The Role of the Referee in Mortgage Foreclosure Cases

Introduction

This document is designed to assist court-appointed Referees in navigating the complex responsibilities associated with mortgage foreclosure proceedings in New York State. Acting as a Referee is a critical fiduciary role that requires strict adherence to statutory requirements, ethical standards, and judicial directives. This guide aims to offer practical information, clarify procedural expectations, and point out common challenges so that Referees can carry out their responsibilities with accuracy, integrity, and professionalism.

Within this document you will find information on qualifying as a Referee, administering hearings, conducting foreclosure auctions, managing closings, and addressing surplus money proceedings. Additionally, this guide outlines the scope of a Referee's authority, compensation rules, and liability considerations, as well as best practices for maintaining impartiality and avoiding conflicts of interest.

These guidelines have been developed to support Referees in performing their duties while safeguarding the rights of all parties and upholding the integrity of the judicial process.

NOTE: This guide is informational only. Always follow the specific Order of Reference and Judgment of Foreclosure and Sale in your case, the Terms of Sale, applicable statutes, and local court rules.

NOTE: The Unified Court System (UCS) will update this guide regularly and publish the latest version on the UCS website.

To submit questions or comments about this guide, please email problemsolvingjustice@nycourts.gov.

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Qualifying as a Referee

1. Part 36 of the Rules of the Chief Judge (22 NYCRR § 36.0, *et seq.*) governs the application and appointment of Referees in foreclosures. 22 NYCRR § 36.1(a)(9); [PART 36. Appointments By the Court | NYCOURTS.GOV]

2. The Chief Administrator of the Courts maintains a list of attorneys who have applied for and who have been approved to act as Referees (§ 36.3). Generally, the appointing judge must choose an attorney from this list, but a judge may appoint an attorney not on the approved list upon a finding of good cause set forth in writing and filed with the fiduciary clerk (§ 36.2[b][2]).

3. The following individuals are disqualified from appointment as a Referee (§ 36.2[c]):

    a. Any Judge, Court-Attorney Referee, or Magistrate serving in New York State.

    b. Any relative of a Judge or person related by marriage to a Judge within the fourth degree of relationship.

    c. A Judicial Hearing Officer (JHO) seeking an appointment in the county where they serve as a JHO.

    d. Any UCS employee (full-time or part-time). Certain relatives of any UCS employee at salary grade JG24 or above are also disqualified from any appointment within the judicial district where the employee is employed.

    e. Certain individuals holding political positions, and certain members of their family, as well as members, associates, counsel, and employees of any law firms or entities while the individual is associated with that firm or entity.

    f. Any former judge (and certain relatives) who has retired from the bench within the past two years, if the appointment is made by a court within the jurisdiction where the judge served.

    g. Any attorney who is currently disbarred or suspended.

    h. Any individual convicted of a felony at any time, and any individual convicted of a misdemeanor and sentenced within the past five years, unless the individual receives a certificate of relief from disabilities.

    If a Referee becomes disqualified during an appointment, the Referee should immediately notify the Court and all parties by E-filing a letter on NYSCEF stating that they can no longer serve.

4. Application for Appointment

    a. Individuals interested in serving as a Referee may apply online: [Applications (for Guardians and Other Fiduciaries) : Guardian & Fiduciary Services (nycourts.gov)]. Qualified Referees must re-register every two years.

    b. The appointments are public record, and the UCS periodically publishes the names of everyone appointed and the compensation of each appointee. 22 NYCRR § 36.5.

Post-Appointment – What's Next?

1. By the time a Referee has been appointed: (1) an Order of Reference will have been issued after the defendant defaulted in answering the Summons and Complaint; (2) the plaintiff will have been granted summary judgment; or (3) an Order of Reference will have been issued after the plaintiff prevailed at trial.

2. The following documents will be provided to the Referee by plaintiff's counsel:

a. Complaint.

b. Note and Mortgage.

c. Order of Reference appointing the Referee.

d. Plaintiff's Affidavit of Amount Due (with annexed documents and exhibits to support the plaintiff's proposed calculation of the amounts due).

e. Referee's Oath (for your signature).

f. Proposed Referee's Report of Amount Due (for your signature).

g. A check for $350.00, unless the Court sets a different amount (CPLR § 8003[a]).

3. The Order of Reference in a mortgage foreclosure case generally restricts the scope of the reference to the following two functions:

   a. Calculating the amount due to the plaintiff (RPAPL § 1321(1); CPLR § 4311); and

   b. Determining if the property should be sold in one or more parcels.

4. Remember that the Court may appoint a different Referee to conduct the sale.

5. Civility & Ethics:

   a. If the Referee has a conflict, notify the Court and all counsel immediately so that the Court can assign a replacement.

   b. Remember that, as a Court-appointed Referee, you are required to adhere not only to the ethical rules for attorneys, but also to the ethical rules applicable to judges.

   c. Avoid actual conflicts (e.g., the Referee represents a party in another matter), as well as the appearance of impropriety. **NOTE:** Holding investments in a national bank acting only as trustee for securitized assets is usually not a conflict.

   d. When in doubt, notify the Court and ask for guidance.

The Referee's Duty and Report of Amount Due

1. The Referee's authority is limited to those powers granted by the Order of Reference.

   a. When a Referee is appointed solely to calculate the amount due, their authority is confined to performing that calculation and does not extend beyond that task. (RPAPL § 1321).

2. Evidentiary Support for the Amount Due

   a. Requirement of Admissible Evidence in Referee's Computation:
   A Referee's calculation of the amount due must be supported by admissible evidence. Otherwise, courts will reject it as not "substantially supported" by the record (*U.S. Bank National Association v Winnie Realty Group, LLC*, 237 AD3d 871, 873-874 [2d Dept 2025]).

   b. Use of Affidavits and Business Records to Establish Amount Due:
   Plaintiffs typically rely on sworn testimony or affidavits from their own employees or those of loan servicers to establish the amount due under the mortgage. The affiant's personal knowledge of the amounts owed is generally based on business records, such as payment histories, related to the subject mortgage. However, if these business records are not provided to the Referee, a court may determine the affiant's assertions to be inadmissible hearsay (*see Nationstar Mortgage, LLC v Durane-Bolivard*, 175 AD3d 1308, 1311 [2d Dept 2019]).

c. Laying a Proper Foundation for Business Records:
When the business records are provided to the Referee, a proper foundation must be laid for their admission by an affiant with personal knowledge of the business practices and procedures of the entity that created the records (*see U.S. Bank National Association v Winnie Realty Group, LLC*, 237 AD3d at 873). Particular care is required when records were created by prior loan servicers or lenders who did not employ the affiant. Such records may be admitted into evidence only if the affiant can establish that the records provided by the prior loan servicer or lender were incorporated into the records of the affiant's employer and routinely relied upon in its own business (*id*.).

3. What Sums Comprise the Amount Due?

a. Unpaid principal balance at the time of default

b. Interest

- Fixed Rate Notes: Interest is calculated on a daily basis (rate x principal ÷ 365) x number of days from default to calculation date.
- Adjustable-Rate Notes: Calculate daily interest separately for each rate period based on the change dates/index in the Note, then add the amount for each period together.
- Use 365 days, not 360, unless the parties agree to a 360-day year and the loan is not (a) $250,000 or less or (b) for a one- or two-family residential dwelling (GOL § 5-527).
- Round interest to the nearest cent.
- Interest runs through the Referee's calculation date. Note that GOL § 5-527(2) restricts the use of compound interest for 1-2 family owner-occupied homes.

c. Late charges up to the date of acceleration (usually when the action is commenced). For owner-occupied one- to six-family dwellings, late fees are capped at 2% of the payment (RPL § 254b; not applicable to commercial foreclosures).

d. Amounts paid by the mortgagee to protect its interest (taxes, PMI/MIP insurance, hazard insurance), if allowed by the Note and/or Mortgage.

e. Amounts paid to protect the property, if allowed in the mortgage and/or required by statute (e.g. property inspections, property preservation as required by RPAPL §§ 1307 and 1308, appraisals).

f. Payments to a senior mortgagee to keep the senior mortgage current, or in rare cases, to pay off the senior mortgagee to prevent a sale, if allowed by the Note and/or Mortgage.

g. Payment of any super-priority liens, if allowed by the Note and/or Mortgage.

The Referee's Hearing

For general information about a trial by a Referee, review CPLR Article 43.

1. If the defendant has not appeared or waived notice, then the Referee can usually calculate the amount due based upon the plaintiff's affidavit and supporting evidence in admissible form.

   - **NOTE**: The Referee should review the affidavit and evidence carefully to make sure that the amount alleged to be due is correct. This review will include checking the plaintiff's computations of the unpaid principal balance, accrued interest (with applicable rates and date ranges), taxes, fees, insurance, etc.

2. If the defendant has appeared and has answered or requested notice, they are entitled to a hearing on the amount due. See CPLR § 4313.

3. A "hearing" can be on the papers (affidavits and documentary evidence) unless the Court requires live testimony.

4. If the defendant does not submit opposition on time, the Referee can decline to conduct a hearing.

5. If a hearing should have been held but was not, the Court can order a new hearing if substantive issues exist. Otherwise, the defendant can raise disputes when opposing confirmation of the Referee's report.

6. The purpose of the hearing before the Referee is not to determine whether the defendant defaulted on the mortgage note; that is the province of the Court.

7. Since the hearing is not being held to decide a motion, there are no formal notice requirements, but as a best practice and a matter of courtesy, the Referee is encouraged to give sufficient notice to all parties who have appeared in the action (*see Bowery Sav. Bank v 130 East 72nd Street Realty Corp*., 180 AD2d 559 [1st Dept 1992]).

8. The Referee has until 30 days after the matter is finally submitted to issue their report. CPLR § 4319.

9. The Referee's compensation is $350 per day for the calculation and report, unless otherwise ordered or stipulated (CPLR § 8003[a]). If seeking additional compensation, the Referee must apply to the Court (CPLR § 8003[b]).

The Foreclosure Auction

1. Appointment: The Court appoints a Referee to conduct the sale. This will often be the same Referee who computed the amount due, but not always.

2. The Referee should receive several documents from the plaintiff's attorney:

   a. Judgment of Foreclosure and Sale (which advises the Referee on where, when, and how to sell the property).

   b. Terms of Sale (before the auction).

   c. Foreclosure Action Surplus Monies Form.

3. Compensation: The Judgment typically sets the statutory fee of $750 for conducting the sale (which includes the closing).

   a. Some judges allow a cancellation fee if the sale is canceled less than 24 hours beforehand. If this cancellation fee is not provided for in the Judgment, the Referee cannot collect one.

   b. Do not request extra payment directly from plaintiff's counsel, even if an auction is canceled or adjourned, without Court approval.

4. The plaintiff's attorneys or their agent will contact the Referee to coordinate the foreclosure auction with the appropriate court clerk and newspaper.

5. The Notice of Sale (RPAPL § 231) should be published once per week for four weeks or twice per week for three weeks in the newspaper specified in the Judgment.

6. Posting of the Notice of Sale

   a. Property outside city limits: If the property is located outside the city or village where the foreclosure sale will take place, the Notice of Sale must be posted in six public locations:

three in the town where the property is located and three in the city or town where the sale will occur.

Example:
A property in the Town of Penfield, NY is scheduled to be auctioned in the City of Rochester. In that case, the Notice must be posted:

In three places in Penfield, *and*
In three places in Rochester.

b. Property within city limits: Posting is not required where the premises are situated in a city or incorporated village where the sale will be held.

Example:
A property in the city of Rochester is scheduled to be auctioned in the City of Rochester. In this case, no posting is required.

7. In general, judgments of foreclosure and sale do not include provisions allowing the Referee to delegate the task of conducting the sale. For example, if “Jane Partner” is appointed, “Joe Associate” cannot run the auction.

8. The sale may be adjourned for no more than 28 days (the Notice of the Adjourned Sale need only be published once). If, however, the sale is adjourned for more than 28 days, the new sale must be re-published and re-posted as if the sale had not been scheduled in the first place.

9. If the Referee does not appear, the auction must be canceled, and a new date and time scheduled. Some courts require this request to be made by email or letter or by court form.

10. The Referee may not alter the Terms of Sale.

11. The Terms of Sale may not contradict the Judgment of Foreclosure and Sale. The Terms of Sale may contain additional terms, as long as they do not conflict with the Judgment.

12. Normally, the Judgment of Foreclosure and Sale will only allow the Referee to enter one bid on behalf of the plaintiff. If a Referee enters more than one bid on behalf of the plaintiff, the Referee’s impartiality may be compromised.

13. The Referee cannot bid on the premises on their own behalf. Doing so violates RPAPL § 232 and automatically voids the sale.

14. Watch out for collusion: Collusion contravenes the purpose of the sale, which is to yield the highest price, and may result in the sale being invalidated. If a Referee notices that bidders are colluding to keep the bid price down, the Referee should advise the Court.

15. Reading the Terms of Sale at auction is not required. RPAPL § 231(4) provides that the terms “must be made known.” The Referee can provide the Terms of Sale in writing to bidders; but if multiple bidders are present, reading them aloud may be helpful.

16. Practical Tips while at the sale:

    a. Announce the time and take note of it.

    b. Call for the attention of bidders, and state the address and case caption.

    c. Make the Terms of Sale known.

    d. Announce that the 10% deposit is due immediately after the sale.

    e. Open the bidding on the property.

f. As each bid is made, ask the bidder to identify themselves and record names and bid amounts.

g. Announce and take note of the time when the winning bid is accepted.

h. If a third party (someone other than the plaintiff) submits the winning bid and asks for permission to leave the auction and go to the bank to obtain a certified check, the Referee may allow it, but is not required to do so. The Referee may consider asking the second highest bidder to wait, in case the winning bidder does not return.

i. Collect full contact information for the purchaser (and their attorney) on the Memorandum of Sale.

17. After the Sale:

    a. The winning bidder signs the Memorandum of Sale.

    b. If a third party wins, the Referee must issue a receipt for the 10% deposit and collect contact information to schedule the closing.

    c. The Referee deposits funds in an IOLA account as the Judgment directs (some Judgments specify a particular bank).

    d. If the plaintiff is the winning bidder, the best practice is for the plaintiff to pay the Referee when presenting the Deed and Report of Sale for signature. This fee is typically $750 and covers both the sale and the closing.

    e. The Referee cannot accept a fee that is greater than that ordered by the Court. If the Referee seeks additional compensation, the Referee must file a motion showing good cause.

18. The Referee must file the Foreclosure Action Surplus Monies Form with the County Clerk within 30 days after the auction. Some judges also require a copy be sent to their chambers. *See* RPAPL § 1355.

19. Remote Bidding at Foreclosure Sales: Remote bidding is a court-approved enhancement to traditional foreclosure auctions that allows qualified bidders to participate without being physically present. It does not replace, but supplements, the in-person sale. If the assigned Referee learns that an auction is eligible for remote bidding and does not wish to participate, they must seek a replacement Referee from the assigning Court immediately.

    a. Key Points for Referees:

        - Auction Rules: While remote bidding is designed to be a uniform process, individual districts or counties may require specific language in their foreclosure judgments to accommodate local rules. More information, including local rules about remote bidding, can be found here: Remote Bidding in New York.

        - Sale Logistics Remain Unchanged: The auction still occurs in person at the time and location specified in the Judgment, or as otherwise scheduled by the Court or the Referee.

        - Role of the Plaintiff's Vendor: A vendor designated by the plaintiff will attend the auction and convey remote bids to the Referee.

        - Equal Treatment: Remote and live bidders compete on equal footing; the Referee should treat all bids as valid once announced.

        - Bid Submission: Remote bids must be submitted in real time. The vendor will announce these bids during the auction.

- Compliance: All remote bidders will be pre-qualified by the vendor, who will verify that they have escrowed funds sufficient to cover the purchase price.
- Referee's responsibility: Accept bids from the plaintiff's vendor as if they were in-person bidders.
- No Technology Requirement: Referees do not interact with the remote bidding platform and incur no additional duties or fees.

b. Changes from Traditional Auctions:

- Terms of Sale: The Terms of Sale will include remote bidding provisions.
- 10% deposit: If a remote bidder wins, the vendor will wire the 10% deposit by the end of the next business day, if not sooner.

The Foreclosure Closing

1. The Referee's duties at the closing are to:
   a. Collect the money from the purchaser.
   b. Pay any outstanding taxes that became liens as of the auction date.
   c. Make any other payments as directed by the Judgment.
   d. Execute and deliver the Referee's Deed (and any recording documents).
   e. File the Surplus Monies Form and Report of Sale.
2. Title: The plaintiff and the third-party purchaser should resolve any title issues beforehand.
3. Closing Delays: If the third-party purchaser closes late (beyond the date specified in the Terms of Sale), they may owe interest to the plaintiff. If the delay is caused by plaintiff or the Referee, and the purchaser was ready on time, the Referee should waive the interest.
4. Paying Taxes: The Referee may pay any outstanding taxes. Usually, the Referee will pay the taxes from the 10% deposit they are retaining.
5. Title Insurance: Third-party purchasers are not required to purchase title insurance, but they decline to do so at their own risk.
6. Disbursements:
   a. The Referee may not pay out any amount not authorized by the Judgment.
   b. The Referee should not pay junior lienholders from closing proceeds, except that a second mortgage holder may be paid where there are no intervening liens and the Judgment allows it (RPAPL §§ 1351 & 1354).
7. Surplus Funds:
   a. Any surplus funds must be deposited with the Court (or designated agency) within five days after the funds are received. RPAPL § 1354(4).
   b. The Referee must also file a Surplus Monies Report within 30 days after the sale. *See* RPAPL § 1355. Some Referees file the report themselves; sometimes the title company files it with the Report of Sale.
8. Common "Myths" Raised by Third-Party Purchasers:

a. *All taxes accrued up to the closing must be paid out of the proceeds*.
INCORRECT — Only taxes that became liens as of the auction date are paid from the proceeds.

b. *The transfer tax must be paid out of the sale proceeds*.
INCORRECT — The Judgment or Terms of Sale may require the buyer to pay the transfer tax. Also, the transfer tax is not a lien on the property at the time of the auction.

c. *A senior mortgage must be paid out of the proceeds of the sale*.
INCORRECT (for two reasons) — If the foreclosure is for a second mortgage, the sale is usually subject to the first mortgage. That means the buyer takes the property with the first mortgage still in place. If the first mortgage was already paid off but never officially removed from the records, it creates a title problem. In that case, the plaintiff must clear up the title issue before the sale.

d. *Third-party purchaser demands insurable title*
NOT REQUIRED – A third-party purchaser is only entitled to receive *marketable* title, unless otherwise directed by the Judgment of Foreclosure and Sale (*see Wells Fargo Home Mtge., Inc. v. Peterson,* 229 AD3d 658 [2d Dept 2024]; *Saxon Mtge. Servs., Inc. v Coakley*, 145 AD3d 699, 699 [2d Dept 2016] ["As a general rule, a purchaser at a foreclosure sale is entitled to a good, marketable title . . . A marketable title is a title free from reasonable doubt, but not from every doubt"] [internal citations omitted].

Potential Liability as Referee

Referees are court-appointed, but do not have judicial immunity and would not be represented by the Attorney General if sued (Public Officers Law § 17[2][a]).

A Referee might potentially have liability exposure if, for example:

1. The Referee converts sale funds, delays remitting money to the plaintiff, or fails to file the surplus monies report and deposit those funds.

2. The Referee fails to collect all sale funds, thereby shorting the plaintiff or the surplus.

Surplus Money Proceedings

1. This is similar to the calculation of the amount due to the plaintiff prior to the entry of Judgment, except that the Referee is charged with determining the priority of claims and the amount owed to each claimant.

2. The Referee must give all claimants notice of the hearing. RPAPL § 1361.

3. The Referee may take live testimony or decide the matter upon affidavits and documentary evidence.

4. Priority is generally based on who perfected their lien first. All claimed amounts should be documented through affidavits and supporting statements.

5. The Referee has broad authority to consider legal and equitable issues related to priority and amounts. *See* CPLR § 4301; *Citibank, N.A. v Schroeder*, 266 AD2d 332 (2d Dept 1999).

6. The Court will confirm or reject the Referee's report (*see* CPLR § 4403) and then direct the Clerk (or Director of Finance) to issue checks to junior lienholders.

Heirs Property Partitions by Sale Actions

In addition to being assigned to preside over a foreclosure auction, a Referee may also be assigned to preside over an heirs property partition sale under RPAPL § 993 (the "Uniform Partition of Heirs Property Act" or "UPHPA"). Heirs property partition actions and foreclosure proceedings each result in a sale of real property, but their purposes and legal frameworks differ significantly.

A standard partition can be initiated by one or more co-owners (tenants in common or joint tenants) who seek to divide or sell the property due to disagreements or an inability to manage it jointly, and where the circumstances of the case do not meet the standards set by the UPHPA. Standard partition actions are subject to a substantially less comprehensive statutory framework than heirs property partitions.

By contrast, a partition action involving "heirs property" as defined by RPAPL § 993(2)(e) is subject to the rules and procedures established by the UPHPA, which, among other requirements, provides for a court-monitored settlement conference process modeled after the CPLR § 3408 foreclosure settlement conference process.

Pursuant to RPAPL § 993, certain heirs property partition actions which proceed to judgment, unlike a foreclosure action, must end in a market sale rather than an auction. After an appraisal and an opportunity for a co-tenant buy-out, if neither a partition in kind nor a buy-out is feasible, the statute requires that the Court order a sale on the open market with a real estate broker, not a public auction.

1. If a Referee is designated to conduct a partition "auction," they should confirm with the Court whether the case is governed by RPAPL § 993.
2. If RPAPL § 993 applies, the Referee should:
    a. Stop any auction process that has already commenced; and
    b. Seek direction from the Court as to whether to proceed by open-market sale in compliance with RPAPL § 993.

Compliance Checklist

Court-appointed Referees must follow all rules and statutes, and the appointing Court's requirements. If the appointed Referee cannot comply with Part 36 or is otherwise unavailable, the Referee must promptly petition the appointing Court for a substitute.

Should the Referee choose to proceed:

DO NOT:

- Cancel or postpone auctions without good cause.
- Threaten to cancel auctions to force advance payment of the Referee's fee.
- Ask plaintiff's counsel directly for extra fees. Any additional compensation must be sought by motion and cannot be obtained without court approval.

DO:

- Timely file all required forms, including fiduciary forms, the Memorandum of Sale, the Report of Sale, and the Surplus Monies Form.
- Promptly notify the Court of a cancelled closing or a failure to close.
- Recognize that, by accepting the appointment, the Referee agrees to comply with local court rules and policies governing foreclosure auctions. If the Referee is unwilling or unable to meet those requirements, the Referee must immediately notify the Court.