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SURROGATE'S PRACTICE AND PROCEEDINGS

Ethical Dilemmas: An Update

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In a prior column we addressed the challenging ethical issues faced in representing multiple clients, a commonplace for trusts and estates practitioners who are frequently perceived as the 'family lawyer' and who frequently represent cofiduciaries and multiple beneficiaries. It is also commonplace for the attorney for a settlor or testator to represent the fiduciaries under the trust agreement or the will that the attorney drafted. See 'The Minefield of Conflicts Facing the Trusts and Estates Attorney.' [FN1]

Attorney Disqualification

We turn today to the disqualification of counsel, a not uncommon consequence of such multiple representations as seen through the prism of several recent decisions.

In Matter of Ruth Harmon, [FN2] the settlor of an inter vivos trust sought to remove the trustees and obtain the trust's assets. The settlor then moved to disqualify the attorney for the trustees on the ground that he had been the settlor's attorney in drafting the trust indenture, citing DR 5-108. The trustees' attorney argued in opposition that following the creation of the trust the settlor had hired two other

attorneys to set the trust aside, and that he had represented the trustees since inception without objection from the settlor.

The surrogate began by setting forth the requirements for disqualification:

A party seeking disqualification of opposing counsel must satisfy three criteria in order for the court to conclude that there is an irrebuttable presumption of disqualification:

(1) the existence of a prior attorney-client relationship between the moving party and opposing counsel,

(2) that the matters involved in both representations are substantially related, and

(3) that the interests of the present client and the former client are materially adverse (citations omitted).

The court ruled that the settlor had failed to meet this test based on the papers submitted and scheduled a hearing 'before summarily disqualifying a party's chosen counsel.'

In his Aug. 27, 2008 decision in Estate of Mary F. Harris, [FN3] Surrogate John Czygier ruled that the respondent-executor in a removal proceeding had established the foregoing three conditions for disqualifying the attorney for the petitioner beneficiary. In Harris, the beneficiary's attorney had represented the executor for the first year of the estate administration. The court held that the executor had demonstrated that the prior representation of the executor in the probate proceeding and the administration of the estate by the beneficiary's current counsel in this removal proceeding 'are substantially related to counsel's representations of the petitioner [the beneficiary] in the SCPA 711 proceeding as the executor's actions in administering the estate form the foundation for the removal proceeding.'

Noting that the executor and his former attorney's new client are clearly antagonistic, the court held that

'the executor is entitled to be free from apprehension that counsel's prior representation of him will inure to the advantage of the petitioner in the SCPA 711 proceeding (see Decana Inc., 27 AD3d at 207; Nationwide Assoc. Inc. v. Targee St. Internal Med. Group P.C., 303 AD2d 728 [2003]; see also Matter of Hof, 102 AD2d at 591; Matter of Lichtenstein, 171 Misc. 2d 29 [1996]).'

'Matter of Maurer'

In Matter of Maurer, [FN4] Surrogate Renee R. Roth of New York County issued a veritable tutorial on the complexities of disqualification. In Maurer, the objectant in a will contest moved to disqualify the proponents' attorney alleging conflict of interest and the necessity for the attorney's testimony at trial. The alleged conflict of interest was the objectant's stated intent to join the proponents' attorney as a defendant in a separate suit brought by objectant in Supreme Court for alleged tortious interference with her rights under a postnuptial agreement with the deceased testator.

In approaching the motion for disqualification, Surrogate Roth set forth the governing principles:

A determination of whether an attorney should be disqualified rests within the sound discretion of the court [citations omitted]; In exercising such discretion the court must be mindful that a party's right to be represented by counsel of his or her own choosing is a valued substantive interest which should not be interfered with absent a clear showing that disqualification is warranted (citations omitted) (emphasis added).

Nevertheless, this valued substantive right to counsel of a party's choice may be 'overridden where necessary, for example, to protect the integrity of the process by avoiding litigation tainted by unwaivable conflicts or to preserve the confidentiality of matters divulged by a prior client.' Id.

The Maurer decision begins with the holding that the objectant lacked standing to seek the disqualification of the proponents' attorney because the attorney had never represented the objectant. But that was not the final disposition. The court exercised its authority to sua sponte consider disqualification 'if there is a conflict or impropriety which is profound enough to be unwaivable. ' In such a case:

the court must be satisfied that such motion [to disqualify] is not a disingenuous litigation tactic designed to interfere with the relationship between the attorney and his current client. Allegations of conflict or impropriety made by the party who lacks standing must, therefore, be serious enough to alert the court that there is a need for it to act sua sponte.

Applying this test, the court denied as premature, without prejudice to renewal, the claim of conflict of interest grounded on the objectant's stated intent to join the proponents' attorney as a codefendant in her tortious interference suit.

In disposing of the objectant's second ground that the proponents' attorney would be a witness in the litigations, the court set forth the tests. Where an attorney may testify on behalf of his clients:

it must be established not only that the attorney is in possession of material information but that his testimony is likely to be necessary (citations omitted). Testimony may be relevant and even highly useful, but still not necessary.

On the other hand, if a party seeks disqualification because he intends to call the attorney, vague and conclusory statements that the attorney's testimony will be adverse to his clients' interests are insufficient (citations omitted).

Proponents asserted that they had no need for their attorney's testimony. And, as objectant failed to meet the test of 'necessary' testimony, the court refused to disqualify the attorney.

'Matter of Piazza'

Attorney disqualification was also the subject of a recent decision in a probate contest from Suffolk County in Matter of Piazza. [FN5] There, the attorney for objectant had first had a meeting with

decedent's three children with a view toward representing one of them in seeking to probate the will. After the meeting, the daughter who became the proponent in the probate proceeding informed the attorney that she was retaining different counsel. He then sent a letter to the children confirming that he would not be the 'estate's attorney.' Sometime later another daughter who was present at the initial consultation retained the lawyer to challenge the will. Proponent then moved to disqualify the objectant's attorney.

Here the issue was not the advocate witness rule under DR 5-102, but one of former representation under DR 5-108. The issue was whether the initial consultation was sufficient for a finding that the attorney had 'represented' the proponent. Surrogate Czygier denied disqualification, holding that the initial meeting was just that, an initial consultation with a number of attendees, which ended before any confidences were imparted to the attorney. Since both proponent and objectant were at the meeting, it was fair for the court to assume that no confidences or secrets were imparted during that meeting.

A recent decision from Bronx County, Matter of Walsh, [FN6] involved an interesting clash between an individual's fundamental right to represent him or herself and the ethical proscription against an advocate also being a witness in a proceeding (DR 5-102). [FN7] Walsh was an SCPA 2103 discovery proceeding commenced by the executor, an attorney who was representing himself as the petitioner. The respondent moved to disqualify the attorney because the respondent had consulted a lawyer friend about an issue in the proceeding and, through happenstance, the lawyer friend subsequently consulted the petitioner-lawyer who gave certain advice contrary to the position he was taking in the discovery proceeding.

In analyzing the issue the court was required to balance the strong policy in favor of the right to counsel of one's choice and the right to represent oneself, against the code's proscription against an advocate acting as a witness. The policy behind the advocate witness rule is that the roles of an advocate and a witness are inconsistent -- as it is unseemly for the advocate/witness to argue his own credibility before the trier of fact. The surrogate held that the policy behind the advocate/witness rule trumps the right of self-representation where the advocate is not a party in his/her individual capacity. Here, the attorney's only interest in the estate was as a fiduciary -- the result may be different if the attorney-fiduciary was the sole or principal beneficiary of the estate.

In the estates field, advocate witness issues seem to arise most often 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. The authors view SCPA 1404 discovery as potentially determinative of the outcome of a probate contest and the attorney drafter can only do harm if he represents the proponent during SCPA 1404 discovery.

Our antennae must always be sensitive to potential disqualification issues. None of us wants to be a respondent in a disciplinary proceeding. Second, there is a growing body of case law that holds that where an attorney is disqualified for a violation of the Disciplinary Rules of the Code of Professional Responsibility, the attorney forfeits his or her fee. [FN8]

SCPA §2307-a

Last year the Legislature again amended SCPA §2307-a (Laws 2007, ch. 488) (effective Aug. 1, 2007) to clarify the nature of the disclosure that must be made by the attorney-fiduciary. Prior to Nov. 16, 2004, this section required disclosure (1) that not only attorneys can serve as executors; (b) that executors receive statutory commissions; and (c) that attorneys serving as executors can charge reasonable attorney's fees in addition to receiving commissions. A fourth disclosure item was added effective Nov. 16, 2004 (Laws 2004, ch. 709) requiring disclosure that if the attorney fails to make the requisite disclosure, the attorney's commissions as executor will be reduced by one-half. In 2007 the disclosure provisions were extended to a nominated executor who is an employee of the attorney-draftsperson or an affiliated attorney, as those terms are defined in the statute.

Two recent decisions apply the 2004 and 2007 amendments. In Matter of Moss, [FN9] Surrogate Roth held that where a testatrix had signed an SCPA 2307-a disclosure statement that complied with the then-applicable disclosure requirements, her subsequent execution of a codicil following the 2004 amendment to 2307-a did not require the execution of a new disclosure statement. The changes made by the codicil did not involve a fiduciary appointment. Therefore, the court stated that it would not have been an occasion for discussion of fiduciary compensation. Query whether the result would have been different if the codicil appointed an attorney as an additional fiduciary or substituted one attorney for

another.

In Matter of Hess, [FN10] (decided with Matter of Moss), Surrogate Roth held that a partner of the attorney-drafter cannot serve as a witness to an SCPA 2307-a disclosure statement. The surrogate held that since the drafter and his partner are 'affiliated' within the meaning of 2307-a's application to affiliated attorneys and employees, the partner is not disinterested in the transaction and therefore is ineligible to act as a witness. The surrogate reasoned that:

[a] nominated executor is identified with the draftsman if the two are ' affiliated' (SCPA 2307-a[5]). In view of the affiliation between the nominated executor and the Partner, the Hess disclosure statement may reasonably be deemed to have been 'witnessed' not simply by the Partner, but, in effect and contrary to the purpose of the statute, by the nominee.

The cited section of the statute, subparagraph 5 [FN11] also identities the attorney drafter with employees and, by parity of reasoning, employees could similarly be deemed ineligible witnesses. Query whether the court will limit its holding only to partners of the attorney-drafter or whether this is a matter for clarifying legislation, The reality is that our partners, associates and employees are the persons whom we typically use as our attesting witnesses and 2307-a witnesses.

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FN1. NYLJ, Dec. 21, 2001, p. 3, col. 1.

FN2. NYLJ, Oct. 16, 2006 (Surr. Ct. Suffolk Co.).

FN3. NYLJ, Aug. 27, 2008 (Surr. Ct. Suffolk Co.).

FN4. NYLJ, Dec. 12, 2006 (Surr. Ct. New York Co.).

FN5. NYLJ, April 29, 2008, p. 35, col. 2 (Surr. Ct. Suffolk Co.).

FN6. 17 Misc3d 407, 840 NYS2d 906, 2007 NY Slip Op 27343 (Surr. Ct. Bronx Co.)

FN7. Code of Professional Responsibility DR 5 -102 (22 N.Y.C.R.R. §1200.21).

FN8. See, e.g., Matter of Winston, 214 AD2d 677, 625 NYS2d 927 (2d Dept. 1995) [attorney who engages in misconduct by violating the Disciplinary Rules is not entitled to legal fees for any services rendered].

FN9. NYLJ, Sept. 24, 2008, p. 40, col. 3, 2008 NY Slip Op 028338 (Surr. Ct. New York Co. 2008).

FN10. NYLJ, Sept. 24, 2008, p. 40, col. 3, 2008 NY Slip Op 028338 (Surr. Ct. New York Co. 2008).

FN11. This subparagraph provides:

Absent compliance with the requirements of subdivision 2 of this section, the commissions of an attorney, or an employee of the attorney who prepared the will or a then affiliated attorney, who serves as an executor shall be one-half the statutory commissions to which such person as executor would otherwise be entitled pursuant to sections 2307 and 2313 of this article.

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