

UNIFORM RULES FOR SURROGATE'S COURTS

Text updated through revisions made March 4, 1998

§ 207.1 Application of part; waiver; special rules; definitions

- (a) Application. This Part shall be applicable to proceedings in all Surrogate's Courts in New York State.
- (b) Waiver. For good cause shown, and in the interests of justice, the court in a proceeding may waive compliance with any of these rules, other than section 207.2, unless prohibited from doing so by statute or by rule of the Chief Judge.
- (c) Additional rules. Local court rules, and all court forms not inconsistent with law or with these rules, shall comply with Part 9 of the Rules of the Chief Judge (22 NYCRR Part 9).
- (d) Application of SCPA, EPTL and CPLR. The provisions of this Part shall be construed consistently with the Surrogate's Court Procedure Act (SCPA) and the Estates Powers and Trusts Law (EPTL). Matters not covered by these provisions, the SCPA and the EPTL shall be governed by the Civil Practice Law and Rules (CPLR).
- (e) Definitions.
 - (1) Chief Administrator of the Courts in this Part also includes a designee of the Chief Administrator.
 - (2) Unless the context requires otherwise, all references to clerk shall mean the Chief Clerk of each Surrogate's Court or the designee of the Chief Clerk.
 - (3) Unless otherwise defined in this Part, or the context otherwise requires, all terms used in this Part shall have the same meaning as they have in the CPLR, EPTL and the SCPA.

§ 207.2 Terms of court.

In each Surrogate's Court there shall be held such terms as the Chief Administrator shall designate.

§ 207.3 [Reserved]

§ 207.4 Papers filed in court; clerk's file number; official forms.

- (a) Unless otherwise specified by the court, attorneys, as well as parties appearing without attorneys, shall prepare and submit all papers, pleadings, orders and decrees to be acted upon by the Surrogate. The party causing the first paper to be filed shall communicate the clerk's file number forthwith to all other parties to the proceeding; service of a citation bearing the file number shall be sufficient. Thereafter such number shall appear on the outside cover and first page to the right of the caption of every paper tendered for filing in the proceeding. The caption also shall contain the title of the proceeding, an indication of the county of venue and a brief description of the nature of the paper. All papers shall comply with the provisions of CPLR and (other than wills, codicils, and forms of other governmental agencies) shall be on standard eight and one-half inch by 11-inch paper. The text of all papers must be legible and, other than prompts and instructions, must be in a standard typeface of 10 to 12-point characters, and have margins that shall be no less than one-half inch. Papers also shall contain the name of the attorney or party submitting them and, whenever possible, the names, addresses and information regarding parties to the proceeding shall be printed in bold typeface.
- (b) The forms set forth in Chapter VII of subtitle D of this title (22NYCRR), designated "Surrogate Court Forms", and including forms for the Surrogate's Court and adoption forms of the Family Court and Surrogate's Court, shall be the official forms of the court and shall be accepted for filing pursuant to SCPA 106. Forms produced on computers or word processors shall be accepted for filing, provided
 - (1) the text used shall be the same as that contained in the official forms and
 - (2) the attorney or party preparing such form shall certify at the end thereof that the form is the same as the official form and that the substantive text has not been altered.

Persons submitting such forms may leave out instructions (contained in brackets) and optional words or phrases that have not been selected or are irrelevant. Submitting a form to be an official form, but upon which the text has been intentionally altered to change the substance or meaning thereof may be regarded as an attempt to mislead the court.

- (c) Examples of the official form shall be available at the clerk's office of any Surrogate's Court.

§ 207.5 Submission of papers to Surrogate.

All papers for signature or consideration of the Surrogate shall be presented in the first instance to the clerk of the court in the appropriate courtroom or clerk's office, except that where the clerk is unavailable or the Surrogate so directs, papers may be filed with the Surrogate and a copy filed with the clerk at the first available opportunity. Where appropriate, orders to show cause may be submitted directly to the Department of Law or the Surrogate. The papers shall be clearly addressed to the Surrogate for whom they are intended, and prominently show the nature of the papers, the title and clerk's file number of the proceeding in which they are filed, and the name of the attorney or party submitting them.

§ 207.6 Transfer of actions from other courts.

(a) An application under SCPA 501 for the consent of the court to the transfer to the Surrogate's Court of an action pending in the Supreme Court, or for the transfer by the Surrogate's Court to itself of any action pending in any other court, or for the consolidation of such action with a proceeding pending in the Surrogate's Court, shall show whether there is pending a proceeding in the Surrogate's Court and the nature of the proceeding, and shall be supported by an affidavit which shall state:

- (1) the court in which such action is then pending;
- (2) the parties to the action;
- (3) the nature of the action;
- (4) whether the action is on the trial calendar;
- (5) an estimate of the time when the action will be reached for trial in the court in which the same is pending, with the facts upon which such estimate is based;
- (6) the reasons why a transfer of the action to this court is desirable; and
- (7) whether a jury trial has been demanded or whether the same has been waived.

(b) There must be annexed to the moving papers a copy of the pleadings in the action sought to be transferred. Upon compliance with the foregoing requirements, an order will be issued by the court directing the adverse parties to show cause why the application should not be granted.

§ 207.7 Service and filing of papers; motions.

(a) Whenever service of a paper or notice is required, copies thereof shall be served upon all parties who have appeared and upon such other persons as the Surrogate may direct. Except as further provided in section 207.9 of this Part, a party has appeared within the meaning of these rules so as to entitle the party to be served with notices or papers:

- (1) if the party has filed a written notice of appearance with a demand for service of all papers at a specified address; or
- (2) if the party has filed a pleading upon which is endorsed the name and address of the attorney appearing for the party or the name and address of the party appearing pro se.

(b) Proof of service of the paper or notice upon all parties shall be filed with the original paper or notice.

(c) In all proceedings the proof of service of process, notices of motion and orders to show cause shall be filed on or before the second day preceding the return date unless the court otherwise permits. In computing such period of two days, Saturdays, Sundays and legal holidays shall not be taken into account. This provision shall not apply to an order to show cause returnable in such limited time as to make compliance with its provisions impracticable.

(d) All contested motions and proceedings shall be made returnable on any day the court is in session, unless otherwise provided in the local rules of the court or by order of the Surrogate.

(e) Unless the court otherwise permits, the moving party shall serve copies of all affidavits and briefs upon all other parties at the time of service of the notice of motion. The answering party shall serve copies of all affidavits and briefs as required by CPLR 2214. Affidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of the relevant law. Unless otherwise directed by the court, answering and reply affidavits and briefs and all papers required to be furnished to the court by CPLR 2214(c) must be filed no later than the time of argument or submission of the motion.

(f) The Surrogate may determine that any or all motions in that court be orally argued and may direct that moving and responding papers be filed with the court prior to the time of argument.

(g) (1) Unless oral argument has been requested by a party and permitted by the court, or directed by the court, motion papers received by the clerk of the court on or before the return date shall be deemed submitted as of the return date.

(2) Attendance by counsel at the calendar call shall not be required unless:

(i) a party intends to make an application to the court that is not on the consent of all parties;

(ii) attendance of counsel or oral argument is directed by the court; or

(iii) oral argument is requested by a party.

(3) Attendance by counsel for a party not requesting oral argument is not required where the hearing of oral argument is based solely upon the request of another party.

(4) A party requesting oral argument shall set forth such request in its notice of motion or on the first page of the answering papers, as the case may be. A party requesting oral argument on a motion brought on by order to show cause shall do so as soon as possible prior to the time the motion is to be heard.

§ 207.8 Removal of papers.

No record or document filed in the court shall be removed therefrom by any person except on written consent of the Surrogate or the clerk. Suitable facilities shall be designated by the Surrogate for the examination or transcription of records and documents by parties or attorneys.

§ 207.9 Appearances.

(a) A person not named in a citation, but who claims to be interested in the proceeding and wishes to intervene therein, shall file a notice of appearance and a petition or affidavit alleging interest.

(b) Unless otherwise directed by the Surrogate, attorneys appearing on behalf of nondomiciliaries or parties not personally served within the State must furnish acknowledged evidence of authority pursuant to SCPA 401.

(c) When directed by the Surrogate, in addition to filing an appearance as required by SCPA 404, a guardian ad litem shall serve a notice of appearance upon all parties.

§ 207.10 Demand for pleadings.

Unless otherwise ordered by the Surrogate, where a party is entitled under SCPA 302(3) to a copy of a pleading on demand, it shall be served within five days of the demand.

§ 207.11 Guardians.

(a) Where application is made to appoint a guardian of two or more infants, a separate petition and proposed order must be presented with respect to each infant.

(b) The order appointing a guardian of the property of an infant shall recite the substance of, or contain a reference to, the requirements of SCPA 1719 regarding guardian's annual accounts.

(c) As soon as a ward reaches 18 years of age, the guardian shall forthwith account to the ward and proceed to obtain a discharge upon receipt and release, by a proceeding for judicial settlement of accounts, or by such other method as directed by the court.

§ 207.12 Appointment of guardian ad litem on nomination.

(a) In addition to the requirements of SCPA 403, all applications for the appointment of guardians ad litem upon the petitions of infants over 14 years of age must contain the following information:

(1) The petition of the infant must state whether the infant has been influenced by the proponent or the accounting party or the attorneys for the fiduciaries, or anyone connected with them or either of them, in the selection of the person the infant nominates as the infant's guardian ad litem, and whether the person nominated by the infant has suggested his or her employment either in person or through others.

(2) The affidavit of the attorney nominated as guardian ad litem must state whether the proponent in a probate proceeding or the petitioner in any other proceeding or the accounting party or the attorney for any of the foregoing persons, or anyone connected with such attorney, has suggested or accelerated the nomination of the attorney as guardian ad litem and, if so, must state the facts.

(b) The papers submitted on an application must satisfy the court that the attorney who is nominated for appointment as guardian ad litem will have no divided loyalty in the performance of his or her duties which might result in failure to protect adequately the infant's rights in the estate.

§ 207.13 Qualification of guardians ad litem; filing report.

(a) Each guardian ad litem shall qualify within ten days of notification of appointment, or may be deemed unable to act. He or she shall review the court's guidelines for guardians ad litem, if available, and carefully examine all matters affecting the guardian's client and all processes and papers to ensure that they are regular and have been duly served. No decree shall be made in the proceeding until the guardian shall report these findings. The report shall be made in writing or, with the consent of the Surrogate, orally in open court, except as otherwise provided in SCPA 1754(4), within 10 court days of the guardian's appointment or from the date to which the proceeding was finally adjourned, unless extended by the court.

(b) A guardian ad litem in a proceeding in which a decree has been entered directing payment of money or delivery of property to or for the benefit of the guardian's ward must file a supplemental report within 60 days after a decree settling the account, showing whether the decree has been complied with insofar as it affects the ward. In all such cases, the fiduciary shall immediately notify the guardian in writing of the date and details of payment or delivery.

(c) The guardian's allowance may be authorized in the initial decree, but, except as provided in SCPA 2111, no allowance shall be paid until an appropriate report is made.

§ 207.14 Infants' funds.

(a) No allowances will be made to a guardian or otherwise for the support or maintenance of an infant, unless an annual account for the preceding year has been filed or good cause is shown in the petition why it has not been filed. The petition must comply with CPLR 1211.

(b) Where an order is granted authorizing the periodic withdrawal of funds belonging to or held in trust for an infant, it shall specify the number and amounts of such withdrawals and the duration of time in which the funds may be used for the purposes stated.

(c) All guardians, persons acting jointly with a guardian, and depositories designated by the court shall produce for examination, whenever so requested by the court, all securities, evidences of deposit or investment or other records, and shall also furnish an accurate record of receipts and deposits of principal and income and of withdrawals and expenditures.

§ 207.15 Birth and death certificates.

(a) A birth certificate shall be filed upon an application for letters of guardianship or an order of adoption.

(b) A death certificate shall be filed upon an application for letters testamentary, letters of administration or voluntary administration. Alternate evidence of death may be accepted in the discretion of the court.

(c) Birth and death certificates may be required to be filed in any other proceeding in the discretion of the court.

§ 207.16 Petitions for probate and administration; proof of distributees; family tree.

(a) All petitions for probate or administration shall (1) contain the information required by SCPA 304, (2) contain an estimate of the gross estate of the decedent passing by will or intestacy, separately showing the values of personal and real property, gross rents for a period of 18 months and information about any cause of action for personal injury or wrongful death, and (3) indicate whether any distributee is a non-marital child or the issue of a non-marital person under EPTL 4-1.2(a)(1) or (a)(2).

(b) Whenever in a petition for probate or administration a party upon whom the service of process is required is a distributee whose relationship to the decedent is derived through another person who is deceased, the petition must either

(1) show the relationship of the distributee to the decedent and the name and relationship of each person through whom such distributee claims to be related to the decedent or,

(2) have annexed a family tree table or diagram showing the name, relationship and date of death of each person through whom such distributee claims to be related to the decedent, which table or diagram shall be supported by an affidavit of a person having knowledge of the contents thereof.

(c) If the petitioner alleges that the decedent was survived by no distributee or only one distributee, or where the relationship of distributees to the decedent is grandparents, aunts, uncles, first cousins or first cousins once removed, proof must be submitted to establish

(1) how each such distributee is related to the decedent and

(2) that no other persons of the same or a nearer degree of relationship survived the decedent.

Unless otherwise allowed by the court, the proof submitted pursuant to this subdivision must be by an affidavit or testimony of a disinterested person. Unless otherwise allowed by the court, if only one distributee survived the decedent, proof may not be given by the spouse or children of the distributee. The proof shall include as an exhibit a family tree table or diagram, except no such table or diagram shall be required if the distributee is the spouse or only child of the decedent.

(d) If the petitioner alleges that any of the distributees of the decedent or others required to be cited are unknown or that the names and addresses of some persons who are or may be distributees are unknown, petitioner must submit an affidavit showing that he or she has used due diligence in endeavoring to ascertain the identity, names and addresses of all such persons.

(e) If a person requesting letters to administer an estate as sole executor or administrator is also an attorney admitted in this State, he or she shall file with the petition requesting letters a statement disclosing:

(1) that the fiduciary is an attorney;

(2) whether the fiduciary or the law firm with which he or she is affiliated will act as counsel; and

(3) if applicable, that the fiduciary was the draftsman of a will offered for probate with respect to that estate.

§ 207.17 [Reserved]

§ 207.18 Use of virtual representation.

(a) In any accounting proceeding where representation is to be utilized pursuant to subdivision 5 of SCPA 315, an affidavit of the petitioner or petitioner's attorney, and of the representor, must be submitted setting forth the following information:

(1) In the affidavit of the petitioner or petitioner's attorney:

(i) the name, address and the interest in the estate of the representor;

(ii) the name, address and the interest in the estate of the representees; and

(iii) the statutory basis for the use of virtual representation.

(2) In the affidavit of the representor:

(i) that the representor has fully reviewed the proceedings;

(ii) the steps taken by the representor to adequately represent the interest of the representees in order to make a considered judgment whether to appear, default, acquiesce or contest the proceedings; and

(iii) that the representor has no conflict of interest in adequately representing the representees.

(b) If the court in any other proceeding, or in an accounting proceeding in circumstances other than set forth in subdivision (a) of this section, questions adequacy of representation by the representor, it may direct the filing of the affidavits set forth in subdivision (a).

§ 207.19 Probate; filing of will; depositions; proof by affidavit.

(a) With every petition for probate of a will there must be filed the original will and a copy thereof, except in the case of lost or destroyed wills or where the Surrogate dispenses therewith or fixes a later time within which such will must be filed. With such copy there must also be filed an affidavit showing that it is a true copy of the original. If the copy be a reproduction by photographic or similar process, the affidavit shall be by one person; otherwise it shall be by the two persons who have compared the copy with the original. In a proceeding for probate of a will alleged to be lost or destroyed, the Surrogate may make such order in respect of the filing of the text thereof as he or she may deem proper.

(b) (1) Unless service is by publication, a copy of the will shall be attached to all citations served and the affidavits of service of citation shall recite the service of a copy of the will.

(2) All waivers and consents filed with the court shall recite in the body of the waiver that a copy of the will was received.

(c) The clerk may require at least two days' notice before taking a deposition or testimony of any attesting witness. When any party is to be represented by a guardian ad litem, proponents should give notice of the time and place of taking a deposition of an attesting witness to such guardian ad litem.

(d) In a probate proceeding where the will purports to exercise a power of appointment, a copy of the instrument creating the power of appointment must be furnished, and the petition for probate shall list those named in said instrument who are adversely affected by the probate of such will. Jurisdiction shall be acquired over such persons in the same manner as over distributees.

§ 207.20 Value of estate.

(a) The fiduciary or the attorney of record shall furnish to the court a list of assets constituting the gross estate for tax purposes, but separately listing (1) those assets that either were owned by the decedent individually, including those in which the decedent had a partial interest, or were payable or transferrable to the decedent's estate and (2) those assets held in trust, those assets over which the decedent had the power to designate a beneficiary, jointly owned property, and all other nonprobate property of the decedent. This list of assets shall be filed with the court by the later to occur of the following events:

(1) if the estate is required to file a Form 706 Federal Estate Tax Return, the due date for the filing of such return, including any extensions of time received for the filing thereof;

(2) if the estate is not required to file a Form 706, the due date for the filing of the New York Estate Tax Return, including any extensions of the time received for the filing thereof;

(3) if the estate is not required to file a New York Estate Tax Return, six months from the issuance of temporary or preliminary letters, limited letters, ancillary letters, full letters of administration or letters testamentary.

At any time after six months from the date of the decedent's death, if any "person interested," as that term is defined by SCPA 103(39), makes a written request for such a list, the fiduciary or attorney of record shall furnish the list within 21 days of the mailing of such request, in as complete a form as is then possible.

(b) The requirement for filing a list of assets may be satisfied by the filing of a summary schedule together with a copy of either Form 706 Federal Estate Tax Return, Form 706NA Federal Estate Tax Return for Nonresident Aliens, or New York State Estate Tax Return TT-385 or ET-90.

(c) In the event such list of assets is not so filed, the court may refuse to issue certificates, may revoke the letters and may refuse to issue new ones until such list has been filed and the fees paid as provided in SCPA 2402. Failure to voluntarily file such list of assets may also constitute grounds for disallowance of commissions or legal fees.

(d) If any additional filing fees are due, they shall be paid to the court at the time of the submission of any of the documents described in subdivision (a) of this section.

§ 207.21 Notification to foreign consuls.

Where it appears that an intestate who died, or any party interested in the estate of the intestate, is the subject of a foreign power whose consul is entitled by treaty to administration or intervention, notice of the application for the appointment of an administrator shall be given such consul.

§ 207.22 Witnesses out of county.

(a) When, in an uncontested probate proceeding, a witness to a will is outside the jurisdiction of the court, and SCPA 1406 is not utilized, the court may order that the witness be examined in the Surrogate's Court of another county or in an appropriate court of another state or county or before a commissioner designated by the court pursuant to SCPA 508, specifying the nature and manner of the examination, and shall send such other court or commissioner a copy of such order together with the original will or court-certified reproduction thereof. If the original will is sent, a court-certified copy thereof shall be retained in the office of the court wherein the proceeding is pending.

(b) When the testimony of the witness is obtained, it shall be annexed to the will or to the copy to which it relates, and together they shall be returned to and filed in the court wherein the proceeding is pending, as provided in SCPA 507.

§ 207.23 Bills of particulars in contested probate proceedings.

(a) In any probate proceeding in which objection to probate is made upon the grounds that the execution of the propounded instrument was procured by fraud or undue influence and the proponent demands or moves for a bill of particulars, the proponent shall be entitled as of course to the following information:

(1) the specific act or acts or course of conduct alleged to have constituted and effected such undue influence, the person or persons charged therewith and the time or times and place or places where it is alleged to have taken place;

(2) the particular false statements, suppressions of fact, misrepresentations, or other fraudulent acts alleged to have been practiced upon the decedent, the place or places where these events are claimed to have occurred and the persons who perpetrated them; and

(3) whether such acts were accompanied by an act of physical violence or mistreatment of the decedent or threats, and if so, the nature thereof.

(b) If it is claimed by the contestant that the instrument offered for probate is not the last will of the deceased, the proponent shall be entitled to a bill of particulars as of course, which shall state:

(1) whether it is claimed that there is an alleged testamentary instrument of later date than the instrument offered for probate;

(2) whether it is claimed that the instrument offered for probate was revoked, and if so, the method by which the alleged revocation was accomplished; or

(3) whether it is merely claimed that the instrument offered for probate was not executed in accordance with the prescribed statutory formalities.

(c) In the demand or notice of motion it shall not be necessary for the proponent to set forth at length the foregoing items; he or she may, in lieu thereof, refer to the items specified in this rule. As to any other desired particulars, the proponent shall set them forth at length in the demand or notice of motion.

(d) Nothing contained in the foregoing shall be deemed to limit the court in denying, in a proper case, any one or more of the foregoing particulars, or in a proper case, in granting other, further or different particulars.

§ 207.24 Discontinuance of proceedings.

In any discontinued action or proceeding, the attorney for the plaintiff or petitioner shall file a stipulation or statement of discontinuance with the clerk of the court within 20 days of such discontinuance. If the action or proceeding has been noticed for judicial activity within 20 days of such discontinuance, the stipulation or statement shall be filed before the date for such activity.

§ 207.25 Kinship matters.

(a) Accounting proceedings. In all kinship matters, whether the hearing be held by the court or referred to a referee, proof must be completed by the party who seeks to establish kinship in an accounting proceeding within one year from the date fixed for a hearing by the court or the date of referral, or the party's objections shall be dismissed and the monies deposited pursuant to CPLR 2601 for the benefit of unknown distributees.

(b) Administration or withdrawal proceedings. In all kinship matters, whether the hearing be held by the court or referred to a referee, proof must be completed by the party who seeks to establish kinship in an administration proceeding or withdrawal proceeding within six months from the date fixed for a hearing by the court or the date of referral or the petition shall be dismissed, without prejudice.

§ 207.26 Contested probate; notice of objections filed.

(a) Objections to probate of a will shall be filed and served with proof of service in conformity with SCPA 1410.

(b) Whenever objections are filed, the proponent shall promptly present a petition for and procure an order directing service of notice of objections filed when required by SCPA 1411. If the proponent fails to present such petition or, having presented it, fails to procure such order or to give the notice prescribed in such section within five days after the return date of the citation or when objections are filed, whichever is later, any other party may present such petition and order and cause such notice to be serviced pursuant thereto.

(c) Since the requirements of SCPA 1411 are jurisdictional, all further pretrial procedures or proceedings shall be stayed until there is compliance with this rule.

§ 207.27 Examinations before trial in contested probate proceedings.

In any contested probate proceeding in which objections to probate are made and the proponent or the objectant seeks an examination before trial, the items upon which the examination will be held shall be determined by the application of article 31 of CPLR. Except upon the showing of special circumstances, the examination will be confined to a three-year period prior to the date of the propounded instrument and two years thereafter, or to the date of decedent's death, whichever is the shorter period.

§ 207.28 Examination of attesting witnesses, accountants and adverse parties or witnesses.

(a) All examinations of attesting witnesses, accountants and adverse parties or witnesses should be conducted on reasonable notice to all attorneys, guardians ad litem and parties entitled under SCPA 302(3). Unless the court otherwise directs, all examinations pursuant to SCPA 1404, 2102, 2103, 2104 and 2211 shall be held at the court-house.

(b) Unless the court permits, such examinations shall not be conducted until jurisdiction has been obtained over all necessary parties to the proceeding and, where necessary, guardians ad litem have been appointed and qualified.

§ 207.29 Note of issue; pretrial conference.

(a) The court may establish such calendars of cases as it deems necessary or desirable for proper case management and may schedule calls of such calendars at such times and in such manner as it deems appropriate.

(b) The court may direct that a trial or hearing date shall not be fixed until after a party shall file in duplicate a note of issue with a certificate of readiness in a form prescribed by the court together with an affidavit of service of said note of issue and certificate of readiness upon all parties who have appeared. The note of issue filed shall contain a statement of the estimated trial time each party will require.

(c) A pretrial conference may be directed by the court, either before or after a trial date is fixed, at which the parties shall attend. At such conference, a schedule of dates for the completion of examinations, disclosure matters, bills of particulars and other pretrial matters may be directed. The court may direct parties to submit for inspection documents and exhibits, may require counsel to stipulate as to facts and issues, and may direct severance or consolidation of issues.

§ 207.30 Statement of issues.

(a) At least 10 days prior to the trial of the issues joined in any proceeding, except where an order framing issues has theretofore been made, the petitioner shall file with the court a statement, in writing, of the nature of such issues, the party who holds the affirmative as to each issue, and the objections, if any, which the petitioner concedes to be well taken or which may have been withdrawn.

(b) In accounting proceedings, an additional notation shall be included in the statement as to any modifications of the account to which the parties consent.

§ 207.31 Jury trials; order framing issues.

(a) No matter shall be assigned a date for trial by jury until an order framing issues and directing a trial by jury has been made pursuant to SCPA 502.

(b) Whenever a jury trial has been demanded, any party on five days' notice of settlement to the attorneys for all other parties who have appeared may present a proposed order framing the issues and directing such trial by jury. Such order shall state plainly and concisely the controverted questions of fact to be determined by the jury.

(c) In such order, the court may fix a date for trial or on which the matter will be placed on the calendar for assignment of trial date. Such order must be served on all parties who have appeared at least 15 days before date of trial or date of calendar call and proof of service filed at least 10 days before such date of trial or calendar call.

§ 207.32 Identification of trial counsel.

(a) Where the attorney of record for any party arranges for another attorney to conduct the trial, the trial counsel must be identified in writing to the court and all parties within 10 days after the filing of the notice of trial. The notice must be signed by both the attorney of record and the trial counsel.

(b) After trial counsel is designated as provided above, no substitution shall be permitted unless the substitute counsel is available to try the case on the day scheduled for trial. Written notice of such substitution shall be given promptly to the court and all parties.

§ 207.33 Engagement of counsel.

No adjournment shall be granted on the ground of engagement of counsel except in accordance with Part 125 of the Rules of the Chief Administrator (22 NYCRR Part 125).

§ 207.34 Exhibits.

(a) A party intending to offer an exhibit that can be readily duplicated or reproduced shall prepare extra copies for use at the trial. A party offering in evidence any paper in his or her possession shall submit a copy to opposing counsel for inspection.

(b) If a filed document is to form part of the evidence to be submitted at trial, such document or a certified copy shall be obtained or ordered from the clerk's office or other repository sufficiently in advance of trial to permit its production without delaying the trial.

(c) Whenever practicable, to avoid unnecessary delay during the trial, counsel shall hand exhibits for marking to the court reporter or other designated person prior to the opening statements or during a recess.

§ 207.35 Absence of attorney during trial.

All trial counsel shall remain in attendance at all stages of the trial until the jury retires to deliberate unless excused by the Surrogate. Any counsel not present during the jury deliberation, further requests to charge, or report of the jury verdict shall be deemed to stipulate that the court may proceed in his or her absence and to waive any irregularity in proceedings taken in his or her absence. The court may permit trial counsel to leave, provided that counsel remain in telephone contact with the court.

§ 207.36 Failure to file timely objections.

Whenever the time to file objections in a proceeding has expired, objections shall not be accepted for filing unless accompanied by a stipulation of all parties to extend the time or unless ordered by the court.

§ 207.37 Submission of orders, judgments and decrees for signature.

(a) Proposed orders or judgments, with proof of service on all parties where the order is directed to be settled or submitted on notice, must be submitted for signature, within 60 days after the signing and filing of the decision directing that the order be settled or submitted.

(b) Failure to submit the order or judgment timely shall be deemed an abandonment of the motion or proceeding unless for good cause shown.

(c) (1) When settlement of an order or judgment is directed by the court, a copy of the proposed order or judgment with notice of settlement, returnable at the office of the clerk of the part in which the order or judgment was granted, or before the judge if the court has so directed or if the clerk is unavailable, shall be served on all parties either:

(i) by personal service not less than five days before the day of settlement; or

(ii) by mail not less than 10 days before the date of settlement.

(2) Proposed counter-orders or judgments shall be made returnable on the same date and at the same place, and shall be served on all parties by personal service, not less than two days, or by mail, not less than seven days, before the date of settlement.

§ 207.38 Compromises.

(a) Upon any application for leave to compromise a claim for wrongful death or personal injuries, or both, the petition and the supporting affidavits shall set forth the time, place and manner in which the decedent sustained the injuries, and a complete statement of all such facts as would justify the granting of the application. If the cause of action did not arise under the laws of the State of New York, the laws of the jurisdiction under which said cause of action arose must be established to the satisfaction of the court.

(b) The petition also shall show the following:

(1) the age, residence, occupation and earnings of the decedent at time of death;

(2) the names, addresses, dates of birth and ages of all the persons entitled to take or share in the proceeds of the settlement or judgment, as provided by EPTL 5-4.4, or by the applicable law of the jurisdiction under which the claim arose, and a statement whether or not there are any children born out of wedlock;

(3) a complete statement of the nature and extent of the disability, other than infancy, of any person set forth in paragraph (2) of this subdivision;

(4) the gross amount of the proceeds of settlement, the amount to be paid as attorneys' fees, and the net amount to be received by petitioner as a result of the settlement;

(5) any obligations incurred for funeral expenses, or for hospital, medical or nursing services, the name and address of each such creditor, the respective amounts of the obligations so incurred, whether such obligations have been paid in full and/or the amount of the unpaid balance due on each of said claims as evidenced by proper bills filed with the clerk;

(6) whether any hospital notice of lien has been filed under section 189 of the Lien Law, and if so, the particulars relating thereto;

(7) on the basis of the applicable law, a tabulation showing the proposed distribution, including the names of the persons entitled to share in the proceeds and the percentage or fraction representing their respective shares, including a reference to the mortality table, if any, employed in the proceeding which resulted in the settlement or judgment, and the mortality table employed in the proposed distribution of the proceeds; and

(8) the cost of any annuities in compromises based upon structured settlements in wrongful death actions.

(c) Where the petition also makes application for the compromise of a claim for personal injuries sustained by the decedent, the petition shall set forth the amount allocated to each cause of action, the basis for such allocation, the effect of such allocation on decedent's estate tax liability, and proof of the citation of the New York State Department of Taxation and Finance, or their waiver thereof.

(d) A supporting affidavit by the attorney for petitioner must be filed with each petition for leave to compromise, showing:

(1) whether the attorney has become concerned in the application or its subject matter at the instance of the party with whom the compromise is proposed or at the instance of any representative of such party;

(2) whether the attorney's fee is to be paid by the administrator, and whether any payment has been or is to be made to the attorney by any other person or corporation interested in the subject matter of the compromise;

(3) if the attorney's compensation is to be paid by any other person, the name of such person;

(4) the services rendered by the attorney in detail; and

(5) the amount to be paid as compensation to the attorney, including an itemization of disbursements on the case, and whether the compensation was fixed by prior agreement or based on reasonable value, and if by agreement, the person with whom such agreement was made and the terms thereof.

(e) In an application for the compromise of a claim solely for personal injuries, the petition shall contain all the facts in relation to such claim and comply with as much of the provisions of this rule as are applicable, and in addition, the petition shall recite the date letters were issued, whether more than seven months have elapsed from such date, the names and post-office addresses of all creditors, or those claiming to be creditors, and the distributees of the decedent, specifying such as are infants or alleged incompetents.

(f) Whenever papers are filed for the compromise of a cause of action in which the original action alleged conscious pain and suffering and wrongful death, and the action is subsequently settled for wrongful death only, the waivers and consents of any adult distributees who will not share in the recovery must recite that they are aware that, by consenting that the entire settlement be considered as a settlement of the cause of action for wrongful death, they are waiving the right to receive any distributive share out of the settlement.

§ 207.39 Costs and allowances.

(a) On the settlement of a decree, any party who shall deem himself entitled to costs may present a bill of costs, provided that at least two days' notice of the taxation thereof has been served on all attorneys appearing in the proceeding. Each bill of costs must show the items of costs to which the party deems himself entitled and must contain an itemized list of any disbursements claims, duly verified both as to amount and necessity. The disbursements for referee's and stenographer's fees may be evidenced by affidavit or by such other proof as may be satisfactory to the court.

(b) An application for an allowance may also be made on two days' notice to all attorneys appearing in the proceeding. Such application shall be accompanied by an affidavit setting forth the number of days necessarily occupied in the hearing or trial; the time occupied on each day in the rendition of the services; and a detailed statement of the nature and extent of the services rendered, including services necessarily rendered or to be rendered in the drawing, entering or executing of the decree.

§ 207.40 Accountings.

(a) Whenever a petition for a voluntary accounting is presented, the account to which it relates must be filed therewith, if not previously filed, and a citation to settle such account must thereupon be procured and served upon the parties required to be cited.

(b) Unless otherwise directed by the court, upon an accounting by an executor, trustee, or administrator c.t.a., a copy of the will or trust instrument must be filed with the petition and account.

(c) Insofar as may be practical, all accounts shall conform with and contain such schedules and information as may be called for in such forms as may from time to time be provided by the Chief Administrator of the Courts or, in the absence thereof, by the court. In the account of a trustee of a common trust fund for a period that begins at the close of the prior intermediate account:

(1) the statements of increases and decreases shall also show gains and losses realized on disposition of assets based upon the fair market values at the beginning of the account of assets held at the beginning of the account and the inventory value of all other assets; and

(2) the statement of assets on hand at the close of the account shall also show that increase of decrease in the fair market value of the assets at the close of the account in relation to the fair market values at the beginning of the account of those assets which were held at the beginning of the account and in relation to the inventory values of the remainder of said assets.

(d) The schedule showing the computation of commissions shall also state in explicit terms whether any personal property listed as an asset of the estate was, at the date of the decedent's death, pledged as collateral to any unpaid obligation of the decedent and, if so, shall set forth:

(1) a description of the property so pledged and the value thereof as listed in the account;

(2) the amount due at the date of death on the obligation for which it was pledged;

(3) the equity in such property at the date of death;

(4) whether the accounting party has included in the claim for commissions any commissions upon the value of the property so pledged and, if so, a statement of the capital value upon which such commissions are claimed with respect to such property.

(e) Unless service is by publication or unless otherwise directed by the court, a copy of the summary statement of account shall be attached to all citations served, and the affidavits of service of citation shall recite the service of a copy of the summary statement of account. Counsel for the accounting party or the accounting party, if not represented by counsel, shall furnish a copy of the full account to all persons cited in the accounting proceeding who request the full account. Failure to furnish such a copy may constitute grounds for disallowance of commissions or legal fees.

(f) Unless otherwise directed by the court, all waivers of citation and consents in accounting proceedings filed with the court shall recite in the body of the waiver that a copy of the summary statement of account was received and shall state that the person waiving understands that he or she may request a copy of the full account from the petitioner or petitioner's attorney.

(g) The cost of producing and delivering a full accounting to persons interested in the estate shall be deemed a proper disbursement and allowed as an expense of administration.

§ 207.41 Contested accountings.

On any accounting by an executor, administrator, temporary administrator, guardian or trustee, any creditor or any other party interested may file objections thereto in writing within such time as shall be allowed by the Surrogate. Such objections must be served upon the accounting party or the accounting party's attorney before the filing thereof in the court. A guardian ad litem appointed in an accounting proceeding shall file a report or objections within 20 days after the appointment unless for cause shown the time to file such report or objections is extended by the Surrogate

§ 207.42 Report of estates not fully distributed.

(a) Whenever the estate of a decedent has not been fully distributed or a final accounting filed with petition for settlement within two years from the date when the first permanent letters of administration or letters testamentary were issued where the gross taxable estate of such decedent does not require the filing of a Federal estate tax return, and within three years if a Federal estate tax return is required, the executor or administrator shall, at or before the end of the first complete month following the expiration of such time, file with the clerk of the court a statement in substantially the following form:

..... COUNTY

Estate of, Deceased

File No.

Date of issuance of first permanent letters

Approximate amount of gross estate

Approximate amount that has been distributed to beneficiaries

Approximate amount remaining in fiduciary's hands at present

This estate has not yet been fully distributed for the following reason: (state briefly)

Date of this report

Fiduciary

Address:

Phone:

Attorney for above Fiduciary

Address:

Phone:

(b) The court shall thereupon take such steps as it deems appropriate to expedite the completion of the administration of the estate and the distribution of all assets.

(c) Failure to file such statement will be considered by the court on any application for commissions or legal fees, and may constitute a ground for disallowance of commissions or fees.

(d) The periods set forth in subdivision (a) of this section are not intended to set a standard time for completion of estate administration, but rather to fix a period after which inquiry may be made by the court.

(e) This section shall not limit the power of the court to direct an accounting at any time on its own initiative or on petition pursuant to SCPA 2205.

§ 207.43 Filing estate tax return.

(a) For all persons who die on or after May 26, 1990, for whom an estate tax return is required to be filed pursuant to section 971 of the Tax Law, if a petition for probate or administration was filed with the Surrogate's Court, the person required to file the tax return shall file a copy of the tax return with such Surrogate's Court, pursuant to section 972(c) of the Tax Law, within 10 days of filing the original tax return with the Commissioner of Taxation and Finance.

(b) Failure to file a copy of the estate tax return pursuant to this section together with the filing fee required by SCPA 2402(3) shall authorize the court to compel an accounting pursuant to SCPA 2205 and may constitute grounds for revocation of letters, imposition of a surcharge or disallowance of commissions or legal fees.

§ 207.44 Payment of estate tax.

(a) No decree of final settlement of an executor's or administrator's account or of the discharge of an executor or administrator shall be signed unless the petition is accompanied or preceded by a copy of the letter from the Estate and Gift Tax Section of the New York Department of Taxation and Finance captioned "New York Estate Tax Discharge from Liability" showing that no final estate tax is due or that the final estate tax plus interest and penalties, if any, have been paid.

(b) Nothing herein shall preclude the discharge of an executor or an administrator who has complied with the requirements of section 1804(3) of the Surrogate's Court Procedure Act where a tax has been fixed but not paid because of insufficient funds in the estate, or the representative seeks a discharge before the estate has been administered, or where no return has been filed, or for other sufficient cause.

§ 207.45 Attorney's fees; fixation of compensation.

(a) In any proceeding in which the relief requested includes the determination of compensation of an attorney or the allowance of expenses of counsel, there shall be filed with the petition an affidavit of services which shall state when and by whom the attorney was retained; the terms of the retainer; the amount of compensation requested; whether the client has been consulted as to the fee requested; whether the client consents to the same or, if not, the extent of disagreement or nature of any controversy concerning the same; the period during which the services were rendered; the services rendered, in detail; the time spent; and the method or basis by which the requested compensation was determined. The affidavit also shall state whether the fee includes all services rendered and to be rendered up to and including settlement of the decree and distribution, if any, thereunder and whether the attorney waives a formal hearing as to compensation.

(b) Except when the SCPA otherwise provides or when compelling reasons exist for so doing, the court shall not fix attorneys compensation or make allowances to parties for counsel expenses unless a proceeding is instituted under SCPA 2110 or unless, in an accounting, the petition and citation state that an application will be made for the determination of compensation, the allowance of counsel expenses and the amount thereof.

§ 207.46 Small estate proceedings.

In all proceedings for settlement of small estates without court administration (SCPA Article 13), if additional certificates of voluntary administration are requested, other than updated or replacement certificates for the same asset or assets as the original certificate, such request shall be accompanied by an affidavit from either the voluntary administrator or the attorney of record setting forth the reasons additional certificates are required.

§ 207.47 Recording assignments of interest in estates.

(a) No assignment of any right, share or interest in an estate of a decedent shall be filed or recorded unless accompanied by an affidavit in a form satisfactory to the court, which shall state whether any power of attorney or separate agreement exists which relates to such assignment or which fixes presently or prospectively the amount payable by or to the assignor.

(b) A copy of such separate agreement shall be annexed to the affidavit, if such separate agreement be in writing, and a statement of the substance thereof shall be incorporated in the affidavit if such separate agreement be oral. No assignment accompanied by a power of attorney shall be recorded unless such power of attorney be recorded.

§ 207.48 Filing and recording of powers of attorney.

(a) No power of attorney affecting any interest in a decedent's estate shall be filed or recorded pursuant to EPTL 13-2.3 unless

(1) the instrument is satisfactory to the court as to form, content and manner of execution and

(2) the person offering the instrument for filing or recording shall furnish an affidavit of the attorney-in-fact, stating: the circumstances under which the power of attorney was procured; the post-office address of the grantor, the amount of his or her interest and relationship, if any, to the decedent; the financial arrangement and exact terms of compensation of the attorney-in-fact or of any other person concerned with the matter; disbursements to be charged to the grantor; a copy of any agreement concerning compensation; and the name of any attorney representing the attorney-in-fact.

(b) An attorney-in-fact in a proceeding for the determination of kinship shall not accept any payment for acting pursuant to a power of attorney unless there has been filed with the court all the terms of the agreed-upon compensation or the same has been fixed by the court in a proceeding pursuant to SCPA 2112.

§ 207.49 Applications for appointment of successor custodians under EPTL 7-4.7.

- (a) A petition for the appointment of a successor custodian under EPTL 7-4.7 shall show:
- (1) the relationship between the petitioner and the minor;
 - (2) the age of the minor;
 - (3) the facts concerning the original gift;
 - (4) whether the donor was the original custodian and, if not, whether he or she joins in the application;
 - (5) the adult members of the minor's family;
 - (6) whether there is a general or testamentary guardian of the minor and, if so, whether he or she joins in the application;
 - (7) what was the relationship between the custodian and the petitioner if the donor was the custodian and is now deceased;
 - (8) if the donor custodian and petitioner were husband and wife, whether they were living together and whether the infant resided with them;
 - (9) with whom the minor is now living; and
 - (10) the monies and securities to be delivered to the successor custodian and the value of such securities.
- (b) If the donor was a relative of the minor and has died leaving a will, a copy of the will should be submitted.
- (c) Additional facts and affidavits shall be submitted as will permit the court to determine from the papers, in the absence of a contest, that the best interests of the minor will be served by the appointment of the petitioner as successor custodian, rather than by the appointment of some other eligible person.
- (d) Unless otherwise ordered by the court, and unless such person or persons have joined in the application, notice of the application shall be served upon
- (i) such persons as are required to be served in a proceeding for the appointment of a guardian,
 - (ii) the donor, if he or she is alive, and the guardian, if there is one of the minor.

§ 207.50 [Reserved]

§ 207.51 Appearance of a guardian, committee or conservator; affidavit required of attorney.

If the affidavit required by SCPA 402 shows that the guardian, committee or conservator is entitled to share in the distribution of the estate or fund in which the infant, incompetent or conservatee is interested or that the guardian, committee or conservator is in any way interested in the estate or fund, such affidavit must state fully the nature of his or her interest. Whenever a guardian, committee or conservator appears by an attorney, the latter shall accompany his or her notice of appearance with an affidavit showing the circumstances which led to his or her employment and whether his or her employment was suggested or accelerated either directly or indirectly by the proponent or accounting party or by the attorney for either of them or by any other person whose interest in the proceeding is adverse to that of the infant, incompetent or conservatee, and showing further that the attorney is free of any restraint, whether professional, personal or otherwise, in his or her complete independence of action on behalf of his or her client or ward.

§ 207.52 Accounting of an attorney-fiduciary.

- (a) Within 12 months from the issuance of letters, or 24 months if the estate must file a Federal estate tax return, if a sole executor or administrator administering an estate is also an attorney admitted in this State, and he or she or the law firm with which the attorney is affiliated is acting as counsel for the estate, the attorney-fiduciary shall file an affidavit setting forth: (1) the total commissions paid or to be paid to him or her; and (2) the total attorney's fees paid or to be paid (by court order, if required) to him or her or to the law firm with which he or she is affiliated, for services rendered to the estate.
- (b) The court may extend the time for filing the affidavit upon good cause shown to the court in writing.
- (c) The court in its discretion may require additional information or documentation from the attorney-fiduciary, including an affidavit of legal services, a cash flow statement and a full accounting pursuant to SCPA 2205.

(d) In the event the affidavit is not so filed, the court may suspend the letters until the affidavit has been filed. Failure to file the affidavit may constitute grounds for disallowance of commissions or legal fees.

(e) Except as otherwise provided by SCPA 2111(1) and (2), or SCPA 2310 or 2311, an attorney-fiduciary as defined in subdivision (a) of this section (or the law firm with which he or she is affiliated) shall not take advances for legal services rendered to the estate, or commissions on account of compensation, until 30 days after filing the affidavit required by subdivision (a).

(f) The provisions of this section also shall apply to each co-fiduciary administering an estate who is an attorney admitted in this State if: (1) he or she or the law firm with which the attorney is affiliated is acting as counsel for the estate; and (2) there is no other co-fiduciary who is not an attorney.

§ 207.53 [Reserved]

Note: the remaining rules relate to adoptions, and are not included in this document.