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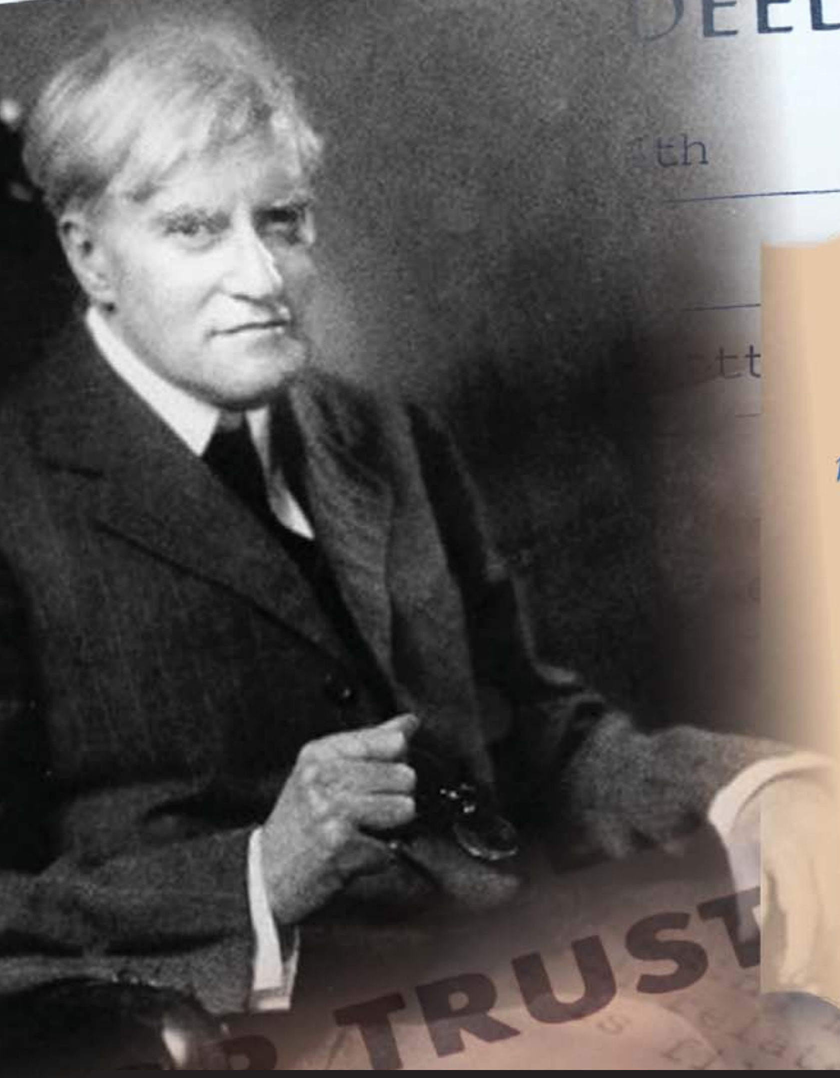

"A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate."

-Benjamin Cardozo

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On The Cover

Justice Benjamin Cardozo's description of the standards for trusteeship, as set forth in *Meinhard v. Salmon*, 249 N.Y. 458 (1928), was chosen for this month's cover to complement the fiduciary theme that runs through the articles on the new Principal and Income Act, the early detection of possible ethical pitfalls for fiduciaries, the changes in Trusts and Estates law, and the full text of the recently published Birnbaum Report, which has raised questions about the way fiduciary appointments have been administered in New York State.

Cover design by Jill Murphy.

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President's Message

Steven C. Krane

"Not Just Another *Pro Bono* Message"

The legal profession responded immediately and unselfishly to the terrorist attacks of September 11, 2001. Etched in my mind is the seemingly endless line of volunteers outside the Association of the Bar of the City of New York's 44th Street home on the evening of September 25. What brought all those lawyers to the sidewalk to and along Sixth Avenue was the first training session for those willing to assist family members in the expedited death certificate process (developed by NYSBA members in conjunction with the court system).

The publicity for the session had been minimal, almost entirely word of mouth, and yet the 500 seats in the Great Hall could not accommodate all who were anxious to help. Hundreds more had to be turned away, assuaged only by the personal thanks of Chief Judge Judith Kaye, who was on site attending a meeting of more than 50 bar leaders convened to address the recovery effort. Ultimately, the heaviest burden the bar associations had to shoulder was to find opportunities for all of the thousands of lawyers who volunteered for the relief effort. Supply seemed to outstrip the demand, as hard as that may be to believe.

Unfortunately, in the mundane world—the world not dealing with the human wreckage engineered by Osama bin Laden and his criminal cohorts—the demand for volunteer lawyers dwarfs the supply. On a daily basis, there continues to be a tremendous need for donated criminal and civil legal services in the communities of New York State, more than enough to provide opportunities for each of the 130,000 registered attorneys in the state. The opportunities may not be quite as galvanizing as those relating to the World Trade Center collapse, but the needs are just as real and often just as immediate. From the unrepresented tenant in Housing Court threatened with imminent eviction, to the victim of domestic violence in need of an order of protection, to the convicted felon constitutionally entitled to appellate counsel, to the immigrant from a totalitarian regime seeking political asylum, to the would-be not-for-profit corporation in need of organizational documents, the opportunities for *pro bono publico* work are virtually limitless. Indeed, a recent survey revealed that only 14% of the civil legal needs of the poor are being served, and we are all too familiar with the crisis brought about by woefully inadequate funding for criminal representation. The 77-page guide to *pro bono* opportunities published by the NYSBA Department of Pro Bono Affairs contains a description of dozens of organizations that need assistance from volunteer lawyers or that coordinate the provision of *pro bono* services around New York State.

Broadly defined, there are *pro bono* opportunities for all types of practitioners and all social and political persuasions. Although "pro bono publico" literally means "for the public good," we tend to think of pro bono service as being confined to free legal services for the poor. Surely that is the heart of what lawyers have traditionally viewed as *pro bono* service, but you do not by any means have to be a "bleeding heart" to do the public good. The public good can be served by engaging in activities that benefit society in general, not just the poor. You do not have to provide these services in conjunction with a legal aid or legal services organization, or a group with a "CLU" at the end, to do legitimate *pro bono* work.

Our own *pro bono* guide lists alternative *pro bono* opportunities for those whose ideologies fall to the right of center. For example, the National Right to Work Legal Defense and Education Foundation maintains a nationwide litigation program to provide free legal assistance to employees who are subjected to the abuses of compulsory unionism arrangements. Then there is the Institute for Justice, a libertarian public interest law firm that litigates to secure economic liberty, school choice, private property rights, freedom of speech, and other vital individual liberties, and to restore constitutional limits on the power of government. More conservative and libertarian public interest organizations can be found in Wilcox, Shackman Naas, *The Right Guide: A Guide to Conservative and Right-of-Center Organizations* (Economics America, Inc. 1995) or in Wagner, Hiboldt & Korsvall, *Policy Experts 2000: A Guide to Public Policy Experts and Organizations* (Heritage Foundation 2000). In other words, there is no philosophical excuse for declining to do *pro bono* work.

How can we harness the psychic energy evidenced by that thousand-lawyer queue snaking along New York City streets in September? Was that a one-time oc-

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currence brought about by the extraordinary tragedy that had just befallen our nation, or was it an awakening of the highest and best traditions of our profession? I hope it was more the latter than the former. In any case, just saying that we are obligated as members of the legal profession to do something in the *pro bono* arena at least periodically during our careers does not seem sufficient. Preaching that it is the right thing to do—as true as that statement may be—has never been adequate. I submit that it is up to the leadership of the bench and bar, judges, firm management, and bar leaders, to make the point clearly and unmistakably, again and again.

Just recently, a group of junior associates from my firm were sworn in as members of the bar of the U.S. District Court for the Southern District of New York. In courtroom packed with lawyers from throughout the district, the judge asked each of the new attorneys, as they were presented for admission, whether they had done any *pro bono* work. A negative answer was met with a stern admonition to find some way to engage in *pro bono* service. (Fortunately, each of the associates from my firm was able to answer the question in the affirmative by recounting their own individual experiences in the *pro bono* arena.) Similarly, I recall that my own five-minute "interview" with a representative of the First Department's Character and Fitness Committee some 20 years ago was mainly an exhortation to find a way to do *pro bono* work of some kind. To the extent that it is not the part of the regular allocution, I urge every interviewer of a candidate for admission to the bar of this state or of a federal district court to attempt to instill in the fledgling attorney a sense of the importance of taking on some responsibility for work in the public interest.

It is just as incumbent upon those who manage law firms or otherwise serve as mentors to new attorneys to inculcate them with the highest traditions of the profession, including *pro bono* service. Too often, we see lawyers deciding whether to engage in a certain activity based solely on whether it is reasonably calculated to lead to the production of income. That cannot be the determinant. Billable hours and bottom lines must not be the sole criteria for evaluating the worth of a lawyer's activity. Nor is it an answer for a firm to encourage *pro bono* work on a lawyer's "own time," requiring lawyers to fit in their public interest activity after satisfying an extravagant annual hour quota. *Pro bono* work must not only be encouraged through words, it must be facilitated through deeds. Law firm policies must accommodate each attorney's professional obligation to give something back to society.

The alternative may not be pretty. If we fail as a profession to instill a strong sense of volunteerism in our ranks, we may well be confronted in the not too distant future with a mandatory *pro bono* regime. While such a regulatory scheme would likely involve a requirement that each attorney donate some number of hours of service annually or contribute a specified sum of money to an approved legal service provider, we do not need the compulsion of yet another set of court-imposed regulations. We should be able to achieve that goal voluntarily. Yet the longer we do not as a profession step up and "do the public good," we run the risk of having some form of mandatory *pro bono* become part of the solution to the perennial legal services funding crisis.

Allow me to close this month's message the way I closed my address to the House of Delegates upon the occasion of my installation as president of this Association. I asked each member of the House, and now I ask each of you, to choose one project that would improve the law, our legal system or our society. I urged each of them to choose a project of importance to them and to dedicate themselves to it. Lastly, I reminded them of Winston Churchill's words: "We make a living by what we get. We make a life by what we give." I exhort each of you to go forth and give.

We have the power as a profession to make this world a far better place. Now more than ever, we have an obligation to use that power to advance the cause of justice and freedom throughout our state and our nation. *Pro bono* service is not an option. It is our duty as lawyers.

Uniform Principal and Income Act Will Work Fundamental Changes In Estate and Trust Administration

By Charles J. Groppe

The New York Principal and Income Act, contained in N.Y. Estates, Powers and Trusts Law section 11-2.1 (hereinafter "EPTL"), has been replaced by Laws of 2001, Chapter 243, dated September 4, 2001, which took effect January 1, 2002. The new law, to be contained in new EPTL Article 11-A, is entitled the "New York Uniform Principal and Income Act" (the "Act").[1]

Not incorporated in the new act, but essential to it and effective simultaneously, are new EPTL 11-2.3(b)(5), which provides for a new "Trustee's Power to Adjust" current distributions, and new EPTL 11-2.4, which establishes an "Optional Unitrust Provision."[2]

Although most attention initially focused on the radical changes in trust administration permitted by the new "power to adjust" and the new "optional 4% unitrust," numerous other revisions are made. These will work fundamental changes in day-to-day administration of, and accounting for, estates and trusts. They include the determination of income due to or due from beneficiaries of trusts; changes in allocation of principal expenses, including source of payment of fees and income taxes; changes in the method of accounting for distributions during administration; new depreciation and depletion rules; and adoption of a new method of accounting for business interests in a proprietorship. This is but a partial list.[3]

Legislative Background

The statute is part of a broad revision of the concepts of trust income and principal set forth in Chapter 243. The statute is the outgrowth of the work of the New York Estates, Powers and Trusts Law–Surrogate's Court Procedure Act Legislative Advisory Committee.[4] The Legislative Memorandum in support of the committee's report states, "The bill was designed to facilitate trust investing for total return in accordance with the prudent investor rule already enacted in New York law [EPTL 11-2.3]."[5]

The Prudent Investor Act,[6] and now the New York Uniform Principal and Income Act, reflect modern realities in investment; namely, that prudent investors will seek a "total return" of current income and capital appreciation. As stated in the supplement to the committee's report:

> Although a prudent investor seeks an investment strategy designed to make appropriate current and future trust distributions, a trustee operating under the current New York principal and income act is required to seek a particular form of return, *i.e.*, return defined as trust accounting income. The investment opportunity and flexibility provided by the prudent investor standard is therefore compromised by a conflicting statute, now generally recognized as archaic and inhibiting.
>
> Specifically, capital appreciation is not recognized as trust accounting income, and yet over extended periods of time equity securities have produced the greatest overall return for investors. The total return on equities is a combination of dividends and capital gain. In recent years corporations have been paying smaller and smaller dividends as a percentage of their value. For example the dividend return on the S&P 500 index now barely exceeds 1%. On the other hand, the capital appreciation on equities since 1982 has raised the Dow Jones industrial average from less than 1,000 to more than 10,000. Trustees, unlike individual investors, are limited to dividend income from equities for current distributions, but dividend income is disappearing and capital appreciation is unavailable to current beneficiaries.[7]

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He wishes to thank his partner Alexander Neave and associate Helen C. Heintz for their contributions to this article.

The New York Uniform Principal and Income Act is intended to work in tandem with the New York Prudent Investor Act by (a) eliminating strictures on trustees, which confined them to seeking a particular form of current return, *i.e.*, trust accounting income; (b) permitting trustees to regard all return, whether ordinary income or capital gain, as part of a "total return" on trust investments; (c) permitting distributions to be made to an "income beneficiary" in the form of an "Appropriate Benefit Currently Distributable" under a "power to adjust,"[8] or as an optional 4% "unitrust"[9] that the trustee may elect; and lastly (d) by conforming, clarifying or modifying rules that were contained in EPTL 11-2.1, the old Principal and Income Act. The new Act is to be construed so as to promote uniformity of the law with respect to its subject matter among states that enact it. A corollary of this is that interpretations of the law in other states would be guidelines in applying the law in this state.

Overview of the Act's Implications

The new Uniform Principal and Income Act and related changes in the Estates, Powers and Trusts Law require serious, thoughtful and immediate attention. The Act changes substantive rights in ways that will be surprising to long-time practitioners. Further, the Act, the new power to adjust and the new option to establish a unitrust, together with the Prudent Investor Act, have created a host of affirmative duties for trustees.

Failure to act to take advantage of the new options, or the inability to justify inaction, could well result in charges of negligence and a resultant surcharge or loss of fees and commissions.

The modern trustee can no longer simply "buy and hold."

Effective Date and Definitions

EPTL Article 11-A was effective as of January 1, 2002.[10] Except as specifically provided in the trust instrument, the will or Article 11-A, the Act applies to any receipt received or expense incurred on or after January 1, 2002, by any trust or decedent's estate established before that date regardless of whether the asset involved was acquired by the trustee before or after that date.[11] Article 11-A also applies to any trust or estate established on or after January 1, 2002, except to the extent that the trust instrument or will provides otherwise, or unless an election or court decision is made pursuant to EPTL 11-2.4 (the new "optional unitrust" statute) to make Article 11-A inapplicable to such trust.[12]

Similarly, new EPTL 11-2.3 and 11-2.4 also took effect on January 1, 2002.

Article 11-A contains definitions of 13 terms that are key to its application.[13] The definitions contained in EPTL 11-2.1(o) of the former Principal and Income Act (there were only four) were keyed back to the preceding subdivisions (a) through (*l*). Similarly, the new law further refines and applies the definitions and other rules in EPTL Article 11-A, Parts 2 through 6.

"Income" is now simply defined as "money or property that a fiduciary [which includes an executor, administrator, personal representative and trustee] receives as current return from a principal asset."[14] The term also includes a portion of receipts from a sale, exchange or liquidation of principal assets, as provided in Part 4 of Article 11-A, relating to allocation of receipts during administration of a trust.[15]

"Income interest" means the right of an income beneficiary to receive all or part of net income, whether as a mandatory or discretionary distribution.[16]

"Net income" means total receipts allocated to income during an "accounting period" (which is defined in EPTL 11-A-1.2(1)), less disbursements made from income, plus or minus transfers under (Article 11-A) or under the exercise of the trustee's power to adjust (under EPTL 11-2.3(b)(5)) to or from income during such period.[17] Thus, future payments made to a beneficiary by virtue of the exercise of a fiduciary's discretionary power to adjust current distributions—which necessarily will require charging or crediting traditional accounting principal—will meet the definition of "net income" for New York purposes. By definition, the power to adjust income may include the power to decrease as well as increase current distributions.

"Principal" is now simply defined as "property held in trust for distribution to a remainder beneficiary when the trust terminates."[18]

Among the other more significant differences are the elimination of any definition of inventory value and a change in the manner of determining income payable to holders of income interests when one interest ends and another begins. "Inventory value" has been eliminated as a concept because its use is no longer required, due to the elimination of the "underproductive property" concept contained in former EPTL 11-2.1(k) and also due to changes in allocation methods. For example, beginning January 1, 2002, income distributed from a testamentary estate subsequent to payments of estate taxes or disproportionate distributions is not based on inventory values but on contemporaneous market values.

Fiduciary Duties

EPTL 11-A-1.3 sets forth general principles governing exercise of a fiduciary's duties in allocating receipts and disbursements,[19] and in exercising a "discretionary power of administration."[20]

EPTL 11-A-1.3(a) states the following:

1. A fiduciary shall administer a trust or estate in accordance with the terms of the will or trust even if there is a different provision in Article 11-A.
2. A fiduciary may exercise a discretionary power of administration even if the exercise of the power produces a result different from a result required or permitted by Article 11-A.
3. A fiduciary shall administer a trust or estate in accordance with Article 11-A if the terms of the trust or will do not contain a different provision or do not give the fiduciary a discretionary power of administration.[21]
4. Further, the fiduciary "shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust or will and Article 11-A do not provide a rule of allocation between principal and income."[22] A trustee shall add a receipt or charge a disbursement to principal if neither the term nor the will nor Article 11-A provides a rule for allocation between principal and income. (The adage among trust officers that one is to "charge income and credit principal" is no longer applicable.)

As with the former law, new EPTL 11-A-1.3(a) is intended to provide default rules; a contradictory provision of the will or trust overrides the default rules. In addition, the allocation rules of EPTL 11-A-1.3(a) are broader than the old law in that they also will apply to actions now set forth in Parts 2 and 3 of the Act relating to determining or distributing income (EPTL 11-A-2.1–2.2) and to apportionment at the beginning and end of an income interest (EPTL 11-A-3.1–3.3). Thus, these duties apply expressly to a fiduciary administering an estate or distributing income on termination of an "income interest." These sections provide rules for determining who is to receive income during the administration of an estate, how fractional distributions are to be determined, how certain costs and fees are to be allocated, and how income is to be apportioned at the beginning and end of an "income interest."[23]

In exercising a discretionary power of administration within the scope of Article 11-A, a fiduciary

> shall administer a trust or estate impartially, based on what is fair and reasonable to all the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with [Article 11-A] is presumed to be fair and reasonable to all the beneficiaries.[24]

This duty of impartiality exists regardless of whether the beneficiaries' interests are concurrent or successive. The precise meaning of the duty of impartiality is a matter of judgment and interpretation affected by the purpose, terms, distribution requirements and other circumstances of the trust not only at the outset but as they may change from time to time.[25]

Apportionment and Distribution

Part 2 of EPTL Article 11-A provides rules for determining and distributing income after a decedent dies, in the case of an estate, or after an income interest in a trust ends. The operative statutes are EPTL 11-A-2.1 ("Determination and distribution of net income") and EPTL 11-A-2.2 ("Distribution to residuary and remainder beneficiaries"). EPTL 11-A-2.1 contains five paragraphs that set forth important rules for allocating income and principal receipts and expenses during estate administration. The rules are as follows:

1. EPTL 11-A-2.1(1) requires the fiduciary first to determine net income and net principal receipts from property specifically given to a beneficiary and then to distribute such income or receipts to the beneficiary of such specific property.
2. EPTL 11-A-2.1(2) requires the fiduciary then to determine the remaining net income under the rules of Parts 3 through 5 of Article 11-A and by (a) including in net income all income from property used to discharge liabilities; (b) paying from income or principal in the fiduciary's discretion fees of attorneys, accountants and fiduciaries, court costs and other expenses of administration, and interest on death taxes, but only to the extent that payment from income will not cause reduction or loss of a marital or charitable deduction; and (c) paying from principal all other disbursements made or incurred in the settlement of the estate or the winding up of a terminating income interest, including, among other charges, debts, funeral expenses and estate taxes apportioned to the estate or interest.[26]
3. EPTL 11-A-2.1(3) requires a fiduciary to distribute to a beneficiary of an outright pecuniary amount the interest (no rate stated) or other amount provided by the will or trust or applicable law from net income or from principal (if income is insufficient). Interest is also payable on pecuniary amounts to be paid outright from a trust after an income interest ends. If no interest or other amount is provided, the fiduciary shall pay the interest or other amount as if the pecuniary amount were required to be paid under a will.[27]
4. EPTL 11-A-2.1(4) requires a fiduciary to distribute the balance of net income as described in EPTL 11-A-2.2 to all other beneficiaries, *i.e.*, residuary beneficiaries or remainder beneficiaries.

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5. EPTL 11-A-2.1(5) bars a fiduciary from making certain payments out of receipts from specifically bequeathed property.

EPTL 11-A-2.2 provides for distribution of all net income left after allocation to specific beneficiaries and allocation of expenses, *i.e.,* after applying the rules set forth in EPTL 11-A-2.1 above.

EPTL 11-A-2.2(a) states that all residuary or remainder beneficiaries are entitled to receive a portion of net income remaining after the distributions under EPTL 11-A-2.1 "equal to the beneficiary's fractional interest in undistributed principal assets, using values as of the distribution date." Any amount allowed as a tax deduction to the estate for income payable to a charity is to be paid without diminution to the charity.[28] If a fiduciary makes more than one distribution of assets to beneficiaries under this section, each beneficiary, including one who has not received part of an asset distribution, is entitled to share in the net income thereafter received.

The essential change made by EPTL 11-A-2.2(b) from previous law is the abolition of the rule for determining fractional interests in undistributed estate administration income, which had been based on inventory values.[29] The new section requires the use of relative market values as of the distribution date for such distribution and also extends the rule requiring use of market values to distributions from terminating trusts.[30]

In determining a residuary or remainder beneficiary's share of net income, the following rules apply:

1. EPTL 11-A-2.2(b)(1) states that each beneficiary is entitled to receive a portion of net income "equal to the beneficiary's fractional interest in the undistributed principal assets immediately before the distribution date, including assets that may later be sold to meet principal obligations."
2. EPTL 11-A-2.2(b)(2) requires that the fractional interest be calculated without regard to specifically bequeathed property or property required to pay pecuniary amounts not in trust.
3. EPTL 11-A-2.2(b)(3) requires that the fractional interest "in the undistributed principal assets must be calculated on the basis of the aggregate [market] value of those assets as of the distribution date without reducing the value by any unpaid principal obligation."

"Accrued Income"

Part 3 of Article 11-A makes several radical changes from prior law in the apportionment of income (what had been familiarly known as "accrued income") and in the determination of when income interests are deemed to begin and end. These rules cause a shift in entitlement to income as compared to prior law.

EPTL 11-A-3.1(a) states that an income beneficiary is entitled to net income from the date on which the income interest begins. The date on which an income beneficiary's right to income begins is either the date specified in the terms of the trust or, if none is specified, on the date an asset becomes subject to a trust or successive income interest. EPTL 11-A-3.1(b) provides rules for determining when an asset becomes subject to a trust; EPTL 11-A-3.1(c) provides rules for determining rights to successive income interests.

New rules apply for determining when rights to income begin:

1. EPTL 11-A-3.1(b)(1) provides that an asset transferred to a trust during the transferor's life becomes subject to the trust on the date of transfer.
2. EPTL 11-A-3.1(b)(2) provides that an asset becoming subject to a trust by reason of a will is deemed subject to the trust as of the date of the testator's death, even if there is an intervening period of estate administration.
3. EPTL 11-A-3.1(b)(3) provides that an asset transferred to a fiduciary by a third party because of an individual's death, is deemed subject to the trust as of the date of that individual's death. Assets later discovered or collected would be deemed subject to the trust as of the date of death.

New rules apply for determining rights to income when successive income interests begin and end:

1. EPTL 11-A-3.1(c) provides that an asset becomes subject to a successive income interest on the day after the preceding income interest ends, even if there is an intervening period of administration to wind up the preceding income interest.
2. EPTL 11-A-3.1(d) states that an income interest ends on the day before an income beneficiary dies or other terminating event occurs, or on the last day of a period during which there is no beneficiary to whom income may be distributed.

No longer will an income beneficiary's right to income accrue "through" date of death. The beneficiary's right to income ends with the day before his or her death. The reference to a period during which there is no beneficiary would refer, for example, to a trust for grandchildren though none are born yet. On the birth of the first grandchild, the period before the birth is treated as having ended on the day before that grandchild's birth, and EPTL 11-A-3.1(d) will then apply.

The new law also affects and, in certain cases, radically changes the law relating to allocating trust receipts and disbursements—*i.e.* who gets the receipt (who pays the expense). One rule applies when a decedent dies or an income interest begins,[31] and another rule applies when an income interest ends.[32] Both change prior law.

EPTL 11-A-3.2 applies when a decedent dies or an income interest begins. It states in substance:

1. EPTL 11-A-3.2(a) provides that if the "due date" (see (3) below) of a receipt or disbursement is before a decedent dies (in the case of an estate) or before an income interest begins (in the case of a trust), it is to be allocated (*i.e.*, credited or charged) to principal.
2. EPTL 11-A-3.2(b) provides that if the due date is on or after the date of a decedent's death or after the date when an income interest begins and it is a "periodic due date" (see (3) below) the receipt or disbursement is to be allocated to income. A receipt or disbursement must be treated as accruing "from day to day" if its due date is not periodic or it has no due date. In such case, the portion accruing before the date of a decedent's death or the income interest begins is principal; the balance is income.
3. EPTL 11-A-3.2(c) defines "due date" as the date on which the payer is required to make payment. If none is stated, there is no due date for purposes of Article 11-A. Distributions to shareholders from an entity[33] are deemed to be "due" on the record date for dividends if one is fixed or, if none, on the declaration date. A due date is "periodic" for receipts and disbursements that must be paid at regular intervals—*e.g.*, a lease or obligation to pay interest, such as interest on municipals or corporate bonds—or if an "entity" customarily distributes at regular intervals.

EPTL 11-A-3.3 is applied to determine when an income interest ends. The rules are as follows:

1. EPTL 11-A-3.3(a) first defines "undistributed income" as "net income received" before the date on which an income interest ends. It does not include income that is "due or accrued" or net income that is required to be added to principal. Thus, the estate of a deceased income beneficiary will no longer receive "accrued" income.
2. EPTL 11-A-3.3(b) then directs the payment of such undistributed income to a mandatory income beneficiary who was surviving when the income interest ended or to the estate of such beneficiary whose death causes the interest to end. (A different rule applies if the beneficiary had a power to revoke more than 5% of the trust. In that case, the undistributed income from the portion of the trust that may be revoked must be added to principal.)
3. EPTL 11-A-3.3(c) provides a special rule that requires apportionment of an annuity or fixed fractional interest to meet the requirements of income, gift, estate or other tax requirement. This would, for example, meet the requirements of charitable remainder trusts under the Internal Revenue Code.[34]

For example, the rules in EPTL 11-A-3.2 and 11-A-3.3 work in the following manner: Assume that a periodic payment of rent that is due on July 20 has not been paid when an income interest ends on July 30; the successive income interest begins on July 31, and the rent payment that was due on July 20 is paid on August 3. Under EPTL 11-A-3.2(a), the July 20 payment is added to the principal of the successive income interest when received. Under EPTL 11-A-3.2(b), the entire periodic payment of rent that is due on August 20 is income when received by the successive income interest. Under EPTL 11-A-3.3, neither the income beneficiary of the terminated income interest nor the beneficiary's estate is entitled to any part of either the July 20 or the August 20 payments because neither one was received before the income interest ended on July 30. The same principles apply to expenses of the trust.

Periodic receipts such as rents, dividends, interest and annuities, and disbursements such as the interest portion of a mortgage payment are not apportioned—*i.e.*, computed—on a day-to-day basis. The entire receipt or disbursement is either income or principal, based on its due date. An example of an interest receipt that does not have a due date—*i.e.*, that is not "periodic"—is interest on an income tax refund. This must be apportioned between principal and income on an accrual (day-to-day) basis.

Allocations of Receipts During Administration

Article 11-A Parts 4 and 5 relate to allocation of receipts and disbursements during the administration of a trust. EPTL 11-A-4.1 to 11-A-4.15 relate to allocation of receipts; EPTL 11-A-5.1 to 11-A-5.6 relate to allocation of disbursements.

EPTL 11-A-4.1 to 11-A-4.15 provide detailed rules for characterizing and allocating receipts. Section 11-A-4.1(b) provides that receipts of money from an "entity," meaning a corporation or other business unit or a common trust fund, are to be allocated to income except as otherwise provided in the section. Receipts of property other than money are to be allocated to principal.[35] Thus, stock dividends are allocable to principal irrespective of their size. A property distribution received in exercise of an option to take money or property is to be considered a distribution of money allocable to income. Receipts of money in a partial or total liquidation of an entity or in exchange for the trust's interest in the entity and capital gains from regulated investment companies or REITs, are principal. Receipts from liquidations are further governed by EPTL 11-A-4.1(a) (e) and (f), which essentially permit the trustee to rely on representations by the paying entity regarding the source and character of the payment.

EPTL 11-A-4.3 is novel. It permits a trustee who conducts a business—*e.g.*, who continues a decedent's or grantor's sole proprietorship—to account separately for the business or activity.[36] If a trustee deems it to be in the best interest of all the beneficiaries to account separately for the business or activity instead of accounting for it as part of the trust's general accounting records, the trustee may do so. This allows the maintenance of a "mini account" or "sub account" just for the business entity.

Activities for which a trustee may maintain separate accounting records include retail, manufacturing, service and other traditional businesses, such as farming, raising and selling livestock and other animals, management of rental properties, extracting minerals and other natural resources, timbering, and trading in derivatives and options.[37]

Certain receipts are and continue to be treated as principal. These include assets received from a transferor during lifetime, or from a decedent's estate, or from a trust with a terminating income interest, or from a payer under a contract naming the trust as beneficiary—*e.g.*, a life insurance policy. Also treated as principal is money or property received from the sale, exchange, liquidation or change in form of principal assets, including realized profit. Thus, capital gain "income" is nevertheless principal. Other principal receipts are certain reimbursements and proceeds of property taken by eminent domain (except any part representing loss of income). Refunds of rental security deposits are principal. However, amounts received as rent are income.[38]

EPTL 11-A-4.6(a) requires that amounts received as interest, whether at a fixed, variable or floating rate, on an obligation to pay money to the trustee, including prepayments, must be allocated to income without amortization of premium.

Section 11-A-4.6(b) relates to obligations such as U.S. Treasury bills, long-term obligations such as U.S. Savings bonds, zero coupon bonds and other discount bonds that bear no stated interest but are payable at maturity or redemption at a greater amount than purchase cost. The increment in value over the consideration paid for the bond or other obligation is income; the return of the consideration is principal.

EPTL 11-A-4.9(c) and (d) pertain to payments from an IRA or similar plan. The focus is on the payment from the plan to a trustee and not on the underlying assets. To the extent a payment is required to be made, 10% of the amount received is allocated to income and the balance to principal. If the 10% allocation does not meet the Internal Revenue Code requirement that all income be distributed to a surviving spouse, subsection (d) requires that a larger allocation be made as necessary to carry out "all income."

EPTL 11-A-4.11 and 11-A-4.12 relate to depletable resources and make a marked change from prior law. In the interest of simplicity, a single default depletion and depreciation rate is set. In the case of mineral interests, water and natural resources, the Act introduces a default provision allocating 10% of royalty and other payments to income and 90% to principal. Timbering requires a complicated allocation, reflecting rate of growth of the timber in relation to rate of removal of the timber from the land. The Act applies whether or not the decedent or donor was extracting minerals or harvesting timber before the interest became subject to the trust.

EPTL 11-A-4.13 substantially eliminates the former "underproductive property" allocation rules of EPTL 11-2.1(k). It now provides that if a gift or estate tax marital deduction is involved, a surviving spouse may compel a trustee to make the property productive. In all other cases, receipts from "unproductive" property are allocable to principal without regard to actual income produced.

Allocation of Disbursements

The allocation of charges against income and principal is also substantially changed.

EPTL 11-A-5.1 directs the trustee to charge to income the portion of expenses not charged to principal pursuant to EPTL 11-A-2.1(2)(B) and (C) relating to certain administration expenses. Further, if a court finds that a judicial proceeding primarily concerns income, it can charge all or a part of the expenses of the proceeding, including legal fees, to income.

Most importantly, income is charged with payment of all the "ordinary expenses incurred in connection with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal . . . and recurring premiums of insurance covering the loss of a principal asset or loss of income from an asset."[39] This would include premium payments on a fiduciary's bond.

Income is also charged with the payment of one-third of the regular fees of any person or persons providing investment advisory or custodial services.

EPTL 11-A-5.2 charges to principal the following:

1. The remaining two-thirds of advisory or custody fees.
2. All of the trustee's compensation calculated on principal for acceptance, distribution or termination and disbursements made to prepare property for sale.
3. Payments on the principal of a trust debt.
4. All expenses for accountings, judicial proceedings or other matters involving both income and remainder interests, other than as provided in EPTL

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11-A-5.1(2), for legal fees in matters that primarily concern income, including a proceeding to construe a trust or to protect the trust or its property.

5. Premiums on policies not covered by a charge to income.
6. Estate, inheritance and transfer taxes, including penalties, apportionable to the trust.
7. Environmental remediation costs.

Depreciation is now expressly permitted by statute. EPTL 11-A-5.3 is a new provision that authorizes the trustee to transfer from income to principal amounts reasonably determined to be advisable to cover depreciation of a fixed asset having a useful life of more than one year, other than real property used as a residence by a beneficiary or tangible personal property held or made available for use by a beneficiary. Depreciation may not be provided for estate property during the administration of a decedent's estate.

> ***A recurring chord in the law and investment literature is that a trustee shall invest with a view to overall rate of investment return.***

With regard to allocation of charges for income taxes paid or payable, EPTL 11-A-5.5 and 11-A-5.6 apply. Taxes on receipts allocated to income are payable from income; taxes on receipts allocated to principal are payable from principal, even if the tax is called an "income tax." Most importantly, EPTL 11-A-5.6 permits a fiduciary to make adjustments between income and principal because of certain tax law elections that create a shifting of economic interests or tax benefits. These arise, for example, from the election to claim principal expenses as deductions on an income tax return, or from distributions of a principal asset that carry out distributable net income to a recipient and relieve another beneficiary of an income tax liability.

Optional Unitrust

A recurring chord in the law and investment literature of prudent investing is that a trustee shall invest with a view to overall rate of investment return. A trustee must make decisions with reference to "the entire portfolio" and "pursue an overall investment strategy" to permit "appropriate present and future distributions." The trustee must—the emphasis is on "must"—act with regard to "risk and return objectives reasonably suited to the entire portfolio."[40]

In short, the trustee's objective is the enhancement of capital value. Not for the trustee—at least since January 1, 1995—is there to be dichotomous investment in principal growth for remainderpersons and income for the current beneficiaries.

To assist the trustee in carrying out this duty, the Prudent Investor Act provides that a trustee may invest in any type of investment consistent with the statute, "since no particular investment is inherently prudent or imprudent for purposes of the prudent investor standard."[41]

This combination of post-1994 obligation and availability of an enlarged spectrum of investment options presents obstacles to implementation: How to meet expectations of current beneficiaries of old-style income trusts and traditional "pay to or apply income" formulas? How to reconcile investment for long-term growth with, probably, low or little short term yield in dividends or other return? How to allocate charges for expenses, fees and disbursements that had heretofore been paid from accounting income? These are but some of the paradoxes introduced by a forced "overall rate of return" paradigm.

EPTL 11-2.4, entitled "Optional unitrust provision," is one of the two novel techniques introduced by the new Uniform Principal and Income Act in an effort to assist trustees in their dilemma. (The other is the "power to adjust," considered hereafter.)

Laws of 2001, Chapter 243 enacted EPTL 11-2.4, a new section allowing an optional election of a 4% unitrust by trustees of trusts other than charitable trusts (unless both income and principal are permanently set aside for charitable purposes) in place of the trust's stated distribution provisions. The option is not available to an estate or to personal representatives. In concept, the unitrust is a pooling device. All annual results—gains, losses, current income, current expenses—are accounted for in the principal value determined as of a fixed day.

There is then an annual payout of 4% of the market value of the fund based on such annual revaluation of the trust's market value. (Obviously, a will or trust may be drafted to provide any amount the client desires. The rate for the statutory optional unitrust that a trustee may elect is, however, fixed at 4%.)

The "unitrust" is already a familiar investment device in the area of charitable remainder trusts.[42] Indeed, many of the Internal Revenue Code requirements such as adjustments of the unitrust payment to take account of short accounting years and additions to and distributions from the fund, and corrections of over- and under-distributions, are readily recognized in the New York "Optional Unitrust Provision."[43]

The current beneficiary—no longer called an "income" beneficiary—will not receive an identified share or amount of current income, but will receive a "unitrust" amount. EPTL 11-2.4(6) fixes that at 4% and applies that rate to the aggregate fair market value of the assets held in the trust on the first business day of the current valuation year.[44]

To permit annual unitrust distributions to reflect changes in investment values, both upwards and downwards, EPTL 11-2.4(c) employs a "smoothing rule" that will cause the annual unitrust payment to reflect investment return. This is accomplished where a trust has been in existence for more than three fiscal years. Commencing with the fourth year, the "unitrust amount" for the current valuation year means an amount equal to 4% multiplied by a fraction. The numerator of the fraction will be the sum of (a) the net fair market values of the assets of the trust on the first business day of the current year, and (b) the values on the first business day of "each [of the two] prior valuation year[s]."[45] The denominator will be 3.

For example, if the respective values of the trust on the first day of the fiscal year of each were as follows, the unitrust amount for the fourth year is set out below:

Year	Net Fair Market Value First Business Day	Required Unitrust Distribution
First	$1,000,000	$40,000
Second	800,000	32,000
Third	850,000	34,000
Fourth	900,000	34,000

4% x ([800,000 + 850,000 + 900,000] ÷ 3) = **<u>$34,000</u>**

Thus, even though on an annual basis in the fourth year, the unitrust amount is indicated to be $36,000 (4% x $900,000), the smoothing rule reflects the average poorer investment yield of the two prior years.

For purposes of the smoothing rule, the fair market values must be adjusted to reflect reductions in the case of a mandated distribution from a trust (*e.g.*, a partial termination) or a receipt other than a return on investment (*e.g.*, an addition to the trust). No adjustment will be needed for payments of capital gains taxes or other liabilities since they are not "distributions."[46]

As noted, the use of the unitrust is "optional." Either a grantor or decedent may direct it to be established,[47] or in appropriate cases a trustee or beneficiary may "opt in" or "opt out" of EPTL 11-2.4. "Opting in" depends on the time of creation of the trust or on court direction. With respect to a trust in existence prior to January 1, 2002, the trustee, with the consent by or on behalf of all interested persons or in his, her or its discretion, *i.e.*, without regard to consent, may elect on or before December 31, 2005, to have EPTL 11-2.4 apply to the trust.[48]

With respect to a trust not in existence prior to January 1, 2002, the trustee, again with consent or in his, her or its discretion, may elect on or before the last day of the second full year of the trust beginning after assets first come into the trust, to have EPTL 11-2.4 apply to the trust.[49]

The court having jurisdiction of a trust is also given power to direct that EPTL 11-2.4 will apply to a trust. This can be done at any time.

Similarly, the court having jurisdiction of a trust subject to EPTL 11-2.4 may, upon the petition of the trustee or any beneficiary, direct that Article 11-A (the Uniform Principal and Income Act) shall apply to the trust and not EPTL 11-2.4. This is the mechanism for "opting out" of the unitrust.

In any proceeding or in the case of an election to opt in or opt out of the unitrust, "persons interested" in the trust shall mean those persons who would be required to be served in a judicial accounting proceeding for the trust taking into account virtual representation,[50] including horizontal virtual representation.[51] Unlike the requirement of SCPA 315, there need not be separate express permission in the trust terms to use horizontal virtual representation.

It is clear that once a unitrust is elected, the trustee and beneficiaries can be relieved of it only by action of the court.[52] Further, EPTL 11-2.4(e)(5)(A) provides a list of factors the court is to consider in determining whether Article 11-A or the unitrust statute is to apply to a trust. EPTL 11-2.4(e)(5)(B) creates a rebuttable presumption to be applied in any proceeding to "opt in" or "opt out" that the unitrust is preferred.

As an editorial judgment, it may be assumed that the statutory factors governing the court's exercise of judicial control will also apply in evaluating the prudence of the trustee's decision to elect into or out of a unitrust.

It is also interesting to note that the concepts of the "overall rate of return" and "unitrust" had their genesis at the beginning of the booming '90s. It will be interesting to watch developments in an era of a sagging Dow and an official recession.

Trustee's Power to Adjust

In recognition of the economic reality that ordinary accounting income payable to an income beneficiary may be small in relation to capital appreciation that will eventually be paid to principal, which in turn will be paid to remainder beneficiaries, and to afford current beneficiaries a share of such appreciation, the new law also enacts a "trustee's power to adjust." This is an alternative to the optional unitrust.[53]

The genesis of the trustee's "power to adjust" was also the Prudent Investor Act. EPTL 11-2.3(b)(3)(a) requires a trustee to invest so as "to make appropriate current and future distributions to or for the benefit of the beneficiaries." When equity investors obtain steadily compounding annual growth of principal value, they thereby benefit future beneficiaries, who are usually unknown and unidentifiable, while slighting current beneficiaries, who are usually those most in a testator's or grantor's favor. Current beneficiaries receive annual distributions of meager "accounting income." Recurring distributions of such a disproportionate kind cannot be considered "appropriate" under the Prudent Investor regime. But if a trust has been drafted to allow only the payment or application of income, how can the trustee's dilemma be resolved?

The drafters of the Uniform Principal and Income Act proposed a solution by giving trustees a power exercisable annually or more or less frequently to adjust the payout from a trust by using accounting principal to supplement accounting income to make up an "appropriate" current distribution. As noted, an "appropriate" distribution might possibly mean a reduction of current payment.

The EPTL–SCPA Legislative Advisory Committee, while favoring the unitrust (EPTL 11-2.4), ultimately proposed enactment of both the unitrust and the power to adjust. The trustee's adjustment power is placed within the context of the Prudent Investor Act as new EPTL 11-2.3(5), entitled "Trustee's power to adjust," effective January 1, 2002.

The adjustment power applies only to trusts subject to the new Article 11-A (Uniform Principal and Income Act).[54] Thus, unitrusts created under EPTL 11-2.4 are not subject to the adjustment power.[55]

The power to adjust will apply only to trusts that describe the amount that may or must be distributed to a beneficiary by reference to the trust income. Only then may a trustee "adjust between principal and income to the extent . . . advisable to enable the trustee to make appropriate present and future distributions . . . if the trustee determines, after applying [the Uniform Principal and Income Act provisions of EPTL Article 11-A], that such an adjustment would be fair and reasonable to all of the beneficiaries, so that current beneficiaries may be given such use of the trust property as is consistent with preservation of its value."[56]

If a trustee has express broad power and discretion to disburse principal to a current beneficiary—a so-called "power to invade"—the adjustment power is not needed.

As with the optional unitrust under EPTL 11-2.4, the use of the power to adjust is given only to trustees not to personal representatives, and applies only to trusts. Unlike a unitrust, which once elected can thereafter be changed only with court approval, a trustee may "adjust" frequently to provide a current beneficiary with an "Appropriate Benefit Currently Distributable" instead of accounting income. The adjustment can also be downward, if that is the appropriate benefit.

In exercising the power to adjust, the trustee may consider the intent of the testator or settlor; the assets of the trust and the extent to which they consist of financial assets; closely held business interests; tangible, intangible and real property; the extent to which assets are used by the beneficiary; and whether an asset was purchased by the trustee or acquired from the settlor or decedent. These factors are in addition to the considerations the trustee must take into account in implementing the Prudent Investor Rule.[57]

The trustee may not make an adjustment that reduces an income interest of a spouse for which an estate or gift tax marital deduction is claimed, if the trust requires that all income be paid at least annually to that spouse. Nor may an adjustment be made that reduces the actuarial value of an income interest for which a gift tax exclusion was claimed, or that changes an account payable as an annuity or fixed fraction of assets. Nor may the trustee make any adjustment from principal permanently set aside for charity, unless the income therefrom is also permanently devoted to charitable purposes.[58]

Other prohibited uses of the power involve the character of or effect on a beneficiary. Thus, the power cannot be used (1) if possessing or exercising it would cause the beneficiary otherwise to be treated as an owner of property for income tax purposes;[59] (2) if any of the trust assets would thus become includible in the beneficiary's estate in cases where the beneficiaries had power to remove a trustee;[60] or (3) if the trustee is a current beneficiary or presumptive remainderman or, if not, would benefit from the adjustment "directly or indirectly."[61] These prohibited powers can, however, be exercised by a co-trustee who is not subject to the restrictions.[62]

Interestingly, the adjustment power cannot be used in an irrevocable lifetime *inter vivos* trust which provides that income be paid to the grantor, if possessing or exercising the power would cause the grantor to lose the benefits of any future public benefit program. The power to adjust cannot be considered as an "available resource" in determining entitlement.[63]

Terms of a trust that limit the trustee's adjustment power will not be deemed contrary to this new section "unless it is clear [that they are] intended to deny the power of adjustment."[64] Presumably, this means that there must be an "all or nothing" express repudiation of the power.

EPTL 11-2.3-A contains a comprehensive set of rules permitting judicial control of the exercise of the trustee's power, with provision for sanctions in certain cases. A court can change the result of the exercise of the power only if it finds that the exercise was an abuse of discretion. An abuse cannot be found merely because the court would have exercised the power differently or not at all.[65]

If a court determines that an abuse has occurred, the court may restore the beneficiaries to their former positions. This is to be done in the first instance by readjusting the beneficiaries' shares. If a current beneficiary got too small an adjustment, principal will be directed to make up the difference. If a current beneficiary got too large an adjustment, the trustee may withhold amounts from future distributions to make principal whole or may require a refund. If neither approach will restore the status quo ante, the court may direct the trustee to pay an appropriate amount from the trustee's own funds but—and this is a significant condition—only if the court also finds, in addition to the breach of trust, that "the fiduciary was dishonest or arbitrary and capricious in the exercise of his, her or its discretion."[66]

In an apparently novel rule, reversing the usual practice in New York whereby courts will not issue declaratory opinions as to whether a trustee's proposed exercise of a discretionary power is reasonable, the new statute expressly authorizes a trustee to seek advance approval of a proposed adjustment.[67] The burden to prove that the proposed action is an abuse of discretion is then cast on the beneficiary.

It appears that this new "power to adjust" will create a continuing monitoring duty on trustees to ascertain if the currently distributable benefit is appropriate. A continuing failure to do so may be considered arbitrary and an abuse of discretion. And while the judicial control element of the statute appears to limit the surcharge option only to cases where the court cannot correct an "abusive" adjustment out of trust funds, it is the author's judgment that the court, in exercise of its equity powers, will not feel itself so constrained. Denial or reduction of commissions is always an option, particularly in an era of "reasonable compensation."[68]

In an apparently novel rule . . . the new statute expressly authorizes a trustee to seek advance approval of a proposed adjustment.

"Tax Considerations"

The new Uniform Principal and Income Act has ramifications that affect the tax characteristics of typical New York trusts. For example, the trustee's power to adjust and the optional power to opt into or out of a unitrust will have an impact on the amount of current payment to a surviving spouse. Indeed, even the definition of income is changed, because what had been a right to income becomes an "Appropriate Benefit Currently Distributable" under EPTL 11-2.3(b)(5) or a "unitrust" interest under EPTL 11-2.4. Because the surviving spouse must be entitled for life to all of the income from the marital share to qualify the marital deduction trust, the enactment of the Act impacts the deduction. In general, whether this obligation is satisfied depends on state law.[69]

As a result of action by the EPTL–SCPA Legislative Committee drafter of the Uniform Principal and Income Act, the Internal Revenue Service issued Proposed Regulations dated February 15, 2001, to revise the definition of "income" under the Internal Revenue Code to accommodate the changes brought about by the New York Uniform Principal and Income Act and similar laws in other jurisdictions.

The Proposed Regulations offer a definition of income and provide in part as follows:

> Under the proposed regulations, trust provisions that depart fundamentally from traditional concepts of income and principal (that is, allocating ordinary income to income and capital gains to principal) will generally continue to be disregarded, as they are under the current regulations. However, amounts allocated between income and principal pursuant to applicable state law will be respected if state law provides for a reasonable apportionment between the income and remainder beneficiaries of the total return of the trust for the year, taking into account ordinary income, capital gains, and, in some situations, unrealized appreciation. For example, a state law that provides for the income beneficiary to receive each year a unitrust amount of between 3% and 5% of the annual fair market value of the trust assets is a reasonable apportionment of the total return of the trust. Similarly, a state law that permits the trustee to make equitable adjustments between income and principal to fulfill the trustee's duty of impartiality between the income and remainder beneficiaries is a reasonable apportionment of the total return of the trust.

In addition, the proposed regulations modify the marital deduction regulation to incorporate the broader definition.[70]

While the Treasury had indicated approval of the power to adjust and the unitrust in the marital deduction area and for QDOT trusts and generation-skipping trusts as well, split interest charitable remainder unitrusts do not benefit for the Proposed Regulations.

Further, while the Proposed Regulations point to approval, they are for now only Proposed Regulations. When they become final, as is fully expected, the Uniform Principal and Income Act options will meet the tax tests.

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1. Article 11-A consists of six parts, as follows:
   Part 1 - Definitions and Fiduciary Duties
   Part 2 - Decedent's Estate or Terminating Income Interest

Part 3 - Apportionment at Beginning and End of Income Interest

Part 4 - Allocation of Receipts During Administration of Trust

Part 5 - Allocation of Disbursements During Administration of Trust

Part 6 - Miscellaneous Provisions

2. 2001 N.Y. Laws ch. 243, §§ 1, 4.
3. 2001 N.Y. Laws ch. 243.
4. See Committee's Fifth Report dated May 11, 1999 and Supplements dated May 26, 2000, February 15, 2001, May 3, 2001.
5. Legislative Memorandum in Support of EPTL–SCPA Advisory Committee's Fifth Report, dated May 11, 1999.
6. EPTL 11-2.3.
7. Supplement to EPTL–SCPA Advisory Committee's Fifth Report, dated May 11, 1999.
8. EPTL 11-2.3(b)(5).
9. EPTL 11-2.4.
10. EPTL 11-A-6.3.
11. EPTL 11-A-6.4.
12. EPTL 11-A-6.4.
13. EPTL 11-A-1.2.
14. EPTL 11-A-1.2(4).
15. *Id*.
16. EPTL 11-A-1.2(6).
17. EPTL 11-A-1.2(8).
18. EPTL 11-A-1.2(10).
19. EPTL 11-A-1.3(a).
20. EPTL 11-A-1.3(b).
21. The former act, EPTL 11-2.1(a)(1), allowed a trustee to do what was "reasonable and equitable." Now, under new Article 11-A, principal is to be charged or credited.
22. EPTL 11-A-1.3(a)(4).
23. EPTL 11-A-1.2(6).
24. EPTL 11-A-1.3(b).
25. Restatement (Third) of Trusts: Prudent Investor Rule § 183 (1992).
26. A major change in the new law is the addition of authority to pay administration expenses and interest on death taxes from income or principal. By permitting the fiduciary to choose the source of payment, the decision can be consistent with the decision to deduct the expenses for income or estate tax purposes, eliminating the need for a separate adjustment between principal and income.
27. According to the National Conference of Commissioners on Uniform State Laws (the revisers of the Uniform Principal and Income Act), this provision is intended to accord gifts under *inter vivos* instruments the same treatment as testamentary gifts. For the rules regarding payment of interest on legacies, see C.J. Groppe et al., Harris New York Estates: Probate, Administration and Litigation, § 13:7 *et seq*. (5th ed., 1996); see also M.V. Turano & C.R. Radigan, New York Estate Administration § 6.04 (1998).
28. This is a carryover from EPTL 11-2.1(d)(2)(ii). The effect is that a charity's share of income is calculated before an income tax deduction is taken into account so as not to have the charity bear part of the income tax.
29. EPTL 11-2.1(d)(2)(B).
30. EPTL 11-A-2.2.
31. EPTL 11-A-3.2.
32. EPTL 11-A-3.3.
33. EPTL 11-A-4.1 (defines the term "entity").
34. There appears to be a possible gap in determining "net income." It is defined in EPTL 11-A-3.3(a) as income received "before" the date on which the interest ends. But EPTL 11-A-3.1(d) provides that an income interest ends on the day before an income beneficiary dies. So, if a beneficiary dies on, say, Wednesday, the income interest would end on the preceding Tuesday, and the undistributed "net income" would be only that received through Monday, *i.e.*, before the day on which the income interest ended. There is no rule relating to entitlement to Tuesday's income.
35. EPTL 11-A-4.1(c).
36. The trustee may maintain separate books and records for the business, whether or not the assets are segregated from other estate assets. This "business operation rule" would not include a traditional securities portfolio. Reference must still be made to N.Y. Surrogate's Court Procedure Act 2108 (hereinafter "SCPA") for requirements for leave to continue a decedent's business.
37. EPTL 11-A-4.3(c).
38. EPTL 11-A-4.4, 11-A-4.5.
39. EPTL 11-A.5.1(3), (4).
40. EPTL 11-2.3(b)(1)–(3).
41. EPTL 11-2.3(b)(4)(A).
42. *See* I.R.C. § 664(d)(2).
43. EPTL 11-2.4(b)(3)–(5).
44. "Income" is also disregarded in fixing commissions in unitrusts. 2001 N.Y. Laws ch. 243 § 6-8 also amends SCPA 2308, 2309 and 2312 to eliminate the charge to income of one-third of annual commissions. The statutes now provide that all commissions are to be paid from principal after allowance for the unitrust amount (and in the case of SCPA 2312, also the annuity).
45. "Prior valuation year" is defined to mean "each of the two years of the trust immediately preceding the current valuation year." EPTL 11-2.4(c)(3).
46. EPTL 11-2.4(b)(2)(B), (3).
47. EPTL 11-2.4(e)(1)(A).
48. EPTL 11-2.4(e)(1)(B)(I).
49. EPTL 11-2.4(e)(1)(B)(II).
50. SCPA 315.
51. EPTL 11-2.4(e)(3).
52. EPTL 11-2.4(e)(2)(A).
53. EPTL 11-2.3(b)(5).
54. EPTL 11-2.3(5)(A).
55. EPTL 11-2.4(e).
56. EPTL 11-2.3(5)(A).
57. EPTL 11-2.3(b)(3)(B), (4)(B). *See* EPTL 11-A-2.1(4).
58. EPTL 11-2.3(b)(5)(C)(i)–(iv).
59. I.R.C. § 671 *et seq.*
60. *See* Rev. Rul. 95-58, 1995-2 C.B. 191, 1995-36 I.R.B. 16 (1995).
61. EPTL 11-2.3(b)(5)(C)(v)–(viii).

62. EPTL 11-2.3(b)(D).
63. EPTL 11-2.3(b)(5)(C)(ix).
64. EPTL 11-2.3(b)(5)(F).
65. EPTL 11-2.3-A(a).
66. EPTL 11-2.3-A(c)(3).
67. EPTL 11-2.3-A(d).
68. SCPA 2312.
69. *See, e.g.*, Treas. Reg. §§ 20.2056(b)-5(f), 20.2056(b)-7(d).
70. Prop. Treas. Reg. §§ 20.2056(b)-5(f), 20.2056A-5(c)(2), 25.2523(e)-1(f).

Early Detection of Possible Pitfalls In Fiduciary Obligations Can Prevent Later Problems

This is the second in a series of two articles devoted to the conflicts that can arise when an attorney represents multiple fiduciaries, the difficulties faced when fiduciaries serve in more than one capacity, the practical implications of the duty of impartiality and the need to avoid any appearance of self-dealing. The article in the November-December issue examined these issues from the attorney's perspective. This article considers the fiduciary's perspective.

BY JOHN R. MORKEN AND GARY B. FREIDMAN

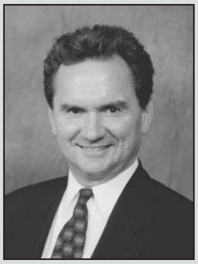
From the fiduciary's perspective, the conflicts of interest that generally arise are traceable to the fiduciary relationship itself. Early recognition and treatment of the potential legal and ethical pitfalls can avoid later problems and expensive litigation.

The basic principles that govern the relationship between and among fiduciaries are embodied in New York Estates, Powers and Trust Law (hereinafter "EPTL") 10-10.7, which requires that fiduciaries act by majority rule in important matters. (*See box, page 23.*)

The statute draws a distinction between the exercise of "joint" and "several" powers, without defining them. "Several" powers are those that are purely ministerial in nature and do not involve the exercise of fiduciary discretions. The cases hold that matters such as collecting estate assets, paying debts, compromising a claim, selling personal property at fair market value and paying of funeral expenses are ministerial in nature and may be exercised by a single fiduciary.[1]

Because most powers exercisable by a fiduciary involve the exercise of discretion (*e.g.*, investment decisions, the sale of real property, tax elections; *see* EPTL 11-1.1), they are joint powers and are subject to the EPTL 10-10.7 mandate that the majority rules. Because fiduciaries can be held responsible for the actions of their co-fiduciaries, *e.g.*, *In re Rothko*,[2] it is imperative for an attorney representing a fiduciary who disagrees with a proposed majority action to advise the client to express the dissent in writing to the co-fiduciaries. If this is done, the client "shall not be liable for the consequences of any majority decision, provided that liability for failure to join in administering the estate or trust or to prevent a breach of the trust may not thus be avoided."[3] In other words, if the proposed conduct appears to be a potential breach of fiduciary duty, or is tainted with fraud or gross negligence, in addition to dissenting in writing, the fiduciary should take affirmative action and seek instructions from the court. Otherwise, if the attorney guesses wrong and it is later determined that the proposed action was a breach of duty, the written dissent will not be worth the paper that it is written on.

A case in point is the estate of a woman named Florence Murphy, who named her four children as co-executors. Three were represented by one attorney, and the fourth by a second attorney. From the start, it was clear that on most issues the fiduciaries were split, three to one. Despite being aware of their ability to override their sister by majority vote, the majority was reluctant to sell any of the decedent's real estate without the consent of their sister, the fourth co-executor. They were afraid of claims later being brought by their sister. Even the Surrogate seemed to agree, holding that all four must agree on sales and sale prices, and if they did not, the Public Administrator would be appointed for the



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purpose of selling the real estate. As a result of this impasse, no real estate was sold for several years. The issue was resolved by the Appellate Division, which held in unequivocal terms that EPTL 10-10.7 applied and that the majority decision would govern.[4] The real estate was thereafter promptly sold.[5]

Although majority rule is the norm, the governing instrument can provide otherwise. In *In re Winston*,[6] the trustees of Harry Winston's estate fought over the meaning of a will provision, which read:

> If at any time a dispute shall arise in respect of the administration of any trust created by this will, I direct my trustees to take such action with respect to the matter in dispute as my son, . . . while serving as a trustee hereunder, shall determine.

In upholding the son's construction that the clause meant what it said, Surrogate Brewster held that the clause was

> a [vaild] direction by testator for the fiduciaries, in the event of a dispute, to take such action as [his son] may direct provided such directed action is made in good faith and is not in violation of a fiduciary duty, or tainted with fraud or gross negligence, in which event the dissenting fiduciary is required to seek instructions from the court.[7]

Designation clauses similar to the one used in *Winston* have repeatedly been upheld by the courts.[8] In *In re Riker*,[9] the decedent appointed his wife, son and daughter as his fiduciaries and directed that:

> [I]n the event that the Executors and Trustees cannot agree on any matter, then, the decision of [MY WIFE] shall prevail and be binding upon the remaining Executors and Trustees.

Surrogate Lambert gave effect to the plain and everyday meaning of the words and held that the clause meant exactly what it said, *viz.*, that the testator "[i]ntended to give his wife the authority to bind the other fiduciaries even if those fiduciaries reach a conclusion contrary to that of the wife."[10] The Surrogate rejected the arguments that (1) the clause was invalid as a matter of law and (2) the clause only applied when there was a difference of opinion among the three fiduciaries.

Similarly, in *In re Langdon*,[11] the decedent appointed both an individual and a corporate fiduciary. His will provided:

> In the event of a difference of opinion between my executors and trustees in the interpretation and carrying out of the provisions of this my Will, it is my wish and I hereby direct that the preference of my sister or my nephew shall prevail.

The Surrogate held that the clause meant what it said: "[I]n the event of a difference of opinion between the executor trustees herein regarding the affairs of the estate, the decision should be made by the sister."

In *In re Rubin*,[12] the will provided that in the event of a dispute between the fiduciaries, two non-fiduciaries were designated by the decedent as the arbiter of such disputes. This provision was enforced by Surrogate Radigan, who held that this was a valid limitation on the power of his fiduciaries, citing *In re Langdon*.

Regardless of whether the fiduciaries' action is governed by a majority vote or by the testator's designation of a "deadlock breaker," the majority may not act without consultation with and in disregard of the minority. Although the EPTL is silent on the issue, case law makes it clear that there must be a reasonable effort to reach accommodation; in sum, there should be joint meetings and joint consultations. The majority may not seize control and act without regard for the voice of the minority. The minority is entitled to air its views and attempt to persuade and make other proposals. The continued disregard of the minority and the subversion of majority power may be redressed by the Surrogate.[13]

The issue of how to resolve an impasse created when there could be no "majority vote" because there were two fiduciaries and the will did not contain any direc-

Text of EPTL 10-10.7

Unless contrary to the express provisions of an instrument affecting the disposition of property, a joint power other than a power of appointment, conferred upon three or more fiduciaries, as that term is defined in 11-1.1, by the terms of such instrument, or by statute, or arising by operation of law, may be exercised by a majority of such fiduciaries, or by a majority of survivor fiduciaries, or by the survivor fiduciary. Such a power conferred upon or surviving to two such fiduciaries may be exercised jointly by both such fiduciaries or by the survivor fiduciary, unless contrary to the express terms of the instrument creating the power. A fiduciary who fails to act through absence or disability, or a dissenting fiduciary who joins in carrying out the decision of a majority of the fiduciaries if his dissent is expressed promptly in writing to his co-fiduciaries, shall not be liable for the consequences of any majority decision, provided that liability for failure to join in administering the estate or trust or to prevent a breach of the trust may not thus be avoided. A power vested in one or more persons under a trust of real property created in connection with the salvaging of mortgage participation certificates may be executed by one or more of such persons as provided in such trust. This section shall not affect the right of any one of two or more personal representatives of a decedent to exercise a several power.

tion for breaking deadlocks between fiduciaries was addressed by Surrogate Roth, in *In re Duell*,[14] who fashioned a creative solution. The initial dispute between the co-executors concerned a distribution of the estate and whether it should be made fractionally, in various properties owned by the estate, or by way of outright ownership of individual buildings. Because the executors could not agree, the Surrogate appointed a well-known estate attorney as a special co-fiduciary with the limited authority to either resolve the deadlock or to make an alternate recommendation to the court. However, it soon became apparent that there were too many disputes to be addressed, and that the appointment of the attorney as a third fiduciary (an administrator, c.t.a.), would have to be made to "resolve deadlocks and avoid the expense and delay of repeated applications to this court for relief." The administrator was directed "to participate in the administration of the assets of this estate at such time as the co-executors are unable to agree."[15]

Each fiduciary may retain counsel and obtain reimbursement for reasonable counsel fees. In *In re Stanley*,[16] an individual and a corporate fiduciary disagreed about use of estate funds to commence litigation. The individual fiduciary, who wished to pursue the litigation, moved for summary judgment granting him mutually exclusive signature powers to estate accounts held by the corporate fiduciary. The Surrogate denied the motion, relying on the general rule that litigation expenses are paid initially by each party and, at the conclusion of the proceeding, the court may order that costs and allowances be paid either by a party personally, from estate assets, out of any person's share or interest, or from the foregoing in such proportion as justice requires.

If efforts to reach accommodation are ignored and common sense does not prevail, you must seek redress from the Surrogate.

The First Department reversed, stating that a fiduciary is unilaterally empowered (*i.e.*, without the consent of a co-fiduciary—a several power) to contest claims or settle claims in favor of the estate and to pay administration expenses including reasonable counsel fees, and that by virtue of his office, each fiduciary is entitled to the custody of the assets of the estate or fund. Accordingly, the individual fiduciary was held to have as much right to pay administration expenses as the corporate fiduciary. The court noted:

> There is no legal authority that bars a fiduciary, who is also a legatee, from using estate funds to administer the estate in his or her discretion. The fact that Mr. Schwarz may benefit personally from, *inter alia*, the re-litigation of the Erbschein, the prosecution of the claims against the widow in Florida and the successful challenge to the Bank's account claims is not relevant. Nor is it relevant that he may be able to recover the costs of these proceedings pursuant to SCPA 2301, 2302(2) and 2110(1). Mr. Schwarz is a fiduciary and should be able to use estate funds to cover administration costs (EPTL 11-1.1(b)(22); *Matter of Rubin, supra*). The litigation costs at issue herein are such administration costs since they are related to the recovery of estate assets.[17]

The Court did caution the individual fiduciary that

> to the extent that such costs do not constitute administration costs, or if [the individual fiduciary], in his capacity as fiduciary, uses the funds to the disadvantage of any person interested in the estate, then, as the Surrogate's Court aptly indicated, he "acts at his peril," exposing himself to liability (*Matter of Leopold, supra; Matter of Rubin, supra*). Accordingly, to the extent that Mr. Schwarz uses estate funds to pursue an action against the widow, which appears likely, and to the extent that such action infringes on her rights under the will, he can be held accountable. Indeed, if the widow, or any other legatee, can show that Mr. Schwarz is mismanaging or misusing estate funds, he may be removed as a fiduciary (*see*, SCPA 711). Further, to the extent that the Bank, as co-administrator, disagrees with petitioner's use of estate funds, it may petition the court for direction (SCPA 2102[6]; *Matter of Rubin, supra*).[18]

Attorneys representing separate fiduciaries should agree upon a division of services, a division of fees and a joint application. Separate tax returns should not be filed unless an agreement cannot be reached. Separate accountings should not be submitted unless claimed errors and omissions cannot be handled effectively by objections to the account. Common sense and good judgment should prevail in reaching reasonable accommodation. Meetings of the executors at regular intervals at mutually convenient locations are recommended. If efforts to reach accommodation do not meet with success, keep a detailed record of what has been done. One of the better ways of maintaining a log is by letters to the co-executors (or their counsel) with respect to all of your proposals and confirmation of all telephone calls.

If efforts to reach accommodation are ignored and common sense does not prevail, you must seek redress from the Surrogate.[19] In 1993, SCPA 2102(6) was broadened and now authorizes a proceeding to require a fiduciary "[t]o comply with such directions as the court may make whenever two or more fiduciaries disagree with respect to any issue affecting the estate."[20]

As a practical matter, the application to the court should be limited to specifics such as the failure to vote estate stock, to keep you fully informed, to meet and discuss estate matters, to exchange data in respect of estate assets and a refusal to agree on a united course of action. The moving papers should contain a factual presentation and be devoid of personal attacks and apoplectic arguments. Just recite the chronology of the efforts, attach copies of the correspondence that was sent and submit a log of telephone calls. If the conduct of the co-fiduciary went beyond mere lack of cooperation and was hostile and intransigent, consider seeking removal. The expenses and attorneys' fees incurred by the fiduciary in the defense of the hostile and intransigent conduct may be charged against the other fiduciary personally.[21]

Self-Dealing

Self-dealing is forbidden. It is dealt with severely and with rigidity. The question of personal gain or loss of the fiduciaries is not reached. Fairness or adequacy of consideration are not germane. The inquiry stops and the sanctions are imposed upon the discovery of the self-dealing. The benefit or gain to the estate is of no moment.[22]

Perhaps the most well known contemporary case of self-dealing involved the estate of Mark Rothko, the famous abstract expressionist painter.[23] One of the arguments made against surcharge in that case was that while there was a conflict of interest, there was no showing of self-dealing, and, absent self-dealing, it was argued that "a challenged transaction must be shown to be unfair."[24] The Court of Appeals answered this argument by pointing out that there was more than sufficient evidence in the record to support the findings that had been made of self-dealing and unfairness. Nonetheless, the point is well taken that every conflict of interest does not necessarily involve actual transactions of self-dealing. Often, a fiduciary is able to maintain a balance between his or her competing loyalties and the various hats being worn.

If self-dealing is found, however, and there is no exoneration clause in the will and no consent by those affected, the courts will apply a "no further inquiry" rule, ignoring "whether the deal was fair or the price adequate or whether the fiduciary had any personal gain."[25] The paramount need for a fiduciary to maintain undivided loyalty, and not be guilty of self-dealing, regardless of the circumstances, has resulted in the courts holding that if you are in violation, the transaction is void, and you will be liable for any damages, including lost profits.[26] In effect, there is a form of strict or absolute liability. An example is *In re Hirschhorn*.[27] There, the co-trustees lent trust funds to a corporation in which they and the trusts had an interest. The Surrogate, in surcharging the co-trustees, made the following comments:

> A trustee cannot properly lend trust funds to himself or herself (IIA, Scott, Trusts [4th ed], 170.17; Bogart, Trusts and Trustees [2d ed] 543[J]). Such a loan is improper even where the terms of the trust give the trustee the widest power of investment (*Carrier v. Carrier*, 226 N.Y. 114). Such a loan is also improper where the trustee has a substantial personal interest in the loan such as being a partner in the partnership to which the trust lends money (*Matter of Myer*, 131 N.Y. 409). It is therefore long and well settled law that for a trustee to lend trust funds to a corporation which he owns all or a substantial part of the shares or to a corporation [in] which the trustee is a principal officer is improper (*Matter of Keene*, 95 Misc. 25; *Matter of Rowe*, 42 Misc. 172; *see generally*, III Scott, Trust, *supra* at 227.8; Uniform Trust Act 3). This is particularly egregious where the loans are made without any security for the trusts.
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> Having stated these fundamental principles of a trustee's duty, the trustee, . . . defends his actions on the basis of mistake of law and reliance on the advice of counsel. Simply his defense appears to be that he did not know he could not make loans from the trusts to Standard Steel Sections and other entities. It is clear however, that where a trustee fails to perform the duties imposed upon a fiduciary, it is no defense that the failure was due to a mistake of law if the trustee was negligent in making the mistake (III Scott, Trusts, [4th ed],) Moreover, where a trustee makes a mistake of law as to the extent of his powers or duties as a trustee, it is no defense that he relied upon the advice of an attorney, even though the attorney was competent. (*Matter of Rothko*, 84 Misc. 2d 830, *aff'd*, 56 A.D.2d 499, *aff'd*, 43 N.Y.2d 305). The subjection of a trustee to absolute liability in these circumstances where he might not be actually at fault because of non-negligent ignorance and mistaken legal advice is harsh but required because he can escape liability by submitting the matter to a court for advice and direction (*City Bank Farmers Trust Co. v. Smith*, 263 N.Y. 292).
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> Under any standard of care, the transactions of these trustees were conflict ridden, smacked of self-dealing and are permeated with the breach of the duty of undivided loyalty (*Matter of Schulman*, 165 A.D.2d 499). Persons who accept the role or office of trustee must be assumed to accept it with the responsibility for acting with ordinary care and prudence. No matter how well intentioned a trustee, it will not excuse him or her from the required amount of diligence and prudence. The conduct of these trustees while perhaps acceptable in the marketplace is not sufficient for a trustee (*Meinhard v. Salmon*, 249 N.Y. 458, 464).

A "no further inquiry" rule may be harsh, resulting in absolute liability despite good intentions and perhaps what might otherwise be considered a reasonable and fair transaction. The solution, as pointed out by the Surrogate in *Hirschhorn*, is to bring an advice and direction proceeding. Another solution, when possible, is to have all those concerned approve of the transaction in writing, after being *fully informed* about the transaction and their rights and remedies.[28] This requires that the persons interested are adult and competent; otherwise a court proceeding will be required.

Self-dealing may be authorized by the court. This might eventuate in the situation where the executor may be the sole market or is willing to pay the highest price for an asset or interest of the decedent's estate. The court, upon a proper showing, including a full and complete disclosure of all relevant information by the fiduciary, may permit the executor to purchase an estate asset.[29] In *Scarborough*, the Court held:

> [T]he rule against self-dealing has not been applied, and does not apply, to interdict the purchase of trust property by a trustee where the court, after conducting a full adversary hearing at which all interested parties are represented, approves and authorizes the sale [citations omitted].[30]

The decedent may authorize self-dealing and may dispense with the rule of undivided loyalty by express language and in some cases by implication.[31]

> No doubt, the rule of undivided loyalty due from a trustee (citations omitted) may be relaxed by a settlor by appropriate language in the trust instrument in which he, either expressly or by necessary implication, recognizes that the trustee may have interests potentially in conflict with the trust (citations omitted); at least, our courts under these conditions enforce the desire of the settlor to secure the services of a person to act as trustee in whom he has confidence, when, without the existence of exculpatory provisions, the trusteeship would be declined by the designee (citations omitted). That is not to say that the settlor's directions allow the trustee free rein to deal with the trust; the law interposes to require that the trustee always exercise good faith in his administration (citations omitted). "No matter how broad the provision may be, the trustee is liable if he commits a breach of trust in bad faith or intentionally or with reckless indifference to the interests of the beneficiaries, or if he has personally profited through a breach of trust" (3 Scott, Trusts (3d ed.), § 222.3, p. 1777). Moreover, the language limiting the general rule is strictly construed so that the trustee's actions will not be approved if he trespasses outside the boundaries of the powers granted (citations omitted).[32]

Although such an exoneration clause in a will or trust permitting self-dealing transactions, in "explicit, clear, and unmistakable" language, may be the safest path, it does not give the fiduciaries a license to self-deal.[33] Even with strong and unambiguous exoneration language, the fiduciary who self-deals must always act in good faith and with care regarding the interest of the beneficiaries.[34] Further, more than mere general exoneration language is required.[35] If you do not have clear language in your will, and you do not have the consents of the parties affected, you must seek approval from the Surrogate, if the transaction is not to be voided and the fiduciary surcharged for damages, which can include loss of profit.[36]

Where distributions are made pro rata to legatees pursuant to the will, new appraisals at the time of distribution would not be required.

Distributions from the Estate

Conflicts of interest often arise in the context of distributions to beneficiaries. In *In re Rappaport*,[37] the Surrogate was asked for advice and direction where the co-executors were divided on whether administration expenses should be taken as a fiduciary income tax deduction or an estate tax deduction. The will provided for an outright fractional marital deduction formula bequest, stated in terms of one-half the adjusted gross taxable estate, with the second part of the residuary going in equal shares to his three children. If the very large litigation fees were taken as income tax deductions, the adjusted gross estate would increase and the marital deduction would grow by 50 percent of those expenses. Such a choice would virtually eliminate that portion of the residuary for the children. On the other hand, taking the deduction on the income tax return would result in payment of more estate taxes.

The Surrogate balanced various fiduciary duties, including the duty to minimize the tax burden on the estate and its beneficiaries, the duty of impartiality, and the duty to abstain from self-dealing. The court was particularly concerned that a fiduciary who is also a beneficiary should not make "a tax election unfairly favoring his beneficial interest over that of another beneficiary."[38] The court held that all administration expenses should be taken on the estate tax return, with the petitioning children of the decedent placing a sum in escrow for the purpose of reimbursing the estate for "the total tax savings which could have been realized by deducting administration expenses on the fiduciary income tax return."[39]

Where distributions are made pro rata to legatees, pursuant to the will, new appraisals at the time of distribution would not be required. However, non-pro rata distributions are frequently authorized by instruments, and are expressly authorized under EPTL 11-1.1(b)(20).

In such an instance, the fiduciaries, to avoid a charge of unfairness, should generally obtain new appraisals so that fair market valuations are utilized at the time of the distribution.[40] However, new appraisals are not always required. For example, in *In re Lawrence*,[41] Surrogate Roth concluded that appraisals should not be required, despite non-pro rata distribution, because the appraisals alone would cost "some ten million dollars."

In another case, the will provided that the property to go to the wife "shall have an aggregate fair market value fairly representative of the appreciation or depreciation value to the date or dates of each allocation of all property then available for allocation. Any property so allocated for such purpose shall be valued at the value as finally determined for federal estate tax purposes."[42] An issue in the accounting was whether distribution to the spouse of the decedent's interest in a leasehold could help satisfy the bequest to the spouse, and if so, what was its value. The Surrogate concluded that there were issues of fact, stating that the terminology in the will "suggested that the final federal determination is a starting point, the basis used to determine the value at the time of distribution."[43] The court also expressed concern that "assignment of the leasehold interest may implicate the fiduciary's duty of impartiality to all beneficiaries."[44]

The Fiduciary as Corporate Director or Officer

The responsibilities of a fiduciary when he or she is also an officer or director of a corporation in which the estate has an interest pose special problems. The vulnerability of the fiduciary extends to the conduct of a corporation, the stock of which is controlled by the estate.[45] He may not purchase estate assets for his personal use nor may he borrow estate funds. He may not pay fees to an accounting or legal firm of which he is a member without court approval; the concealment of self-dealing by the use of dummies will not be countenanced.[46]

The responsibilities of a fiduciary when he or she is also an officer or director of a corporation in which the estate has an interest pose special problems.

The fiduciary's conduct in the managing of the corporation may be oppressive and constitute overreaching as applied to the estate's beneficiaries. Thus, in one instance, the Appellate Division removed a trustee who had used his control of the corporate stock to make himself president and paid himself a large salary to the detriment of the beneficiaries who were dependent upon the income received from the stock for their support.[47]

In what circumstances does the fiduciary's duty to account extend not only to the estate or trust, but also to the corporation in which the estate or trust has an interest? The answer is that it depends. In one recent case, the trustee argued that he was not accountable for his actions in his capacity as president of a corporation, because the trust held less than a majority of the corporation's outstanding shares. Both the Surrogate and the Appellate Division disagreed, because the trustee "exercised working control of the corporation, such that he is accountable in the Surrogate's Court for any breach of trust, fraud or self dealing which injures the trust (citation omitted)."[48] At the very least, even if a full accounting from the corporation is not required, inquiry may be made of the fiduciary with respect to his or her conduct as an officer of the corporation to ascertain whether his or her conduct as such was motivated by self interest to the injury of the trust beneficiaries.[49]

It should not, however, be concluded that because the Surrogate's Court may inquire about a trustee's actions as a corporate officer, it necessarily follows that the Surrogate can also compel the declaration of dividends by the corporation. The Second Department held that the inquiry into the trustee's role in managing the corporation would be "limited to the issues of whether there was a breach of trust or negligence, and whether a surcharge should be imposed on the trustee (citations omitted)."[50] The Appellate Division went on to suggest that the Surrogate might have authority to require the declaration of dividends, where the corporation was entirely owned by the trust. However, in all other cases, "the issue of whether dividends should be paid by the corporations and the amount of those dividends is generally determined by corporate directors in their discretion, and the court is not justified in interfering absent evidence of bad faith, fraud, clear abuse of discretion or dishonesty on the part of the directors (citations omitted). Moreover, a cause of action to compel the declaration of a dividend is of a derivative nature, belonging to the corporation (citations omitted)."[51]

Investment Decisions

Co-fiduciaries may disagree on investment policy. An example might be where one co-trustee is an income beneficiary and seeks to promote investments yielding high income, while the other trustee wishes to encourage growth for the benefit of the remainderpersons. Just such a case was *In re Iskyan*.[52] There, the individual co-trustee refused to approve an investment by the corporate co-trustee of some portion of trust funds to protect the remainderpersons. The Surrogate held that under EPTL 10-10.7, the "duty to invest funds is one which requires the exercise of judgment and discretion and accordingly requires that the trustees act jointly [and, in this case, unanimously because there were only two] in selecting investments (citation omitted)."[53] The court noted that it had authority to intervene because of the individual co-trustee's refusal to participate, and if the facts supported the corporate co-trustee's contentions, the court could direct the individual to join with her co-trustee and to exercise the power. The court also noted that not only did the corporate co-trustee have the authority to come to the court to solve the problem, it also had a "duty to apply to the court for directions."[54]

The use by fiduciaries of an investment advisor is clearly appropriate, and in many instances, the wisest course. As with all complicated estate matters, the use of experts often pays dividends when it comes to defending the attorney's or the client's conduct on a contested accounting. Showing the prudence in the choice of the investment advisor in the first instance, and then showing the thorough job done by both the advisor and the fiduciary in determining investments, sales, purchases, etc., can only help when there are objections to investment performance.[55] The Prudent Investor Act, EPTL 11-2.3, expressly permits the delegation of investment powers, but, of course, the fiduciary must exercise prudence in the selection of his or her advisor.[56]

A fiduciary has general authority as a fiduciary to employ agents. While EPTL 11-1.1 provides no explicit authorization for hiring agents, and a fiduciary may not delegate her or his discretionary authority, "there is no prohibition against delegating to others the power to act upon decisions he has made."[57] As one court held, "a fiduciary can employ agents to do work he legitimately cannot do himself . . . the facts in each estate will determine whether or not the retention of agents is warranted."[58]

As with the investment advisor, the employment of other professionals on complicated or technical matters may serve the estate well and assist in protecting the fiduciary in the event of a contested accounting.

Moreover, it is the authors' experience that, at times, the employment of agents by multiple fiduciaries who find themselves unable to agree is helpful in easing the administration of the estate. For example, if the estate owns commercial real estate, a professional managing agent may not only be necessary because of the nature of the assets, but such may also help avoid conflicts between the fiduciaries. Of course, care must be taken by the fiduciaries to stay involved and to avoid any over-delegation of authority that might amount to an abdication of fiduciary responsibility.

Conclusion

The question has been asked, perhaps rhetorically, "Who then is the faithful and sensible steward?"[59] Judge Cardozo gave one, now classic, answer: "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate."[60]

Stating these principles and applying them are, of course, two different things. For the fiduciary with multiple hats, or in conflict with other fiduciaries, or in estates with beneficiaries who have very differing interests, and for the attorney called in to assist in such cases, applying these principles requires a particular sensitivity. The fiduciary or attorney should always err on the side of caution and be willing, if necessary, to decline qualification or turn down the representation. When in doubt, apply to the court for assistance!

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1. *See In re Leopold*, 259 N.Y. 274 (1932); *In re Bulova*, 60 Misc. 2d 151, 301 N.Y.S.2d 1008 (Sur. Ct., N.Y. Co. 1969)
2. 84 Misc. 2d 830, 379 N.Y.S.2d 923 (Sur. Ct., N.Y. Co. 1975), *modified*, 56 A.D.2d 499, 392 N.Y.S.2d 870 (1st Dep't), *aff'd*, 43 N.Y.2d 305, 372 N.E.2d 291, 401 N.Y.S.2d 449 (1977) *on remand*, 95 Misc. 2d 492, 407 N.Y.S.2d 954 (1978).
3. EPTL 10-10.7.
4. *In re Murphy*, 185 A.D.2d 819, 587 N.Y.S.2d 846 (2d Dep't 1992).
5. As anticipated, the fourth co-executor did seek to surcharge her co-executors as a result of the sales which did take place. *See In re Murphy*, N.Y.L.J., Sept. 15, 1999, p. 32, col. 5 (Sur. Ct., Richmond Co.).
6. N.Y.L.J., Dec. 24, 1990, p. 33, col. 3 (Sur. Ct., Westchester Co.).
7. *Id*.
8. *See, e.g.*, *In re Riker*, N.Y.L.J., Mar. 10, 1982, p. 12, col. 5; *In re Langdon*, 154 Misc. 252, 277 N.Y.S. 581 (Sur. Ct., Westchester Co. 1935). *See generally* Roth, *Multiple Fiduciaries And Their Powers*, N.Y.L.J., Apr. 25, 1982, p. 1, col. 1; *cf. In re Rubin*, 143 Misc. 2d 303, 540 N.Y.S.2d 944 (Sur. Ct., Nassau Co. 1989).
9. N.Y.L.J., Mar. 10, 1982, p. 12, col. 5 (___Ct.,___Co.).
10. *Id*.
11. 154 Misc. at 253-54 (emphasis in original).
12. 143 Misc. 2d 303.
13. *Cf. In re Martin*, 29 Misc. 2d 271, 215 N.Y.S.2d 278 (Sur. Ct., Kings Co. 1961).
14. N.Y.L.J., July 23, 1996, p. 23, col. 1 (Sur. Ct., N.Y. Co.).
15. *Id*.
16. 240 A.D.2d 268, 660 N.Y.S.2d 107 (1st Dep't 1997).
17. *Id*. at 269.
18. *Id*. at 270.
19. *See In re Martin*, 29 Misc. 2d 271, 215 N.Y.S.2d 278 (Sur. Ct., Kings Co. 1961); *In re Philippe*, 37 Misc. 2d 893, 235 N.Y.S.2d 594 (Sur. Ct., N.Y. Co. 1962).
20. Formerly this subdivision only authorized a proceeding where the dispute concerned the custody of money or other property of the estate committed to them.
21. *In re De Beixedon*, 262 N.Y. 168, 186 N.E. 431 (1933).
22. *In re Ryan*, 291 N.Y. 376, 52 N.E.2d 909 (1943); *see Meinhard v. Salmon*, 249 N.Y. 458 (1928).
23. *See In re Rothko*, 43 N.Y.2d 305, 401 N.Y.S.2d 449 (1977).

24. *Id*. at 318.
25. Margaret Valentine Turano & C. Raymond Radigan, *New York Estate Administration* 406 (1991).
26. *Rothko*, 43 N.Y.2d 305.
27. N.Y.L.J., Apr. 29, 1998, p. 30, col. 3 (Sur. Ct., Nassau Co.).
28. *See Birnbaum v. Birnbaum*, 117 A.D. 2d 409, 503 N.Y.S.2d 451 (4th Dep't 1986).
29. *In re Scarborough Properties*, 25 N.Y.2d 553, 307 N.Y.S.2d 641 (1969).
30. *Id*. at 558-59. *See In re Tuttle*, 4 N.Y.2d 159, 173 N.Y.S.2d 279 (1958) (court-approved payment of accounting fees to executor/trustee); *In re Rosenberg*, 165 Misc. 92, 2 N.Y.S.2d 300 (Sur. Ct., Richmond Co. 1937) (removal denied where trustees relied on informal advice of Surrogate in exceeding their investment powers); IIA Austin Wakeman Scott, *The Law of Trusts* 170.7 (4th ed. 1987); George Gleason Bogert, *The Law of Trusts and Trustees* 543 (rev. 2d ed., 1991 cum. pocket part at 55) ("Court approval of an otherwise disloyal transaction will relieve the trustee of liability.").
31. *In re Ridings*, 297 N.Y. 417 (1948); *In re Durston*, 297 N.Y. 64 (1947); *In re Roche*, 259 N.Y. 458 (1932); *In re Lonas*, 197 Misc. 678, 93 N.Y.S.2d 115 (Sur. Ct., Broome Co. 1949).
32. *O'Hayer v. De St. Aubin*, 30 A.D.2d 419, 423, 293 N.Y.S.2d 147 (2d Dep't 1968).
33. Charles Bryan Baron, *Self-dealing Trustees and the Exoneration Clause: Can Trustees Ever Profit from Transactions Involving Trust Property?*, 72 St. John's L. Rev. 43 (1998).
34. *O'Hayer*, 30 A.D.2d at 423 (citing Austin Wakeman Scott, *The Law of Trusts* 222.3 (3d ed. 1967). *See In re Lawrence*, 242 A.D.2d 416, 662 N.Y.S.2d 36 (1st Dep't 1997)).
35. *In re Amaducci*, N.Y.L.J., Nov. 2, 1999, p. 36, col. 4 (Sur. Ct., Westchester Co.).
36. *In re Rothko*, 43 N.Y.2d 305; *In re Hirschhorn*, N.Y. L.J. Apr. 29, 1998, p. 30, col. 3 (Sur. Ct., Nassau Co.).
37. 121 Misc. 2d 447, 467 N.Y.S.2d 814 (Sur. Ct., Nassau Co. 1983).
38. *Id*. at 451.
39. *Id*. at 452.
40. *See In re Blazer*, N.Y.L.J., July 22, 1992, p. 26, col. 3 (Sur. Ct., Nassau Co.).
41. N.Y.L.J., Nov. 2, 1998, p. 30, col. 4 (Sur. Ct., N.Y. Co.).
42. *In re Allen*, File No. 284129, Dec. No. 733 (Sur. Ct., Nassau Co., Oct. 7, 1999).
43. *Id*.
44. *Id*.
45. *In re Soss*, 71 N.Y.S.2d 23 (Sur. Ct., N.Y. Co. 1947).
46. *In re Tuttle*, 4 N.Y.2d 159, 173 N.Y.S.2d 279 (1958).
47. *In re Hirsch*, 116 A.D. 367, 101 N.Y.S. 893 (1st Dep't 1906).
48. *In re Scuderi*, 247 A.D.2d 392, 667 N.Y.S.2d 913 (2d Dep't 1998); *see In re Steinberg*, 153 Misc. 339, 274 N.Y.S. 914 (Sur. Ct., Kings Co. 1934).
49. *In re Shehan*, 285 A.D. 785, 141 N.Y.S.2d 439 (4th Dep't 1955).
50. *In re Goerler*, 227 A.D.2d 479, 480, 642 N.Y.S.2d 923 (2d Dep't 1996).
51. *Id*. at 480-81; *see also In re Cashman*, 14 N.Y.2d 426, 252 N.Y.S.2d 447 (1964).
52. N.Y.L.J., Oct. 12, 1994, p. 28, col. 3 (Sur. Ct., Nassau Co.).
53. *Id*.
54. *Id*.
55. *See, e.g.*, *In re Marshak*, N.Y.L.J., Aug. 11, 1994, p. 23, col. 4 (Sur. Ct., N.Y. Co.).
56. *See In re Younker*, 174 Misc. 2d 296, 663 N.Y.S.2d 946 (Sur. Ct., N.Y. Co. 1997); *see also In re Axe*, 132 Misc. 2d 137, 502 N.Y.S.2d 943 (Sur. Ct., Westchester Co. 1986).
57. Linda B. Hirschson et al. eds., Warren's Heaton on Surrogates' Courts, 361.01[5], (6th ed. 2000).
58. *In re Grace*, 62 Misc. 2d 51, 57, 308 N.Y.S.2d 33 (Sur. Ct., Nassau Co.), *aff'd*, 35 A.D.2d 783, 315 N.Y.S.2d 816 (2d Dep't 1970).
59. *Luke* 12:42 (New American Standard Bible).
60. *Meinhard*, 249 N.Y. at 464

Legislative Action in 2001 Updated Accounting Concepts And Made Procedural Changes

BY JOSHUA S. RUBENSTEIN

The 2001 Legislative Session brought numerous substantive changes to the laws affecting estate planning and administration. There were many accounting-related changes, designed primarily to modernize concepts of, and allocations between, income and principal. A number of important procedural changes were also made.[1] The following is a review of the changes.

Surrogate's Court Procedure Act

Probate Proceedings

1. Surrogate's Court Procedure Act 1411(3) (hereinafter "SCPA") has been amended to provide that whenever objections to the probate of a will are filed, the additional citation need not be issued to "each person named or referred to in the propounded instrument who has not appeared in the proceeding" unless his or her interest would be affected by the outcome of the proceeding. This change took effect immediately.[2]

Claims

2. SCPA 1813(1) has been amended to permit an application for the compromise or sale of any estate claim to be brought by "any person (other than a claimant) whose rights or interests will be affected by the allowance of the claim," not just by the fiduciary. This change took effect immediately.[3]

Accounting

3. A new section, 2222-a, has been added to the SCPA, providing that whenever a legatee, distributee or beneficiary is an inmate or prisoner in a state or local correctional facility, the court shall give prompt written notice to the State Crime Victim's Board and direct that no payment be made to such inmate or prisoner for a period of 30 days following the entry of the order containing such direction. This change took effect immediately. It applies to all judgments originally entered prior to the effective date, as well as to all judgments, obligations or agreements to pay profits from a crime or funds from a convicted person entered, incurred or entered into on or after the effective date.[4]

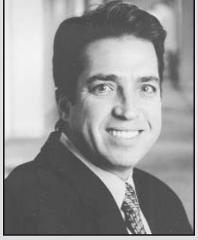
Costs, Allowances and Commissions

4. A new section, 2308(1)(c), has been added to the SCPA, providing that in the case of trusts created on or before August 31, 1956,

> commissions provided by paragraph (a) of this subdivision for receiving principal shall not be allowed to a trustee who qualifies to act as such on or after June 5, 1978, and shall not be allowed on additions of property received on or after June 5, 1978; such commissions on any increments in property that are payable by reason of any sale, exchange or liquidation of such property shall be allowed on the lesser of (1) the amount of such increments on the date of sale, exchange or liquidation of such property and (2) the amount of such increments on June 5, 1978; and such commissions on any increments in property that are payable by reason of any distribution of such property shall be allowed on the lesser of (1) the amount of such increments on the date of distribution of such property and (2) the amount of such increments on the effective date of this paragraph.[5]

5. SCPA 2308(3) has been amended to provide that in the case of trusts whose income is governed by a unitrust election, annual commissions shall be payable from corpus and not out of the unitrust amount. The change took effect January 1, 2002.[6]

6. SCPA 2309(3) has been amended to provide that in the case of trusts whose income is governed by a unitrust election, annual commissions shall be payable from corpus and not out of the unitrust amount. The change took effect January 1, 2002.[7]



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7. SCPA 2312(5) has been amended to provide that in the case of trusts whose income is governed by a unitrust election, annual commissions shall be payable from principal and not out of the unitrust amount. The change took effect January 1, 2002.[8]

Estates, Powers and Trusts Law

Uniform Principal and Income Act

8. A new Article 11-A has been added to the Estates, Powers and Trusts Law (herein after "EPTL") incorporating the new Uniform Principal and Income Act with certain modifications. Part 1 sets forth definitions and fiduciary duties. Part 2 provides for the determination and distribution of net income (from estates and terminating income interests). Part 3 provides for the apportionment of the beginning and end of an income interest. Part 4 provides for the allocation of receipts during the administration of a trust, setting forth specifically the treatment of receipts from entities, receipts not normally apportioned, and receipts normally apportioned. Part 5 provides for the allocation of disbursements during the administration of a trust. Part 6 provides for certain miscellaneous rules governing the application and construction of the act. This change took effect January 1, 2002.[9]

The existing Principal and Income Act shall not apply to any receipt or expense received or incurred by any trust or decedent's estate after January 1, 2002.

Trusts

9. A new section, 7-1.13(k), has been added to the EPTL, permitting division of trusts for the purpose of having one or more trusts governed by the Uniform Principal and Income Act and another one or more trusts governed by a unitrust election. The change took effect January 1, 2002.[10]

Powers

10. EPTL 10-6.6 has been amended, and a new paragraph (g) has been added, to provide that a trustee with an absolute power of invasion over principal may exercise such discretion by appointing principal in further trust with or without the consent of persons interested in the trust, and with or without prior court approval, and to provide that this section does not abridge any comparable power such a trustee has under any other statute or under common law. The change took effect immediately.[11]

Fiduciaries

11. EPTL 11-2.1(m) has been amended to provide that the existing Principal and Income Act shall not apply to any receipt or expense received or incurred by any trust or decedent's estate after January 1, 2002, the effective date of this change.[12]

12. EPTL 11-2.3(b) has been amended by renumbering subparagraph 5 as subparagraph 6 and by adding a new subparagraph 5 to the Prudent Investor Act, providing for a power to adjust between principal and income to the extent that a trustee considers it advisable to do so in order to enable the trustee to make appropriate present and future distributions, and setting forth those factors to consider in exercising such power. This change became effective on January 1, 2002.[13]

13. Newly enacted EPTL 11-2.3-A provides for judicial control over the power to adjust between income and principal, providing that a court may not change the fiduciary's decision unless it determines that the fiduciary's decision was an abuse of discretion, and setting forth the available remedies in the event that an abuse of discretion is found. This change took effect January 1, 2002.[14]

14. Newly enacted EPTL 11-2.4 provides for an optional unitrust provision, whereby the net income of any trust to which this section applies will mean a unitrust amount equal to 4% of the fair market value of the assets held in the trust on the first business day in the current valuation year, or, if the trust has been in existence for four or more years, 4% of the average such fair market value for the current year and the prior two years. This section applies (i) if the governing instrument so provides; (ii) if, with respect to a trust in existence prior to January 1, 2002, the trustee, with consent on behalf of all persons interested in the trust or in the trustee's discretion, elects to have this section apply on or before December 31, 2005; or (iii) if, with respect to a trust not in existence before January 1, 2002, the trustee so elects on or before the last day of the second full year of the trust beginning after assets first become subject to the trust. This change took effect January 1, 2002.[15]

Other Provisions

15. EPTL 13-2.2(a) has been amended to reflect references to newly enacted provisions of Article 9 of the Uniform Commercial Code with respect to transfers and mortgages of interests in decedents' estates, and the requirements of writing and recording thereof. This change took effect July 1, 2001.[16]

Insurance Law

Rules

16. Insurance Law § 1110(b) and (c) have been amended with respect to investment limitations for charitable gift annuity societies to permit such investments to be made in accordance with prudent investor standards. This change is effective immediately.17

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1. A bill that passed the Assembly on February 26, 2001 and the Senate on March 20, 2001, would have added a new § 4501-a to the N.Y. Civil Practice Law & Rules (hereinafter "CPLR"), providing for the uniform treatment of professional privileges upon death or disability. The bill provided that the personal representative succeeds to all the communicant's rights and privileges with respect to the privilege after the communicant's death or during the communicant's disability, and the privilege may be waived by any party in interest in any action or proceeding with respect to the validity or construction of any gratuitous transfer of property. Medical professionals may not withhold information as to the mental or physical condition of a communicant from a surviving spouse or distributee, but no professional in possession of any information that would tend to disgrace the memory or reputation of a decedent or disabled communicant shall disclose such information except upon order from the court. The bill would also have amended CPLR 4503 by deleting paragraph (b), which provided for the probate exception to the attorney-client privilege, which is now contained in new CPLR 4501-a. These changes would have been effective 60 days after enactment. The governor belatedly vetoed this bill on November 13, 2001.
2. 2001 N.Y. Laws ch. 393.
3. 2001 N.Y. Laws ch. 234.
4. 2001 N.Y. Laws ch. 62, § 9.
5. 2001 N.Y. Laws ch. 376.
6. 2001 N.Y. Laws ch. 243, § 6.
7. 2001 N.Y. Laws ch. 243, § 7.
8. 2001 N.Y. Laws ch. 243, § 8.
9. 2001 N.Y. Laws ch. 243, § 3.
10. 2001 N.Y. Laws ch. 243, § 9.
11. 2001 N.Y. Laws ch. 204.
12. 2001 N.Y. Laws ch. 243, § 5.
13. 2001 N.Y. Laws ch. 243, § 1.
14. 2001 N.Y. Laws ch. 243, § 2.
15. 2001 N.Y. Laws ch. 243, § 4.
16. 2001 N.Y. Laws ch. 84, § 41.
17. 2001 N.Y. Laws ch. 419.

Clarifying Evidentiary Rules On Contents of Reports by Physicians Could Give Jurors More Information

An article last month addressed the legal issues that arise when one physician is called to give trial testimony based on the report of a physician who is not testifying. This article makes some proposals for clarifying the evidentiary rules and the extent to which information is made available to the jury about the contents of the report.

By Marcy S. Friedman

As the prior article noted, cases involving a testifying physician's reliance on another physician's out-of-court report[1] have distinguished between the permissible basis for the testifying physician's opinion and the admissibility of the report itself or of testimony about its contents. The prior article concluded that, on close analysis, the cases provide workable and sound criteria for determining whether an out-of-court report may serve as a basis for a testifying physician's opinion. Unfortunately, however, the cases do not provide equally useful guidance regarding the admissibility of the report.

Using the Report as a Basis for the Expert's Opinion

This article does not focus in any detail on the criteria for determining the permissible basis for a testifying physician's opinion, because the criteria developed in existing case law and discussed in the prior article can be used effectively to predict the outcome on issues that commonly arise but have not been the subject of appellate opinion.

One issue, which illustrates the usefulness of the existing criteria, is the extent to which a treating physician may testify about the plaintiff's need for future surgery based on the report of a consulting surgeon maintained in the treating physician's file. Under the standards set forth in the cases, if the issue arises in an action in which the plaintiff claims that surgery is needed as a result of injuries sustained in an accident, testimony based on the report may well be appropriate, assuming the report itself appears to be reliable, provided that the treating physician referred the plaintiff to the surgeon not for the purpose of formulating an opinion for litigation but for treatment; the treating physician had the expertise to evaluate the surgeon's report; and the treating physician actually used the report in treating the plaintiff or assisting the plaintiff with treatment decisions. Here, although the plaintiff's need for future surgery may be an important issue in the case, there are sufficient guarantees of reliability to permit the testimony.

On the other hand, if the issue arises in a medical malpractice case, and the physician who treats the plaintiff after the alleged malpractice refers the plaintiff to a surgeon for consultation on whether surgery is required as a result of the malpractice, then the out-of-court opinion of the surgeon is not merely important but goes to the ultimate issue of whether or to what extent there was malpractice. In this instance, even if the surgeon's report and circumstances of the testifying physician's reliance on the report demonstrate its reliability, the testimony should not be permitted, given the defendant's interest in confronting witnesses on the critical issue.

Admissibility of the Report

Issues concerning the admissibility of the report or of testimony about its contents have proved more troublesome for the courts. The cases consistently hold, whatever the subject matter of the report, that the report is not admissible unless there is a basis for admission independent of the testifying physician's reliance upon the report—that is, a basis under a recognized exception to the hearsay rule.

In contrast, once a report is held to be a permissible basis for the testifying physician's opinion, the courts permit limited testimonial references to the report. The testifying physician is permitted "to identify the report upon which he relied and explain its significance in forming his opinion."[2] Treating physicians may testify "with respect to" the contents of reports of test results.[3]

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The cases are somewhat ambiguous on whether non-treating physicians may also give such testimony. The cases do not otherwise establish specific guidelines for determining the extent of the testimony that may be given about the contents of the report.[4] Nor do they set forth the rationale for admitting testimony about the contents of the report but not the report itself.

This rationale appears, however, upon consideration of the hearsay rule. Under the rule, if the report is inadmissible, then any testimony regarding its contents should also be inadmissible if offered for its truth. The hearsay rule is not violated if the testimony is admitted not for its truth but for the limited purpose of explaining the basis for the expert's opinion. Although cases decided under the Federal Rules of Evidence commonly admit the testimony for this limited purpose, the New York cases do not ordinarily expressly do so.[5]

Clarification that the testimony is admitted to explain the basis for the testifying physician's opinion would at least serve to provide an analytically coherent basis for precluding admission of the report but permitting testimony about its contents. As discussed further below, however, the limiting instruction is subject to criticism on other grounds, and it is not the intent of this article to advocate its use. Rather, the courts should address, and consider expanding, the extent to which information is made available to the jury about the contents of the report. Determining the means by which to expand such information requires careful consideration, given the complexity of the competing interests.

The concerns that underlie the hearsay rule are not seen to be implicated when it is left to the cross-examiner to examine the bases of the expert's opinion.

Under N.Y. Civil Practice Law and Rules 4515 (hereinafter "CPLR"), unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based.[6] Upon cross-examination, he may be required to specify the data and other criteria supporting the opinion.[7] As stated in the legislative history, this statute was designed to remove the rigidity of the common law requirement that the opinion of an expert witness be elicited in response to a hypothetical question, and to "'permit the expert to state what he knows in a natural way'," while giving the cross-examiner "'full opportunity to discredit him'."[8]

As the Court of Appeals further explained in *Caton v. Doug Urban Construction Co.*,[9]

> although CPLR 4515 permits an expert witness to state an opinion without specifying the data upon which it is based, it does not avoid the necessity for presentation of such data. Its purpose is, rather, to make the expert's presentation more readily understandable by permitting the opinion to be stated on direct, and leaving the development of the data on which it is based for cross-examination [citation omitted]. It does not, however, change the basic principle that an expert's opinion not based on facts is worthless [citation omitted].[10]

Hearsay and Confrontation Concerns

Difficult issues arise for the courts when the party who calls the expert does not wish to avail itself of its option under CPLR 4515 to leave it to the cross-examiner to examine the bases for the opinion, but seeks instead to buttress the opinion on direct examination by eliciting the bases, including the hearsay. In this situation, as discussed above, the courts not only refuse to admit the out-of-court report, but are clearly uncomfortable even with the limited testimonial references to the report that case law currently authorizes.

The discomfort in these circumstances appears to reflect concern that accepted hearsay norms will be violated by allowing the jury to hear about unauthenticated material, even if it is not formally received in evidence. Concern for the right to confront witnesses in criminal cases, and for the legitimate interests of parties in civil cases to confront adversaries on crucial issues, also explains the courts' restriction of the references that the expert will be permitted to make on direct examination to the contents of an unadmitted report.[11]

On the other hand, the concerns that underlie the hearsay rule are not seen to be implicated when it is left to the cross-examiner to examine the bases for the expert's opinion. The cross-examiner ordinarily will have had extensive pre-trial disclosure of the hearsay bases for a medical expert's opinion (including copies of reports of medical providers who have treated or examined the plaintiff, and authorizations to examine hospital records and X-ray and technicians' reports pursuant to N.Y. Comp. Code R. & Regs. tit. 22, § 202.17). The cross-examiner is considered to be in a position to make an informed decision as to whether to attempt to undermine the witness' reliance on the hearsay bases.[12]

Although CPLR 4515 appears to contemplate that the cross-examiner will develop the factual bases for the opinion, it is not uncommon in personal injury cases for the cross-examiner to explore the bases in only the most perfunctory fashion. This common strategic decision by the cross-examiner, together with the limits the courts place on elicitation of the bases for the opinion by the party who called the physician where hearsay is involved, leads to a situation in which the jury frequently is left with no real basis on which to evaluate the physician's opinion or to choose between the often diametrically opposed opinions offered by the plaintiff's and defendant's dueling physicians. In short, the jury often has little more to go on than the general impression that the physician makes on the stand or the impressiveness of his or her resume.

Apart from the fact that CPLR 4515 clearly does not dispense with the requirement that the factual predicates for the expert's opinion be placed in the record, it is self-evident that the worth of an expert's opinion is dependent on the validity of its bases. Nevertheless, there has been a long-standing (and, seemingly irresolvable) debate, both scholarly and practical, regarding the extent to which out-of-court material relied upon by an expert may be admitted into evidence.

One frequently cited commentator argues, based on hearsay and confrontation concerns, that the expert's reliance on the out-of-court report should not be a basis for its admission, or for permitting the expert to quote extensively from the report, and that the expert should only be permitted to "identify and briefly describe" the report.[13] Yet, even this commentator, whose arguments strongly support existing New York law, acknowledges that "[i]n particularly compelling circumstances, and especially in civil cases," it might be appropriate for judges to "admit reliable background documentation."[14]

A responding commentator forcefully argues that the failure to give the jury the facts that it needs to evaluate the expert's opinion "changes the expert's role in litigation to that of a super-factfinder capable of producing admissible substantive evidence (an opinion) from inadmissible evidence," and unduly "allows the expert witness to influence the outcome of a case based on evidence that the finder of fact may not hear and cannot consider."[15] This commentator contends that because the out-of-court material must be reliable in order to form a permissible basis for the expert's opinion, it is sufficiently reliable to be considered by the jury. He further argues that the courts should not merely permit testimony about the bases for the opinion, but rather should fashion a new exception to the hearsay rule authorizing the admission for its truth of the out-of-court material on which the expert relies.[16]

Given judicial respect for the parties' interest in confronting adverse witnesses, it does not seem likely that such a thoroughgoing exception to the hearsay rule will be adopted. However, as the arguments for providing the jury with sufficient information not merely to understand but to evaluate the bases for an expert's opinion are strong ones, the courts should consider expanding the information that is made available to the jury to facilitate the latter role.

One approach would be to adopt the federal precedent, which admits testimony about the out-of-court material on which the expert relied, with the limiting instruction that the information is admitted not for its truth but for the purpose of explaining the bases for the opinion. The advantages of the limiting instruction are that it minimizes, if not wholly avoids, the impact on the right of confrontation and other hearsay objections. It also provides the jury with substantially more information about the bases for the expert's opinion than does current New York State law.

However, the instruction is otherwise vulnerable to criticism. It is widely considered that the instruction involves distinctions requiring "mental gymnastics" that a jury may be unable to perform.[17] For example, where the out-of-court material consists of a report of a plaintiff's test results or an evaluation by a specialist of the extent of the plaintiff's injuries, the material may be an important, and possibly necessary, factual predicate for a sound opinion regarding the cause or permanence of the plaintiff's injuries. Under such circumstances, it is questionable whether a jury can reasonably be expected to consider the report as a basis or explanation for the opinion, without also considering its truth.

A persuasive argument may also be made that the limiting instruction does not give the jury sufficient information to evaluate the expert's opinion. One of the jury's traditional functions, in assessing the soundness of an expert opinion, is to determine whether the opinion is supported by the facts. The limiting instruction supplies the jury with the bases used by the expert so that the jury can understand the expert's reasoning; but it does not invite the jury to consider whether the bases—to the extent they involve factual data—are correct. The limiting instruction thus not only fails to provide the jury with the factual data necessary to enable it to perform its function of determining whether the opinion has support in the facts, but arguably diverts attention from the issue.

Significantly, this jury function is not eliminated by the professional reliability exception to the requirement that expert opinion be based only on facts in evidence. On the contrary, as explained by the Court of Appeals in *People v. Jones*:[18]

> Expert opinion testimony is used in partial substitution for the jury's otherwise exclusive province which is to draw "conclusions from the facts" [citation omitted]. It is a kind of authorized encroachment in that respect. But, to insure that the jury is not doubly displaced, it "must [at least] have the facts upon which the expert bases his opinion in order to evaluate the worth of that opinion" [citation omitted], as well as to judge the reliability of extrajudicial material, if that is the plank upon which the expert's opinion rests.

People v. Jones further stated that "an expert who relies on necessary facts . . . which are not contained on the record is required to testify to those facts prior to rendering the opinion."[19] However, the case did not expressly consider the extent to which a court should admit out-of-court factual material on which an expert relies. Rather, the case appears to have involved not merely a failure to set forth the basis for the expert's opinion in the record, but the absence of a factual basis for the opinion—that is, the expert appears to have improperly assumed a material fact without any evidentiary support for the fact in the record, and without identifying any support for the assumption outside the record.

People v. Jones thus did not finally resolve the tension between the jury's need for the facts necessary to evaluate the expert's opinion, on the one hand, and the confrontation and other hearsay concerns, which have traditionally been cited to restrict the out-of-court information that the jury receives about the facts, on the other. The case is nevertheless perhaps the strongest judicial statement to date of the compelling reasons for providing the jury with the factual data underlying an expert's opinion. It suggests the need for the courts to reassess the established, but largely unexamined, rule which limits an expert's testimonial references to out-of-court material, and to address directly the difficult issue of whether, and under what circumstances, testimony about the contents of such material should be admitted for its truth. To this end, the courts will be called upon to consider not only whether the federal limiting instruction should be followed, but whether it is possible, without unduly offending confrontation and other hearsay concerns, to improve upon the limiting instruction by admitting testimony about the out-of-court material for its truth.

Hospital records, the treating physician's own records, and test films are all admissible under recognized statutory and case law exceptions to the hearsay rule.

Expanding Permissible References

The suggestion that the courts consider expanding the permissible testimonial references to the out-of-court bases for an expert's opinion is not made without full recognition of the tortured history of efforts in this state to revise the rules of evidence, and of the caution the courts have traditionally exercised in authorizing the admission of hearsay.[20] A different approach, which has found favor with the courts and which provides the jury with at least some additional information about the bases for expert opinion, involves expanding recognized exceptions to the hearsay rule.

The appellate courts have already proved receptive to expansion of the business records exception to cover medical records of consulting physicians and laboratories which are maintained in a treating physician's file. In *Freeman v. Kirkland*,[21] the First Department held that it was not error for a trial court to admit the "complete medical file of plaintiff's treating osteopathic physician, including records, reports and correspondence generated by other medical specialists and laboratories, where the treating physician's testimony at trial established that the medical records related to the diagnosis and treatment of plaintiff's injuries." In *Cohn v. Haddad*,[22] the Second Department cited this holding approvingly, stating in dictum that the reports of other physicians contained in a treating doctor's records generally would be admissible.

The argument has been made that *Freeman v. Kirkland* authorizes the admission of reports of other physicians maintained in a treating physician's file, including reports expressing the other physicians' opinions on critical issues, provided that the reports are germane to diagnosis and treatment.[23] However, *Freeman v. Kirkland* has not been followed even to authorize the admission of other physicians' reports that do not contain opinions on ultimate issues. Rather, it apparently has been ignored by the many cases, reviewed in the prior article, that have permitted treating physicians to base opinions in part on other physicians' reports prepared for the plaintiffs' treatment, but that have consistently treated the reports as inadmissible hearsay.

Because *Freeman v. Kirkland* would establish a potentially significant exception to the hearsay rule, the reasons for the courts' reluctance to follow the case should be addressed. First, although the summary opinion cited the business records exception to the hearsay rule[24] as the basis for the court's holding, it did not address the traditional precepts that a business record is a record made by an employee of the business in its regular course,[25] and that the mere filing and retention of papers received from other entities "is insufficient to qualify the documents as business records."[26]

These precepts are not inflexible, as shown by *People v. Cratsley*,[27] which applied the business records exception to a report that was not made by an employee of the business whose record it was claimed to be, where the maker of the report prepared the report on behalf of the business and in accordance with its requirements, and the business relied on the report in making determinations regarding its clients. The case involved a workshop for mentally retarded clients, and admitted an IQ report that was prepared by an outside consultant but used by a counselor employed by the workshop in determining the eligibility of a client for admission to the workshop and in formulating the client's program after admission. Under these circumstances, the court found that the report had the indicia of reliability typically associated with a business record. Records maintained in a treating physician's file that were actually obtained from other physicians for the plaintiff's treatment and used for such treatment are prepared under similar circumstances and bear similar guarantees of reliability to the records admitted in *People v. Cratsley*.

More importantly, *Freeman v. Kirkland* did not acknowledge the compelling lesson of *Borden v. Brady*[28] that the right to cross-examine adverse witnesses is unduly impaired where the testifying treating physician is permitted to base an opinion on an out-of-court report that expresses opinion concerning crucial issues in the case, even if the report was actually prepared for the plaintiff's treatment. If *Freeman v. Kirkland* were modified to exclude reports containing such opinion, the courts could then comfortably rely on the case to admit more objective reports maintained in the treating physician's file.

If such reports were admitted into evidence, a jury concededly would not generally be able to interpret the reports without expert assistance. But the need for expert assistance does not mean that the admission of the reports would be an academic exercise. Under current practice, the parties' respective experts routinely interpret admitted X-rays. Although experts also routinely rely on out-of-court reports of other physicians in formulating their opinions, they often simply identify the reports and assert their conclusions, without pointing to anything in the reports that supports the conclusions. If the reports were in evidence and could be reviewed by the jury, both parties would have an incentive to interpret them for the jury, and to cite the contents that support or detract from their respective experts' positions. The jury would thus have a more complete factual basis on which to evaluate expert opinion than is currently provided.

Conclusion

In sum, many of the objections to a physician's testimony at trial based on another physician's report may be readily avoided by using existing procedures for the independent admission of the report. Hospital records, the treating physician's own records, and test films are all admissible under recognized statutory and case law exceptions to the hearsay rule. *Freeman v. Kirkland*, as clarified, would provide an additional exception for consulting physicians' reports maintained in a treating physician's file, provided that they did not express opinion on ultimate issues. Together, these exceptions to the hearsay rule would cover almost all of the reports on which physicians commonly rely in formulating opinions about the condition, treatment and prognosis of plaintiffs in personal injury actions.

Nevertheless, circumstances will continue to arise in which a testifying physician must rely on an unadmitted report. In these circumstances, the courts should ensure, consistent with respect for the values that the hearsay rule serves, that the jury has sufficient information about the factual bases for the opinion to evaluate its soundness. The best means by which to achieve this goal will be an important subject for future debate.

1. As used in this article, the term "out-of-court report" means a report prepared by a physician who is not a witness at trial and which is not independently admitted into evidence under an exception to the hearsay rule—*e.g.*, as a business record.
2. *Borden v. Brady*, 92 A.D.2d 983, 984, 461 N.Y.S.2d 497 (3d Dep't 1983).
3. *Serra v. City of New York*, 215 A.D.2d 643, 644, 627 N.Y.S.2d 699 (2d Dep't 1995).
4. *See* Robert A. Barker & Vincent C. Alexander, Evidence in New York State and Federal Courts, § 703.1 (1996).
5. *See id*. § 703.2 (citing federal authorities). *But see People v. Rudd*, 196 A.D.2d 666, 601 N.Y.S.2d 933 (2d Dep't), *appeal denied*, 82 N.Y.2d 853, 606 N.Y.S.2d 605 (1993) (rare New York case approvingly noting the use of such limiting instruction).
6. CPLR 4515.
7. *Id*.
8. Alexander, McKinney Practice Commentary, CPLR 4515 (1992) (quoting N.Y. Adv. Comm. on Prac. & Proc., Second Prelim. Rep., Legis. Doc. No. 13, p. 263 (1958)).
9. 65 N.Y.2d 909, 493 N.Y.S.2d 453 (1985).
10. *Id*. at 911.
11. *See* Ronald L. Carlson, *Policing the Bases of Modern Expert Testimony*, 39 Vand. L. Rev. 577 (1986).
12. *See* Barker & Alexander, *supra* note 4, § 705.2, at 538 n.2.
13. Carlson, *supra* note 11, at 584.
14. *Id*. at n.29.
15. Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson*, 40 Vand. L. Rev. 583, 586 (1987).
16. *Id*.
17. *Id*. at 585.
18. 73 N.Y.2d 427, 430–31, 541 N.Y.S.2d 340 (1989).
19. *Id*. at 430.
20. New York is one of the few remaining common law jurisdictions, notwithstanding a 30-year effort to adopt a code of evidence along the lines of the federal rules, which reflect significantly more liberal standards than New York State law for the admission of hearsay. *See* Charles J. Walsh & Beth S. Rose, *Increasing the Useful Information Provided by Experts in the Courtroom: A Comparison of Federal Rules of Evidence 703 and 803(18) with the Evidence Rules in Illinois, Ohio, and New York*, 26 Seton Hall L. Rev. 183, 245 (1995).
21. 184 A.D.2d 331, 332, 584 N.Y.S.2d 828 (1st Dep't 1992).
22. 244 A.D.2d 519, 664 N.Y.S.2d 621 (2d Dep't 1997).
23. *See* Thomas A. Moore, *The Admissibility of Physicians' Office Records*, N.Y.L.J., June 6, 1995, p. 3, col. 1.
24. CPLR 4518.
25. *See* Alexander, McKinney Practice Commentary, CPLR 4518 (1992).
26. *Standard Textile Co. v. National Equip. Rental*, 80 A.D.2d 911, 437 N.Y.S.2d 398 (2d Dep't 1981).
27. 86 N.Y.2d 81, 90, 629 N.Y.S.2d 992 (1995).
28. 92 A.D.2d 983, 461 N.Y.S.2d 497 (3d Dep't 1983).

Report of the Commission On Fiduciary Appointments

> Reprinted here is the text of the report of the Commission on Fiduciary Appointments, which Chief Judge Judith S. Kaye appointed to examine the practices the state has used in choosing lawyers for fiduciary positions such as guardians *ad litem* in Surrogate's Court, receivers in bankruptcy matters, and guardians under Article 81 of the Mental Hygiene Law.
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> The commission, chaired by Sheila L. Birnbaum of Skadden, Arps, Slate, Meagher & Flom LLP, makes extensive recommendations for new regulations that would apply to attorneys who receive court appointments. The Office of Court Administration is seeking public comment on the recommendations by April 3, 2002, with a view toward subsequently making new rules on how fiduciary appointments will be administered.
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> Former NYSBA President Joshua M. Pruzansky of Islandia is serving as chair of a 19-member Special Committee on Fiduciary Appointments that is to review the state's findings and make recommendations to the court system.
>
> Members of the NYSBA are encouraged to read the report. Comments may be directed either to the Office of Court Administration directly, to Joshua Pruzansky as chairman of the NYSBA committee, or to a committee member.
>
> The committee members are Hon. Cheryl E. Chambers of State Supreme Court in Brooklyn, Hon. Lee L. Holzman of Surrogate's Court in the Bronx, Ilene S. Cooper of Uniondale, Paul A. Golinski of Brooklyn, John J. Gross of Northport, Garry W. Jenkins of New York, Norman L. Reimer of New York, Joshua S. Rubenstein of New York, Sanford J. Schlesinger of New York, Arthur Terranova of the Queens County Bar Association, Lynn R. Terrelonge of Brooklyn, Clover M. Drinkwater of Elmira, Kathryn Grant Madigan of Binghamton, Stephen M. Newman of Buffalo, Robert L. Ostertag of Poughkeepsie, Louis W. Pierro of Albany, Leory Wilson Jr. of White Plans, and former NYSBA President G. Robert Witmer Jr. of Rochester.

INTRODUCTION

Fiduciary appointments are judicial assignments of individuals, usually private attorneys, to assist the courts and serve litigants in a variety of situations. For example, a court may appoint a receiver to manage a property that is the subject of litigation; a guardian to handle the affairs of an incapacitated person; or a guardian ad litem to represent the interests of a child or incapacitated person involved in a Surrogate's Court proceeding. Fiduciary appointees generally receive their fees from the assets of the individual or business the fiduciary has been assigned to represent or manage. Although in many cases the fees are relatively small or even non-existent, in some cases they can be quite lucrative.

Fiduciary appointments have long been a subject of public attention and controversy. Over 130 years ago, Benjamin Cardozo's father, Manhattan Supreme Court Justice Albert Cardozo, was harshly criticized and ultimately forced to leave the bench in large part because of his repeated appointment of relatives and political cronies as fiduciaries.[1] Although public criticism of the process continued through the years, extensive regulatory limitations on appointments did not arise until the 1980s, with the promulgation of Part 36 of the Rules of the Chief Judge.

Even with the promulgation of Part 36, however, public concerns about the fiduciary appointment process have persisted. Indeed, these concerns may have reached their peak in January 2000, when a controversial letter written by two politically-connected Brooklyn attorneys who had received numerous fiduciary appointments was made public. In their letter, the attorneys complained that, contrary to what they perceived to be the "long-standing practice" in Brooklyn, certain lucrative fiduciary appointments were being assigned to another attorney who, although having close ties to a top political party official, had no record of party service and thus had not demonstrated his "entitlement" to the appointments. To many, the letter confirmed the widely-held perception of the inappropriate influence of politics on the fiduciary appointment process.

In response to these developments, Chief Judge Judith S. Kaye, in her 2000 State of the Judiciary address, announced a three-part program to reform the fiduciary appointment process. First, she created the Office of the Special Inspector General for Fiduciary Appointments, with authority to investigate violations of the fiduciary rules and recommend referrals of such violations to appropriate disciplinary and other enforcement authorities. Second, she directed the State's Administrative Judges to evaluate the fiduciary appointment process in their judicial districts and suggest operational changes that should be made. Finally, Chief Judge Kaye established the Commission on Fiduciary Appointments, with the responsibility to examine the existing rules and procedures governing fiduciary appointments and offer recommendations to improve them.

This Report is the result of over a year of painstaking analysis of New York's complex fiduciary appointment process. The Commission interviewed scores of judges, attorneys, court personnel and others familiar with the process; it examined reports, recommendations and related materials submitted by judicial associations, bar associations and other interested organizations; it conducted public hearings; it reviewed voluminous fiduciary appointment data; and it surveyed fiduciary appointment practices in other jurisdictions across the nation.

Based on this extensive study, the Commission found that many fiduciary appointees are fulfilling their obligations with considerable skill and professionalism — indeed, the Commission was impressed to learn of the hundreds and hundreds of cases in which fiduciary appointees serve for minimal or no compensation. But the Commission also found extensive and significant flaws in the existing process. This Report presents the Commission's findings, and offers detailed recommendations for addressing these problems so that full public confidence in the integrity and impartiality of New York's fiduciary appointment process may be maintained.

I. THE COMMISSION AND ITS DELIBERATIONS

In creating the Commission on Fiduciary Appointments, Chief Judge Kaye chose a broad cross-section of leaders of the bench, bar and academia. A list of the 17 Commission members and their backgrounds is attached as Appendix A. The Chief Judge's statement announcing the Commission noted that the Commission would "assess the effectiveness of the current regulatory structure" governing fiduciary appointments, and "evaluat[e] the efficacy of existing administrative rules." Among the issues that the Commission was charged with examining were "the appointment process, monetary limits on compensation, eligibility and expertise requirements for appointment and ethical standards pertaining to fiduciary assignments."

The Commission conducted an extensive, wide-ranging review of the fiduciary appointment process in New York, obtaining the views and recommendations of many individuals with day-to-day involvement and practical understanding of the process. For example, the Commission received presentations from and held briefing sessions with: the Presidents of the Supreme Court Justices Association of the State of New York, the Supreme Court Justices Association of the City of New York and the Surrogates Association of the State of New York, as well as individual judges with experience in this area; the Presidents, selected committee chairs and other representatives of the New York State Bar Association, the Association of the Bar of the City of New York and the New York County Lawyers Association; and the Chief Clerks of several Supreme Courts and Surrogate's Courts. The Commission also met on a number of occasions with Sherrill Spatz, the Unified Court System's Special Inspector General for Fiduciary Appointments. A complete list of the individuals who met with the Commission is attached as Appendix B.

In addition, the Commission conducted two public hearings: in Buffalo on November 29, 2000, at which judges and attorneys testified; and in Manhattan on December 7, 2000, at which judges, attorneys, litigants and other interested individuals testified. A complete list of persons testifying at the two public hearings is attached as Appendix C.

Commission members also held informational sessions with Supreme Court Justices and Surrogates during the two-week Annual Judicial Seminars in Rye Brook in July 2000, and they attended meetings of the State Bar Association's House of Delegates (July 2000) and Judicial Section (May 2000).

The Commission received numerous reports, recommendations and other written materials from various individuals and organizations, including the New York County Lawyers Association and committees of the State Bar Association and the Association of the Bar of the City of New York. The Commission also received and closely reviewed extensive information on fiduciary appointments collected by the Office of the Special Inspector General for Fiduciary Appointments and the Office of Court Administration's Internal Audit staff, as well as information from OCA's fiduciary database. Finally, the Commission examined fiduciary appointment practices in other jurisdictions around the country, and spoke with officials in those jurisdictions about their practices.

Early on, the Commission sought to identify the primary issues requiring examination. It then grouped the issues into three general categories—(1) Eligibility/Qualifications for Appointment, (2) Appointment Process and (3) Oversight of the Appointment Process—and established subcommittees for each of these categories. In the ensuing months, the subcommittees worked to develop proposed solutions for the problems, and it was those proposals that formed the basis for discussing and developing the series of recommendations the Commission offers in this Report.

II. FIDUCIARY APPOINTMENTS IN NEW YORK

A. Categories of Fiduciary Appointments

In New York, judges are frequently called upon to appoint fiduciaries to assist the court and provide services to litigants and other individuals. The primary categories of fiduciary appointments are referees, receivers, Article 81 fiduciaries (court evaluators, guardians, attorneys for alleged incapacitated persons and court examiners) and guardians ad litem.

Referees Under New York law, courts have broad powers to delegate authority to referees to determine issues and perform functions on behalf of the courts.[2] A primary purpose for which courts use referees is to sell real property that has been the subject of a judgment of foreclosure.[3] Typically, the referee is appointed to compute the value of the property, and then sell it at a public auction usually held at the courthouse. The fees for these services are relatively small—$50 to compute the value of the property, and $500 to sell the property (unless the property is of high value and the court authorizes a greater fee).[4]

Receivers When there is a risk that property that is the subject of litigation may be "removed from the state, or lost, materially injured or destroyed," a person with interest in the property may move for appointment of a receiver to manage the property while the action is pending.[5] The receiver is authorized to take and hold real and personal property and to sue for, collect and sell debts or claims.[6] In the most common case in which a receiver is appointed—a mortgage foreclosure proceeding—this means that the receiver may collect rent and institute or defend lawsuits relating to the collection of rent or the eviction of tenants. The receiver's fee, which is paid from the proceeds of the property in receivership, may not exceed five percent of the total sums the receiver collects and disburses.[7]

Article 81 Fiduciaries Under Article 81 of the Mental Hygiene Law, a court may appoint a guardian to provide for the personal care of an incapacitated person and/or manage the property and financial affairs of that person.[8] When a petition for appointment of a guardian is filed, the court first appoints a ***court evaluator***. The court evaluator conducts an investigation and submits a report and recommendations to the court addressing whether the alleged incapacitated person ("AIP") is in fact incapacitated, the availability and reliability of alternative resources and the selection of and powers that should be assigned to the guardian. In practice, the court evaluator is usually a private attorney, but he or she may be a physician, psychologist, accountant, social worker, nurse or any other qualified person.[9] If the AIP is a patient in a facility such as a hospital or nursing home, the facility may be appointed as the court evaluator; or if the AIP has minimal or no assets, the Mental Hygiene Legal Service may be appointed.[10]

The AIP has the right to be represented in the proceeding by counsel of his or her choice. But in other situations, such as when the AIP requests counsel or the court determines that appointment of counsel would be helpful, the court may appoint ***counsel for the AIP***.[11]

If the court determines, after a hearing, that the AIP is incapacitated and that appointment of a guardian is necessary, the court may proceed to appoint a ***guardian***.[12] In appointing a guardian, preference is usually given to a person nominated by the incapacitated person or to a family member.[13] If the incapacitated person does not nominate anyone, and if no family member is available for appointment, the court must appoint some other "suitable" individual, usually a private attorney. In cases in which the incapacitated person has minimal or no assets, the court may appoint an appropriate social services agency or not- for-profit organization to serve as guardian.[14]

Along with providing for the personal care and/or managing the property and financial affairs of the incapacitated person, the guardian must file periodic reports and financial accountings with the court. The reports, which must address the incapacitated person's condition and care, and the accountings[15] are reviewed by a ***court examiner*** appointed by the court. The court examiner, also usually a private attorney, submits his or her own report to the court evaluating the report submitted by the guardian.[16]

All persons appointed as court evaluators, guardians or court examiners must complete a training program approved by the Chief Administrator of the Courts.[17] Article 81 fiduciaries generally are paid from the assets of the incapacitated person. Court evaluators and attorneys for AIPs are usually paid hourly fees based on the fair and reasonable value of their services.[18] The court must establish a plan for the guardian's compensation, which may be based on a percentage of the amounts the guardian receives and disburses, a percentage of the incapacitated person's assets, an hourly fee or a combination of these or other methods.[19] Court examiners are paid a set fee that is based on the amount of the incapacitated person's assets (the fees are set by the Appellate Division).

Guardians Ad Litem Surrogate's Courts frequently appoint guardians ad litem to protect the interests of individuals incapable of protecting themselves.[20] Under section 403 of the Surrogate's Court Procedure Act, appointment of a guardian ad litem generally arises when an unrepresented person under a disability is a necessary party to a proceeding and is incapable of adequately protecting his or her rights.[21] Persons under a disability include infants, incompetent and incapacitated individuals, prisoners, unknowns and unborns.

The guardian ad litem, who must be an attorney,[22] undertakes an investigation of the facts and reviews all operative documents (the will, trust, accounting, tax return, etc.) and other materials to determine if there has been compliance with applicable laws and procedures. Upon completion of 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.

The guardian ad litem's fee is generally paid out of the estate.[23] The fee must be reasonable, based on the nature and extent of the services, the time spent, the stature and experience of the lawyer, the complexity of the issues and the results achieved.[24]

Secondary Appointments In cases in which fiduciaries are appointed, "secondary" fiduciaries may also be appointed or retained to perform various services. For example, receivers frequently retain counsel and property managers to assist them with legal matters and day-to-day management of the property under receivership; guardians often retain counsel and accountants and other financial professionals; and guardians ad litem occasionally retain other professionals as "assistants" to help with their responsibilities. In some cases, secondary appointees can receive lucrative fees; in receivership cases, for example, the counsel's compensation (which is calculated on an hourly fee basis) often can exceed the receiver's compensation.

B. Regulation of the Fiduciary Appointment Process

Over the past several decades, a number of legislative and administrative efforts have been taken to promote fairness and openness in the fiduciary appointment process.

Judiciary Law § 35-a In 1967, the Legislature enacted section 35-a of the Judiciary Law to "bolster confidence in the disposition of court appointments" by ensuring that information about the compensation of court appointees is made available to the public.[25] Section 35-a originally required that all court appointees, other than those compensated with public funds, file with the Office of Court Administration a notice of appointment when appointed and a statement of award of compensation when paid.[26] Several years of experience with this requirement, however, demonstrated that in a great many cases the appointees were not making these filings. Accordingly, in 1975, the Legislature amended section 35-a to eliminate the appointee's filing requirements and substituted the requirement of a single filing—of the compensation awarded—to be made by the judge, not the appointee.[27] Placement of the filing requirement with the judge was considered a more reliable means of ensuring that the filings would be made.

Appellate Division, First Department Rules In the 1970s, extensive public criticism of the fiduciary appointment process arose in response to the practice of certain Supreme Court judges in New York City to appoint close relatives of other Supreme Court judges. To address this problem, the Appellate Division, First Department, promulgated rules in 1977 for the Supreme Court in New York and Bronx counties (22 NYCRR § 660.24). Under these rules, the judge presiding over a case in which a fiduciary was to be appointed did not select the fiduciary. Rather, another judge of the court, whose name came up next on a strict rotational list, made the selection.

Silverman Committee Report In 1978, shortly after its promulgation of section 660.24, the First Department also appointed a committee to study the fiduciary appointment process and make recommendations for improvement. The Committee, chaired by Justice Samuel Silverman, was composed of 15 judges and lawyers in the First Department.

The Silverman Committee issued its report in 1980. It concluded that section 660.24 was unduly cumbersome and should be repealed. Instead, the Committee recommended that the judge handling the case be trusted to select the fiduciary, but with certain limitations. Among the proposed limitations were that relatives of judges be ineligible for appointment and that former judges be ineligible for two years after leaving the bench. The Committee also recommended that fiduciary appointees be ineligible to receive more than one "substantial" appointment within a 12-month period.

The Silverman Committee's recommendations were converted to rule form and presented to the Administrative Board of the Courts. Following the opposition of the Judicial Conference and the Association of Supreme Court Justices, however, the Administrative Board rejected the rules and declined to refer them to the Court of Appeals.

Part 36 of the Rules of the Chief Judge Several years later, in the wake of renewed public charges of favoritism in the appointment process, then-Chief Judge Lawrence Cooke proposed that fiduciaries be selected randomly from computer-generated lists of qualified candidates. Although this proposal was not adopted either, shortly thereafter a new set of rules was drafted, circulated for public comment and promulgated with the approval of the Court of Appeals. The new rules, Part 36 of the Rules of the Chief Judge, took effect on April 1, 1986.

The 1986 version of Part 36 governed appointments of guardians, guardians ad litem, conservators, committees for the incompetent, receivers and persons designated to perform services for a receiver.[28] It was thought that these appointments 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. The new rules placed the determination of the appointees' qualifications squarely with the appointing judge.[29] This meant that there were no minimum qualifications for placement on the newly-created lists of prospective appointees. And the rules provided that the judge need not even use the lists, so long as the judge set forth on the record the reasons for not doing so.

The 1986 version of Part 36 rendered ineligible for appointment *any* known relative of any judge of the Unified Court System, whether by blood or marriage.[30] There were no exceptions, no matter how far removed the relative was down the judge's family tree or geographically from the appointing judge's court.

A key component of Part 36 was the limitation on the number of highly compensated appointments that an individual fiduciary could receive. The rules provided that no appointee could receive more than one appointment in any 12-month period for which the compensation was anticipated to be more than $5,000, except in unusual circumstances involving continuity of representation or familiarity with the case.[31] No limits, however, were imposed on the number of below-$5,000 appointments an individual appointee could receive.

Finally, the rules imposed obligations on fiduciary appointees to make two separate filings. First, the prospective appointee had to file a certification of compliance verifying to the appointing judge that the appointment would not be in violation of Part 36 and specifying all appointments received within the previous 12 months.[32] Second, after the appointment was made, the appointee had to file a notice of appointment with the Office of Court Administration.[33] The notice of appointment was filed as 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.[34] The rationale underlying the filing requirements was to open up the appointment process to public view and to provide sufficient information to the appointing judge to facilitate compliance with the rules.

Changes in Part 36 The current Part 36 retains its essential character from its original enactment 15 years ago, with a few changes. In 1989, the rules were amended to disqualify a judicial hearing officer from receiving appointments in a court of a county in which he or she serves on a JHO panel.[35] In 1990, the rules again were amended to require that the 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 has been filed and that no fees be awarded unless the appointee filed the notice of appointment and certification of compliance.[36]

In 1991, an 11-member committee was appointed by the Administrative Board to review the rules and recommend whether any changes were needed. The committee, chaired by Nassau County Surrogate C. Raymond Radigan, issued a report and recommendations in 1993. Along with a number of technical, fine-tuning recommendations,[37] the committee recommended that the $5,000 rule—that an individual appointee may receive only one appointment in a 12-month period for which it is anticipated that the compensation will exceed $5,000—be increased to $10,000. The Administrative Board and the Court of Appeals ultimately approved the technical changes, but rejected the recommendation to raise the $5,000 threshold.

Finally, in 1994, Part 36 was amended to include referees among the categories of appointments subject to the rules.[38] And in 1996, the strict ban against appointment of any relative of a judge was loosened, to prohibit appointment of relatives of judges within the sixth degree of relationship (which extends to second cousins).

C. The Administration of Part 36

Individuals seeking inclusion on the fiduciary list must complete and send to OCA a four-page application with background information on education and experience, including all prior court appointments in the last five years, and the category (or categories) of fiduciary appointments requested. The information from the application is entered in a computer database, which can segregate the data by county, type of appointment and other criteria. The database is contained in the court system's Intranet computer network, which is available to judges and court personnel throughout the State.

OCA conducts no screening of the applications; except for relatives of judges within the sixth degree of relationship, all applicants are placed on the fiduciary list. Thus, any determination of a prospective appointee's qualifications is left entirely to the appointing judge, who has access to the database as well as the hard copies of the application forms.

Once the judge selects a fiduciary from the list (or not, if good reason is set forth in the record), the prospective appointee is notified and is required to file a notice of appointment form (UCS Form 830.1) and a certification of compliance form (UCS Form 830.3), which must list all appointments received within the previous 12 months. The certification of compliance form is filed with the court and placed in the court file. The notice of appointment form is filed with both the court and OCA.

The rules require that the notice of appointment form be filed within 10 days of the fiduciary's receipt of notification that the appointment was made. There is no mechanism, however, to enforce the 10-day filing requirement, and OCA will accept the forms no matter when they are filed. After the form is received, relevant data from the form is entered into the OCA fiduciary database.

When the fiduciary seeks approval to be paid and the compensation exceeds $500, he or she completes a statement of approval of compensation form (UCS Form 830) and submits it to the appointing judge for approval. The judge in turn signs the approval and submits the completed form to OCA.[39] These forms specify the amount of compensation approved, and contain a certification by the fiduciary that the notice of appointment was filed with OCA (without which the judge may not approve any fees). Relevant data from the form is then entered in the database.

All of this information—hard copies of the fiduciary applications, notices of appointment, statements of approval of compensation and information from these documents that is entered in the OCA database—is available to the public upon request.

III. CONCERNS WITH THE EXISTING PROCESS

A. Public Concerns

With the promulgation in the mid-1980s of Part 36 of the Rules of the Chief Judge, the court system began its first comprehensive effort to regulate the fiduciary appointment process in New York. Nevertheless, widespread concerns over the impartiality and fairness of the process have persisted. These concerns have been reflected in a continuous stream of newspaper articles highlighting questionable practices in the appointment process in a number of courts. Some of the articles revealed that former judges were receiving large numbers of appointments and in certain cases extremely lucrative appointments.[40] Other articles documented the disproportionately large number of appointments received by high-level political party officials.[41] Yet other articles focused on appointments received by close relatives of non-judicial court officials, and by persons who contributed to the appointing judges' judicial campaigns.[42]

The last concern was also the subject of a report of the Committee on Government Ethics of the Association of the Bar of the City of New York. That report examined the fiduciary appointments of two New York City Surrogates who had recently run for office. The report revealed that a majority of the Surrogates' appointments (66% and 54%, respectively) were received by lawyers who either had contributed to their judicial campaigns or worked with law firms that had contributed.[43]

B. The Garry/Ludwig Letter

Concerns about political influence in the fiduciary appointment process were heightened by the controversial December 20, 1999 letter written by Thomas J. Garry and Arnold J. Ludwig. Thomas Garry and Arnold Ludwig, along with William Garry, comprise the Brooklyn law firm of Ludwig & Garry. Until recently, Ludwig & Garry was the law firm of choice for receivers in Brooklyn seeking to retain legal counsel (*see* pp. 29-30, *infra*). Arnold Ludwig, a former law secretary in Brooklyn Supreme Court, is an officer of the Brooklyn Democratic organization and was a member of the organization's Law Committee. Thomas Garry is also an officer of the Brooklyn Democratic organization and was a member of the Law Committee. Thomas Garry and William Garry are the sons of a sitting Brooklyn Supreme Court Justice.

Among their numerous appointments as counsel to receivers, the Garry & Ludwig firm was retained as counsel by the receiver originally appointed to manage the Cypress Hills Cemetery, which had been placed in receivership pursuant to an action charging mismanagement brought in Brooklyn Supreme Court in 1993 by the State Attorney General's Office. When the court replaced the original receiver in 1996, Garry & Ludwig was continued as counsel, and the firm was again continued as counsel when the court replaced the second receiver in 1998 with Manhattan attorney Ravi Batra. Although not himself a Brooklyn Democratic official, Mr. Batra employs the Brooklyn Democratic county leader in an "of counsel" capacity. The Cypress Hills receivership, which is still pending, has proved to be a particularly lucrative case for its fiduciary appointees, with over $1.5 million in fiduciary fees paid out to date.

In early December 1999, however, Mr. Batra wrote to Garry & Ludwig to advise that he was substituting his own law firm as counsel to the receiver in the Cypress Hills case and in three other pending cases in which he was serving as the receiver. Batra claimed that the Ludwig & Garry firm was incompetent and attempting to "churn" legal fees; Garry & Ludwig claimed that Batra was motivated by his desire to obtain legal fees in addition to his receiver's commissions. In any event, their removal from the cases motivated Thomas Garry and Arnold Ludwig to write to the Chair of the Brooklyn Democratic Law Committee resigning their positions as members of the Committee. They also sent copies of the letter to dozens of other Brooklyn elected and party officials. The letter was eventually obtained by the press, and the story was reported in newspapers throughout the metropolitan area in January 2000.[44]

In their letter, the lawyers articulated their understanding that their loyal service to the party entitled them—not Mr. Batra—to a continuing share of fiduciary appointments. They complained that their "diligent work and unquestioned loyalty to the Organization over the many years are clearly not as important as the desires of Mr. Ravi Batra [who] . . . holds no party or elected position in our County" and "has never assisted the Law Committee on any level whether it be collecting signatures, binding petitions or trying an election law case, etc." The letter went on to state that "[o]ne cannot reasonably expect our firm to continue to avail to the Organization our professional services, the utilization of our employees, and the use of our facilities while the Organization sits idly by and permits Mr. Batra to maliciously injure our practice and reputation without consequence." The letter concluded with an expression of hope "that one day in the not so distant future we will be able to work together again when the interests of the Organization are once again paramount to the unfettered demands of one non-contributing individual." A copy of the letter is attached as Exhibit D.

C. Problems Identified by the Special Inspector General and the Auditors

The ongoing investigation by the Special Inspector General for Fiduciary Appointments and OCA's auditing staff has revealed serious flaws in the fiduciary appointment process. The investigation has confirmed many of the newspaper article charges, including those concerning the receipt of multiple and lucrative appointments by high-level political party officials, former judges and relatives of nonjudicial employees of the court system. Some of the major problems in the existing system are highlighted below.[45]

Political Party Officials have Received Numerous Appointments. A number of high-level political party officials have received extensive appointments. For example:

- One county political party leader has received nearly 100 appointments.
- Another county political party leader has received over 75 appointments.
- The small law firm of another county political party leader has received over 200 appointments.
- The small law firm of yet another county political party leader has received over 100 appointments.
- A lawyer whose small law firm employs a county political party leader has received nearly 100 appointments.

Former Judges have Received Numerous Appointments. Former judges have received numerous appointments, including some extremely lucrative individual appointments. The following are some examples:

- A former appellate judge has received nearly 250 fiduciary appointments.
- A former Surrogate has received nearly 70 appointments.
- Another former Surrogate has received nearly 60 appointments.
- A former Supreme Court Justice has received over 60 appointments.
- A former County Court Judge has received nearly 70 appointments.
- A 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.
- A former judge was awarded $350,000 in fees for a receivership appointment obtained within a year of the judge's retirement from the bench (the fee was later reduced to $200,000 by the Appellate Division).

Relatives of Nonjudicial Employees have Received Numerous Appointments. Immediate relatives of nonjudicial employees of the Unified Court System have received numerous appointments. For example:

- The spouse of a high-level managerial employee has received nearly 250 appointments.
- The spouse of a law secretary has received over 100 appointments in that court.
- A county clerk's son has been retained as property manager in numerous receivership cases in that county.

Compliance with Filing Requirements has been Deficient. The investigation has also revealed widespread noncompliance with the filing requirements of Parts 26 and 36 of the Rules of the Chief Judge. The following are examples from some of the counties investigated:

- Of the more than 400 Kings County Supreme Court receivership cases reviewed, not a single approval of compensation statement was filed with OCA, as required under Part 26. In addition, in those cases, only 22% of the receivers filed a notice of appointment with OCA and only 20% filed a certificate of compliance with the court, as is required under Part 36. Of 50 Kings County guardianship cases reviewed, 76% of the court evaluators filed a notice of appointment and 84% filed a certificate of compliance, but only 25% of the guardians filed a notice of appointment and only 42% filed a certificate of compliance. Approval of compensation statements were filed for 76% of the court evaluators and 53% of the guardians.

- In Queens County Supreme Court, 25 receivership cases and 25 guardianship cases were reviewed, and in Queens County Surrogate's Court 25 cases in which guardians ad litem were appointed were reviewed. In the receivership cases, only 18% of the receivers filed a notice of appointment and only 7% filed a certificate of compliance, and approval of compensation statements were filed for none of the appointments. In the guardianship cases, although 84% of the appointees filed a notice of appointment and 77% filed a certificate of compliance, approval of compensation statements were filed for only 52% of the appointments. In Surrogate's Court, compliance was much better: appointees filed a notice of appointment in 91% of the cases and a certificate of compliance in all of the cases, and an approval of compensation statement was filed for 79% of the appointees.
- In Nassau County Supreme Court, 25 receivership cases and 25 guardianship cases were reviewed. In the receivership cases, only 23% of the receivers filed a notice of appointment and only 15% filed a certificate of compliance, and an approval of compensation statement was filed in only 15% of the cases. In the guardianship cases, 84% of the court evaluators and 55% of the guardians filed a notice of appointment, and 89% of the court evaluators and 64% of the guardians filed a certificate of compliance. Approval of compensation statements were filed for 89% of the court evaluators but for only 40% of the guardians.
- In Erie County Supreme Court, 24 receivership cases and 50 guardianship cases were reviewed. Only 23% of the receivers filed a notice of appointment and only 19% filed a certificate of compliance; approval of compensation statements were filed for only 30% of these appointees. In the guardianship cases, 41% of the court evaluators and 11% of the guardians filed a notice of appointment, and 24% of the court evaluators and 21% of the guardians filed a certificate of compliance; approval of compensation statements were filed for 39% of the court evaluators and 22% of the guardians. Fifty Surrogate's Court cases in which guardians ad litem were appointed were reviewed, and again the filing compliance was much better: 78% of the appointees filed a notice of appointment and 100% filed a certificate of compliance, and an approval of compensation statement was filed in 95% of the cases.

Problems also have been detected in the manner in which information from the filings is entered in the OCA fiduciary database. Names of appointees and amounts of compensation have been entered incorrectly, and multiple entries for the same individual are not uncommon (for example, John P. Doe could be listed as "John P. Doe," "John Doe," "J. Doe," "J.P. Doe," etc.)

The Rules were not Applied to Secondary Appointments. As noted, the requirements of Part 36 expressly apply to "persons designated to perform services for a receiver." § 36.1(a). Nevertheless, a practice evolved in the courts in which the rules were not applied to secondary appointees such as counsel to the receiver and property managers. Thus, the receivers, and not the judges, selected their own counsel and property managers. Moreover, these secondary appointees rarely, if ever, complied with the filing requirements, and they did not consider themselves bound by any of the other provisions of Part 36, such as the prohibition against appointment of relatives and the $5,000 rule. One extreme result of this practice was that the three-attorney Brooklyn law firm of Ludwig & Garry, two of whose members are the sons of a sitting Brooklyn Supreme Court Justice, received 75% of all counsel to receiver assignments in Brooklyn Supreme Court from 1995 through 1999, generating hundreds of thousands of dollars in fees for the firm.

Fortunately, this problem has been addressed. In March 2000, Chief Administrative Judge Jonathan Lippman issued a memorandum to judges across the State emphasizing that the Part 36 rules apply to secondary appointments in receivership cases. As a result, it has now been made clear that judges must appoint the counsel and property managers, and that these secondary appointees must comply with the filing provisions and the other requirements of the rules.

Widespread Billing Irregularities have been Uncovered in Receivership and Guardianship Cases. The investigation by the Special Inspector General and the auditors has uncovered disturbing trends in fiduciary billing practices in many cases. As discussed, receivers are paid a percentage of the amounts they collect and disburse; guardians usually are paid similarly, or they are paid based on a percentage of the assets of the incapacitated person (*see* pp. 8, 11, *supra*). In many receivership and guardianship cases, the receivers and guardians retain counsel (sometimes themselves or their own law firms), who are paid a separate fee, also from the assets and generally on an hourly basis. In some of the cases reviewed, the counsel performed strictly legal services, such as litigation. In many other instances, however, judges regularly approved legal fees for services performed by the attorney that were not of a legal nature and should have been deemed part of the receiver's or guardian's routine duties. The legal fees approved for these services ranged from $150 per hour to over $400 per hour; and, at least in the receivership cases, the fees often exceeded the receiver's commissions.

The following are some examples of the types of services for which hourly legal fees were routinely approved:

- Preparing the guardian's initial, annual and final accountings and reports
- Preparing the receiver's accounting
- Locating heirs and obtaining family records
- Reviewing and reconciling bank statements
- Speaking with hospital and nursing home staff

• Preparing forms for filing with OCA
• Obtaining bonds

Courts Frequently Appointed the Court Evaluator as Guardian. It is relatively common for the court to appoint the court evaluator (or, less frequently, the court-appointed attorney for the alleged incapacitated person) as the guardian. In fact, in eight of the 50 Article 81 cases audited in Brooklyn Supreme Court, the court evaluator was appointed guardian. Yet, because a primary responsibility of the court evaluator is to advise the court on whether a guardian should be appointed, this is a potential conflict of interest in some cases, raising an appearance of impropriety. An even more serious concern arises when the court appoints the attorney for the AIP as the guardian.

Limits on Lucrative Appointments may have been Widely Violated. As discussed, except in narrow circumstances, Part 36 prohibits a single appointee from receiving more than one fiduciary appointment within a 12-month period in which the anticipated compensation will exceed $5,000. The investigation and audits have identified many individual appointees who received more than one appointment in a 12-month period for which they ultimately received compensation greater than $5,000. In most of these cases, however, it is extremely difficult to determine whether violations of the $5,000 rule occurred. This is because it is often not clear at the time of appointment what the total compensation, which is a function of a series of typically unpredictable factors such as the duration of the appointment, ultimately will be. For this reason, many have urged the Commission to recommend replacement of the $5,000 rule with a simpler, more enforceable limitation on appointments.

It is also apparent that, in many cases, fiduciaries avoid the restrictions of the $5,000 rule by deliberately reducing the amount of the compensation for which they seek court approval. For example, the investigation and audits have identified an exceptionally large number of fee applications in the $4,900 to $4,999 range. In fact, some fiduciaries have openly acknowledged in their fee applications that they were deliberately reducing their fee requests to avoid the strictures of the $5,000 rule.

Judges have Given Appointments to High-Level Participants in their Election Campaigns. The investigation has revealed that a number of judges have given fiduciary appointments to high-level participants in their judicial election campaigns. Appointments were given to campaign managers, coordinators, treasurers and finance committee chairs. Some of these appointments were made within a year or two of the conclusion of the campaign.

D. Problems Identified by the Commission

The Commission's extensive study of New York's fiduciary appointment process has confirmed the existence of many of the problems noted above. The Commission has also identified other problems in the appointment process. Some of the additional problems are discussed below.

The Current Fiduciary Lists are Largely Unusable. Under the existing rules, judges are expected to select fiduciaries from the lists of candidates that OCA compiles for each county of the State. In many jurisdictions, however, these lists contain thousands of names and are essentially unusable. For example, the New York County list has over 5,700 names, the Kings County list over 4,700, the Nassau County list over 3,900, the Westchester County list over 3,000 and the Erie County list over 1,700. The excessive size of these lists presents significant obstacles to judges seeking to use them in any sort of systematic way.[46] Also, because the lists are not updated, they include many people who have retired, moved away or even died.

Inclusion on the Lists is Essentially Automatic. The existing rules require no qualifications for inclusion on the fiduciary lists. There are no education or training requirements,[47] and no background or experience criteria. In addition, other than relationship to a judge within the sixth degree, nothing disqualifies an individual from inclusion on the lists. Thus, convicted criminals, disbarred and suspended attorneys, bankrupts, individuals whom courts have removed as fiduciaries in prior cases for poor performance, and others who arguably should not be eligible for appointment now face no limitations on their names being included on the lists.

Certain Individuals Who Serve in a Fiduciary Capacity are not Covered by the Existing Rules. A number of appointees who arguably serve in a fiduciary capacity and are paid from the assets of a party or the estate are not now subject to the existing rules. In some cases these appointments are made by the court; in other cases the individuals are retained by another fiduciary who has been appointed by the court. Those appointed by the court include: court examiners (who are appointed to review the reports and accountings filed by Article 81 guardians[48]); special needs trustees (who are appointed to establish trusts on behalf of incapacitated persons when funds remain after repayment of Medicaid liens); and private law guardians (who are appointed to protect the interests of children in matrimonial cases). Those retained by a fiduciary appointee include: counsel for Article 81 guardians (who are retained by guardians to handle legal, and often non-legal, matters); accountants for Article 81 guardians (who are retained by guardians to handle tax and other financial matters); and assistants to guardians ad litem (who are retained by guardians ad litem to perform investigative and other tasks).

None of these appointees are governed by the fiduciary rules. Thus, they do not file the required forms, and they are not subject to the limitations that apply to other fiduciaries, such as the prohibition on appointment of judges' relatives and the $5,000 rule.

Public Funds are not Available to Compensate Fiduciaries in Indigent Cases. In a great many cases in which fiduciaries are appointed, particularly many Article 81 cases, the individual for whom the appointment is made has minimal or no assets. Unlike in other types of cases involving indigent litigants, such as criminal cases and most Family Court cases, institutional offices and private lawyers generally do not receive public funds to handle these assignments. Accordingly, the appointments become pro bono assignments, which can often impose unreasonable demands on those called upon to handle them. For example, at the public hearing that the Commission held in Buffalo, representatives of a legal services office testified at length about the tremendous time commitment and other pressures on their office that arise when the office is appointed without compensation as guardian in an Article 81 proceeding.[49] The same concerns have been raised by private attorneys who have undertaken these pro bono assignments. This has led to a practice that some (though not all) have condemned — the tendency of some judges to reward private attorneys who have taken pro bono fiduciary appointments with lucrative appointments when they become available.

Laypersons Believe They Have Nowhere to Go with Questions and Complaints. At its public hearing in New York City, the Commission heard a litany of complaints from individuals who were parties, or had relatives or friends who were parties, in cases in which fiduciaries were appointed. The Commission also received numerous letters and written submissions from other complainants. Although the Commission had neither the resources nor the mandate to investigate these complaints, it is apparent that there is widespread mistrust and confusion among many people who are directly affected by fiduciary appointments. Much of this results from what the Commission has concluded is a widely-held perception that the court system and its representatives are not available to answer questions and investigate complaints that ordinary citizens have about the fiduciary process.

IV. CONCLUSIONS AND RECOMMENDATIONS

On the basis of its extensive examination of New York's fiduciary appointment process, the Commission has concluded that there are significant flaws in the current system. These flaws are present at every stage of the process: in the procedures by which individuals qualify for appointment; in the lists judges are expected to use in selecting appointees; in the provisions that seek to limit the number of lucrative appointments that individual appointees may receive; in the judicial scrutiny of applications for fiduciary compensation; and in compliance with the filings required of judges and appointees.

The Commission has identified a series of reforms, discussed below, that can vastly improve the current process.

A. Eligibility and Qualifications

Under the existing rules, anyone who applies (other than a relative of a judge within the sixth degree of relationship) can automatically have his or her name added to the OCA fiduciary list, thus becoming eligible for fiduciary appointments. In the Commission's view, it makes little sense to establish appointment lists, and expect judges to use them in selecting fiduciaries, if there are no criteria that render individuals eligible or ineligible for inclusion on the list. The Commission believes applicants should have to meet at least one critically important qualification—fiduciary training—to become eligible for the fiduciary list. At the same time, certain factors should render individuals ineligible for the list.

Training Should be Required for Inclusion on the Fiduciary Lists. By statute, persons appointed in Article 81 cases as court evaluators, guardians or court examiners must complete a training program approved by the Chief Administrator of the Courts.[50] These appointees need not, however, complete a training program to be included on the OCA fiduciary list. Other types of fiduciary appointees are subject to no training requirements at all, either to be eligible to receive appointments or for inclusion on the OCA list. A number of judges and bar association representatives have recommended to the Commission that mandatory training be extended to all categories of fiduciary appointees, and that training be required not only to receive an appointment but to be included on the OCA list as well.

The Commission agrees with these recommendations, and proposes that training programs approved by the Chief Administrator of the Courts be required for all those seeking inclusion on the OCA list. In particular, persons seeking inclusion on the lists for appointment as a "primary" fiduciary—receivers, referees, Article 81 fiduciaries and guardians ad litem—should be required to complete a training program on the substantive issues pertaining to that particular fiduciary category. For example, an individual applying for consideration as a receiver and also as a guardian ad litem should be required to complete a separate program for each of those fiduciary categories. In addition to the relevant substantive training, the programs should include instruction on the rules governing fiduciary appointments and the filings required of fiduciaries. Persons seeking inclusion on the lists for appointment as a "secondary" fiduciary[51] should also be required to complete a training program, but their training could be limited to instruction on the rules and the filings. Continuing training of those who have completed the initial training and been included on the list should be required when necessary, such as when major changes in the law are enacted. In addition, all training programs should apply for Continuing Legal Education accreditation (*see* 22 N.Y.C.R.R. Part 1500), so that attorneys who complete fiduciary training receive CLE credit.

State and County Political Party Leaders Should be Ineligible for Appointment. Among the fiduciary appointments in recent years that have generated the greatest criticism have been those received by political party leaders and their law firms (*see* Section III). Party leaders exercise considerable influence over the judicial nomination and selection process. The sheer number of appointments that they and their law firms have received thus raises a troubling perception that political considerations may be influencing these appointments.

Accordingly, the Commission recommends that State and county political party chairs, and their immediate relatives, be prohibited from receiving fiduciary appointments while they serve in that position and for a period of two years after they step down. Recognizing that this ban would not be effective if the partners or employees of political party chairs who are lawyers could still receive appointments, it is further recommended that the same prohibition apply to the partners, legal associates and other employees of the political party chairs' law firms.

The Commission also debated whether, as some have suggested, a prohibition on receiving appointments should apply to elected officials. Fiduciary appointment of elected officials raises many of the same concerns that arise from the appointment of political party leaders. For several reasons, however, the Commission decided not to recommend such a ban. It was generally agreed that prohibiting ***all*** elected officials from receiving appointments would be overinclusive; yet it would be extremely difficult to delineate which elected officials should be banned and which should not. Moreover, although elected officials have received fiduciary appointments, the investigation and audits have not revealed that they have received large numbers of appointments or particularly high-paying appointments. One explanation for this may be that, unlike political party leaders, who are not elected to their party positions (although they may be elected officials in other capacities), elected officials are subject to the ultimate check of the voters.

Immediate Relatives of Higher-Level Nonjudicial Employees Should be Ineligible for Appointment. As discussed, under the existing rules relatives of judges within the sixth degree of relationship are ineligible for fiduciary appointments. No similar ban applies to relatives of nonjudicial employees of the court system, even though many of the same perceptions of favoritism can arise when their relatives receive court appointments, particularly when the employees are higher-level officials. As noted in Section III, immediate relatives of higher-level nonjudicial employees have received numerous appointments.

The Commission recommends that relatives of nonjudicial employees at or higher than grade 24 be prohibited from receiving fiduciary appointments.[52] However, because judges, and not nonjudicial employees, actually make the appointments, this prohibition need not be as broad as the prohibition on appointment of relatives of judges—prohibiting the appointment of ***immediate*** relatives (spouses, parents and children) of nonjudicial employees is sufficient.

Limitations Should be Imposed on Former Judges Receiving Appointments. Fiduciary appointments of former judges have also generated concern and criticism. Some former judges have received an inordinate number of appointments, and others have received extremely lucrative appointments, in some instances shortly after they left the bench. The Commission recognizes that former judges often may be among the most qualified individuals to handle fiduciary assignments. At the same time, however, their appointment raises a serious perception that sitting judges may be rewarding their former colleagues.

In an attempt to strike the proper balance between these competing interests, the Commission recommends a prohibition on former judges (and their relatives within the sixth degree of relationship) receiving fiduciary appointments for a two-year period after leaving the bench. A two-year ban would be similar to other existing rules, such as the two-year ban on former State appellate judges practicing in their former courts[53] and the two-year ban on former State government employees practicing or appearing before their former agencies.[54] And it would enable the courts to continue to reap the benefits of the experience and skill of former judges, but only a reasonable period of time after they step down from the bench.

A two-year ban on appointments should also apply to former higher-level nonjudicial employees (as defined above) and their immediate relatives.

Disbarred and Suspended Attorneys Should be Ineligible for Appointment. Clearly, attorneys who have been disbarred or suspended from the practice of law should not be eligible for fiduciary appointments during the period of their disbarment or suspension. The Appellate Division and the Office of Court Administration should arrange that OCA receive notice of disbarments and suspensions so that it may remove those attorneys from the fiduciary lists. Attorneys who are reinstated to the bar or whose suspensions have terminated should be eligible for appointments, but the disclosure required in the current application for inclusion on the OCA fiduciary list—which calls for disclosure (with details) of any prior discipline by the grievance committee or the Appellate Division, including any pending disciplinary proceedings—should be continued.[55]

Criminal Offenders Should be Ineligible for Appointment. Persons convicted of a felony offense should be permanently ineligible to receive fiduciary appointments. The only exception should be if the convicted felon receives a certificate of relief from disabilities,[56] and in that situation the individual should have to disclose the conviction in the application for inclusion on the OCA fiduciary list.

Persons convicted of a misdemeanor offense should be ineligible to receive fiduciary appointments for a five-year period following their sentencing. Again, the only exception should be if the offender receives a certificate of relief from disabilities, and he or she should still have to disclose the misdemeanor conviction in the fiduciary application. Moreover, in general, the criminal history disclosure required in the current fiduciary application—convictions of all crimes and offenses, other than traffic violations—should be continued.

Information Regarding a Fiduciary's Bankruptcy History Should Continue to be Available. Persons who have been adjudicated bankrupt may not be the ideal candidates for fiduciary appointments, which often require the appointee to manage the finances of another individual or a business. Nevertheless, because federal law protects the rights of bankrupts to enjoy most of the privileges and benefits available to other citizens, it may not be lawful to render bankrupts ineligible for fiduciary appointments. Rather, so that judges and others have access to this relevant information, the disclosure of a fiduciary's bankruptcy history currently required in the fiduciary application should be continued.[57]

Procedures Should be Adopted to Remove Fiduciaries From the List for Good Cause. No policy now exists regarding removal of an individual from the fiduciary list. Appointees who are derelict in their fiduciary duties, fail to file the required forms, engage in inappropriate billing practices or commit other misdeeds can be replaced as fiduciaries in individual cases. But there are no procedures in place to remove them from the list so that other judges do not unwittingly select them for future appointments.

The Commission recommends that the rules be amended to authorize the Chief Administrative Judge to remove an individual from the fiduciary list for good cause. The Chief Administrative Judge could act after receiving a complaint from a judge or litigant, upon a recommendation of the Special Inspector General for Fiduciary Appointments or based upon any other reliable information.

B. The Appointment Process

Some of the more difficult issues that the Commission examined involved the procedures governing the appointment of fiduciaries. These include matters concerning how a fiduciary should be selected, what role the fiduciary lists should play in this process and whether limitations should be imposed on the number and nature of the appointments that individual appointees may receive. The Commission's recommendations follow.

Judges Should Have Full Authority to Select the Fiduciary. A seminal issue that the Commission addressed is the question of how a fiduciary should be selected. A few individuals and organizations, most notably the Association of the Bar of the City of New York, have recommended that a strict, or blind, rotational appointment system be adopted, with appointees randomly selected by computer from the OCA fiduciary list. Proponents of this approach point out that it would effectively eliminate any perception that favoritism or other inappropriate factors influence the appointment process. Although a strict rotational system is used to select bankruptcy trustees in U.S. Bankruptcy Court, the Commission is unaware of any state that has adopted this approach.

Others have suggested a variation on the strict rotational system. Under this approach the judge would select the fiduciary, but from a small list of names randomly generated from the OCA list. Yet another variation would be to allow the judge to depart from the randomly generated list, but a judge who did so would be required to provide a satisfactory reason. This is similar to the system now being used in Massachusetts.

The great majority of those who shared their views on this subject with the Commission strongly favor preserving the full authority of judges to select the fiduciary. They point out that potential candidates for a fiduciary appointment typically possess widely varying skills and expertise. They further note that cases in which fiduciaries are appointed can raise different issues and problems, and thus require particular services and talents. As a result, they argue, 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.

There was considerable interest among Commission members in a rotational system for selection of fiduciaries. But after careful analysis of this difficult question the Commission has concluded that, assuming the recommendations set forth in this Report are implemented and prove to be effective in redressing existing problems in the fiduciary appointment process, judges should continue to have full authority to select the fiduciary. This is because, in selecting a fiduciary, the paramount objective must be to choose an individual who will provide quality service to the court, the parties and others affected by the litigation. That goal is best achieved when judges, in the exercise of their discretion, select a candidate with the skills and background needed to meet the task at hand.

The Commission recognizes that leaving the selection decision entirely to judicial discretion creates a risk of inappropriate factors influencing appointments. But that does not justify removing the selection authority from the judges, particularly where there are other steps, as outlined in this Report, that can be taken to minimize this risk.

Judges Should Select Fiduciaries From the OCA List. The fiduciary rules should make clear that judges should select fiduciaries from the OCA list. Public perception of the fairness of the appointment process, moreover, would be enhanced if judges made every effort to appoint individuals with diverse backgrounds and experiences, including minorities, women and younger persons.

In certain situations, however, judges may have reason to appoint a fiduciary who is not included on the list. For example, an individual not on the list may have a particular expertise required in the case or may have some previous involvement with the case or the parties. In these and other limited situations, judges should have authority to appoint someone not on the list, but when they do so they should be required to provide a reason in writing. Appointees who are not on the list, however, should still have to demonstrate that they could qualify for inclusion on the list—that is, that they meet all the criteria for such inclusion.[58] Furthermore, they should be required to make the same filings as are required of those on the list.

Specialized Fiduciary Lists Should be Created. If judges are to be expected to select fiduciaries from the OCA list, as we recommend, significant changes must be made in the current list. First, criteria must be established so that it is no longer essentially "automatic" for anyone to be added to the list. The eligibility/qualification requirements proposed above, including the mandatory training requirement, should go a long way toward making inclusion on the list a more meaningful status. Second, in many counties the current lists are simply too large. One relatively simple way to address this problem is to create specialized lists based on the fiduciary category for which the applicant is seeking appointment. Although some applicants request consideration for more than one category (or even for all categories), many do not. And if, as the Commission has recommended, training is required for inclusion on the list, a greater number of applicants will be more discriminating in the fiduciary categories for which they seek appointment. Specialized lists thus would be significantly smaller than a single, all-encompassing list and, as a result, far more usable.

Some have also suggested that the lists be categorized based on the experience of the applicants, similar to the programs that counties across the State have established to assign counsel to indigent criminal defendants. These "18-B" programs[59] typically include a misdemeanor panel, a felony panel and a homicide panel, with ascending levels of experience required for each. Although this idea is worthy of further exploration, the Commission is not prepared at the present time to recommend that the fiduciary lists be categorized based on experience. In the Commission's view, it would be extremely difficult to develop fair criteria for determining which applicants should be assigned to which categories. In addition, establishing and maintaining these panels would require extensive effort and resources, akin to that involved in the assigned counsel panels.

Re-registration Should be Required for All Those on the Fiduciary List. Another way to reduce the size of the fiduciary lists is to require periodic re-registration. The current list contains the names of hundreds, if not thousands, of individuals who have retired or are no longer available for fiduciary appointments. A re-registration requirement would provide a relatively simple means of removing these persons from the list.

The Commission recommends that re-registration be required every two years. The re-registration form should be a shorter version of the original application form, requiring that the applicant simply note any changes from the original application.

Additional Types of Appointees Should be Governed by the Fiduciary Rules. The Commission has identified a number of additional court appointees who serve in a fiduciary capacity but are not currently subject to the regulation of the fiduciary rules. Court examiners, who are appointed by the court to review the reports and accountings filed by Article 81 guardians and are paid from the incapacitated person's assets, are selected from lists compiled by the Appellate Division and are not subject to the filing and other requirements of the fiduciary rules. The Commission has discerned no reason why court examiners should be treated any differently from other Article 81 appointees, and recommends that they be selected by the appointing authority from the OCA fiduciary list and governed by all other provisions of the fiduciary rules.[60]

Special needs trustees are usually appointed to establish and administer a trust (a special needs or "SNT" trust) so that a disabled person may continue to maintain Medicaid eligibility after receiving a substantial personal injury award. In carrying out their duties, they perform tasks similar to that of a guardian of property. These appointees, who receive their fees from the proceeds of the trust, should be subject to the fiduciary rules.

Judges in matrimonial cases make appointments that several bar associations and judges have maintained should be subject to regulation and disclosure. Guardians ad litem are appointed in matrimonial cases to investigate and report back to the court on particular issues, and their fees are paid by the parties. As such, they perform a function similar to that of guardians ad litem in Surrogate's Court cases. Although the current fiduciary rules could be read as applying to them, many courts have not viewed these appointees as subject to the rules. The Commission recommends that the rules make clear that they apply to these appointments.

In addition, in recent years "privately paid" law guardians are being appointed in increasing numbers to represent the interests of children in matrimonial cases. These appointees usually are selected from law guardian panels that the Appellate Division Departments designate pursuant to the Family Court Act.[61] Although the distinctions between privately paid law guardians and guardians ad litem are not always clear (in both instances fees are paid by the parties), in general the guardian ad litem serves the interests of the court whereas the law guardian performs the more traditional role of a lawyer serving the interests of the child. Given that designation of law guardian panels is a statutory responsibility of the Appellate Division, the Commission does not recommend that privately paid law guardians be selected from the OCA fiduciary list. Nevertheless, it is recommended that these appointees be subject to the other requirements of the Part 36 rules, and that Part 26 be amended to make clear that judges must report the compensation they approve for privately paid law guardians.[62]

Additional Types of "Secondary" Appointees Should be Governed by the Rules. As was recently emphasized, "secondary" appointees in receivership cases are subject to the fiduciary rules and must be appointed by the court, not by the "primary" fiduciary (*see* pp. 29-30, *supra*). The Commission recommends that other types of "secondary" appointees who currently are retained by court-appointed fiduciaries should also be treated as fiduciaries subject to all of the applicable rules. These assignments, which have become quite common and can involve substantial fees, include: counsel for Article 81 guardians, who are retained to handle legal matters on behalf of the incapacitated person; accountants for Article 81 guardians, who are retained to handle tax and other financial matters on behalf of the incapacitated person; and assistants to guardians ad litem, who are retained to perform investigative and other tasks. As is true in the receivership cases, the primary fiduciary should be able to request that the court appoint a particular individual for one of these assignments, but the rules must make clear that the actual appointment is to be made by the court.

New Limits Should be Imposed on the Number of Higher-Paying Appointments that Individual Fiduciaries may Receive. Many have urged the Commission to devise a more workable limitation on the number of higher-paying appointments that individual fiduciaries may receive. Most view the existing $5,000 rule—which requires a prospective fiduciary appointee to anticipate at the time of appointment whether his or her ultimate compensation will exceed that threshold—as highly confusing and largely unenforceable. The Commission agrees that the $5,000 rule, at least by itself, is an ineffective means of preventing the concentration of higher-paying appointments in a few individuals.

Several alternatives have been suggested. Some have proposed that limits be imposed on the number of appointments that an individual may receive within a specified time period. For example, once an individual receives, say, five appointments in a 12-month period, he or she would be ineligible for an appointment for another year. In the Commission's view, such a rule would be unwise. It would do nothing to prevent the assignment of five highly lucrative cases to an individual appointee every year; and it would have the undesirable effect of preventing an individual appointee who had received five extremely low-paying cases from receiving any additional cases during the next year.

A more sensible approach is to limit future appointments based on the amount of compensation that an appointee has received over a given time period. Once an appointee has been awarded a threshold amount of compensation in all of his or her fiduciary assignments during any 12-month period—the Commission recommends the threshold be $25,000—the appointee would be ineligible for another appointment for an additional 12-month period. For example, an individual who actually received $10,000 on March 1 for compensation in one case, $10,000 on April 1 for compensation in a second case and $5,000 on May 1 for compensation in a third case would not be eligible again for a fiduciary appointment until the following May 1. This would provide a clearer rule that would not require anyone to anticipate what the ultimate compensation might be in any case. And it would provide an effective means of preventing the type of deliberate under-billing—that is, the spate of billings between $4,500 and $4,999—that has been used to evade the limitations of the existing $5,000 rule.

Although fully aware of the problems with the $5,000 rule, the Commission does not advocate its elimination. If combined with the $25,000 rule outlined above, the $5,000 rule can still serve a useful purpose. That is because the proposed $25,000 limitation, by itself, does nothing to prevent an appointee who has received potentially lucrative appointments for which he or she has not yet been compensated from receiving unlimited additional potentially lucrative appointments. For example, an individual who received an appointment on March 1 in a case in which it was expected that the ultimate compensation would be tens of thousands of dollars could receive another similarly lucrative appointment on April 1 and yet another similarly lucrative appointment on May 1, so long as he or she had not yet actually received compensation exceeding $25,000. Despite its shortcomings, retention of the $5,000 rule can provide some protection against such a result.

Judges Must be More Scrupulous in Reviewing Applications for Compensation. The investigation and audits have identified numerous receivership and guardianship cases in which judges approved legal fees for services that were not of a legal nature. It is sometimes necessary in these cases for legal counsel to handle litigation and other matters that clearly demand the services of an attorney. In far too many of the cases, however, counsel were compensated at hourly legal rates for work that the guardians or receivers should have performed as part of their ordinary duties. For example, counsel billed and were compensated for preparing routine reports and accountings, precisely the type of work that the receiver or guardian should have performed. The apparent motivation for the receivers and guardians to retain counsel to perform this work is that receivers and guardians are usually paid on a percentage basis (for receivers, a percentage of the amounts collected and disbursed; for guardians, the same standard or in some cases a percentage of the incapacitated person's assets), not on an hourly basis. Thus, they generally will receive the same compensation regardless of the amount of work they devote to the case. Receivers and guardians have an incentive, therefore, to retain others to perform this work because it will mean less work for the receiver or guardian without reducing their compensation. In the most extreme cases, of which there are many, receivers and guardians hire themselves (or their law firms) to perform this work.

Judges should not be permitting this to occur. First, judges, should not appoint counsel to the receiver or counsel to the guardian[63] unless it is clear that counsel will be performing services of a legal nature. Second, unless there is some convincing reason to do so—such as a significant cost savings—judges should not appoint the receiver or guardian as his or her own counsel. Finally, judges must be far more scrupulous in reviewing fee applications: they should flatly refuse to approve compensation to counsel, or they should compensate them out of amounts that otherwise would go to the receiver or guardian, for services that should have been performed by the receiver or guardian.

The Commission urges judges to follow these recommendations and bring these troubling billing practices to an end. If over a period of time it becomes apparent that these practices are continuing, court administration should consider pursuing more affirmative measures through administrative rulemaking or legislation.

Limits Should be Imposed on Appointment of Other Article 81 Fiduciaries as the Guardian. In Article 81 cases, it is not unusual for the court, after determining that a guardian should be appointed, to name the court evaluator as the guardian. This may raise an appearance of a conflict of interest, because the court evaluator's primary responsibility is to recommend whether a guardian should be appointed for an alleged incapacitated person (AIP). In many cases, however, particularly those in which there are minimal assets, it may be economically prudent to name the court evaluator, who will have acquired familiarity with the case and may have established a working relationship with the incapacitated person, as the guardian. Accordingly, the Commission recommends that, as a general rule, the court evaluator should not be appointed as the guardian. In cases involving minimal assets or other extenuating circumstances, however, appointment of the court evaluator as guardian might be appropriate, but the court should provide a reason in writing when doing so.

The Commission has reached a different conclusion as to the attorney for the AIP. Unlike the court evaluator, who is appointed to investigate the facts and make recommendations to the court, the attorney for the AIP is appointed strictly as an advocate for the AIP. Thus, appointment of the attorney as the guardian, or even as counsel to the guardian, raises more serious conflict of interest concerns. The Commission recommends that this never be authorized.

C. Oversight of the Appointment Process

Perhaps the best deterrent against abuses in fiduciary appointments is full and open disclosure of the appointment process. Providing the public with meaningful information about which judges are making appointments, which appointees are receiving appointments and how much the appointees are being paid can go a long way toward ensuring that appointments are not influenced by favoritism, politics or other inappropriate factors. Regrettably, the oversight system that was in place over the past years failed to accomplish this. As is discussed in Section III, compliance with the fiduciary filing requirements was wholly deficient. This denied the public a complete and accurate picture of the appointment process, allowing for an environment in which many inappropriate appointments and other abuses were able to escape necessary scrutiny.

Fortunately, the court system has now implemented major changes in oversight procedures. Based largely on interim recommendations that the Commission forwarded to Chief Judge Kaye and Chief Administrative Judge Lippman, a revamped, comprehensive oversight program was instituted in March 2001 (a copy of the Commission's interim recommendations is attached as Appendix E). Under the new program, a special fiduciary clerk, reporting to the District Administrative Judge, has been designated in each of the judicial districts across the State.[64] The fiduciary clerk sends all relevant forms to the fiduciary appointee, receives completed forms back from the appointee and then sends the completed forms to OCA and places copies in the court file. Before seeking approval of compensation, the appointee must obtain written confirmation from the fiduciary clerk that the required forms have been filed. When the judge approves compensation, the judge submits the compensation form to the fiduciary clerk, who sends the form on to OCA. In addition to these responsibilities, the fiduciary clerk also regularly monitors the OCA fiduciary database to ensure that OCA has accurately entered all necessary appointment and compensation information. Under the new program, information will be made available on a regular basis to appropriate legal newspapers and other periodicals of the names of all fiduciaries appointed, all payments made to fiduciaries and the judges who made such appointments and authorized such payments. Chief Administrative Judge Lippman's memorandum to the Administrative Judges outlining the new oversight procedures and the Administrative Judges' new responsibilities is attached as Appendix F.[65]

These new procedures will result in a vastly improved oversight system, and the Commission is pleased that its recommendations were acted upon so promptly. The following are some additional recommendations to improve the oversight process.

All Persons on the Fiduciary List Should be Assigned an Identifying Number. As is discussed in Section III, individual fiduciaries are frequently listed under multiple names in the OCA fiduciary database. To avoid this, everyone on the fiduciary list should be assigned an identifying number, perhaps the last four digits of their social security number (which is the attorney identification procedure used in the federal courts). Fiduciary appointees would be required to include their number on all forms and papers they submit. This would eliminate confusion when fiduciary forms are received as to who the individual is, and ensure that a single name is used for every fiduciary in the database.

Law Firms Should Report More than $25,000 in Fiduciary Compensation. The public has an interest in knowing if a law firm, as an entity, has received substantial fees from fiduciary appointments. Although fiduciary compensation received by individual attorneys can be tracked in the database, there is no way of knowing the collective sums that an individual law firm receives. Accordingly, the Commission recommends that law firms whose members and employees receive a total of more than $25,000 in fiduciary fees in a single calendar year be required to report such amounts to OCA. The information would be entered in the fiduciary database, and it would be regularly provided to legal newspapers and other periodicals for publication.

Compensation Should be Reported to OCA in All Cases, Even Those in Which No Compensation is Received. Under current law, judges are required to submit an approval of compensation statement to OCA only if the compensation approved exceeds $500. Many judges and lawyers have recommended that all fiduciary compensation be reported to OCA, even if no fee is paid. They maintain that the current rule prevents the public from learning of the large numbers of fiduciary assignments that appointees accept for which they receive minimal or no fees. If the extent of these "pro bono" assignments was more widely known, it is argued, the public would be less critical of the far smaller number of lucrative appointments that fiduciaries receive.

Although the Commission has some concerns about the additional burdens this could impose on judges and court personnel, it recognizes that reporting of compensation in all cases (including pro bono cases) would provide a more realistic view of the process. The reporting requirement should not apply, however, to referees in mortgage foreclosure cases—who receive set fees that rarely exceed the $500 threshold—except when their fees in fact exceed that threshold.

Periodic Audits Should be Conducted of the Fiduciary Filing Process. Although the new oversight program holds great promise, its effectiveness should be periodically evaluated by OCA's auditing staff. The audits should include examination of court files, fiduciary clerks' records and the OCA fiduciary database to determine whether all required forms are being filed, judges are refusing to approve compensation if forms have not been filed and information from the forms is being accurately entered in the database. Any continuing problems with the filing process should be identified and immediately addressed by court administrators.

D. Additional Recommendations

The Revised Fiduciary Rules Should Include a Preamble. During the course of the Commission's work, a number of individuals suggested the need for an official articulation of the purposes of the fiduciary rules. The Commission believes there should be no confusion about the rules' objectives, and that a brief preamble setting forth those objectives should be incorporated into the revised rules. The preamble should plainly state that the rules are intended to ensure that fiduciaries are to be selected solely on the basis of merit, without favoritism, nepotism or the influence of other factors unrelated to the appointee's qualifications or the needs of the case. The preamble also should state that, because it is impossible to draft rules addressing every situation to which they should apply, judges who make fiduciary appointments should always be mindful of general ethics principles and the importance of avoiding the appearance of impropriety and favoritism. A proposed preamble is attached as Appendix G.

Judges Should Receive Training on the Fiduciary Appointment Process. In addition to mandatory training for fiduciary appointees, judges who make fiduciary appointments should receive instruction on the fiduciary rules and their application. This instruction should be a regular component of the annual judicial seminars, and it should be permanently incorporated into the training program for newly elected and newly appointed judges.

The Court System Should Designate an Ombudsman to Provide Information and Field Complaints About the Fiduciary Process. Many laypersons contacted the Commission in the past year with questions and complaints about the fiduciary process. The Commission also received extensive testimony at its public hearings on the frustrations that laypersons have experienced with the process. While it was impossible for the Commission to investigate the complaints or answer all of the questions that were raised, it is apparent that there is a great need for the court system to designate staff to perform this function. We strongly recommend this, and suggest that the Office of the Special Inspector General for Fiduciary Appointments might be an appropriate entity to which this responsibility could be assigned.

Public Funds Should be Available to Compensate Article 81 Guardians in Cases Involving Minimal or No Assets. The Commission heard from many attorneys about the burdens imposed on those who are enlisted by the courts to serve as Article 81 guardians in cases in which the incapacitated person has minimal or no assets. These "pro bono" assignments are taken on not only by private attorneys but by legal services offices as well. The assignments are particularly burdensome, typically far more so than other pro bono assignments, because they often require considerable attention during non-business hours and they can last for any number of years. Moreover, the need to assign private attorneys to these cases has led to a practice that some have criticized — some judges reward those who take pro bono cases with lucrative fiduciary assignments when they become available.

The Commission believes that a serious effort should be made to earmark public funds to compensate guardians in these cases. One option is the creation of a public guardian office, which a number of other states and many counties across the nation have established. Another option is the creation of an "18-B" type program for guardianship assignments. A third option is to fund existing legal services offices or public and private social service agencies to handle the assignments. These options, and other possible approaches, should be carefully studied, perhaps by a committee of experts in this area designated by the court system.

Additionally, the court system should take one immediate step — albeit a relatively small one — to address this problem. Recently, the Continuing Legal Education rules were amended to provide limited CLE credit for "performing uncompensated legal services for clients unable to afford counsel pursuant to . . . assignment by a court."[66] Service as a guardian probably does not qualify as "legal services" — indeed, a guardian need not even be an attorney. Accordingly, this provision should be amended to provide that attorneys who perform uncompensated services as a guardian are eligible for CLE credit.

Where Practical, Article 81 Cases Should be Assigned to a Small Group of Judges in Each Jurisdiction. It had been the practice in some of the larger judicial districts to assign all Article 81 cases in a county to a single judge. This practice promoted efficiency because the judges developed expertise in handling the highly specialized issues and problems that arise in Article 81 cases. Moreover, pursuant to State law, these cases must be resolved in an expedited fashion.[67] Concerns can arise, however, if a single judge in a large county is responsible for making all of the numerous, and sometimes lucrative, fiduciary appointments that must be made in Article 81 cases.

The Commission believes that the opposite approach—assigning Article 81 cases to the full complement of judges in a county—is inefficient, especially in the larger counties. Accordingly, the Commission supports the court system's recent decision to assign Article 81 cases in most of the downstate counties to a small group of judges, and recommends that this approach be expanded to additional counties where it is practical to do so. This promotes efficiency while ensuring that appointments are not concentrated in a single judge. The Commission further recommends that the groups of judges handling these cases be rotated periodically.

An Administrative Support Office Should be Created as a Resource for Judges Handling Guardianship Matters. Given the highly specialized nature of guardianship cases, consideration should be given to establishing an administrative support office within the court system to serve as a resource for judges assigned to guardianship matters. This office could develop uniform procedures and forms, organize regular training programs for judges and nonjudicial staff, approve training programs for Article 81 appointees,[68] better integrate technology into the work of the guardianship parts, propose appropriate rulemaking and legislative reforms and generally serve as a central source of expertise for judges and court personnel handling guardianship cases.

Attorneys Should not Contribute to Judges' Campaigns for the Purpose of Receiving Fiduciary Appointments. The Commission was greatly disturbed by the findings of a 1998 report of the Association of the Bar of the City New York that strongly suggested a connection between lawyers' contributions to two Surrogates' campaigns and the fiduciary appointments made by those judges. As the Administrative Board of the Courts has stated, "pay to play" is wrong and is prohibited by the Code of Professional Responsibility, which governs lawyers' conduct.[69] The Commission agrees with those conclusions, and has reviewed a number of proposals offered by the City Bar and others to curb the practice. However, given the Administrative Board's strong statement condemning this practice, and its decision not to take further action at this time, the Commission, with one exception, has declined to make specific recommendations in this regard.

The one exception concerns the appointment of high-level participants in judicial campaigns. The investigation has revealed that some judges have appointed their own campaign coordinators, managers, treasurers and finance chairs to fiduciary appointments. Some of these appointments were made within a year or two of the conclusion of the judicial campaign. In the Commission's view, such appointments raise serious perceptions of favoritism that reflect unfavorably on the judiciary as a whole. Accordingly, it is recommended that judges be prohibited for a two-year period following the judicial election from appointing persons serving in the capacity of their campaign coordinator, manager, treasurer or finance chair. It is also recommended that the two-year ban apply to these campaign officials' immediate relatives and law partners and associates.

CONCLUSION

The Commission appreciates the opportunity Chief Judge Kaye has given us to examine these important issues. Fairness and impartiality in fiduciary appointments is a critical component of how the public views the judicial system. We believe that the recommendations offered in this Report, if implemented, will significantly bolster the public's trust and confidence in the courts.

Even with the implementation of these reforms, however, the fiduciary appointment process will still demand ongoing monitoring and evaluation. The Commission thus offers one final recommendation: that this Commission (or a successor Commission) be authorized to continue to meet on a periodic basis, perhaps annually, to evaluate the effect of the new rules and procedures. With continuing access to the information acquired by the Office of the Special Inspector General for Fiduciary Appointments and OCA's internal auditors, the Commission would be able to identify any lingering systemic weaknesses. It could then propose any necessary measures for further reform, including other measures that the Commission considered during the course of its deliberations.

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1. *See* Andrew Kaufman, *Cardozo*, pp. 16-19 (Harvard Univ. Press 1998).
2. CPLR Rule 4301
3. *See* CPLR § 5103(b); Real Prop Acts. § 1351(1).
4. CPLR § 8003.
5. CPLR § 6401(a).
6. CPLR § 6401(b).
7. CPLR § 8004(a). In cases in which the receiver's commission, based on the five percent formula, would not amount to $100, the court may authorize a fee of up to $100 for the services rendered. And in cases in which the receiver collects no sums, or is in possession of no sums at the termination of the receivership, the court may authorize a fee based on the services rendered. CPLR § 8004(b).
8. MHL § 81.02(a). Surrogate's Courts may appoint a guardian for an infant, SCPA Article 17, or for a mentally retarded person or a developmentally disabled person. SCPA Article 17-A.
9. MHL § 81.09(b)(1).
10. MHL §§ 81.09(b)(2) & (3).
11. MHL § 81.10.
12. 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." MHL § 81.16(c)(2).
13. MHL § 81.17; Bailly, Practice Commentaries, McKinney's Cons. Laws of N.Y., Vol 34A, MHL § 81.19, p. 360 (1996).
14. MHL § 81.19(2); *see also* Soc. Serv. Law § 473-d (community guardian programs).
15. MHL §§ 81.30, 81.31.
16. MHL § 81.32.
17. MHL §§ 81.39 - 81.41.
18. *See* Bailly, Practice Commentaries, McKinney's Cons. Laws of N.Y., Vol. 34A, MHL § 81.09, p. 308 (1996).
19. MHL § 81.28. *See also* SCPA §§ 2307, 2309.
20. Guardians ad litem are also appointed on occasion in matrimonial cases.
21. SCPA § 403(2). An infant over the age of 14 may petition the court to appoint a named attorney as his or her guardian. SCPA Article 17-A.
22. SCPA § 404(1).
23. 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 proceeding. SCPA § 405(1).
24. *See* Turano, Practice Commentaries, McKinney's Cons. Laws of N.Y., Vol. 58A, SCPA § 405, p. 391 (1994).
25. *See* Governor Rockefeller's approval message, L. 1967, c. 625, McKinney's 1967 Session Laws of New York, p. 1535.
26. By its terms, the statute applies to a broader category of court appointments than those that could be considered "fiduciary" appointments: that is, "any person appointed by the court in any capacity, including but not limited to appraiser, special guardian, guardian ad litem, general guardian, referee, counsel, special referee, auctioneer, special examiner, conservator, committee of incompetent or receiver."
27. L. 1975, c. 834, § 1. This requirement was also promulgated in Part 26 of the Rules of the Chief Judge (22 NYCRR Part 26). Notably, Part 26, reflecting the mandate of section 35-a, applies to fiduciary appointments but also to a much broader group of court appointments.
28. 22 NYCRR § 36.1(a). Although the rules expressly included and thus required that the judge make secondary appointments in receivership cases—"persons designated to perform services for a receiver"—they did not address secondary appointments in other types of cases in which fiduciaries are appointed. In addition, the Part 36 rules applied to a narrower category of appointees than did the Part 26 rules, which, in implementing section 35-a of the

Judiciary Law, applied essentially to all court appointees other than those compensated with public funds.

29. *Id.*

30. 22 NYCRR § 36.1(b)(1).

31. 22 NYCRR § 36.1(c).

32. 22 NYCRR § 36.1(d).

33. 22 NYCRR § 36.3(a).

34. *Id.*

35. 22 NYCRR § 36.1(b)(2).

36. 22 NYCRR §§ 36.3(a), 36.4(c).

37. These included that the rules be amended to reflect changes necessitated by the enactment of Article 81 of the Mental Hygiene Law—that is, to apply the rules to court evaluators and attorneys for alleged incapacitated persons, and to delete references in the rules to conservators and committees.

38. However, under the rules, referees are not subject to the filing requirements of Part 36 if their compensation is not anticipated to exceed $550 (the statutory amount specified in CPLR § 8003(b)). 22 NYCRR § 36.1(f). *See also* 22 NYCRR § 26.2 (judge must submit approval of compensation form to OCA only if appointee's compensation is more than $500).

39. 22 NYCRR § 26.2.

40. *See, e.g.,* Maggie Haberman, et al., "Dirty Dozen Grab Patronage $$$," New York Post, January 30, 2000, p. 8, col. 3; Salvatore Arena, "Top Politicians Get Lucrative Court Jobs," Daily News, January 30, 2000, p. 30, col.1; Jordan Rau and Katie Thomas, "Select Cast Gets Lucrative Roles," Long Island Newsday, September 24, 1999; Ed Tagliaferri, "High-Paying Surrogate Court Cases Go to Politically Connected, Records Show," Gannett Suburban Newspapers, June 10, 1998, p. A1, col. 4; Jack Newfield, "Judges: Patronage Saints to their Pals," New York Post, May 13, 1993, p. 7, col. 1.

41. *See, e.g.,* Joe Calderone & Thomas Zambito, "System's Exploiting the Helpless," Daily News, May 21, 2001, p. 6, col. 1; Salvatore Arena, "Top Politicians Get Lucrative Court Jobs," Daily News, January 30, 2000, p. 30, col. 1; Dan Morrison, "Dem Leader Profits From Court System: Judges Steer Assignments to Manton's Firm," Long Island Newsday, January 30, 2000; Jordan Rau and Katie Thomas, "Select Cast Gets Lucrative Roles," Long Island Newsday, September 24, 1999; Ed Tagliaferri, "High-Paying Surrogate Court Cases Go to Politically Connected Judges, Records Show," Gannett Suburban Newspapers, June 10, 1998, p. A1, col. 4; Maggie Haberman, et al., "Here's Who Gets Pick of Judge's Patronage Plums," New York Post, November 10, 1997, p. 6, col. 1; Michael Finnegan, "Judge Rolls Out Pork Barrel," Daily News (Queens edition), June 20, 1993, p. 1 (Q-LI), col. 1; Jack Newfield, "Judges: Patronage Saints to Their Pals," New York Post, May 13, 1993, p. 7, col. 1.

42. *See, e.g.,* Dan Morrison, "Breaking the Rules," Newsday, October 17, 2000; Jack Newfield, et al., "Kings County Princes of Patronage," New York Post, November 9, 1997, p. 8, col. 1.

43. "Contributions to Campaigns of Candidates for Surrogate, and Appointments by Surrogates of Guardians Ad Litem," Report of the Committee on Government Ethics of the Association of the Bar of the City of New York (July 1998).

44. *See, e.g.,* Alan Feuer, "Brooklyn Lawyers, Ex-Insiders, Outline a Court Patronage System," New York Times, January 5, 2000, p. B1, col. 2; Jack Newfield, et al., "B'klyn Dems Rocked by Insider Patronage Letter," New York Post, January 5, 2000, p. 6, col. 4; Bob Liff, "2 Lawyers Quit Dem Posts, Cite Lack of Patronage Fees," Daily News, January 5, 2000, p. 46, col. 1.

45. Total numbers of appointments noted in this Report reflect only those fiduciary appointments that were reported to OCA. As discussed below, however, non-reporting by fiduciaries and judges was a pervasive problem; also, the reporting requirements do not apply to referee appointments and court examiner appointments. Thus, the totals discussed here are certainly lower than the actual number of appointments.

46. *See, e.g.,* Testimony of Hon. Stanley L. Sklar, President of the New York City Association of Supreme Court Justices, December 7, 2000 public hearing.

47. Under the Mental Hygiene Law, judges are not authorized to appoint Article 81 fiduciaries unless the appointees have completed a training program approved by the Chief Administrator of the Courts. *See* MHL §§ 81.39 - 81.41. Part 36 does not, however, require completion of such a program for inclusion on the fiduciary list.

48. *See* p. 10, *supra*.

49. Testimony of Karen Nicholson, Esq. and Helen Ferraro-Zaffram, Esq., of Legal Services for the Elderly, Disabled and Disadvantaged of Western New York, Inc., November 29, 2000 public hearing.

50. MHL §§ 81.39 - 81.41.

51. The Commission's recommendations concerning which "secondary" appointees should be subject to the fiduciary rules are discussed on pp. 51-52, *infra*.

52. These are the nonjudicial employees who are required to file an annual financial disclosure statement. *See* 22 NYCRR § 40.2(a). To the extent that there may be some chief court clerks in some of the upstate counties at grades lower than grade 24, their relatives should be prohibited from receiving fiduciary appointments as well.

53. 22 NYCRR § 16.1.

54. Pub. Off. Law § 73(8).

55. As discussed in Section II, these applications are available to all judges in hard copy form and on the OCA fiduciary database.

56. The circumstances in which a certificate of relief from disabilities may be issued are set forth in Article 23 of the Correction Law.

57. The application requires that the individual disclose, with details, whether any petition in bankruptcy has ever been filed by or against him or her.

58. This includes the proposed training required for inclusion on the fiduciary list (*see* pp. 38-39, *supra*), although the judge should be authorized to waive the training requirement if it would be impracticable, such as where the appointment will be of a short duration.

59. *See* County Law Article 18-B.

60. This recommendation is supported by the Appellate Division, First Department. In fact, the First Department has considered going even further and establishing a pilot program in which court employees, or possibly an independent contractor, would perform the functions currently handled by court examiners.

61. *See* Fam. Ct. Act § 243(c). Panel members are assigned primarily in Family Court cases. Each of the Appellate Division Departments has established eligibility criteria and an extensive screening process for inclusion on the panels.

62. Some have also suggested that court-appointed experts in matrimonial cases (whose fees are paid by the parties), such as psychologists who provide opinions on custody issues and financial experts who provide valuations of marital property, should be subject to some sort of reporting requirement. The Commission agrees, and recommends that the court system make clear to judges that they should be reporting the compensation they approve for these experts, in accordance with Part 26 (which requires reporting of compensation not only for fiduciary appointments but for a broader group of court appointments).

63. *As discussed, judges, and not the primary fiduciaries, should be appointing the counsel.*

64. In the Surrogate's Courts in New York City, the special fiduciary clerk reports to the respective Surrogate.

65. A similar memorandum was sent to the New York City Surrogates.

66. 22 NYCRR § 1500.22(j).

67. *See* MHL §§ 81.07(a)(1), 81.13 (absent good cause, hearing must be conducted within 28 days, and decision rendered within 45 days, of filing of Article 81 petition).

68. *See* MHL §§ 81.39 - 81.41 (requiring that such programs be approved by the Chief Administrator of the Courts).

69. *See* "Statement of the Unified Court System on "Pay to Play," March 6, 2000.

APPENDIX A

Commission Members

Sheila L. Birnbaum, Esq. (Chair) Skadden, Arps, Slate, Meagher & Flom LLP; Member, United States Judicial Conference Advisory Committee on Rules and Civil Procedure; former Chair, New York State Advisory Committee on Civil Practice; former Member, American Bar Association House of Delegates; former Associate Dean and Professor of Law, New York University School of Law

Roger Bennett Adler, Esq. Private Law Practice; former President, Network of Bar Leaders; former President, Brooklyn Bar Association

Hon. Seymour Boyers Gair, Gair, Conason, Steigman & Mackauf; former Associate Justice, Appellate Division, Second Department; former Administrative Judge, 11th Judicial District

Gary S. Brown, Esq. Chief Attorney, Westchester Regional Office, New York State Department of Law; former Executive Director, Fund for Modern Courts

George F. Carpinello, Esq. Boies, Schiller & Flexner LLP; Chair, New York State Advisory Committee on Civil Practice; former Professor of Law, Albany Law School

Howard A. Glickstein, Esq. Dean, Touro College, Jacob D. Fuchsberg Law Center; former Director, President's Task Force on Civil Rights Reorganization; former General Counsel, United States Commission on Civil Rights

Patricia D. Hynes, Esq. Milberg Weiss Bershad Hynes & Lerach LLP; former Chair, Committee on Federal Judiciary, American Bar Association; former Executive Assistant United States Attorney (Southern District of New York)

Hon. George D. Marlow Associate Justice, Appellate Division, First Department; Co-Chair, New York State Advisory Committee on Judicial Ethics

Hon. E. Leo Milonas Pillsbury Winthrop LLP; former Associate Justice, Appellate Division, First Department; former Chief Administrative Judge of the Courts

Anthony R. Palermo, Esq. Woods Oviat Gilman LLP; former President, New York State Bar Association; former Secretary, American Bar Association

John J. Reilly, Esq. Reilly & Reilly; Member, Judicial Advisory Council, Nassau County

Barbara Paul Robinson, Esq. Debevoise & Plimpton; former President, Association of the Bar of the City of New York

O. Peter Sherwood, Esq. Kalkines, Arky, Zall & Bernstein, LLP; former Corporation Counsel, City of New York; former Solicitor General, State of New York

Hon. Rose H. Sconiers Justice, Supreme Court, 8th Judicial District; First Vice President, New York State Association of Supreme Court Justices

Hon. Richard D. Simons McMahon, Grow & Getty; former Associate Judge and former Acting Chief Judge, New York State Court of Appeals; former Associate Justice, Appellate Division, Third Department

Hon. James N. White Former Associate Justice, Appellate Division, Third and Fourth Departments; former Administrative Judge, 4th Judicial District

Hon. Paul J. Yesawich, Jr. Former Associate Justice, Appellate Division, Third Department; former President, Cortland County Bar Association; former Commission, New York State Law Revision Commission

Counsel

Lawrence K. Marks, Esq.

APPENDIX B

Individuals Who Met with the Commission

Rose Mary Bailly, New York State Law Revision Commission; Michael Cipollino, Chief Clerk, Suffolk County Surrogate's Court; Evan Davis, President, Association of the Bar of the City of New York; Carole de Fritsch, New York County Lawyers Association; Hon. Phyllis Gangel-Jacob, Supreme Court, New York County; Charles Gibbs, OCA Advisory Committee on Surrogate's Courts; Thomas Kilfoyle, Chief Clerk (Civil Term), Supreme Court, Kings County; Hon. Edwin Kassoff, Supreme Court, Queens County; Howard Krooks, Elder Law Section, New York State Bar Association; Craig Landy, President, New York County Lawyers Association; Hon. Diane Lebedeff, Supreme Court, New York County; Michael Miller, New York County Lawyers Association; Hon. Louis Palella, President, Supreme Court Justices Association (New York State); Hon. Edward Rappaport, President, Supreme Court Justices Association (New York City); Thomas Rice, President, New York State Bar Association; Josh Rubinstein, Trust and Estates Section, New York State Bar Association; Hon. Jacqueline Silbermann, Administrative Judge for Matrimonial Matters; Hon. Peter Wells, President, Surrogate's Association of the State of New York; John Werner, Chief Clerk (Civil Term), Supreme Court, New York County; Hon. Virginia Yancey, Supreme Court, Kings County

APPENDIX C

Public Hearings

Buffalo, New York (November 29, 2000): Karen Nicholson (Legal Services for the Elderly, Disabled or Disadvantaged); Hellen Ferraro-Zaffram (Legal Services for the Elderly, Disabled or Disadvantaged); Hon. Joseph Mattina (Erie County Surrogate); Elizabeth Clark (Surrogate's Court Committee, Erie County Bar Association); Hon. Norman Joslin (Supreme Court, 8th Judicial District); Samuel Houston; Chris Brunea; Emmett Creahan (Mental Hygiene Legal Services, Fourth Department); Hon. John Michalek (Supreme Court Justices Association, 8th Judicial District).

New York City (December 7, 2000): Hon. Stanley Sklar (New York City Association of Supreme Court Justices); Hon. Robert Lifson (Supreme Court, Suffolk County); Klaus Eppler (New York County Lawyers Association); Craig Landy (New York County Lawyers Association); Hon. Abraham Gerges (New York State Association of Supreme Court Justices); Steven Zeidman (Fund and Committee for Modern Courts); Howard Krooks (New York State Bar Association); Robert Kruger (Elder Law Section, New York State Bar Association); Standish Smith (Heirs, Inc.); Lori Duboys; Evelyn Goldberg; Jenny Williams; Barbara Reede (New York State Supreme Court Justices Auxiliary); Darnell Smith; Robert Abrams; Pamela Carvel; Ashley Scharge; Adrienne Lefkowitz; Elena Sassower (Center for Judicial Accountability); George Sassower; Albina Goldbetter

Appendix D

December 20, 1999

Michael M. Freeman, Esq.

Law Chairman

Kings County Democratic Party

16 Court Street

Brooklyn, New York 11241

Dear Michael,

It is with great unhappiness that we must inform you that we hereby resign our positions as members of the Kings County Democratic Law Committee.

It has became apparent that our diligent work and unquestioned loyalty to the Organization over the many years are clearly not as important as the desires of Mr. Ravi Batra. Although, Mr. Batra holds no party or elected position in our County, he has nevertheless, imposed himself on the political workings of our Organization for the sole purpose of his own personal financial gain.

Therefore, we will be unable to continue to represent candidates for elected and/or judicial office free of charge, as we have done so in the past. One cannot reasonably expect our firm to continue to avail to the Organization our professional services while the Organization sits idly by and permits Mr. Batra to maliciously injure our practice and reputation without consequence.

As I am sure that the facts surrounding our termination as Mr. Batra's attorneys on his numerous Court appointed Receiverships will be discussed by many members of our Organization, we feel it is now necessary to clarify the issues surrounding our recent termination.

As you have been made aware, on December 7, 1999, Mr. Batra, via facsimile correspondence, terminated our firm as his attorneys on all of his many Receivership matters: including the representation of Mr. Batra with respect to his Receivership of the Cypress Hills Cemetery. **It must be clearly noted that Mr. Batra stated in his termination letter of December 7, 1999, that his own firm will now represent him on all Receivership matters.** Mr. Batra claims that our firing was as a result of our firm's lack of competent legal representation. As you can personally attest, our firm is well recognized as an authority in the area of Receivership law. **I can assure you that any such claims are merely a transparent attempt to deflect attention from Mr. Batra's true motive of obtaining both the legal fees generated from these matters in addition to collecting a Receiver's commission from said cases.**

It is indisputable that our firm has done an excellent job in protecting the interests of our clients, a fact that can be attested to by many members of our own Organization. I must reiterate that Mr. Batra is merely attempting to secure legal fees for his own firm while continuing to collect commissions on these matters as well.

Although, we have the utmost respect and affection for you and the excellent work you have done as the Law Chairman, we are left with no alternative but to resign as members of the Law Committee. To continue on in our capacity as Law Committee members in light of Mr. Batra's inexcusable actions would be far too much to expect, given the fact that the Organization has permitted an individual **with no party position** or history in this County to dictate how our Organization is run. As Law Chairman you are well aware of the fact that Mr. Batra has never assisted the Law Committee on any level whether it be collecting signatures, binding petitions or trying an election law case, etc. In fact, it is unknown as to what Mr. Batra has accomplished in any capacity to benefit our Organization.

I cannot stress to you enough the sense of betrayal we presently are experiencing. Clearly, you recognize the unwavering loyalty and dedication our firm, as well as that of our predecessors, have shown to this Organization over the course of the past twenty five (25) years. It is unprecedented and disheartening how one man's greed and self absorption can go unchecked. Simultaneously, such an act reduces the credibility of the once most powerful political organization in the nation, to an Organization that permits unprovoked attacks by an outsider without consequence.

It is unfathomable that such action would be tolerated by any other political organization within this City or State. It is quite evident that permitting Mr. Batra's behavior has severely damaged our credibility and reputation as a political Organization.

We hope that one day in the not so distant future we will be able to work together again when the interests of the Organization are once again paramount to the unfettered demands of one non-contributing individual.

Regretfully submitted,

cc: Hon. Clarence Norman, Jr., Hon. Jeffrey C. Feldman, Hon. Joan L. Millman, Hon. Leo A. Barrile, Hon. Herbert E. Berman, Hon. Roberta Sherman, Hon. Diane M. Gordon, Hon. Decosta Headley, Jr., Hon. Lewis Fidler, Hon. Renee Hauser, Hon. Booker T. Ingram, Hon. Mary L. Hobson, Hon. Heather E. Gayle, Hon. William H. Boone, Hon. Jacob Gold, Hon. Lori Citron Knipel, Hon. Ann Levine, Hon. Michael R. Geller, Hon. Marsha Rapaport, Hon. Paul Podhaizer, Hon. Joan E. Ribaudo, Hon. Charles J. Ragusa, Hon. Pat V. Guadagnino, Hon. Dov Hikind, Hon. Joseph A. Bova, Hon. Maryrose Sattie, Hon. Linda Minucci, Hon. Steven D. Cohn, Hon. Azalia Rivera, Hon. Angel Rodgriguez, Hon. Elizabeth R. Daly, Hon. Ralph J. Perfetto, Hon. Vito J. Lopez, Hon. Narcisa Ruiz, Hon. Martin Malave-Dilan, Hon. Nellie Santiago, Hon.

Essie Duggan, Hon. William Boyland, Jr., Hon. Annette Robinson, Hon. Albert Vann, Hon. Freddie Hamilton, Hon. Kendell Stewart, Hon. Edith Wingfield

APPENDIX E

Oversight of the Fiduciary Appointment Process

1. The District Administrative Judge shall have primary responsibility for oversight of the fiduciary assignment process within his or her judicial district. The Administrative Judge shall designate a special fiduciary clerk to assist in this responsibility.

2. At the time of appointment, the fiduciary shall file a notice of appointment and a certificate of compliance with the fiduciary clerk (rather than with OCA). The fiduciary clerk shall record the appointment in his or her own index of appointments, and then send the filings to OCA, where they will be entered in the fiduciary database. The fiduciary clerk will regularly monitor the database to confirm that relevant information concerning the appointment has, in fact, been accurately and timely entered.

3. Before seeking approval of compensation, the fiduciary must first obtain a form from the fiduciary clerk confirming that the fiduciary has filed a notice of appointment and a certificate of compliance. The fiduciary must attach this confirmation form to the application for payment, and the judge may not approve payment unless the form is so provided.

4. A copy of the order approving payment shall be filed with the fiduciary clerk (rather than with OCA). The fiduciary clerk shall record the payment in his or her index, and such information shall be sent to OCA, where it will be entered in the fiduciary database. The fiduciary clerk will regularly monitor the database to confirm that relevant information concerning payments to fiduciaries has, in fact, been accurately entered.

5. Every three months, the Administrative Judge, with the assistance of the fiduciary clerk, shall transmit to the Chief Administrative Judge a report specifying all fiduciary appointments, all payments to fiduciaries and the judges who made such appointments and authorized such payments during that period.

6. The Chief Administrative Judge shall arrange, on a semi-annual basis, for the publication in appropriate law journals and periodicals and the court system's Web site of the names of all fiduciaries appointed, all payments to fiduciaries and the judges who made such appointments and authorized such payments during the prior year.

APPENDIX F

MEMORANDUM

February 22, 2001
TO: District Administrative Judges
FROM: Jonathan Lippman
SUBJECT: Oversight of Fiduciary Filings

As was announced by the Chief Judge in her State of the Judiciary address and as was discussed at the recent Statewide Administrative Judges' and Supervising Judges' meeting, we have developed a new plan to improve compliance with the fiduciary filing requirements set forth in Parts 26 and 36 of the Rules of the Chief Judge. As you know, the Rules require three separate filings in a case in which a fiduciary (as defined in the Rules) is appointed: (1) prior to accepting an appointment, a prospective fiduciary must file with the court a **certification of compliance** verifying that the appointment will not be in violation of the Rules (UCS Form 830.3); (2) within ten days of the date of appointment, the fiduciary must file a **notice of appointment** with OCA (UCS Form 830.1); and (3) at the time the judge approves compensation of more than $500 to a fiduciary, the judge must file a **statement of approval of compensation** with OCA (UCS Form 830).

Investigation by the OCA auditing staff and the Special Inspector General's Office has revealed that, across the State, compliance with these filing requirements is deficient. This raises serious concerns, because it is critical that accurate, comprehensive information be readily available so that the public can know who receives fiduciary appointments and how much they are paid. Accordingly, after consultation with the Commission on Fiduciary Appointments, we have devised a new oversight system that, by involving Administrative Judges more directly in the process, will better ensure that all required filings are made.

Under this system, the District Administrative Judges will have new responsibilities for oversight of the filing process within their judicial districts. In carrying out these new responsibilities, the Administrative Judge shall designate a special fiduciary clerk (or clerks, if necessary) to assist in the oversight process (in the Surrogate's Courts in New York City, the Chief Clerk of each of the courts will serve as the special fiduciary clerk). The components of the new system are as follows:

- When a fiduciary is selected, the appointing judge shall promptly send a copy of the order of appointment to the special fiduciary clerk. The fiduciary clerk shall record the appointment in his or her own separate index of appointments, and then promptly send a "fiduciary packet" to the appointee. The packet will include a copy of the order of appointment, a notice of appointment form (UCS Form 830.1), a certification of compliance form (UCS Form 830.3), a statement of approval of compensation form (UCS Form 830), a notice of appearance/affidavit of service (where appropriate) and instructions for completing the various forms.
- The instructions that the fiduciary clerk sends to the appointee shall direct the appointee to complete the notice of appointment form and the certification of compliance form and return them to the fiduciary clerk. If the forms are not returned, the fiduciary clerk shall contact the appointee and request immediate submission of the forms. (If the forms are still not returned, the fiduciary clerk will refer the mat-

ter to the Administrative Judge for appropriate action.) Upon receipt of the forms from the appointee, the fiduciary clerk shall review them for completeness and accuracy, record their receipt in his or her separate index of appointments, ensure that the certification of compliance form is placed in the court file and then send the notice of appointment form to OCA, where the relevant information from the form will be entered in the OCA fiduciary database. The fiduciary clerk will regularly monitor the OCA database to verify that appointment information has, in fact, been accurately entered. If such information has not been accurately entered, the clerk shall so notify OCA.

- Before seeking approval of compensation, the fiduciary appointee must first obtain written confirmation from the fiduciary clerk establishing that the appointee has filed a notice of appointment and certification of compliance (a new form will be developed for this purpose). The appointee must include the written confirmation with the application for approval of payment, and the judge may not approve payment unless the written confirmation is so provided (*see generally* Part 36, § 36.4(c), prohibiting approval of compensation if forms are not filed).
- When a judge approves compensation to a fiduciary appointee, the judge shall submit the approval of compensation form (UCS Form 830) to the fiduciary clerk, rather than to OCA. The fiduciary clerk shall record the payment in his or her separate index, and then send the form to OCA, where payment information will be entered in the fiduciary database. The fiduciary clerk will regularly monitor the database to verify that payment information has, in fact, been accurately entered. If such information has not been accurately entered, the clerk shall so notify OCA. Judges should be advised of these new procedures, including the requirements that orders of appointment be promptly sent to the fiduciary clerk, applications for approval of payment include the fiduciary clerk's confirmation and the judge's approval of compensation form be submitted to the fiduciary clerk.
- On a regular basis, publication will be made in appropriate law journals and periodicals of the names of all fiduciaries appointed, all payments made to fiduciaries and the judges who made such appointments and authorized such payments during the prior year.

Please plan to have this new system in place in your districts by March 26, 2001. Within the next few weeks, after you have had an opportunity to begin to structure this new system, we will be conducting a training session for the newly-appointed special fiduciary clerks from across the State. Although implementation will require considerable thought and attention on your part, I do not expect that it will require new resources. If resources are an issue for you, however, please let Judge Pfau know.

Thank you for your cooperation in this critically important effort.

cc: Hon. Joseph J. Traficanti, Jr., Hon. Joan B. Carey, Hon. Ann T. Pfau. Hon. Juanita Bing Newton

APPENDIX G

Proposed Preamble

Public trust in the judicial process demands that fiduciary appointments be fair, impartial and beyond reproach. Accordingly, the rules governing such appointments are intended to ensure that fiduciaries be selected solely on the basis of merit, without favoritism, nepotism or other factors unrelated to the qualifications of the appointee or the requirements of the case. The rules also require that fiduciaries receive training in the performance of their duties. At the same time, the rules preserve a judge's discretion to select appropriate, qualified candidates.

The rules are designed to provide guidance to judges, and to preclude certain categories of persons from eligibility for appointment, as well as set forth limitations on the number of appointments and aggregate fees any one candidate may receive.

However, the rules cannot be written in a way that forecasts every situation in which they should be applied. Therefore, judges must also be mindful of general ethics principles and the appearance of impropriety and favoritism. The appointment of trained, competent fiduciaries, and the avoidance of favoritism, nepotism, excessive or inadequate fees and unnecessary appointments shall be the fundamental objectives underlying all appointments made, and orders issued, pursuant to this Part.

Language Tips

By Gertrude Block

Question: One of our associates expressed concern about the use of *Esq*. after his name on the firm's business card because he believed it inappropriate to use the title to refer to oneself. That comment elicited additional questions from firm members about the honorific *Esq*.: Is it proper following the names of the firm members on the letterhead of the firm's stationery? Is it proper to use *Esq.* in the salutation of a letter and in the address of the letter? How about the plural (*Esqs.*) after the names of firm members?

Answer: Another New York attorney sent a similar question, adding that he would like to know the origin of the honorific. A third attorney asked whether the honorific may properly be used by women lawyers.

These questions have been asked by members of other state bars, and have been sometimes hotly argued in subsequent correspondence after my answer appeared.

Originally the term *Esquire* (*Esq.*) had nothing to do with lawyers. It derives from the Latin word scutarius ("shield-bearer") and entered Middle English (1100–1400) when legal language was dominated by Latin and French. The term denoted a country gentleman who aspired to knighthood and had apprenticed himself to a knight to accomplish that end. The meaning of *Esquire* later expanded to include commoners who had attained the position of "gentleman" in English society.

But when *Esq.* crossed the Atlantic, an egalitarian American society that disdained social rank used the term to indicate occupation, not social status. During the 19th century, an "Esquire" was a justice of the peace or an associate judge, expanding by the end of the century to include lawyers, who were invariably male. I wrote in response that there seemed no reason to exclude women from using a title that originally had nothing to do with lawyers.

This answer brought forth a flood of correspondence, with only a very few opposing the use of *Esq.* by women. Most correspondents strongly (and vociferously) opposed the use of Esq. to refer to oneself. One New York attorney wrote that it was poor style for lawyers to call themselves "Esq." and even worse to use the honorific on the firm's letterhead. Another wrote that she had "nothing but contempt for this offensive practice." Other lawyers added that the "poor public image of lawyers was worsened by this practice." In the words of another reader, "the term exacerbates the impression that lawyers are a posturing, self-serving group."

Most opposed using *Esq.* altogether. A sizable minority, however, favored using it to address other lawyers. Summing up that opinion, one lawyer wrote that *Esq.* was a title properly bestowed upon the "sendee" by the sender.

Among the small minority of lawyers who favored using *Esq.* in a letterhead or in a complimentary close as a self-reference, one wrote that his law school had awarded him an L.L.B. degree, and because the bar refused to recognize him as a J.D., he signs himself "Esq." Some lawyers argued that holders of the M.D. and Ph.D. degrees are not criticized for adding those letters to their signatures. Another lawyer argued that nobody except another lawyer knows what J.D. means.

New York attorney John Gregorek was one of those who defended the use of *Esq.* by the individual as a self-reference. In response, another New York lawyer, seemingly upheld that stand:

> Bravo to my colleague, who, with wild abandon of political and social correctness, defends the use of Esq. by admitted attorneys. . . . There is a beneficial purpose to be served by authorizing the whole usage of this term. The public does not recognize its proper usage, and it's quite our job to make it otherwise. . . . If we, as attorneys, use the title in our own correspondence, mailing labels, computer programs, and the like, the designation will take on its proper importance in everyday society. Who knows? Today, Esq., tomorrow our own license plates!

As can be seen, there is no consensus about the propriety of using *Esq.* either to refer to other attorneys or to oneself. The majority of those who sent opinions, however, favored addressing other lawyers as "Esquire," but disapproved of designating themselves as "Esquire." Among those who objected to applying the honorific to oneself, the feeling ran so strong that I would avoid using it in the firm's letterheads, correspondence, and in referring to firm members.

Question: Attorney Gary Muldoon of Rochester writes that on a few resumes he has received the individuals have described themselves as a "Juris Doctorate candidate" although they have already received the J.D. degree. He asks, "Shouldn't the title be 'Juris Doctor' or 'Juris Doctorate recipient'? Also, isn't that wording on a resume somewhat pretentious?"

Answer: An individual who has received the Juris Doctor degree is no longer a "candidate," but a holder of the degree. Comparably, a Ph.D. candidate is a person who has not completed the requirements for the degree. On attaining that end, the person is a Ph.D., not a candidate.

In regard to whether "J.D." should appear after the applicant's name, if the resume clearly indicates elsewhere (as it almost certainly does) that the individual has the J.D., it may seem pretentious and self-serving to include that designation after the individual's name.

Gertrude Block is the writing specialist and a lecturer emeritus at Holland Law Center, University of Florida, Gainesville, FL 32611. Her e-mail address is Block@law.ufl.edu.

CONTINUED FROM PAGE 64

Epistrophe. Repeating the same word at the end of successive clauses. Francis Bacon, 1597: "Reading maketh a full man, conference a ready man, and writing an exact man."

Zeugma. Using a verb with two subjects, modifiers, or objects, or an adjective with two nouns, one appropriate or both appropriate in different ways. Groucho Marx: "Time flies like an arrow. Fruit flies like a banana."

In lengthy lists, or for poetic value, repeat because, that, and similar words. Then make your lists parallel. *Example:* "The court finds *that* defendant is guilty, *that* defendant is a menace to society, and *that* defendant is entitled to no mercy." *Example:* "The court announced that oral argument will last for an hour, and no rebuttal time will be granted." *Becomes:* "The court announced that oral argument will last for an hour and that no rebuttal time will be granted." *Example:* "Lawyers write because they have something magical to express and *because* they are paid to write."

Ultaquistic Subterfuge

Do not repeat words that have different meanings. Doing so is called ultaquistic subterfuge:

"Some litigators who practice in *Civil* Court are quite *uncivil*."

"The court will not *consider* whether the promise was given without *consideration*."

"Counsel *appealed* to the Appellate Division to decide the *appeal*."

Similarly, do not repeat words that have contrary meanings. As Cardozo explained, "When things are called by the same name, it is easy for the mind to slide into an assumption that the verbal identity is accompanied in all its sequences by identity of meaning."[11] For example, no matter how unconstitutional it might be, a statute that protects invalids is not an "invalid statute." Miscues will also arise if you write, as the Fifth Circuit did, about "prophylactics against a wrongful discharge."[12] Other confusing words and pairs:

Sanction. "The Legislature *sanctions* the penal sanction." Avoid *sanction*, which means "to permit," "to forbid," or "to punish."

Oversight. "Although the partner had *oversight* over his associate, the brief was filed late because of an *oversight*." Avoid *oversight*, which means "intentional supervision" or "unintentional error."

May and *might.* "The law students may study hard." *Might* expresses greater doubt than *may*. Be careful when you use *may*, which means "are permitted to" or "is possible that they will." Distinguish *may* from *might*.

Table. "The bar association tabled the motion." Avoid *table* as a verb. In America, it means "to adjourn for possible consideration later." But many Americans use *table* in the British sense: to bring forward for immediate consideration.

On the other hand, word play can be effective. Lenny Bruce: "The halls of justice. That's the only place you see the justice. In the halls."[13] Arthur Garfield Hays: "When there's a rift in the lute, the business of the lawyer is to widen the rift and gather the loot."[14] Calvin Coolidge: "The business of America is business." Chief Judge Kaye: "The Third Branch just cannot leave it to the Fourth Estate to fill the knowledge vacuum about the justice system."[15] More legal wisdom handed down through the ages:

"The truth lies somewhere in the witness's lies."

"The judge seemed bored on calendar day. All she did was go through the motions."

"The law student studied defamation in her torts class. The professor wanted to add insult to injury."

"While drafting a contract to buy a racehorse, the lawyer added a rider."

"Notaries seal their documents to make a good impression."

If being sanctioned for oversights is something you might want to table, accept that unnecessary variety is not the spice of life. Instead of finding another word for synonym, ask yourself, What is the opposite of antonym?

1. Emerson has been much misquoted. Often omitted from the original is the word foolish before consistency. See Ralph W. Emerson, Self-Reliance, *in Ralph Waldo Emerson* 131, 137 (Richard Poirier ed., 1990).
2. Anatole France, *The Red Lily* 75 (Modern Library 1917) (1894) (emphasis added).
3. William Shakespeare, *Julius Caesar* act 3, sc. 2 (Brutus) (emphasis added).
4. *United States v. Public Utilities Comm'n*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring) (emphasis added).
5. Sermon at the Ebenezer Baptist Church, February 1968, giving what he hoped would be his eulogy.
6. For a list of rhetorical devices, with examples, see Bryan A. Garner, *The Elements of Legal Style* 147-72 (1991). The above devices, from anaphora through epistrophe, are from Garner.
7. *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (Black, J.).
8. Fuller, Proverbs (1732), in M. Frances McNamara, *2,000 Famous Legal Quotations* 90 (1967).
9. *Berkovitz v. Arbib & Houlberg, Inc.*, 230 N.Y. 261, 274 (1921) (Cardozo, J.).
10. Deuteronomy 16:20.
11. *Lowden v. Northwestern Nat'l Bank & Trust Co.*, 298 U.S. 160, 165 (1936) (Cardozo, J.).
12. *Findeisen v. North East Indep. Sch. Dist.*, 749 F.2d 234, 238 (5th Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985).
13. Bruce M. Nash et al., *Lawyer's Wit and Wisdom* 74 (1995) (quoting Lenny Bruce).
14. *Id*. (quoting Arthur Garfield Hays).
15. Judith S. Kaye, *Rethinking Traditional Approaches*, 62 Albany L. Rev. 1491, 1496 (1999).

GERALD LEBOVITS is a judge of the New York City Civil Court, Housing Part, currently assigned to Brooklyn and Staten Island. An adjunct professor of law and the Moot Court faculty advisor at New York Law School, he is the author of numerous articles and Advanced Judicial Opinion Writing, a handbook for New York State's trial and appellate courts, from which this column is adapted. His e-mail address is Gerald.Lebovits@law.com.

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Lieberman, Ellen
Lindenauer, Susan B.
* MacCrate, Robert
Mandell, Andrew
Miller, Michael
Miller, Sonia E.
Minkowitz, Martin
Opotowsky, Barbara Berger
* Patterson, Hon. Robert P., Jr.
Paul, Gerald G.
Pickholz, Hon. Ruth
Quattlebaum, Poppy B.
Raubicheck, Charles J.
Rayhill, James W.
Rifkin, Richard
Robertson, Edwin D.
Roper, Eric R.
Rosner, Seth
Rubenstein, Joshua S.
Safer, Jay G.
Scarborough, Robert H.
Schumacher, H. Richard
* Seymour, Whitney North, Jr.
Silkenat, James R.
Sloan, Pamela M.
Souther, Eugene P.
Stenson, Lisa M.
Vitacco, Guy R., Sr.
Yates, Hon. James A.

Second District
Cerchione, Gregory T.
Dollard, James A.
Doyaga, David J.
Fisher, Andrew S.
Hesterberg, Gregory X.
Kamins, Barry
Lashley, Allen
Morse, Andrea S.
Reich, Edward S.
Sunshine, Nancy T.
Terrelonge, Lynn R.

Third District
Ayers, James B.
Bauman, Harold J.
Cloonan, William N.
Connolly, Thomas P.
Dorsey, Richard J.
Flink, Edward B.
Friedman, Michael P.
Higgins, Patrick J.
Kelly, Matthew J.
Klein, Frank
LaFave, Cynthia S.
Leistensnider, Ruth E.
Lester, Kelly Mooney
Maney, Hon. Gerard E.
Miranda, David P.
Murphy, Sean
Netter, Miriam M.
Pierro, Louis W.
Samel, Barbara J.
† Tharp, Lorraine Power
Tippins, Timothy M.
Treece, Hon. Randolph F.
* Williams, David S.
* Yanas, John J.

Fourth District
Cioffi, Cristine
Clements, Thomas G.
Coffey, Peter V.
Doern, James E D
FitzGerald, Peter D.
Harper, David A.
Hoye, Hon. Polly A.
Keniry, Hon. William H.
Russell, William E.
Tishler, Nicholas E.

Fifth District
Doerr, Donald C.
Dwyer, James F.
Fennell, Timothy J.
Fetter, Jeffrey M.
Getnick, Michael E.
Gingold, Harlan B.
Klein, Michael A.
Kogut, Barry R.
Michaels, Joanne E.
Priore, Nicholas S.
Rahn, Darryl B.
Renzi, David A.
†* Richardson, M. Catherine
Rizzo, James S.
Uebelhoer, Gail Nackley

Sixth District
Beehm, Angelina Cutrona
Denton, Christopher
Drinkwater, Clover M.
Folmer, John B.
Gacioch, James C.
Lewis, Richard C.
Mayer, Rosanne
Peckham, Hon. Eugene E.
Reizes, Leslie N.
Wayland-Smith, Tina

Seventh District
Bleakley, Paul Wendell
Buzard, A. Vincent
Castellano, June M.
Clifford, Eugene T.
Dwyer, Michael C.
Grossman, James S.
Harren, Michael T.
Heller, Cheryl A.
Lawrence, C. Bruce
†* Moore, James C.
* Palermo, Anthony R.
Reynolds, J. Thomas
* Van Graafeiland, Hon. Ellsworth
* Vigdor, Justin L.
Wallace, David G.
†* Witmer, G. Robert, Jr.

Eighth District
Attea, Frederick G.
Doyle, Vincent E., III
Edmunds, David L., Jr.
Eppers, Donald B.
Evanko, Ann E.
Evans, Sue M.
* Freedman, Maryann Saccomando
Gerstman, Sharon Stern
Gold, Michael A.
Graber, Garry M.
†* Hassett, Paul Michael
McCarthy, Joseph V.
Mohun, Michael M.
O'Connor, Edward J.
O'Mara, Timothy M.
Palmer, Thomas A.
Pfalzgraf, David R.
Porcellio, Sharon M.

Ninth District
Aydelott, Judith A.
Fedorchak, James M.
Gardella, Richard M.
Geoghegan, John A.
Golden, Richard Britt
Goldenberg, Ira S.
Headley, Frank M., Jr.
Herold, Hon. J. Radley
Klein, David M.
Kranis, Michael D.
Longo, Joseph F.
Manley, Mary Ellen
* Miller, Henry G.
Mosenson, Steven H.
O'Leary, Diane M.
* Ostertag, Robert L.
Riley, James K.
Stewart, H. Malcolm, III
Walker, Hon. Sam D.

Tenth District
Abrams, Robert
Asarch, Hon. Joel K.
†* Bracken, John P.
Filiberto, Hon. Patricia M.
Franchina, Emily F.
Gutleber, Edward J.
Kramer, Lynne A.
Levin, A. Thomas
Levy, Peter H.
Meng, M. Kathryn
Mihalick, Andrew J.
Monahan, Robert A.
Perlman, Irving
†* Pruzansky, Joshua M.
Purcell, A. Craig
†* Rice, Thomas O.
Roach, George L.
Rothkopf, Leslie
Spellman, Thomas J., Jr.
Tully, Rosemarie
Walsh, Owen B.

Eleventh District
Bohner, Robert J.
Darche, Gary M.
Dietz, John R.
Fedrizzi, Linda F.
Glover, Catherine R.
Nashak, George J., Jr.
Nizin, Leslie S.
Terranova, Arthur N.
Wimpfheimer, Steven

Twelfth District
Bailey, Lawrence R., Jr.
Friedberg, Alan B.
Kessler, Muriel S.
Kessler, Steven L.
Millon, Steven E.
†* Pfeifer, Maxwell S.
Schwartz, Roy J.
Torrent, Damaris Esther
Torres, Austin

Out-of-State
Chakansky, Michael I.
* Walsh, Lawrence E.

THE LEGAL WRITER

What's Another Word For "Synonym"?

BY GERALD LEBOVITS

Lawyers should not repeat themselves. Jury trials can be a trying experience. But the language police will arrest you if you write, "She did that before, before a jury." And what lawyer would want to begin a sentence with "In In re Rhea." Not all repetition is redundant, however, and variety is often the spinach of life. This column explores the vices and virtues of inelegant variation, consistency, repetition, and ultaquistic subterfuge.

Inelegant Variation

Inelegant variation is the technique by which a writer uses different terms to identify one person, place, thing, or idea. The stylistic error is that synonyms and variants confuse. The tone error is that those who use synonyms and variations are affected. Years ago the word *elegant* was pejorative. Today the pejorative is *inelegant*. Most writers on legal writing—jargon mongers all—call the error by its original name, "elegant variation."

Use different words to mean different things. Do not use different words for the same thing. Some believe that variety in word choice gives depth to writing, that, to quote Ralph Waldo Emerson, "consistency is the hobgoblin of little minds."[1] Not only are they wrong, but they are not right.

Some high-school teachers tell students to reach for thesauruses to find different words to say the same thing. Editors have devoted their careers to explaining why these teachers are wrong. Repeating the same word for the same thing strengthens and clarifies. Repetition is boring only to novices. An example of inelegant variation, with the variations italicized: "I met with *plaintiff's attorney* about the *postponement* he *requested*. The *lawyer* [attorney] for *the litigant who brought the action* [plaintiff] *asked for* [requested] *an adjournment* [postponement]." Confusing and affected, no?

Consistency

Be consistent in tone: Do not be formal in one place but informal in another. Be consistent in point of view: Do not use your point of view in one place and the reader's in another. Be consistent in reference: Do not write "this advocate" in one place, "this writer" in another, "I" in a third. Be consistent in voice: Do not write "this Court finds" in one place but "it is found" in another.

Repetition

Repeating key nouns, verbs, articles, and prepositions adds power and aids comprehension. Repetition makes writing powerful, clear, and consistent. Repetition cures inelegant variation.

Notice the repetition of the preposition *to* in the Pledge of Allegiance: "I pledge allegiance *to* the flag of the United States of America and to the republic for which it stands . . . ." From Anatole France: "The law in its majestic equality, forbids the rich as well as the poor *to* sleep under bridges, *to* beg in the streets, and *to* steal bread."[2] From The Bard: "I come to bury Caesar, not *to* praise him."[3]

This is how Justice Robert Jackson repeated the preposition *by*: "I should concur in this result more readily if the Court could reach it by analysis of the statute instead of by psychoanalysis of Congress."[4]

Repeating the article: "The law clerk and the confidential secretary are appointed." Without the repetition, the law clerk and confidential secretary is one person.

Repeating the same word adds rhetorical power to writing and speaking. President George W. Bush on September 11, 2001: "These acts shattered steel, but they cannot dent the steel of American resolve."

We celebrate the Reverend Dr. Martin Luther King Jr., not only because of what he stood for and what he said, but also because of his artful use of rhetorical repetition—with parallelism—to say it: "[S]ay that I was a drum major for justice. Say that I was a drum major for peace. I was a drum major for righteousness. And all of the shallow things will not matter."[5]

Repeating the same word for the same thing strengthens and clarifies. Repetition is boring only to novices.

Some devices of rhetorical repetition:[6]

Anadiplosis. Repeating the last word of one clause at the start of the next: "His life was just; just will be his reward."

Anaphora. Repeating the same word or words at the start of successive clauses. Justice Black: "Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not."[7]

Antanaclasis. Repeating a word that has different meanings. Fuller: "It is the justice's clerk that makes the justice."[8]

Antimetabole. Repeating words in successive clauses in reverse order. "She worked to live. She did not live to work."

Chiasmus. Repeating words in inverted order. Judge Cardozo: "Jurisdiction exists that rights may be maintained. Rights are not maintained that jurisdiction may exist."[9]

Epizeuxis. Repeating words without interruption. The Creed of Law: "Justice, justice shall you pursue . . . ."[10]

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