



TRUSTS AND ESTATES UPDATE

Expert Analysis

Attorney-Client Relationship: Fees, Malpractice, Counsel Withdrawal

The relationship between counsel and his or her client requires careful consideration of legal and ethical obligations. These past several months have seen decisions addressed to these concerns within the context of both supreme and surrogate's court matters pertaining to attorney malpractice, attorney-fiduciaries, legal fees, and withdrawal of counsel.

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• Statute of Limitations Not a Bar to Suit for Legal Malpractice

In a suit for legal malpractice, cross-appeals were taken from orders of the Supreme Court, which in pertinent part granted the motion for summary judgment by one of the named defendants, and denied the motions for summary judgment by the remaining defendants and by the plaintiff.

The subject malpractice action arose from work allegedly performed by the named defendants in connection with a suit for medical malpractice. Defendants moved for summary judgment asserting, *inter alia*, that the action was time-barred. The Supreme Court granted the motion by one of the named defendants, but otherwise denied the applications, finding that remaining defendants had failed to make a *prima facie* showing that the attorney-client relationship had ended more than three years before plaintiff commenced suit.

The record revealed that one of the named defendants, Breitbart, had been substituted as counsel in litigation commenced by the attorneys initially retained by plaintiff's mother. Thereafter, associates from Breitbart's firm formed their own firm (HMM) and became plaintiff's attorneys of record. HMM subsequently dissolved in November 1998 and one of the named partners took the medical malpractice action with him to a new firm, which informed plaintiff, in January 1999, that the action could not proceed inasmuch as an index number had never been purchased. As a result, plaintiff commenced suit in January 2002 for malpractice by her counsel.

In support of their claim that plaintiff's action was time-barred, defendants HMM asserted that their representation of plaintiff did not continue within the statutory period, and, in fact, had terminated

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in January 1998 when plaintiff and her father were advised by an HMM partner that the medical malpractice suit could not be pursued. The record, however, revealed that HMM continued to retain plaintiff's file and intended to attempt to resurrect the file with the court on plaintiff's behalf.

There was no indication that the firm offered to return plaintiff's file to her or that plaintiff had requested the file. In fact, the court found that the file continued to remain in the possession of the HMM firm, as an active case, and remained so when it was taken by one of the HMM partners, upon the dissolution of the firm, to another firm.

Plaintiff was never informed that her file had been brought to another firm, albeit she had been informed at a meeting in January 1999 with a partner in that firm of its disinterest in pursuing the case due to the lack of an index number.

Nevertheless, the court found that the meeting was insufficient to place plaintiff on notice that her attorney-client relationship with her attorneys at HMM had concluded. Indeed, the former HMM partner corresponded with plaintiff and her father subsequent to the January 1999 meeting, informing them that the file remained in the firm's possession, and offering to provide any part or all thereof to her if requested.

In finding that plaintiff's action for malpractice against the HMM firm was not time-barred, the Appellate Division reiterated the long-standing rule that requires an attorney of record to provide reasonable notice to the client when withdrawing from representation.

The court gave an opinion that reasonable notice does not exist when a client is required to infer, from ambiguous action or inaction, or through the actions of an attorney with whom the client has had no relationship, that he or she is no longer represented. This is particularly the case when the attorney-client relationship is immersed in delay, inaction by counsel and lack of communication between the client and counsel. The court held that under such circumstances more than equivocal

behavior is required to sever the representational relationship.

Accordingly, within this context, the court determined that HMM had failed to adequately inform plaintiff that their relationship with her had terminated and that summary judgment in HMM's favor was properly denied. By contrast, as to the defendant Breitbart, the court held that summary judgment was appropriate. The court found that although HMM had never been formally substituted for him as plaintiff's counsel, it was clear to all parties involved that plaintiff had retained HMM to represent her in the underlying action for medical malpractice.

Gotay v. Breitbart, 866 NYS2d 638 (1st Dept. 2008)

• Disclosure Requirements Applicable to Nondomiciliary Attorney-Fiduciary

In an uncontested probate proceeding, the issue before the court was whether the disclosure requirements of SCPA 2307-a were applicable to the proponent, an out-of-state attorney named as fiduciary.

The decedent's will, which had been prepared by proponent, had been executed in New Jersey and named proponent's New Jersey firm as the executor. Pursuant to the terms of the instrument, the decedent left 20 percent of her estate equally to her brother and his wife, and 80 percent of her estate in trust for the benefit of her daughter-in-law, with remainder to charity. Approximately two years after the execution of her will, the decedent executed a codicil in which she named the proponent as fiduciary of her estate rather than the law firm.

In petitioning for probate of the decedent's will, proponent failed to file a disclosure statement pursuant to SCPA 2307-a with the court. Hence, the question arose as to whether she was subject to the provisions of the statute.

In determining that the statute applied to nondomiciliary attorney-fiduciaries, the court examined its legislative history and noted that it was designed to curb the possible abuses that can be part of the drafting of a will.

Towards this end, the Legislature mandated disclosure to the client concerning the choices available in the selection of an executor and the financial implications of naming an attorney to serve in such capacity. The court determined that there was nothing in the language of the statute which exempted out-of-state attorney/fiduciaries from the scope of its provisions. Rather, the court held

that the statute apparently applies in any case in which the client for whom a will is being prepared is domiciled in New York.

Accordingly, the court admitted the decedent's will to probate and limited the commissions of the attorney-fiduciary to one-half the amount that would otherwise be allowable under SCPA 2307.

In re Estate of Deener, 2008 N.Y. Slip Op 28470, N.Y. Sur., Nov. 28, 2008 (Sur. Roth)

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• **Court of Appeals Addresses Issue of Unconscionability of Contingency Fee Arrangement**

In a dispute regarding the validity of a contingency fee arrangement, the Court of Appeals was asked to answer the certified question of whether the appellate division had properly affirmed the orders of the surrogate's court, which confirmed the report of a referee denying a pre-answer motion to dismiss the petition by counsel for payment based upon the existence of questions of fact.

The record revealed that counsel had initially been retained in 1983 on an hourly basis to represent the widow of the decedent in connection with her late husband's estate, including but not limited to a lawsuit against the executor pertaining to his administration of the assets.

Over the next 21 years from the date of the retainer, the firm billed the decedent's widow more than \$18 million in legal fees. In addition, unknown to the firm, the decedent's widow paid over \$5 million in "bonuses" or "gifts" to three of the named partners in the firm, as well as approximately \$2.7 million in taxes on these bonuses or gifts. In the interim, the executor died, and his son became the successor executor of the decedent's estate. The lawsuit against the deceased executor nevertheless continued.

In November 2004, the decedent's widow, confronted by legal bills which, according to her, were approximately \$1 million per quarter, requested a new fee arrangement with counsel. That revised fee arrangement was entered in January 2005, and provided, inter alia, for counsel to be paid a flat fee of \$300,000 per quarter, a cap of \$1.2 million on hourly billings, and a payment to counsel of 40 percent of any additional distributions to beneficiaries made by the estate, or any settlement amount, if the case were settled, less any amounts paid to the firm to the date of distribution or settlement.

Five months after the revised retainer agreement was entered, the case was settled for the sum of \$104.8 million, thereby requiring the decedent's widow to pay to counsel, pursuant to the terms of their revised retainer, legal fees in excess of \$40 million. The decedent's widow refused to pay and counsel commenced a proceeding in surrogate's court to compel payment of their fee. The matter was referred to a referee to hear and report.

Immediately thereafter, the decedent's widow commenced suit in supreme court against counsel and the three partners who had received over \$5 million in bonuses or gifts, requesting rescission of the revised retainer agreement and return of all fees paid during the 22 years the firm had represented her, on the grounds that the revised retainer agreement was unconscionable as a matter of law. The supreme court removed this action to the surrogate's court,

and the surrogate also referred this matter to the referee previously assigned to hear and report.

The decedent's widow, and the successor executor of the decedent's estate, then moved to dismiss the petition by counsel for fees, and counsel cross-moved for partial summary judgment dismissing the claim of the decedent's widow for a refund of fees previously paid to the firm. The referee denied the motions to dismiss, concluding that the issue as to the unconscionability of the revised retainer arrangement required additional evidence pertaining to, inter alia, the widow's understanding of the fee arrangement, her capacity at the time it was entered into, and whether counsel took unfair advantage of the widow in negotiating the revised fee agreement based upon their preexisting confidential relationship with her.

Plaintiff was never informed that her file had been brought to another firm, though she had been informed at a 1999 meeting with a partner in that firm of its disinterest in pursuing the case due to the lack of an index number.

The surrogate confirmed the report of the referee in its entirety, and a majority of the Appellate Division, First Department, affirmed, holding, in pertinent part, that before any determination regarding unconscionability could be made, the circumstances underlying the agreement had to be fully developed. Similarly, the court found that the claims of the decedent's widow regarding the ethical violations of counsel in accepting the bonuses or gifts, as well as in connection with the agreement itself, required resolution of certain factual issues. The dissenting opinion, however, would have denied any fees to counsel as well as referred the matter to the Disciplinary Committee. Leave to appeal to the Court of Appeals was granted.

Based on the record presented, and the standard of review required on a motion to dismiss, the Court of Appeals concluded that the facts and circumstances surrounding the revised retainer had not been sufficiently developed to determine whether or not the agreement was unconscionable at the time it was made.

Specifically, the Court held that counsel had not been given the opportunity to present admissible proof as to whether the revised agreement was fair and reasonable and fully understood by the decedent's widow. Moreover, the Court said that even if it was determined that the fee arrangement was not unconscionable at its inception, subsequent circumstances and events could render it unenforceable if the amount of the fee, combined with the large amount of the recovery it represents, seems disproportionate to the services performed. The Court noted that while the underlying facts suggested that the amount of the fee requested by counsel seemed on its face disproportionate to the work performed under the revised agreement, additional information was required to evaluate the agreement's unconscionability further.

Accordingly, the orders of the Appellate Division

were affirmed, and the certified question answered in the affirmative.

Lawrence v. Miller, 2008 N.Y. Slip Op. 09434, N.Y., Dec. 2, 2008, No. 1, 76

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• **Disqualification of Counsel Due to Conflict of Interest**

In *Third Eye Productions LLC v. Malanoski*, the court disqualified counsel from representing defendants in the pending matter due to their concurrent representation of plaintiff in another active litigation.

In reaching this result, the court said that an attorney may not represent a party in one matter and be adverse to that party in another matter unless the attorney demonstrates "the absence of any 'actual or apparent conflict' in loyalties or diminution in the vigor of representation." (citations omitted). The court found that defendants counsel failed to satisfy this standard. While defendants argued that the plaintiff in the pending action was not the same entity as the plaintiff in the other active litigation, the court found otherwise and thus concluded that the concurrent representation presented a conflict in loyalties.

Accordingly, the court disqualified counsel from representing defendants in the pending litigation.

Third Eye Productions, LLC v. Malanoski, NYLJ, Dec. 19, 2008, p. 28 (Sup. Ct., New York County) (Cahn, J.)

Legislative Update

This past year has seen several important legislative developments in the field of trusts and estates including the following:

- *Chapter 173, Bill No. 8858A*: Repeals EPTL 5-1.4 and replaces it with a new EPTL 5-1.4 in order to provide that a divorce, including a judicial separation, or annulment revokes any revocable disposition or appointment of property made by a divorced individual to or for the benefit of the former spouse, unless the instrument provides otherwise. The statute applies to all divorces or death occurring after July 7, 2008.
- *Chapter 176 of the Session Laws of 2008*: Amended the Mental Hygiene Law in order to clarify the limitations on the court's power to invalidate the will or codicil of an incapacitated person.
- *Chapter 177 of the Session Laws of 2008*: Amended the Mental Hygiene Law in order to address the power of the guardian upon the death of an incapacitated person.
- *Chapter 300 of the Session Laws of 2008*: Increases the value of personal property subject to small estate administration to \$30,000 from \$25,000.