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Cases on Responsibility to Uphold Integrity of Attorney's Role

As we each devote a significant part of our lives to the practice of law, and in some instances, the enhancement of the profession through participation in Continuing Legal Education (CLE) seminars, professional organizations, and pro bono services, we are often reminded of our responsibility to uphold the integrity of our role, and to refrain from conduct that will undermine our credibility and subject us to sanctions.

This month's column discusses two decisions that bring such conduct to bear and instruct us regarding the kind of behavior to avoid in representing a client.

In addition, it highlights recent opinions relevant to the field of trusts and estates, addressing such issues as attorney's fees and powers of attorney.

Sanctions Ordered

In the first decision addressing attorney misconduct, the court was confronted with various ethical and statutory violations apparently committed by plaintiffs' counsel in connection with applications for summary relief.

The record revealed that after serving upon his adversary notarized affidavits in support of the motions, and preparing an affirmation of service regarding same, plaintiffs' attorney substituted the affidavits with revised versions and filed the original with the court without serving same upon opposing counsel. Hence, opposing counsel were served with an entirely different set of papers than those which were submitted by counsel to the court in support of plaintiffs' motions. Opposing counsel did not become aware of the "bait and switch" until either the return date of the motions or the hearing date respecting

the issue of sanctions.

Apparently, the situation was further exacerbated at the hearing when plaintiffs' counsel failed to demonstrate that the revised affidavits had been served, but simply asserted, without proof, that he had complied with the rules of the CPLR in regard to motion practice. Moreover, the court found that plaintiffs' attorney had knowingly altered documents which had been submitted as proof of plaintiffs' claims, and had certified the accuracy thereof when filing his clients' motion papers.

In assessing the issue of counsel's conduct, the court referred to the provisions of 22 NYCRR §130-1.1, and concluded that frivolous conduct within the purview of the rule includes the assertion of material factual statements that are false. An attorney's certification on a pleading, written motion or other papers served on another party or filed or submitted to the court signifies that the contentions therein are not frivolous. Hence, the court concluded that a false certification in itself is grounds for the imposition of sanctions. Moreover, the court found that plaintiffs' counsel had intentionally filed misleading and false documents and had purposely deceived his adversaries, all in an effort to affect the decision-making process.

Based on the foregoing, the court held that sanctions should be imposed on counsel upon due consideration of the conduct at issue, the amount sought in the lawsuit, and the overall purpose of deterring such conduct in the future. Accordingly, counsel was fined $34,000 for his actions, and the matter was referred to the Disciplinary Committee of the Second Judicial Department.

***PDG Psychological P.C. v. State Farm Ins. Co.*, NYLJ, July 7, 2005, p. 22 (Civil Ct., Queens Cty.) (Siegel, J.)**

In the second decision respecting attorney misconduct, the court in *Matter of Edward Shapiro, P.C.* was also confronted with counsels' failure to comply with the certification requirement of the court rules. More specifically, it was alleged that although the signature of plaintiffs' attorneys appeared on thousands of court-related documents, in fact, the documents did not contain their true signature. At a hearing of the matter, counsel admitted that while they had read the subject documents, they had not signed them.

The court held, based upon the circumstances presented, that it would not strike the pleadings in issue pursuant to CPLR 2101, since it could not find any evidence of prejudice resulting from the signature defects, and granted counsel leave to correct all the papers, or in the alternative, given the volume of corrective work required, the opportunity to ratify all the signatures on each document within 30 days.

Nevertheless, the court determined that sanctions were warranted as a means of deterring any such conduct by counsel or the bar at large in the future, and fined counsel in the sum of $40,000. In reaching this result, the court considered the amount of time expended by the court in connection with the matter, the tremendous burden that was imposed on the court's staff and its resources, and the volume of cases involved, as well as such mitigating factors as counsels' candidness and cooperation with the court, and their

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apparent lack of intent to deceive the court or their adversaries.

***Matter of Edward Shapiro, P.C.,* NYLJ, July 7, 2005, p. 22 (Civil Ct., N.Y. Cty.) (Weinstein, J.)**

Attorney's Fees and Retainer Agreements

Continuing with the theme of decisions on which I reported in my last column, the Civil Court, Kings County, addressed the rules regarding retainer agreements and letters of engagement as they may impact upon an application for legal fees.

The circumstances surrounding the dispute over fees arose when plaintiff was retained by the defendant, whom he had represented in the past with respect to real estate purchases and transfers, to represent him and a corporate entity in connection with a real estate closing involving the mortgaging of six properties. The bill that was sent defendant for the work was considerably higher than prior bills. Defendant, although he claimed that he called plaintiff to dispute the bill, sent plaintiff the sum of $3,500 as and for full payment, although it was less than half the sum due. Plaintiff stated that he had no time to send a letter of engagement or retainer agreement to the defendant and that he treated the payment as a sum paid on account.

At trial, plaintiff could not produce any time records or a written diary of work performed. He testified that it was his general practice to perform work and to then send a bill based upon what he thought the work was worth. Defendant did not dispute the work plaintiff claimed he had performed, but stated that he had never been charged more than $100-$125 per hour for services rendered.

After referring to the court rule regarding letters of engagement and written retainers, the court noted that, absent a finding that counsel fell into one of its exceptions, decisions either denied fees for failure to comply with its terms, or allowed fees to counsel based upon quantum meruit. Upon consideration of the record and the testimony of counsel, the court concluded that he offered no basis for being excepted from the rule's general requirements, and as such, was not entitled to the full amount he billed. Nevertheless, the court held that counsel was entitled to fees for work performed based upon a theory of quantum meruit. Accordingly, in view of the fact that plaintiff failed to present evidence or testimony as to the standard billing rates for the work performed, or expert testimony as to the difficulty of the services rendered, the court allowed plaintiff the fees he had been paid and nothing more.

***Grossman v. West 26th Corp.,* NYLJ, Aug. 3, 2005, p. 19 (Civil Ct., Kings Cty.) (Nadelson, J.)**

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• ***Authority of Attorney-in-Fact to Amend a Trust.*** Before the court in *In re Estate of Goetz* was the issue of whether an attorney-in-fact could use the authority conferred to amend a trust created by another person and grant to herself a limited power of appointment over the trust remainder.

The Westchester County Supreme Court ruled on whether registered domestic partners could maintain a derivative action for loss of services and consortium.

Pursuant to the terms of the trust in issue the grantor reserved to himself the right to amend or revoke its terms during his lifetime.

The court reviewed the general authority of an attorney-in-fact finding that such an agency authorizes the recipient of the power to act for the principal in all matters which do not require that the principal act for himself. With regard to the amendment of trusts, New York EPTL 7-1.16 provides that a lifetime trust is irrevocable, unless it expressly provides that it is revocable, and if it is, the trust may be amended or revoked in the grantor's will or by a written instrument executed by the person authorized to revoke or amend the trust. EPTL 7-1.17.

In this latter regard, the court found that although the terms of the subject trust gave the grantor the right to revoke or alter its terms by an instrument in writing executed and acknowledged by him and delivered to the trustees during his lifetime, it did not confer the same authority upon the grantor's agent or upon any other person. Moreover, neither the terms of the power of attorney in issue, nor the provision of the General Obligations Law expressly conferred such authority. That being said, the court held that the instruments had to be construed as written, and that it could not add to or alter their provisions in the guise of interpreting them.

Accordingly, the court declared the trust amendment by the grantor's attorney-in-fact to be void and of no effect, and the attempted alteration thereby of the trust remainder to be invalid.

***In re Estate of Goetz,* NYLJ, Aug. 2, 2005, p. 27 (Surrogate's Ct., Westchester Cty.) (Scarpino, S.)**

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• ***Validity of Post-Nuptial Agreement Revisited.*** In my last column, I commented upon the decision by the Supreme Court, Kings County in *Kudrow v. Kudrow,* wherein the court declared the subject postnuptial agreement invalid for lack of a proper acknowledgment. Because the acknowledgment at issue was taken by a New York notary in the state of Florida, the court concluded that it could only be made before a notary qualified in the state of Florida, or a commissioner of deeds appointed in New York State to take acknowledgments outside the state.

Subsequent to the decision being rendered, the court, on reargument, reversed its opinion, concluding that Executive Law §142-a made the acknowledgment by the New York notary in Florida valid. Pursuant to the provisions of that statute, the "official certificates" or other acts of notaries are not to be invalidated or impaired or in any manner deemed defective because the action was taken outside the jurisdiction where the notary was authorized to act.

***Kudrow v. Kudrow,* NYLJ, July 21, 2005, p. 20 (Supreme Ct., Kings Cty.) (Krauss, J.)**

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• ***Court Denies Loss of Consortium Claim to Unmarried Partner.*** The issue of domestic partnerships and same-sex marriage has yet to be determined by the state Legislature or passed upon by this state's highest court and as such remains highly controversial. Recently, the Supreme Court, Westchester County, had occasion to pass upon the question of whether registered domestic partners could maintain a derivative action for loss of services and consortium.

In answering the question in the negative, the court held that while domestic partners may be extended certain rights, insofar as health care and other benefits are concerned, they have not achieved the status of married couples. Because the state has always held that a lawful marriage is a prerequisite to a claim for loss of consortium and services, domestic partners may not recover with respect to such a claim.

***Lennon v. Charney,* NYLJ, July 1, 2005, p. 21 (Supreme Ct., Westchester Cty.) (LaCava, J.)**