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REPORT BY THE COUNCIL ON JUDICIAL ADMINISTRATION

COMMENTS ON THE OFFICE OF COURT ADMINISTRATION'S PROPOSED AMENDMENTS TO PART 36 OF THE RULES OF THE CHIEF JUDGE (22 NYCRR PART 36 – APPOINTMENTS BY THE COURT) AND RELATED FORMS

We write on behalf of the Council on Judicial Administration of the New York City Bar Association, in response to the request of the Administrative Board of the Courts seeing public comment on proposals by the OCA Special Commission on Fiduciary Appointments (the "Commission") to amend Part 36 of the Rules of the Chief Judge (Appointments by the Court). We offer our comments in two parts. First, we comment on the language proposed for the Part 36 rules. Second, we comment on the Commission's 19-page Executive Summary, which summarizes the underlying issues and the Commission's recommendations.

I. Proposed Part 36 Rule Changes:

A. The Executive Summary describes the appointment of the Hon. Michael V. Coccoma as a new "Statewide Administrative Judge for Fiduciary Matters," an appointment we endorse. We further note:

1. The Rules refer to the "Chief Administrator" and in other places to an "administrator" (Rule 36.1(b)(2)(v)) and "Administrative Judge" (e.g., p. 3, Issue (B), Rec. (3)). "Chief Administrator" is a position established by the constitution (N.Y. Const. Art. 6 § 28) and is used in § 212 of the Judiciary Law and in 22 NYCRR § 1.0 of the Rules of the Chief Judge.[1] We believe references to administrator or Administrative Judge should be clarified to indicate whether they refer to the Chief Administrator or to the Administrative Judge of a County or Judicial District.

2. Further, it appears that the intention of the Chief Judge, as set forth in the first paragraph of the Summary, was to establish a permanent position of Statewide Administrative Judge for Fiduciary Matters, and we believe consideration should be given to changing Part 36 references to the Chief Administrator to this new Administrative Judge.

[1] The title "Chief Administrative Judge" appears to be an administrative enhancement of the statutory term.

B. For the reasons stated below, we do not agree with the proposed paragraph (f) to Rule 36.3.

1. The current Rule 36.3(e) provides that a person or entity may be removed from a list established for a category of appointment for "any conduct incompatible with appointment from that list," but *conditions removal on providing the person or entity with an opportunity to respond after receipt of a written statement*. The proposed Rule 36.3(f) would empower the Chief Administrator to "temporarily suspend" the person or entity "upon a showing of probable cause."

2. Our first concern is that the proposed rule does not state who is to provide the "showing of probable cause". The accompanying statement suggests the intent is to provide for temporary suspension if the person or entity is "under investigation by the Managing Inspector General for Fiduciary Appointments (MIGFA)." However, there is no reference in Part 36 to such an Inspector General. At a minimum, any reference to a probable cause determination should describe the process for determining such cause, particularly where the determination is being made without notice and an opportunity to be heard.

3. The more serious concern to us is that the proposed rule would label the person or entity as being the subject of a probable cause determination *before* having an opportunity to be heard. A determination of "probable cause," using a term common largely to criminal law, also could be damaging to the person's or entity's reputation, even if later found not to be warranted.

4. Our Committee believes that the current Rule 36.3(e) provides satisfactory authority to the Chief Administrator (or Fiduciary Judge). In the event that the Commission has concluded, based on the experience of judges and other court officials, that authority is necessary for the Chief Administrator, we believe the rule should be clear that the action is at the Chief Administrator's discretion rather than a probable cause finding. We propose the following language for the new Rule 36.3(f):

> **(f) Notwithstanding section 36.3(e), pending a final determination on the issue of removal, the Chief Administrator may temporarily suspend any person or entity from any list if the Chief Administrator determines, in his or her discretion after consultation with the appointing judge, that the conduct of the person or entity presents an immediate threat of financial or other harm to clients or wards or to the public.**

We believe this proposed language is appropriate to make clear that the Chief Administrator has taken the action *sua sponte* and without a formal determination of misconduct.

II. Comments on the Executive Summary:

We provide the following comments on the Commission's findings and recommendations in the Executive Summary.

A. Page 3, Recommendation 3, relating to appointments under Part 36, recommends that the rules should "[r]equire a report of fiduciary appointments to the Administrative Judge and OCA each quarter copying the Fiduciary Clerk."

1. Clarification is needed as to who is to receive this report, the Administrative Judge of the county or Judicial District, the Chief Administrator, or the new Statewide Administrative Judge for Fiduciary Matters.

2. For courts within New York City, we recommend that this Report be distributed to all guardianship judges citywide, which would enable the guardianship judges to see which attorneys have received appointments.

B. Issue H (on pages 7-8) states that "judges are often unaware of a potential appointee's qualifications and experience." We believe two related reforms could benefit both the courts and potential appointees, and could be accomplished by amending § 36.3(b) of the Part 36 Rules, prescribing Qualifications for Appointment.

1. If the Rules provided appointees with greater guidance on particular skills useful for each of the appointment categories, they could provide more detail on their qualifications in the registration & qualification process.

2. At the same time, with more specific and recognized language, courts might find it easier to find potential appointees whose qualifications and experience are what is needed for the particular task.

3. The use of recognized terms in the application process would facilitate electronic searching. For example, a judge can search for a Spanish speaking fiduciary if the data base were updated to contain searchable resumes of persons on the eligible fiduciary list.

C. Issue J (on page 8) concerns appointments for indigent and low income individuals. The Commission recommends utilizing senior attorneys and newer attorneys seeking additional experience for assignments with limited or no funds available for fees.

1. We are concerned that this approach may result in a presumption that certain categories of lawyers get the uncompensated work while other categories get the work for which compensation is available. While a formal "rotation" may not be feasible, we believe the guidelines for appointments in compensated cases should encourage the appointing court to consider the potential appointee's prior service on pro bono matters.

2. We realize this may be controversial as it infringes on the autonomy of the appointing judge. However if the appointing judge deems a person qualified to serve for an indigent or low income person, the person should be qualified to serve where substantial assets are involved as well.

D. We disagree with the Commission's conclusion stated in Issue Q on pages 12-13, regarding not permitting a winning bidder to assign right to purchase to a 3rd party. The report states this is a "disruption in the chain of title." It does not appear to be a disruption, however, since the title is not transferred from the referee to the successful bidder at the sale--title is transferred at the closing. There are instances where the successful bidder at the auction seeks to obtain title in the name of a corporation or LLC, or other business entity. Yet the recommendation (on page 13), provides that the referee shall transfer title only to the successful bidder. We suggest the referee may transfer title to a business entity owned by the successful bidder, e.g., an LLC in which the successful bidder is the majority or sole member or a corporation in which the successful bidder is the sole or controlling shareholder.

E. In Part 2 of the Executive Summary, on Education and Training Issues and Recommendations, Item C (at pages 13-14) recommends that biennial refresher training be required as a condition of biennial recertification. Refresher training should be tailored specifically to each appointment category, with confirmation that refresher training is needed for the particular category.

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We hope these comments will be helpful.

Council on Judicial Administration
Carolyn E. Demarest, Chair

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