

## NY Courts Adopt Committee Suggestions On Fiduciaries

**B**y order of Chief Judge Judith Kaye, the courts have added new Rule 36 to 22 NYCRR. The new Rule is entitled and the changes in the appointment and compensation of fiduciaries recommended by a special Commission of seventeen members earlier in the year. [See, NYPRR January 2002, page 1.] Following is a summary of the new Rule's provisions.

***Application of Rule.*** The new Rule applies to the appointment by a judge of the Unified Court System of any of the following: guardians; guardians ad litem; law guardians not paid from public funds; court evaluators; attorneys for "alleged incapacitated persons"; court examiners; supplemental needs trustees; receivers; and referees other than special masters.

The Rule also applies to the following persons performing services for guardians or receivers: counsel; accountants; auctioneers; appraisers; property managers; and real estate brokers.

***Appointment by judge required.*** Only a judge authorized by law to make the appointment may appoint any of the persons recited above, including those persons included in the list because they perform services for guardians or receivers.

***Appointments limited to approved list.*** All appointments must be made from a list of applicants approved by the Chief Administrator of the Courts. Appointments of persons not on the list may be made only upon a written finding of good cause filed with the fiduciary clerk of the appointing court and with the Chief Administrator. No person may be appointed who has been removed from the list for unsatisfactory performance or for conduct incompatible with appointment.

Persons disqualified from appointment. The following persons are disqualified from appointment:

- judges of the Unified Court System or their relatives to the sixth degree of relationship;
- in any court in the county in which he serves on a judicial hearing panel, a judicial hearing officer pursuant to Part 122 of the Rules of the Chief Administrator;
- any full-time or part-time employee of the Unified Court System, and, within limits, their spouses, siblings, parents or children;
- for two years after he leaves his position, any executive director of a state or county political party, his spouse, sibling, parent or child and "the members, associates, counsel and employees of any law firm" associated with him;

- for two years following the election of any judge for whom he performed services, any person who would be appointed by that judge and who served as a campaign chair, coordinator, manager, treasurer or finance chair for "a candidate for judicial office," plus the spouse, sibling, parent or child of that person, or anyone associated with the law firm of that person.

Also disqualified are: for two years after he leaves office, any former judge of the Unified Court System, or his spouse, sibling, parent or child, but only within the jurisdiction in which he served as judge; during the period of disbarment or suspension, any lawyer who has been disbarred or suspended; and any person convicted of a felony, or, within five years after the date of sentencing, any person convicted of a misdemeanor.

In addition, a judge may not appoint: 1) either the receiver or guardian himself or any "person associated with a law firm" of the receiver or guardian, as counsel to the receiver or guardian; 2) any attorney for an alleged incapacitated person, as guardian of that person, or as counsel to the guardian; and 3) any person serving as a court evaluator, as guardian for the incapacitated person, except under extenuating circumstances set forth in writing and filed with the fiduciary clerk.

***Limitations on Compensation.*** The new Rules contain several provisions relating to the compensation of court- appointed fiduciaries:

1. No person may receive more than one appointment in any calendar year if compensation in that appointment is likely to be greater than \$5,000.
2. No person receiving more than \$50,000 in compensation by all New York courts in any one calendar year may be appointed to compensated assignments in the following calendar year.
3. Whenever an appointee seeks compensation greater than \$500, he must file with the fiduciary clerk a form approved by the OCA confirming that the appointee has filed a notice of appointment and certification of compliance (*infra*); a judge may not approve compensation greater than \$500 unless the fiduciary clerk confirms that the appointee has filed the notice of appointment and certification of compliance.
4. When a judge approves compensation greater than \$5,000, she must submit a statement in writing setting forth the reasons for the compensation and file a copy of her order and statement with the fiduciary clerk.
5. A law firm whose members, associates and employees have received approval of compensation greater than \$50,000 in any one calendar year, must report "such amounts" on a form created by the Chief Administrator (*infra*).
6. Compensation to any appointee shall not exceed the fair value of her services.
7. An appointee who serves as counsel to a guardian or receiver shall receive no compensation if her services should have been performed by the guardian or receiver himself.

***Procedure for Appointment.*** All candidates for fiduciary appointment must apply on forms promulgated by the Chief Administrator. The forms will be designed to elicit information necessary to establish that the candidate meets the qualifications for appointment and "to apprise the appointing judge of the applicant's background."

***Qualifications for Appointment.*** The Chief Administrator will fix the educational and training requirements for placement upon the lists of candidates for appointment. The Chief Administrator will define the rules and the applicable law, procedures and ethical standards for each category of appointment. Any educational or training programs or courses offered to candidates must be certified by the OCA. Attorneys participating in these programs or courses may be eligible for CLE credits if approved by the CLE Board.

***Establishment of Lists.*** The Chief Administrator will prepare separate lists of candidates for each category of appointment. He will also make available to the appointing judge "such information as will enable the appointing judge to be apprised of the background of each candidate." When necessary to enable the appointing judge to appoint a person with "substantial experience" in a category of assignments, the Chief Administrator may create the appropriate subsidiary list.

***Reregistration for Inclusion on List.*** Each candidate upon an approved appointment list must reregister every two years to remain on the list, in accordance with a procedure to be established by the Chief Administrator.

***Removal from List.*** A candidate for appointment on an approved list may be removed from the list "for unsatisfactory performance" or any conduct "incompatible for appointment" from the list, or if she becomes disqualified from appointment for some other reason. But no candidate may be removed until she has received a written statement of the reasons for her removal and is given an opportunity to submit facts in opposition.

***Procedure after Appointment.*** Within thirty days following any fiduciary appointment, the appointee must file with the fiduciary clerk of the court in which the appointment is made both a notice of appointment and a certification of compliance with Part 36 of the Rules. Both forms will be designed by the Chief Administrator. An appointee who will act without compensation need not complete the certification of compliance.

The notice of appointment must show the date of appointment and "the nature of the appointment." The certification of compliance must contain:

1. a statement that the appointment complies with the requirements for qualification for appointment (Section 36.2(c)) and with the limitations upon compensation (Section 36.2(d)).
2. a list of all appointments received by the appointee in the current calendar year and in the previous year, including: the name of the judge who made each appointment; the compensation awarded; and, where compensation remains to be awarded, the amount of compensation anticipated. If the compensation which remains to be awarded is expected to be more than \$5,000, it must be listed and described separately. If an appointee is unable to certify that the certification

of compliance meets the requirements of Part 36, he must so inform the appointing judge immediately.

As noted above, a law firm "whose members, associates and employees" have received approval for compensation exceeding \$50,000 under Part 36 in a single calendar year, is obligated to report the amounts of such compensation on a form prescribed by the Chief Administrator.

Persons appointed to serve as referees to sell property or as referees to compute need not file either a notice of appointment or a certificate of compliance if their compensation is not expected to exceed \$500.

***Publication of Forms and Appointment.*** All forms filed in accordance with Part 36 shall become public records. The Chief Administrator is instructed to 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."