

Commission Proposes Changes In Fiduciary Appointments

BY NYPRR STAFF

A Commission of seventeen members appointed by Chief Judge Judith S. Kaye has issued a report recommending more than twenty changes in the system under which New York judges make appointments of fiduciaries, including referees, receivers, court evaluators, guardians, attorneys for fiduciaries, and guardians ad litem. At present, fiduciaries are appointed from a list maintained by the Office of Court Administration (OCA). Anyone may apply to be included in the list except a person who is related to a judge within the sixth degree of relationship.

Following is NYPRR's summary of the Commission recommendations. The complete text of the report may be found at www.courts.state.ny.us. Written comments about the recommendations should be sent by March 8, 2002, addressed to: Michael Colodner, Esq., Counsel, Office of Court Administration, 25 Beaver St., New York, NY 10004.

Training should be required for candidates on the Fiduciary Lists. At present, no training is required for inclusion on the OCA fiduciary lists. This should be changed and all candidates should be trained in the substantive issues pertaining to the fiduciary category they wish to serve in. Separate training programs would be required for receivers and guardians ad litem, for example. Candidates should be trained also in the rules governing fiduciary appointments and fiduciary filings. Candidates who qualify for the list should receive additional training when major changes in the law are enacted. Candidates who go through the fiduciary training programs should receive CLE credit.

Political party leaders, their law firms and their immediate relatives should be ineligible for appointment. The appointment of political leaders and their law firms to fiduciary assignments has been widely criticized, in part, because the leaders exercise influence over judicial nominations and selection. State and county party leaders - and their immediate relatives - should be excluded from appointment while in office and for two years after the leaders step down. The same prohibition should apply to the partners, associates and employees of the party leader's law firm.

Immediate relatives of higher-level nonjudicial employees should be ineligible for appointment. Under the existing rules, relatives of judges within the sixth degree of relationship are ineligible for appointment. The rules for non-judicial employees of the court system need not be so stringent, but immediate relatives (spouse, parents and children) of non-judicial employees at grade 24 or higher should be ineligible for appointment. In the past, these relatives have received numerous appointments.

Former judges should be ineligible for two years after leaving the bench. Some former judges have received an excessive number of appointments. This raises the perception that sitting judges are rewarding their former colleagues. At the same time, judges are often more qualified than others to handle fiduciary assignments. To strike a proper balance, former judges and their relatives (within the

sixth degree of relationship) should be prohibited from appointments for two years after the judges leave the bench. This two-year ban should also apply to former high-level non-judicial employees and their immediate relatives.

Criminal offenders and disbarred or suspended attorneys should be ineligible for appointment.

Anyone convicted of a felony should be permanently ineligible for fiduciary appointment. Anyone convicted of a misdemeanor should be ineligible for five years following sentencing. Attorneys who are disbarred or suspended should be ineligible during the period of disbarment or suspension. OCA should receive notice of disbarments and suspensions to enable it to remove the attorneys involved from the list. After reinstatement, the attorney may receive appointments, but he or she should disclose past and present disciplinary actions on the application for appointment.

A candidate's bankruptcy history should be made available. All applicants for fiduciary appointments should disclose their bankruptcy history. Because applicants with a history of bankruptcy may not be ideal candidates for appointment, judges and others should have access to this information.

Procedures should be adopted to remove fiduciaries from the list for good cause. The Chief Administrative Judge should be authorized to remove anyone from the fiduciary list for good cause. Under the existing rules, a fiduciary may be relieved of his or her assignment for dereliction of duties, but there is no procedure for removing anyone from the fiduciary list itself or from receiving any other assignment.

Judges should select the fiduciaries. The Commission considered several methods for selecting fiduciaries from the list of eligible appointees. One method considered was a blind rotational system. Another was a modified rotational system in which the judge would pick from a small group of candidates selected at random. The Committee decided to maintain the present system of granting each judge full authority to select from the entire list of candidates. The other steps recommended by the Commission to control appointments would help to ensure that inappropriate factors would not influence a judge's appointments.

Judges should select fiduciaries from the OCA list. The rules should make clear that judges should select fiduciaries from the OCA list. Appointees should be selected fairly from diverse backgrounds and experiences, including minorities, women and younger persons. In limited circumstances requiring particular expertise, a judge would be permitted to appoint a fiduciary not on the OCA list, but the fiduciary should be required to show that she meets the qualifications for the OCA list and to make the same filings as any other fiduciary.

Specialized fiduciary lists should be created. Inclusion of candidates on the fiduciary list should not be automatic. The present list is too large and unwieldy. The training and other requirements recommended by the Commission should help to make inclusion on the list more meaningful. Specialized lists should be created based upon the specific fiduciary capacity the candidate wishes to qualify for. These would be smaller and more manageable than the present longer indiscriminate list. The Committee does not presently recommend basing appointment on experience, although that may require further study.

Re-registration should be required for persons on the fiduciary list. One way to reduce the size of the fiduciary list is to require periodic re-registration. This would clean the list of people who have retired or

are no longer available to serve. Re-registration should be required every two years on a shorter version of the original application form.

Other types of judicial appointees should come under the fiduciary rules. The following court appointments, in addition to those already covered, should be regulated by the fiduciary rules: court examiners appointed by the court to review the reports and accountings filed by Article 81 guardians; special needs trustees appointed to administer a trust to enable a disabled person to maintain Medicaid eligibility after receiving a substantial personal injury award; and guardians ad litem in matrimonial cases appointed to investigate specific issues and report to the court. "Privately paid" law guardians in matrimonial actions are presently selected from law guardian panels maintained by the Appellate Divisions and need not come from the OCA fiduciary list, but they should be subject to the filing and other requirements applicable to other fiduciaries.

Other types of "secondary" appointees should come under the rules. "Secondary" appointees in receivership cases are presently subject to the rules. The rules should be extended to include other secondary appointees, including: counsel and accountants for Article 81 guardians and assistants to Article 81 guardians who perform investigative and other tasks. The primary fiduciary may request specific individuals on the list, but the actual appointment should be made by the judge.

Individual fiduciaries should be limited in the number of higher-paying appointments they may receive. The present rule restricting appointees to one appointment in any 12-month period for which the compensation is anticipated to be more than \$5,000 should be retained. It would be unwise to limit the number of appointments one person may receive in any specific time period. The Committee recommends, in addition, a new rule providing that no one person may receive more than \$25,000 in fiduciary compensation in any one 12-month period.

Judges must be more scrupulous in reviewing applications for compensation. Judges should not be permitting these current practices: billing by counsel at regular hourly rates for services which are not legal in nature and which should have been performed by the guardian or receiver as part of his own duties; retention by guardians and receivers of themselves or their law firms as their counsel to perform work which they should have done in their appointed roles. To remedy these practices, judges should not appoint counsel to fiduciaries unless the work required is clearly legal in nature and should not appoint a receiver or guardian to serve as his own counsel. Judges should be more scrupulous in reviewing fee applications. If these steps fail, the OCA should consider additional rulemaking or legislation.

Article 81 fiduciaries other than the guardian should not be appointed guardian. In Article 81 cases, a judge often appoints the court evaluator as the guardian. This may create the impression of conflict because the evaluator's function is to recommend whether a guardian is necessary in the first place. Except in a case with minimal assets, the evaluator should not be named as guardian. The attorney for the alleged incapacitated person (AIP) in an Article 81 proceeding should never be appointed as guardian for the AIP or as counsel to the guardian.

All persons on the fiduciary list should be assigned an identifying number. To avoid the confusion caused by the listing of multiple names for candidates in the OCA database, each candidate should be

assigned an identifying number, such as the last four digits of his social security number. This number should be listed on all papers and documents submitted by the fiduciary.

Law firms should report more than \$25,000 in fiduciary compensation. Because applications and data are maintained for individual lawyers only, there is no way of telling how much any one law firm has received from fiduciary appointments. To provide this data, every law firm which receives more than \$25,000 in fiduciary fees in a single 12- month period should be required to report those fees to the OCA. This information would be available to the press and the public.

Compensation should be reported to OCA in all cases, even if no compensation is received. Current law requires judges to submit approval of compensation forms only if the compensation exceeds \$500. Some lawyers argue that uncompensated pro bono work is therefore not reported and the public's perception of the fiduciary process is skewed. To provide a more realistic view of the process, compensation should be reported in all cases whether or not compensation is received (except for referees in mortgage foreclosure cases).

Periodic audits should be conducted of the fiduciary filing process. The effectiveness of any new oversight program requires periodic evaluation by the OCA auditing staff. The audits should include examination of court files, fiduciary clerks' records and the OCA fiduciary database. This will show whether all forms are being filed and information from the forms is being entered in the database. It will also show if the judges are refusing to approve compensation if the filing requirements are not being met.

The revised fiduciary rules should include a preamble. The new rules should be introduced by a preamble which clearly states that their objective is to ensure that fiduciaries are selected solely on the basis of merit, without favoritism, nepotism or any influence unrelated to the appointee's qualifications or the needs of the case. It should also instruct judges who make appointments to be mindful of general ethics principles and to avoid the appearance of impropriety or favoritism.

Judges should receive training on the fiduciary appointment process. As a regular component of the annual judicial seminars, judges should receive instruction on the fiduciary rules and their application. The instruction should be included in the training program for newly elected or appointed judges.

The court system should designate an ombudsman to provide information and field complaints about the fiduciary process. The Commission received many questions and complaints from the public during its deliberations about the fiduciary process. The need for permanent machinery to handle questions and complaints is clear. The Commission recommends that these functions be assigned to the Office of the Special Inspector General for Fiduciary Appointments.

Article 81 guardians in cases involving minimal or no assets should be compensated through public funds. Many attorneys have complained about the burdens of serving as guardian for an incapacitated person. These "pro bono" assignments are burdensome because they often last for years and involve work outside the office. A serious effort should be made to provide public funds to pay for these services. Some options: the creation of a public guardian office; the creation of an "18-B" type program for guardianship assignments; providing funds to existing legal services or to private and public social agencies to handle these assignments. In addition, CLE credit should be given to lawyers who perform uncompensated guardianship services.

Where practical, Article 81 cases should be assigned to a small group of judges in each jurisdiction.

The Commission does not advise assigning all Article 81 cases to a single judge. Nor does it recommend the use of all the judges in a county in Article 81 cases. Instead, it suggests that these cases be assigned in each county to a small group of judges. The groups of judges handling these cases should be rotated periodically.

An administrative support office should be created as a resource for judges handling guardianship matters. Because guardianship cases are highly specialized, thought should be given to an administrative office within the court system to serve as a resource for judges handling guardianship cases. This office would develop uniform forms and practices, approve training programs and investigate new technology.

Attorneys should not contribute to judges' campaigns for the purpose of receiving fiduciary appointments. A 1998 report by the New York City Bar suggested a link between lawyers' contributions to two Surrogates' campaigns and the fiduciary appointments made by these judges. "Pay to play" is wrong and violates the Code of Professional Responsibility. The Commission makes one specific recommendation at this time: that judges be prohibited for two years following their election from appointing to fiduciary assignments persons who served as their campaign managers, coordinators, treasurers or finance chairs. The prohibition would also apply to the immediate relatives of these persons and to their law partners and associates.