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Pretrial Advocacy: An Ethical Checklist—Part II

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Guardian & Elder Law:
New and Noteworthy

BY JOHN B. DIETZ, ESQ.

There is much that is new and noteworthy in Guardianship and Elder Law. The Courts, including the Court of Appeals, have rendered an array of interesting decisions. The legislature has been active in making new laws. And of course at the beginning of each new year the administrative agencies are busy promulgating program changes. What follows is a selective survey of some of the recent Court decisions, new laws, and administrative changes.

Supplemental Needs Trusts: In Matter of Abraham XX, 165, the Court of Appeals addressed the question as to whether the State can recover its remainder interest in an amount equal to the total medical assistance paid or whether the State is limited to the amount expended from the trust’s effective date to the recipient’s death. Unfortunately, the Court decided the case in favor of the State.

The facts are familiar. Abraham XX suffered an injury at birth. His institutional care was paid for by Medicaid. A personal injury suit was brought on behalf of Abraham XX. The matter settled and the Medicaid lien at the time, $1.7 million, was paid in full. After years of litigation the sum of $2.17 million was retroactively placed into a Supplemental Needs Trust (SNT). There was an 18 month gap, however, from the time of verdict and the date the trust was funded. Abraham died on June 11, 2003. Medicaid sought reimbursement for payments made during the gap. Abraham’s mother argued the State was only entitled to recovery of Medicaid payments made after the SNT was funded. During the gap, Medicaid payments were “correctly paid” and not subject to recovery.

The Court rejected the mother’s argument. The Court held that when an SNT is established pursuant to Social Security, Medicaid, and other options before routinely creating and funding this popular legal tool. MHL §81.29. MHL §81.29 (d) has been amended in connections with the authority of the Courts to vitiate wills and codicils of an Incapacitated Person. In Matter of Ruby S., N.Y.L.J., Feb. 11, 2002, Justice Thomas, Supreme Court, Queens County, took the then extraordinary step of voiding the Last Will & Testament of an Incapacitated Person.

The decision was both decried and hailed. The decision seemed logical and fair. Why was it necessary to wait until the death of the Incapacitated Person, sometimes many years later, to challenge the validity of a will? Especially, when one considers that the Incapacitated Person may still be alive, the witnesses available, and the events fresh in everyone’s minds.

On appeal Justice Thomas’ decision was left intact. The Appellate Division deflected any decision on the grounds that the appellant, who was the nominated executor and the attorney drafter, lacked standing. Two months later, however, In the Matter of Lillian A., 307 A.D.2d 921, 762 N.Y.S.2d 899 (2d Dept 2003), the Court stated that the Supreme Court did have authority to revoke a last will and testament, citing to MHL §81.29(d).

The legislature has now put the issue to rest. The Court has no authority to invalidate a will or codicil, according to the amended MHL §81.29 (d). While the Supreme Court may amend, modify or revoke any previously executed power of attorney, power of appointment, health care proxy, or any contract, conveyance, or disposition during lifetime or to take effect upon death, made by the incapacitated person prior to the appointment of the guardian if the court finds that the person was incapacitated or if

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This article continues from Part I, which was published in the February 2009 issue of the Queens Bar Bulletin.

C. Ethical Considerations During the Discovery Stage of Litigation.

Ethical situations arise during discovery. Although attorneys have numerous procedural tools to aid in gathering information, attorneys must be vigilant not to abuse these tools. An ethical checklist reminds attorneys of their duty to supplement or correct information provided during discovery and to refrain from tactics designed to delay litigation or harass opposing litigants or third parties.

Attorneys must not abuse procedural tools.

The use of interrogatories during discovery presents attorneys with ethical questions. C.P.L.R. 3132 and F.R.C.P. Rule 33(a) dictate that only a party to a civil action may promulgate an interrogatory to another party to that same action. To get information from a non-party, the attorney must use other discovery tools. These rules influence plaintiff’s counsel to determine who should be named as defendants.

ABA Model Rule 3.1 dictates that attorneys must refrain from naming a person as a defendant merely to benefit from discovery procedural tools. Comment 1 to ABA Model Rule 3.1 provides that “[t]he advocate has a duty to use legal procedure for the fullest benefit of the client’s cause, but also a duty not to abuse legal procedure.” Naming a person as a defendant to gain information about the case through interrogatories is one example of an abusive use of legal procedure. Although the Model Rules note that the law establishes the limits within which an advocate may proceed, the law is often unclear. To determine the proper scope of advocacy, attorneys must be wary of the potential for abuse. A related idea is the use of a lawsuit to obtain information for non-litigation purposes. The attorney has an ethical duty to refrain from such conduct, as directed by ABA Model Rule 3.1.

Attorneys must supplement or correct information provided during discovery.

Attorneys engaged in civil discovery must be familiar with F.R.C.P. Rule 26(a) and C.P.L.R. 3101(h), which require attorneys to supplement discovery documents and disclosure when they learn new information. A party is required to supplement or correct a Rule 26(a) disclosure to include information acquired after the disclosure was made if the court so orders it or “if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.” In New York, C.P.L.R. 3101(h) requires a party to “amend or supplement” information provided through disclosure after “obtaining information that the response was incorrect or incomplete when made, or that the response, though correct and complete when made, no longer is correct and complete, and the circumstances are such that a failure to amend or supplement the response would be materially misleading.”

Attorneys must also be familiar with F.R.C.P. Rule 26(g)(1). This Rule provides that an attorney’s signature on a Rule 26(a) disclosure certifies that the disclosure is “complete and correct as of the time it is made.” Rule 26(g)(2)(A) provides that an attorney’s signature on a discovery request, response, or objection certifies that the discovery document is “consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.” The requirements Rule 26(g) imposes on discovery papers parallel the Rule 11 requirements imposed on pleadings, motions, and other papers.

N.Y. Rule of Professional Conduct 3.3(a)(3) addresses the situation in which an attorney learns that a client has materially misled a party or the court by offering false evidence. The Rule provides that a lawyer shall not knowingly “offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.” ABA Model Rule 3.3(a)(3) adds that a “lawyer may refuse to offer evidence . . . that the lawyer reasonably believes is false.”

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that the evidence was false, the attorney must correct the situation. If the attorney knowingly presents false evidence and fails during a deposition (called an “examination before trial” in New York), the attorney must act immediately. Comment 10 to ABA Rule 3.3 provides that the “advoca-"cethe harmless good faith mistake of the party's motion or application, attorneys tend to respect the withdrawal or correction of the false statements or evidence.” If that fails, then the attorney must withdraw from the representation, if the court per- mits. If withdrawal is not an option or will not undo the effect of the false evidence, "the advocate must make such disclosure to the court as is required to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by [ABA Model Rule 1.6, Confidentiality of Information].”36

Attorneys may not use discovery tactics to delay or prolong litigation. Discovery abuse is a persistent problem in the legal profession. Legal commentators continue to call for reform, while criti- cism of the effect of discovery tactics on peaceful reso- lutions of civil disputes continues. The ABA’s Code of Professional Responsibility contains a provision addressing concerns about the breakdown of civility in the legal profession and the nefarious prolongation for the good old days when lawyers acted like lawyers. Comment 1 to the former Soviet Commercielle S.P.A. v. Industrial & Commercial Research Corp., one of many cases on the subject, the court wrote after a year of delays and the costs of trial:40 "The lawyer’s responsibility . . . includes a year. Or is it ten?”38 The court pointed out the time span are the production of incomplete answers to Plaintiff’s first set of interrogatories, the lawyer was instructed to provide only the essential information. If the lawyer could not provide the information, the lawyer was instructed to provide the information in writing. The court also noted that the plaintiff’s attorney did not appear at the motion to tax fees, his counsel to serve a notice of motion and schedule a hearing in advance of the date the plaintiff’s attorney was unable to travel to his office to complete the brief for a timely filing. The court noted that the plaintiff’s attorney continued to communicate with the court regarding the sanctions. The court found that the plaintiff’s attorney was unable to travel to his office to complete the brief for a timely filing. The plaintiff’s attorney twice refused, forcing defendant’s counsel to file a notice of motion and request for extension of time for the plaintiff’s attorney not to have acquiesced to the requested extension.37 The court criticized the plaintiff’s attor- ney’s conduct and noted that the lawyer’s duty to the plaintiff “continued to show the same myopic view of the matter that caused the need for the effort in the first place” and that continued to "[characterize] the attorney’s conduct as a duty to the client.” The court stated that the plaintiff’s attorney did not appear at the motion to tax fees, the court noted that the plaintiff’s attorney was unable to travel to his office to complete the brief for a timely filing. The plaintiff’s attorney twice refused, forcing defendant’s counsel to file a notice of motion and request for extension of time for the plaintiff’s attorney not to have acquiesced to the requested extension.37 The court explained that the plaintiff’s attorney was missing the point and was "[w]hat is at issue is the need to explain why the plaintiff’s attorney was unable to attend the hearing. The court then summarized what every lawyer is expect- ed to know and live by: "[t]he lawyer’s duty requires the lawyer to avoid unnecessary delay in pursuing the client’s interests even through reasonably available lawful means under the disciplinary rules but that “rea- sonably available means” do not include refusing to confer to an opposing counsel’s reasonable requests that do not prejudice the client’s rights. Attorneys should be courteous to opposing counsel and consent to reasonable requests about court proceed- ings, settings, continuances, waiving of procedural formalities, and similar matters that do not prejudice client rights. When a plaintiff’s attorney appeared in court on the motion to tax fees, his explanation was that he did not agree to the extension because his client did not. In response, the court explained that while a lawyer's duty is to represent the client, ethical proscriptions impose duties on attorneys in their dealings with other attorneys and parties.

E. Ethical Considerations During Pretrial Negotiation

Negotiations present unique challenges. Although the attorney’s primary duty is to the client, ethical boundaries impose duties on attorneys in their dealings with other attorneys and parties. Attorneys must not make false representa- tions during negotiations.

Ethical constraints limit attorneys’ attempts to negotiate favorable settlements. N.Y. Rule of Professional Conduct 4.1 provides that “[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.” This rule can conflict with an attorney’s “truth” obligations during negotiations. puffing is not unethical; it is a common negotiation tactic. Comment 2 to ABA Model Rule 1.4 addressing puffing: “Under generally accepted conventions in negotia- tion, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value . . . and the party’s intentions as to an acceptable settle- ment of a claim are ordinarily in this cate- gory . . . . The attorney must draw a line separating ethically acceptable estimates and estimates that are material misrepresentations of material fact. One helpful technique to conform with the N.Y. Rules of Professional Conduct and Model Rules is to separate statements concerning the negotiation itself (“He won’t take a penny less!”) from...
letters rogatory. Rather, relevant Federal case law establishes that the treaty controls the mechanism for transmittal and delivery of letters rogatory among signatory states, and does not preclude service by other means.

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The Court therefore reversed so much of the Appellate Division’s decision as was
dismissed for lack of jurisdiction.

FOOTNOTES

34. The Court found Funk v. Barry, 19 N.Y.2d 364, 653 N.Y.S.2d 247 [1996] as establishing that the rule is invoked only where there is an explicit direction to sub- mit or settle an order or judgment.

Professional aviators from Orville and Wilbur Wright to Chuck Yeager have
even crossed the sound barrier in the air. The next frontier is space. But what is
to follow in the footsteps of those visionaries who defined the rules of flight?

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issues concerning objectivity facts out-
side the context of the negotiation (“He
paid $16,000 for the car in 2005”). Statements about the negotiation are more
likely to be estimates or intentions that fall
within Comment 2 protection, whileABA Model Rule 4.1 prohibits misrepresenting objectivity facts. Another helpful technique is for attorneys to put themselves into the opposing party’s shoes to assess
whether a negotiation statement is abusive or misleading.

F. Conclusion.


42. 532 F. Supp. 665, 668 (N.D. Ill. 1982).

43. 113 S. Ct. 1774, 123 L. Ed. 2d 398 (1993).

44. 846 F.2d 549 (9th Cir. 1988).


46. L. 2005 ch. 575.

47. 433 F3d 1199 [2006] [en banc].

48. 50. Plaintiff also attempted to justify jurisdiction
among other indiscretions, plaintiff’s attorney’s

49. 37. Charles Yabon, Senior Judge of the U.S. Court of
Appeals for the Ninth Circuit. This article is an
adaptation of a lecture delivered by him at the
Ethics of the Judicial Process.

50. Plaintiff attempted to justify this assertion of
jurisdiction based on a federal court order in the
York courts to hold that, however defendant’s acts may
be characterized, they were not “tortious” within the
meaning of that statute.

51. Yahoo! v. The Ligue Contre Le Racisme et L’Antisionnisme, 433 F3d 1199 [2006] [en banc]. Interestingly, Yahoo! wound up dismissed. Three
judges on the eleven-judge en banc panel found that
there was no jurisdiction, three others found the case
not ripe for determination. The six votes were combined,
and the result was a dismissal.


53. After the determination that Federal authorities
were not entitled to the funds, they were initially
transferred into the DA’s custody. The DA sought several
orders of attachment, which did not go smoothly for rea-
sons not germane to the appeal here. Eventually, the
money was returned to Federal control, by reason of a
request from the Brazilian government and an order of the
UD States District Court. Although the Court of Appeals noted, the attachment issues were thus
rendered moot, leaving the service issues as the only
ones in the case.

54. The Court noted that attempts were made to serve
four of the defendants in Brazil by
substituted service pursuant to CPLR 308(2) or “nail-
and-mail” pursuant to CPLR 308(4), but that service
was not completed.

644, 640 (1st Dep’t 1968).

56. Kremerman v Cruz Velekamp S.A. de C.V., 22
F.Jd 640, 645 [10th Cir 1994]

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**10 N.Y.3d 243, 855 N.Y.S.2d 427 [2008].**

**ANSWERS TO MARITAL QUIZ ON PAGE 15**

**Question #1 - DRL §250 provides for a
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