NEW YORK STATE
Unified Court System
OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL
COUNSEL

MEMORANDUM

March 12, 2018

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on Proposed Amendment of Rules Relating to Appointments by the Court (22 NYCRR Part 36) to (1) Enlarge Income Caps for Appointees; and (2) Exempt Attorneys for the Child from Various Part 36 Provisions

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The Administrative Board of the Courts is seeking public comment on a proposed amendment of rules relating to appointments by the Court (22 NYCRR Part 36), proffered by the Unified Court System's Second Special Commission on Fiduciary Appointments, to (1) enlarge income caps on Part 36 appointees, and (2) exempt attorneys for the child from various Part 36 provisions. In brief, the proposal calls for the following:

1. the amendment of 22 NYCRR §36.2(d)(2) to increase, from $75,000 to $100,000 or $125,000, the amount that a person or entity may be awarded in aggregate Part 36 compensation in a calendar year while remaining eligible for additional compensated appointments in the following year. This amount was last increased more than a decade ago (from $50,000 to $75,000, effective January 1, 2007) (Exh. A).

2. the amendment of 22 NYCRR §36.1(a)(3) and the insertion of a new section 36.4(g) to exclude application of Part 36 to private pay Attorneys for the Child, with the exception of rules addressing appointment, use of lists, disqualification, and approval and reporting of compensation received (i.e., sections 36.2[a], [b], and [c]; 36.3, and 36.4[a]). This proposal is supported by the UCS Matrimonial Practice Advisory and Rules Committee, which has provided a memorandum explaining the amendment (Exh. B).

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Persons wishing to comment on the proposed rules should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than May 15, 2018.**

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

The Chief Judge of the State of New York

Judith S. Kaye

ADMINISTRATIVE ORDER OF THE
CHIEF JUDGE OF THE STATE OF NEW YORK

Pursuant to the authority vested in me, and upon consultation with the Administrative Board of the Courts, and with the approval of the Court of Appeals of the State of New York, I hereby rescind Administrative Order AO/04/07, and I hereby amend, effective nunc pro tunc as of January 1, 2007, section 36.2(d)(2) of the Rules of the Chief Judge, relating to fiduciary appointments, to read as follows:

(d) Limitations on appointments based upon compensation

* * *

(2) If a person or entity has been awarded more than an aggregate of [$50,000] $75,000 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.

Judith S. Kaye
Chief Judge of the State of New York

Attest: Stuart M. Cohen
Clerk of the Court of Appeals

Dated: February 4, 2008

AO/ 06 /08

EXHIBIT B

Supreme Court
of the
State of New York

HON. JEFFREY S. SUNSHINE

JUSTICES' CHAMBERS
360 ADAMS STREET
BROOKLYN, NY 11201

May 22, 2017

Hon. Michael V. Coccoma
Chair, Office of Court Administration's Second
Special Commission on Fiduciary Appointments
4 ESP, Suite 2001
Albany, NY 12223

Re.: Attorneys for Children and Part 36

Dear Judge Coccoma:

As you know a subcommittee of the Matrimonial Practice Advisory and Rules committee, chaired by the Hon. Andrew Crecca and comprised of our committee members the Hon. Hope Zimmerman, Harriet Weinberger, Esq. and Donna England, Esq., have been working on a proposal related to attorneys for children and part 36 of the Rules of the Chief Judge (22 NYCRR - Part 36).

On Friday May 19, 2017 the Matrimonial Practice Advisory and Rules Committee voted to unanimously approve the enclosed report and recommendations of the subcommittee.

I thought it would be appropriate to send this report and recommendations to you and your committee for consideration. Of course both Judge Crecca and I are available to answer any questions and or comments.

I extend my sincere thanks to Michele Gartner, Esq. who served together with our committee's counsel, Susan Kaufman, Esq., as ex officio members of the subcommittee.

Very truly yours,

Jeffrey S. Sunshine, J.S.C.
Chair, Chief Administrative Judge's
Matrimonial Practice Advisory and Rules Committee

JSS/mjs

cc: Hon. Lawrence Marks
Hon. Andrew Crecca
Hon. Hope Zimmerman
John McConnell, Esq.
Harriet Weinberger, Esq.
Donna England, Esq.
Michele Gartner, Esq.
Susan Kaufman, Esq.

MEMORANDUM

TO: Justice Jeffrey Sunshine, J.S.C., Chair of the Chief Administrative Judge's Matrimonial Practice Advisory and Rules Committee

FROM: Hon. Andrew Crecca, Chair, Matrimonial Practice Advisory and Rules Committee Subcommittee on Part 36

RE: Private Pay Attorneys for The Child Should Be Excluded From Part 36 Rules

DATE: May 22, 2017

Inclusion of the appointment of privately paid attorneys for the child(ren) within the application of the Part 36 Rules in its current form is a vestige of an antiquated and disavowed manner of viewing such attorneys. To that end, it is our contention that Part 36 should be amended with regard to the appointments of privately paid Attorneys for Children. We understand and are fully cognizant of the overriding goal of transparency in the establishment and implementation of Part 36. However, as this memo will demonstrate, Attorneys for Children are not fiduciaries as their representation is defined by court rule and legislative mandate, and they should be treated differently within the framework of Part 36.

I. Background on Representation of Children by "Law Guardians"

Many divorcing litigants are unable to ensure that the best interests of their child(ren) are being considered while they are enmeshed in their own legal battle. Therefore, in a contested matrimonial matter, it is often necessary for the child(ren) to have his/her/their own legal representation. In 1962, Section 241 of the FCA was enacted establishing a system of law guardians for minors who often required the assistance of counsel to help protect their interests, and to help them express their wishes to the court (*see also* Section 35(7) of the Judiciary Law for appointments in Supreme Court). These attorneys were viewed as in the position of *parens patriae* for the minor and were often asked to file a report and/or to make recommendations to the court with regard to their conclusions as to what was in the best interests of the child(ren) for whom they were designated "law guardian." Sometimes they were called as witnesses in the litigation. These

"law guardians" were considered to be analogous to a guardian ad litem, having been appointed to report back to the court on the "condition" or "situation" of the incompetent child(ren).

In the mid-1990s, the Supreme and Family Court began to direct the parent/parents in contested custody and visitation matters to pay the fees of law guardians, upon a determination by the court that the party/parties had the funds to bear the cost of the law guardian. In its order appointing the said "law guardian", the Supreme Court would direct that the legal fees of this attorney be privately paid by one or both of the litigants while setting the retainer amount and hourly rate (unless both parties were indigent, in which case the law guardian would be selected from an approved list and paid by the state at state rates pursuant to Judiciary Law section 35(3), much the same way that in Family Court, if independent legal counsel was not available, such counsel would be appointed in custody matters pursuant to FCA Section 245).

It was against this backdrop that the 2001 Report of the Commission on Fiduciary Appointments recommended that the class of attorneys then known as "privately paid law guardians" be included under the umbrella of the Part 36 Rules which took effect on June 1, 2003. The Commission expressly provided that the Part applies only to "law guardians who are not paid from public funds, in those judicial Departments where their appointments are authorized." [*see* Section 36.1(a)(3)]. Scores of attorneys who are appointed to represent children are not obligated to report under the Part 36 rules. In addition to matrimonial actions, Attorneys for the Child(ren) are designated to represent child(ren) in Family Court matters including delinquency proceedings, persons in need of supervision proceedings, child protective proceedings, termination of parental rights proceedings, family offense and paternity proceedings, as well as custody, visitation and interstate custody matters. When appointed pursuant to Family Court Act §§ 245 and 249 they are paid at "state rates" through the court system, much like indigent criminals' assigned counsel are paid, and are not subject to Part 36 rules. Additionally, any attorney appointed to represent a child within the Third Department is paid at the "state rate", not privately, as the Third Department has determined that "private pay" attorneys for the child(ren) are not authorized. The Fourth Department permits "private pay" attorneys to be appointed only by the Supreme Court, while the First and Second Departments permit both the Family Court and Supreme Court to make such

appointments. Consequently, it appears to be a small percentage of attorneys who represent children throughout the state who are governed by the Rules of Part 36.

II. Changes in the Role of Attorneys Representing Children

Significant changes in the role of attorneys representing children have occurred since the adoption of the Part 36 Rules which belie the need for inclusion of private pay attorneys for children in the application of the Part 36 Rules. In the December 2001 Report of the Commission on Fiduciary Appointments ("the Birnbaum Report"), the Commission recommended that "law guardians" be subject to the Part 36 rules (but not be selected from the OCA fiduciary list). However, in its February 2005 updated Report, the Commission stated: "Finally, in deference to the Chief Judge's Matrimonial Commission, which is addressing issues surrounding matrimonial law guardians in New York, we take no position on the application of Parts 36 and 26 to these fiduciaries."[1] Thereafter in its 2006 Report to the Chief Judge, the Matrimonial Commission endorsed changes in the role of attorneys for children recommended by the New York State Bar Association Committee on Children and the Law in their Law Guardian Representation Standards (the "State Bar Standards"),[2] stating: "these attorneys must be viewed as the attorneys for the children and are subject to the same rules of professional responsibility applicable to all attorneys. Included are restrictions and obligations concerning ex-parte communications, client confidentiality and conflicts of interests." [3] Moreover, the Matrimonial Commission concluded that the attorney for the child is not a fiduciary, saying "The Commission believes that this issue requires further research, discussion, and consideration and recommends that the OCA consider revising its rules and policies to reflect more accurately the Commission's conclusion the attorney for the child is not a fiduciary." [4] The Matrimonial Commission further recommended adoption of the State

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[1] See Report of the Commission on Fiduciary Appoints (2005) available at http://www.nycourts.gov/reports/fiduciary-2005.pdf at page 53.

[2] *Law Guardian Representation Standards, Vol. II: Custody Cases* (3d ed., 2005) (adoption by the New York State Bar Association Executive Committee then pending)

[3] See Matrimonial Commission, Report to the Chief Judge of the State of New York [Feb.2006] available at http://www.nycourts.gov/reports/matrimonialcommissionreport.pdf at page 41.

[4] See Matrimonial Commission Report, supra, at page 38.

Bar Standards through a court rule, which followed in 2007 as 22 NYCRR Section 7.2 of the Rules of the Chief Judge.

III. 2010 Legislative Mandate for an Attorney Client Role

Following the State Bar Standards and the Matrimonial Commission recommendations, in 2010 the Legislature adopted a change in the title of "law guardian" to "attorney for the child(ren)" as used in Family Court Act Section 241 et seq. and other statutes, including Judiciary Law Section 35.[5] However, this was no mere change of appellation, as over time the courts have also directed a change in advocacy. The courts began to define the role of the attorney for the child(ren), an attorney-client relationship, from as early as 2003 (*see Campolongo v Campolongo*, 2 AD3d 476, 768 NYS2d 498 [2d Dept 2003]), which would necessarily dictate a change in their responsibility. No longer are these attorneys for the child(ren) to act in the capacity of *parens patriae*, an arm of the court reporting or recommending to the court what they believe to be in the child(ren)'s best interests. Rather, these attorneys are directed to advocate the child(ren)'s position. He/she acts as any attorney involved in the litigation representing the child client as a party in interest, zealously advocating the position of his/her client(s) within the boundaries of the ethical rules under which every attorney is governed. The legislative memorandum annexed to the bill stated in part ". . . almost from its inception, the ambiguous term 'Law Guardian', although defined in Section 242 of the Family Court Act as an attorney, has created debate and confusion. The term suggests a role that combines functions of the attorney-advocate with those of the guardian ad litem, functions that are inherently incompatible." [6]

As stated by Professor Merrill Sobie in the 2010 commentary: "[i]t is tempting to conclude that the amendment does not change substantive law. After all, Section 242 has always defined a

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[5] Representation of Children, 2010 Sess. Law News of N.Y. Ch. 41 (A. 7805-B) (McKinney's).

[6] NEW YORK STATE ASSEMBLYMEMORANDUM IN SUPPORT OF LEGISLATION, A. 7805B, revised 2/26/10

'law guardian' as an attorney designated to represent minors. The original drafters had apparently shied from expressly stipulating the obvious, inventing a confusing term unique to New York. However, titles are significant, regardless of their definitions, and the words 'law guardian', with their guardian ad litem connotation, influenced the Act's development. Viewed in that light, the 2010 legislative initiative represents the culmination of the progression from a hybrid lawyering model to a largely traditional attorney-client paradigm." This "new" attorney-client model, provides the child with an attorney who is his/her advocate and can assist the child/client in the comprehension of the factual and legal issues involved in their cases, without becoming an arm of the Court. ...."[7]

An attorney for the child should not be used as an investigative tool for the court or as an advisor (*see Matter of William O. v Michele A.*, 119 AD3d 990, 988 NYS2d 299 [3d Dept 2014]). Rather, in his 2015 Commentary, Professor Sobie states: "[j]udges should always treat attorneys for children as they do attorneys for adult parties, despite the occasional [or often] perceived notion that the [attorney for the child] is somehow 'independent' or 'neutral', and hence quasi-judicial."[8] Clearly, the role of the attorney for the child is different from the role of a guardian ad litem who functions as an arm of the court.

IV. Other Appointees under Part 36 Have Different Duties and Roles

Inasmuch as the other appointments contemplated by Part 36 of the Rules of the Chief Judge are of persons selected to make decisions for, in what they deem to be in the best interests of, others (*i.e.* guardians, guardians ad litem, court evaluators, attorneys for alleged incapacitated persons, court examiners, supplemental needs trustees, receivers, referees, certain persons performing services for guardians or receivers, and public administrators), or made when the appointee is alleged to be incapacitated (*see* MHL § 81.10), they are distinguishable from the appointment of an attorney for the child. As articulated in Section 7.2 of the Rules of the Chief Judge and by the various court decisions throughout the state, the attorney for the child is obligated

[7] Merrill Sobie Supplementary Practice Commentaries, Fam. Ct. Act § 241 McKinney's 2008.

[8] Merrill Sobie Supplementary Practice Commentaries, Fam. Ct. Act § 241 McKinney's 2015)

to zealously advocate for the child's position, not substituting his/her opinion as to what is in that child's best interests, with limited exceptions where the attorney for the child is convinced that the child lacks sufficient capacity, or at substantial risk of imminent, serious harm (*see* Section 7.2 (c) and (d) of the Rules of the Chief Judge; *see also Matter of Brian S.*, 141 AD3d 1145, 34 NYS3d 851 [4th Dept 2016]; *Matter of Mark T. v Joyanna U.*, 64 AD3d 1092, 882 NYS2d 773 [3d Dept 2009]).

The attorney for the child is an advocate for the child, similar to the advocates representing the parents in the underlying proceeding who are not subject to the Part 36 Rules even when they are paid privately. Similarly, when a court within its discretion, directs that compensation be paid to an attorney for the child privately, by one or both of the parties, this situation is analogous to a court, within its discretion, directing that one party pay the fees of the attorney for the non-monied spouse (*see* DRL § 237). The attorney for the non-monied spouse is not included under the Part 36 Rules, nor should be the attorney for the child paid privately pursuant to court order. The actions of the attorney for the child are governed by the same ethical rules or considerations as the other attorneys involved in the litigation, and he/she is not subject to the same fiduciary obligations as the other appointees subject to the rules of Part 36. Indeed, as noted above, the Matrimonial Commission concluded that, the attorney for the child is not a fiduciary and should not be so regarded. [9]

V. Attorneys for Children Are Rigorously Trained and Screened

Attorneys for Children are a highly qualified group as they are fully vetted, screened and required to complete a rigorous application process prior to being certified for inclusion on the Attorneys for Children Panels. Each of the Judicial Departments has an annual recertification process that requires panel members to complete a mandatory continuing legal education component. To assist in that regard, a panoply of continuing legal education seminars, at which experts and practitioners in the field of family law lecture on relevant topics including current caselaw and statutory developments, are held throughout the year. Further, the Directors within

[9] Matrimonial Commission Report, supra, at p. 38.

each of the Departments work in conjunction with advisory committees to review and establish their procedures for the certification and re-certification of the panel members, for the periodic evaluation of the panel members, for investigating complaints made against panel members, and for the removal of panel members.

VI. Part 36 Should Be Amended to Conform with the Legislative Mandate

The progression from "law guardian", an attorney acting in the position of *parens patriae* for the court making decisions for the child and recommendations to the court about the child's best interest, to "attorney for the child", an attorney zealously advocating for his/her client as recommended by the State Bar Standards and the Matrimonial Commission, has been mandated by the Legislature. In order to obey this legislative mandate and to finally eradicate the confusion which may surround the obligations of these child advocates, the courts must promulgate rules consistent therewith. Rule 7.2 is consistent with the legislative mandate insofar as it describes the functions of the attorney for the child. Unfortunately, Part 36 as currently written regarding privately paid Attorneys for Children, is inconsistent with the legislative mandate, and should be amended.

To continue assuring the transparency and safeguards contemplated by Part 36, we are proposing that Part 36 be amended by creating a separate category for privately paid Attorneys for Children under Section 36.4 Procedure After Appointment, similar to sub-section (e) of Section 36.4, which provides for the Approval and Reporting of Compensation Requirements Received by Counsel to the Public Administrator [see Section 36.4 (e) of Part 36]. Under our proposal privately paid Attorneys for Children would continue to be subject to the rules regarding appointment, use of lists, and disqualification contained in Sections 36.2(a), (b) and (c), as well as to the rules regarding approval and reporting of compensation received and awarded in a new Section 36.4 (g) so that the public would have free access to information about appointments by jurists to individual attorneys. However, it would be made clear that only those specific Sections of Part 36 would apply to privately paid Attorneys for Children because of their special qualifications as fully vetted, trained, and annually recertified panel members who are not fiduciaries.

Accordingly, we are suggesting the following amendment to Part 36.

<u>Proposal:</u>

Part 36 of the Rules of the Chief is hereby amended to read as follows:

§ 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 related 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) of this section, 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) attorneys for the child who are not paid from public funds, in those judicial departments where their appointments are authorized[;] <u>,except that only sections 36.2(a),(b) and (c); 36.3 and 36.4 (a) and (g) of this Part shall apply.</u>

(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); and

(10) the following persons or entities performing services for guardians or receivers:

(i) counsel;

(ii) accountants;

(iii) auctioneers;

(iv) appraisers;

(v) property managers; and

(vi) real estate brokers;

(11) a public administrator within the City of New York and for the Counties of Westchester, Onondaga, Erie, Monroe, Suffolk and Nassau and counsel to the public administrator, except that only sections 36.2(c) of this Part and 36.4(f) of this Part shall apply, and that section 36.2(c) of this Part shall not apply to incumbents in these positions until one year after the effective date of this paragraph.

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

(1) appointments of attorneys for the child 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) except as set forth in section 36.1(a)(11) a public official vested with the powers of an administrator;

(vi) a person or institution whose appointment is required by law; or

(vii) a physician whose appointment as a guardian ad litem is necessary where emergency medical or surgical procedures are required; and

(3) an appointment other than above without compensation, except that the appointee must file a notice of appointment pursuant to section 36.4(b) of this Part.

§ 36.2 Appointments

(a) Appointments by the judge. All appointments of the persons or entities set forth in section 36.1 of this Part, including those persons or entities set forth in section 36.1(a)(10) of this Part 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) of this Part.

(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 fourth 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 a chair or executive director, or their equivalent, of a state or county political party (including any person or persons who, in counties of any size or population, possess or perform any of the titles, powers or duties set forth in Public Officers Law section 73(1)(k)), 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; and

(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 $ 75,000 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) Registration. 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 lists. 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.

(f) Notwithstanding section 36.3(e), pending a final determination on the issue of removal, the Chief Administrator may temporarily suspend any person or entity from any list upon a showing of good cause that the person's conduct places clients or wards at significant risk of financial or other harm, or presents an immediate threat to the public.

§ 36.4 Procedure after appointment

(a) Upon appointment of a fiduciary pursuant to this Part, the Court shall forward a copy of the appointment order to the designated fiduciary clerk within two business days.

(b) 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) of this Part; 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;

(c) where compensation remains to be awarded;

(d) the compensation anticipated to be awarded; and

(e) 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.

(c) Approval of compensation. (1) Upon the approval of compensation of more than $ 500, the court shall file with the fiduciary clerk (i) 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; and (ii) a copy of the proposed order approving compensation.

(2) The court shall not sign an order awarding compensation exceeding $ 500 until such time as the fiduciary clerk has confirmed that the appointee has properly filed the notice of appointment and certification of compliance.

(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.
(5) Unless otherwise directed by the court, a fiduciary appointee may utilize supporting attorneys and staff in their firm without additional Court approval. Support attorneys and staff may perform tasks only under the fiduciary appointee's direct supervision: all appearances and reports must be made by the fiduciary appointee; and all compensation earned by support attorneys or personnel shall be charged to the appointee for purposes of compensation limits pursuant to this Part.

(d) 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.

(e) Reporting of compensation received by a referee to sell real property. (1) A referee to sell real property shall make a letter application to the court to authorize payment over $ 750 for a "good cause" adjournment or if there is a rebid or resale.

(2) Upon approval of compensation exceeding $ 750 to a referee to sell real property, the Court shall file a copy of its compensation order with the appropriate fiduciary clerk, who shall generate the required Unified Court System forms and monitor compliance and filing with the Part 36 processing unit. Payment of such compensation may not be made until the plaintiffs in the matter have received a copy of the court's compensation order.

(3) 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 $ 750.

(f) Approval and reporting of compensation received by counsel to the public administrator.

(1) A judge shall not approve compensation to counsel to the public administrator in excess of the fee schedule promulgated by the administrative board of the public administrator under SCPA 1128 unless accompanied by the judge's statement, in writing, of the reasons therefor, and by the appointee's affidavit of legal services under SCPA 1108 setting forth in detail the services rendered, the time spent, and the method or basis by which the requested compensation was determined.

(2) Any approval of compensation in excess of the fee schedule promulgated by the administrative board of the public administrator shall be reported to the Office of Court Administration on a form promulgated by the Chief Administrator and shall be accompanied by a copy of the order approving compensation, the judge's written statement, and the counsel's affidavit of legal services, which records shall be published as determined by the Chief Administrator.

(3) Each approval of compensation of $ 5,000 or more to counsel shall be reported to the Office of Court Administration on a form promulgated by the Chief Administrator and shall be published as determined by the Chief Administrator.

(g) Reporting requirements and approval of compensation of attorneys for the child set forth in section 36.1(3) of this Part

(1) Every attorney for the child 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 a notice of appointment on a form as promulgated by the Chief Administrator. The notice of appointment shall include:
(i) the date of the appointment and the name of the judge who made the appointment; and
(ii) a statement that the attorney for the child is qualified to accept the appointment pursuant to section 36.2 (c)of this Part and is in compliance with the requirements of the judicial department where the appointment was made; and
(iii) the amount of the initial retainer and hourly fee authorized by the appointment.

(2) Approval of a final order of compensation
(i) Every attorney for the child appointed pursuant to this Part shall upon completion of representation of the child(ren) client(s) or at such time otherwise permitted by the court shall file a statement of services rendered on a form as promulgated by the Chief Administrator which shall include the total number of hours of services rendered, the hourly billing rate for such services, the responsibility of each party to pay for such services, the total compensation earned, and the actual compensation received.
(ii) The court shall not sign an approval of a final order of compensation until such time as the fiduciary clerk has confirmed that the appointed attorney for the child has properly filed the notice of appointment as required in section 36.4(g)(1) hereof.
(iii) Compensation to attorneys for the children pursuant to this part shall not exceed the fair value of services rendered consistent with the order of appointment.
(iv) The judge shall file a copy of the final order of compensation with the fiduciary clerk at the time of signing the order.

§ 36.5 Publication of appointments

(a) All forms filed pursuant to section 36.4 of this Part 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.