



NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

JOHN W. MCCONNELL
COUNSEL

MEMORANDUM

September 12, 2016

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on a Proposal to Amend Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36 -- Appointments By The Court), Related Forms, and Section 207.13(a) of the Uniform Rules of the Surrogate's Court

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The Administrative Board of the Courts is seeking public comment on a proposal to amend Part 36 of the Rules of the Chief Judge (Appointments by the Court), related forms, and section 207.13(a) of the Uniform Rules of the Surrogate's Court proffered by the Office of Court Administration's Second Special Commission on Fiduciary Appointments, chaired by the Hon. Michael V. Coccoma (Deputy Chief Administrative Judge for the Courts Outside the City of New York and Statewide Administrative Judge for Fiduciary Matters). The Special Commission's proposals, issued following a comprehensive review and assessment of the regulatory process governing the judicial appointment and compensation of fiduciaries pursuant to Parts 26 and 36 of the Rules of the Chief Judge, are designed to replace outdated terminology, improve clarity, and promote compliance with obligations under those rules.

The Executive Summary of the Special Commission's Report is set forth as Attachment A. The proposed revisions to Part 36 and their rationale are set forth in Attachment B; proposed amendments to forms are set forth in Attachment C; the proposed amendment of 22 NYCRR §207.13(a) is Attachment D. Among other things, the proposals call for:

- authorization of temporary suspension from the Part 36 list pending investigation in appropriate cases;
- clarification of court processes for managing appointment orders, notices, and compensation orders;
- clarification of terms of use of attorneys and staff from the firms of fiduciary appointees;
- clarification of certain filing requirements of referees to sell real property; and

- substitution of the term “attorney for the child” for the outdated “law guardian.”

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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 November 15, 2016.**

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.

Attachment A

OCA Second Special Commission on Fiduciary Appointments

**Executive Summary:
Issues & Recommendations**



Executive Summary

To address growing concerns throughout the state regarding certain limitations and challenges that were affecting the current fiduciary appointment process, Chief Judge Jonathan Lippman, in his 2015 State of the Judiciary address, appointed the Honorable Michael V. Coccoma, Deputy Chief Administrative Judge for Courts outside NYC, as the Statewide Administrative Judge for Fiduciary Matters. In his new role, Judge Coccoma was tasked with organizing a comprehensive review and assessment of the fiduciary appointment and compensation processes pursuant to Part 26 and Part 36 of the Rules of the Chief Judge. To that end, Judge Coccoma established the Second Special Commission on Fiduciary Appointments. Members of the commission were selected based on the recommendation of judges and non-judicial fiduciary experts, including OCA employees and court attorneys. Once appointments were finalized, members were surveyed in an effort to identify problems with the current process and to solicit feedback and suggestions on how best to remedy these issues.

The inaugural meeting of the Special Commission was held on June 15, 2015 at the NYS Judicial Institute and the following mission statement was presented to the Commission:

“To review and reassess the effectiveness of the regulatory structure governing the judicial appointment of fiduciaries, and to formulate recommendations that will streamline and improve the fiduciary appointment and compliance monitoring processes and serve to promote public confidence and respect for the judiciary.”

This mission statement provided a succinct starting point upon which the Commission would extrapolate. Each Commission member was appointed to one of the following four subcommittees – each conducting a targeted analysis in a particular substantive area of the fiduciary appointment process:

1. Operations and Staffing;
2. Compliance and Audit;
3. Education and Training; and
4. Automation and Technology.

The Commission members tirelessly volunteered both their time and expertise to investigate the ever-changing landscape of Fiduciary Appointments. Each subcommittee’s analysis was

memorialized in a written report with findings and recommendations. While a more detailed analysis of the Commission’s findings and recommendations is set forth in the full Commission report, the foregoing summarizes the totality of the Commission’s work, underscoring the major issues identified and the corresponding recommendations of the Commission. The recommendations of the Commission include an eight-stage implementation strategy, which is summarized in order of priority as follows:

First, appropriate staff should be assigned to effectively implement key recommendations;

Second, education and training should be both mandated and increased for judges and non-judges;

Third, uniformity in Part 36 appointment orders should be implemented

Fourth, provide clarity related to “secondary appointees” in Court orders;

Fifth, implement a targeted outreach to encourage the enrollment and appointment of individuals with particular interests and/or skills;

Sixth, make specific amendments to Part 36 which, among other things, allow the Chief Administrator to temporarily suspend appointees with unsatisfactory performance;

Seventh, implement recommendations related to Attorneys for the Children;

Eighth, develop and implement a new Part 36 process that includes a “record everything” automated system.

With this plan, the appointment and monitoring process will be streamlined and improved. In addition, public confidence and respect for the judiciary will be accomplished.

1. Operations, Staffing, Compliance and Audit Issues and Recommendations:

A. Issue:

Current staffing is inadequate for effective processing and oversight of fiduciary appointments and monitoring of compliance with court rules and procedures.

Recommendations:

1. Review and assess current staffing with respect to the OCA units responsible for Part 36 processing, oversight and training.
2. Review and assess local court staffing needs with respect to Part 36 processing, oversight and training.

3. Train and assign local court personnel to provide on-site organizational assistance, supervision, oversight and training of judges, chambers staff and support staff.

B. Issue:

Fiduciary Clerks are not being forwarded all Part 36 appointment orders. There is no uniform procedure to assure that chambers notifies the Fiduciary Clerk when a judge has made a Part 36 appointment. The Fiduciary Clerk may only become aware of the appointment when there is an application by the appointee for approval of compensation. Additionally, there are no consistent, standardized internal checks following a Part 36 appointment to ensure the UCS-872 has been properly completed and returned prior to the judge signing and filing the UCS-875 for approval of compensation. Similarly, there are no consistent internal procedures to ensure that the Court completes and files a UCS-875.

Recommendations:

1. Amend Part 36 to state that “when a Part 36 appointee is appointed, a copy of the order shall be forwarded by the Court to the Fiduciary Clerk within two [2] business days.”
2. Amend Part 36 to make it clear that it is the judge’s responsibility to see that orders of appointment are sent to the Fiduciary Clerk and that orders approving compensation are not signed until the Fiduciary Clerk verifies that the appointee has filed a UCS-872 (Notice of Appointment and Certification of Compliance).
3. Require the Court Clerk to keep track of the number and types of fiduciary appointments made by the Court. Require a report to the Administrative Judge and OCA each quarter, copying the Fiduciary Clerk.
4. Where appropriate, separate appointment orders should be issued for each fiduciary appointed regardless of whether they are in the same case, appointed at the same time or are the same type of fiduciary. For example, separate orders appointing two different Guardians Ad Litem (GAL) when there are two or more individuals who have different interests.

5. Staff should utilize written logs or other in-house tracking methods as well as regularly accessing the Fiduciary Clerk database or examining court files to track forms submissions. Procedures to compel the return of overdue forms should include follow-up notices, emails or phone calls from the Fiduciary Clerk. Should the matter remain unresolved, it should be referred back to the appointing judge or may be calendared in a compliance part. If the appointee remains noncompliant, the matter may be referred to the Office of the Managing Inspector General for Fiduciary Appointments (MIGFA).

C. Issue:

Fiduciary appointments and compensation are not always clearly identified in court orders and are therefore not always processed and documented properly.

Recommendations:

Appropriate court personnel should provide oversight by conducting periodic audits, providing fiduciary staffing updates and ensuring timely training to new fiduciary staff members.

D. Issue:

There is a lack of uniformity with regard to fiduciary forms and orders, and these inconsistencies are confusing and inhibit compliance with Part 36 rules.

Recommendations:

1. Standard forms and model orders should be created and made available as part of the Part 36 materials. These orders and forms may be customized to correspond to certain categories of appointment and contain optional provisions that may be included or excluded as appropriate. The standard forms should be created to address two significant aspects of Part 36: 1) the ability of an appointee to serve under the Rules of Part 36, and 2) the scope of the appointee's authority. Create and promulgate a model order that sets forth the scope of the appointee's authority, with particular focus on those actions that require prior Court approval. Such an order would contain all language required

by Part 36 and also could include suggestions that fit into a “Best Practices” category. The model order could include affirmative provisions and prohibitions to remind the appointee of the limits of the appointment.

2. Require appointees to affirm continuing fitness with each appointment.
 - a. While the UCS-872 Form requires affirmation of eligibility to accept the appointment, best practices would suggest that an affidavit and/or affirmation be executed at the time of appointment by each Receiver and secondary appointee, affirming their competence for service. Part 36 should be amended to require this affidavit/affirmation. This step would significantly aid in the compliance process and identify any changes in qualifications that may have otherwise been overlooked.
 - b. The following language should be included in all orders appointing Part 36 fiduciaries:

“I am familiar with the duties and responsibilities of a (receiver, guardian, property manager, etc.), have experience in such area, and am fully capable and prepared to assume those duties and responsibilities which are commensurate with my abilities.”
3. The following language should be included in all orders appointing Part 36 primary and secondary appointees:
 - a. “ORDERED, that [Appointee Name], [Fiduciary ID], with offices located at [Business Address], is hereby appointed as [Appointment Type], [on behalf of _____]; and it is further”
 - b. “ORDERED that pursuant to 22 NYCRR §36.1, the [Appointment Type] shall be subject to Part 36 of the Rules of the Chief Judge; and it is further”
 - c. “ORDERED, that by accepting this appointment the [Appointment Type] certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR 36), including but not limited to, Section 36.2(d) (“Limitations on appointments based on compensation”), and if the [Appointment Type] is disqualified from receiving an appointment pursuant

to the provisions of Part 36, the [Appointment Type] shall notify the appointing judge forthwith; and it is further...”

4. The following language should be included in orders appointing all Part 36 fiduciaries, except for Mortgage Foreclosure Referees whose compensation is anticipated to be less than \$750, and Court Examiners in the 3rd and 4th Departments:

“ORDERED, upon receipt of this order and UCS Form 872 (Notice of Appointment and Certification of Compliance), the [Appointment Type] shall complete, execute and return the UCS Form 872 to the Fiduciary Clerk; and it is further...”

5. Establish a statewide fiduciary forms committee comprised of appropriate court personnel to review existing forms and orders and propose revisions and standardized language to facilitate enhanced compliance.

E. Issue:

It may be unclear to Receivers and Guardians that prior Court approval is required to hire and/or compensate “secondary appointees.”

Recommendations:

The following language should be included in all orders appointing Part 36 Guardians and Receivers:

1. “ORDERED, that pursuant to 22 NYCRR §36.1(a)(10) the Guardian [or Receiver] is not authorized to hire counsel, an accountant, auctioneer, appraiser, property managers, or real estate broker (secondary appointees) without further order of this Court, and that the Guardian [or Receiver] is not authorized to pay fees to any secondary appointee(s) without further order of this Court; and it is further,”
2. “ORDERED, that pursuant to Part 36.2(c)(8), no Guardian [or Receiver] shall be appointed as his or her own counsel, and no person associated with a law firm of that Guardian [or Receiver] shall be appointed as counsel to that Guardian [or Receiver] unless there is a compelling reason to do so; and it is further,”

3. "ORDERED, that compensation for the secondary appointee(s) is subject to prior Court approval upon submission of an affirmation showing experience/expertise, services rendered, time expended, prevailing rate in the community, rate charged, challenges presented and results achieves; and it is further..."

F. Issue:

Receivers routinely hire non-Part 36 secondary appointees (e.g., Licensing Agents) for whom there is no requirement for approval of appointment or reporting of compensation.

Recommendations:

Review 36.1(a)(10) for inclusion of additional appointment categories commonly encountered in receiverships.

G. Issue:

It is unclear to appointees whether they may utilize attorneys and/or support staff from their firm without an additional appointment by the Court.

Recommendations:

Unless specifically prohibited, the appointed individual should be permitted to utilize attorneys and/or support staff in their firm without additional Court approval.

However, all appearances and reports must be made by the appointed individual, and all compensation earned should be charged to the appointed individual. Part 36 should be amended to reflect this, and where appropriate, language should be incorporated into orders appointing Part 36 fiduciaries directing that attorneys or support staff in the appointed individual's office may perform tasks only under the appointee's direct supervision, and that all substantive appearances and reports must be performed and/or created by the person appointed. (NOTE: The Second Department specifically prohibits its Attorneys for Children from delegating tasks.)

H. Issue:

Judges are often unaware of a potential appointee's qualifications and experience. Although the official list of potential appointees is quite lengthy, judges frequently report that they are not comfortable selecting an "unknown appointee." This

unfamiliarity may result in appointments being concentrated among a relatively small group of individuals.

Recommendations:

1. Educate judges and court staff that the potential appointee's Part 36 application and resume (where provided) are available online in the Part 36 database. Each application includes detailed information regarding a potential candidate's background, skill, and experience.
2. Require all applicants to attach a current resume to their Part 36 application, and with each biennial registration.

I. Issue:

The list of qualified individuals is too limited.

Recommendations:

Targeted outreach would encourage the enrollment of individuals with particular interests and/or skills. It would also provide the opportunity to include other groups, such as senior lawyers and under-represented minorities.

J. Issue:

In many cases, such as guardianships involving low income or indigent individuals, and litigation involving financially distressed businesses, limited or no available funds are available to pay appointees for their service – making these cases unattractive to potential appointees, and as a result, eligible fiduciaries may refuse appointment.

Recommendations:

Utilize targeted outreach to senior attorneys and newer attorneys seeking additional experience. These individuals may not view these cases as unattractive and may be willing to accept appointment for reasons other than compensation.

K. Issue:

The Inspector General does not currently possess the authority to suspend an individual's eligibility for fiduciary appointment while under investigation by the

Managing Inspector General for Fiduciary Appointments (MIGFA) due to allegations of unsatisfactory performance or conduct incompatible with appointment.

Recommendations:

Amend the Part 36 Rules, as follows:

“Pending a final determination on the issue of removal, the Chief Administrator is authorized to temporarily suspend any person or entity from any list upon allegations, which establish probable cause, of unsatisfactory performance or conduct incompatible with appointment from that list, or if disqualified from appointment pursuant to this Part, upon the recommendation of the MIGFA and/or the Court, where the Chief Administrator finds that the conduct places clients/wards at significant risk or presents an immediate threat to the public.”

L. Issue:

It is difficult to identify and monitor those cases in which referees to sell real property are awarded compensation exceeding \$750. This generally arises when:

1. An Order of Reference authorizes \$250 for the referee to do the computation and report, and then the judgment of foreclosure authorizes payment of \$500 for the sale, but also authorizes a fee (often from \$200 to \$250) if a sale is adjourned.
2. An auctioned sale is not closed and the property has to be put up for rebid/resale, at which time the attorney is paid an additional fee.

In either situation, the attorney/referee who is awarded compensation exceeding \$750 must receive and file a UCS-872, and the judge approving the compensation must file a UCS-875. With a renewed emphasis on Part 36 compliance, some Courts have been sending a UCS-872 to all referees under the theory that any fee may potentially exceed \$750. This creates unnecessary work, and in counties with very heavy foreclosure calendars, an untenable workload.

Recommendations:

1. Continue the exemption, but amend Part 36 (§36.4[d]) to require that the referee must make a written application (letter is acceptable) to authorize

payment that is anticipated to total over \$750 for a “good cause” adjournment or if there is a rebid/resale.

2. Amend Part 36 (§36.4[d]) to require that upon approval of compensation over \$750, the Court must send a copy of its order to the Fiduciary Clerk, who will then generate the required UCS forms 872 and 875, monitor compliance and file with the reporting unit.
3. Amend Part 36 (§36.4[d]) to provide that plaintiffs may not pay the authorized additional compensation until they receive a copy of the Court’s order.

M. Issue:

In orders appointing referees there is insufficient language to advise them of their responsibilities under 22 NYCRR 36 when their compensation exceeds \$750 [22 NYCRR §36.4(d)].

Recommendations:

1. Place the following language in both the Order of Reference and Judgment of Foreclosure and Sale:
 - a. “ORDERED, that if the referee’s fees are anticipated to exceed \$750, the referee must apply [by letter] to the Court for approval of such fees, and the references comply with 22 NYCRR §36.4(d), before such fees can be paid; and it is further,”
 - b. “ORDERED, that plaintiff is only authorized to pay the referee fees in excess of \$750 upon receipt of an order by the Court authorizing such payment; and it is further...”

Such decretal paragraphs should be placed in the same area of the order as all other paragraphs referring to the appointee’s responsibilities under 22 NYCRR Part 36.

2. Require filing of the Foreclosure Action Surplus Monies Form with the Fiduciary Clerk and revise the form to include a “check box” for the referee to indicate receipt of total fees in excess of \$750. Although this will identify non-compliance

with Part 36 only after the fact, it will serve as an alert to the Fiduciary Clerk, Referee and the Court to address the issue.

N. Issue:

Inconsistencies between Part 36, which requires paperwork is returned within 30 days, and Surrogate's Court Rule § 207.13, which requires Guardians Ad Litem to qualify and report within 10 days, creates confusion regarding compliance with filing requirements.

Recommendations:

Amend the time frame in 22 NYCRR § 207.13 from 10 days to 30 days to make it consistent with Part 36.

O. Issue:

There is some confusion regarding the meaning of the phrase "guardians ad litem....their counsel and assistants" contained in § 36.1(a). Although there are enrollment categories for "Counsel to Receiver" and "Counsel to Guardian," there is no enrollment category for "counsel and assistants" to a GAL. Thus, it is unclear to both the Court and to appointees as to whether GALs may utilize attorneys and/or support staff from their firm without an additional appointment by the Court.

Recommendations:

Part 36 should be amended to clarify that the appointed individuals may utilize attorneys and/or support staff in their firm without additional Court approval unless specifically prohibited, and such language should be incorporated into all fiduciary appointment orders directing that "attorneys or support staff in the appointed individual's office may perform tasks under the appointee's direct supervision, but all substantive appearances and reports must be performed and/or created by the person appointed."

P. The following is a list of issues all relating to Attorney for the Child (AFC) appointments:

Issues:

1. Many private-pay Attorney for the Child (AFC) appointments are unreported by the Court.
2. A UCS-872 is often not sent to AFC appointees.
3. AFC appointees frequently fail to return a completed UCS-872 to the Fiduciary Clerk.
4. Because AFCs do not consistently follow required procedures for approval of compensation, a UCS-875 approving compensation is not generated by the Court, and thus, a significant portion of compensation goes unreported pursuant to Judiciary Law 35-a.

Recommendations:

1. Formulate and mandate online training regarding the Part 36 Rules for all judges who may appoint private-pay AFCs.
2. Formulate written and online training materials regarding the requirements of Part 36 and mandate online training for all AFCs seeking registration for private pay appointments.
3. Require judges and appointees to use standardized UCS forms for the order appointing an AFC (UCS-880), the AFC's affirmation of legal services (UCS-881), and the final order approving the AFC's compensation (UCS-882).
4. Implement a case monitoring system to ensure that, upon the conclusion of service, AFCs submit an affirmation of services (UCS-881) and a proposed final order approving compensation (UCS-882). A case should not be closed unless and until the Court signs a final order approving the AFC's compensation and a UCS-875, when required.
5. Amend Part 36 as follows:
 - a. Substitute "Attorney for the Child" for "Law Guardian."

Q. Issue:

When a referee permits a winning bidder at an auction sale to assign the right to purchase to a third party prior to the closing, there is a disruption in the chain of title.

Recommendations:

Referees should not be permitted to transfer title from the actual purchaser at the sale to a third party at the closing. The following language should be included in all orders appointing Part 36 referees:

“ORDERED, that the closing of title shall take place at the office of the referee, or at such other location as the referee shall determine, within forty-five (45) days after such sale unless otherwise stipulated by all parties. The referee shall transfer title only to the successful bidder at the auction. Any delay or adjournment of the closing date beyond forty-five (45) days may be stipulated among the parties, with the referee’s consent, up to ninety (90) days from the date of sale, but any adjournments beyond ninety (90) days may be set only with the approval of this Court; and it is further...”

R. Issue:

There is no mechanism in place for oversight of supplemental needs trusts created for an injured party (often a child) outside of an Article 81 guardianship. Although the trustee must file an annual accounting with the County Clerk, the accounting is not reviewed by a judge or a referee unless the trust instrument itself requires such review.

Recommendations:

Because of the wide-ranging ramifications regarding the regulation of trusts, this issue should be referred to Surrogate’s Court Advisory Committee **and/or the Advisory Committee on Civil Practice** to consider whether it is appropriate to adopt a court rule or statutory amendment to require the Court or a Referee to review annual accountings for SNTs created outside of guardianships or other court proceedings.

2. Education and Training Issues and Recommendations:

A. Issue:

There is currently no training required for list enrollment of foreclosure referees or for enrollment in the following secondary appointment categories:

1. Counsel to Guardian
2. Counsel to Receiver
3. Accountant (to Guardian or Receiver)
4. Appraiser (to Guardian or Receiver)
5. Property Manager (to Guardian or Receiver)
6. Real Estate Broker (to Guardian or Receiver)

Recommendations:

Require specialized training for Foreclosure Referees, Counsel to Guardian and Counsel to Receiver appointees, and require a brief training for all remaining secondary appointment categories regarding how their appointment relates to the Guardianship or Receivership.

B. Issue:

Training for the eight categories of primary appointment is generally provided by sponsoring organizations utilizing an OCA-approved curriculum. However, the approval does not expire, and there is no mechanism in place to ensure that programs are routinely reviewed and updated.

Recommendations:

Review and recertify the training curricula used by sponsoring organizations every two years.

C. Issue:

Fiduciaries in eight primary appointment categories are required to receive training at the onset of their qualification, but there is currently no requirement for retraining to obtain recertification.

Recommendations:

Mandate comprehensive training utilizing an OCA formulated and approved curriculum for initial qualification of all fiduciaries, and require biennial refresher training as a condition of biennial recertification.

D. Issue:

A lack of routine mandatory training for judges, chambers staff and support staff fosters an environment of limited understanding and confusion regarding the requirements and procedures for fiduciary appointments pursuant to Parts 26 and 3 of the Rules of the Chief Judge.

Recommendations:

1. Increase education and training for all those involved in Part 26 and Part 36 appointments.
2. Mandate annual education and training for all judges making such appointments (including those designated as Acting Supreme Court Justices), chambers and court support staff. Incorporate fiduciary training for judges as part of the regular program at judicial seminars.
3. Incorporate instructions/directions regarding Part 26 and Part 36 in the Judge's Bench Book.

3. Automation and Technology Issues and Recommendations:

A. Issue:

The current process is very complex and time-consuming. These shortcomings discourage compliance and hinder monitoring.

Recommendations:

Develop a new "record everything" statewide automated fiduciary system that captures all appointments, certifications and compensation orders.

B. Issue:

Since judges are not required to report compensation of \$500 or less, OCA cannot accurately track annual compensation for any given fiduciary, and the fiduciary bears the responsibility to inform the Court when they have reached or exceeded the annual compensation cap – this likely leads to inaccurate reporting. In non-Part 36 appointments, the Notice of Appointment [UCS-872] form IS NOT filed, but a Statement of Approval of Compensation [UCS-875] form for compensation exceeding \$500 IS required for most non-Part 36 appointments. As such, there is no

way to match the compensation award to the corresponding fiduciary appointee – creating a significant gap in reporting of compensation awarded to certain fiduciary appointees.

Recommendations:

1. All appointments will be recorded in the automated system (and categorized as Part 36 or non-Part 36) thereby creating an electronic record to which to attach any subsequent compensation awarded.
2. All compensation awards will be recorded irrespective of the amount of compensation to facilitate three major objectives:
 - a. Enabling OCA to accurately calculate the total compensation awarded for any given fiduciary as a reliable reference for the Court;
 - b. Identifying fiduciaries appointed pursuant to Part 36 who have reached or exceeded the annual compensation cap; and
 - c. Creating a comprehensive accounting of all fiduciary appointments, including non-Part 36 appointments, and all corresponding compensation, including non-Part 26 compensation under \$500, for the purposes of accurate reporting and public transparency.
3. Each Part 36 fiduciary appointee must be an individual - not an agency/organization - and is required to have an “account” and a unique identifier.

C. Issue:

The Part 36 process relies too much on paper and is difficult to navigate. The filing of Appointment and Compensation forms is cumbersome, and the manual entry of fiduciary information is burdensome to court staff.

Recommendations:

The system will replace paper forms with online entry, and the system will use email (and possibly text messaging) not regular mail to communicate with appointees.

The Court will be able to generate appointment and compensation orders

electronically from the system. The efficiencies of a fully automated system will make the process more streamlined, and thus more easily navigable.

D. Issue:

Required forms are not filed timely or may not be filed at all.

Recommendations:

Send automated email verifications to all appointees. Require Part 36 appointees to complete and submit an online Notice of Appointment form [UCS-872], and require non-Part 36 appointees to acknowledge/affirm receipt of the Order of Appointment within 30 days. Send routine automated follow-up emails if required data has not been entered and submitted within 30 days.

E. Issue:

Compliance by secondary appointees is extremely poor.

Recommendations:

The secondary appointee's appointment record would not stand on its own. It will be attached/linked to the primary appointee's appointment record, and the primary appointee would be copied on all automated email notifications sent to the secondary appointee – creating a culture of awareness. Periodic emails will be sent to primary appointees reminding them that Court approval is required to hire and compensate secondary appointees, and asking them to affirm whether or not a secondary appointee has been hired and/or compensated. If hiring/compensating a secondary appointee is acknowledged, notification will be sent to the Court.

F. Issue:

Compensation orders are not reported by the Court and/or compensation is made by the appointee without proper Court approval.

Recommendations:

The "record everything" system will include:

1. Entry of Statement of Approval of Compensation [UCS-875] data, including the 35-a information, as part of the original appointment record, which must be electronically confirmed by the judge.

2. Indicators when required appointment data is incomplete – alerting the user that the compensation process should not be initiated until all steps in the appointment process have been completed.
3. Automated emails requiring appointees to acknowledge/affirm receipt of Approval of Compensation Orders – prohibiting fiduciaries from making payment until this step is completed.

G. Issue:

Currently available means of monitoring compliance are cumbersome and inefficient.

Recommendations:

The “record everything” system must:

1. Provide automated alerts if required fiduciary data is incomplete (e.g., when compensation is ordered prior to the filing of a Notice of Appointment).
2. Send electronic notification of compensation orders and require fiduciaries to electronically “acknowledge and accept” the fee approval of any amount.
3. Send follow-up notices and reports to the judge, Fiduciary Clerk, and appointee (and primary appointee if appointee in question is a secondary appointee) when an order is issued without complete information.

H. Issue:

Due to factors such as suspected underreporting, the absence of a requirement for non-Part 36 appointees to formally acknowledge appointment, and the absence of a requirement to report compensation under \$500, available statistics are inherently incomplete and inaccurate.

Recommendations:

A “record everything” automated system will provide accurate, comprehensive and readily available online statistical reports to Fiduciary Clerks, judges and chambers staff, court administrators, and the Appellate Division. Statistical reports may be configured to compile information aimed at enhancing the effectiveness and efficiency of monitoring fiduciary compliance.

I. Issue:

Developing a new “record everything” automated system will require a significant commitment of time and resources.

Recommendations:

Attempting to enhance existing systems may seem quicker and easier. However, enhancing current systems would necessitate a similar (if not greater) commitment of time and resources, and would simply not yield the extensive benefits of a new mandatory automated system. While a “record everything” approach may seem extreme, quick and easy attempts to enhance current systems have repeatedly failed to yield the desired results. Recording all appointments and compensation is the best path to: 1) realize maximum compliance with Part 36 and Part 26 rules, 2) effectively monitor the fiduciary appointment process, and 3) ensure public transparency. Anything short of that essentially leaves us in no better a position than we are in today.

Conclusion

The above recommendations offer cogent and feasible remedies to many of the issues identified in the current fiduciary appointment and compensation processes. While some are near term and some are longer term initiatives, implementing these recommendations will streamline and improve the process and aid in achieving the following four paramount organizational goals:

- Maximum compliance with Part 36 and Part 26 rules
- Effective monitoring and reporting of the fiduciary appointment and compensation processes
- Public transparency
- Public confidence in and respect for the judiciary

Commission Members

Hon. Michael V. Coccoma; *Deputy Chief Administrative Judge – Courts outside NYC & Statewide Administrative Judge for Fiduciary Matters, Office of Court Administration*

Hon. Sharon A.M. Aarons; *Justice of the Supreme Court, Bronx County Supreme Court – Civil Term*

Richard Adler; *Case Management Coordinator, Nassau County Supreme Court*

Mark L. Annunziata; *Chief Clerk, Monroe County Surrogate's Court*

Deborah Barrer, Esq.; *Principal Court Attorney, 5th Judicial District*

Nancy J. Barry, Esq.; *Chief Clerk, Westchester County Supreme & County Courts*

Nicole Botti, Esq.; *Principal Court Attorney, 7th Judicial District*

Hon. Russell P. Buscaglia; *Judge of the Court of Claims/Acting Justice of the Supreme Court, Erie County Supreme Court*

Elizabeth Candreva, Esq.; *Managing Inspector General for Fiduciary Appointments, Office of the Inspector General*

Ronald M. Cerrachio; *Chief Clerk, Richmond County Surrogate's Court*

John D'Alessandro, Esq.; *Court Attorney-Referee, Bronx County Supreme Court – Civil Term*

Jennifer DiLallo; *Principal Management Analyst, Office of the Deputy Chief Administrative Judge – Courts outside NYC*

Hon. Richard A. Dollinger; *Judge of the Court of Claims/Acting Justice of the Supreme Court, Monroe County Supreme Court*

Mary Doyle, Esq.; *Principal Attorney, Appellate Division – 4th Dept.*

Hon. Elizabeth H. Emerson; *Justice of the Supreme Court, Suffolk County Supreme Court*

Steven E. Flatow, *Principal Court Analyst, New York County Supreme Court – Civil Term*

Michele Gartner, Esq.; *Special Counsel for Surrogates and Fiduciary Matters, OCA Office of Guardianship & Fiduciary Services*

Hon. Donald A. Greenwood; *Justice of the Supreme Court, Onondaga County Supreme Court*

Margaret M. Gribbon; *Chief Clerk, Queens County Surrogate's Court*

Hon. David H. Guy; *Surrogate, Broome County Surrogates Court*

Tracy Hamilton, Esq.; *Director, Office of Attorneys for Children, Appellate Division – 4th Dept.*

Michael P. Hausler; *Chief Clerk, Bronx County Surrogate's Court*

Laurie A. Hubbard; *Chief Clerk, Chemung County Surrogate's Court*

Judith Israeli, Esq.; *Associate Court Attorney, Richmond County Supreme Court – Civil Term*

Karen R. Jordan; *Chief Clerk, Cortland County Supreme & County Courts*

Hon. Kathy J. King; *Acting Justice of the Supreme Court, Kings County Supreme Court – Civil Term*

Hon. Gary F. Knobel; *Acting County Court Judge, Nassau County Supreme Court*

Hon. Joan B. Lefkowitz; *Justice of the Supreme Court, Westchester County Supreme Court*
Alan Lowe; *Principal Court Analyst, Queens County Supreme Court – Civil Term*
Rob Marchiony, Esq.; *Appellate Court Attorney, Appellate Division – 3rd Dept.*
Hon. Andrea Masley; *Acting Justice of the Supreme Court, New York County Supreme Court*
Hon. Lee A. Mayersohn; *Justice of the Supreme Court, Queens County Supreme Court – Civil Term*
Amy Miller; *Deputy Chief Clerk, Orange County Surrogate's Court*
Paula B. Miller; *Chief Clerk, Schenectady County Surrogate's Court*
Hon. Paul Morgan; *Surrogate, Rensselaer County Surrogate's Court*
Chip Mount; *Director of Research and Technology, OCA Division of Technology*
Hon. Matthew Murphy; *County Court Judge & Surrogate, Niagara County Surrogates Court*
Joseph Musolino; *Court Clerk Specialist, Kings County Supreme Court – Civil Term*
Jose Pagan; *Case Management Coordinator, Bronx County Supreme Court – Civil Term*
Kristine K. Pecheone; *Chief Clerk, Oneida County Surrogate's Court*
William J. Perritt; *Principal Management Analyst, Office of the Deputy Chief Administrative Judge – Courts outside NYC*
Hon. Stan L. Pritzker; *Justice of the Supreme Court, Washington County Supreme Court*
Robert F. Quinlan, Esq.; *Principal Law Clerk, 10th Judicial District – Suffolk*
Jane Schreiber; *Director, Office of Attorneys for Children, Appellate Division – 1st Dept.*
Hon. Howard H. Sherman; *Justice of the Supreme Court, Bronx County Supreme Court – Civil Term*
Scott Singer; *Court Clerk Specialist, New York County Supreme Court – Civil Term*
Kris Singh, Esq.; *Principal Court Attorney, 4th Judicial District*
Margaret Sowah, Esq.; *Deputy Clerk of the Court, Appellate Division – 1st Dept.*
F. Christian Spies; *Chief Clerk, Schoharie County Multi-bench Courts*
Angela Stamm-Philipps; *Deputy Chief Clerk, Niagara County Surrogate's Court*
Hon. Charles Troia; *Acting Justice of the Supreme Court, Richmond County Supreme Court*
Michael Veruto, Esq.; *Chief Clerk, Niagara County Supreme & County Courts*
Frank Volz, Esq.; *Court Attorney-Referee, Suffolk County Surrogate's Court*
Laura Weigley, Esq.; *Assistant Deputy Chief Administrator, OCA Division of Administrative Services*
Harriet Weinberger, Esq.; *Director, Office of Attorneys for Children, Appellate Division – 2nd Dept.*
Susan M. Wilson; *Chief Clerk, Rensselaer County Surrogate's Court*
Sam Younger; *Deputy Director, OCA Division of Administrative Services*
Hon. Hope Zimmerman; *Justice of the Supreme Court/Supervising Judge Matrimonial Parts, Nassau County Supreme Court*

Attachment B

The Fiduciary Commission's recommendations pertaining to the Part 36 Rules are set out below, along with a summary of the rationale underlying each recommendation.

- Amend Sections 36.1(a)(3) and 36.1(b)(1) to eliminate the term “law guardian” and substitute the term “attorney for the child.”

The Fiduciary Commission recommended these revisions to eliminate outdated language.

- Amend Section 36.3 to add the following:

(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 probable 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.

Part 36 presently authorizes the Chief Administrator to remove an enrollee from the fiduciary eligibility list for “unsatisfactory performance list or any conduct incompatible with appointment.” [Section 36.3(e)]. The Fiduciary Commission recommended that the Chief Administrator be authorized to suspend an individual on the Part 36 eligibility list when he or she is under investigation by the Managing Inspector General for Fiduciary Appointments (MIGFA) due to allegations of unsatisfactory performance or conduct incompatible with appointment.

- Amend Section 36.4 to add the following:

(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 [2] business days.

The Fiduciary Commission proposed this addition to ensure that chambers timely notifies the fiduciary clerk when a judge has made a Part 36 appointment. Timely notification is critical to promote compliance with both the recording and reporting requirements of Part 36.

Part 36 requires that “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 ... a notice of appointment and a certification of compliance with this Part, on

such form as promulgated by the Chief Administrator.” [Section 36.4(a)(1)]. No compensation may be awarded unless the appointee has completed and returned this form. [Section 36.4(b)(2)].

UCS Form 872, the Notice of Appointment and Certification of Compliance, is generated by the court’s fiduciary clerk, who enters information from the order into the court system’s centralized electronic database. The fiduciary clerk then mails this form to the appointee, who is responsible for completing the form and mailing it back to the court. By completing, signing, and returning this form to the fiduciary clerk, the appointee formally affirms that he or she is eligible to accept the appointment. Upon return, the form is transmitted by the fiduciary clerk to the Office of Court Administration, which enters its return in the centralized fiduciary database, thus making the information publically available.

- Amend Section 36.4(b) [now 36.4(c)] as follows:

1) Upon [seeking] **the** approval of compensation of more than \$500, [an appointee must] **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) A judge shall not approve compensation of more than \$500, and no compensation shall be awarded, unless the appointee has filed the notice of appointment and certification of compliance form required by this Part and the fiduciary clerk has confirmed to the appointing judge the filing of that form.]~~

(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.

This is a corrective amendment, intended to improve clarity. It reflects the fact that UCS Form 875, the Statement of Approval of Compensation, is generated by the court's fiduciary clerk and transmitted to the judge by the fiduciary clerk, who must complete and sign the form.

- Amend Section 36.4 to add the following:

[(d)] (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 UCS 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.

The Fiduciary Commission proposed this amendment to promote compliance with the Part 36 filing requirements. Referees to sell real property and to compute whose compensation for such appointments is not anticipated to exceed \$750, are exempt from the requirement of filing a Notice of Appointment and Certification of Compliance. On occasion, however, a referee's compensation does exceed \$750, thus triggering the filing requirement. This generally arises when:

1. An Order of Reference authorizes \$250 for the referee to do the computation and report, and then the judgment of foreclosure authorizes payment of \$500 for the sale, but also authorizes a fee (often from \$200 to \$250) if a sale is adjourned.
2. An auctioned sale is not closed, and the property is put up for rebid/resale for which the attorney is paid an additional fee.

In either situation, the attorney/referee who is awarded compensation exceeding \$750 must receive and file a Notice of Appointment and Certification of Compliance, and the judge approving the compensation must file a Statement of Approval of Compensation. To ensure compliance, some courts send a Notice of Appointment and Certification of Compliance to every appointed referee. This creates a great deal of additional work, especially in counties with a very heavy high volume of foreclosure filings. This proposal is intended to facilitate the identification of cases in which referees to sell real property are awarded compensation exceeding \$750.

- Amend Section 36.4 to add the following:

(g) 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.

The Fiduciary Commission noted that it is often unclear to appointees whether they may utilize attorneys and/or support staff from their firm without an additional appointment by the court. This amendment is intended to eliminate confusion and promote clarity.

**Proposed Amendment of Part 36 of the Rules of the
Chief Judge (Appointments by the Court)**

Submitted for Public Comment
September 12, 2016

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Section 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 fundamental objectives that should guide all appointments made, and orders issued, pursuant to this Part.

Section 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) ~~law guardians~~ **attorneys for the child** who are not paid from public funds, in those judicial departments where their appointments are authorized;
- (4) court evaluators;
- (5) attorneys for alleged incapacitated persons;
- (6) court examiners;
- (7) supplemental needs trustees;
- (8) receivers;
- (9) referees (other than special masters and those serving otherwise 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) and 36.4(e) of this Part shall apply, and that section 36.2(c) shall not apply to incumbents in these positions until one year after the effective date of this paragraph.

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

(1) appointments of [~~law guardians~~] **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 the subject of the guardianship proceeding; a person or entity nominated as guardian by the subject of the proceeding; a person or entity proposed as guardian by a party to the proceeding; 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(a) of this Part.

Section 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 §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.

(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 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 a service to the same person or entity in further or subsequent proceedings.

Section 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 probable 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.

Section 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 [2] business days.

~~(a)~~ **(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 section 36.2(c) and (d) of this Part; and

(ii) a list of all appointments received 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 \$5,000 or more is anticipated to be awarded during any calendar year. The list shall include the appointment for which the filing is made.

(4) A person or entity who is required to complete the certification of compliance, but who is unable to certify that the appointment is in compliance with this Part, shall immediately so inform the appointing judge.

~~[(b)]~~ **(c)** Approval of compensation.

(1) Upon ~~[seeking]~~ **the** approval of compensation of more than \$500, ~~[an appointee must]~~ **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) A judge shall not approve compensation of more than \$500, and no compensation shall be awarded, unless the appointee has filed the notice of appointment and certification of compliance form required by this Part and the fiduciary clerk has confirmed to the appointing judge the filing of that form.]~~

(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.

~~[(e)]~~ (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)]~~ (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 UCS 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.

~~[(e)]~~ (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.

Section 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.

Attachment C

The Fiduciary Commission recommended the inclusion of uniform language in Part 36 appointment orders to eliminate confusion and emphasize appointees' obligations under the Part 36 fiduciary rules. The Fiduciary Commission's recommendations are set out below:

1. The following ordering paragraphs should be included in all orders appointing Part 36 primary and secondary appointees:

- a. "ORDERED, that [Appointee Name], [Fiduciary ID], with offices located at [Business Address], is hereby appointed as [Appointment Type], [on behalf of _____]; and it is further"
- b. "ORDERED that pursuant to 22 NYCRR §36.1, the [Appointment Type] shall be subject to Part 36 of the Rules of the Chief Judge; and it is further"
- c. "ORDERED, that by accepting this appointment the [Appointment Type] certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR 36), including but not limited to, Section 36.2(d) ("Limitations on appointments based on compensation"), and if the [Appointment Type] is disqualified from receiving an appointment pursuant to the provisions of Part 36, the [Appointment Type] shall notify the appointing judge forthwith; and it is further..."
- d. "ORDERED, that by accepting this appointment the [Appointment Type] certifies he/she is familiar with the duties and responsibilities of a [Appointment Type] and has experience in such area, and is fully capable and prepared to assume those duties and responsibilities which are commensurate with his/her abilities."
- e. "ORDERED, that attorneys or support staff in the appointee's office may perform tasks under the appointee's direct supervision [unless otherwise directed by the court], but all substantive appearances and reports must be performed and/or created by the appointee."

2. The following ordering paragraph should be included in orders appointing Part 36 fiduciaries, except for those who are not required to file a Notice of Appointment and Certification of Compliance (e.g, Mortgage Foreclosure Referees whose compensation is anticipated to be less than \$750):

"ORDERED, upon receipt of this order and UCS Form 872 (Notice of Appointment and Certification of Compliance), the [Appointment Type] shall complete, execute and return the UCS Form 872 to the Fiduciary Clerk; and it is further..."

3. The following ordering paragraphs should be included in orders appointing mortgage foreclosure referees:

- a. "ORDERED, that if the referee's fees are anticipated to exceed \$750, the referee must apply [by letter] to the Court for approval of such fees, and the references comply with 22 NYCRR §36.4(d), before such fees can be paid; and it is further,"
- b. "ORDERED, that plaintiff is only authorized to pay the referee fees in excess of \$750 upon receipt of an order by the Court authorizing such payment; and it is further..."
- c. "ORDERED, that the closing of title shall take place at the office of the referee, or at such other location as the referee shall determine, within forty-five (45) days after such sale unless

otherwise stipulated by all parties. The referee shall transfer title only to the successful bidder at the auction. Any delay or adjournment of the closing date beyond forty-five (45) days may be stipulated among the parties, with the referee's consent, up to ninety (90) days from the date of sale, but any adjournments beyond ninety (90) days may be set only with the approval of this Court; and it is further..."

4. The following ordering paragraphs should be included in orders appointing Part 36 Guardians and Receivers:

1. "ORDERED, that pursuant to 22 NYCRR §36.1(a)(10) the Guardian [or Receiver] is not authorized to hire counsel, an accountant, auctioneer, appraiser, property managers, or real estate broker (secondary appointees) without further order of this Court, and that the Guardian [or Receiver] is not authorized to pay fees to any secondary appointee(s) without further order of this Court; and it is further,"
2. "ORDERED, that pursuant to Part 36.2(c)(8), no Guardian [or Receiver] shall be appointed as his or her own counsel, and no person associated with a law firm of that Guardian [or Receiver] shall be appointed as counsel to that Guardian [or Receiver] unless there is a compelling reason to do so; and it is further,"
3. "ORDERED, that compensation for the secondary appointee(s) is subject to prior Court approval upon submission of an affirmation showing experience/expertise, services rendered, time expended, prevailing rate in the community, rate charged, challenges presented and results achieves; and it is further..."

Attachment D

**Proposed Amendment of Section 207.13(a) of the
Uniform Rules of the Surrogate's Court**

Submitted for Public Comment



Section 207.13 Qualification of guardians *ad litem*; filing report.

(a) Each guardian *ad litem* shall qualify within [~~10~~] **30** days of notification of appointment, or may be deemed unable to act. He or she shall review the court's guidelines for guardians *ad litem*, if available, and carefully examine all matters affecting the guardian's client and all processes and papers to ensure that they are regular and have been duly served. No decree shall be made in the proceeding until the guardian shall report these findings. The report shall be made in writing or, with the consent of the Surrogate, orally in open court, except as otherwise provided in SPCA 1754(4), within 10 court days of the guardian's appointment or from the date to which the proceeding was finally adjourned, unless extended by the court.

(b) A guardian *ad litem* in a proceeding in which a decree has been entered directing payment of money or delivery of property to or for the benefit of the guardian's ward must file a supplemental report within 60 days after a decree settling the account, showing whether the decree has been complied with insofar as it affects the ward. In all such cases, the fiduciary shall immediately notify the guardian in writing of the date and details of payment or delivery.

(c) The guardian's allowance may be authorized in the initial decree, but, except as provided in SCPA 2111, no allowance shall be paid until an appropriate report is made.