

TRUSTS AND ESTATES UPDATE

Expert Analysis

The Relationship Between Attorney and Client

Because of the sanctity of the attorney-client relationship and the trust and confidence it naturally engenders, it is closely scrutinized by the courts in order to insure that no unfair advantage is taken by one party over the other, commitments made are fulfilled, and a lawyer's conduct and work is performed within the bounds of propriety. In recent months these concerns have been demonstrated by decisions addressed to retainer agreements, the rules regarding attorney misconduct, and disqualification of counsel. These decisions, while not emanating from the Surrogate's Court, are instructive to practitioners in every field.

Retainer Agreements

Retainer agreements, and the entitlement of counsel to fees in the absence of a retainer, were the subject of an opinion by the Appellate Division, First Department in *Nabi v. Sells*. Before the court was an appeal from an Order of the Supreme Court, New York County (O. Peter Sherwood, J.), which granted the defendant-law firm's motion to dismiss its former client's claim that the firm forfeited its right to a legal fee pursuant to a contingency fee arrangement by reason of its noncompliance with the provisions of 22 NYCRR 1215.1.

In concluding that the defendant law firm was entitled to legal fees for services rendered, the court held that noncompliance of the retainer agreement with the provisions of 22 NYCRR 1215.1 did not bar counsel from recovering in quantum meruit. In reaching this result, the court reasoned that while a client had the right to discharge an attorney at any time, and for any reason, regardless of a retainer agreement, this right did not entitle the client to be unjustly enriched at the attorney's expense, by avoiding the payment of fees for services rendered, except in the case when the attorney's discharge was for cause.

By
**Ilene
Sherwyn
Cooper**



Hence, in the absence of proof that the defendant law firm was discharged for cause, the court held that its recovery was limited to quantum meruit in a fixed dollar amount, which could be more or less than that provided in the rescinded contingency fee agreement. Nevertheless, despite the nullity of that agreement, the court opined that it could be utilized as a "guide" in determining the fair value of counsel's services, together with such other factors as the time spent by counsel, the difficulty of the case, the amount involved, and the results achieved. *Nabi v. Sells*, NYLJ, Dec. 22, 2009, p. 25 (App. Div., 1st Dept).

Disqualification motions are viewed with disfavor, and as such, a party seeking disqualification must satisfy a heavy burden in order to prevail.

Charging Lien

In an action to recover damages for personal injuries, counsel appealed from so much of an Order of the Supreme Court, Kings County (Lewis, J.) which, inter alia, denied, with prejudice, his motion to fix his legal fees based upon his contingency fee agreement, and to impose a charging lien in the amount of such fees.

The appellant, the attorney of record for the plaintiffs in an action to recover for property and economic damages sustained by the corporate plaintiff, and for personal injuries sustained by the individual plaintiffs resulting from an automobile accident, conceded that at no time did he enter a written retainer agreement with the plaintiffs or file a contingency fee agreement

with the Office of Court Administration pursuant to 22 NYCRR 691.20. In view thereof, the court held that counsel was not entitled to recover a contingency fee. Nevertheless, the court concluded that he might be entitled, in a separate plenary action, to recover in quantum meruit for the reasonable value of his services, and therefore modified the order of the Supreme Court accordingly. *Micro-Spy Inc. Res. v. Marietta Small, Etc.*, NYLJ, Jan. 19, 2010, p. 32 (App. Div., 2d Dept).

Disqualification of Counsel

In an action for damages relating to losses incurred in a real estate transaction, the defendants moved to disqualify plaintiffs' counsel, asserting that one or more attorneys from the firm were likely to be called as witnesses in the case.

The court opined that disqualification of counsel in order to forestall an ethical violation rests within the sound discretion of the court. In assessing whether and to what extent such discretion should be exercised, the court opined that the client's right to counsel of his or her own choosing must be balanced against the court's duty to maintain the highest standards for the profession.

Nevertheless, disqualification motions are viewed with disfavor, and as such, a party seeking disqualification must satisfy a heavy burden in order to prevail. To that extent, the court noted that while state disciplinary rules may serve as guidance as to whether that burden has been satisfied, they are not dispositive.

The court noted that New York's Rules of Professional Conduct, effective April 1, 2009, addressed the situation raised by the subject motion, i.e., the circumstances in which an attorney may act both as an advocate and witness before a tribunal. So too did the predecessor to these rules, as evidenced by the provisions of 22 NYCRR 1200.21. The import of the advocate-witness rule is to avoid the unseemly situation of an attorney advocating his own credibility, and opposing counsel vigorously cross-examining a lawyer-adversary.

However, despite the foregoing, the court recognized that the rule does not necessarily require that the attorney-witness be disqualified other than at the trial of the matter. Towards that end, plaintiffs conceded that it never intended for its counsel to represent them other than during the pretrial phase of the case. Although defendants' counsel maintained that disqualification was nevertheless immediately required, citing the possibility of motion practice in which the court might have to assess counsel's credibility, or confusion by the jury if counsel were seen in the dual role of an examiner and a witness, the court discredited both arguments, concluding that any taint or confusion could be cured by means less drastic than disqualification. Moreover, and in any event, counsel represented to the court that it would not participate in any depositions.

Accordingly, subject to the foregoing, defendants' motion to disqualify plaintiffs' counsel was denied. *Amusement Industry Inc. v. Stern*, NYLJ, Oct. 16, 2009, p. 29 (SDNY)

Attorney Misconduct

In a suit for legal malpractice, plaintiff sought to amend his complaint in order to allege a cause of action for attorney misconduct and to seek treble damages pursuant to the provisions of Judiciary Law §487.

The gravamen of the cause of action for malpractice related to work performed by counsel on plaintiff's behalf in connection with a trust created by his late mother. This work included proceedings involving the trust in the state of Hawaii.

According to plaintiff, counsel failed to arrange for his appearance in Hawaii on three occasions, resulting in his being removed as trustee of the trust and being directed to pay the legal fees of his brother, who was also a party to the proceedings. Additionally, as a result of defendant's alleged negligence, plaintiff allegedly failed to make a distribution of the trust, as required by the court and the terms of the instrument, and to sell trust securities, also in accordance with the instrument, causing plaintiff to be surcharged for interest on the amount of the unpaid distribution, and for the losses sustained with respect to the securities.

Based upon the foregoing, plaintiff sought to amend his complaint in order to allege counsel's failures to act or act properly, withholding of information with respect to the trust and the court proceedings in Hawaii, and acts of deception and false representations and statements, as evidenced by two letters to the presiding judge in the matter. The damages asserted included those originally alleged, as well as treble and punitive damages attributable to counsel's "chronic and extreme pattern of legal delinquency" pursuant to Judiciary Law §487.

The court opined that in the absence of prejudice or surprise, a complaint in an action

for legal malpractice may be amended unless the proposed amendment is patently devoid of merit. Although defendant asserted prejudice and surprise in opposition to the motion, the court found that claim unavailing. The court also rejected the defendant's opposition based on the statute of limitations.

More problematic, however, was the defendant's contention that the provisions of Judiciary Law §487 applied only to the conduct of New York attorneys in connection with proceedings pending in New York courts, and thus, were inapplicable to his purported conduct in connection with the Hawaiian proceedings.

In analyzing the issue, the court, on the one hand, reviewed decisions of the Second Circuit and New York Civil Court, both of which supported the claim of the defendant, and on the other hand, the statute and its legislative and judicial history, which provided for no such limitation in its scope. Indeed, as noted by the court, the general purpose of the statute, as recognized repeatedly in the appellate opinions, was to provide redress for attorney deception and overreaching regardless of whether a judicial proceeding was pending.

The court in 'Fifty-Six Hope Road' held that inclusion of a third party in otherwise privileged communications for the purpose of providing counsel with a greater factual base was insufficient, in itself, to bring that party within the purview of the attorney-client privilege.

As such, the court found no basis for curtailing the application of Judiciary Law §487 to judicial proceedings pending in New York, concluding that a New York court has sufficient interest in supervising the conduct of attorneys admitted to its bar, and protecting resident clients who have been harmed by any such conduct falling within its scope. Plaintiff's application to amend his complaint was, therefore, granted. *Cinao v. Reers*, NYLJ, Jan. 22, 2010, p. 25 (Sup. Ct., Kings County).

Attorney-Client Privilege

Before the court in *Fifty-Six Hope Road Music Ltd. v. UMG Recordings Inc.*, was an application by the plaintiffs for return of purportedly privileged documents which plaintiffs alleged had been inadvertently produced to the defendant by a third-party witness, whom plaintiffs claimed had been retained by them as their "representative" in the litigation.

The court held that the burden of establishing the applicability of the attorney-client privilege is on the party asserting it. Once established, the privilege will apply to communications between

a client, or his representative, and his or her counsel, which are intended to be maintained in confidence, and undertaken for the purpose of obtaining legal advice.

Within this context, the court found that plaintiffs had failed to meet their burden of demonstrating that the third party to whom counsel's communications were made was a representative or agent acting on their behalf. Significantly, the court noted that plaintiffs provided no explanation of why a third party was even made privy to the subject communications, other than a perfunctory statement that he had knowledge of the underlying facts of the case and was necessary in order for counsel to provide them with informed legal advice.

The court held that inclusion of a third party in otherwise privileged communications for the purpose of providing counsel with a greater factual base was insufficient, in itself, to bring that party within the purview of the attorney-client privilege.

Moreover, the court found it significant that although served with a subpoena for the documents in issue, they did not object to the requests made or indicate to the defendant that the documents they sought might be subject to a claim of privilege. In fact, the court noted that plaintiffs waited five months before informing the third party that the documents subpoenaed might be protected from disclosure.

Accordingly, the court held that plaintiffs had failed to provide any grounds for a return of the subject documents on the basis of the attorney-client privilege.

Further, the court rejected plaintiffs claim that the documents were protected by the work-product doctrine, concluding that plaintiffs had failed to provide an adequate explanation of why it was necessary to share the documents with a third party, whom was likely to be a material witness in the litigation, and subject to disclosure by plaintiffs adversary. To this extent, the court noted that plaintiffs may have waived the privilege by insisting that defendant seek the subject documents from the third party witness. *Fifty-Six Hope Road Music Ltd. v. UMG Recordings Inc.*, NYLJ, Feb. 9, 2010, p. 28 (SDNY)