Pretrial Advocacy: An Ethical Checklist—Part I

Gerald Lebovits
Criminal Law: Cases

BY: ILENE J. REICHMAN, ESQ.

During the past year, the New York Court of Appeals addressed a variety of issues in the area of criminal law and procedure. This article will review and highlight several cases that may be of interest to the criminal practitioner.

In People v. Michael Rawlins, 10 N.Y. 3d 136 and a companion case, People v. Dwan Meekins, 10 N.Y. 3d 136 (decided February 19, 2008), the Court decided to resolve an issue of first impression: whether DNA and latent fingerprint comparison reports are “testimonial” statements within the meaning of Crawford v. Washington, 541 U.S. 3 (2004). In Rawlins, the defendant’s latent fingerprints were lifted from six burglarized commercial establishments and compared by several different detectives, one of whom did not testify at trial. In Meekins, a DNA report was prepared by multiple technicians at a private laboratory that the NYPD had outsourced the task of testing crime scene samples. None of the technicians testified at trial. However, a supervisor at the laboratory testified that she had reviewed the reports prepared and kept in the regular course of business. On appeal, Rawlins and Meekins challenged the admissibility of those reports as a violation of their Sixth Amendment right of confrontation. The Court of Appeals held that the DNA report in Meekins was not “testimonial” within the definition of Crawford because it shed no light on the guilt of the accused. By contrast, The Court held that the fingerprint report in Rawlins was “testimonial” since it was inherently accusatory and offered to prove an essential element of the charges charged. The error in Rawlins was nevertheless found to be harmless beyond a reasonable doubt.

In People v. Donnie Simmons, 10 N.Y. 3d 946 (decided July 1, 2008), the defendant sought dismissal of an indictment on the grounds that his right to testify before the grand jury had been violated. Simmons was held on bail following his arraignment in the criminal court on a misdemeanor charge where he was represented by an attorney from the misdemeanor panel of the Assigned Counsel Plan. At his next court appearance, the prosecutor notified him and his attorney of his intent to present the case to a grand jury. However, his attorney failed to appear for the scheduled grand jury appearance and Simmons was not produced for that proceeding. In support of the motion to dismiss filed by his new attorney, Simmons argued that his first attorney had constructively abandoned him at a critical stage of the prosecution. The Court of Appeals disagreed, holding that the failure of defense counsel to facilitate defendant’s testimony before the grand jury did not amount to a denial of his right to effective assistance of counsel since there was no showing that the outcome of the grand jury proceeding would have been different if he had testified. In People v. Jason Naradzay, N.Y.3d (decided June 18, 2009). The Court held that a defendant’s statement made in the presence of the prosecutor in the presence of the prosecutor in a grand jury proceeding is “testimonial” since it was inherently accusatory and offered to prove an essential element of the charges charged. The error in Naradzay was nevertheless found to be harmless beyond a reasonable doubt.

New Amendments to Section 3420 of the Insurance Law Relating to Late Notice to Insurers and Disclaimers of Coverage

BY MARTIN SCHULMAN, ESQ.*

On January 17, 2009 a change in the Insurance Law took effect that substantially benefits both insured and injured parties. As of that date amendments to Section 3420 of the Law mandate that an insurer may not disclaim coverage based on “late notice” unless it suffers material prejudice as a result of the delay. In conjunction with the change, Sec. 3001 of the CPLR was also amended to allow insured parties to maintain Declaratory Judgment actions against an insurer on the issue of late notice.

Background

Prior to the change, signed into law by Governor Patterson in July, 2008, if an insured failed to notify its insurer of an accident in a timely manner, the insurer was able to disclaim coverage whether or not it was prejudiced by the delay. New York was one of only a few states that adhered to the “no prejudice” rule and it was rigidly enforced by the Court of Appeals. Delays in giving notice of an accident or an injury to an insurer, even where such delays were innocent or the result of honest misunderstandings on the part of the insured often resulted in a disclaimer by the insurer and its refusal to either defend or indemnify under an insurance policy.

A concise statement of the Court’s position was given in 2005 by Judge Smith in Argo Corp. v. Greater N.Y. Mutual Insurance Co., 4 N.Y.3d 332.

He wrote:

“A liability insurer, which has a duty to indemnify and often also to defend, requires timely notice of lawsuit in order to be able to take an active, early role in the litigation process and in any settlement discussions and to set adequate reserves. Late notice of lawsuit in the liability insurance context is so likely to be prejudicial to these concerns as to justify the application of the no-prejudice rule. Argo’s delay was unreasonable as a matter of law and thus, its failure to timely notify GNY vitiates the contract. GNY was not required to show prejudice before declining coverage for late notice of lawsuit.”

CPLR Update 2009

BY DAVID H. ROSEN, ESQ.

Arbitration

It is basic to the determination of arbitration issues that whether a contract to arbitrate has in fact been made is a matter to be determined by the court. Where the parties have agreed to arbitrate, and one party demands an arbitration of a dispute, the service of the demand triggers a short limitations period of twenty days, during which the responding party must make application to the court for a stay of arbitration or be held to have waived any objection to the arbitration based upon the demanding party’s lack of compliance, or time limitations or even that the dispute is within the arbitration agreement. An exception to this strict rule applies where the parties never in fact agreed to arbitrate. In such a case, the Court of Appeals has previously held in Matter of Matarasso that the twenty-day limitations period does not apply. In Matter of Fiveco, Inc. v Haber, the Court of Appeals considered whether the 4 Matarasso rule applies so as to allow a late petition to stay arbitration, where the expiration of the time for filing the petition did not occur.

The contract involved the installation and maintenance of music and game machines in petitioner’s bar. The contract contained a broad arbitration clause, and was to last for five years, with a five-year extension if certain payments were made by the respondent to petitioner. A payment was made, but petitioner claimed that it was not one which would trigger the five year extension. Claiming that the contract had expired, petitioner demanded that respondent remove the machines from its premises, which the respondent did. Respondent then served a demand for arbitration, alleging that the payment did extend the contract for the additional five years, and that petitioner had breached the contract by demanding removal of the machines.

Not until three months later, petitioner commenced the proceeding pursuant to CPLR Article...
Judge Lippman Begins Service as New Chief Judge of the New York Court of Appeals

BY SPIROS TSHUMBUS

On January 14, 2009, Governor Paterson announced that he had selected Jonathan Lippman as his nominee to be Chief Judge of the New York Court of Appeals. In late January, the State Senate confirmed Judge Lippman’s nomination, and he assumed his seat on the Court of Appeals during the month of February. Judge Lippman has a long and distinguished career of service within the judicial system. He served as Chief Administrative Judge of the New York Unified Court System for over 11 years, and most recently was the Presiding Justice of the Appellate Division, First Department. Prior to his selection to serve on the Appellate Division, he was a Supreme Court Justice serving in Westchester County.

Judge Lippman is a graduate of New York University School of Law, and has been a long time resident of New York City. He is married with two children. He was selected from a list of seven nominees presented to the Governor to fill the position recently vacated by Chief Judge Judith Kaye, who retired on December 31, 2008. Judge Lippman has reached 64 years of age and will be able to serve as Chief Judge of the New York Court of Appeals for a little more than six and a half years, to wit, December 31, 2015, when he reaches the mandatory retirement age. Judge Lippman is the first Chief Judge not selected from the New York Court of Appeals itself in more than 100 years.

Judge Lippman is well known for his administrative skills, and it was recently reported, as he was concluding his two-year tenure on the Appellate Division, that the backlog of that Court had been dramatically decreased, and that cases were being heard and decided in a more expeditious manner. Governor Paterson, in making his selection of Judge Lippman, praised the Judge’s qualifications and character, and stated that he would make an outstanding Chief Judge of the Court. It had been widely reported that Judge Lippman and Judge Jones, who was already sitting on the New York Court of Appeals, were the leading candidates for selection of Chief Judge. Evidently, because of the high quality of the candidates who were presented to him, and the difficult decision which he had to make, Governor Paterson waited almost to the last day of the required time period to announce his selection. The choice of Judge Lippman was well received within the legal community and we are certain that he will make an outstanding contribution to the Court of Appeals and to the New York State Court System. Judge Lippman is well known to our Bar Association having appeared at many of our programs and functions. We congratulate Judge Lippman on his appointment and wish him all the very best.

Pretrial Advocacy: An Ethical Checklist — Part I

BY GERALD LEBOVITS AND JOSEPH CAPASSO

Professionals use checklists to ensure consistency and completeness in carrying out tasks. Checklists are useful memory aids when multi-tasking under stress to finish a project. Commercial airline pilots use checklists during each phase of flight to ensure that they configure the aircraft for engine start, taxi, and take-off. Pilots also rely on checklists so that they do not forget routine tasks like deploying the landing gear during an in-flight emergency.

Checklists are equally useful in the legal profession. The phases of pretrial litigation include chaotic procedures that require expert multi-tasking. Using an ethical checklist will save the attorney from a “gear-up” landing.

This article sets forth an ethical checklist that highlights important provisions of the Federal Rules of Civil Procedure (F.R.C.P.), the New York Civil Practice Law and Rules (C.P.L.R.), the American Bar Association (ABA) Model Rules of Professional Conduct, the 2009 New York Rules of Professional Conduct,1 and the New York State Standards of Civility.2 Attorneys must consider these provisions from the initial prospective-client interview through the pleading, discovery, and motion stages of pretrial negotiation and litigation. All references in this article to the New York Rules of Professional Conduct are to the new Rules, which the four judicial departments of the Appellate Division approved on December 16, 2008, and which will take effect on April 1, 2009.3

A. Ethical Considerations During the Initial Client Interview.

Client interviews are an important first step in pretrial litigation. During the interview, information flows rapidly between attorney and client. The attorney must make quick decisions, ask follow-up questions to elicit more facts, and be mindful of numerous ethical situations that might arise. With a checklist in hand, the prudent attorney will avoid many hazardous ethical dilemmas. Initially, the attorney must decide whether representing the client is morally correct. The attorney must then guard against shaping the client’s factual narrative to fit a legal theory and helping the client commit illegal conduct. During the initial interview or soon thereafter, the attorney should define the scope of the representation and fee arrangement.

Does the client have a legal and moral right to the relief requested?

The first item on any ethical checklist involves a threshold moral determination. Abraham Lincoln once told a prospective client: “Yes, . . . we can doubtless gain dollars to which you seem to have a legal claim, but which rightfully belongs, it appears to me, as much to the woman and her children as it does to you.”4 Lincoln continued: “You must remember that some things legally right are not morally right. We shall not take your case, but will give you a little advice for which we will charge you nothing. You are a sprightly, energetic man; we would advise you try your hand at making six hundred dollars in some other way.”5 An attorney needs facts to make this initial moral decision. The attorney must determine the best way to secure these facts from the client. Attorneys should learn the entire story, from the client and other sources, while allowing the client to present the facts undisputed. Attorneys who do not actively listen or who fail to facilitate full client communication risk embarrassing on litigation without all the relevant facts. Attorneys who knowingly ignore, or decide they do not want to know, the facts place themselves in dangerous ethical situations. The next item on our ethical checklist, therefore, is to use care developing the facts underlying a case.

Do not mold the client’s factual narrative to fit a legal theory.

An attorney’s efforts to structure a client’s version of the facts can cross the line from poor interviewing to violating ethical norms. Robert Traver illustrated this principle in Anatomy of a Murder.6 The defense attorney lectured his prospective client, Lieutenant Manion, on the legal defenses to first-degree murder, trying to obtain facts to support Manion’s only plausible defense. The attorney reflected: “It had been obvious to me . . . that insanity was the best, if not the only, legal defense the man had. And here I had just slammed shut every other escape hatch . . . ?”7 The attorney told Manion that persons acquitted of murder due to insanity must spend time in a mental hospital. The law required this to discourage phony pleas. In explaining the law in a precise sequence, the attorney led his client to the insanity defense but stopped just short of asking him whether he was insane when he committed the murder. Instead, “[t]he lecture was about over. The rest was up to the stu-
objectives with vigor, zeal, and undivided loyalty. The attorney must not, however, advise or help a client commit a wrong. Sometimes questions during client interviews reveal information about the client that is not about contemplated future actions. The attorney should be cognizant of both the N.Y. Rules of Professional Conduct and the ABA Model Rules of Professional Conduct. According to N.Y. Rule of Professional Conduct 1.16(c)(2), a lawyer may withdraw from representing a client who “has used the lawyer’s services to perpetrate a crime or fraud.” Comment 2 to ABA Model Rule 1.16 adds that an attorney must decline or withdraw from representation if the client demands that the attorney engage in conduct that is illegal or violates the Rules or other law. Attorneys must be vigilant to detect questions from clients covertly trying to gain assistance in illegal conduct.

Define the scope of the representation.
Taking time to define the representation is an important part of the initial client interview. The attorney should define the scope and objectives of the representation and the lawyer-client fee arrangements by agreement with the client. In New York, 22 N.Y.C.R.R. Part 1215 defines the requirements for the written letter of engagement. The attorney should make it clear to a client . . . shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter. (1) if otherwise impractical; or (2) if the scope of services to be provided cannot be determined at the time of commencement of representation.”

The letter of engagement should include an (1) explanation of the scope of the legal services to be provided; (2) explanation of the attorney’s fees to be charged, expenses and billing practices; and (3) where applicable, shall provide that the client may have a right to arbitrate fee disputes under 22 N.Y.C.R.R. Part 137.11

There are four exceptions to these letter-of-engagement requirements: (1) representation when the fee is expected to be less than $3000; (2) representation when the attorney’s services are similar to those previously rendered to and paid for by the client; (3) representation in domestic-relations matters subject to 22 N.Y.C.R.R. Part 1400; or (4) representation when the attorney is admitted to practice in another jurisdiction and does not maintain an office in New York state or when one or more material parts of the services will be rendered in New York.

Communicate fee arrangements to the client.
The final item on our initial client inter-
view checklist reminds attorneys to structure fee arrangements to avoid later ethical questions. The nature and amount of an attorney’s fee are subject to contractual agreement between the attorney and the client except when a statute or court order sets the fee. The attorney must bargain at arm’s length with the client. The attorney must also protect against later claims of unethical conduct in establishing the fee.

Court Notes
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The respondent was charged with mis-
conduct emanating from his service as supervisor and then Chief Clerk of the King’s County Surrogate’s Court. Following issuance of an order declaring that no factual issues existed, and an opportunity for the respondent to be heard in mediation, the case was bound over to conduct prejudicial to the administration of justice.

Be wary of client questions designed covertly to seek the attorney’s assis-
ance in contemplated crime or fraud.
The attorney should pursue a client’s

Failing to timely register as an attorney with the New York State Office of Court Administration (OCA) (22)

Representing the lender and purchaser in a real estate transaction without informing them of the conflict; assisting the pur-
chaser in conducting the attorney knew to be illegal and fraudulent (i.e., facilitating the breach of a mortgage contract); failing to advocate for either the lender or the pur-
chaser, but rather failing to assist in managing to both; depositing fiduciary funds into a business account; and failing to indicate on law firm letterhead required information relative to deceased members of the firm.

Handling a matter for which the attorney lacked the requisite degree of competence; counseling or assisting a client in conduct that the attorney knew to be illegal or fraudulent (i.e., helping a client to conceal information from a lender); permitting a person who recommended the attorney’s employment to influence his or her profes-
sional judgment; and failing to cooperate

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**Pretrial Advocacy: An Ethical Checklist — Part I**

The attorney should pursue a client’s

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The Lieutenant looked out the win-
dow . . . I sat very still. Then he looked at me. ‘Maybe,’ he said, ‘maybe I was insane . . . ’

This story highlights how poor inter-
viewing techniques place attorneys in eth-
ical quandaries. To avoid molding client perceptions, the attorney should focus on active listening as an alter-
native to soliciting facts. Then the attorney may mold an available legal theory to fit the facts honestly relayed and earnestly uncovered.

Through active listening the attorney hears the client’s message and sends it back in a reflective statement that mirrors what the attorney has heard. Active listen-
ing provides nonjudgmental understanding and stimulates client participation in the interview. Instead of simply repeating what the client just said, the attorney’s response should be an affirmative effort to convey the essence of what the attorney just heard. The attorney’s response com-
municates the following to the client: “This is what I have heard you say.” This technique helps the client feel comfortable and directed during the interview. By supporting the facts openly and fully and shelters the attorney from ethical proprieties during the interview process.9

Counseling or assisting a client in con-
duct that the lawyer knew to be illegal or fraudulent (i.e., engaging in a real estate transaction with a “straw buyer”) and engaging in conduct that had the appearance of improt

Failing to maintain a proper book-
keeping record; writing bulk checks for fees without noting which client matters the checks represented; failing to adhere to Court Rules regarding the filing of Retainer and Closing statements with OCA; improperly depositing funds belonging to another attorney; and failing to adequately supervise staff

Drawing IOLA checks to pay client expenses and/or disburse fees before com-
mensurate deposits cleared; failing to ade-
quately supervise the work of associates and non-lawyers; engaging in an imper-
missible conflict of interest by acting as an attorney and real estate broker in the same transaction; and making a cash withdrawal from an escrow account

Maintaining personal funds in an escrow account; commingling personal funds with funds held as a fiduciary, incident to the practice of law; failing to maintain a con-
temporary and non-lawyers; engaging in an imper-
misible conflict of interest by acting as an attorney and real estate broker in the same transaction; and making a cash withdrawal from an escrow account

Drawing escrow checks without ascer-
ting that sufficient funds were on deposit, causing the check to be dishon-
ored, and failing to maintain proper escrow records

Individually drawing checks against the attorney’s IOLA account, rather than his business account, and individually depositing business funds into his IOLA account

A court that determines the reasonableness of a fee will give the benefit of the doubt to the client because the attorney has the burden to prove the reasonableness of the fee.

N.Y. Rule of Professional Conduct 1.5(a) forbids attorneys from charging an illegal or excessive fee. The Rule outlines eight factors to determine whether a fee is excessive.

Under 22 N.Y.C.R.R. Part 137, New York attorneys must offer arbitration to clients in most civil matters and submit to fee arbitration or mediation if a client in a civil matter requests it. Under Section 137.1(a) and (b), the fee-arbitration pro-
gram does not apply to representations begun before January 1, 2002, or to (1) criminal matters; (2) fee disputes involv-
ing less than $1000 or more than $50,000, unless the arbitral body and the parties consent; (3) claims involving substantial legal issues, including malpractice or mis-
conduct; (4) claims for damages or relief other than adjusting a fee; (5) disputes over a fee allowed by a statute, or rule, or set by a court; (6) disputes in which no legal services have been rendered for more than two years; (7) disputes with out-of-
state attorneys who have no office in New York or who did not render any material portion of the services in New York; and (8) disputes in which the person requesting arbitration is neither the client nor the client’s legal representative.13

E. Considerations During the Arbitration

Neglecting an estate matter

Neglecting a legal matter and failing to maintain contact with clients

Neglecting a legal matter and improperly withdrawing from representation

Engaging in conduct that adversely reflects on fitness to practice by communi-
cating with a represented party on the sub-
ject of the representation

Engaging in an improper conflict of interest and lacking candor before the Grievance Committee

Conducting improper advertising while under suspension from the practice of law

Falsely acknowledging, and then filing, a deed when the person executing the doc-
ument was not, in fact, before the attorney

Having been convicted of Driving While Intoxicated, a misdemeanor

**The Queens Bar Bulletin – February 2009**
Pleading Stage of Litigation. The Preamble to the ABA Model Rules of Professional Conduct recognizes the attorney’s obligation to protect and pursue an attorney’s duty to represent a client’s legitimate interests within the bounds of the law while maintaining a civil, courteous, and professional attitude toward all. Attorneys must ensure that their devotion to the client does not conflict with duties to other parties, other counsel, the courts, and the administration of justice.

Attorneys must sign all papers filed with the court. C.P.R 210(d) requires that “[e]ach paper served or filed shall be indorsed with the name, address and telephone number of the attorney for the party serving or filing the paper . . . .” Similarly, F.R.C.P. Rule 11(a) and 22 N.Y.C.R.R. Part 130-1.1a require that at least one attorney of record or, if unrepresented by counsel, the party itself must have every pleading, motion, and other paper. By presenting a signed paper to the court, an attorney or unrepresented party certifies that the content of the document is not being presented for any improper purpose. This includes for example, attempting to “initiate, propound, or delay discovery” or “sustain or uproot an opposing party.”

Additionally, “the claims, defenses, and other legal contenions therein are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law.” When filing a pleading with a court, the attorney must certify having performed “an inquiry reasonable under the circumstances” of the information presented to the court. The certification is also required for any pre-filing inquiries to anticipate a Rule 11 violation. The court will assess whether the attorney’s failure to perform a reasonable inquiry or investigation is “indicated by sanction or disciplinary action, and they do not act in good faith on the merits of the litigation, or to harass or maliciously injure another” or if the attorney or client asserts “material factual statements that are false.”

This article continues with Part II in the March 2009 issue of the Queens Bar Bulletin.

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