
COUNSEL

MEMORANDUM

To: All Interested Persons

From: David Nocenti

Re: Request for Public Comment on Adopting a New Rule of the Chief Judge to Facilitate Requests for Judicial Accommodations Under the Americans with Disabilities Act

Date: August 17, 2023

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The Administrative Board of the Courts is seeking public comment on a proposal, proffered by the Chief Judge’s Advisory Committee on Access for People with Disabilities (“Advisory Committee”), to adopt a new Rule of the Chief Judge (Part 52, 22 NYCRR § 52) that would authorize trial court judges to entertain, on an *ex parte* basis, certain requests for disability accommodations made pursuant to the Americans with Disabilities Act (“ADA”) (Exhibit A – Proposed Rule). The Advisory Committee believes that the proposed rule is critical to promoting access to justice for individuals with invisible disabilities and that the rule properly balances confidentiality against the due process and ethical concerns implicated.

Although the provision of auxiliary aids and supportive services—such as assistive listening devices, sign language interpreters, Braille materials, and CART reporting—may be accomplished by clerical, administrative, and other non-judicial staff, some types of reasonable accommodations for court users with disabilities must be obtained through judicial, rather than administrative, action. These judicial accommodations include adjournments, extended time to submit papers, remote appearances, schedule changes, and the way testimony is given. Requests for these types of accommodations require the exercise of a judge’s inherent authority over the courtroom and the parties to a proceeding. Such requests are by their nature beyond the power of court administrators to grant or deny.

To receive an accommodation under the ADA, a person must self-identify as having a

covered disability. While certain disabilities, such as a mobility impairment requiring the use of a wheelchair, are readily observable, others are non-apparent or “invisible,” such as diseases and conditions substantially affecting bodily organs or systems; conditions causing chronic illness, pain or fatigue; neurological or cognitive impairments; and psychiatric disorders. Although some individuals with invisible disabilities are willing to freely disclose their status, others strongly prefer that their disability remain private, either out of a fear of discriminatory treatment by others, a disinclination to share personal details with strangers, or a desire to avoid the public dissemination of confidential medical information.

According to the Advisory Committee, the proposed rule seeks to minimize the public disclosure of disabilities specifically in the context of a judicially granted accommodation. It does so by removing the ethical constraints on a judge’s ability to entertain an accommodation request without notice to all parties. Pursuant to the Rules of Judicial Conduct, a judge may ethically entertain an *ex parte* communication where authorized by law to do so, see 22 NYCRR 100.3(B)(6)(e), and promulgation of this rule will constitute such authorization. Promulgation of the proposed Rule will both authorize a court to entertain requests for judicial accommodations on an *ex parte* basis and allow court users with disabilities to seek a needed disability accommodation on a confidential basis, without fear of public exposure of sensitive personal information.

The Advisory Committee submits that the proposed rule will protect the confidentiality interests of persons with disabilities to the greatest extent possible, while still ensuring that the due process concerns of other parties to a proceeding will not be unduly jeopardized. The proposed Rule requires the *ex parte* request be made in writing, without reference to the subject matter or merits of the proceeding, and in accordance with the requirements of CPLR 2217(b). The *ex parte* application and any material submitted in support are to be kept confidential and not disclosed by the court to other participants or the public, except in the case of several narrowly drawn exceptions which recognize that in some unique instances it may be appropriate to share some limited aspect of the request with other participants in order to protect those persons’ own due process rights.

Thus, under the first exception, if the court believes information submitted in the request is both germane and necessary to the court’s determination of the merits and is not otherwise in or likely to become part of the record, the court may disclose to other parties the existence of the

request and the pertinent information, but such disclosure shall not entitle the other parties to be heard on the accommodation request. This exception addresses a circumstance where fairness requires the opposing parties be made aware of submitted information if the judge intends to rely on it in determining the matter, and is consistent with ethical opinions regarding the court's acquisition of *ex parte* information. This first exception is only applicable to an accommodation request made by or for a party to the proceeding, not to one made by an attorney on their own behalf, and the Advisory Committee does not expect that it will apply in most instances.

Second, the Advisory Committee states that the proposed rule provides for an exception that requires disclosure of the request having been made where the court has determined that the person seeking the accommodation has a qualifying disability and the accommodation sought is for more time to submit papers, an adjournment, or any other request that the court reasonably believes could prejudice an adversary's right to a fair and timely resolution of the matter. In this instance, disclosure is limited to the fact that an ADA accommodation request has been made and the particular accommodation requested. Disclosure of personal information about the disability – including a general description or any details about the type of disability or the limitations it imposes – is not permitted. In the Advisory Committee's view, no disability-related information needs to be disclosed here because, in addition to privacy concerns, it would be inconsistent with the ADA to allow other parties to contest the existence of a requestor's disability or the limitations it imposes. However, notice and an opportunity to be heard should be provided where the court is being asked to grant an accommodation that could reasonably be said to impact another party's procedural rights.

Under this second exception, appropriate deference is made to the due process rights of the other parties, but submissions in opposition to the request are limited to the issue of whether granting the request would intrude upon their right to a fair and timely resolution to such a degree that the nature of the court proceeding would be fundamentally altered. The Advisory Committee does not expect that judges will be likely to come to a reasonable belief that granting a single or several adjournments or extensions will result in sufficient prejudice to trigger this exception, and that it is more likely that such a belief would not arise until a tipping-point has been reached following multiple adjournments or extensions. In addition, the Advisory Committee believes this limited exception is necessary to prevent an inadvertent undermining of the appearance of judicial impartiality. Where repeated requests are granted as disability

accommodations for one side, but not acknowledged as such, the perception of disparate treatment might arise.

The Advisory Committee views the proposed rule as optimizing privacy protection for people with disabilities to encourage the requesting of accommodations while also according appropriate deference to the nature of the judicial system, the adversarial process, and the ethical obligations of judges. In addition to allowing an *ex parte* application (with limited exceptions), the proposed rule also provides additional privacy protections, including the filing of compliant applications under seal, the redaction of any personal information related to the disability from any publicly available version of an order granting or denying the application, and the filing of unredacted orders under seal.

The proposed rule is attached as Exhibit A.

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Persons wishing to comment on the proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: David Nocenti, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 10th Fl., New York, New York, 10004. Comments must be received no later than October 2, 2023.

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 Ex Parte Rule

(a) With respect to an accommodation that can be granted only by a judge or judicial officer, a person with a disability, as defined by the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 *et seq.*), may apply for one on an ex parte basis. An ex parte application for a reasonable accommodation shall:

- (1) be in writing; and
- (2) state the disability and explain how it limits the person's ability to meaningfully participate in the proceeding; and
- (3) state the accommodation sought and explain why the accommodation is needed; and
- (4) in no manner refer to the subject matter or merits of the proceeding that is before the Court in which the accommodation is sought; and
- (5) as provided for by CPLR 2217(b), be accompanied by an affidavit stating the result of any prior application for similar relief and specifying the new facts, if any, that were not previously shown.

(b) An ex parte application for an accommodation under this rule may be made by a party or an attorney on their own behalf, or by an attorney on behalf of a party, or by a party or attorney on behalf of a witness or other participant in the proceeding. Individuals who, because of a disability, are unable to put their request in written form may obtain help in doing so from court personnel.

(c) In its discretion and only as may be reasonably necessary to determine the application, the Court may require the applicant to provide the Court with additional information about the person's disability and how it limits participation in the proceeding.

(d) The ex parte application and all material submitted in support shall be kept confidential by the Court and not be disclosed by the Court to other participants in the proceeding or the public, except in the following limited circumstances and under the following conditions:

- (1) the ex parte application or supporting material contains information about a party's disability that (i) the Court believes is both germane to and necessary for the Court to consider in determining the merits of the underlying matter before it, and (ii) is not otherwise part of,

nor likely to become part of, the record before it. In this circumstance, disclosure by the Court shall be limited to the existence of the application and the pertinent information, and shall not entitle any other party to be heard on the accommodation application itself. Or,

(2) the Court has determined that the person for whom the accommodation is sought has a qualifying disability, and the accommodation being sought is an extension of time to submit papers, an adjournment, permission to participate remotely, or any other accommodation that, if granted, could potentially prejudice the rights of another party to a fair or timely resolution of the matter. If the Court reasonably believes that granting the requested accommodation will be prejudicial, the Court shall disclose only the fact that an ex parte ADA accommodation application has been made and the particular accommodation the application seeks. Information pertaining to the nature of the disability, including a general description of or any details about the type of disability and the limitations it imposes, shall not be disclosed.

Following disclosure, the Court shall permit timely responding submissions by affected parties. The arguments raised shall be limited to whether the proposed accommodation would so intrude upon the rights of the opponent to a fair or timely resolution of the matter that the nature of a court proceeding would thereby be fundamentally altered. Or,

(3) confidentiality is waived in whole or part by the applicant.

(e) Once an ex parte accommodation application has been made pursuant to this rule, the Court may, on an ex parte basis, engage in discussions with the applicant and/or the person for whom the accommodation is sought regarding the application. Such discussions shall be kept confidential by the Court and not disclosed except as may be provided for in paragraph (1) of subdivision (d), above.

(f) Provided that the ex parte application complies with the requirements of this rule and except for what has been disclosed pursuant to subdivision (d), above, the Court shall find good cause to direct that the written application and any supporting material be filed under seal.

(g) The Court's decision to grant or deny, in whole or in part, the ex parte application shall be issued promptly and memorialized in a written order.

(1) The order shall:

- (i) recite the accommodation(s) sought; and
- (ii) if the application is denied, in whole or in part, explain the reason(s) for denial; and

(iii) if the application is granted, in whole or in part, state the accommodation(s) that will be provided and the duration of its provision; and

(iv) state the date upon which the order is provided to the applicant.

(2) The order shall not:

contain information about the person's disability or limitations it imposes unless such information is redacted and an unredacted copy is filed under seal. If no such information is contained in the order, all parties shall receive a copy. If any such information is contained in the order, the applicant shall be provided with both a redacted and unredacted copy of the order, but all other parties shall receive only a redacted copy.

(h) This rule shall only apply to requests for accommodations acted upon by a judge or judicial officer acting in a judicial capacity; it shall not apply to requests for accommodations acted upon by court administrators.

(i) This rule shall not preclude a party or attorney from making an oral or written application for an accommodation on notice.