Comments from the NYSBA Committee on Animals and the Law
to proposed OCA revisions to 22 NYCRR Part 36.1(b)(2)(ii)

The proposed OCA revision to the Part 36 fiduciary rules is well-intentioned. These comments address a potential unintended consequence. As a result of certain negative repercussions, there should be language in the proposed rules to protect the vulnerable populations who will have informal guardians ad litem appointed on their behalf.

A process that does not screen a potential guardian ad litem (GAL) has no way of ensuring that the proposed individual is someone who truly has the incapacitated person's well-being as their own, particularly as it relates to conflicts of interest. On its face the suggestion that a family member or friend can serve an individual may well be true, but for many individuals that is unfortunately not the case. Consider one scenario where GALs are appointed in an estate context for incapacitated heirs. The family member who steps up to assume the role of GAL may be honest and loyal to the incapacitated person, or they may not be. An unscrupulous or even misguided family member may try to influence the estate proceeding in such a way that the vulnerable person's interests are compromised.

Consider another scenario, one where GALs are appointed in a summary eviction proceeding. Eighty-five to ninety percent of eviction respondents, tenants or occupiers are unrepresented by counsel, while the representation rate for landlords is the reverse. While a guardian ad litem and an attorney fulfill different roles, an unrepresented litigant will benefit from a GAL. By its very nature an eviction hearing can often be rote and swift. Simultaneously, many people facing eviction are facing other issues besides losing their home, and having a GAL to assist them in representing their interests would efficiently benefit them and the thoroughness and integrity of the court process. A GAL who likely has a greater knowledge of the totality of circumstances the respondent is facing than the court does, a GAL who is a step removed from the immediate crisis the respondent is facing, might be better able to represent the respondent's interests than the respondent could do solo.

As part of the GAL appointment process, the requisite forms that a GAL submits to the court upon appointment include an affidavit that states that the GAL has no interest adverse to the incapacitated person, that the GAL is not connected in business with the attorney or counsel of the adverse party, and that the GAL is of sufficient ability to answer to the vulnerable person for any damages which may be sustained by any negligence or misconduct in the prosecution of said action by the GAL's actions. These assertions must still be required of any GAL appointed in any proceeding pursuant to CPLR Rule 1202 (c).

By extension, all GALs appointed outside of the Part 36 process must be made aware of these requirements and a court must insist they are complied with. These requirements must be re-stated explicitly in the proposed rules so as to avoid any chance that they will not be followed.

However, an informally appointed GAL might have interests in the housing at issue or be connected in some way with the landlord's interests that are not revealed to the court. Conflicts of interest can arise in virtually any situation. Adding the suggested language and processes

would serve the good intentions of the proposed amendments and impose a minimal burden that might yield great protections for litigants and the process.

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