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Pretrial Advocacy: An Ethical Checklist—Part II

Gerald Lebovits

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Guardian & Elder Law: New and Noteworthy

BY JOHN R. DIETZ, ESQ.

John Dietz

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 the 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 Services Law 366(2)(b)(2)(iii)(A) "the beneficiary explicitly provides the State with a right to recover the total Medicaid paid on behalf of the individual. There is no temporal limitation. The sole, though substantial, stated limitation on the State's recovery is the existence of remaining assets in the trust upon the beneficiary's death".

Are SNT's as valuable a planning tool now as before the Court's decision? There are many advocates who contend that disabled individuals, their families, and attorneys, must now give a hard critical look at the SNT, 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 not 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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Queens Bar Bulletin

for an update to the

2009 Queens County Bar Association Annual Directory

CPLR Update 2009

BY DAVID H. ROSEN, ESQ.

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

The two-judge dissent, while agreeing that "good cause" is not shown here merely by the merit of the underlying application and lack of prejudice to the adversary, was unwilling to adopt the strict attitude of the majority. In particular, the dissent pointed out that the *Brill* and *Miceli* decisions simply ruled out late summary judgment motions: the would-be movant was not ultimately deprived of his day in court. Here, the effect of a strict construction was to deprive the plaintiff wife of an "enormous money judgment granted. . .against an opponent who had thrown every possible obstacle in her path".

In reversing, the Court of Appeals did not address the Appellate Division's application of *Brill* and its progeny to Rule 202.48. Rather, it held the rule inapplicable under the facts. The plaintiff wife was entitled to the money judgment as a result of the original 1966 decision, which specifically directed the entry of a money judgment "without further order." Thus, no settlement was required and Rule 202.48 was inapplicable[34]. The point was reiterated in the 1996 judgment and again in the decision on the 2000 motion. There was thus no time limit on the entry of the money judgment, and no need for the 2000 motion for leave to enter the money judgment. That Supreme Court had "unaccountably" added a direction to "settle judgment" as a money judgment the wife was entitled to without a further order did not change the result.

With the result reached by the Appellate Division having been reversed, but its rationale not having been addressed, it remains an open question whether or not Rule 202.48 will remain subject to the strict construction of time limits set forth in the original *Farkas* decision. The prudent approach is to assume that it will be, and to take great care to submit or settle orders and judgments in a timely fashion. It must not be assumed that the court will excuse late submissions merely because there has been no change in circumstances or prejudice to the adversary.

In *Wilson v Galicia Contr. & Restoration Corp.*,[35] the Court of Appeals illustrated, yet again, that a defendant whose answer has been stricken for a willful failure to disclose is in the same position as if he

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Pretrial Advocacy: An Ethical Checklist

BY GERALD LEBOVITS AND JOSEPH CAPASSO*

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(e) 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."[32] 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."[33] 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."[34] 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."[35] 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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Joseph Capasso

If an attorney has offered material evidence believing it was true but later learns

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that the evidence was false, the attorney must correct the situation. If the attorney knows of false statements made by a client 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 "advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence." If that fails, then the attorney must withdraw from the representation, if the court permits. If withdrawal is not an option or will not undo the effect of the false evidence, "the advocate must make such disclosure to the tribunal as is reasonably necessary 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 litigation or force settlement.

Discovery abuse is a persistent problem in the legal profession. Legal commentators continue to call for reform, while criticizing the effectiveness of "moralistic sermons about the breakdown of civility in the legal profession and nostalgic yearning for the good old days when lawyers acted like gentlemen."[37] In *SCM Societa Commerciale S.P.A. v. Industrial & Commercial Research Corp.*, one of many cases on the subject, the court wrote after a year-and-a-half battle between the parties over discovery motions that "the only things accomplished in this time span are the production of incomplete answers to Plaintiff's first set of interrogatories, the impregnation of my file cabinets, the generation of legal fees and the fact that I have aged a year. Or is it ten?"[38] The court noted that many defendants instruct their attorneys to delay litigation to make the plaintiff lose money and interest in the lawsuit. Although this practice deters future litigation and is desirable from a defense standpoint, it is "indefensible under the Federal Rules of Civil Procedure"[39] and potentially sanctionable under Rule 37.

The ABA Model Rules impose an ethical duty to avoid using discovery delay tactics. Canon 31 of the ABA Canons of Professional Ethics, a predecessor to the Model Rules, provided that "[t]he responsibility for advising as to questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions."[40] ABA Model Rule 3.4 provides that an attorney shall not, "in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party." N.Y. Rule of Professional Conduct 3.2 similarly prohibits an attorney from using means "that have no substantial purpose other than to delay or prolong the proceeding." N.Y. Standard of Civility VI(A) advises attorneys to avoid discovery procedures designed to place an undue burden or expense on a party. Attorneys should advise clients that they will not use delay tactics.

D. Ethical Considerations During the Motion Stage of Litigation.

In contemplating responses to another party's motion or application, attorneys should consider not only tactical but also ethical and professionalism issues a motion or application might present. When another attorney requests additional time to respond to a motion or meet a deadline, opposing attorneys should recall that at some later point in the litigation they might be in the same position.

Attorneys must treat other attorneys with respect and grant their reasonable requests.

The court in *Regional Transportation Authority v. Grumman Flexible Corp.* addressed the issue of how attorneys treat their fellow attorneys, noting that "[i]t is a truism that a commission and a uniform may make someone an officer, but not an officer and a gentleman. Apparently the same may be said of a license to practice law."[41] In that case the defendant's reply brief was due on a Friday, immediately following an immobilizing snowstorm in Washington, D. C., where defendant's local counsel's offices were located. The attorney was unable to travel to his office to complete the brief for a timely filing. The attorney telephoned plaintiff's counsel to ask whether he would agree to a four-day extension. The plaintiff's attorney twice refused, forcing defendant's Chicago counsel to serve a notice of motion and appear in court for an extension. The plaintiff's attorney did not appear at the motion call. In granting the extension, the court noted that because the brief was the final brief on the motion, there was no reason for the plaintiff's attorney not to have acquiesced to the requested extension.[42]

The court criticized the plaintiff's attorney's behavior. The court wrote that plaintiff's attorney "continued to show the same myopic view of the matter that caused the needless effort in the first place" and that he continued to "characteriz[e] the issue as whether anyone may be forced to stipulate to an extension."[43] The court explained that the plaintiff's attorney was missing the point and that "[w]hat is rather involved is the responsibility of a lawyer in dealing with his fellow lawyer."[44] The court then summarized "what every lawyer is expected to know and live by"[45]: lawyers shall seek their clients' lawful objectives through reasonably available lawful means under the disciplinary rules but that "reasonably available means" do not include refusing to accede 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 proceedings, settings, continuances, waiving of procedural formalities, and similar matters that do not prejudice client rights.

When the 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 stated that "the thrust of the [Model] Code [of Professional Responsibility] is that such a decision–certainly in the circumstances here–is for the lawyer and not for the client at all."[46] The court was also alarmed that the attorney's argument in response to the motion for fees, after having had the Code provisions called to his attention, remained the same, namely that his conduct was justified. The court reprimanded the attorney to "relieve the defendant of a burden in unjustly-caused attorneys' fees and expenses that it should not have been required to incur and should not be required to bear."[47] The court wrote that the attorney had multiplied the proceedings in the case "unreasonably and vexatiously" and ordered him to pay the defendant's attorney's fees.[48]

The N.Y. Standards of Civility addresses attorneys' interactions with other attorneys.[49] Attorneys should respect the schedule and commitments of opposing counsel while protecting their client's interests. Attorneys should agree to reasonable requests for extensions of time, consult with other attorneys to avoid scheduling conflicts, and promptly notify opposing attorneys and the court when they must cancel or postpone hearings, examinations before trial, meetings, or conferences. As the Preamble to the Standards notes, the civil-litigation process cannot work unless attorneys treat each other with civility and respect.

Attorneys must reveal to the court binding, adverse authority.

Attorneys must act professionally when they communicate with the court. The focus in written motion papers should be on the major points on which the motion turns. Attorneys should always address and attempt to rebut their opponent's arguments. Ignoring opposing counsel's difficult issues will not make them disappear. Attorneys should file motions only if they have answers to their opponent's arguments.

Attorneys have an ethical duty to call to the court's attention directly adverse and controlling legal authority in the applicable jurisdiction. N.Y. Rule of Professional Conduct 3.3(a)(2) provides that an attorney shall not knowingly "fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." Federal and New York courts have disciplined attorneys for failing to do so.[50] The attorney is always free, however, to argue that the cited authority is not sound or that the court should not follow it. Comment 4 to ABA Model Rule 3.3 adds that "[t]he underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case."

E. Ethical Considerations During Pretrial Negotiations.

Negotiation ethics have received much attention in recent years. The American Bar Association Litigation Section has adopted guidelines on the ethics of settlement negotiation.[51] Ethical boundaries play an important role in negotiations because of the conflicting duties that arise. Although the attorney's primary duty is to the client, ethical proscriptions impose duties on attorneys in their dealings with other attorneys and parties.

Clients come first in the negotiation.

No matter the stage of litigation, the attorney always owes the client a duty to provide competent representation. N.Y. Rule of Professional Conduct 1.1 provides that "a lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Negotiations outside the courtroom call for the same degree of preparation and competence that the attorney must exhibit inside the courtroom in the presence of a judge and the public. Attorneys place client interests ahead of (1) the attorney's personal interests; (2) the desires of other attorneys in the firm; (3) third parties; and (4) the judge's desires.

Negotiations present unique challenges. When a third party has an interest in the outcome of the negotiation, the attorney must remember who the client is. N.Y. Rule of Professional Conduct 1.8(f) prohibits an attorney from accepting compensation for representing a client "from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and (3) the client's confidential information is protected as required by Rule 1.6." Attorneys should rely on the N.Y. Rules of Professional Conduct and the Model Rules to structure their negotiations.

The attorney must relay to the client all legitimate settlement offers for approval or rejection.[52] It is good practice when possible to relay all offers to the client in writing, unless the offer is not serious. A written offer serves many purposes: (1) it helps avoid later confusion concerning the exact terms of the offer; (2) it documents the exact terms presented to the client; and (3) it enables the attorney to comply with the N.Y. Rule of Professional Conduct 1.4(b) requirement to explain a matter to the extent reasonably necessary to permit the client to make an informed decision.[53] The client should counter-sign and date a copy of the letter if the settlement is acceptable.

A settlement for multiple clients requires each client's informed consent.

N.Y. Rule of Professional Conduct 1.7 permits attorneys to represent multiple clients in civil cases if they can adequately represent the interests of each and if the clients give informed consent to the multiple representation. Attorneys who represent multiple clients have additional duties when their clients receive a settlement offer. N.Y. Rule 1.8(g) provides that "a lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client." The Rule adds that "[t]he lawyer's disclosure shall include the existence and nature of all the claims . . . involved and of the participation of each person in the settlement."[54] Clients must consent to the individual settlement offers made to each client in a joint representation.

Attorneys must not make false representations 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 "puffing" tactics during negotiations. Puffing is not unethical; it is a common negotiation tactic. Comment 2 to ABA Model Rule 4.1 addresses puffing: "Under generally accepted conventions in negotiation, 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 settlement of a claim are ordinarily in this category . . . ." The attorney must draw a line separating ethically acceptable estimates and intentions from unethical misrepresentations of material fact.

One helpful technique to conform with the N.Y. Rules of Professional Conduct and the ABA Model Rules is to separate statements concerning the negotiation itself ("He won't take a penny less!") from

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letters rogatory. Rather, relevant Federal case law establishes that the treaty controls the mechanism for transmittal and [56] delivery of letters rogatory among signatory states, and does not preclude service by other means.

The remaining question was whether service had indeed been effected pursuant to the CPLR in Brazil, and the Court concluded that they had, except for four served by substitute service or nail-and-mail.

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

FOOTNOTES

34. The Court cited *Funk v. Barry*, 89 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 submit or settle an order or judgment.

35. *Wilson v Galicia Contr. & Restoration Corp*., 10 N.Y.3d 827, 860 N.Y.S.2d 417 [2008]

36. Plaintiff submitted neither a verified complaint or an affidavit of merit on the motion, or for that matter at the inquest, and Safway never objected.

37.*Goodyear v. Weinstein*, 224 AD2d 387, 638 N.Y.S.2d 108; *Zelnik v. Bidermann Industries U.S.A., Inc*., 242 A.D.2d 227, 662 N.Y.S.2d 19; *Wolf v. 3540 Rochambeau Associates*, 234 A.D.2d 6, 650 N.Y.S.2d 161; *Feffer v. Malpeso*, 210 A.D.2d 60, 61, 619 N.Y.S.2d 46; *Mullins v. DiLorenzo*, 199 A.D.2d 218, 219, 606 N.Y.S.2d 161; *Income Property Consultants Inc. v. Lumat Realty Corp*., 88 AD2d 582, 449 N.Y.S.2d 799; *Georgia Pacific Corp. v. Bailey*, 77 A.D.2d 682, 429 N.Y.S.2d 787; *Union Nat. Bank v. Davis*, 67 A.D.2d 1034, 413 N.Y.S.2d 489; *Red Creek Nat. Bank v. Blue Star Ranch*, 58 A.D.2d 983, 396 N.Y.S.2d 936

38.*Bass v. Wexler*, 277 A.D.2d 266, 715 N.Y.S.2d 873 [stating that cases to the contrary are no longer to be followed]; *Roberts v Jacob*, 278 A.D.2d 297, 718 N.Y.S.2d 201

39. *Boudreaux v State of La., Dept. of Transp*., 11 N.Y.3d 321, ___ NYS2d ___ [2008]

40. *Byblos Bank Europe, S.A. v Sekerbank Turk Anonym Syrketi*, 10 N.Y.3d 243, 855 N.Y.S.2d 427 [2008]

41. CPLR 5304(b)(5) states, relevant part: "[a] foreign country judgment need not be recognized if . . . the judgment conflicts with another final and conclusive judgment."

42. *Hilton v Guyot*, 159 US 113, 163-164 [1895]

43. CPLR 5302

44. *Campbell v Cothran*, 56 NY 279, 285 (1874)

45. *Solow Mgt. Corp. v Tanger*, 10 N.Y.3d 326, 858 N.Y.S.2d 63 [2008]

46. L. 2005 ch. 575

47. L. 2008, ch. 443

48. *Financial Indus. Regulatory Auth., Inc. v Fiero*, 10 N.Y.3d 12, 853 N.Y.S.2d 267 [2008]

49. L. 2008, ch. 66, effective April 28, 2008

50. Plaintiff also attempted to justify jurisdiction under the "tortious act" provisions of CPLR302(a)(3), but the federal courts did not need input from the New 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 La Ligue Contre Le Racisme et L'Antisemitisme,* 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.

52. *Morgenthau v Avion Resources Ltd*., 11 N.Y.3d 383, ___ NYS2d ___, 2008 NY Slip Op 09006 [2008]

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 reasons 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 US District Court for the District of Columbia. As 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.

55. *Dobkin v Chapman*, 21 NY2d 490, 501 [1968]

56. *Kreimerman v Casa Veerkamp S.A. de C.V*., 22 F3d 634, 640 [5th Cir 1994]

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statements concerning objective facts outside 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, while ABA Model Rule 4.1 prohibits misrepresenting objective facts. Another helpful technique is for attorneys to put themselves into the opposing attorney's shoes to assess whether a negotiation statement is abusive or misleading.[55]

F. Conclusion.

Professional aviators from Orville and Wilbur Wright to Chuck Yeager have always counseled student pilots to maintain checklist discipline. Checklists save lives. Just as the most competent commercial aviator can forget to deploy the landing gear, attorneys engaged in pretrial litigation can forget that cases are fraught with potential ethical quagmires. Ethical checklists save careers, protect the public, and promote the good administration of justice.

FOOTNOTES

[32] Fed. R. Civ. P. 26(e)(1). Rule 26(e)(1) further defines the duty to supplement Rule 26(a)(2)(B) expert- witness disclosures. This duty "extends both to information contained in the [expert's] report and to information provided through a deposition of the expert." Fed. R. Civ. P. 26(e)(2).

[33] Fed. R. Civ. P. 26(g)(1).

[34] Fed. R. Civ. P. 26(g)(2)(A).

[35] 22 N.Y.C.R.R. 1200, Rule 3.3(a)(3).

[36] Model Rules of Prof'l Conduct R. 3.3 cmt. 10.

[37] Charles Yabon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 Colum. L. Rev. 1618, 1619 (1996) (proposing that the best solution for lawyer misconduct in discovery proceedings is the same one parents use when their kids act up on long car trips—tell them to "shut up and knock it off").

[38] 72 F.R.D. 110, 112 (D.C. Tex. 1976).

[39] *Id*.

[40] Code of Prof'l Ethics Canon 31, *available at* http://www.abanet.org/cpr/1908-code.pdf.

[41] 532 F. Supp. 665, 668 (N.D. Ill. 1982).

[42] *Id*. at 667.

[43] *Id*.

[44] *Id*.

[45] *Id*.

[46] *Id*.

[47] *Id*. at 668.

[48] *Id*.

[49] *See* Standards of Civility, *supra* note 2, at III.

[50] *See, e.g.*, *Jorgenson v. Volusia County*, 846 F.2d 1350, 1352 (11th Cir. 1988) (imposing Rule 11 sanctions on attorney for failing to cite adverse authority); *Nachbaur v. Am. Transit Ins. Co*., 300 A.D.2d 74, 75-76, 752 N.Y.S.2d 605, 607-08 (1st Dep't 2002) (imposing sanctions and awarding attorneys fees for, among other indiscretions, plaintiff's attorney's failure to cite adverse authority).

[51] *See* American Bar Association, Section of Litigation, *Ethical Guidelines for Settlement Negotiations* (2002).

[52] Model Rules of Prof'l Conduct R. 1.2 cmt. 1.

[53] Dessem, *supra* note 9, at 585.

[54] 22 N.Y.C.R.R. Part 1200, R. 1.8(g).

[55] Dessem, *supra* note 9, at 587.

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ANSWERS TO MARITAL QUIZ ON PAGE 15

Question #1 - DRL §250 provides for a three year statute of limitations of prenuptial agreements, that is tolled until a matrimonial action is filed or the death of one of the parties. This law became effective July 3, 2007. Does the tolling extend to agreements barred by the six-year statute of limitations on or before July 3, 2007?

Answer: Yes, provided a court did not previously bar an action relating to that agreement because it violated the six-year statute of limitations. Amendment to DRL §250 enacted May 21, 2008.

Question #2 - Can the non payment of child support be a crime?

Answer: Yes, New York Penal Law §260.05(2) became effective November 1, 2008. If a parent, guardian or other person obligated to make child support payments by an order of a court of competent jurisdiction, for a child under the age of 18, knowingly fails or refuses, without lawful excuse, fails to provide such support when he or she is able to do so or becomes unable to do so, when though employable he or she voluntarily terminates employment, voluntarily reduces his or her earning capacity or fails to diligently seek employment, said person is committing a Class A misdemeanor.

Question #3 - Does the Child Support Collection Unit charge a fee for its services?

Answer: Yes, beginning with federal fiscal year October 1, 2008 to September 30, 2009, and then each year thereafter, when they collect in excess of $500.00 during the fiscal year, an annual service charge of $25.00 will be deducted from the child support collected. A fee may not be charged to anyone who has ever received cash assistance from the federal Title IV-A program.

Question #4 - What must be shown in order to modify a maintenance award contained in a stipulation of settlement incorporated but not merged in a judgment of divorce?

Answer: Extreme hardship. *DiVito v. DiVito* 56 A.D.3d 601; 867 N.Y.S.2d 334 (2nd Dept. 2008)

Question #5 - In a stipulation of settlement, if you intend the alternate payee to share in the New York City Police Department pension benefits of his or her spouse whether those benefits are based on a service retirement benefit or a disability benefit, is it necessary to include both an ordinary disability pension and accident disability retirement benefit?

Answer: Yes. *Berardi v. Berardi* 54 A.D.3d 982; 865 N.Y.S.2d 245 (2nd Dept. 2008)

Practice Note - Remember if you exclude disability benefits, the alternate payee will lose his or her share of Variable Supplement Benefits. The recipient of a disability pension receives 25% higher pension benefit, but is not entitled to receive any Variable Supplement Benefits.

Question # 6 - Can maintenance be awarded after a divorce, when the divorce judgment makes no provision for maintenance?

Answer: Yes, *Wilson v. Pennington* 301 A.D.2d 445; 752 N.Y.S.2d 887 (1st Dept. 2003).

Question #7 - In a stipulation of settlement, which was incorporated into a judgment of divorce, but not merged therein, the father agreed to pay 100% of the children's college education. The father sought to allocate the college costs based upon his reduced income and the mother's increased income. The child support provision in the agreement provided for reallocation. The College provision was separate and apart from the child support provision and did not provide for such reallocation. Should the father's obligation to pay 100% of the children's college education costs be reallocated?

Answer: *No, Colucci v. Colucci* 54 A.D.3d 710; 864 N.Y.S.2d 67 (2nd Dept. 2008).

Questions #8 - If a non-custodial parent presents insufficient and incredible evidence to establish his or her income, how is the court to fix child support?

Answer: Award child support based on the needs of the child. *Evans v. Evans* 870 N.Y.S.2d 394 (2nd Dept. 2008)

Question #9 - Does a parties' lack of contribution to the marriage effect the percentage of the marital assets that party receives in equitable distribution?

Answer: Yes, in *Evans v. Evans* 870 N.Y.S.2d 394 (2nd Dept. 2008), the Appellate Division affirmed the trial court's award of 15% of the value of the marital assets and 10% of the pension.

Question #10 - Lower court permitted counsel to withdraw as defendant's attorney for the defendant's failure to provide financial information. Was it error for the lower court to refuse to adjourn the trial to give the defendant the opportunity to retain new counsel?

Answer: No, generally CPLR §321(c) requires that there be a 30-day stay of proceedings after counsel is permitted to withdraw. An exception is when the attorney's withdrawal is caused by a voluntary act of the client. *Sarlo-Pinzur v. Pinzur* 2009 NY Slip Op 01207 (2nd Dept. 2009)