

Report on Fiduciary Issues: Recommendations From a Guardianship Perspective¹

Introduction

The current study by the Commission on Fiduciary Appointments of court-appointed fiduciaries is particularly welcome. New York County Lawyers' Association ("NYCLA") believes that the public, courts, and litigants are generally well-served by the work of fiduciaries. However, NYCLA maintains that the policies, rules, and procedures applicable to fiduciary appointments beg for revision.

By recommending appropriate reform, the Commission on Fiduciary Appointments would best assist the Chief Judge to achieve the laudable goals of (1) articulating clear policies to guide appointing judges, fiduciaries, and participants in individual cases, (2) maintaining clear and accurate information on fiduciary candidates and appointees, with a system which avoids additional expense and facilitates compliance, and (3) making information available to the public to increase accountability and public confidence.

NYCLA, based upon the original analysis developed by its Committee on Elder Law, offers to the Commission a special expertise and a depth of knowledge in the single type of proceeding which almost universally involves two or more fiduciary appointments – guardianship proceedings commenced under Article 81 of the Mental Hygiene Law ("Article 81" and "MHL," respectively). These proceedings, by

¹ On June 12, 2000, the Board of Directors adopted the Report of its Committee on Elder Law. The report was drafted by the Chair of the Committee, Hon. Diane A. Lebedeff, and the Committee's Subcommittee on Fiduciary Issues: Phyllis E. Dubrow, Esq. (Chair), Carol R. de Fritsch, Esq., and Michael Miller, Esq.

statute, require the appointment of at least one, often two, and sometimes three fiduciaries that are subject to Part 36 of the Rules of the Chief Judge.

Elder Law Committee members bring the broadest possible range of perspectives, having served as: appointees to each of the fiduciary positions – guardian, court evaluator and assigned counsel; litigators both seeking and opposing the appointment of a guardian, who observe the performance of appointees and are familiar with fee applications in such proceedings; advocates both criticizing and defending the performance of guardians and other appointees; court examiners assigned by the Appellate Division to review the accounts and performance of guardians; and, legal educators who provide training on the regulatory system. For more than one year, its chair has presided over some 60% of the guardianship matters brought in the New York County Supreme Court.

The role of each fiduciary in an Article 81 matter is distinct:

- **The court evaluator** is often described as “the eyes and ears of the court.”

The court evaluator interviews all relevant parties including the person who is the subject of the proceeding, confirms and locates assets, determines the underlying medical condition and other relevant circumstances, recommends whether a guardian be appointed, and often proposes a guardian. The court evaluator must commence work immediately in order to finish the evaluation and submit a written report for a hearing mandated by MHL § 81.07 to be held within 28 days after the Order to Show Cause is signed by the judge. An evaluator may also take certain actions to protect the alleged incapacitated person’s interests prior to the hearing.

- **The counsel for the alleged incapacitated person** is sometimes appointed to represent an alleged incapacitated person, but such appointment is not required in every case. Counsel will be appointed, for example, upon request, or when temporary powers are sought before the date for the full hearing, or where a health care facility placement is sought. The court-appointed counsel must meet with the alleged incapacitated person and represent him or her but does not prepare a written report. Although it occurs rarely, the court may forego appointment of a court evaluator if appointing counsel.
- **The guardian** is subject to Part 36 rules only where the guardian is a non-relative, appointed by the court from the pool of fiduciaries. The guardian is not appointed until after the hearing, but the guardian's work goes on until well after the incapacitated person's death, past the wrapping up of the ward's final affairs, to the preparation and court-approval of a final account of the guardian's proceedings. In addition to marshaling assets and managing all property and financial affairs, the guardian may be charged with the maintenance of the ward's physical well-being, including housing, medical care, security, and other personal needs issues.

The responsibilities undertaken by fiduciaries in guardianship proceedings are often profound. Assignments are undertaken on very short notice. Unlike many other appointees, these fiduciaries frequently make critical decisions about living conditions and health care.

This report addresses the current regulations, policies and procedures pertaining to fiduciary appointments and the UCS-830 forms that serve to monitor

them. We focus on Part 36 of the Rules of the Chief Judge (the “Fiduciary Rules”).

The subjects upon which we comment are as follows:

- **Statements of purpose, policy objectives, and performance standards should be added to the rules.**
- **The current “\$5,000” formula is obscure and confounding.**
- **The Fiduciary Rules should set standards for fee applications.**
- **The fiduciary list should be properly maintained.**
- **Fiduciary compliance with reporting requirements should be encouraged.**
- **The use of 18-B to pay guardians of institutionalized indigents should be endorsed.**
- **Basic cautionary observations.**

Appended also is a suggested re-drafting check list for Part 36 of the Rules of the Chief Judge; the appendix lists areas of revisions proposed in the text of this Report, and add minor new points not addressed in the text.

Statements of Purpose, Policy Objectives and Performance Standards Should Be Added to the Rules

The current Fiduciary Rules, by their very nature, must reflect public policies so compelling that the rules are justified even in the absence of clear statutory support. There is general confusion as to how the Fiduciary Rules apply and what they are intended to achieve, which would be alleviated by statements of purpose and policies.

Possible statements to address these concerns include the following:

6. The Chief Judge has determined that it is in the public interest to adopt rules setting forth standards for the appointment and the performance of fiduciaries and to make information on such appointments available to the public.

This sort of a general statement as to the reason for the Fiduciary Rules, perhaps amplified in a preamble providing a statement of the historical impetus for them and the purpose of any amendments, would assist the public, the bench, the bar, and all other participants in such matters.²

7. Judges should strive to make appointments from a broad spectrum of qualified applicants and should refrain from appointing any one fiduciary with undue frequency.

Providing judges with a statement of objectives for appointments would be a respectful acknowledgment of the judiciary's ability to apply public policy. The goal of appointing a greater number of qualified potential fiduciaries should be expressly stated in the Fiduciary Rules.

² A statement of purpose should explain why some fiduciary positions are covered by the Fiduciary Rules and other positions not. Some examples of those that are not covered are arbitrators, appraisers not involved with receivership cases, and court-appointed trustees of Supplemental Needs Trusts.

8. Appointees should be capable of fulfilling their duties swiftly and fully and should promptly decline any appointment, or request removal, where a lack of availability or other circumstances may delay the progress of a case or impair the performance of fiduciary obligations.

Currently, there is nothing in the Fiduciary Rules which imposes an affirmative duty on an appointee or prospective appointee to advise the appointing judge of impediments to performance. The public and those involved with the matter would be best served by a stated policy making clear that an appointment is not a sinecure or a gesture of favoritism, but, rather, is a delegation of work to be done.

A statement addressing the obligations of a fiduciary would give strong support to a judge who finds that a fiduciary should be removed for not performing adequately, which is more likely to occur if a judge expands his or her universe of potential appointees to include applicants with whose work the judge is not closely familiar. Such a stated policy could also serve as a basis for another participant in a matter to object to a fiduciary's performance.

9. Appointees whose fees are set on an hourly basis should serve efficiently at a reasonable cost in light of the goals to be achieved and the benefits conferred, while fully performing their obligations.

Generally, in Article 81 guardianship cases, the fees of court evaluators and counsel for the alleged incapacitated person are based on an hourly rate and the amount of time spent. Particularly in cases where the incapacitated person has substantial liquid assets, the incapacitated person and family members sometimes fear that, in a "feeding frenzy," work will be created in order to warrant payment to the fiduciary of a substantial share of those assets. Conversely, however, where assets are limited, the fiduciary should not hesitate to do whatever is required, irrespective of the potential fee.

10. Appointees whose fees are calculated as a percentage of the incapacitated person's assets should perform commensurate with any compensation to be awarded, and undertake essential tasks regardless of the adequacy of compensation.

There are inherent difficulties in cases that generate both generous and meager commissions. A policy should be articulated for the "percentage" fee situation, where there may be little or no correlation between the work required and the compensation that will be paid.

There may be a high fee where little work is necessary; conversely, substantial work may be required where assets will only support a modest fee. The policy should encourage the guardian of less than \$5,000 in assets to take the time to establish a burial fund and discourage the guardian who might leave \$100,000 in a low-interest account because the anticipated fee does not appear to warrant the effort and risk of finding an investment vehicle with a higher rate of return.

The Current "\$5,000" Formula Is Obscure and Confounding

Subsection 36.1 (c) of the current rule purports to limit appointments where the fiduciary's compensation is over \$5,000 and gives the appearance of promising to accomplish the objective of avoiding multiple appointments with substantial compensation. In practice, it is ineffective and mischievous. Most attorneys and judges admit to confusion as to the parameters of the rule and what it is intended to accomplish.

Under the current rule, a prospective appointee must certify that "receipt of this appointment will not give me more than one appointment within the prior 12 months for which the compensation was or is anticipated to exceed the sum of

\$5,000.00.”³

Glaringly, the current rule limits neither the number of appointments nor total compensation. Moreover, it requires information that may not be available, and it may serve to disqualify competent individuals unnecessarily.⁴ With the ambiguities and contradictions in the current rule, the potential appointee who takes a pessimistic view of potential fees – or a particularly favorable interpretation of the rule – will be eligible for more appointments than other candidates.

An appointee does not know how much a fee will be until it is received.

In truth, an appointee or prospective appointee has no way of knowing what a fee will be until it is received. For the new matter, when the appointee accepts the appointment, it cannot be foreseen how complex the new matter will be, what assets are available for payment, or whether the incapacitated person will die before very much time has been spent. For a prior matter, the prospective appointee still may not

³ This reference to compensation that is “anticipated” is one of the reasons the rule may be best described as “mischievous.” Without even allowing for compensation that is “reasonably” anticipated, the determination of “anticipated compensation” is subjective, as anticipated by the appointee. The corresponding standard which the appointing judge is directed to apply -- an appointment “for which compensation would exceed that permitted by this subdivision.” -- seems to be objective. However, that standard also is meaningless because the Fiduciary Rule contains no upper limit on compensation that may be exceeded.

Further, the UCS-830 forms do not serve to give the appointing judge any indication that a prospective appointee might be disqualified because of prior appointments. The Certification of Compliance (form UCS-830.1) that a new appointee is required to provide the appointing judge, listing prior appointments, gives no indication of the amount of compensation received or anticipated for any of them.

⁴ When a judge approves a “waiver” of the “\$5,000 rule,” the permissible reasons are limited to “continuity of representation or familiarity with a case” (22 NYCRR 36.1 [c]). This standard is different from the “waiver” necessary to appoint a person not on the fiduciary list, which includes “prior experience with the ward or estate” and adds the additional and often utilized element of “particular expertise necessary to the case”; the difference between these two standards promotes needless confusion and innocent mistake.

know whether the fee he or she anticipates will be awarded or, if awarded, whether there will be sufficient assets remaining for payment.

- **The current rule does not take continuing appointments into account, it ignores the number of appointments, and it fails to consider total compensation.**

It is incomprehensible why the current rule ignores the total compensation a fiduciary may receive.

Court evaluators and counsel for alleged incapacitated persons generally complete their service within three months; for those roles, far less than \$5,000 may be generous compensation. Under the current rule, there is no limit on such appointments if fees are \$4,999 or less, and an individual may be given dozens of such appointments with no limit to the total amount to be awarded.

Guardians, as many other fiduciaries, may serve for many years. Inexplicably, subsection 36.1 (c) ignores the compensation received from a continuing appointment and only asks about appointments within the prior 12 months.

- **Any monetary standard should be based upon total compensation actually received.**

The only practical basis for a limit on appointments is total compensation received. As noted above, asking a potential appointee about “anticipated fees” invites understatement; even an appointee who is optimistic may not receive the fee expected.

- **An alternative to the current rule is a general bar on any new appointment when a fiduciary has received a given amount in fiduciary fees in the prior 12 months. Such a rule could permit, where appropriate, with written justification, an additional appointment. At a higher dollar**

ceiling, there could be an outright prohibition on any new compensable appointment until compensation received in the prior 12 months falls below a threshold established at either the lower or higher amount.

An all-inclusive rule would be easier to apply and would be more honest. Such a rule would recognize that experienced fiduciaries may well have a number of continuing fee-generating appointments and that it nevertheless is to the public's benefit that they continue to apply their skills to newly arising matters.

Whatever the dollar limit, it should be considered a supplement to performance standards for fiduciaries and to a policy encouraging utilization of a broad range of appointees. After all, there is a profound contribution to the public weal where fees are commensurate with actual worthwhile work of a fiduciary and where dedicated service is provided.

We submit that the true purpose of any compensation limitation on appointments would be to recognize the limited capacity of any individual to devote the necessary attention to a number of demanding appointments. It is an appropriate concern of the Chief Judge whether any one fiduciary can fulfill the responsibilities delegated by a multitude of appointing courts.⁵

The Fiduciary Rules Should Set Standards for Fee Applications

NYCLA submits that additional text pertaining to fee applications should be added to section 36.4 of the Fiduciary Rules ("Compensation").

⁵ If the category of fiduciary roles covered by the Fiduciary Rules is expanded, the additional roles should be considered as the Commission addresses limits on compensation.

Helpful provisions would include the following:

- **Where appropriate, judges are encouraged to accept fee applications made at the hearing on the record, with or without affidavits of services rendered.**

Particularly in guardianship cases with modest assets, where fee awards also will be modest, it generally is appropriate to cut down the time a fiduciary is required to spend on a matter by waiving the requirement that the fiduciary prepare and submit an affidavit of services with a proposed fee order after the hearing. Allowing the application to be made at the hearing also would save the associated costs of copying and mailing the application.

In such matters as the no- and low-asset cases commenced by the Department of Social Services for the City of New York, where a court evaluator is paid a stipend of \$600, inclusive of disbursements, and which are a large percentage of the cases in New York City, it should be appropriate to award the stipend without requiring an affidavit of services. There can be no doubt that the court evaluator's report, a consideration of the amount of time spent in court for the hearing, and a statement on the record that a higher fee would be warranted if the fiduciary's normal billing rate were applied, is sufficient for such a modest award.

- **Fiduciaries should be required to append a copy of the completed UCS-830.1 and UCS-830.3 forms to their written fee applications and contemporaneously to submit a form UCS-830.**

Requiring that copies of the requisite Notice of Appointment (UCS-830.1) and Certification of Compliance (UCS-830.3) and OCA's form for approval of compensation (UCS-830) be appended to the request for compensation would relieve

confusion, promote timely processing, and encourage compliance with reporting requirements. If this requirement were incorporated into the Fiduciary Rules, clerks would be able to alert fiduciaries to the defect in their papers if they had not provided the required forms.

Many fiduciaries either forget to submit the UCS-830 form or believe that submission with the application for compensation appears presumptuous. The failure to submit the UCS form with the fee request turns each fee application into a two-step process and makes more work for the judge as well as the fiduciary.

- **Where written fee applications are based on the time spent on a matter, the fiduciary should be required also to include a brief statement of the results accomplished and benefits conferred for the period covered by the application with a detailed time listing.**

A statement of results accomplished would place a fee request in perspective. Such a statement also would assist judges who must write a supporting order approving a fee over \$2,500, as required by Subsection 36.4(b).

The application also should state the date that specific services were rendered and the time spent, in tenths of an hour. Where fee applications are based only on a narrative text, other participants and the judge are unable to scrutinize the time spent on individual tasks.

- **Requests for reimbursement of out-of-pocket costs should be based on actual costs and only for items which are not included within hourly billing rates as overhead.**

Attorney-fiduciaries tend to prepare requests for compensation based upon their office practices. It should be a requirement that the actual out-of-pocket costs be given; a request for a court order directing that another's funds be paid to a fiduciary is not the equivalent of a client who can agree to be billed "profit center"

disbursement rates. An example of such a practice is \$50 charged for overnight mail.

An actual sworn statement that disbursement items are not included in overhead is well known in Surrogate's Court practice (*Matter of Aitken*, 160 Misc. 2d 587, 591, 610 N.Y.S.2d 436, 439 [Surr. Ct., N.Y. Co., 1994, Roth, J.]) and is a useful assurance to any court.

The Fiduciary List Should Be Properly Maintained

Section 36.2 of the Fiduciary Rules requires the Office of Court Administration to maintain a list of applicants seeking appointment. In theory, this list provides an appointing judge with a pool of available applicants from whom to select appropriate fiduciaries and thereby avoid any appearance of partiality. The list could facilitate an appointing judge's efforts to reach out to a broader group of prospective appointees. In practice, however, the fact that the list is so out of date discourages rather than facilitates its use for that purpose.

If the fiduciary list is to be useful, the following is recommended:

- **The fiduciary list must be kept up-to-date.**

Estimates are that no more than 20% of the key information -- such as status, address, and telephone number -- is accurate. As one example, former Surrogate Marie Lambert, who passed away many years ago, remains on the list as a candidate for fiduciary appointments. Individuals who had filed applications many years ago but have become judges since then are chagrined that their names remain on the list.

Other qualified applicants who still wish to be selected cannot be found because their addresses or even just their telephone numbers have changed. Many

such persons have complained that they have submitted updated information but the corrections have not been made.

Procedures must be instituted for regularly reconfirming and cross-checking information.

NYCLA recommends that: (1) fiduciary list information be updated when fiduciary forms containing new information are filed or requests for change are made, (2) attorney listings be updated to remain consistent with biennial attorney registration, and (3) a biennial reconfirmation program be implemented.

Reconfirmation of fiduciary list data and eligibility at least every two years is imperative. It seems that it would be possible to update information from the biennial attorney registrations. There is no known impediment to such use of the registration data. For candidates who are not attorneys and therefore cannot be cross-checked in the Lawyer's Diary, there is no other source of correct information that is known.

Information on revoked appointments should be maintained and available to the judiciary.

The current fiduciary list lacks any means for a judge to know whether a candidate for appointment has been removed from a past assignment. Access to such information is essential if judges are encouraged to broaden their pool of appointees.

NYCLA takes no position on whether removal information should be available to the public, but it supports the Commission's consideration of such issue. NYCLA also takes no position on whether there should be standards and/or procedures for removing candidates from the fiduciary list for cause, but we note that a procedure has been adopted for removal of names from the "18-B" list.

Fiduciary Compliance With Reporting Requirements Should Be Encouraged

NYCLA believes that the Commission and the Inspector General will investigate compliance with reporting requirements. At one time, it was reported that there was a clear pattern of a failure to submit required reports (NYLJ, July 20, 1990, p. 1, col. 3). But, it is significant that even the first step – a ready access to the blank forms – is not an easy task; indeed, these forms were only recently posted on the web site for the Office of Court Administration, following a request of NYCLA's Committee on Elder Law, and will be available through NYCLA's web site.

Compliance could be further facilitated and encouraged by the following steps:

- **All OCA/UCS form should include the telephone number, fax number, e-mail address, and web site, and filing the forms by fax and e-mail should be permitted.**

Currently, only OCA's address is given on the UCS forms. If compliance with the filing requirements is desired, OCA should devote sufficient administrative resources to an effort to process telephone, fax and e-mail inquiries and filings, as well. Information on how to obtain copies of the forms also should be readily and widely available.

- **There should be a designated resource for inquiries regarding late filings of notices of appointment and perhaps even an amnesty program announced for those who have failed to file.**

It would be helpful, on a going-forward basis, to add a check box to the UCS-830 form (Statement of Approval of Compensation) to certify that the UCS-830.1(Notice of Appointment) has been filed. The form UCS-830 also should give

information as to the office to contact about a late filing.

If the Commission does determine non-filing to be a problem, late filers should be encouraged to file, especially while this issue is receiving public attention. An amnesty program might encourage such persons to come forward. NYCLA has no position on whether late filing inquiries or filings should involve the Inspector General.

The Use of 18-B to Pay Guardians of Institutionalized Indigents Should Be Endorsed

The 18-B program has been recognized as available to compensate persons who serve to protect an indigent's liberty interest. It has been recognized that when a person is placed in a nursing home or comparable facility, a guardian must be in place to arrange discharge if the person improves for, otherwise, no one may be available to arrange discharge and the institutional placement becomes "effectively 'irrevocable'" (*Matter of Gambuti [Bowser]*, 242 A.D.2d 431, 434 [1st Dept. 1997]).

It is a common situation that a person who will be placed in a nursing home has modest limited assets, which can be absorbed by the expense of establishing a burial fund, cleaning and surrendering an apartment, the payment of the costs and fees of a guardianship proceeding, and a short period of work by a guardian. On-going income such as social security benefits typically goes to the residential facility to defray that cost. Thus, once the assets are "spent down," no funds may remain to pay for the services of a guardian. Courts were tempted to appoint an emergency guardian to make the arrangements, who would then be discharged from responsibility thereafter; this practice was found to be improper in *Matter of Gambuti (Bowser)*, *supra*.

Accordingly, given that a liberty interest has been held to compel the continued services of a guardian, where no family member is available to serve and a non-family member has been appointed guardian, it is appropriate to support the expansion of the 18-B program to include not only assigned counsel, but also a guardian.

Basic Cautionary Observations

NYCLA recommends that, as the Fiduciary Commission considers reforms, it bear in mind several cautionary points.

- **A fiduciary should be able to act immediately upon appointment.**

In Article 81 guardianship matters, appointees must be able to take immediate action. The statute requires that the hearing be held within 28 days from the commencement of the proceeding, and it is typical that a required asset search and a bank account confirmation alone will take several weeks. Other emergency action may be necessary to protect the subject of the proceeding.

In the guardianship area, a rule that a “prospective appointee” must file a certification “prior to the acceptance of the appointment” (section 36.1 [d]) does not serve the interest of the alleged incapacitated person, is inconsistent with the statutory mandate for speedy resolution, and is unsuited to the needs of such cases.

- **Suggestions that fiduciary roles be made into court-affiliated staff positions are ill-advised.**

Governmental fiduciary programs adopted in other States may be advanced to the Commission as “good government” models appropriate to New York. Such discussions almost always ignore that an experienced, excellent and low cost

governmental resource already exists in New York State: Mental Hygiene Legal Services (“MHLS”). MHLS often serves as counsel in a guardianship matter where a person is confined in a hospital, health care facility or nursing home. MHLS sometimes also accepts court evaluator appointments. It merits the Commission’s attention whether MHLS has adequate resources in every Department and whether increased funding should be recommended.

Public policy weighs against court personnel advocating a position to the judiciary. To an already suspicious person who has been alleged to be incapacitated, the combining of the tribunal and an investigator-witness suggests that the proceeding will be a “kangaroo” court. In New York, a common employer of both a tribunal and witness-investigator is generally acceptable only for administrative proceedings.

Moreover, the appointing judge should be free to draw upon the expertise of individuals determined to be best suited to the needs of each particular case. New York Article 81 cases present a particularly broad range of issues, so broad that it is unlikely that sufficient expertise in the multitude of areas involved would be found in a limited administrative staff.

The experiences in less populated counties may not be the same as New York County.

This report reflects the experience of attorneys who practice in the counties of metropolitan New York. The experiences of the counties upstate, where there are fewer candidates for appointment and where experience in guardianship matters is less common, may warrant different solutions.

Conclusion

NYCLA hopes that this report assists the Commission on Fiduciary Appointments in its work. We have attempted to bring to the Commission the experience and special expertise our members have with regard to fiduciary appointments in general and Article 81 proceedings in particular, and our members' familiarity with the Part 36 Fiduciary Rules.

Court-appointed fiduciaries serve an important and valuable function, protecting the interests of those least able to protect themselves. Most fiduciaries perform their obligations with generosity and diligence. Abuses are rare.

We believe that our recommendations, if adopted, will provide an articulated public policy which fairly addresses known problems and will reduce innocent mistakes caused by inconsistencies and lack of clarity in the current Fiduciary Rules. These reforms also will provide clear guidance and support to the judiciary, reflect confidence in and respect for judges, and remove an unfair burden they now carry. We believe that the result will be a workable system with true accountability for fiduciary performance and compensation that is fair, with enhanced compliance – in short, a system which is fully worthy of public confidence.

APPENDIX

Part 36 Fiduciary Rules: A Redrafting Checklist

For ease of reference, the checklist is presented in the same order as the text of the Fiduciary Rules.

Section 36.0 Purpose and Policies

Add text.

Section 36.1 Appointments

- **Subdivision (a)** addresses the **initial appointment** by the appointing judge. Appointee positions covered should be broken out and placed in a separate subdivision, perhaps even in a subdivision of the proposed new section 36.0. A study of the positions covered is suggested.
- Remove first reference regarding judicial review of "the qualifications of candidates for appointment" because the statement about judicial review of "the qualifications of any appointee" in the last sentence is sufficient.
- Break out acceptable reasons to appoint people who are not on the OCA fiduciary list, and articulate the standard applicable to justification for such action, as well as the statement that court evaluators must be appointed from the list.

Subdivision (b)(1) bars appointments of **relatives of judges and housing judges** "within the sixth degree of relationship." A plain English statement of the furthest type of family member barred would be helpful.

Subdivision (b)(2) bars appointments of certain **judicial hearing officers**. The use of the phrase "serves on a judicial hearing officer panel for such court" would be clarified if:

(a) the word "panel" is deleted, for it does not refer to active service but a mere listing; and

(b) the concept of "service" is replaced with "served as a judicial hearing officer for at least one day in the 30 days prior to the appointment" or another period of time the Commission finds appropriate

Such revision would lead to a standard recognizing that judicial hearing officer employment is *per diem* and possibly sporadic.

Subdivision (c) contains the "**dollar test**" addressed at length in the text of the Report.

It is urged that:

- (a) the test be revised to (1) be consistent with a well supported policy,
- (2) clearly refer to some objective feature of a fee, and (3) the figure should be updated to account for inflation since the rule was

promulgated in 1986; and,
(b) any standard for judicial waiver be made consistent with the test utilized in the current subdivision (a) above to include the needs of the case.

Subdivision (d) requires the **filing of a notice of appointment** by a fiduciary. Proposed changes include:

- (a) Filing Fiduciary Rules should be placed a single subdivision and harmonized;
- (b) This filing provision, governing a notice to be filed with the appointing judge, should be preceded by text relating to a yet earlier required filing, i.e. the filing with OCA, which, oddly, is not mentioned until section 36.3 (a);
- (c) The effectiveness of the appointment should not be delayed until a filing is completed or there must be authority to take immediate action in guardianship cases and perhaps in other emergency conditions;
- (d) The rule should call for not only a listing of appointments in the last 12 months but also include a defined type of fee information, *i.e.*, awarded or collected, and the data should be adjusted to capture whatever is relevant to eligibility;
- (e) Provision for electronic and fax filing of forms would assist speedy filing; and,
- (f) Thought should be given to whether “case file” is an appropriate phrase.

Subdivisions (e) and (f) set forth exceptions to the rule. Exceptions are best placed immediately after a definition of the applicable rule.

Section 36.2 Lists of Available Applicants

Subdivision (a) references compilation of the list and contains directive as to what falls under the word “maintain.”

A new subdivision should be added setting forth a system for updating the fiduciary list which could well include:

- (a) Automatic updating for attorneys when new attorney registration information is filed;
- (b) Automatic updating when fiduciary forms are filed with different identifying information; and
- (c) Biennial re-certification of identifying data and eligibility; if a further cross-check on assignments is deemed desirable, such form could require a statement of judicial appointments received, both those subject and not subject to the rule, and perhaps even fees awarded and/or collected.

Section 36.3 Reporting of Appointments

All provisions relating to reporting, data collection, and the public availability of such information should be incorporated in this section. Consideration should be given to expanding this section to address all fiduciary “paperwork” requirements, including fee approval forms. If the Commission designs a method to allow remedial late filings, such provision should be added here.

Section 36.4 Compensation

It is suggested that this section be expanded to include provisions relevant to fee applications.

Subdivision (a) must be clarified in relation to statutorily set compensation, which may not be capable of adjustment on a valuation concept. Currently, it mandates that a fee award “not exceed the fair value of the services rendered.” Yet, certain fee formulas are established by statute, such as SCPA 2307. Guidance must be added as to the manner in which statutorily set percentage-based commissions could be adjusted to reflect “fair value,” or the rule amended to eliminate this issue.

Subdivision (b) sets a \$2,500 threshold requiring a judicial written statement regarding fee awards. It may be that this figure should be adjusted for inflation since the rule was first promulgated.

Subdivision (c) bars fee awards unless the required notices have been filed. It would encourage compliance and ease administrative burdens if the applicant were required to certify to such notices in any fee application made.

Section 36.5 Education and Training

The rule should also state that an appointee may be required to take an educational course after an appointment is made. Post-appointment educational requirements are commonly imposed upon guardians, which is not addressed by the Fiduciary Rules.