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COURT-APPOINTED FIDUCIARIES: NEW YORK'S EFFORTS TO REFORM A WIDELY-CRITICIZED PROCESS

LAWRENCE K. MARKS[†]

INTRODUCTION

The New York courts have a long tradition of appointing private individuals, usually lawyers, to assist them in various capacities. In mortgage foreclosure actions, a receiver may be appointed to manage the property while the foreclosure litigation is pending, and a referee may be appointed to sell the property once the foreclosure is consummated. In guardianship proceedings, a court evaluator may be appointed to recommend whether a guardian is needed for an alleged incapacitated person, and if so, then a guardian will be appointed to manage the personal and financial affairs of the ward. In estate cases, a guardian ad litem may be appointed to assist the court in determining how best to protect the interests of a child affected by the litigation.

These are some of the more common examples of what are known as “fiduciary” appointments.¹ One of the distinguishing features of these appointments is that the appointees are privately paid. Unlike private attorneys appointed by courts to represent, for example, indigent litigants in criminal and family

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¹ A “fiduciary” is often regarded as one who protects the pecuniary interests of another. The dictionary definition, however, is broader. *See, e.g.,* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 433 (10th ed. 1993) (defining “fiduciary” as “of, relating to, or involving a confidence or trust”). Indeed, in New York, fiduciary appointments can encompass situations more akin to traditional attorney-client relationships, such as attorneys for alleged incapacitated persons and law guardians in matrimonial cases. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 36.1 (2003).

matters, a fiduciary appointee's fees are not paid by the government.² Rather, the fiduciary's fees and costs are paid by the litigants themselves, and in some cases, the amounts can be quite substantial.

In light of the money-making potential of these appointments, they have long been the subject of close public scrutiny. This scrutiny, in turn, has led to widespread criticism that judges' fiduciary appointments are influenced by inappropriate factors such as political favoritism and personal connections, particularly in cases involving substantial fees. Some of the strongest criticism surfaced in early 2000 following the release of a letter written by two politically-connected lawyers to political party officials complaining that despite the lawyers' long and unswerving service to the party, they were not receiving their fair share of fiduciary appointments.

In the wake of the harsh public reaction to this letter and in an effort to preserve public trust and confidence in the courts, New York Chief Judge Judith S. Kaye took a series of unprecedented steps. Of particular note was the creation of a new office within the court system to investigate allegations of ethical violations and other misconduct arising out of fiduciary appointments. Chief Judge Kaye also appointed a commission, composed of high-level representatives of the bench and bar, to conduct a sweeping evaluation of New York's fiduciary appointment process and to make recommendations for reform.

The report of the Chief Judge's Commission on Fiduciary Appointments (the "Commission"), released in December 2001, confirmed many of the criticisms of the process that had been made over the years. The report proposed sweeping changes in the process, including new standards governing eligibility and qualifications for appointment as a fiduciary in New York, revised appointment procedures, and improved oversight measures. The Commission's recommendations resulted in the recent promulgation by the Chief Judge of a comprehensive set of stringent new fiduciary appointment rules, making New York's fiduciary appointment process the most closely regulated of any in the nation.

² See, e.g., N.Y. COUNTY LAW § 722-b (McKinney 1991) (prescribing that costs of legal representation of indigent criminal defendants and indigent adult family court litigants are borne by the counties).

This Article examines the new rules and explains the context in which they were developed. Part I outlines the types of fiduciary appointments that are made in New York and prior efforts to regulate the appointment process. Part II discusses the criticisms of the fiduciary appointment process that have been leveled in recent years and the recommendations for reform that the Commission offered in response to those criticisms. Part III analyzes the new rules that emerged from the Fiduciary Commission's recommendations. Part III also explores further measures that might be considered if problems in New York's fiduciary appointment process persist.

I. FIDUCIARY APPOINTMENTS IN NEW YORK

A. *Types of Fiduciary Appointments*

In New York, judges appoint fiduciaries in a wide range of cases. Some of these appointments are made to assist the court in its adjudicative responsibilities; some are made to protect the interests of litigants or others affected by the litigation; and some, if not most, are made in furtherance of a combination of these and other purposes.

1. Article 81 Fiduciaries

A particularly fertile area of fiduciary appointments is guardianship, or Article 81, cases.³ Under Article 81 of the New

³ N.Y. MENTAL HYG. LAW §§ 81.01–44 (McKinney 1996). Enacted in 1992, Article 81 replaced the existing system of conservatorships and committees—former N.Y. Mental Hygiene Law articles 77 and 78—that was used to appoint a surrogate decision-maker for persons unable to make decisions for themselves. In addition to creating a new range of fiduciaries to assist the court and the incapacitated person, Article 81 was designed to shift the focus from the underlying cause of the individual's incapacity to how the incapacitated person could best carry out the daily activities of living. See Rose Mary Bailly, Practice Commentaries, N.Y. Mental Hyg. Law § 81.01, at 248 (McKinney 1996). The article's legislative findings and purpose section states, in relevant part:

The legislature finds that it is desirable for and beneficial to persons with incapacities to make available to them the least restrictive form of intervention which assists them in meeting their needs but, at the same time, permits them to exercise the independence and self-determination of which they are capable. The legislature declares that it is the purpose of this act to promote the public welfare by establishing a guardianship system which is appropriate to satisfy either personal or property management needs of an incapacitated person in a manner tailored to the

York Mental Hygiene Law, a court may appoint a guardian to provide for the personal care of an incapacitated person or to manage the property and financial affairs of the incapacitated person or both.⁴ An Article 81 proceeding is commenced by the filing of a petition in New York's court of general jurisdiction, the New York Supreme Court.⁵ The court then appoints a court evaluator who must conduct an investigation and submit a report with detailed recommendations to the court addressing, among other things, whether the alleged incapacitated person (AIP) is in fact incapacitated, whether adequate and reliable resources are available as an alternative to the appointment of a guardian, and what authority should be exercised by a guardian if one is ultimately appointed.⁶ The court evaluator may be an attorney, physician, psychologist, accountant, social worker, nurse, or any other qualified person;⁷ in practice, the courts usually appoint attorneys.

AIPs have the right to be represented in the proceedings by counsel of their choice.⁸ If the AIP is not represented, the court must appoint counsel in a variety of situations, such as when the AIP requests counsel, the AIP seeks to contest the petition, or the court determines that appointment of counsel would be helpful.⁹

individual needs of that person, which takes in account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life.

N.Y. MENTAL HYG. LAW § 81.01 (McKinney 1996).

⁴ See N.Y. MENTAL HYG. LAW § 81.02(a) (McKinney 1996). Surrogate's Courts may appoint a guardian for an infant, N.Y. Surr. Ct. Proc. Act §§ 1701-27 (McKinney 1996), or for a mentally retarded person or a developmentally disabled person, *id.* §§ 1750-61.

⁵ Although Mental Hygiene Law § 81.04(a) authorizes filing in a county court as well, as a practical matter, guardianship proceedings in New York are handled in supreme court. Mental Hygiene Law § 81.06 specifies who may bring the petition.

⁶ N.Y. MENTAL HYG. LAW § 81.09(5) (McKinney 1996). Appointment of a court evaluator is mandatory, although if the court appoints an attorney for the AIP, it may forgo appointment of the court evaluator. See *id.* § 81.10(g).

⁷ See *id.* § 81.09(b)(1). If the AIP is a patient in an institution such as a hospital or a nursing home, the institution or the Mental Hygiene Legal Service may be appointed as the court evaluator. See *id.* § 81.09(b)(2). The courts also have increasingly been appointing Mental Hygiene Legal Service as court evaluator where the AIP has minimal or no assets.

⁸ See *id.* § 81.10(a).

⁹ See *id.* § 81.10(c).

Following a hearing, if the court concludes that the AIP is in fact incapacitated and that appointment of a guardian is necessary, the court may appoint a guardian.¹⁰ In selecting the guardian, the courts generally give preference to a person nominated by the incapacitated person or to a family member.¹¹ If no such person is available for appointment, the court must appoint some other “suitable” person;¹² again, the usual practice is to appoint an attorney. If the incapacitated person is indigent, the court may appoint a non-profit organization or social service agency as guardian.¹³

In the course of providing for the personal care or managing the property and finances of the incapacitated person, the guardian must file with the court regular financial accountings as well as periodic reports that address the incapacitated person’s condition and care.¹⁴ The court appoints a court examiner to review these reports and provide the court with his or her own report assessing the accounting and report filed by the guardian.¹⁵ The court examiners are also usually attorneys.

In general, Article 81 fiduciaries are paid from the assets of the incapacitated person. Court evaluators and attorneys for AIPs usually are paid hourly fees based on the fair and reasonable value of their services.¹⁶ Court examiners are paid set fees prescribed in schedules promulgated by the appellate division, which are based on the amount of the incapacitated

¹⁰ See *id.* § 81.16(c). The guardian’s powers must be limited to those the court has found “necessary to assist the incapacitated person in providing for personal needs and/or property management.” *Id.* § 81.16(c)(2).

¹¹ See *id.* § 81.17 (allowing the AIP to nominate a guardian); Rose Mary Bailly, Practice Commentaries, N.Y. Mental Hyg. Law § 81.19, at 360 (McKinney 1996).

¹² N.Y. MENTAL HYG. LAW § 81.19(a)(1) (McKinney 1996). The statute provides that “[a]ny individual over eighteen years of age . . . who is found by the court to be suitable to exercise the powers necessary to assist the incapacitated person may be appointed as guardian.” *Id.*

¹³ See *id.* § 81.19(2); see also N.Y. SOC. SERV. LAW § 473-d (McKinney 1992) (authorizing “[c]ommunity guardian” programs).

¹⁴ N.Y. MENTAL HYG. LAW §§ 81.30–.31 (McKinney 1996).

¹⁵ See *id.* § 81.32.

¹⁶ See Rose Mary Bailly, Practice Commentaries, N.Y. Mental Hyg. Law § 81.09, at 307–08 (McKinney 1996); see also *In re Potts*, 213 A.D. 59, 62, 209 N.Y.S. 655, 657 (4th Dep’t 1925), *aff’d* 241 N.Y. 593, 150 N.E. 568, 241 N.Y.S. 593 (1925) (stating that in determining reasonableness of an attorney’s claim for services, court should consider nature of services rendered, difficulty of case, time spent, amounts involved, results obtained, and the professional standing of the attorney).

person's assets. Guardians are paid in accordance with individual compensation plans that the court establishes;¹⁷ the compensation plan may be based on a percentage of the incapacitated person's assets, a percentage of the amounts the guardian receives and disburses, an hourly fee, or some combination of these methods.¹⁸

2. Receivers

In cases involving disputes over property, the risk may arise that the property will be materially injured or destroyed before resolution of the dispute. To protect against this, the party with an interest in the property may petition the court for appointment of a receiver to manage the property while the litigation is pending.¹⁹ Receivers are authorized to take possession of real and personal property and to sue for, collect, and sell debts or claims.²⁰ For example, in what is by far the most common type of case in which receivers are appointed—a mortgage foreclosure proceeding—the receiver is authorized to collect rents and initiate or defend against lawsuits involving collection of the rent or the eviction of tenants.

Receivers are paid from the assets of the property in receivership. The fee, or commission, is based on the total sums that the receiver collects and disburses during the pendency of the receivership and may not exceed five percent of such amounts.²¹

¹⁷ See N.Y. MENTAL HYG. LAW § 81.28(a) (McKinney 1996).

¹⁸ Mental Hygiene Law § 81.28(a) makes explicit reference to methods for compensating fiduciaries under the Surrogate's Court Procedure Act. *Id.*; see also N.Y. SURR. CT. PROC. ACT § 2307 (McKinney 1997) (calculating commissions for fiduciaries other than trustees based on amount received and disbursed); see *id.* § 2309 (calculating commissions for trustees based on principal amount of trust).

¹⁹ See N.Y. C.P.L.R. § 6401(a) (McKinney 1980). Technically, the statute labels the appointee a "temporary" receiver because the receivership may not continue after final judgment unless the court directs otherwise. See *id.* § 6401(c).

²⁰ See *id.* § 6401(b).

²¹ See *id.* § 8004(a) (McKinney 1981). In cases in which a receiver's fee, based on the five percent formula, would be less than one hundred dollars, the court may direct a fee of up to one hundred dollars for the services rendered. *Id.* In cases in which no funds exist at the termination of the receivership, the court may direct that the party who sought appointment of the receiver pay the receiver's fee. *Id.* § 8004(b).

3. Referees

Under New York law, courts may appoint referees to perform a range of functions on their behalf.²² A primary purpose for which courts use referees is to sell property that has been subject to a foreclosure judgment.²³ The referee computes the value of the property and then sells it at a public auction that is usually held at the courthouse. The referee's fees, which are paid from the proceeds of the sale, are generally fifty dollars to compute the value of the property and five hundred dollars to sell the property.²⁴

4. Guardians ad Litem

Courts appoint guardians ad litem to protect the interests of individuals not capable of protecting themselves. Generally, guardians ad litem are appointed in surrogate's court cases.²⁵ Appointment of a guardian ad litem typically arises when an unrepresented person under a disability is a necessary party to a proceeding and is incapable of adequately protecting his or her own rights.²⁶ Persons under a disability include infants, incapacitated and incompetent individuals, prisoners, unborns, and unknowns.²⁷

²² See generally *id.* § 4301 (McKinney 1992) ("A referee to determine an issue or to perform an act shall have all the powers of a court in performing a like function . . .").

²³ See *id.* § 5103(b) (McKinney 1997) (mandating that property sold by court order be sold in the manner directed by the judgment of the court); N.Y. REAL PROP. ACTS § 1351(1) (McKinney 1979) (allowing for judicial sale of property by referees).

²⁴ N.Y. C.P.L.R. § 8003 (McKinney 1981). If the value of the property is high, the court may designate a greater fee to sell the property. *Id.* § 8003(b).

²⁵ Guardians ad litem are appointed on occasion in other types of cases as well, such as matrimonial cases in supreme court.

²⁶ See, e.g., *In re Estate of O'Connor*, 72 Misc. 2d 490, 491, 339 N.Y.S.2d 726, 727-28 (Sur. Ct. N.Y. County 1973) (holding that the court was obliged to appoint a guardian ad litem for an infant who was a necessary party to estate litigation). An infant over the age of fourteen may petition the court to appoint a named attorney as his or her guardian. See N.Y. SURR. CT. PROC. ACT § 403(1) (McKinney 1994).

²⁷ See *In re Rosner*, 144 A.D.2d 148, 149, 534 N.Y.S.2d 476, 477 (3d Dep't 1988) (holding, in the alternative, that a person unable to understand proceedings was disabled within the meaning of SCPA 403(2)); *Estate of Winston*, 92 Misc. 2d 208, 209, 399 N.Y.S.2d 999, 1000 (Sur. Ct. N.Y. County 1977) (finding an individual incapable of protecting her legal rights disabled); *Estate of Robles*, 72 Misc. 2d 554, 557, 339 N.Y.S.2d 171, 174 (Sur. Ct. Orange County 1972) (noting that since an individual was in a penal institution, he was incapacitated, and, therefore, a guardian ad litem was necessary).

A guardian ad litem must be an attorney.²⁸ Upon appointment, the guardian ad litem undertakes an investigation of the facts and reviews all operative documents and other relevant materials, such as the will, trust, tax return, and other financial documents to determine whether there has been compliance with applicable laws and procedures. After completing the investigation and review, the guardian ad litem files a report with the court recommending whether objections should be made or other proceedings should be conducted to protect the interests of the ward.²⁹

In most cases, the guardian ad litem's fee is paid out of the estate.³⁰ The fee must be a reasonable one based on "the nature and extent of the services, the time spent [on the case,] the stature and experience of the lawyer, the complexity of the issues, and the results achieved."³¹

5. Secondary Fiduciaries

In proceedings in which fiduciaries are appointed, secondary fiduciaries may be appointed or retained by the primary fiduciaries to perform various services and functions. In receivership cases, for example, counsel and property managers are often employed to assist the receiver with legal matters and day-to-day management of the property under receivership.³² Article 81 guardians often retain counsel as well as accountants and other financial professionals to assist in their responsibilities. Guardians ad litem may also retain other professionals to assist them.

²⁸ See N.Y. SURR. CT. PROC. ACT § 404(1) (McKinney 1994).

²⁹ The guardian ad litem must report to the court what he or she believes to be in the ward's best interests, regardless of whether that is consistent with the ward's wishes. *Matter of Aho*, 39 N.Y.2d 241, 247, 347 N.E.2d 647, 650-51, 383 N.Y.S.2d 285, 288 (1976). Thus, the guardian ad litem's role differs from that of an attorney, who must advance his or her client's wishes even if, in the attorney's view, they may not be in the client's best interests.

³⁰ The court, however, may direct that the fee be paid from the assets of the person under disability or, for good cause shown, by another party to the proceedings. See N.Y. SURR. CT. PROC. ACT § 405(1) (McKinney 1994).

³¹ Margaret V. Turano, *Practice Commentaries*, N.Y. Sur. Ct. Proc. Act § 405, at 391 (McKinney 1994).

³² See generally N.Y. C.P.L.R. § 6401(b) (McKinney 1980) (recognizing a receiver's authority to employ counsel, although only upon express authorization by the court).

Secondary fiduciaries are generally paid hourly fees for their work, and in some cases their fees can be lucrative.³³ Indeed, in receivership cases, the counsel's compensation can exceed the receiver's compensation.³⁴

B. Regulation of the Fiduciary Appointment Process and Part 36 of the Rules of the Chief Judge

Public criticism of fiduciary appointments in the New York courts has been widespread and long-standing. Discussed in greater detail in Part II, such criticism has centered on allegations that judges do not always select fiduciaries based on merit, but rather on politics, nepotism, and other factors unrelated to the objective qualifications of the appointees, particularly in cases involving large fees. An early example of the problem involves Albert Cardozo, Benjamin Cardozo's father and a Manhattan supreme court justice in the second half of the nineteenth century. In large part because of public outrage over his repeated appointment of relatives and political cronies as fiduciaries, Albert Cardozo was forced to resign his judgeship in disgrace.³⁵

Continuing criticism in the century following Albert Cardozo's resignation eventually led to a series of efforts to improve the appointment process or, at the least, make it subject to greater scrutiny. The first step was taken in 1967 with the state legislature's enactment of section 35-a of the New York Judiciary Law. In its original form, section 35-a mandated that all court appointees, other than those compensated with public funds, file with the New York State Office of Court Administration a notice of appointment at the time of appointment and a statement of award of compensation at the time of payment. Governor Rockefeller's approval message explained that the purpose of the law was to "bolster public confidence in the disposition of court appointments" by ensuring that information about the compensation of court appointees is

³³ See REPORT OF THE COMMISSION ON FIDUCIARY APPOINTMENTS, at 12 (Dec. 2001) [hereinafter COMMISSION] (noting the potentially lucrative nature of secondary appointments), available at <http://www.courts.state.ny.us/fiduciaryreport/fidcommreport.htm#anchor15472>.

³⁴ See *id.*

³⁵ See ANDREW KAUFMAN, CARDOZO, 16–19 (1998).

made available to the public.³⁶ After several years of experience with this requirement, it became apparent that a significant number of appointees were failing to make the required filings. Thus, the law was amended in 1975 to eliminate the requirement that the appointee file the forms. Instead, it now requires that *the judge* make a single filing of the compensation awarded.³⁷ It was assumed that imposing the filing requirement on the judge would be a more reliable means of ensuring that filings would be made.

In the 1970s, the fiduciary appointment process again came under public scrutiny as a result of charges that certain supreme court judges in New York City were appointing close relatives of other supreme court judges. In response, the Appellate Division, First Department, promulgated a strict new appointment procedure for the counties within its jurisdiction—New York and Bronx counties. The procedure provided that the judge presiding over the case in which a fiduciary was to be appointed would not select the appointee; instead, another judge of the court, determined on a rotational basis, would make the selection.³⁸

At about the same time, the First Department appointed a committee to study the fiduciary appointment process and make recommendations for improvement. Issuing its report in 1980, the committee concluded that the rotational selection process that the First Department had implemented was unduly cumbersome and that it was preferable that the judge handling the case select the fiduciary appointee.³⁹ The committee, however, recommended that relatives of judges be ineligible for appointment and that former judges be ineligible for two years

³⁶ Governor's Approval Memorandum, ch. 625, N.Y. Laws (Apr. 27, 1967), reprinted in 1967 N.Y. Laws 1535 (McKinney). The statute applied to a broad category of appointments, including appointments not traditionally falling within the category of "fiduciary" appointments: i.e., "all court appointees, including all persons appointed as appraisers, special guardians, guardians ad litem, general guardians, referees, counsels, special referees, committees of incompetents, [or] receivers." *Id.* The only appointments excluded from the requirements of the statute were, in general, those in which the appointees were compensated from public funds.

³⁷ 1975 N.Y. Laws 834, § 1. This requirement was promulgated as well in Part 26 of the Rules of the Chief Judge. N.Y. COMP. CODES R. & REGS. tit. 22, § 26 (1975).

³⁸ See N.Y. COMP. CODES R. & REGS. tit. 22, § 660.24 (1977).

³⁹ REPORT OF THE COMMITTEE ON JUDICIAL APPOINTMENTS, at 21-22 (1980) (on file with author).

after leaving the bench.⁴⁰ The committee further proposed that individual appointees be eligible for only one “substantial” appointment within a twelve-month period.⁴¹ The committee’s recommendations were referred to the Administrative Board of the Courts.⁴² Following opposition from the New York State Judicial Conference and the New York State Association of Supreme Court Justices, the Administrative Board rejected the rules, and they were never referred to the Court of Appeals for approval.⁴³

Several years later, following renewed charges of favoritism in the appointment process, a set of fiduciary appointment rules was drafted, circulated for public comment, and submitted to and approved by the Court of Appeals. The new rules, Part 36 of the Rules of the Chief Judge, took effect on April 1, 1986.⁴⁴

In its original form, Part 36 governed “appointments of guardians, guardians ad litem, conservators, committees for the incompetent, receivers, and persons designated to perform services for a receiver.”⁴⁵ Notably, the rules placed the authority for selecting the appointee with the judge presiding over the case. Although the rules required the creation of lists of candidates for appointment, no minimum qualifications were established for placement on the lists. Rather, the appointing judge was required to determine the appointee’s qualifications for appointment, and the rules provided that the judge need not even use the lists so long as he or she set forth on the record the reasons for not doing so.⁴⁶

⁴⁰ *Id.* at 16–18.

⁴¹ *Id.* at 23.

⁴² The Administrative Board of the Courts, consisting of the Chief Judge of the Court of Appeals and the Presiding Justice of each of the four appellate departments, has a broad consultative role in the establishment of standards and administrative policies for the New York State Unified Court System. N.Y. JUD. LAW § 211(1) (McKinney 1983).

⁴³ See COMMISSION, *supra* note 33, at 14–15.

⁴⁴ N.Y. COMP. CODES R. & REGS. tit. 22, § 36 (1986).

⁴⁵ *Id.* § 36.1(a). The rules thus applied to a narrower category of appointees than those governed by Jud. Law § 35-a. See *supra* note 36. It was thought that the appointments specified in the rules were the “most common and the most remunerative, and that it would be impractical to apply the new oversight procedures to additional categories of appointments.” COMMISSION, *supra* note 33, at 15.

⁴⁶ N.Y. COMP. CODES R. & REGS. tit. 22, § 36.1(a) (1986).

Several of the First Department committee's recommendations found their way into the new rules. The rules rendered ineligible for appointment *any* relative of *any* judge of the New York State Unified Court System, whether by blood or marriage.⁴⁷ In addition, the rules limited the number of higher compensation appointments that an individual appointee could receive. No appointee could receive more than one appointment within any twelve-month period for which the compensation was anticipated to be more than \$5000, except in unusual circumstances involving continuity of representation or familiarity with the case.⁴⁸

The rules also required appointees to make two separate filings. The appointee was required to file a certification of compliance verifying that the appointment would not be in violation of the rules⁴⁹ and specifying all appointments received within the previous twelve months.⁵⁰ Once the appointment was made, the appointee also had to file a notice of appointment with the Office of Court Administration.⁵¹ Under the rules, the notice of appointment was a public record, and the Chief Administrator of the Courts was required to arrange for the periodic publication of the names of the persons appointed.⁵²

⁴⁷ *Id.* § 36.1(b)(1). The original version of the rule disqualified all relatives of judges, no matter how far the relative was down the judge's family tree or geographically removed from the appointing judge's court. The rule was moderated somewhat in 1996, to prohibit appointment of relatives of judges within the sixth degree of relationship (which extends to second cousins).

⁴⁸ *Id.* § 36.1(c).

⁴⁹ Essentially, this meant that the appointee was not related to a judge, and the appointment would not violate the \$5000 rule.

⁵⁰ *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 36.1(d) (1986).

⁵¹ *See id.* § 36.3(a).

⁵² *See id.* Following its promulgation in 1986, Part 36 was amended in several respects. In addition to the loosening of the prohibition against appointing relatives of judges, *see supra* note 47, the rules were amended to prohibit judicial hearing officers from receiving appointments in a court of a county in which they served on the judicial hearing officer panel, N.Y. COMP. CODES R. & REGS. tit. 22, § 36.1(b)(2) (1989). Part 36 was also amended to require that notice of appointment be filed no later than the first business day of the week following the appointment, that the appointee certify in writing to the appointing judge that the notice of appointment was filed, and that no fees be awarded unless the appointee had filed the notice of appointment and certification of compliance. *Id.* §§ 36.1(d), 36.4(c) (1990). Finally, Part 36 was amended to include referees among the categories of appointments subject to the rules; however, referees were not subject to the Part 36 filing requirements if their compensation was not anticipated to exceed \$550. *Id.* § 36.1(f) (1994); *see also* N.Y. C.P.L.R. § 8003(b) (McKinney 1981).

II. CRITICISMS OF THE PROCESS AND CALLS FOR REFORM

A. *Criticisms of the Fiduciary Appointment Process*

Despite the stricter regulation of the appointment process that followed promulgation of Part 36, widespread criticism persisted. A stream of newspaper articles revealed pervasive concerns with the appointment process, including allegations that high-level political party officials,⁵³ former judges,⁵⁴ and relatives of court employees⁵⁵ were receiving numerous

⁵³ See, e.g., Salvatore Arena, *Top Politicians Get Lucrative Court Jobs*, N.Y. DAILY NEWS, Jan. 30, 2000, at 30; Joe Calderone & Thomas Zambito, *System's Exploiting the Helpless*, N.Y. DAILY NEWS, May 21, 2001, at 6; Michael Finnegan, *Judge Rolls Out Pork Barrel*, N.Y. DAILY NEWS (Queens edition), June 20, 1993, at 1; Maggie Haberman et al., *Here's Who Gets Pick of Judge's Patronage Plums*, N.Y. POST, Nov. 10, 1997, at 6; Dan Morrison, *Dem Leader Profits From Court System: Judges Steer Assignments to Manton's Firm*, NEWSDAY, Jan. 30, 2000, at A8; Jack Newfield, *Judges: Patronage Saints to Their Pals*, N.Y. POST, May 13, 1993, at 7; Jordan Rau & Katie Thomas, *Select Cast Gets Lucrative Roles*, NEWSDAY, Sept. 24, 1999, at A7; Ed Tagliaferri, *High-Paying Surrogate Court Cases Go to Politically Connected Judges, Records Show*, GANNETT SUBURBAN NEWSPAPERS, June 10, 1998, at A1.

These charges were confirmed in the Commission on Fiduciary Appointments' December 2001 report. The report revealed that one county political party leader had received nearly 100 fiduciary appointments, another had received over seventy-five appointments, the small firm of another had received over 200 appointments, the small firm of yet another had received over 100 appointments, and a lawyer whose small firm employed a county political leader had received nearly 100 appointments. COMMISSION, *supra* note 33, at 25–26.

⁵⁴ See, e.g., Arena, *supra* note 53; Maggie Haberman, et al., *Dirty Dozen Grab Patronage \$\$\$*, N.Y. POST, Jan. 30, 2000, at 8; Newfield, *supra* note 53; Rau & Thomas, *supra* note 53; Tagliaferri, *supra* note 53.

These charges were also confirmed in the report of the Commission. The report cited examples of a former appellate judge receiving nearly 250 fiduciary appointments, a former Surrogate receiving nearly 70 appointments, another former Surrogate receiving nearly 60 appointments, a former Supreme Court Justice receiving over 60 appointments and a former County Court Judge receiving nearly 70 appointments. The report also revealed that one former judge was awarded \$424,000 in fees for a guardian ad litem appointment obtained within three months of the judge's retirement from the bench, and another former judge was awarded \$350,000 for a receivership appointment obtained within a year of the judge's retirement from the bench. COMMISSION, *supra* note 33, at 26.

⁵⁵ See, e.g., Dan Morrison, *Breaking the Rules*, NEWSDAY, Oct. 17, 2000, at A3. The Commission on Fiduciary Appointments reported, for example, that the spouse of a high-level managerial court employee received nearly 250 appointments, the spouse of a law secretary received over 100 appointments in that court and a county clerk's son had been retained as property manager in numerous receivership cases in that county. COMMISSION, *supra* note 33, at 26–27.

appointments. It was also revealed that lawyers who had contributed money to judicial campaigns were receiving appointments from those judges.⁵⁶

Suspicious of the role of political favoritism in fiduciary appointments were underscored by the public disclosure in January 2000 of a letter written by two politically-connected Brooklyn lawyers. The lawyers, recipients of numerous fiduciary appointments, had been retained but later dismissed as counsel by another lawyer who had been appointed receiver in a particularly lucrative receivership proceeding in Brooklyn Supreme Court. In their letter, addressed to a top Brooklyn Democratic Party official and distributed to dozens of party operatives, the lawyers complained that despite years of loyal party service, they were no longer obtaining their fair share of fiduciary appointments from the courts.⁵⁷ The letter, with its plain implication that political party officials controlled the assignment of fiduciaries, led to a firestorm of criticism of the courts and calls for reform of the fiduciary appointment process.⁵⁸

⁵⁶ A 1998 bar association report revealed that a majority of the guardian ad litem appointments of two New York City Surrogates who had recently run for office were awarded to lawyers who either had contributed to the Surrogates' judicial campaigns or worked with law firms that had contributed. See COMM. ON GOV'T ETHICS OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, CONTRIBUTIONS TO CAMPAIGNS OF CANDIDATES FOR SURROGATE, AND APPOINTMENTS BY SURROGATES OF GUARDIANS AD LITEM (July 1998), at <http://www.abcny.org/surreport.html> (last visited Mar. 6, 2003).

⁵⁷ The lawyers wrote that their "diligent work and unquestioned loyalty to the [party] over the many years are clearly not as important as the desires of [the receiver who had dismissed them in the case] . . . [who] holds no party or elected position in our County" and "has never assisted the [party's] Law Committee on any level whether it be collecting signatures, binding petitions or trying an election law case, etc." They further wrote that "[o]ne cannot reasonably expect our firm to continue to avail to the [party] our professional services, the utilization of our employees, and the use of our office facilities, while the [party] sits idly by and permits [the receiver] to maliciously injure our practice and reputation without consequence." COMMISSION, *supra* note 33, at App. D.

⁵⁸ See, e.g., *Courthouse Cronyism Merits Kaye's Fast Response*, NEWSDAY (Queens edition), Jan. 13, 2000, at A48; Alan Feuer, *2 Brooklyn Lawyers, Ex-Insiders, Outline a Court Patronage System*, N.Y. TIMES, Jan. 5, 2000, at B1; *Justice for Sale*, N.Y. DAILY NEWS, Jan. 7, 2000, at 40; Thomas J. Lueck, *Giuliani Urges Chief Judge to End Patronage in Courts*, N.Y. TIMES, Jan. 6, 2000, at B5; Jack Newfield, David Seifman, & Maggie Haberman, *B'klyn Dems Rocked by Insider 'Patronage' Letter*, N.Y. POST, Jan. 5, 2001, at 6; David Seifman & Maggie Haberman, *Rudy Asks Probe of Patronage in Brooklyn*, N.Y. POST, Jan. 6, 2000, at

Extensive problems were also subsequently documented in the December 2001 report of the Special Inspector General for Fiduciary Appointments, the official appointed by Chief Judge Judith S. Kaye to investigate fiduciary appointment practices in the New York courts. The Special Inspector General found that, in many counties, the forms required in cases in which fiduciaries are appointed—the notice of appointment, the certification of compliance, and the statement of approval of compensation⁵⁹—were filed in a minimal number of cases.⁶⁰ Furthermore, in many of the cases in which guardians or receivers retained counsel to assist them, the courts approved compensation to the counsel for work that should have been deemed part of the ordinary or routine responsibilities of the guardian or receiver.⁶¹ The Special Inspector General also found that, contrary to the express requirements of the Part 36

4; Sidney Zion, *Patronage Still Runs Politics*, N.Y. DAILY NEWS, Jan. 13, 2000, at 43.

⁵⁹ See N.Y. COMP. CODES R. & REGS. tit. 22, §§ 26.3, 36.3(a) (2002).

⁶⁰ Even in the counties with the best rate of filing compliance, in guardianship cases the required forms were filed in less than half the cases and in receivership cases forms were filed in barely one-third of the cases. Indeed, in all of the cases in Brooklyn Supreme Court between 1995 and 2000 in which a receiver was appointed (417 cases), not a single approval of compensation statement was filed. In Surrogate's Court cases in which guardians ad litem were appointed, compliance with the filing requirements was better, although in some counties the forms were filed in only about half of the cases. OFFICE OF THE SPECIAL INSPECT. GEN. FOR FIDUCIARY APPOINTMENTS AND OFFICE OF INTERNAL AFFAIRS, INTERNAL AUDIT UNIT, FIDUCIARY APPOINTMENTS IN NEW YORK: A REP. TO CHIEF JUDGE JUDITH S. KAYE AND CHIEF ADMINISTRATIVE JUDGE JONATHAN LIPPMAN, (2001) [hereinafter FIDUCIARY APPOINTMENTS], http://www.courts.state.ny.us/fiduciaryreport/ig_fiduciary.html (last visited Mar. 6, 2003).

⁶¹ For example, in guardianship cases, including those in which the appointed guardians themselves were lawyers, judges approved legal fees for services such as obtaining a bond, gathering the incapacitated person's assets, preparing the guardian's reports and accountings, and preparing and filing the required forms. Similarly, in receivership cases, including those in which the appointed receivers were lawyers, judges approved legal fees for services such as preparing accountings and billings and meeting with tenants and property managers. See FIDUCIARY APPOINTMENTS, *supra* note 60. A related problem was the courts' failure to distinguish between legal services and services not legal in nature that should have been billed at considerably lower rates. For example, the report cited cases in which lucrative hourly fees were approved for social visits with the incapacitated person and shopping errands. *Id.*

rules,⁶² receivers, and not judges, were appointing their counsel and property managers.⁶³

B. Recommendations of the Commission on Fiduciary Appointments

In response to these developments and in addition to her appointment of the Special Inspector General for Fiduciary Appointments, Chief Judge Kaye established a “blue ribbon” panel—the Commission on Fiduciary Appointments—with responsibility to examine the existing rules and procedures governing fiduciary appointments and to offer recommendations on ways to improve them.⁶⁴ The Commission conducted an exhaustive review of the fiduciary appointment process in New York, interviewing scores of judges, lawyers and court administrators; holding public hearings; working closely with the Special Inspector General; and reviewing fiduciary appointment practices in other jurisdictions across the country.⁶⁵

The Commission released its report and recommendations in December 2001. Its long list of recommendations fell within three broad categories: (1) eligibility and qualifications, (2) the appointment process, and (3) oversight of the appointment process.

1. Eligibility and Qualifications

Under the version of the Part 36 rules promulgated in 1986, applicants for inclusion on the list of candidates for fiduciary appointments required no qualifications; anyone who applied,

⁶² N.Y. COMP. CODES R. & REGS. tit. 22, § 36.1 (1986).

⁶³ An extreme result of this practice was that in Brooklyn, a single, small law firm obtained roughly three-quarters of all counsel to receiver assignments over the period examined. If the rules had been followed, two of the three attorneys in the firm would not have been eligible for these assignments because they were the sons of a sitting state supreme court judge. *See id.* § 36.1(b)(1) (2002); FIDUCIARY APPOINTMENTS, *supra* note 60.

⁶⁴ The Commission was chaired by Sheila L. Birnbaum, a prominent corporate litigator. Among its other members were a former New York Court of Appeals judge, a former Chief Administrative Judge of the New York courts, a former New York State Bar Association president, a former Association of the Bar of the City of New York president, a former New York City Corporation Counsel and a law school dean. COMMISSION, *supra* note 33, at App. A.

⁶⁵ *See id.* at 4–5.

except relatives of judges, was placed on the list.⁶⁶ The Commission addressed this deficiency with a series of recommendations. First, it recommended that persons seeking eligibility for appointment as a fiduciary complete a training program approved by the Chief Administrator of the Courts.⁶⁷ Noting that state law requires training before Article 81 fiduciaries, such as court evaluators, guardians, and court examiners, may be appointed,⁶⁸ the Commission recommended that other fiduciaries subject to the rules, including "secondary" fiduciaries, be required to complete a training program on the substantive issues pertaining to the particular category of fiduciary appointment. In addition to substantive training, the Commission recommended that fiduciaries receive training on the fiduciary appointment rules, including instruction on the filings required of fiduciary appointees.⁶⁹ It was also recommended that additional training of those who completed the initial training should be required when necessary, such as when major statutory changes are enacted.⁷⁰

The Commission further recommended that, in addition to being related to a judge, a series of circumstances should disqualify individuals from receiving a fiduciary appointment. Noting the extensive negative publicity arising from the large numbers of fiduciary appointments received by some political party leaders and their law firms, the Commission recommended that state and county political party chairs, their immediate relatives, and their law firms be ineligible for fiduciary appointments.⁷¹ The ban on appointments would continue for two years after the party chair stepped down.⁷² The Commission, however, expressly rejected the suggestion that elected officials be ineligible for appointments as well. According to the Commission, elected officials had not received large

⁶⁶ N.Y. COMP. CODES R. & REGS. tit. 22, § 36.1(b)(1) (1986).

⁶⁷ COMMISSION, *supra* note 33, at 38.

⁶⁸ See N.Y. MENTAL HYG. LAW §§ 81.39-.41 (McKinney 1996).

⁶⁹ COMMISSION, *supra* note 33, at 38-39.

⁷⁰ *Id.*

⁷¹ The Commission emphasized that party leaders exercise great influence over the judicial nomination and selection process, and thus "[t]he sheer number of appointments that they and their law firms have received . . . raises a troubling perception that political considerations may be influencing these appointments." *Id.* at 39.

⁷² See *id.* at 39-40.

numbers of appointments or particularly high-paying appointments.⁷³

The Commission next recommended that former judges and their relatives within the sixth degree of relationship be ineligible for appointments for a two-year period after leaving the bench.⁷⁴ While recognizing that former judges may be among the most qualified individuals to handle fiduciary assignments, the Commission made note of the widely-held perception that sitting judges favor their former colleagues when making fiduciary appointments.⁷⁵

A related recommendation was that the immediate relatives of higher-level non-judicial employees of the court system be ineligible for appointment and that the employees themselves and their immediate relatives⁷⁶ be ineligible for appointment for two years following their resignation or retirement from their positions.⁷⁷ The Commission concluded that many of the same perceptions of favoritism can arise when relatives of court employees, particularly higher-level court employees, receive court appointments.

The Commission further recommended that persons convicted of a felony offense be permanently ineligible for appointment unless they received a certificate of relief from disabilities.⁷⁸ In addition, it was recommended that persons convicted of a misdemeanor offense be ineligible for a period of five years following their sentencing unless they received a certificate of relief from disabilities.⁷⁹

⁷³ *Id.* at 40.

⁷⁴ *Id.* at 41–42.

⁷⁵ *Id.* The Commission concluded that the two-year ban struck the appropriate balance, citing similar two-year bans on former New York appellate judges practicing in their former courts, N.Y. COMP. CODES R. & REGS. tit. 22, § 16.1 (2003), and former New York government employees practicing or appearing before their former agencies, N.Y. PUB. OFF. LAW § 73(8) (McKinney 2001).

⁷⁶ A somewhat narrower ban on relatives of former court employees—“immediate” relatives, as opposed to relatives within the sixth degree of relationship—was proposed because it is judges, and not court employees, who actually make the appointments. COMMISSION, *supra* note 33, at 40–41.

⁷⁷ *Id.* at 40–42. “Higher-level” employees were defined as those who are required under the court system’s rules to file an annual financial disclosure statement. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 40.2(a) (2003).

⁷⁸ COMMISSION, *supra* note 33, at 43.

⁷⁹ *Id.* The Commission also recommended that a conviction of any offense (other than a traffic violation) be disclosed in the application for inclusion on the

Finally, the Commission noted that no procedure existed to remove from the appointment lists individuals who fail to follow the rules, are incompetent, or commit other misconduct in their performance as fiduciaries. Accordingly, it was recommended that the fiduciary rules be amended to authorize the Chief Administrator of the Courts to remove an individual from the appointment lists for good cause.⁸⁰

2. The Appointment Process

The Commission devoted considerable attention to the process for selecting appointees. Central to this examination was the question of whether judges should retain full authority to select the fiduciary. Some, including the Association of the Bar of the City of New York, recommended that appointees be selected randomly, preferably by computer, from the appointment lists.⁸¹ The virtue of this approach is that it would foreclose any suggestion that the appointments were influenced by favoritism or other inappropriate factors.⁸² Others recommended variations of this approach, such as requiring the judge to select the appointee from a small group of candidates randomly selected from the appointment lists.⁸³ In the end, the Commission recommended that judges continue to have full authority to select the fiduciary. The Commission reasoned that the primary objective should be the selection of an individual who will provide quality service to the court and the parties, and that is best achieved where the judge has discretion to select a candidate with the skill and experience necessary to meet the demands of the particular assignment.⁸⁴

appointment lists, as should any personal bankruptcy history. *Id.* at 43–44.

⁸⁰ *Id.* at 44.

⁸¹ *Id.* at 45.

⁸² Although apparently no other states have adopted such a system for court appointments, appointments of interim trustees in United States Bankruptcy Court cases are made on a strict rotational basis from a panel of qualified candidates. Additionally, Massachusetts requires that appointments be made successively from a court's appointment lists, although the judge may deviate from that process by providing a written statement of the reasons for doing so. MASS. SUP. CT. R. 1:07(3) (2000).

⁸³ COMMISSION, *supra* note 33, at 45.

⁸⁴ As the Commission stated:

[P]otential candidates for a fiduciary appointment typically possess widely varying skills and experience . . . [and] cases in which fiduciaries are

The Commission further recommended that judges be required to select appointees from appointment lists compiled by the Office of Court Administration, and if judges deviated from the list in making an appointment, they should have to provide a written explanation.⁸⁵ The Commission recognized, however, that if judges were to be expected to select appointees from the appointment lists, the lists would have to be made more meaningful. Thus, in addition to requiring training for inclusion on the lists,⁸⁶ the Commission recommended that specialized lists be created based on the fiduciary category—for example, guardian, receiver, guardian ad litem—for which the applicant is seeking appointment.⁸⁷ It was also suggested that consideration be given to categorizing the appointment lists based on experience, similar to the appointment lists for attorneys assigned to represent indigent criminal defendants.⁸⁸ Additionally, to remedy the fact that the lists contained “hundreds, if not thousands” of people who had retired or were otherwise no longer available for appointment, it was recommended that all those on the lists be required to re-register every two years.⁸⁹

The Commission also recommended that three additional types of appointees be covered by the rules: court examiners, supplemental needs trustees, and private pay law guardians.⁹⁰ Court examiners, who review the periodic accountings and

appointed can raise different issues and problems, and thus require particular services and talents. As a result... any system in which fiduciaries are randomly assigned will frequently fail to match the appropriate appointee to the appropriate case. Although judges themselves sometimes have difficulty making the correct match in some cases, they do a far better job than would a system of random selection.

Id. at 45–46.

⁸⁵ *Id.* at 46–47. The Commission recommended, however, that an appointee who is not on the appointment list should still have to meet all the criteria for inclusion on the list (e.g., not a relative of a judge, not a political party leader, etc.).

Id. at 47.

⁸⁶ See *supra* notes 67–70 and accompanying text.

⁸⁷ COMMISSION, *supra* note 33, at 46–47. The Commission noted that if separate training was required for each discrete appointment category, applicants would not, as experience had shown, routinely seek eligibility for most (or even all) categories. This would result in appointment lists that are smaller and easier to use than the present lists. *Id.* at 48.

⁸⁸ *Id.* at 48.

⁸⁹ *Id.* at 48–49.

⁹⁰ *Id.* at 49–50.

reports filed with the court by guardians and report to the court on those filings,⁹¹ are selected from lists compiled by the appellate division and were not subject to any of the requirements of the fiduciary rules. The Commission, however, discerned no reason why they should be treated differently from the other court appointees in guardianship proceedings, such as guardians and court evaluators.⁹² Supplemental needs trustees are appointed to administer trusts typically established so that persons under a disability may continue to maintain Medicaid eligibility after receiving a personal injury award.⁹³ They are similar to guardians of property, and they take their fees from the proceeds of the trusts.⁹⁴ Private pay law guardians are appointed in matrimonial cases to advocate for the interests of children affected by the litigation.⁹⁵ Their fees are paid by the parties.

The Commission recommended that additional types of “secondary” appointees be covered by the rules as well.⁹⁶ It was recommended that the rules continue to apply to secondary appointments in receivership cases.⁹⁷ Further, it was

⁹¹ See *supra* note 15 and accompanying text.

⁹² COMMISSION, *supra* note 33, at 49.

⁹³ See *id.* at 49.

⁹⁴ See *id.* at 49–50.

⁹⁵ See *id.* at 50–51. The role of private pay law guardians is often confused with that of guardians ad litem, who may also be appointed in matrimonial cases. Generally, a guardian ad litem is appointed to report to the court on the interests of the child, whereas a law guardian performs the more traditional role of a lawyer serving the interests of the child.

⁹⁶ *Id.* at 51.

⁹⁷ *Id.* This provision in the rules had generated considerable controversy even before the Commission recommended its continuation. In a March 9, 2000 memorandum from the Chief Administrative Judge (on file with author), judges were reminded that the rules applied to secondary appointments in receivership cases, and as a result the judges, not the receivers, were required to make these appointments. Some judges questioned the legality of a court rule mandating that judges appoint counsel to a receiver, citing C.P.L.R. § 6401(b), which provides that a receiver “shall have no power to employ counsel unless expressly so authorized by order of the court.” N.Y. C.P.L.R. § 6401(b) (McKinney 2003). These judges apparently read this provision as requiring that the judge first must provide the receiver with the general authority to retain counsel, but that once the judge does so, only the receiver, not the judge, may select the counsel. This strained reading of the statute was rejected by court administrators, and subsequently, when a number of judges permitted receivers to select their own counsel, the judges were investigated by the State Commission on Judicial Conduct. See Daniel Wise, *Judges Face Investigations over Hirings by Receivers*, N.Y. L.J., Feb. 13, 2002, at 1. It was

recommended that the rules apply to counsel for Article 81 guardians, accountants for Article 81 guardians, and assistants to guardians ad litem. The Commission found that these appointments had become increasingly common and could involve substantial fees.⁹⁸ Thus, while the appointments should be made by the judge, the primary appointee should be able to request that the court appoint a particular individual.⁹⁹

The Commission recommended important new limits on the number of higher-paying appointments that individual appointees may receive. To the surprise of some, it proposed that the existing \$5000 rule—limiting appointees to one appointment within a twelve-month period in which the compensation is anticipated to be more than \$5000—be continued.¹⁰⁰ The Commission acknowledged that, because this rule requires the appointee to anticipate at the outset of the appointment what the ultimate compensation will be—a difficult factor to calculate in many cases as it can often turn on the duration of the appointment—it is “confusing and largely unenforceable.”¹⁰¹ Nevertheless, it concluded that the \$5000 rule was of some value, particularly if combined with a rule that limited additional appointments based on the actual compensation an appointee received during a given period. In that regard, the Commission proposed that once an appointee exceeded a threshold of \$25,000 awarded for all of his or her appointments during any twelve-month period, the appointee should be ineligible to receive another appointment during the next twelve-month period.¹⁰² In the Commission’s view, this was a less confusing rule because it required no estimation of what the ultimate compensation might be in the case. It also would help address what the Commission had found was a practice by some appointees of deliberate under-billing—e.g., seeking an

later reported that the judges ultimately were not disciplined because they had agreed to follow the rules in future cases. Nancie L. Katz, *5 Judges in Probe Get Only a Warning*, N.Y. DAILY NEWS, May 14, 2002, at 12; *Not Even a Slap on the Wrist*, N.Y. DAILY NEWS, May 20, 2002.

⁹⁸ COMMISSION, *supra* note 33, at 51.

⁹⁹ *See id.* at 51–52.

¹⁰⁰ *Id.* at 53.

¹⁰¹ *Id.* at 52.

¹⁰² *Id.* at 53.

award of only \$4900 in a case—to avoid the limitations of the \$5000 rule.¹⁰³

Finally, the Commission recommended a series of measures designed to curb inappropriate fiduciary billing practices. Citing the Special Inspector General's finding that, in many cases, counsel to receivers or guardians received compensation at high hourly legal rates for work that the receivers or guardians should have performed as part of their own responsibilities,¹⁰⁴ the Commission urged judges not to appoint counsel to a receiver or guardian unless it is clear that counsel will be performing legal work.¹⁰⁵ In addition, it was proposed that, absent a convincing reason such as significant cost savings, judges should not be authorized to appoint the receiver or guardian as his or her own counsel.¹⁰⁶ Moreover, the Commission proposed that judges be required to refuse compensation to counsel or to deduct counsel's compensation from that of the receiver or guardian for work that should have been performed by the receiver or guardian.¹⁰⁷

3. Oversight of the Appointment Process

Recognizing that many abuses can be avoided if the public is provided with comprehensive, accurate information about which judges are making fiduciary appointments, who is receiving the appointments, and how much compensation is being paid, the Commission made extensive recommendations to improve compliance with the fiduciary filing requirements. These recommendations, in fact, were made in the form of interim recommendations prior to the issuance of the Commission's final report. Court administrators responded by implementing a new oversight process in March 2001.¹⁰⁸

Under this new process, a special fiduciary clerk has been designated in each of New York's twelve judicial districts. When

¹⁰³ *See id.*

¹⁰⁴ *See supra* note 61 and accompanying text.

¹⁰⁵ COMMISSION, *supra* note 33, at 54–55.

¹⁰⁶ *Id.* at 55.

¹⁰⁷ *Id.*

¹⁰⁸ The Commission's interim recommendations were attached to its December 2001 report. *See id.* at App. E. The Chief Administrative Judge's memorandum to the District Administrative Judges outlining the new process was also attached to the Commission's report. *Id.* at App. F.

a judge makes an appointment, the fiduciary clerk sends the official forms—the notice of appointment and the certification of compliance—to the appointee. The appointee then completes the forms and returns them to the fiduciary clerk, who sends them on to the Office of Court Administration and places copies in the court file. When the appointee seeks approval to be paid, he or she must obtain written confirmation from the fiduciary clerk that all required forms have been filed, and the judge may not approve compensation unless such confirmation is provided. Upon approving compensation to the appointee, the judge must submit the approval of compensation form to the fiduciary clerk, who then transmits the form to the Office of Court Administration. The Office of Court Administration enters relevant information from the forms into a fiduciary appointment database.

C. *Reaction to the Commission's Recommendations*

Following the release of the Commission's December 2001 report, the court system invited public comment on the report's recommendations. Extensive comments were received from a wide range of bar associations, judges, social service agencies, and legal practitioners.¹⁰⁹ The responses were generally supportive, particularly with regard to the recommendations concerning training, upgrading qualifications, using specialized lists, and enhancing oversight of the appointment process. There was considerable opposition, however, to several of the recommendations, particularly the proposed ban on appointing retired judges, the proposed new limits on the number of higher-paying appointments that individual fiduciaries may receive, and the proposed extension of those limits to "secondary" appointments.

A number of the bar associations and judicial associations opposed the recommendation that retired judges be ineligible for appointments for a two-year period after they leave the bench. These groups emphasized that retired judges are among the

¹⁰⁹ Indeed, a special committee of the New York State Bar Association created to review the Commission's recommendations issued its own report, fifty pages in length, on the recommendations. See N.Y. STATE BAR ASS'N, REP. OF THE SPECIAL COMM. ON FIDUCIARY APPOINTMENTS, (May 2002).

most qualified individuals to receive appointments.¹¹⁰ It was also suggested that any disqualification of retired judges be limited to the jurisdiction where the retired judge sat.

A great many of those commenting expressed their opposition to the recommended limits on higher-paying appointments. It was argued that the proposed \$25,000 limitation would sharply reduce the number of individuals available for appointment. This was particularly so in guardianship cases, which require highly specialized practitioners with both legal knowledge regarding financial management and the ability to assess and take care of the personal needs of incapacitated persons.¹¹¹ It was also pointed out that the proposed limitation, if applied to non-profit institutions that provide guardian services, would effectively put them out of business, greatly reducing the supply of providers who serve as guardians for persons of limited means. As for the \$5000 rule, commentators argued that it was confusing, unenforceable, and out-of-date.

Many were opposed to the inclusion of "secondary" appointments within the scope of the rules. Concerns were raised that requiring secondary appointees to meet the screening and filing requirements would raise the costs of their services for the receivers and guardians who need them. There was additional concern that, in guardianship proceedings in which the guardians were not professionals, it would be unduly burdensome for them to have to return to court for authorization every time they sought to hire a professional for assistance in preparing the annual reports and accountings. The state bar argued that, in receivership cases, enhanced oversight of secondary appointees was unnecessary because the adversarial system will prevent the waste of assets.¹¹²

¹¹⁰ See *id.* at 26.

¹¹¹ See *id.* at 39–40.

¹¹² See *id.* at 36. The report stated that "mortgage foreclosure actions are contested matters with two or more financially interested parties represented by counsel [I]f the appointment of counsel for the receiver and the property managers are [sic] made by motion on notice, the parties principally interested in the management of the property and the funds produced will have an opportunity to be heard." *Id.*

III. THE NEW RULES AND PROCEDURES

A. *The New Part 36*

Following a review of the public comments on the Commission's recommendations and after consulting with the Administrative Board of the Courts and obtaining approval from the Court of Appeals,¹¹³ Chief Judge Kaye repealed the old rules and promulgated a new Part 36 of the Rules of the Chief Judge.¹¹⁴ They apply to the appointment of guardians, court evaluators, attorneys for alleged incapacitated persons, guardians ad litem,¹¹⁵ referees,¹¹⁶ receivers, and persons or entities performing services for receivers—that is, all of the appointments covered under the old rules.¹¹⁷ In addition, the rules now apply to law guardians who are not paid from public funds, court examiners, supplemental needs trustees, and persons or entities performing services for guardians.¹¹⁸

By their terms, the rules do not apply to a number of other appointments.¹¹⁹ These include a guardian who is a relative of the incapacitated person or who has been nominated as guardian or proposed as guardian by the incapacitated person,¹²⁰ a person

¹¹³ Administrative rules of the Chief Judge must be approved by the Court of Appeals, after consultation with the Administrative Board of the Courts. N.Y. JUD. LAW § 211(2) (McKinney 2003).

¹¹⁴ N.Y. COMP. CODES R. & REGS. tit. 22, § 36 (2003), available at <http://www.courts.state.ny.us/fiduciaryreport/part36.htm>. The new rules take full effect on June 1, 2003.

¹¹⁵ N.Y. COMP. CODES R. & REGS. tit. 22, § 36.1(a) (2003). The rules now define guardians ad litem as those “appointed to investigate and report to the court on particular issues, and their counsel and assistants.” *Id.* § 36.1(a)(2).

¹¹⁶ *Id.* § 36.1(a)(9). The rules do not, however, apply to referees serving as special masters or otherwise serving in a judicial capacity. *Id.*

¹¹⁷ *Id.* § 36.1(a).

¹¹⁸ *Id.* For both receivership and guardianship proceedings, the new rules define these secondary appointments as counsel, accountants, auctioneers, appraisers, property managers, and real estate brokers. *Id.* § 36.1(a)(10).

¹¹⁹ Even, however, appointees who are expressly exempted from the regulation of the Part 36 rules are still ineligible for appointment if they have been convicted of a felony or a misdemeanor (for five years following imposition of the misdemeanor sentence) or have been disbarred or suspended from the practice of law. *See id.* § 36.2(c)(7); *see also infra* notes 137–38 and accompanying text.

¹²⁰ N.Y. COMP. CODES R. & REGS. tit. 22, § 36.1(b)(2)(i)(2003). This includes a guardian ad litem nominated by an infant fourteen years of age or older pursuant to section 403-a of the New York Surrogate's Court Procedure Act. *See id.* § 36.1(b)(2)(ii).

or institution whose appointment is required by law,¹²¹ a public administrator,¹²² a nonprofit institution serving as a guardian or court evaluator—including the Mental Hygiene Legal Service,¹²³ a law guardian appointed pursuant to section 243 of the New York Family Court Act,¹²⁴ a bank or trust company as a depository for funds or as a supplemental needs trustee,¹²⁵ and a guardian ad litem appointed as a physician where emergency medical treatment is necessary.¹²⁶ Notably, the rules further provide that persons or entities performing services for these exempted appointees are also exempt from the rules.¹²⁷

The new rules adopt the Commission's recommendation that the judge presiding over the case have the authority to select the fiduciary and that, in general, the judge must select the appointee from lists established by the Chief Administrator of the Courts.¹²⁸ The judge may appoint someone not on the list only upon a finding of "good cause," which must be set forth in writing and filed with the fiduciary clerk and the Chief Administrator.¹²⁹ Those appointed who are not on the list, however, must still comply with all of the requirements and limitations of the rules. In other words, even though they have not applied for placement on the appointment list, they must meet the qualifications for doing so, and they must file all necessary forms relating to their appointment.¹³⁰

Under the new rules, additional categories of persons are ineligible for placement on the appointment list. As was true under the prior rules, relatives of judges within the sixth degree

¹²¹ See *id.* § 36.1(b)(2)(vi).

¹²² See *id.* § 36.1(b)(2)(v).

¹²³ See *id.* § 36.1(b)(1).

¹²⁴ See *id.* These are law guardians who are appointed to represent children in Family Court proceedings and who are paid from public funds. *Id.*

¹²⁵ See *id.* § 36.1(b)(2)(iv).

¹²⁶ See *id.* § 36.1(b)(2)(vii).

¹²⁷ See *id.* § 36.1(b)(2).

¹²⁸ See *id.* § 36.2(a)–(b).

¹²⁹ See *id.* § 36.2(b)(2). Although the rules provide judges with this limited authority to appoint someone not on the list, an individual who has been affirmatively removed from the list may not be appointed under any circumstances. *Id.*; see also *infra* note 152 and accompanying text.

¹³⁰ See N.Y. COMP. CODES R. & REGS. tit. 22, § 36.2(b)(3) (2003). The appointing judge, however, may waive any education and training requirements that otherwise would apply to the appointment if satisfaction of those requirements would not be practical. *Id.*

of relationship continue to be ineligible for appointment, as are judicial hearing officers in the county where they serve on the judicial hearing officer panel.¹³¹ A series of new disqualifying criteria, however, now also apply. Former New York State judges and their immediate relatives¹³² are ineligible for appointment within the jurisdiction where they served for two years after they leave the bench.¹³³ Full-time and part-time New York State court employees and their immediate relatives are ineligible, as are the immediate relatives of higher-level court employees.¹³⁴ State and county political party chairs and executive directors, their immediate relatives, and law firms or other businesses with which they are employed are ineligible for appointment while the party official serves in that capacity and for a period of two years after stepping down from such position.¹³⁵ Judicial campaign officials, their immediate relatives, and their law firms are ineligible for appointment by the judge for whom they campaigned for a two-year period following the judicial election.¹³⁶ Finally, disbarred and suspended attorneys are ineligible during the period of their disbarment or suspension,¹³⁷ and convicted felons and

¹³¹ See *id.* § 36.2(c)(1)–(2).

¹³² See *id.* As used herein, “immediate relatives” includes a spouse, sibling, parent, or child. *Id.* § 36.2(c)(4)(i).

¹³³ See *id.* § 36.2(c)(5). Jurisdiction is defined as statewide for Court of Appeals judges, judicial department for Appellate Division judges, principal judicial district in which they served for supreme court judges and court of claims judges, and principal county in which they served for all other judges. *Id.*

¹³⁴ See *id.* § 36.2(c)(3). The relatives are ineligible for appointment within the judicial district where the higher-level employee is employed, or statewide if the higher-level employee has statewide responsibilities. See *id.* Higher-level court employees are defined in the rules as those who hold a grade within the court system’s salary structure of higher than JG24, or its equivalent. See *id.*

¹³⁵ See *id.* § 36.2(c)(4)(i). Notably, this prohibition is broader than an analogous provision in the New York Public Officers Law that bars political party chairs and various elected officials and public employees from practicing law before, or transacting business with, a state agency. See N.Y. PUB. OFF. LAW § 73 (McKinney 2001). That statutory ban does not extend to a law firm or other organization employing the party chair or public official if he or she does not share in the firm’s or organization’s net revenues. See *id.* § 73(10).

¹³⁶ See N.Y. COMP. CODES R. & REGS. tit. 22, § 36.2(c)(4)(ii) (2003). The prohibition applies to a campaign chair, manager, treasurer, or finance chair. *Id.*

¹³⁷ See *id.* § 36.2(c)(6).

misdeemeanants—though only for five years following their sentencing for the misdemeanor—are ineligible.¹³⁸

Additionally, the rules render ineligible certain individuals who are otherwise ineligible for placement on the appointment list for particular categories of appointments. A person who has been appointed as court evaluator in a guardianship proceeding may not be appointed as guardian to the subject of that proceeding unless there are “extenuating circumstances” that the appointing judge sets forth in writing and files with the fiduciary clerk.¹³⁹ On the other hand, a person who has been appointed as the attorney for an alleged incapacitated person may not be appointed as guardian to that person or as counsel to the guardian of that person under any circumstances.¹⁴⁰ The rules also provide that, absent a compelling reason, a receiver or guardian may not be appointed as his or her own counsel.¹⁴¹

Despite the extensive criticism of the Commission’s recommendations for limitations on appointments based on

¹³⁸ See *id.* § 36.2(c)(7). The prohibition on misdeemeanants can be waived by the Chief Administrator of the Courts. *Id.* In addition, a convicted felon or misdeemeanant can become eligible upon receipt of a certificate of relief from disabilities. See *id.* See generally N.Y. CORRECT. LAW § 701 (McKinney 2002) (prescribing procedures for issuance of certificates of relief from disabilities).

¹³⁹ N.Y. COMP. CODES R. & REGS. tit. 22, § 36.2(c)(10) (2003). The court evaluator, who must recommend to the court whether a guardian should be appointed for the alleged incapacitated person, has a potential conflict of interest if he or she has an opportunity to be appointed as the guardian in that case. The exception recognizes, however, that in some cases it might make good sense to appoint court evaluators as the guardian, such as where they have developed a relationship of trust with the incapacitated person.

¹⁴⁰ See *id.* § 36.2(c)(9). Like the court evaluator, the attorney for the alleged incapacitated person may also develop a relationship of trust with the incapacitated person. Nevertheless, because of the attorney’s role as the advocate for the incapacitated person, the potential conflict of interest is even greater. Thus, the rules establish a strict ban on the attorney’s eligibility for the guardianship appointment.

¹⁴¹ See *id.* § 36.2(c)(8). The prohibition also applies to the receiver’s or guardian’s law firm. A related provision in the new rules states that “[a]ppointees 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.” *Id.* § 36.4(b)(4). These provisions are designed to address the “double dipping” abuses documented in the Special Inspector General’s report in which counsel to guardians and receivers (which in some cases were the same person) performed work that should have been deemed part of the guardian’s or receiver’s routine responsibilities and then were paid separate hourly legal fees above and beyond the commissions that were paid to the guardian or receiver. See *supra* note 61 and accompanying text.

compensation,¹⁴² the new rules include two important provisions of that nature. First, the rules continue the \$5000 rule but with some key changes. The new rule limits an appointee to one appointment within a *calendar year* for which the compensation anticipated to be awarded *within any calendar year* exceeds \$5000.¹⁴³ Basing the rule on appointments within a calendar year, rather than within the floating twelve-month period employed in the prior rule, makes the rule easier to comply with and enforce. Also, the new rule's focus on compensation to be awarded within any calendar year significantly narrows its scope in certain cases. For example, under the previous rule, a relatively modest guardianship appointment expected to pay only \$500 per year would have implicated the rule if the incapacitated person was expected to live more than ten years. Finally, unlike the old version, the new rule contains no exceptions.¹⁴⁴

The new rules also adopt the Commission's recommendation for a limitation based on actual compensation received. The new rule provides that if an appointee is awarded more than an aggregate of \$50,000 in compensation during a calendar year for all of his or her appointments, then the appointee is ineligible for new appointments in the following calendar year.¹⁴⁵ The new

¹⁴² See *supra* note 111 and accompanying text.

¹⁴³ N.Y. COMP. CODES R. & REGS. tit. 22, § 36.2(d)(1) (2003). "Compensation" is defined as "awards by a court of fees, commissions, allowances or other compensation, excluding costs and disbursements." *Id.* § 36.2(d)(3).

¹⁴⁴ The prior version permitted an exception where the judge found "unusual circumstances of continuity of representation or familiarity with a case." *Id.* § 36.1(c).

Application of the \$5000 rule to "private pay" law guardians, who for the first time are now covered by Part 36, *see id.* § 36.1(a)(3) (2003), may be problematic. "Private pay" law guardians, assigned to represent children in what are frequently hotly litigated matrimonial cases, routinely bill more than \$5000 for their services (particularly in some of the state's larger counties). Application of the \$5000 rule to these appointments, therefore, may have the effect of limiting the appointees to a single appointment in a calendar year, a result that was neither desired nor anticipated. Amendment of the new rules to exempt these appointments from the \$5000 rule, or possibly to raise the \$5000 threshold, should be considered.

¹⁴⁵ See *id.* § 36.2(d)(2). The rule refers to compensation "awarded" rather than to compensation received. This was intended to prevent appointees, many of whom pay themselves after obtaining approval from the court to do so, from manipulating the timing of when they actually received their compensation. Since many appointees, however, may also control the timing of their requests for approval of compensation, the potential for manipulation may not have been entirely

rule thus doubles the \$25,000 threshold that the Commission had suggested, and, as is true for the new \$5000 rule, it is geared to calendar years rather than floating twelve month time periods. Like the new \$5000 rule, the \$50,000 rule contains no exceptions.¹⁴⁶ It should be emphasized, however, that the \$50,000 rule in no way imposes a cap or otherwise limits the compensation that fiduciaries may receive in cases in which they already have been appointed.¹⁴⁷ Rather, the rule simply bars an individual from receiving new appointments in the next calendar year once he or she is awarded compensation in excess of \$50,000 from all of his or her appointments in a given calendar year. Unlike the \$5000 rule, when the appointment was *made* is not relevant; the question is when the compensation is *awarded*.

For the most part, the administration of Part 36 has not changed under the new rules. Individuals interested in serving as fiduciaries must file an application with the Office of Court Administration.¹⁴⁸ The application requires information about the individual's background and experience and requires the applicant to designate the categories of appointments they are interested in and the counties in which they seek to be appointed.¹⁴⁹ The Office of Court Administration is developing appointment lists in each county for each of the appointment categories.¹⁵⁰ The lists will be contained in the Unified Court System's computer network that is available to judges and court personnel throughout the state. Unlike in the past, those on the appointment lists will be required to re-register every two years to remain on the lists.¹⁵¹ In addition, the Chief Administrator of the Courts is now authorized to remove individuals from the list

eliminated.

¹⁴⁶ Both the \$5000 rule and the \$50,000 rule are based on "fees, commissions, allowances or other compensation," not including costs and disbursements. *Id.* § 36.2(d)(3).

¹⁴⁷ *Cf. id.* § 36.4(b)(4) ("Compensation to appointees shall not exceed the fair value of services rendered.").

¹⁴⁸ *Id.* § 36.3(a).

¹⁴⁹ See Unified Court System Form 870.

¹⁵⁰ See N.Y. COMP. CODES R. & REGS. tit. 22, § 36.3(c) (2003). Although the rules permit separate lists within an appointment category based on level of experience, *id.*, the Office of Court Administration has no immediate plans to establish such lists.

¹⁵¹ N.Y. COMP. CODES R. & REGS. tit. 22, § 36.3(d) (2003).

for "unsatisfactory performance or any conduct incompatible with appointment."¹⁵²

A major change in the procedures governing the appointment lists is the new training requirement. The rules require the Chief Administrator to establish education and training requirements for placement on the appointment lists.¹⁵³ In implementing this mandate, the Chief Administrator is requiring those seeking appointment in the "primary" fiduciary categories¹⁵⁴ to complete a substantive training program for the particular category of appointment.¹⁵⁵ Those seeking "secondary"¹⁵⁶ appointments are not being required to complete a substantive training program. Given that they perform a narrower role than the primary appointees, their licensing status in their respective areas is recognized as meeting the education and training requirement of the rules. Along with the substantive training requirement, those seeking inclusion on the appointment lists must also certify that they have carefully reviewed the Part 36 rules and a written explanation of the rules that is provided to all applicants.

Finally, the new rules continue the requirement that appointees file a notice of appointment and certification of compliance (which will be a single combined form) at the time of appointment.¹⁵⁷ In addition, when seeking compensation in excess of five hundred dollars for their work, appointees must

¹⁵² See *id.* § 36.3(e).

¹⁵³ See *id.* § 36.3(b).

¹⁵⁴ These include guardians, court evaluators, court examiners, attorneys for alleged incapacitated persons, guardians ad litem, law guardians, supplemental needs trustees, and receivers. See *id.* § 36.1(a)(1)–(9). Referees are not being required to complete a formal training program.

¹⁵⁵ The Chief Administrator must certify the programs, most of which are being conducted by bar associations. Attendance at some programs held prior to the effective date of the rules, particularly Article 81 training programs, is being recognized and credited.

¹⁵⁶ These are the persons who perform services for guardians or receivers, and include counsel, accountants, auctioneers, appraisers, property managers, and real estate brokers. See N.Y. COMP. CODES R. & REGS. tit. 22, § 36.1(a)(10) (2003).

¹⁵⁷ See *id.* § 36.4(a)(1). The fiduciary clerk sends the form and other relevant information to the appointee at the time of appointment. The appointee then must complete the form and return it to the fiduciary clerk within thirty days of the appointment. *Id.* Appointees who will be receiving no compensation for their work are not subject to the requirements of the rules, *id.* § 36.1(b)(3), except that they must complete the notice of appointment portion of the form and file it with the fiduciary clerk, *id.* § 36.4(a)(1).

submit to the court a statement of approval of compensation containing the fiduciary clerk's written confirmation that the appointee has filed the notice of appointment and certification of compliance.¹⁵⁸ The rules expressly provide that a judge may not approve compensation unless such confirmation has been provided.¹⁵⁹ Upon awarding compensation to the fiduciary, the judge must sign the approval of compensation statement which specifies the amount approved and transmit it to the fiduciary clerk.¹⁶⁰ The fiduciary clerk will send the forms to the Office of Court Administration, where all relevant information will be entered into a central fiduciary appointment database available to judges and court personnel throughout the state. In addition, the Office of Court Administration plans to publish on the court system's web site the names of all persons who receive fiduciary appointments, the judges who made the appointments, and the compensation awarded.¹⁶¹

B. *Future Measures*

Although the new Part 36 rules are comprehensive in their scope and will lead to major improvements in the fiduciary appointment process, further issues should be examined and additional steps should be considered if problems persist. Perhaps the most controversial of the potential measures is a random or rotational assignment system. In preserving the judge's authority to select the fiduciary, the new rules reflect the conclusion of the Commission that, on balance, judicial discretion best meets the needs of the litigants and the courts.¹⁶² The primary drawback of judicial discretion, however, is that it can allow for, or at least create the perception of, favoritism in the selection process. Indeed, although the rules now disqualify

¹⁵⁸ See *id.* § 36.4(b)(1).

¹⁵⁹ See *id.* § 36.4(b)(2).

¹⁶⁰ The rules governing statements of approval of compensation, set forth in Part 26 of the Rules of the Chief Judge, derive from section 35-a of the New York Judiciary Law. See *supra* notes 36–37 and accompanying text. Part 36 also requires that whenever a judge approves compensation greater than \$5000, he or she must file a written explanation with the fiduciary clerk. N.Y. COMP. CODES R. & REGS. tit. 22, § 36.4(b)(3) (2003).

¹⁶¹ See generally N.Y. COMP. CODES R. & REGS. tit. 22, § 36.5(b) (2003). The New York State Unified Court System's web site is located at <http://www.courts.state.ny.us>.

¹⁶² See *supra* notes 81–84 and accompanying text.

certain individuals from appointment and impose new limitations on the number of appointments that individual appointees may receive, they do not completely eliminate the potential for politics or other inappropriate factors to continue to influence the appointment process. If ongoing examination reveals that such factors continue to exert significant influence on fiduciary appointments, a stronger argument could be made for some form of a random appointment process. One possibility might be to require the judge to select the appointee from a small group of candidates randomly selected from the appointment list. A variation of that approach would be to require selection from a randomly selected group but permit discretion to select someone else if the judge sets forth in writing good cause for doing so.

Another area for possible future reform is stricter regulation of fiduciary compensation. Although the new rules provide that “[c]ompensation to appointees shall not exceed the fair value of services rendered,”¹⁶³ there is no guarantee that this general admonition will eliminate billing abuses by fiduciaries.¹⁶⁴ Greater judicial scrutiny of applications for approval of compensation is critical, particularly for fiduciaries who are paid hourly fees for their services.¹⁶⁵ Ultimately, however, serious consideration may have to be given to establishing fee schedules that prescribe the authorized compensation for work performed by fiduciaries.¹⁶⁶

¹⁶³ N.Y. COMP. CODES R. & REGS. tit. 22, § 36.4(b)(4) (2003).

¹⁶⁴ See *supra* note 61 and accompanying text.

¹⁶⁵ Typically, these include guardians ad litem, law guardians, court evaluators, attorneys for alleged incapacitated persons, and secondary appointees. With regard to secondary appointees, the rules also seek to prevent “double billing” situations in which counsel to guardians and counsel to receivers are compensated for work that should have been performed by the primary fiduciary. N.Y. COMP. CODES R. & REGS. tit. 22, § 36.4(b)(4) (2003) (“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.”).

¹⁶⁶ Fee schedules could be enacted by the State legislature, *cf.* N.Y. COUNTY LAW § 722-b (McKinney 1991) (setting compensation for counsel assigned to represent indigent criminal defendants and indigent adult litigants in Family Court), or promulgated by the courts, either pursuant to statutory delegation by the Legislature, *cf.* N.Y. JUD. LAW § 35-b(5) (McKinney 2002) (delegating authority to Court of Appeals to approve fee schedule for assigned counsel in capital cases), or on their own, *cf.* Admin. Order No. 73 of the Chief Admin. of the Courts, (February 6, 1992) (promulgating fee schedules for court-appointed experts).

The Commission highlighted the need for a better system of providing guardians in cases in which the incapacitated person has minimal or no assets.¹⁶⁷ In some cases, legal service offices or social service agencies are available to serve as guardian. In many other cases, however, the courts rely on private attorneys to handle these assignments on a pro bono basis. These are often particularly difficult assignments because they can last for years and can involve extensive work during non-business hours. As a result, some judges reward those who take pro bono assignments with lucrative assignments when they become available—a practice that some have criticized.

In any event, a more coordinated approach to assigning guardians in these cases is needed. Some states, such as California and Illinois, have created public guardian offices to handle cases involving minimal assets.¹⁶⁸ These offices may also be assigned cases in which an incapacitated person has assets; the fees paid in those cases help offset the general expenses of operating their offices. The state legislature should consider such an approach for New York, particularly if public guardian offices can be established with limited cost to the taxpayers. As our population continues to age, the demand for guardianship services will only increase.¹⁶⁹

Another subject in need of further study is the role of court examiners. Court examiners are appointed in guardianship proceedings to assess the periodic reports and accountings filed by the guardians.¹⁷⁰ Thus, they are appointed to assist the court in ensuring that guardians adequately meet their responsibilities in managing the financial and personal affairs of their wards. It is widely suspected, however, that court

¹⁶⁷ COMMISSION, *supra* note 33, at 61–62.

¹⁶⁸ See CAL. GOV'T CODE § 27430 (Deering 2003); 20 ILL. COMP. STAT. ANN. 3955/30 (West 2002).

¹⁶⁹ A variation of the public guardian approach has been in place in Westchester County since the mid-1990s. In all cases in which a relative, friend, or other person is not available for nomination, the court appoints a local non-profit social service agency as guardian, whether the incapacitated person has assets or not. The fees received from the cases with assets, supplemented by a modest appropriation from the county government, enables the social service agency, which has social workers, accountants, and other professionals on its staff, to meet its expenses.

¹⁷⁰ See *supra* note 15 and accompanying text.

examiners often do not adequately fulfill this function.¹⁷¹ By subjecting court examiners for the first time to the same regulation as other Article 81 appointees, the new rules take an important step in the right direction. Yet it should be re-evaluated whether private individuals paid from the assets of the incapacitated persons are necessary to perform this oversight function. Rather than perpetuating another layer of appointments in guardianship cases, it may be that court personnel could fulfill this role as well, if not better, than private appointees.¹⁷²

Finally, one area of concern not addressed at all by the Commission or by the new rules is the operation of the public administrator offices.¹⁷³ Every county in New York has a public administrator who is authorized by law to act as the fiduciary of an estate when no other person is eligible and available to serve as administrator or executor.¹⁷⁴ In the five counties of New York

¹⁷¹ An egregious example of this was brought to public attention shortly before the release of the new Part 36 rules. In November 2002, the Queens County District Attorney announced the indictment of an attorney who had received over 150 fiduciary appointments in Queens County. The indictment charged the attorney with stealing over \$1 million from the funds of six incapacitated persons for whom he had been appointed as guardian. *See* Press Release, Queens County District Attorney's Office, Court-Appointed Long Island City Attorney Indicted on Charges of Stealing Over \$1.2 Million From Funds of Six Incapacitated Individuals Including Teen Born Totally Disabled, Quadriplegic and Alzheimers' Victim; Over 150 Additional Fiduciary Appointments of Defendant Under Investigation (Nov. 18, 2002), <http://www.queensda.org/Press%20Releases/Press%20Release%20Main%20Page.htm>. In two of the cases, the amounts allegedly stolen exceeded \$500,000. Suspensions were raised when the Public Administrator's Office discovered irregularities in the finances of one of the incapacitated persons, who had died. *See id.* It seems clear that if the court examiners assigned to these cases had been adequately monitoring the performance of the guardian they would have uncovered these thefts.

¹⁷² In this regard, the New York court system has initiated a pilot program in two counties in which the Office of Court Administration's internal auditors are being randomly appointed as court examiners in a select number of cases. *See* Press Release, New York State Unified Court System, Courts Adopt New Fiduciary Appointment Rules (Dec. 2, 2002) (on file with author). The purpose of the program is to test whether an alternative approach to the appointment of private individuals as court examiners is viable.

¹⁷³ Indeed, the rules expressly exempt public administrator offices from their purview. N.Y. COMP. CODES R. & REGS. tit. 22, § 36.1(b)(2)(v) (2003).

¹⁷⁴ *See generally* N.Y. SURR. CT. PROC. ACT arts. 11, 12 (McKinney 1995). The Public Administrator has all the powers afforded a fiduciary to manage the affairs of the estate, including collecting and handling the decedent's assets, liquidating personal and real property, searching for heirs, preparing tax returns, filing an

City and in the six largest counties outside of New York City,¹⁷⁵ the public administrator is a distinct public official appointed by the surrogate; in the remaining counties, the county treasurer serves as the public administrator. The public administrator receives a statutory commission based on the size of each estate administered, and the commission proceeds are remitted to the local government.¹⁷⁶

In recent years, public administrator offices, particularly those in New York City, have been sharply criticized for mismanagement of their responsibilities.¹⁷⁷ Public scrutiny has focused on the public administrators' counsel, who prepare all necessary court papers and perform other services on behalf of the public administrators.¹⁷⁸ Unlike the public administrator, the counsel is not a government employee but a private attorney who retains his or her legal fees, which are paid from the estates. Such counsel are often politically-connected lawyers, and their fees can be quite lucrative, reportedly amounting to hundreds of thousands of dollars per year.¹⁷⁹

There are a number of potential alternatives to the current practice, the most obvious being for the public administrators to hire staff attorneys to perform this work. Using public employees as counsel would avoid the negative perception that lucrative estate work is being channeled to favored attorneys and could save the estates considerable expense.¹⁸⁰ Private

accounting of all transactions for the estate, and ultimately distributing the estate assets. *Id.* §§ 1123, 1213.

¹⁷⁵ Those counties are Erie, Monroe, Nassau, Onondaga, Suffolk, and Westchester.

¹⁷⁶ N.Y. SURR. CT. PROC. ACT §§ 1107(1), 1208(1) (McKinney 1995). In a few upstate counties, the public administrators are authorized to retain their commissions. *See id.* § 1207.

¹⁷⁷ *See, e.g.*, ROBERT ABRAMS & EDWARD V. REGAN, JOINT REVIEW BY THE STATE COMPTROLLER AND THE ATTORNEY GENERAL OF THE NEW YORK CITY PUBLIC ADMINISTRATORS (1992).

¹⁷⁸ In New York City, the counsel is appointed by the Surrogate. N.Y. SURR. CT. PROC. ACT § 1108(2)(a) (McKinney 1995). Outside New York City, the public administrators appoint their own counsel. *See id.* § 1206(3).

¹⁷⁹ *See* Larry Cohler-Esses, *Brooklyn Judge Has Ties to Buddy Making a Killing on Estates*, N.Y. DAILY NEWS, May 13, 2002, at 8; *Graverobbing Made Legal*, N.Y. DAILY NEWS, May 14, 2002, at 26; Nancie Katz & Larry Cohler-Esses, *Where There's No Will, There's a Way*, N.Y. DAILY NEWS, May 13, 2002, at 8.

¹⁸⁰ As the public administrators are local government, not court, employees, New York City and the county governments would have to authorize their public administrators to hire staff attorneys. This would not have to be an added expense

counsel might still be retained in unusually complex cases, but that would be the rare exception. Other alternatives for consideration would be including the counsel to the public administrators among the appointees regulated by Part 36—which, in particular, would subject them to the new provisions limiting appointments based on compensation—or promulgating strict fee schedules for the counsel.

CONCLUSION

The preamble to New York's new fiduciary appointment rules states that "[p]ublic trust in the judicial process demands that appointments by judges be fair, impartial and beyond reproach," and that the new rules are designed "to ensure that appointees are selected on the basis of merit, without favoritism, nepotism, politics or other factors unrelated to the qualifications of the appointee or the requirements of the case."¹⁸¹ Indeed, the new rules are a major step forward in addressing long-standing flaws in the process, and they serve as a model for other judicial systems around the nation looking to strengthen their fiduciary appointment procedures.

Scrutiny of fiduciary appointments in New York, however, is ongoing. The court system's Special Inspector General's Office has been established as a permanent watchdog, and with easier access to enhanced information, the press's keen interest in this subject is sure to continue. Accordingly, time will tell whether the new rules succeed in resolving the many problems that have plagued New York's appointment process over the years. If achievement of the goals set forth in the preamble is thwarted, adoption of further measures—including those cited in this Article—may be warranted.

for local governments if the public administrators could charge the estates fees, albeit much lower fees than currently charged by the private counsel, for the staff attorneys' services.

¹⁸¹ N.Y. COMP. CODES R. & REGS. tit. 22, § 36.0 (2003).