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TRUSTS AND ESTATES UPDATE

Expert Analysis

Attorney-Client Relationship: Fees, Retainer, Disqualification, Malpractice

By
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The relationship between attorney and client has proven a fertile subject for both Supreme and Surrogate's Court decisions over the past several months. These opinions have addressed such issues as legal fees, retainer agreements, and malpractice. This month's column will report on these opinions, providing instruction on some of the fundamental concepts impacting this area of the law.

Retainer Agreement

In a proceeding for the judicial settlement of the account of the institutional co-executor of the estate, objections were filed by two of the decedent's sons, as co-executors, to, inter alia, the legal fees claimed by the three firms retained by the institutional co-executor, the petitioner, during the course of its administration. The issue was submitted to the court for decision.

The decedent's estate at death was valued at approximately $1.25 million. The principal asset thereof was his cooperative apartment in New York.

Pursuant to the terms of the retainer between petitioner and the firm of Windels Marx, counsel agreed to a flat fee of $50,000 for services in (1) probating the decedent's will and obtaining the issuance of letters testamentary to the named executors; (2) preparing and filing estate tax returns and representing the estate at any audit thereof; and (3) attending to the general administration of the estate. The retainer excluded services performed in connection with any litigation or in connection with the projected sale of the decedent's apartment. The retainer also contemplated additional fees incurred for outside experts, including a lawyer in France relative to the decedent's apartment in Paris.

Despite the foregoing, the petitioner requested that the firm be allowed fees of $200,000 for services performed, plus disbursements. In support of the application, the petitioner argued that the firm was not bound by the terms of its retainer, and that fees should be awarded to it on a quantum meruit basis. More specifically, petitioner maintained that the additional fees incurred by counsel were attributable to the recalcitrance of the individual co-executors, who interfered with and complicated the administration of the estate.

> In 'Jacoby,' the New York County Surrogate's Court denied the request of petitioner's counsel for fees in excess of its retainer.

The New York County Surrogate's Court opined that notwithstanding the existence of a retainer, the Surrogate has the inherent authority to fix and determine legal fees payable from an estate. Thus, while an estate must pay the fees of fiduciary's counsel, it will only be charged with the reasonable value of the legal services rendered. As such, retainer agreements between an estate fiduciary and counsel will not always be enforceable to the same extent as a commercial contract. Indeed, when a legal fee has been prescribed by a retainer, the attorney bears the burden of proving that the agreed-upon fee is reasonable.

When, however, counsel seeks a fee in excess of the fee contained in a retainer, the attorney will be bound by the terms of its agreement, regardless of the complexity involved in the handling of the estate. The court noted that while such a result would invariably be disappointing to a firm that is caused to incur more time and effort than otherwise expected, "the practitioner who agrees to a flat fee for specified legal services is chargeable with the knowledge that a client may make the lawyer's professional objectives harder or easier to reach than is typical. Thus, where clients add to the lawyer's work burden, the lawyers…cannot seek relief from [a] bargain's terms by claiming unfair surprise."

Accordingly, the court denied the request of petitioner's counsel for fees in excess of its retainer. As to fees for services performed outside the scope of the agreement, upon review of counsel's affidavit of services and contemporaneous time records, the court awarded an additional sum for work performed in connection with the sale of the decedent's New York apartment.

Similarly, the court awarded fees to the two other firms retained by petitioner; however, it reduced the fees of one such firm, finding that the amount sought was somewhat excessive, as it included instances of double billing.

In re Estate of Jacoby, NYLJ, Dec. 19, 2011, at 17 (Sur. Ct. New York County) (Sur. Glen).

Disqualification of Counsel

In a suit for malpractice, defendants moved to disqualify plaintiffs' counsel on the grounds that their testimony was required.

The action for malpractice was purportedly predicated on advice provided by counsel to plaintiffs, as co-executors of the decedent's estate, to sell a building that constituted one of its principal assets. The will of the decedent bequeathed the property to his five children. In addition, the instrument bequeathed plaintiffs "the largest amount that could pass free of estate tax," i.e., the sum of $675,000. Although plaintiffs derived $124,000 of this sum from their late father's company, the only property available to fund the balance of the bequest was the said building. Accordingly, in order to satisfy their bequest, plaintiffs alleged that on the advice of counsel, they signed a contract for sale of

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the building to themselves, as co-executors. Thereafter, the building was sold to another buyer for approximately $2.2 million.

When the plaintiffs accounted, objections to the sale were filed. At some point during the litigation, plaintiffs discharged the defendants, and retained new counsel. The matter was ultimately settled to the extent that plaintiffs were required to pay $177,500 to two of their siblings, together with interest. The suit for malpractice followed.

During the course of discovery in the litigation, defendants sought information regarding plaintiffs' discussions with new counsel that led to the malpractice suit, as well as information relating to the discussions between plaintiffs and their counsel that led to the settlement. Plaintiffs opposed the requests, claiming attorney-client privilege, and the defendants moved to disqualify plaintiffs' counsel, whom they claimed they had to depose in connection with their discovery demands.

The Supreme Court, New York County, denied the motion. The court held that while the subject of the attorney-client communications was relevant to the action for malpractice, that fact did not, without more, necessarily place the contents of the communications "at issue" in the lawsuit. The court opined that in the context of a litigation, discovery is only required if the material or testimony is placed at issue—i.e., when a party has asserted a claim or defense it intends to prove by use of the privileged material.

In the pending action, the court noted that plaintiffs' claims for malpractice were predicated on damages arising out of the settlement of the accounting proceeding. While defendants maintained that this placed the communications leading to the settlement, albeit privileged, at issue, the court held otherwise. In particular, the court found that plaintiffs did not claim that they would be utilizing the privileged material or work product in order to prove the alleged malpractice of the defendants.

Moreover, although the defendants claimed that discovery of the privileged material was critical to their defense, the court concluded that defendants did not need to know whether plaintiffs' new counsel thought defendants acted negligently, but rather, were required to present the legal and factual basis for their position that they were not guilty of malpractice.

Accordingly, the motion for disqualification was denied.

Corrieri v. Schwartz & Fang, P.C., NYLJ, Feb. 2, 2102, at 31 (Sup. Ct. New York County) (York, J.)

Fixation of Fees

In a contested accounting proceeding, the parties agreed to submit the issue regarding the reasonableness of counsel fees to the court without a hearing.

Although objectant, who was a distributee of decedent, claimed that counsel had agreed not to charge the estate for services performed, the court found that he had failed to submit evidence to support his contention that counsel was not to be compensated. Rather, the law sustained the right of a fiduciary to retain counsel in the administration of an estate, and to be reimbursed the cost of those services as reasonable expenses of administration.

In support of his application for fees, counsel submitted an affidavit of legal services to the court. However, counsel did not submit contemporaneous time records, claiming that they were not maintained by his office in connection with the work performed for the estate. Instead, counsel relied on his office records and personal recollection. To this extent, counsel maintained that he spent approximately 10 hours on estate matters over a four-year period performing such tasks as filing a petition for letters of administration, preparing a supporting affidavit and procuring waivers, numerous consultations with the petitioners, collecting assets from the estate of the decedent's predeceased spouse, and establishing an estate account.

The Kings County Surrogate's Court held that while there was no hard and fast rule in determining reasonable legal fees, the criteria set forth in *Matter of Freeman*, 34 NY2d 1(1974), and *Matter of Potts*, 213 AD 59 (1925), affd. 241 NY 593 (1925), is generally relied on for this purpose. To this extent, the court noted that the time spent is the least important part of the calculus in the fixation of fees. Further, the court noted that experienced counsel are generally expected to resolve estate matters more proficiently and expeditiously than less experienced attorneys.

Based on the foregoing, the court fixed and determined counsel fee in the sum of $1,500. In reaching this result, the court held that counsel could not be compensated for performing such executorial work as collection of assets and opening an estate account.

In re Kinsler, NYLJ, Nov. 30, 2011, at 26 (Sur. Ct. Kings County) (Sur. Torres).

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Malpractice Claim

In a malpractice action, the defendant law firm moved to dismiss the suit on the grounds that it was time-barred. Plaintiff had retained the defendant law firm to represent her in a matrimonial action. The action was ultimately withdrawn predicated upon an agreement by the parties to execute a post-nuptial agreement that defendant law firm was to prepare. Plaintiff's counsel prepared the agreement, but according to plaintiff, breached its duty to her by failing to arrange for the execution of the agreement by her husband. Plaintiff's husband subsequently left the marital home and sold one of the properties that was subject to the agreement. When plaintiff sued for enforcement, she learned that her husband had not executed the document.

The Queens County Supreme Court opined that pursuant to CPLR 214(6), the limitations period for a legal malpractice claim is three years, whether the claim is cast in contract or tort. A legal malpractice action accrues, and the limitations period begins to run, when the alleged malpractice is committed, and not when the client discovers the wrong or injury.

The court found that plaintiff's claim against the defendant firm accrued in November 2007, but that plaintiff had not commenced suit until August 2011. Further, the court found that plaintiff had not presented any evidence that the statute of limitations had been tolled. Indeed, the court held that any assertion by plaintiff of the continuous representation doctrine would be unavailing.

Accordingly, plaintiff's action was dismissed as time-barred.

Singh v. Edelstein, NYLJ, Feb. 2, 2012, at 33 (Sup. Ct. Queens County) (McDonald, J.)