"SURROGATE'S COURT PRACTICE"

For Presentation By
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At UB Law School Alumni Association's GOLD Group CLE Program
"Ethical Considerations Associated With
Non-Traditional Representation"
February 8, 2018

I. What is Surrogate's Court and how is it unique among other civil courts in New York State?

Surrogate's Court handles all matters relating to wills, trusts, estates and property of deceased persons. It also shares authority with the Family Court to hear certain adoption proceedings. Lastly, it appoints guardians for the person and/or property of infants and intellectually/developmentally disabled individuals, and in certain instances maintains joint control of that property.

Some common proceedings handled in Surrogate's Court include:

A. Probate: The process by which a Will is established to the satisfaction of the Surrogate to be the valid Last Will and Testament of the decedent.

B. Administration: A procedure for collecting and distributing assets of a person who died without a Will.

C. Voluntary Administration: A simple and inexpensive method of administering an estate of a deceased person where personal assets in the decedent's name alone do not exceed $30,000. If the decedent owned real property, a full administration (or probate) proceeding would be needed to deal with it.

D. Miscellaneous Proceedings: These encompass a variety of proceedings in estate and trust litigation, including compelling a fiduciary to account, removal of a fiduciary, construction of a Will or trust, turnover of property belonging to the estate, and the like.

E. Guardianship: A procedure for the appointment of a guardian of the person or property of an infant or intellectually/developmentally disabled adult.

F. Adoption: A procedure which establishes the legal relationship of parent and child between two or more individuals.

II. The roles of attorneys in Surrogate's Court.

A. Probate
B. Administration
C. Accountings
D. Miscellaneous
E. Guardianships
F. Adoptions

III. Ethical Issues Facing Surrogate's Court Practitioners.

Conflicts of interest and ethical issues can easily arise in Surrogate's Court practice. Trusts and estates lawyers are often – albeit erroneously – perceived as the lawyer for "the family" or "the estate." It is not uncommon for trusts and estates lawyers to represent the fiduciary of a deceased client's estate, and, also, either formally or informally, to advise the spouse and other members of the decedent's family concerning their interests in the decedent's estate. That the potential for conflicts of interest to arise in such multiple representations is hardly surprising.

The New York Rules of Professional Conduct prohibit multiple representations where a conflict arises unless the lawyer can adequately represent each of the clients and each client consents after full disclosure of the implications, advantages and risks. Because an attorney may be asked to represent any number of parties, including an estate or trust fiduciary, a beneficiary under an instrument, a distributee, a creditor, an objectant or any other individual or entity claiming an interest in an estate, it is crucial for an attorney to understand who the client is and the potential conflicts that may rise in connection with the purposed representation.

A. Representing Fiduciaries

i. The Myth of the "Attorney for the Estate"

Well-established New York law makes clear that an attorney retained by an estate fiduciary for the performance of estate duties is the attorney for the fiduciary, **not for the estate**. *In re Schrauth's Will*, 249 AD 847 [1937]; *Matter of Scanlon*, 2 Misc 2d 65, 69 [1956]; *Matter of Hof*, 102 AD2d 591, 593 [1984]; CPLR 4503 (a)(2). Courts have long held that an attorney retained by an executor is not the attorney for the estate. *Matter of Gold*, NYLJ, Feb. 15, 2002, at 9, col 1 [2014].

Attorneys often casually say they represent an estate, but they actually represent the estate's fiduciary(ies). *See Matter of Schrauth*, *supra*, at 69. An estate is incapable of retaining any attorney in its own right: "[o]nly persons, natural or legal, can retain an attorney. An estate is a res. An estate cannot enter into retainer contract with counsel. A lawyer cannot communicate with an estate" (Ordover and Gibbs, Fiduciary's Attorneys and Duty to Beneficiaries, NYLJ, February 25, 1999, at 3, col 1).

In *Matter of Harris*, 21 Misc 3d 239, 241-242 [2008], Surrogate Holzman noted that: "Estates, unlike corporations or other recognized legal entities, may not litigate in their own name but, instead, can only appear in litigation by a personal representative (*see* EPTL 11-3.1; *see also* CPLR 1015 [a]). Consequently, when attorneys state they are appearing on behalf of an estate, such a statement is technically incorrect because the attorney is representing the personal representative of the estate, and not the estate itself or the beneficiaries of the estate".

This distinction is crucial, and if a practitioner fails to recognize this nuance, he or she may wind up in a difficult situation:

- *Matter of Schrauth*, 249 AD 847 [1937]: Attorney represented co-executors of an estate. The decedent's widow, one of the co-executors, retained separate counsel to assert her right of election. The widow's application was opposed by the attorney who previously represented her on the grounds that he represented "the estate." The Appellate Division held at the outset that the attorney "was retained as attorney for the executors, and not as attorney for the estate." Thus, "[i]t would have been better if he had remained neutral and permitted some other attorney to represent the sons and daughters."

- *Matter of Hof*, 102 AD2d 591, 593 [1984]: Petitioner, an administrator of an estate, moved to disqualify the attorney for her co-administrator on the grounds of a conflict of interest. The attorney had previously represented both co-administrators, but was dismissed by petitioner when he allegedly participated in the prosecution of a compulsory accounting proceeding seeking to surcharge her. The trial court denied the motion, but the Appellate Division, Second Department, reversed, holding that since there was an allegation that petitioner breached her fiduciary duties, the attorney's prior representation "may well have been the source of information substantiating the claimed breach."

- *Matter of Harris*, 21 Misc 3d 239 [2008]: Petitioner, a residuary legatee, brought a proceeding to revoke the letters testamentary issued to the executor. The executor then made a motion to disqualify the legatee's attorney on the ground that the attorney's representation of the legatee violated the attorney's fiduciary duties to the executor because the attorney previously represented the executor in his capacity as executor of the estate. The attorney opposed the motion, arguing that he (the attorney) represented the estate, not the executor, and that no attorney-client relationship had formed between the attorney and the executor. The court disagreed and granted the motion to disqualify. Because an estate could not litigate in its own name but had to appear by a personal representative under EPTL 11-3.1 and CPLR § 1015(a), the attorney represented **the executor and <u>not the estate</u>**. Because the interests of the executor and the legatee were materially adverse, the attorney, having previously represented the executor, could not represent the legatee because a conflict of interest existed.

- *Matter of Mary Harris*, NYLJ, Nov. 17, 2010, at 26, col 3: Noting that, in connection with an attorney fee application, the fee should be reduced because the attorney "spent more time than necessary on some issues because he failed to recognize that he represented the executor of the estate, not the estate itself or the beneficiaries of the estate."

ii. Co-Fiduciaries

Generally, there is no prohibition against an attorney representing multiple fiduciaries. The fiduciaries owe a common duty to the estate and are typically jointly and severally liable to the estate beneficiaries. Unless divergent interests arise, multiple fiduciaries may be jointly represented by the same attorney.

There are numerous considerations for an attorney who may be retained by co-fiduciaries:

a. Legal Fees

While co-executors have the right to engage separate counsel, courts have found that the "practice of retaining separate counsel tends to lead to duplication of legal services and excessive fees" (*In re Estate of Mergentime*, 155 Misc 2d 502, 507 [1992]). As such, courts have limited fees to an amount that might be awarded to a single attorney representing both executors (*id*; *see also Matter of Shirk*, NYLJ, Aug. 26, 1991 at 26, col 3 [where "multiple fiduciaries are represented by different attorneys, the aggregate fee should not exceed the amount paid to a single attorney representing a sole fiduciary"]). Thus, in the absence of a conflict, efficiency and economy may justify one attorney representing multiple fiduciaries.

b. Multiple Fiduciaries

An attorney who has represented multiple fiduciaries cannot subsequently represent one (or some) of them in a proceeding against the others involving the same estate (*Matter of Druckman*, NYLJ, January 28, 2000, at 28, col 6).

- *Matter of Poll*, NYLJ, June 29, 1998, at 33, col 6: Co-executors Christine and Anita were represented by the same law firm for over a decade. The positions of the co-fiduciaries became divergent with respect to whether to proceed with an appeal. The Appellate Division directed, and the fiduciaries ultimately moved for, orders to appoint a neutral co-executor for purposes of breaking the impasse. Christine also moved to have the law firm disqualified from representing Anita on the ground that the firm previously represented Christine and that she had shared many confidences. The law firm attempted to avoid disqualification, arguing that no confidences had been shared with Christine. The court found this argument incredible and rejected it outright.

c. Representing Both a Fiduciary and Beneficiary

Generally, there is no prohibition against an attorney representing both a fiduciary and a beneficiary. Despite the absence of a strict prohibition, Rule 1.7 (a) of the New York Professional Rules of Conduct cautions that "a lawyer shall not represent a client if a reasonable lawyer would conclude that the representation will involve the lawyer in representing different interests." There are numerous potential conflicts which may arise between fiduciaries and beneficiaries – asset allocation, distributions, accountings, investment strategy, and the like – that would make dual representation impossible.

- *Matter of Milford E. Abel*, NYLJ, Oct. 23, 1992, at 37, col 5: Court disqualified law firm, despite full disclosure and written consents, on ground of conflict of interest. The court found that the law firm's representation of the trustee and decedent's spouse – who filed objections to the accounting – was a conflict. The court also refused to award the firm attorney's fees on the ground that the law firm should have been aware of the conflict prior to accepting the representation. "Since the firm should have been aware of the situation prior to accepting a retainer, no fee can be awarded."

- *Matter of Mary Harris*, NYLJ, Nov. 17, 2010, at 26, col 3: An executor discharged his attorney because he no longer wanted to follow the attorney's advice. Attorney was subsequently retained to represent one of the estate distributees, who then sought to remove the executor. The executor successfully moved to disqualify the attorney from representing the distributee because the attorney had placed himself in a direct conflict with the executor, his former client. The court further found that, as a result of the conflict, all legal fees incurred in connection with the executor's motion to disqualify the attorney were to be deducted from the reasonable compensation payable to the attorney from the executor. With respect to the attorney's application for fees from the distributee, the court refused to make an award of fees, holding that the disqualification of the attorney as the attorney for the distributee was "tantamount to a discharge for cause" because of the contravention of the duty of loyalty to his former client. Because "the serious misconduct and conflict of interest relate to the representation at issue" the attorney forfeited his right to seek a legal fee from the distributee.

- *Matter of Bruccoleri*, NYLJ, Aug. 9, 2013, at 32. Attorney was retained by executor and executor's sister, a beneficiary under decedent's Will, with respect to issues relating to the preparation of decedent's tax returns during decedent's lifetime. Several months later, the beneficiary discharged the attorney and retained separate counsel. The beneficiary then moved to disqualify the attorney, asserting that she had a prior attorney-client relationship in connection with a matter substantially related to issues in dispute in the estate accounting proceeding. The beneficiary argued that the attorney was using information gained during

that representation to implicate her, his former client, in the purported mishandling of the decedent's funds and improprieties in connection with filing decedent's taxes. The court not only disqualified the attorney from representing the executor, but held that the attorney "should have terminated his representation of both [the beneficiary] and the executor upon his determination that the interests of his clients were materially adverse."

- *Matter of O'Brien*, NYLJ, Jan. 15, 2014, at 26, col 5: A motion to disqualify was granted on the grounds that the law firm could not represent both the trustee of the trust and a lifetime beneficiary of the trust. An apparent conflict exists because "an attorney cannot adequately represent a lifetime beneficiary whose needs may require depletion of the Trust, as well as a Trustee who has an obligation to preserve assets for the remaindermen."

Word of caution: a motion to disqualify based on a conflict of interest must be made promptly. *See Matter of Peters*, 124 AD3d 1266 [2015]. In *Matter of Peters*, objectant demonstrated that she had a prior attorney-client relationship with petitioner's attorney, that the issues in the estate litigation were substantially related to other legal proceedings involving the parties, *i.e.*, involving ownership of the same parcel of property, and that her interests were adverse to those of petitioner. Despite this showing, the Appellate Division refused to disqualify counsel for the petitioner on the ground that objectant had waived any objection to the conflict. Objectant had been aware of the facts underlying the conflict for more than one year before the motion to disqualify was made. In light of the complexity of the litigation, the hardship to petitioner and the estate if the motion to disqualify was granted and the one year delay, the Appellate Division, Fourth Department, held that the motion was made as an "offensive tactic" and denied the relief sought.

d. Self-Dealing and Fiduciary Misconduct.

An attorney faced with misconduct or wrongdoing by a fiduciary-client is bound by the requirements of Rules 1.2(d), 3.3(b), 3.4(a) and 4.1 of the New York Rules of Professional Conduct. Rule 1.2(d) states in relevant part that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent… ." Rule 3.4 states in part that a lawyer shall not "suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce" or "conceal or knowingly fail to disclose that which the lawyer is required by law to reveal… ." Rule 4.1 prohibits a lawyer from "knowingly mak[ing] a false statement of fact or law to a third person."

With respect to fiduciary self-dealing or other fraudulent conduct, Rule 3.3(b) is particularly relevant. Rule 3.3 states that "[a] lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." The duty to disclose criminal or fraudulent conduct to a tribunal "apply even if compliance requires disclosure of information otherwise protected by Rule 1.6" (*see* Rule 3.3[c]).

When does a lawyer have an obligation to disclose misconduct under Rule 3.3(b)? Two factors must be present:

- The lawyer must **have knowledge** that the client-fiduciary is engaging in criminal or fraudulent conduct.
    - whether the lawyer "knows" that the client has engaged or is engaging in criminal or fraudulent conduct relating to the proceeding is a crucial fact.
    - Rule 1.0(k) provides that "knows" means "actual knowledge of the fact in question."
    - Mere suspicion is not enough to constitute knowledge (*see*, NYSBA Prof. Ethics Comm. OP. #635 [1992] and NYSBA Prof. Ethics Comm. OP. #480 [1978]). The lawyer must possess a sufficient degree of knowledge of ostensibly wrongful conduct (*see*, NYSBA Prof. Ethics Comm. OP. #1102, n. 1 [2017]).
- The matter must constitute "representation before a tribunal."
    - A probate matter constitutes representation "before a tribunal" (*see*, NYSBA Prof. Ethics Comm. OP. #1034 [2014]).
    - Preparation of an accounting containing false representations is "related to the proceeding" within the meaning of Rule 3.3(b) (*id*.).

Under the language of Rule 3.3(b), disclosure of the wrongdoing to the tribunal is required only "if necessary." Counsel first must take "reasonable remedial measures" before resorting to disclosure to avoid a breach of the lawyer's obligation under Rule 1.6. Because counsel's knowledge constitutes confidential information under Rule 1.6, and does not fall within any of the exceptions contained in Rule 1.6(b), if disclosure is not "necessary" under Rule 3.3, it would also not be permitted under Rule 1.6. Therefore, if there are any reasonable remedial measures short of disclosure, that course must be taken (*see*, NYSBA Prof. Ethics Comm. OP. #837 [2010]). The duty of confidentiality does not stand in the way of disclosure because Rule 1.6(b)(6) permits disclosure "when permitted or required under these Rules," and Rule 3.3(c) says that the duties stated in Rule 3.3(b) "apply even if compliance requires disclosure of information otherwise protected by Rule 1.6."

Examples of Remedial Measures

- Persuade the fiduciary not to engage in fraudulent or criminal conduct.
    - With respect to remedial measures, the Commentary to Rule 3.3(b) states "[t]he advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the

tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence."

- Only applicable if the conduct is anticipated to occur, not already committed.

- Demand the fiduciary correct the wrongdoing.

- If wrongful conduct cannot be prevented or corrected, then disclosure to the tribunal is likely the only other available remedial measure.

- Motion to Withdraw

  - May be necessary to avoid a violation of Rule 1.2(d), which prohibits a lawyer from assisting a client in conduct the lawyers knows is illegal or fraudulent.

  - Withdrawal may not be sufficient as a remedial measure because it may not prevent or correct the wrongdoing.

  - A reasonable belief that the client is engaging or has engaged in criminal or fraudulent conduct constitutes grounds for withdrawal from representation. If withdrawing when Rule 3.3(b) does not apply, the lawyer must preserve the confidences of the client unless an exception to confidentiality in Rule 1.6(b) applies (*see,* NYSBA Prof. Ethics Comm. OP. #1034 [2014].

B. Representation of Former Clients.

Rule 1.9 (b) of the Rules of Professional Conduct states that "a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client." This rule reflects the well-established principle that "[a]ttorneys owe a continuing duty to former clients not to reveal confidences learned in the course of their professional relationship. It is this duty that provides the foundation for the well-established rule that a lawyer may not represent a client in a matter and thereafter represent another client with interests materially adverse to interests of the former client in the same or a substantially related matter" (*Kassis v. Teacher's Ins. & Annuity Assn.*, 93 NY2d 611, 615 [1999]).

Relevant Case Law:

- *Matter of Gold*, NYLJ, Feb. 15, 2002, at 9, col 1: Respondent, the decedent's wife, moved to disqualify law firm representing the executor on the ground that the law firm had represented decedent and respondent jointly as husband and wife. The court found no attorney-client

relationship between respondent and the law firm where the law firm did not consult with the wife to provide legal advice. Even if the law firm prepared tax returns for the husband and wife, this was insufficient to create an attorney-client relationship.

- *Matter of Strasser*, 129 AD3d 457 [2015]: Appellate Division affirmed disqualification of an attorney in an MHL article 81 guardianship proceeding. The attorney had been appointed as counsel for the AIP in the guardianship proceeding. After completion of his representation of the AIP, the co-guardians of the AIP retained the attorney to represent them in a proceeding against the AIP's property guardian. The Appellate Division found that the interests of the AIP and the co-guardians were substantially related to this proceeding and were materially adverse. Further, the court held that joint representation of the co-guardians was improper. Although an actual conflict had not yet arisen between the co-guardians, the "potential conflict of interest due to the co-guardians' mutual financial dependence on [the AIP], their related competing financial interests under the terms of a certain trust, and their status as beneficiaries under [the AIP's will" would give the appearance that the attorney was representing conflicting interests (at 458-459).

C. Attorney as Beneficiary.

Rule 1.8 (c) of the New York Rules of Professional Conduct states that:

> A lawyer shall not:
>
> (1) Solicit any gift from a client, including a testamentary gift, for the benefit of the lawyer or a person related to the lawyer; or
>
> (2) Prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any gift, unless the lawyer or other recipient of the gift is related to the client and a reasonable lawyer would conclude that the transaction is fair and reasonable.
>
> For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative, or individual with whom the lawyer maintains a close, familial relationship.

If a lawyer accepts a gift from the client, the lawyer is peculiarly susceptible to the charge that he or she unduly influenced or overreached the client. If a client voluntarily offers to make a gift to the lawyer, the lawyer may accept the gift, but before doing so should urge that the client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which the client desires to name the lawyer beneficially be prepared by another lawyer selected by the client. A lawyer may <u>never</u> suggest that a gift be made to the lawyer or for the lawyer's benefit.

Relevant Case Law:

- *Matter of Putnam*, 257 NY 140 [1931]: This seminal case embodies the long-standing rule. "Attorneys for clients who intend to leave them or their families a bequest would do well to have the will drawn by some other lawyer. Any suspicion which may arise of improper influence used under the cover of the confidential relationship may thus be avoided. The law, recognizing the delicacy of the situation, requires the lawyer who drafts himself a bequest to explain the circumstances and to show in the first instance that the gift was freely and willingly made" (*id*. at 143).

- *Matter of Delorey*, 141 AD2d 540 [1988]: Attorney drafted Will which named him the sole legatee and excluded nieces, nephews and other family members. The attorney had a long-standing relationship and friendship with decedent, but he failed to advise her to have the Will prepared by a disinterested attorney. Probate of the Will was denied because the testimony of the attorney was insufficient to overcome the inference of undue influence.

- *Matter of Henderson*, 80 NY2d 388 [1992]: Decedent asked her long-time attorney and financial adviser to prepare a Will designating himself and his family as major beneficiaries. Understanding the scrutiny such a Will would be subject to, the attorney directed the client to retain another attorney to prepare the Will. The independent attorney briefly met with the client, but did not seriously inquire as to the reasons for the large bequest to the attorney and his family and to virtually disinherit her sister. The independent attorney also prepared the Will based primarily on a memorandum drafted by the beneficiary-attorney outlining decedent's assets and testamentary wishes, namely the bequests to the beneficiary attorney and his family members. The Court of Appeals held that, under the circumstances, "it could be inferred that [decedent] did not receive the benefit of counselling by an independent attorney and that her Will was essentially the indirect product of her discussions and relationship with [the beneficiary-attorney]" (*id*., at 394).

- *Matter of Flynn*, NYLJ, Sep. 10, 2004, at 24, col 6: Decedent's son was the attorney-draftsman of her Will and a beneficiary. The court found that no inference of undue influence having been exercised upon the decedent could be drawn because the son was a natural object of decedent's bounty, the bequest to the attorney-draftsman was one of several similar legacies to other children of the decedent, the declarations of the witnesses to the

execution of the offered instrument, and the fact that no other interested party had objected to the bequest.

- *Matter of Carter*, 31 Misc 3d 1236(A) [2011]: Will denied admission to probate where it was drafted by an attorney who was the primary beneficiary of the decedent's estate, was unrelated to decedent and was the driving force behind the execution of the Will.

- *Matter of Frey-Woulters*, NYLJ, May 23, 2016, at 19, col 1: Surrogate *sua sponte* ordered an evidentiary hearing regarding whether legacy in the amount of $250,000 to drafting attorney – who was also named executor – was the product of undue influence.

D. Attorney as a Fiduciary.

It is not uncommon for an attorney who drafted an instrument for a decedent to be named as the fiduciary. The New York Rules of Professional Conduct do not prohibit an attorney from being named as executor or trustee. Rule 1.8(c) provides guidance in such circumstances. It states that:

> A lawyer shall not:
>
> (3) Solicit any gift from a client, including a testamentary gift, for the benefit of the lawyer or a person related to the lawyer; or
> (4) Prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any gift, unless the lawyer or other recipient of the gift is related to the client and a reasonable lawyer would conclude that the transaction is fair and reasonable.
>
> For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative, or individual with whom the lawyer maintains a close, familial relationship.

The commentary to Rule 1.8(c) provides that, to obtain a client's consent for an attorney to act as fiduciary, the lawyer must inform his or her client of the nature and extent of the lawyer's financial interest in the appointment and the availability of alternative candidates.

In addition to the requirements of the Rules of Professional Conduct, the New York State Legislature enacted Section 2307-a of the Surrogate's Court Procedure Act to ensure that attorneys disclose to their clients the attorney's potential right to legal fees and executor commissions. SCPA 2307-a requires an attorney-drafter to make written disclosures to a client who designates the attorney, or an affiliated attorney, to serve as executor. The statute was enacted in 1995 and applies to all Wills executed after January 1, 1996. It was subsequently amended in 2004 and 2007. SCPA 2307-a is intended to address perceived misconduct by any attorney who seeks to be named (or have an associate named) as executor for financial advantage (*see*, NYS Assembly Memorandum in Support of Legislation [S.3195; A.5491]).

SCPA 2307-a applies to:

- All Wills executed after January 1, 1996.

- Estates of all decedents who die after December 31, 1996, regardless of the date the Will was drafted.

- Attorneys named as executors in documents that they, or anyone affiliated with them, have prepared.

Under SCPA 2307-a, an attorney who prepares a Will in which he or she is nominated as executor to:

- Prepare a disclosure statement – signed by the testator and one witness – that is generally executed with the will.

- The disclosure statement must "substantially conform" to the language contained in SCPA 2307-a [3][a] and [b] (SCPA 2307-a [4][a]).

    - The statute was amended in 2004 and 2007, so it is <u>crucial</u> that the correct language is used.

- If the disclosure statement does not "substantially conform" to the language in the relevant statute, then the executor will be limited to ½ of commissions.

- The disclosure statement must be filed with the probate petition.

<u>Relevant Case Law</u>

- *Matter of Daly*, NYLJ, Dec. 14, 2001, at 21, col 1: Attorney-executor drafted a Will in 1986 and decedent died in 2001. The attorney failed to obtain a SCPA 2307-a disclosure and argued that the court should waive the requirement for "good cause," namely that it would impose an undue burden on the attorney to go back to check all his files to determine in which Wills he had been named executor and secure the required disclosure. The court declined to waive the requirement, noting that if the Legislature wanted to exclude all Wills before a certain date it could have done so.

- *Matter of Tackley*, 13 Misc 3d 818 [2006]: The issue before the court was whether a written acknowledgement signed by the decedent that certain disclosures were made to him must include language added to SCPA 2307-a pursuant to the 2004 amendment. The court held that the legislature, in drafting 2307-a(4), requires the disclosure to "substantially conform" to the model disclosure language. While a minor clerical error or stylistic variance may be acceptable, omission of any substantive aspect of the model language – here, disclosure that, absent execution

of an acknowledgment, the attorney serving as executor was entitled to one-half the commissions otherwise due – cannot be condoned.

- *Matter of Moss*, 21 Misc 3d 507 [2008]: Surrogate held that an acknowledgment of disclosure witnessed by the attorney-executor's partner was invalid for purposes of SCPA 2307-a. The witness was not independent because of the partnership affiliation between the witness and the attorney-executor.

- *Matter of Deener*, 22 Misc 3d 605 [2008]: An out-of-state attorney drafted a Will, in which she was named executor, for a decedent who was domiciled in New York. The attorney did not file a SCPA 2307-a disclosure statement and argued that she was relieved of the requirement because she was not admitted to practice in New York. The court disagreed and limited the attorney-executor to one-half commissions. In so ruling, the court noted that SCPA 2307-a plainly requires the disclosure be made to the testator "[w]hen an attorney prepares a will to be proved in the courts of this state." Thus, the court held that this applies "at a minimum when the client for whom the Will is being prepared is domiciled in New York." The court further noted that the statutory language could encompass "any case in which the attorney has reason to anticipate that the instrument will be offered for probate in New York."

    - But note that in *Matter of Restuccio*, 39 Misc 3d 179 [2012], the court held that an out of state attorney ***who had no knowledge of the client's intent to change domicile to New York*** could not be expected to comply with SCPA § 2307-a.

- *Matter of Sullivan*, NYLJ, Jan. 27, 2009, at 37, col 2: Failure to search a law firm's files for all Wills executed prior to 1996 because the law firm had a policy not to seek appointments as fiduciary did not excuse failure to make any effort to make required disclosure to decedent or to obtain a written acknowledgement of SCPA 2307-a disclosure.

- *Matter of Rafailovich*, NYLJ, Mar. 29, 2012, at 26-5, col 6: Holding that SCPA 2307-a does not apply retroactively to mandate additional language added by the 2004 and 2007 amendments to SCPA 2307-a to be added to disclosure. A Will executed on April 24, 2002, which conformed to SCPA 2307-a in effect at that time, substantially complied with statute.

E. The Advocate-Witness Problem.

An ethical issue arises if there is a possibility that the attorney may be called as a witness in a matter. Rule 3.7 provides that a lawyer shall not act as an advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless (1) the testimony relates solely to an uncontroverted issue or to the nature and value of legal services rendered in a matter, (2) the disqualification would work a substantial hardship on the client, (3)

the testimony relates solely to a matter of formality with no expectation of opposition evidence, or (4) the testimony is authorized by the court.

The advocate-witness rule, codified as Rule 3.7 of the Rules of Professional Conduct, provides:

> 1. A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:
>
> a. the testimony relates solely to an uncontested issue;
>
> b. the testimony relates solely to the nature and value of legal services rendered in the matter;
>
> c. disqualification of the lawyer would work substantial hardship on the client;
>
> d. the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or
>
> e. the testimony is authorized by the tribunal.
>
> 2. A lawyer may not act as advocate before a tribunal in a matter if:
>
> a. another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or
>
> b. the lawyer is precluded from doing so by Rule 1.7 [Conflicts of Interest: Current Clients] or Rule 1.9 [Duties to Former Clients].

Advocate witness issues often arise in probate matters. The attorney who prepared the Will is often retained by the nominated executor in the probate proceeding. The question facing the attorney-drafter when SCPA 1404 examinations are requested in a probate proceeding is whether or not the proponent is best served by the attorney's continued representation or whether independent counsel should represent the proponent for 1404 discovery.

In making a decision to disqualify an attorney based on Rule 3.7, the court must balance the appearance of impropriety or harm to a party if disqualification is denied against the valued right to choose one's own counsel and any unfairness that disqualification, if granted, will cause in the particular case. *See Matter of Christopher*, 2016 N.Y. Misc. LEXIS 2996, 2016 NY Slip Op 31545(U); *see also Matter of Popkin*, NYLJ, June 4, 2010, at 42, col 6. Courts are

constrained not to apply Rule 3.7 mechanically (*id.*).

Relevant Case Law

- *Matter of Howell*, NYLJ, Feb. 17, 2017, at 38, col 4: Rule 3.7 refers only to lawyers; therefore disqualification rules do not apply to non-lawyer employees, in this case, paralegals.

- *Matter of Christopher*, *supra*, holding that "[t]he asserted need to take further pretrial discovery from [attorney] is not a sufficient basis for disqualification since the rule on its face applies only to 'advocacy before a tribunal' (Rules of Professional Conduct, Rule 3.7[a]) and not to pretrial discovery."

- *Matter of Bodkin*, 128 AD3d 1526 [2015]: Objectants moved to disqualify executor's attorney because he was from the same law firm as the attorney who drafted and supervised execution of decedent's Will. The Appellate Division held that disqualification of executor's attorney was not required under Rule 3.7 because objectants failed to establish that any testimony from another attorney at the law firm for executor's attorney would be prejudicial to the executor.

- *Estate of Erlich v. Wolf*, 127 AD3d 613 [2015]: Attorney for defendant properly disqualified where the attorney's testimony about the existence and validity of agreement entered into by defendant – which defendant claims no knowledge of – is material and necessary.

- *Matter of Florio*, 39 Misc 3d 1225(A) [2013]: An attorney should not be disqualified where the testimony relates solely to an uncontested issue. Thus, where no question of fact existed as to whether funds were comingled, attorney testimony was not required and disqualification not warranted.

- *Matter of Giantasio*, 173 Misc 2d 100 [1997], holding that "[t]here is no per se rule barring an attorney-drafter from representing a will proponent during the pre-trial stages of litigation."

F. Capacity

Different transactions require different levels of capacity. There is a difference with respect to the capacity required to execute a Will (testamentary capacity) and the capacity required to execute a power of attorney (capacity to contract).

Testamentary Capacity

In order to execute a Will, a testator must have testamentary capacity, *i.e.*, an understanding of (i) the nature and extent of his or her property, (ii) the natural objects of his or her bounty, and (iii) the provisions of the Will (*Matter of Kumstar*, 66 NY2d 691 [1985]). The standard for testamentary capacity is lower than the standard for capacity to execute other

contracts (*see Matter of Coddington*, 281 AD 143, 146 [1952], aff'd 307 N.Y. 181 [1954]). "The proponent is merely required to demonstrate that the testator was sober and lucid during the execution ceremony" (*Matter of Redington*, NYLJ, July 18, 2014, at 24, col 1, *citing Matter of Roberts*, 34 Misc 3d 1213 [A] [2011]).

Power of Attorney

To execute a power of attorney, a person must have the same capacity is required to enter into a contract (*see Matter of Hong v. Hong*, 2013 NY Slip Op 32164(U) [2013]). General Obligations Law §5-1501 (2)(c) defines capacity as the "ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in the power of attorney, or the authority of any person to act as agent under a power of attorney."

Diminished Capacity

When an attorney is faced with a client with diminished capacity, the Rules of Professional Conduct, Rule 1.14 [Clients with Diminished Capacity], provide more clarity than the former Disciplinary Rules and Ethical Considerations with respect to this situation.

Rule 1.14 states that:

> (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.
>
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
>
> (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Lawyers should maintain "conventional" attorney-client relationships with clients who have diminished capacity to the extent possible. Thus, if an impaired client is able to make

competent decisions, the lawyer is constrained to follow those directives (*see* Rule 1.2 [a] [a lawyer "shall abide by a client's decisions concerning the objectives of representation"]).

In circumstances where a client cannot make competent decisions, however, Rule 1.14 (b) is applicable. Rule 1.14(b) provides that if a lawyer "reasonably believes" that a client with diminished capacity is "at risk of substantial physical, financial or other harm" and cannot "adequately act" in her own interest, the lawyer may take "reasonably necessary protective action." Rule 1.14(b) essentially permits a lawyer to breach client confidentiality by "consulting with individuals or entities" who can protect the client, including "seeking the appointment of a guardian ad litem, conservator or guardian."

Lawyers must tread with caution because Rule 1.14 (b) does not permit a lawyer to engage in carte blanche revelation of client confidences. The confidentiality obligations imposed by Rule 1.6 fully apply to clients with diminished capacity. Rule 1.14(c) expressly cautions that Rule 1.14(b) authorizes a lawyer to reveal confidential information "only to the extent reasonably necessary to protect the client's interests." Thus, attorneys must be circumspect with the information disclosed to ensure that only enough is revealed to protect the client or persuade a court to appoint a guardian.

Relevant Cases

- *Matter of Watson*, 121 AD3d 1158 [2014]: Attorney was found to have taken advantage of "an elderly client with questionable mental capacity" by preparing a will and power of attorney that named the attorney's life partner attorney-in-fact- and beneficiary under the will. The client was the uncle of the attorney's life partner, however the Appellate Division, Third Department, held that "even when dealing with family matters, attorneys must render their professional services in strict compliance with the disciplinary rules and zealously safeguard the funds of others (at 1159). As such, the attorney was guilty of professional misconduct and suspended for two years.

- *Matter of Aversa*, 88 AD3d 339 [2011]: Attorney was appointed as guardian for an incapacitated person who received a $5 million settlement in a personal injury action. The attorney drafted a Will for the incapacitated person and named himself executor and the attorney's wife (in her maiden name) the primary beneficiary. Attorney was found guilty of misconduct and was disbarred.

- *Matter of Macinnes*, NYLJ, Apr. 6, 2009, at 36, col 3: Court declined to appoint a guardian ad litem where, although the objectant may have displayed "idiosyncratic behavior," he was able to adequately protect his rights. Objectant retained counsel, filed objections to the petition and demonstrated that he understood nature of the pending proceeding for letters of administration.

- *Cheney v. Wells*, 23 Misc 3d 61 [2008]: Defendant was an extremely difficult client who had gone through a number of attorneys. Her most recent lawyer sought to withdraw in the midst of litigation against defendant, telling the court that she could not represent Defendant without violating her own ethical

responsibilities. The court examined New York's ethical rules, MRPC 1.14 (now Rule 1.14) and the Restatement (3d) of the Law Governing Lawyers and concluded that there was "no ethical impediment" to the lawyer seeking a limited guardianship for defendant solely for the purpose of defending her in the litigation and that the lawyer could disclose to the court whatever confidential information would be necessary to prove the need for a guardian.

G. Joint Representation Scenarios

Spouses

It is commonplace for married couples to jointly consult with a lawyer on estate planning matters. Joint representation has many advantages for spouses, including the possibility of reduced fees, compared to the fees if each spouse had separate representation, and development of a uniform estate plan.

Spouses can have differing, and sometimes conflicting, interests and objectives regarding their estate planning. For example, they may have different views on how property should pass after the death of one or both of them. A spouse may also reveal to the lawyer a secret that the spouse wants to be concealed from the other spouse, for example, an illegitimate child or extramarital affair.

In a joint representation situation, the attorney cannot be an advocate for one spouse against the other. No confidences exist which may not be shared with the other spouse. Information that either spouse gives the attorney related their estate planning cannot be kept from the other.

It is recommended that at the inception of joint representation of spouses, disclosure should be made to obtain consent. The lawyer is under no duty to protect confidences of one spouse from the other, and, depending on the circumstances, may have to withdraw from representing one or both spouses.

Adoption

Joint representation of birth parents and adoptive parents is prohibited in adoption proceedings. *See Matter of Michelman,* NYLJ, Sept. 16, 1994, at 1, col 5; *Matter of Anonymous*, NYLJ, Oct. 11, 1989, at 24, col 3. An exception may exist where the adoptive parent is either married or closely related to one of the birth parents, in which case the potential for conflict is greatly reduced (*see,* NYSBA Prof. Ethics Comm. OP. #68 Jan. 8, 1968 [11-66]).