

**Part 36 of the
Rules of the Chief Judge
&
Domestic Relations Actions and
Proceedings**



Committee on Matrimonial Practice

**Guardian & Fiduciary Services
of the
New York State Unified Court System**

Introduction

Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36) governs many critically important appointments made in civil actions or proceedings in New York Courts, including matrimonial and other domestic relations matters. In the *2004 State of the Judiciary Address*, Chief Judge Judith S. Kaye underscored the importance of Part 36 and the reforms initiated by its recent amendment. With a focus on matrimonial and other domestic relations matters, this pamphlet answers many frequently asked questions about Part 36. It does not answer everything, but serves as a good introduction to judges and attorneys who need to know how Part 36 impacts on matrimonial and domestic relations practice

If you have any questions about Part 36, appointments, including eligibility for list enrollment, certified training requirements, the sufficiency of prior training, and the date and location of certified training programs, please contact:

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Q1: Does Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36) govern judicial appointments in matrimonial actions and other domestic relations proceedings?

A: Yes, Part 36 governs the following judicial appointments commonly made in these actions or proceedings:

- (1) guardians ad litem [' 36.1(a)(2)];
- (2) privately paid law guardians in Judicial Departments where authorized (First, Second and Fourth) [' 36.1(a)(3)];
- (3) receivers [' 36.1(a)(8)];
- (4) referees, e.g., a referee to sell property;¹
- (5) secondary appointees of receivers, i.e., whenever a Part 36 receiver seeks to retain an attorney, accountant, appraiser, auctioneer, property manager or real estate broker, that professional is deemed a Part 36 appointee subject to all of its provisions [' ' 36.1(a)(10); 36.2(a)].

¹Remember, referees performing judicial functions in a quasi-judicial capacity are exempt from Part 36, e.g., a referee to hear and report [CPLR 4201] or hear and determine [CPLR 4301], or a referee to supervise discovery [CPLR 3104] [' 36.1(a)(9)].

Q2: Does Part 36 apply to publicly paid panel law guardians?

A: No, publicly paid law guardians are specifically exempted from Part 36 [' 36.1(b)(1)].

Q3: Does Part 36 apply to forensic experts appointed in matrimonial actions and other domestic relations proceedings, such as psychologists to perform custodial evaluations, or accountants to perform business valuations?

A: No, Part 36 only applies to those judicial appointments specifically listed in ' 36.1(a); experts, such as psychologists for custodial evaluations and accountants for business valuations, are not included in that list. (Remember, professionals, such as accountants and appraisers, who are listed in ' 36.1(a)(10) are Part 36 appointees only to the extent that they perform services for a receiver or guardian; if any such professional is appointed by a court as a forensic expert, he/she is not a Part 36 appointee.)

Q4: Does Part 36 regulate who may be appointed by a court?

A: Yes, to the extent that Part 36 provides for the establishment of a list of qualified applicants for each category of appointment [' 36.3 (c)], and

requires the court to make all appointments from the appropriate list [' 36.2(b)(1)]. Judges, however, always maintain complete discretion in the process of selecting appropriate appointees. There is no requirement, for example, that judges make appointments according to the order in which eligible appointees' names appear on a list.

Q5: May a court ever select an appointee not enrolled on an appropriate list?

A: Yes, a court may select an appointee not enrolled on an applicable list (a non-list appointment), but only upon a written finding of good cause, filed with the fiduciary clerk and sent to the Chief Administrative Judge [' 36.2(b)(2)]; such a non-list appointee must otherwise be qualified and eligible for appointment and comply with all the provisions of Part 36, including the filing requirements of ' 36.4 [' 36.2(b)(3)]. The court, however, may waive any education and training requirements if considered impractical [' 36.2(b)(3)].

Q6: What is the procedure for enrollment on Part 36 lists?

A: Go to the court=s web site www.nycourts.gov/ip/gfs and click on the [Application for Appointment](#). Follow the instructions: read Part 36 and the official *Explanatory Note* available at the same web

site; complete the application online; print; sign and mail the application with any required attachments to the mailing address provided [' 36.3(a)].

Q7: Is the filing of the application the only requirement?

A: No, prior to filing the application, each applicant must complete certified training for any category of appointment requiring such training (see Question 7A of the Application for Appointment) [' 36.3(b)]. In the case of privately paid law guardians, the applicant must also meet the requirements of, and be approved by, the Appellate Division of intended service before becoming eligible for appointment. (See the court web site www.nycourts.gov/ip/gfs for training schedules and Appellate Division contact information for law guardian requirements and training.)

Q8: How long is a list enrollee eligible for appointment?

A: Two years. All enrollees are required to re-register every two years to maintain eligibility for appointment [' 36.3(d)].

Q9: Is an enrollee subject to removal from a Part 36 list?

A: Yes, the Chief Administrative Judge may remove for unsatisfactory performance or any conduct incompatible with appointment. An enrollee subject to removal is entitled to a written statement of reasons for removal and an opportunity to provide an explanation and facts in opposition [' 36.3(e)]. Appointment after removal is prohibited [' 36.2(b)(3)].

Q10: Does Part 36 establish certain disqualifications from appointment?

A: Yes, ' 36.2(c) sets forth a long list of disqualifications, many of which are new to Part 36. Some of these disqualifications are based on position, e.g., judges, judicial hearing officers, court employees, political party officials, judicial campaign officials, former judges. Others are based on relationship, i.e., certain relatives of those disqualified by position. Still others are based on circumstances, e.g., disbarred or suspended attorneys or convicted criminals. Read ' 36.2 (c) carefully. Some disqualifications are absolute. Others are limited by time, geography or the degree of relationship. Also, read carefully Question 15 of the AApplication for Appointment@. An applicant must be able to answer ANo@ to each item of this question in order to be eligible for enrollment on any Part 36 list.

Q11: Does Part 36 provide for disqualification from appointment for all political activities?

A: No, disqualification from appointment is limited to the chair or executive director, or their equivalent, of a state or county political party and the spouse, sibling, parent or child of such official while in office and for two years after leaving office. Also disqualified are the members, associates, counsel and employees of any law firms or entities for the period during which the official is associated with the firm or entity [36.2(c)(4)(i)].

Q12: What about activity on judicial election campaigns?

A: Not all political activity on behalf of a judicial candidate creates a disqualification from appointment. Disqualification is limited to a campaign chair, coordinator, manager, treasurer or financial chair for a candidate for judicial office, and only to the extent that the judge for whom that official served may not appoint the official during the course of the campaign and for a period of two years following the judicial election. This prohibition also applies to the campaign official-s spouse, sibling, parent or child and anyone associated with the official-s law firm [36.2(c)(4)(ii)].

Q13: Must a privately paid law guardian bill at the same rate as publicly paid law guardians?

A: No, the court sets the rate of compensation for a privately paid law guardian, which is not limited to the rate authorized for publicly paid law guardians. (Go to the court-s web site www.nycourts.gov/ip/gfs and click on ALaw Guardian@ for a complete explanation of the Law Guardian Appointment and Compensation Process and to access PDF fillable forms.)

Q14: Does Part 36 limit the amount of compensation that a law guardian or any Part 36 appointee may be awarded?

A: No, there is no prescribed minimum or maximum amount of compensation that may be awarded to an appointee, other than the fair value of services rendered, as determined by the court [' 36.4(b)(4)].

Q15: What, then, does ' 36.2 (d) limit when it says, ALimitations based upon compensation”?

A: Appointments.

Q16: How?

A: By applying two different rules, which use the amount of compensation that has been awarded, or is anticipated to be awarded, for prior appointments to determine eligibility for any new appointment. These are called the \$15,000 [' 36.2(d)(1)] and \$50,000 Rules [' 36.2(d)(2)].

Q17: What does the \$15,000 Rule do?

A: The \$15,000 Rule prohibits a new Part 36 appointment for which compensation of more than \$15,000 is anticipated to be awarded, **IF DURING THE SAME CALENDAR YEAR (JANUARY 1 TO DECEMBER 31) IN WHICH THE NEW APPOINTMENT IS MADE** the appointee has received a prior appointment for which compensation of more than \$15,000:

- was awarded

OR

- is anticipated to be awarded IN ANY CALENDAR YEAR.

“ANY CALENDAR YEAR”: An appointment may begin and end within a single calendar year. Often, however, because of the long-term nature of an appointment (e.g., a guardian) or protracted litigation (e.g., a law guardian in a contested matrimonial action), [' 36.2(d)(2) an appointment may span multiple years. It is possible that for an appointment made today there may be awards of compensation on an

annual basis for many years. Otherwise, there may not be an award of compensation until an appointment's conclusion a year or two later. Consequently, in determining compensation anticipated to be awarded for today's appointment, consideration may have to be given to a potential award in the year of appointment or in a future year—both of which constitute "ANY CALENDAR YEAR."

Q18: How does the \$15,000 Rule work?

A: Apply the \$15,000 Rule, by asking:

- #1 Does the new appointment have anticipated compensation of more than \$15,000 in any calendar year?
 - \$ If NO, the appointment may be accepted.
 - \$ If YES, then ask:
- #2 In the same calendar year as the new appointment, was there a prior appointment with compensation, or anticipated compensation in any calendar year, of more than \$15,000?
 - \$ If NO, then the new appointment may be accepted.
 - \$ If YES, then the new appointment may not be accepted.

*** Remember this formula:

YES to #1 + YES to #2=NO new appointment.

Q19: What does \$50,000 Rule do?

A: The \$50,000 Rule prohibits those who have been awarded more than an aggregate of \$50,000 by all courts in any calendar year from accepting a new compensated appointment in the next calendar year.

Q20: How does the \$50,000 Rule work?

A: This Rule looks back at the aggregate of compensation awarded during the prior calendar year. Appointees must keep track of the totals of all Part 36 compensation awarded by all courts during each calendar year. Once the aggregate of compensation exceeds \$50,000, the appointee will be ineligible for new *compensated* appointments in the next calendar year (uncompensated, i.e., *pro bono*, appointments may be accepted). Remember, it is the *next calendar year* that is affected by the \$50,000 Rule and not the prior year. If an appointee already has compensation awards of more than \$50,000 in a calendar year, he/she is not prohibited from receiving further awards of compensation or appointments in the remainder of that year. Only compensated appointments in the next year are prohibited.

Q21: How does Part 36 define compensation for the \$15,000 and \$50,000 Rules?

A: Part 36 defines compensation as an award by a court of “fees, commissions, allowances and other compensation, excluding costs and disbursements.” [§ 36.2(d)(3)]. The date of an order approving compensation is deemed the date of compensation. Actual receipt is neither defined as compensation nor does it serve as the date of compensation. For example, when a law guardian is appointed and authorized in the order of appointment to bill every 60 days and pay himself/herself upon collection, the actual receipt of those moneys is neither compensation nor the date of compensation pursuant to Part 36. There is only compensation and a date of compensation when there is a court order approving the amount to which the law guardian is entitled, which is usually at the conclusion of the law guardian’s service (Go to www.nycourts.gov/ip/gfs and click on ALaw Guardian@ for a complete explanation of the Law Guardian Appointment and Compensation Process and to access PDF fillable forms.)

Q22: Is there an exception to the \$15,000 and \$50,000 Rules?

Yes, there is one exception for “continuity of representation or service.” [§ 36.2(d)(4)] If the same appointee must be reappointed to ensure a continuity of representation or service for the same benefited person in the same, or a related,

action/proceeding, the reappointment will not be prohibited, notwithstanding that the appointment would otherwise violate the \$15,000 or \$50,000 Rule. For example, a law guardian in a divorce action may be reappointed as law guardian for the same child in a post-judgment visitation enforcement proceeding, or a law guardian in a Family Court visitation proceeding may be appointed in a Supreme Court divorce action involving the issue of custody. The exception, however, would not extend to a law guardian in a divorce action being appointed guardian ad litem in the probate proceeding of a grandparent's will. Familiarity is not enough. There must be consonance of appointment category and relationship between appointee and the person for whom appointed.

Q23: Is a law firm subject to the \$50,000 Rule or the \$15,000 Rule?

A: No, the limitations based upon compensation apply to the individual appointee, and not to the aggregate compensation of all those who practice in a law firm.

Q24: Does Part 36 require a law firm to file any reports?

A: Yes, a law firm must report aggregate approved compensation of \$50,000 or more for all members, associates or employees of the law firm. The report is for informational purposes [' 36.4 (c)].

Q25: Where may the law firm report be found?

A: The form, known as the AReport of Compensation Received by Law Firms® (UCS 876) is available at www.nycourts.gov/ip/gfs
The form is in PDF fillable format.

Q26: When and where is the law firm report filed?

A: The UCS 876 must be filed on or before March 31 of each year, for the prior year. The address for filing can be found on the form.

Q27: What must an appointee do when appointed?

A: Within thirty (30) days of appointment, an appointee must sign, and file with the local fiduciary clerk, the UCS 872 (notice of appointment/certification of compliance) [§ 36.4(a)]. An automated system is in place to record and track appointments and compensation awards. An appointee will receive from the fiduciary clerk the UCS 872 completed from information in the court's database. This information will include data about the appointee (name, address, phone number, etc.), the case, the appointment, the appointing judge, and prior appointment and compensation history. The UCS 872 will instruct the appointee to check the form for accuracy, make corrections, including additions and deletions, and sign it in one of two places: at the end of Part A, if it is an uncompensated appointment, or the end of Part B, if

compensated. Part B is the certification of compliance and must be carefully reviewed for prior appointments in the current calendar year and compensation awards in the prior calendar year. By signing Part B, the appointee certifies qualification for appointment [§ 36.2(c)] and compliance with the \$15,000 and \$50,000 Rules [§ 36.2(d)]. If an appointee cannot certify compliance or must decline appointment for any other reason, the fiduciary clerk must be notified immediately.

Q28: What does Part 36 require a compensated appointee to do at the conclusion of service in order to receive an order awarding compensation?

A: Part 36, in conjunction with Part 26 of the Rules of the Chief Judge, does not require the appointee to do anything. The court, however, must complete and file with the fiduciary clerk UCS 875 (a statement of approval of compensation) [§ 36.4 (b)]. This statement will include all of the information from UCS 872 and the fiduciary clerk's certification that UCS 872 was filed. Also included will be all information required by Judiciary Law § 35-a, particularly the amount of compensation awarded, the basis for the award and reasons for any award of \$5,000 or more.

Q29: Does the appointee have any obligations in the compensation process?

Yes, but these are not Part 36 obligations. These obligations are otherwise imposed by law and practice, and demand, at a minimum, an application for an order awarding compensation and proof sufficient to support the application.

Q30: Are there specific obligations in the compensation process for law guardians?

Yes, privately paid law guardians are subject to the procedures established by the Chief Administrative Judge in his memorandum of November 18, 2003. These include the settlement of an order approving compensation (UCS 882), supported by a detailed affirmation of services (UCS 881). These procedures are explained and forms are provided at the court's web site: www.nycourts.gov/ip/gfs

Q31: Are Part 36 appointment and compensation forms part of the record of an action or proceeding and filed in the court's file?

A: No, Part 36 appointment and compensation forms [§ 36.4] are administrative forms for recording, tracking and reporting the appointment activity of courts. They are similar to other administrative forms used by clerks to record, track and report case activity. These forms are not part of the record of a case, nor are they kept in the case file. These forms are

filed with, and maintained by, the Office of Court Administration.

Q32: Are Part 36 appointment and compensation forms public records?

Yes, all forms filed pursuant to ' 36.4, which include the UCS 872 and UCS 875, are public records. The Chief Administrative Judge is directed to arrange for the publication of the names of all persons appointed by each appointing judge, together with the compensation approved for each appointee [' 36.5]. All this information is available for public access on the court-s web site at www.nycourts.gov/ip/gfs

Q33: Is the application filed pursuant to § 36.3 (a) also a public record?

No, the application and the information it contains is confidential and is only made available to the court. The purpose of the application is to give the court needed information on an appointee's qualification and eligibility for appointment and apprise the court of his/her background to determine the appropriateness of the appointment.

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MATRIMONIAL PRACTICE**

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The Committee is grateful to Mr. Patrick C. O'Reilly for his efforts in connection with this brochure.