

THE RULES OF THE CHIEF JUDGE PART 36



Questions and Answers



**NYS Office of Court Administration
Guardian & Fiduciary Services
25 Beaver Street
New York, NY 10004**

Phone: 212- 428-5505

Website: www.nycourts.gov/ip/gfs

Email: gfs@nycourts.gov

QUESTION 1: What appointments does Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36) govern?

ANSWER: Part 36 governs the following judicial appointments made by judges or justices (including town and village justices) of the Unified Court System (UCS) (§ 36.1 [a]):

- 1) guardians;
- 2) guardians ad litem, including their counsel and assistants;
- 3) privately paid attorneys for the child where authorized (First, Second and Fourth Judicial Departments);
- 4) court evaluators;
- 5) attorneys for alleged incapacitated persons;
- 6) court examiners;
- 7) supplemental needs trustees;
- 8) receivers;
- 9) referees, e.g., a referee to sell property. Referees performing judicial functions in a quasi-judicial capacity are exempt from Part 36. Those exemptions include: a referee to hear and report (CPLR 4201) or hear and determine (CPLR 4301), or a referee to supervise discovery (CPLR 3104);
- 10) secondary appointees of guardians and receivers. Whenever a Part 36 guardian or receiver seeks to retain an attorney, accountant, appraiser, auctioneer, property manager or real estate broker, that professional is a Part 36 appointee subject to all of its provisions (§§ 36.1 [a] [10]; § 36.2 [a]);
- 11) public administrators and counsel to the public administrator (within the City of New York and the counties of Westchester, Onondaga, Erie, Monroe, Suffolk and Nassau) are subject to the certain sections of the rules, including the disqualifications of § 36.2 (c) and special compensation reporting requirements in § 36.4 (e).

QUESTION 2: Guardians, guardians ad litem and law guardians all sound alike; are these different kinds of appointments?

ANSWER: Yes, these three categories of appointment are very different and have very different functions and responsibilities. Typically, guardians are appointed to assist persons with limitations (e.g. elderly or infirm persons) in making day-to-day decisions. "Guardians ad litem" (most often utilized in Surrogate's Court) are appointed in a single case to report to the court and represent the interests of children or incapacitated persons while the case is ongoing. "Law Guardians," also known as "Attorneys for the Child," represent children as advocates in family court matters or in custody and visitation disputes. Do not confuse these three categories with the appointment of "attorneys for alleged incapacitated persons" which are found only in Mental Hygiene Law Article 81 guardianship proceedings.

QUESTION 3: Does Part 36 regulate who may be appointed by a court?

ANSWER: Yes, to the extent that Part 36 provides for the establishment of a list of qualified applicants for each category of appointment (§ 36.3 [c]), and requires the court to make all appointments from the appropriate list (§ 36.2 [b] [1]). Judges, however, always maintain complete discretion in the selection of appropriate appointees. There is no requirement, for example, that judges make appointments according to the order in which eligible appointees' names appear on a list.

QUESTION 4: May a court ever select an appointee not enrolled on an appropriate list?

ANSWER: Yes, a court may select an appointee not enrolled on an applicable list (a "non-list" appointment), but only upon a written finding of good cause, filed with the fiduciary clerk and sent to the Chief Administrative Judge (§ 36.2 [b] [2]); such a non-list appointee must otherwise be qualified and eligible for appointment and comply with all the provisions of Part 36, including the filing requirements of § 36.4 (§ 36.2 [b] [3]). The court, however, may waive any education and training requirements if considered impractical (§ 36.2 [b] [3]).

QUESTION 5: Are any appointments in the enumerated categories exempt from Part 36 applicability?

ANSWER: Yes, even though an appointment is in a category to which Part 36 applies, a person or entity may be exempt from its provisions under the circumstances set forth in § 36.1 (b).

QUESTION 6: What are those exemptions?

ANSWER: Exemption from Part 36 applicability found in § 36.1 (b) (1):

- 1) attorney for the child, appointed pursuant to the section 243 of the Family Court Act (contract agencies),
- 2) guardians ad litem in termination of parental rights proceedings, who are paid from public funds, and
- 3) the Mental Hygiene Legal Service;

Exemptions from Part 36 applicability found in § 36.1 (b) (2):

- 4) the guardian or supplemental needs trustee who is
 - a. a family member of the incapacitated person / beneficiary, or
 - b. a person nominated by the incapacitated person / beneficiary, or
 - c. a person proposed by a party to the guardianship proceeding or a party to the supplemental needs trust proceeding.

- d. Essentially, this exception is for family and friends of the incapacitated person / beneficiary; ¹
- 5) a guardian who is a person or entity having a legally recognized duty or interest with regard to an incapacitated person;
- 6) a guardian ad litem
 - a. nominated by an infant of 14 years of age or older or
 - b. appointed pursuant to CPLR Article 12, who is the uncompensated friend or relative of a party incapable of adequately prosecuting or defending the party's rights;
- 7) a not-for-profit agency performing property management or personal needs services or acting as court evaluator;
- 8) a bank or trust company as a depository for funds or as a supplemental needs trustee;
- 9) a public official vested with the powers of an administrator, such as, the chief financial officer of a county;
- 10) a person or institution whose appointment is required by law;
- 11) a physician whose appointment as a guardian ad litem is necessary where emergency medical or surgical procedures are required.

Exemptions from Part 36 applicability found in § 36.1 (b) (3):

- 12) appointees who serve without compensation. ²

QUESTION 7: What is the procedure for enrollment on Part 36 lists?

ANSWER: Go to the New York Unified Court System web site <https://iapps.courts.state.ny.us/fiduciaryonline/InstructionsPage>. Follow the instructions: read Part 36 and the official Explanatory Note (found under "statutes and rules" on menu); complete and submit the application online.

QUESTION 8: Is the filing of the application the only requirement?

ANSWER: No, prior to filing the application, each applicant must complete certified training for any category of appointment requiring such training (§ 36.3 [b].)

¹ Usually referred to as "lay" guardians, these are relatives, friends, neighbors, etc., of the incapacitated person/beneficiary, including professionals such as family attorneys, accountants, physicians, clergy, etc., who may be on the Part 36 list because of their profession but who are nominated or proposed in the particular case because of their relationship to the incapacitated person/beneficiary, not because of their selection by the court from a list.

² Nevertheless, a Notice of Appointment (UCS-872) must still be filed; however, the appointee who serves without compensation is not required to file a Certification of Compliance. The purpose of filing the Notice of Appointment is to record the pro bono service provided by fiduciaries. No Certification of Compliance is necessary because it is only used to show compliance with qualification and eligibility standards that do not apply to uncompensated appointees.

QUESTION 9: How long is a list enrollee eligible for appointment?

ANSWER Two years. All enrollees are required to re-register every two years to maintain eligibility for appointment (§ 36.3 [d]).

QUESTION 10: Is an enrollee subject to removal from a Part 36 list?

ANSWER: Yes, the Chief Administrative Judge may remove for unsatisfactory performance or any conduct incompatible with appointment. An enrollee subject to removal is entitled to a written statement of reasons for removal and an opportunity to provide an explanation and facts in opposition (§ 36.3 [e]). Appointment after removal is prohibited (§ 36.2 [b] [2]).

QUESTION 11: Does Part 36 establish certain disqualifications from appointment?

ANSWER: Yes, § 36.2 (c) sets forth a long list of disqualifications, many of which were new to Part 36. Some of these disqualifications are based on position, e.g., judges, judicial hearing officers, court employees, political party officials, judicial campaign officials, former judges. Others are based on relationship, i.e., certain relatives of those disqualified by position. Still others are based on circumstances, e.g., disbarred or suspended attorneys or convicted criminals. Read § 36.2 (c) carefully. Some disqualifications are absolute. Others are limited by time, geography or the degree of relationship.

QUESTION 12: Does Part 36 provide for disqualification from appointment for all political activities?

ANSWER: No, disqualification from appointment is limited to the chair or executive director, or their equivalent, of a state or county political party and the spouse, sibling, parent or child of such official while in office and for two years after leaving office. Also disqualified are the members, associates, counsel and employees of any law firms or entities for the period during which the official is associated with the firm or entity (§ 36.2 [c] [4] [i]).

QUESTION 13: What about activity on judicial election campaigns?

ANSWER: Not all political activity on behalf of a judicial candidate creates a disqualification from appointment. Disqualification is limited to a campaign chair, coordinator, manager, treasurer or financial chair for a candidate for judicial office, and only to the extent that the judge for whom that official served may not appoint the official during the course of the campaign and for a period of two years following the judicial election. This prohibition also applies to the campaign official's spouse, sibling, parent or child and anyone associated with the official's law firm (§ 36.2 [c] [4] [ii]).

QUESTION 14: Does Part 36 limit the amount of compensation that a Part 36 appointee may be awarded?

ANSWER: No, there is no prescribed minimum or maximum amount of compensation that may be awarded to an appointee, other than the fair value of services rendered, as determined by the court (§ 36.4 [b] [4]).

QUESTION 15: What, then, does § 36.2 (d) limit when it says, “Limitations based upon compensation”?

ANSWER: Appointments.

QUESTION 16: How?

ANSWER: By applying two different rules, which use the amount of compensation that has been awarded, or is anticipated to be awarded, for prior appointments to determine eligibility for any new appointment. These are called the \$15,000 (§ 36.2 [d] [1]) and \$100,000 Rules (§ 36.2 [d] [2]).

QUESTION 17: What does the \$15,000 Rule do?

ANSWER: The \$15,000 Rule **prohibits** acceptance of a **new** Part 36 appointment if:

1. the award of compensation in any calendar year for this new appointment is anticipated to be more than \$15,000, AND

2. during the **same calendar year** (January 1 to December 31) in which the new appointment is made, the appointee received a prior appointment for which compensation of more than \$15,000 was awarded **or** is anticipated to be awarded **in any calendar year**.

“Any calendar year”: An appointment may begin and end within a single calendar year. Often, however, because of the long-term nature of an appointment (e.g., a guardian or receiver) or protracted litigation (e.g., a attorney for the child in a contested matrimonial action), an appointment may span multiple years. It is possible that for an appointment made today there may be awards of compensation on an annual basis for many years; or, there may be only one award of compensation when the appointment concludes years later. Consequently, in determining compensation anticipated to be awarded for today’s appointment, consideration must be given to a potential award in the year of appointment **or** in a future year—both of which constitute “any calendar year.”

QUESTION 18: How does the \$15,000 Rule work?

ANSWER: Apply the \$15,000 Rule, by asking:

1. Does the new appointment have anticipated compensation of more than \$15,000 in any calendar year?
 - If NO, the appointment may be accepted.
 - If YES, then ask question #2:
2. In the same calendar year as the new appointment, was there a prior appointment with compensation, **or** anticipated compensation in any calendar year, of more than \$15,000?
 - If NO, then the new appointment may be accepted.
 - If YES, then the new appointment may not be accepted.

[Remember this formula:

YES to question 1 + YES to question 2 = NO to new appointment.]

QUESTION 19: What does the \$100,000 Rule do?

ANSWER: The \$100,000 Rule prohibits those who have been awarded more than an aggregate of \$100,000 by all courts in any calendar year from accepting a new compensated appointment in the next calendar year.

QUESTION 20: How does the \$100,000 Rule work?

ANSWER: This Rule looks back at the aggregate of Part 36 compensation awarded during the prior calendar year. Appointees must keep track of their totals of all Part 36 compensation awarded by all courts during each calendar year. Once the aggregate of compensation exceeds \$100,000, the appointee will be ineligible for new compensated appointments in the next calendar year (uncompensated, i.e., pro bono, appointments may be accepted). Remember, it is the next calendar year that is affected by the \$100,000 Rule and not the current year nor the prior year. If an appointee already has compensation awards of more than \$100,000 in a calendar year, he/she is not prohibited from receiving further appointments or awards of compensation in the remainder of that year. Only compensated appointments in the next year are prohibited.

QUESTION 21: How does Part 36 define compensation for the \$15,000 and \$100,000 Rules?

ANSWER: Part 36 defines compensation as an award by a court of “fees, commissions, allowances and other compensation, excluding costs and disbursements.” (§ 36.2 [d] [3]). The date of an order approving compensation is deemed the date of compensation. Actual receipt is neither defined as compensation nor does it serve as the date of compensation. For example, when an attorney for the child is appointed and authorized in the order of appointment to bill every 60 days and pay himself/herself upon collection, the actual receipt of those moneys is neither compensation nor the date of compensation pursuant to Part 36. There is only compensation and a date of compensation when there is a court order approving the

amount to which the attorney for the child is entitled, which is usually at the conclusion of the attorney for the child's service (Go to www.nycourts.gov/ip/gfs and click on "Attorney for the child" for a complete explanation of the Attorney for the child Appointment and Compensation Process and to access PDF fillable forms.)

QUESTION 22: Are there any exceptions to the \$15,000 and \$100,000 Rules?

ANSWER: Yes, there is one exception for "continuity of representation or service." (§ 36.2 [d] [4]) If the same appointee must be reappointed to ensure a continuity of representation or service for the same benefited person in the same, or a related, action/proceeding, the reappointment will not be prohibited, notwithstanding that the appointment would otherwise violate the \$15,000 or \$100,000 Rule. For example, a court evaluator in a guardianship matter or a attorney for the child in a divorce action may be reappointed as court evaluator or attorney for the child for the same individual in a post-judgment proceeding. The exception, however, would not extend, to a attorney for the child in a divorce action or court evaluator in a guardianship action being appointed guardian ad litem in a probate proceeding of a will. Familiarity is not enough. There must be consonance of appointment category and relationship between appointee and the person for whom he or she was appointed.

QUESTION 23: Are law firms subject to the compensation limits of the \$100,000 Rule or the \$15,000 Rule?

ANSWER: No, the limitations based upon compensation apply to the individual appointee, and not to the aggregate compensation of all those who practice in a law firm.

QUESTION 24: Does Part 36 require a law firm to file any reports and where may this report be found?

ANSWER: Yes, a law firm must report aggregate approved compensation of \$50,000 or more for all members, associates or employees of the law firm. The report is for informational purposes (§ 36.4 [c]). The form, known as the "Report of Compensation Received by Law Firms" (form UCS-876) is available at the Guardian & Fiduciary web site www.nycourts.gov/ip/gfs The form is in PDF fillable format.

QUESTION 25: When and where is the law firm report filed?

ANSWER: The UCS-876 must be filed on or before March 31 of each year, for the prior year. The address for filing can be found on the form.

QUESTION 26: What must an appointee do when appointed?

ANSWER: Within thirty (30) days of appointment, an appointee must complete and

file online the UCS-872 (notice of appointment/certification of compliance) (§ 36.4 [a]). An automated system is in place to record and track appointments and compensation awards. An appointee will receive by email the UCS-872 completed with information from the court's database. This information will include data about the appointee (name, address, phone number, etc.), the case, the appointment, the appointing judge, and prior appointment and compensation history. The UCS-872 will instruct the appointee to check the form for accuracy, make corrections, including additions and deletions, and sign it in one of two places: sign at the end of **Part A, if it is an uncompensated** appointment; or, the end of **Part B, if compensated**. Part B is the certification of compliance and must be carefully reviewed for prior appointments in the current calendar year and compensation awards in the prior calendar year. By signing Part B, the appointee certifies qualification for appointment (§ 36.2 [c]) and compliance with the \$15,000 and \$75,000 Rules (§ 36.2 [d]). If an appointee cannot certify compliance or must decline appointment for any other reason, the fiduciary clerk should be notified immediately.

QUESTION 27: What must be listed on Part B of the certification of compliance? Are, e.g., foreclosure referee appointments to be listed? Should appointments be listed where compensation awarded was \$500 or less?

ANSWER: Yes, all appointments, including foreclosure referee appointments must be listed on Part B of the UCS-872. All awarded compensation, including compensation of \$500 or less must be listed. (The appointee may attach copies to the UCS-872)

QUESTION 28: What does Part 36 require a compensated appointee to do at the conclusion of service in order to receive an order awarding compensation?

ANSWER: Part 36, in conjunction with Part 26 of the Rules of the Chief Judge, does not require the appointee to do anything. The court, however, must complete and file with the fiduciary clerk UCS-875 (a statement of approval of compensation) (§ 36.4 [b]). This statement will include all of the information from UCS-872 and the fiduciary clerk's certification that UCS-872 was filed. Also included will be all information required by Judiciary Law § 35-a, particularly the amount of compensation awarded, the basis for the award and reasons for any award of \$5,000 or more.

QUESTION 29: Does the appointee have any obligations in the compensation process?

ANSWER: Yes, but these are not Part 36 obligations. These obligations are otherwise imposed by law and practice, and demand, at a minimum, an application for an order awarding compensation and proof sufficient to support the application.

QUESTION 30: Are Part 36 appointment and compensation forms part of the record of an action or proceeding and filed in the court's file?

ANSWER: No, Part 36 appointment and compensation forms (§ 36.4) are administrative forms for recording, tracking and reporting the appointment activity of courts. They are similar to other administrative forms used by clerks to record, track and report case activity. These forms are not part of the record of a case, nor are they kept in the case file. These forms are filed with, and maintained by, the Office of Court Administration.

QUESTION 31: Are Part 36 appointment and compensation forms public records?

ANSWER: Yes, all forms filed pursuant to § 36.4, which include the UCS-872 and UCS-875, are public records. The Chief Administrative Judge is directed to arrange for the publication of the names of all persons appointed by each appointing judge, together with the compensation approved for each appointee (§ 36.5). All this information is available for public access on the court's web site at www.nycourts.gov/ip/gfs

QUESTION 32: Is the application filed pursuant to § 36.3 (a) also a public record?

ANSWER: No, the application and the information it contains is confidential and is only made available to the court. The purpose of the application is to give the court needed information on an appointee's qualification and eligibility for appointment and apprise the court of his/her background to determine the appropriateness of the appointment.