

RECENT DEVELOPMENTS IN
MENTAL HEALTH LAW AND TREATMENT

PART 36
OF THE RULES OF THE CHIEF JUDGE

Materials Prepared by
and to Accompany the lecture of

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PART 36
OF THE RULES OF THE CHIEF JUDGE

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1. History

- A. Birnbaum Commission Report
- B. Special Inspector General's Report
- C. Recommendations and Public Comment Period
- D. Action by the Administrative Board, Court of Appeals, Chief Judge
- E. New Part 36: November 15, 2003
- F. Amendments to New Part 36: April 10, 2003

2. Overview of New Part 36 (as amended)

A. Preamble: purpose and intent-to promote competence in the appointment system and to avoid favoritism, nepotism and politics

- B. What categories of appointment are covered
- C. Who is eligible for appointment
- D. How to get on appointment lists
- E. How the process of appointment works
- F. What is a public record

3. Applicability and exemption from applicability

- A. Nine categories of primary appointment
- B. Six categories of secondary appointment with regard to guardians and receivers only
- C. Major exemptions and the effect of exemption
 - nominated or proposed guardian or SNT trustee

NFP as guardian or court evaluator

bank or trust company as SNT trustee or depository

appointee required by law

MD as GAL in surgical case

uncompensated appointee (NB still file NOA)

4. Appointments

A. General Rule: all nonexempt appointees for applicable categories must be selected from OCA list

B. Exception: appointment off the list with a judicial finding of good cause (filed with FC & forwarded to CAJ)

C. Off-list appointees obligated by other provisions of Part 36

5. Disqualifications

A. Two major types

By reason of position/relationship/background/involvement in case

By reason of compensation

B. Position/relationship/background/involvement in case (36.2 [c] eff.. /1/1/03)

judges and relatives (6th degree)

MO in county

F/T or P/T UCS employees or relative (spouse, parent, sibling, child AND

NO RELATIVE OF RELATIVE) - JG 24 or equivalent

Political party officials + limited relatives + members, associates et al.- 2
years after leaving office (starts 1/1/03)

members/associates clause eff. 6/1

members/associates in law firm OR ENTITY

members/associates only applies while official associated during
time of office or 2 years after

Campaign officials + limited relatives + members/associates of LAW FIRM
during officials association with firm

2 years after election

during the election of incumbent

Former judges + limited relatives for 2 years after office

2 years begins 1/1/03

◦ within jurisdiction of service

Disbarred/suspended attorney

Felons / Misdemeanants (misd for 5 yrs. from conviction only)

Unless certificate of relief

Or misdemeanant gets waiver from CAJ

- Receiver/guardian prohibited from being own counsel unless compelling reason (no written finding/filing)
- Attorney for AIP prohibited from being guardian or attorney for

guardian-absolute prohibition

Court evaluator prohibited from being guardian unless extenuating circumstances, in writing and filed with FC

C. Limitation based upon compensation

15,000 rule (formerly 5,000)

50,000 rule

New exception-continuity of representation

6. List enrollment

A. Application-go to www.nvcourts.gov/gfs "New Part 36 Forms"

B. Qualification-training and NOT

Training: guardian, court evaluator, attorney for alleged incapacitated person, law guardian, court examiner, supplemental needs trustee, receiver, guardian ad litem

No training: referee and the 6 secondaries

C. Lists

D. Reregistration

E. Removal

7. Procedure after appointment

A. Combined Notice of Appointment and Certification of Compliance

B. NOA filed by uncompensated

C. Referees to compute and sell don't file

D. NOA: name, date and type of appointment

E. Certification: current appointment, appointing judge, anticipated compensation and whether anticipated over 15,000; same info for other appointments in same year; from prior year all awards of compensation, listing the appointment, appointing judge

F. Approval of compensation

Filed in all 500 or more cases

Certification by FC

Not filed by referees in foreclosure

Compare with Part 26 and Judiciary Law 35-a

Statement by judge if more than 5,000

Reporting requirement by law firms-reporting for reporting

8. Publication

36.4 papers are public records (not applications)

periodic publication



PART 36. Appointments by the Court

§ 36.0 PREAMBLE

Public trust in the judicial process demands that appointments by judges be fair, impartial and beyond reproach. Accordingly, these rules are intended to ensure that appointees are selected on the basis of merit, without favoritism, nepotism, politics or other factors unrelated to the qualifications of the appointee or the requirements of the case.

The rules cannot be written in a way that foresees every situation in which they should be applied. Therefore, the appointment of trained and competent persons, and the avoidance of factors unrelated to the merit of the appointments or the value of the work performed are the fundamental objectives that should guide all appointments made, and orders issued, pursuant to this Part.

§ 36.1 APPLICATION

(a) Except as set forth in subdivision (b), this Part shall apply to the following appointments made by any judge or justice of the Unified Court System:

- (1) guardians;
- (2) guardians ad litem, including guardians ad litem appointed to investigate and report to the court on particular issues, and their counsel and assistants;
- (3) law guardians who are not paid from public funds, in those judicial departments where their appointments are authorized;
- (4) court evaluators;
- (5) attorneys for alleged incapacitated persons;
- (6) court examiners;
- (7) supplemental needs trustees;
- (8) receivers;
- (9) referees (other than special masters and those otherwise performing judicial functions in a quasi-judicial capacity);
- (10) the following persons or entities performing services for guardians or receivers:
 - (i) counsel
 - (ii) accountants
 - (iii) auctioneers
 - (iv) appraisers
 - (v) property managers
 - (vi) real estate brokers

(b) Except for sections 36.2(c)(6) and 36.2(c)(7), this Part shall not apply to:

- (1) appointments of law guardians pursuant to section 243 of the Family Court Act, guardians ad litem pursuant to section 403-a of the Surrogate's Court Procedure Act, or the Mental Hygiene Legal Service;
- (2) the appointment of, or the appointment of any persons or entities performing services for, any of the following:
 - (i) a guardian who is a relative of (A) the subject of the guardianship proceeding or (B) the beneficiary of a proceeding to create a supplemental needs trust; a person or entity nominated as guardian by the subject of the proceeding or proposed as guardian by a party to the proceeding; a supplemental needs trustee nominated by the beneficiary of a supplemental needs trust or proposed by a proponent of the trust; or a person or entity having a legally recognized duty or interest with respect to the subject of the proceeding;
 - (ii) a guardian ad litem nominated by an infant of 14 years of age or over;
 - (iii) a nonprofit institution performing property management or personal needs services, or acting as court evaluator;
 - (iv) a bank or trust company as a depository for funds or as a supplemental needs trustee;
 - (v) a public administrator or public official vested with the powers of an administrator;
 - (vi) a person or institution whose appointment is required by law;
 - (vii) a physician whose appointment as a guardian ad litem is necessary where emergency medical or surgical procedures are required.
- (3) an appointment other than above without compensation, except that the appointee must file a notice of appointment pursuant to section 36.4(a) of this Part.

§ 36.2 APPOINTMENTS

(a) Appointments by the judge. All appointments of the persons or entities set forth in section 36.1, including those persons or entities set forth in section 36.1(a)(10) who perform services for guardians or receivers, shall be made by the judge authorized by law to make the appointment. In making appointments of persons or entities to perform services for guardians or receivers, the appointing judge may consider the recommendation of the guardian or receiver.

(b) Use of lists.

- (1) All appointments pursuant to this Part shall be made by the appointing judge from the appropriate list of applicants established by the Chief Administrator of the Courts pursuant to section 36.3 of this Part.
- (2) An appointing judge may appoint a person or entity not on the appropriate list of applicants upon a finding of good cause, which shall be set forth in writing and shall be filed with the fiduciary clerk at the time of the making of the appointment. The appointing judge shall send a copy of such writing to the Chief Administrator. A judge may not appoint a person or entity that has been removed from a list pursuant to section 36.3(e).
- (3) Appointments made from outside the lists shall remain subject to all of the requirements and limitations set forth in this Part, except that the appointing judge may waive any education and training requirements where completion of these requirements would be impractical.

(c) Disqualifications from appointment.

- (1) No person shall be appointed who is a judge or housing judge of the Unified Court System of the State of New York, or who is a relative of, or related by marriage to, a judge or housing judge of the Unified Court System within the sixth degree of relationship.
- (2) 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.
- (3) No person shall be appointed who is a full-time or part-time employee of the Unified Court System. No person who is the spouse, sibling, parent or child of an employee who holds a position at salary grade JG24 or above, or its equivalent, shall be appointed by a court within the judicial district where the employee is employed or, with respect to an employee with statewide responsibilities, by any court in the state.
- (4) (i) No person who is the chair or executive director, or their equivalent, of a state or county political party, or the spouse, sibling, parent or child of that official, shall be appointed while that official serves in that position and for a period of two years after that official no longer holds that position. This prohibition shall apply to the members, associates, counsel and employees of any law firms or entities while the official is associated with that firm or entity.
(ii) No person who has served as a campaign chair, coordinator, manager, treasurer or finance chair for a candidate for judicial office, or the spouse, sibling, parent or child of that person, or anyone associated with the law firm of that person, shall be appointed by the judge for whom that service was performed for a period of two years following the judicial election. If the candidate is a sitting judge, the disqualifications shall apply as well from the time the person assumes any of the above roles during the campaign for judicial office.
- (5) No former judge or housing judge of the Unified Court System, or the spouse, sibling, parent or child of such judge, shall be appointed, within two years from the date the judge left judicial office, by a court within the jurisdiction where the judge served. Jurisdiction is defined as follows:
 - (i) The jurisdiction of a judge of the Court of Appeals shall be statewide.
 - (ii) The jurisdiction of a justice of an Appellate Division shall be the judicial department within which the justice served.
 - (iii) The jurisdiction of a justice of the Supreme Court and a judge of the Court of Claims shall be the principal judicial district within which the justice or judge served.

- (iv) With respect to all other judges, the jurisdiction shall be the principal county within which the judge served.
- (6) No attorney who has been disbarred or suspended from the practice of law shall be appointed during the period of disbarment or suspension.
- (7) No person convicted of a felony, or for five years following the date of sentencing after conviction of a misdemeanor (unless otherwise waived by the Chief Administrator upon application), shall be appointed unless that person receives a certificate of relief from disabilities.
- (8) No receiver or guardian shall be appointed as his or her own counsel, and no person associated with a law firm of that receiver or guardian shall be appointed as counsel to that receiver or guardian, unless there is a compelling reason to do so.
- (9) No attorney for an alleged incapacitated person shall be appointed as guardian to that person, or as counsel to the guardian of that person.
- (10) No person serving as a court evaluator shall be appointed as guardian for the incapacitated person except under extenuating circumstances that are set forth in writing and filed with the fiduciary clerk at the time of the appointment.
- (d) Limitations on appointments based upon compensation.**
- (1) No person or entity shall be eligible to receive more than one appointment within a calendar year for which the compensation anticipated to be awarded to the appointee in any calendar year exceeds the sum of \$15,000.
- (2) If a person or entity has been awarded more than an aggregate of \$50,000 in compensation by all courts during any calendar year, the person or entity shall not be eligible for compensated appointments by any court during the next calendar year.
- (3) For purposes of this Part, the term "compensation" shall mean awards by a court of fees, commissions, allowances or other compensation, excluding costs and disbursements.
- (4) These limitations 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.

§ 36.3 PROCEDURE FOR APPOINTMENT

- (a) Application for appointment.** The Chief Administrator shall provide for the application by persons or entities seeking appointments pursuant to this Part on such forms as shall be promulgated by the Chief Administrator. The forms shall contain such information as is necessary to establish that the applicant meets the qualifications for the appointments covered by this Part and to apprise the appointing judge of the applicant's background.
- (b) Qualifications for appointment.** The Chief Administrator shall establish requirements of education and training for placement on the list of available applicants. These requirements shall consist, as appropriate, of substantive issues pertaining to each category of appointment — including applicable law, procedures, and ethics — as well as explications of the rules and procedures implementing the process established by this Part. Education and training courses and programs shall meet the requirements of these rules only if certified by the Chief Administrator. Attorney participants in these education and training courses and programs may be eligible for continuing legal education credit in accordance with the requirements of the Continuing Legal Education Board.
- (c) Establishment of lists.** The Chief Administrator shall establish separate lists of qualified applicants for each category of appointment, and shall make available such information as will enable the appointing judge to be apprised of the background of each applicant. The Chief Administrator may establish more than one list for the same appointment category where appropriate to apprise the appointing judge of applicants who have substantial experience in that category. Pursuant to section 81.32(b) of the Mental Hygiene Law, the Presiding Justice of the appropriate Appellate Division shall designate the qualified applicants on the lists of court examiners established by the Chief Administrator.
- (d) Reregistration.** The Chief Administrator shall establish a procedure requiring that each person or entity on a list reregister every two years in order to remain on the list.
- (e) Removal from list.** The Chief Administrator may remove any person or entity from any list for unsatisfactory performance or any conduct

incompatible with appointment from that list, or if disqualified from appointment pursuant to this Part. A person or entity may not be removed except upon receipt of a written statement of reasons for the removal and an opportunity to provide an explanation and to submit facts in opposition to the removal.

§ 36.4 PROCEDURE AFTER APPOINTMENT

(a) Notice of appointment and certification of compliance.

- (1) Every person or entity appointed pursuant to this Part shall file with the fiduciary clerk of the court from which the appointment is made, within 30 days of the making of the appointment, (i) a notice of appointment and (ii) a certification of compliance with this Part, on such form as promulgated by the Chief Administrator. Copies of this form shall be made available at the office of the fiduciary clerk and shall be transmitted by that clerk to the appointee immediately after the making of the appointment by the appointing judge. An appointee who accepts an appointment without compensation need not complete the certification of compliance portion of the form.
- (2) The notice of appointment shall contain the date of the appointment and the nature of the appointment.
- (3) The certification of compliance shall include:
- (i) a statement that the appointment is in compliance with sections 36.2(c) and (d); and (ii) a list of all appointments received, or for which compensation has been awarded, during the current calendar year and the year immediately preceding the current calendar year, which shall contain (A) the name of the judge who made each appointment, (B) the compensation awarded, and (C) where compensation remains to be awarded, (i) the compensation anticipated to be awarded and (ii) separate identification of those appointments for which compensation of \$15,000 or more is anticipated to be awarded during any calendar year. The list shall include the appointment for which the filing is made.
- (4) A person or entity who is required to complete the certification of compliance, but who is unable to certify that the appointment is in compliance with this Part, shall immediately so inform the appointing judge.

(b) Approval of compensation.

- (1) Upon seeking approval of compensation of more than \$500, an appointee must file with the fiduciary clerk, on such form as is promulgated by the Chief Administrator, a statement of approval of compensation, which shall contain a confirmation to be signed by the fiduciary clerk that the appointee has filed the notice of appointment and certification of compliance.
- (2) A judge shall not approve compensation of more than \$500, and no compensation shall be awarded, unless the appointee has filed the notice of appointment and certification of compliance form required by this Part and the fiduciary clerk has confirmed to the appointing judge the filing of that form.
- (3) Each approval of compensation of \$5,000 or more to appointees pursuant to this section shall be accompanied by a statement, in writing, of the reasons therefor by the judge. The judge shall file a copy of the order approving compensation and the statement with the fiduciary clerk at the time of the signing of the order.
- (4) Compensation to appointees shall not exceed the fair value of services rendered. Appointees who serve as counsel to a guardian or receiver shall not be compensated as counsel for services that should have been performed by the guardian or receiver.

(c) Reporting of compensation received by law firms. A law firm whose members, associates and employees have had a total of \$50,000 or more in compensation approved in a single calendar year for appointments made pursuant to this Part shall report such amounts on a form promulgated by the Chief Administrator.

(d) Exception. The procedure set forth in this section shall not apply to the appointment of a referee to sell real property and a referee to compute whose compensation for such appointments is not anticipated to exceed \$550.

§ 36.5 PUBLICATION OF APPOINTMENTS.

- (a)** All forms filed pursuant to section 36.4 shall be public records.
- (b)** The Chief Administrator shall arrange for the periodic publication of the names of all persons and entities appointed by each appointing judge, and the compensation approved for each appointee.

PART 36 OF THE RULES OF THE CHIEF JUDGE: AN EXPLANATORY NOTE

On November 15, 2002, Hon. Judith S. Kaye, Chief Judge of the New York State Court of Appeals, in consultation with the Administrative Board of the Courts and with the approval of the Court of Appeals, adopted a new Part 36 of the Rules of the Chief Judge (22 NYCRR), effective June 1, 2003, to govern appointments by all courts in the State of New York. The new rules are intended to create a system that broadens the eligibility for appointment to a wider range of applicants well-trained in their category of appointment, establishes procedures that promote accountability and openness in the selection process, and insulates that process from appearances of favoritism, nepotism or politics.

1. APPLICABILITY

Part 36 governs nine categories of primary appointments and six categories of secondary appointments (§ 36.1(a)), as set forth below.

a. Guardians

Part 36 applies to guardians appointed for: 1) incapacitated persons pursuant to Mental Hygiene Law Article 81; 2) minors pursuant to Surrogate's Court Procedure Act Article 17 or Civil Practice Laws and Rules Article 12; and 3) the mentally retarded or developmentally disabled pursuant to Surrogate's Court Procedure Act Article 17-A (§ 36.1(a)(1)). If a person is appointed guardian upon a ward's nomination or a party's proposal, appointment is exempt from Part 36 (§ 36.1(b)(2)(i)).

A guardianship where the appointee is a nonprofit institution, department of social services, or other public agency with legally recognized duties or interests is exempt from Part 36 (§ 36.1(b)(2)(i), (iii)). Guardianships in proceedings for the termination of parental rights (see Social Services Law § 384-b, Surrogate's Court Procedure Act § 403-a, Family Ct. Act Article 6) are also exempt, since only persons or entities authorized by law may be appointed guardian in such proceedings (§ 36.1(b)(2)(i), (vi)).

b. Guardians ad litem

Part 36 applies to guardians ad litem appointed under the general provisions of Surrogate's Court Procedure Act § 403 and Civil Practice Laws and Rules 1202, including guardians ad litem appointed to investigate and report to the court on particular issues (§ 36.1(a)(2)). Where a court appoints counsel or assistants to guardians ad litem, these appointees also are governed by the rules. If appointed a guardian ad litem upon the nomination of an infant of 14 years of age or over, the appointee is exempt (§ 36.1(b)(2)(ii)). Similarly exempt is a physician whose appointment as a guardian ad litem is necessary where emergency medical or surgical procedures are required (§ 36.1(b)(2)(vii)).

c. Law guardians

Privately paid law guardians who are appointed in domestic relations matters in those Departments of the Appellate Division where authorized are subject to the provisions of Part 36 (§ 36.1(a)(3)). Law guardians appointed and paid from public funds are exempt (§ 36.1(b)(1)). (As a general rule, Part 36 applies only to appointees compensated at the expense of private parties, and not those compensated from public funds such as appointments pursuant to Family Court Act 243, Surrogate's Court Procedure Act § 403-a, 407, Judiciary Law 35, and County Law Article 18-B.)

d. Court evaluators, attorneys for alleged incapacitated persons, court examiners

In proceedings for the appointment of guardians for incapacitated persons pursuant to Article 81 of the Mental Hygiene Law, the court may appoint an attorney for the alleged incapacitated person (Mental Hygiene Law § 81.10) or appoint a court evaluator as an independent witness to investigate and report to the court (Mental Hygiene Law § 81.09). These appointments are governed by Part 36 (§ 36.1(a)(4), (5)), except that a nonprofit institution appointed court evaluator is exempt (§ 36.1(b)(2)(iii)). The Mental Hygiene Legal Service, which may serve as attorney for an alleged incapacitated person or court evaluator, is also exempt (§ 36.1(b)(1)).

If a guardian is appointed pursuant to Article 81 of the Mental Hygiene Law, the court may also assign a court examiner to audit and report on accountings required to be filed in such guardianship proceedings (Mental Hygiene Law §§ 81.30, 81.31). Court examiners are designated by the Presiding Justice of each Department of the Appellate Division (Mental Hygiene Law § 81.32), and, upon designation, must comply with all the provisions of Part 36 (§ 36.1(a)(6), 36.3 (c)).

e. Supplemental needs trustees

Supplemental needs trustees (see Omnibus Budget Reconciliation Act of 1993 (42 USC 1396p(d)(4), EPTL § 7-1.12, SSL § 366(2)(b)(2)(iii), 18 NYCRR § 360-4.5) may be appointed in a number of contexts in Supreme Court or Surrogate's Court, e.g., in infants' compromise orders, or in proceedings under Article 17-A of the Surrogate's Court Procedure Act, or Article 81 of the Mental Hygiene Law. When selected by the court and appointed by judgment or order, a supplemental needs trustee is subject to the provisions of Part 36 (§ 36.1(a)(7)), unless the appointee is a bank or trust company (§ 36.1(b)(2)(iv)), or is appointed upon nomination by the beneficiary, or by the proponent, of the trust (§ 36.1(b)(2)(i)).

f. Receivers

Part 36 applies to receivers almost without exception (§ 36.1(a)(8)). In rare cases where the choice of receiver would be dictated by law, such an appointee would be exempt (§ 36.1(b)(2)(vi)).

g. Referees

Referees are treated differently under Part 36 depending on the purpose for which they are appointed. Under Articles 31 and 43 of the Civil Practice Laws and Rules, referees, sometimes called "special masters", are often used in a quasi-judicial capacity to supervise discovery or conduct trials in civil actions or proceedings. No matter what their title, if referees are used to perform a judicial function, they are exempt from Part 36 (§ 36.1(a)(9)). Referees appointed for all other purposes are governed by the rules. These appointments are usually for the purpose of performing an act outside of court, e.g., conducting the sale of real property in a mortgage foreclosure action or supervising a labor union election.

Referees to compute the value of, and sell, real property in the ordinary mortgage foreclosure action, and who receive the usual compensation of \$550, are subject to all of the provisions of Part 36 preliminary to appointment, including the disqualification provisions of section 36.2(c), the limitations based on compensation of section 36.2(d), and list enrollment under section 36.3. Upon appointment, however, referees to compute and sell are not required to file the notice of appointment or certification of compliance that all other Part 36 appointees must file (§ 36.4(d)). They are also excepted from filing a statement of approval of compensation pursuant to Judiciary Law § 35-a (1)(a) and 22 NYCRR § 26.1(a) (see section 5(b), *infra*), because the \$550 total compensation results from two separate appointments that are below the statutory threshold (\$50 for computation; \$500 for sale).

h. Secondary appointments of guardians and receivers: counsel, accountants, appraisers, auctioneers, property managers, real estate brokers

When a guardian or receiver subject to the provisions of Part 36 seeks to retain counsel, or an accountant, appraiser, auctioneer, property manager or real estate broker, the appointee

professional becomes a Part 36 appointee (§ 36.1(a)(10)). The guardian or receiver must request that the judge appoint such a professional (§ 36.2(a)), and the professional must comply with all the provisions of Part 36, including those governing list enrollment (§ 36.3), disqualification and limitation based on compensation (§ 36.2), and all filing requirements (§ 36.4).

2. APPROVED LISTS: APPLICATION, ENROLLMENT, USE

All persons or entities whose appointments are governed by Part 36 (§ 36.1(a)), and who are not exempt under section 36.1 (b), must be enrolled on an approved list established by the Chief Administrator of the Courts (§ 36.3(c)) from which all names for appointment must be selected (§ 36.2(b)(1)), except when good cause exists to appoint outside the list (§ 36.2(b)(2)). In those exceptional circumstances, the court must make a finding of good cause, in writing, and file its finding with the fiduciary clerk, who has the duty of supervising the filing of all papers in the Part 36 appointment process (see §§ 36.2(b)(2), (10), 36.4(a)(1), (b)(1)-(3)). A copy of the finding also will be sent to the Chief Administrator of the Courts (§ 36.2(b)(2)). A person or entity not appointed from an appropriate list still must comply with all the other provisions of Part 36, e.g., the appointee must not be disqualified from appointment under section 36.2(c) or (d) and must file all Part 36 forms pursuant to section 36.4, but any education and training requirements may be waived (§ 36.2(b)(3)). At no time may a court appoint a person or entity removed from a list for cause (§ 36.2(b)(2)). (See § 36.3(e) for the procedure for removal upon the Chief Administrator's determination of unsatisfactory performance or conduct incompatible with appointment from a list.)

To enroll on a list maintained by the Chief Administrator of the Courts, an applicant must have completed the required training for each category of appointment for which enrollment is requested (§ 36.3(b)). Once all required training is completed, an application must be submitted on the application form promulgated by the Chief Administrator (UCS-870) (§ 36.3(a)). Court examiners for proceedings under Article 81 of the Mental Hygiene Law and privately paid law guardians in domestic relations actions first must be approved by the Appellate Division before being eligible for placement on a list.

Section 36.3(d) provides for biennial re-registration, which will permit the Chief Administrator to keep all lists current.

3. DISQUALIFICATIONS

The following persons are disqualified from appointment (§ 36.2(c)):

- a. a judge or housing judge of the Unified Court System, or a relative of, or a person related by marriage to, a judge or housing judge of the Unified Court System within the sixth degree of relationship;
- b. a judicial hearing officer in a court in a county in which he or she serves as a judicial hearing officer;
- c. a full-time or part-time employee of the Unified Court System;
- d. the spouse, brother/sister, parent or child of a full-time or part-time employee of the Unified Court System at or above salary grade JG24, or its equivalent: 1) employed in a judicial district where the relative is applying for appointment or 2) with statewide responsibilities;
- e. a person who currently serves, or has served within the last two years (commencing January 1, 2003), as chair, executive director, or the equivalent, of a state or county political party; the spouse, brother/sister, parent or child of such political party official; or a member, associate, counsel or employee of a law firm or entity with which such political party official is currently associated;
- f. a former judge or housing judge of the Unified Court System who left office within the last two years (commencing January 1, 2003) and who is applying for appointment within

the jurisdiction of prior judicial service, as defined by section 36.2(c)(5) of the Rules of the Chief Judge; or the spouse, brother/sister, parent or child of such former judge;

- g. an attorney currently disbarred or suspended from the practice of law by any jurisdiction;
- h. a person convicted of a felony for which no certificate of relief from disabilities has been received;
- i. a person convicted of a misdemeanor for which sentence was imposed within the last five years and for which no certificate of relief from disabilities, or waiver by the Chief Administrator of the Courts, has been received; or
- j. a person who has been removed from an appointment list of the Chief Administrator of the Courts for unsatisfactory performance or conduct incompatible with appointment.

The disqualifications for disbarred or suspended attorneys (see paragraph (g), supra) and convicted criminals (see paragraphs (h) and (i), supra) apply to any appointments under section 36.1(a), even if otherwise exempted under the rules pursuant to section 36.1(b).

Additionally, there are three disqualifications that do not limit list enrollment, but may render an enrollee disqualified from appointment due to the circumstances of a particular case. These disqualifications are: 1) receivers or guardians, or persons associated with the law firm of a receiver or guardian, are prohibited from being appointed counsel to the receiver or guardian (§ 36.2(c)(8)); 2) counsel to alleged incapacitated persons in Mental Hygiene Law Article 81 proceedings are prohibited from being appointed guardian, or counsel to the guardian, for an incapacitated person they have represented (§ 36.2(c)(9)); and 3) court evaluators in Mental Hygiene Law Article 81 proceedings are prohibited from being appointed guardian for an incapacitated person in a proceeding in which they served as court evaluator (§ 36.2(c)(10)). In the first and third of these disqualifications, exceptions may be made. If there is a compelling reason, such as savings to the estate of the receivership or guardianship, the receiver or guardian may be appointed counsel. Similarly, if there are extenuating circumstances, such as the unavailability of others to be appointed guardian and a familiarity and trust developed between court evaluator and incapacitated person, a court evaluator may be appointed guardian upon a written finding by the court of extenuating circumstances.

There is also a disqualification relating to judicial campaign activity. This does not prevent list enrollment, but limits appointment by a judge for whom the enrollee acted as campaign chair, coordinator, manager, treasurer or finance chair in a campaign for a judicial election that took place less than two years prior to the proposed appointment (§ 36.2(c)(4)(ii)). If the candidate is a sitting judge, the disqualification also applies to a person who assumes any of the above roles during the campaign for judicial office. Included in this disqualification are the spouse, brother/sister, parent or child of the campaign official, or anyone associated with the campaign official's law firm.

4. LIMITATIONS ON APPOINTMENTS BASED UPON COMPENSATION

Subdivision (d) of section 36.2 establishes two additional disqualifications from appointment, not related to list eligibility, but based upon anticipated or previously awarded compensation. These restrictions do not limit compensation per se, but use compensation as a basis for determining availability for future appointment. There are no exceptions to the application of these limitations.

a. The \$15,000 rule

Section 36.2(d)(1) prohibits appointees from receiving more than one appointment in the same calendar year (i.e., January 1 to December 31) for which compensation in excess of \$15,000 is awarded in that calendar year or anticipated to be awarded

in any calendar year. Two examples illustrate the rule: 1) If appointed as attorney for an alleged incapacitated person in 2003, and compensation of, for example, \$20,000 for that appointment is awarded or anticipated to be awarded in that same year, the appointee is precluded from receiving another appointment in 2003 for which compensation in excess of \$15,000 is anticipated either in 2003 or in any single future year; and 2) If appointed as guardian in 2003, for which an annual commission of, for example, \$20,000 is anticipated to be awarded in the following year (2004), the appointee is precluded from receiving another appointment in 2003 for which compensation in excess of \$15,000 is anticipated to be awarded either in 2003 or in any single future year.

b. The \$50,000 rule

Section 36.2(d)(2) establishes a limitation on appointments based on an annual, aggregate amount of compensation. If compensation is awarded in an aggregate amount of more than \$50,000 during any calendar year (no matter what year the appointment was made), the appointee will be ineligible for any compensated appointments during the next calendar year. It is the year of the award of compensation, and not the year of its actual receipt, that activates the application of the rule. Like its \$15,000 counterpart, the \$50,000 rule is a limitation on appointments, and not on compensation; nothing in the \$50,000 rule prevents a court's award, or an appointee's receipt, of total compensation exceeding \$50,000 in any calendar year. Excess compensation in one year simply prevents compensated appointments in the following year.

Both of these limitations do not apply when the appointment is necessary to maintain continuity of representation of the same person or entity in further or subsequent proceedings.

5. PROCEDURE AFTER APPOINTMENT

a. Combined notice of appointment and certification of compliance

Part 36 appointees must complete and file with the fiduciary clerk within 30 days of appointment a two-part form containing a notice of appointment and certification of compliance (§ 36.4(a)(1)), which will be sent to the appointee by the court immediately after appointment. If the appointee cannot certify qualification for appointment in the certification of compliance section of the combined form, or cannot accept appointment for any other reason, the appointee must immediately notify the court (§ 36.4(a)(4)).

The notice of appointment contains the date and nature of the appointment (§ 36.4(a)(2)), and the certification of compliance certifies that the appointee is not disqualified from service and is not otherwise precluded by any limitation based on compensation (§ 36.4(a)(3)(i); see § 36.2(c), (d)). The appointee must list all appointments received during the current calendar year (§ 36.4(a)(3)(ii)), report the amount of compensation awarded for each (§ 36.4(a)(3)(ii)(B)), or, if not awarded, the total amount of compensation anticipated for each (§ 36.4(a)(3)(ii)(C)(i)), and separately identify appointments for which compensation is anticipated to exceed \$15,000 in any calendar year (§ 36.4(a)(3)(ii)(C)(ii)). The appointee must also list all appointments for which compensation was awarded in the year immediately preceding the current calendar year (§ 36.4(a)(3)(ii)) and report the amount awarded for each (§ 36.4(a)(3)(ii)(B)). For all appointments, the name of the appointing judge must be given (§ 36.4(a)(3)(ii)(A)).

There are two exceptions to this procedure. Although exempt from the application of Part 36 (see § 36.1(b)(3)), uncompensated appointees must still file the combined notice and certification form, but need only complete the notice of appointment section of the form (§ 36.4(a)(1)). This will allow uncompensated fiduciary activity to be recorded and appropriately recognized. The other exception applies to

referees to compute the value of, and sell, real property. Although subject to the application and list process of Part 36 (see § 36.1(a)(9)), referees to compute and sell are relieved from the obligation to file the combined notice and certification form for appointments where total compensation is not anticipated to exceed \$550 (§ 36.4(d)).

b. Approval of compensation

Judges who approve compensation of more than \$500 are required to file a statement of approval of compensation with the Office of Court Administration pursuant to Judiciary Law 35-a(1)(a) and 22 NYCRR Part 26. Whenever a court is requested to approve compensation in excess of \$500 for a Part 36 appointee, a statement of approval of compensation on a form promulgated by the Chief Administrator of the Courts must be submitted for signature to the approving judge. The statement must contain a confirmation signed by the fiduciary clerk that the combined notice of appointment and certification of compliance form was filed (§ 36.4(b)(1)). No judge may approve compensation of more than \$500 without this statement and the signed confirmation of the fiduciary clerk (§ 36.4(b)(2)). Additionally, every approval of compensation in excess of \$5000 must contain the judge's written statement of the reasons for such approval (§ 36.4(b)(3)). After signing the order approving compensation and the statement of approval of compensation, the judge must file a copy of the order and the original statement with the fiduciary clerk. The fiduciary clerk will then forward the statement of approval of compensation to the Office of Court Administration for entry of the amount of compensation in its database under the name of the appointee. This will keep the database current for periodic publication under section 36.5.

The rules cite the standard for judicial approval of compensation, viz., fair value for all services rendered that are necessary to the performance of the appointee's duties (§ 36.4(b)(4)). This determination remains in the sound discretion of the court and depends on the factual circumstances of each case.

6. REPORTING LAW FIRM COMPENSATION

Section 36.4(c) obligates law firms to report, in writing, to the Chief Administrator of the Courts whenever total compensation in any calendar year is \$50,000 or more for Part 36 appointments of law firm members, associates or employees. The form for reporting law firm compensation will set forth the time for filing.

The reporting of law firm compensation is for informational purposes only. Limitations based on compensation apply only to the individual appointee, not the firm, and the appointment and compensation of one person in the firm are only considered in certifying the availability of that individual for appointment and do not affect the availability for appointment of any other person in the firm.

7. PUBLICATION

The notice of appointment and certification of compliance, statement of approval of compensation, and report of law firm compensation, filed pursuant to section 36.4, are public records, and therefore, the names of appointees and appointing judges, and the amounts of approved compensation, are subject to periodic publication by the Chief Administrator of the Courts (§ 36.5).