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Look Before You Leap

Balancing the roles of attorney and executor or trustee of an estate.

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SOMETIMES, no matter how long we practice, we have to be reminded to get it right. While the concepts addressed in this article may to many estate practitioners seem so fundamental that they do not bear repeating, the harsh reality is that even the most competent, compassionate and ethical attorneys consistently get it wrong.

It is common for an attorney to act as both the draftsperson of a last will and testament and the attorney for the probate estate. In some instances, that attorney may also have been named the executor and/or trustee of a trust (either created by that will or an inter vivos trust which may have been created simultaneously as part of the overall estate plan). The failure to take into consideration the inherent conflict that exists when taking on these multiple roles can, and quite often does wreak havoc upon even the most competent of counsel.

The failure to address and properly handle the conflict at the time of drafting, and the subsequent overlapping work of attorney, executor and/or trustee regularly gives rise to litigation in the Surrogate's Court. The Surrogate has the ability, sua sponte, to review legal fees and commissions to be paid by an estate, even where the beneficiaries of the estate have agreed to those fees and commissions.[1] The outcome of those proceedings may not only reduce or eliminate the fees and commissions earned,[2] but can lead to a surcharge by the Surrogate. Often, depending on the Surrogate's findings, the attorneys' continuing ability to practice can be seriously impacted should a finding of impropriety be referred to the Grievance Committee where various penalties, ranging from admonishment to censure to suspension have been meted out to attorney/fiduciaries who were found to have breached fiduciary duties and attendant disciplinary rules while acting as such.[3]

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The easiest way to avoid all of this is to simply refuse a client's request to act as a fiduciary.[4] With a long-standing client, however, this may be an especially difficult, if not impossible thing to do for a variety of reasons. So, having agreed to act as a fiduciary, what should counsel do?

The First Step

The first and most basic piece of advice is "where a client requests that you serve as fiduciary, make a record of the reasons for the nomination and the discussions of the amount of commissions (or multiple commissions) and whether there would also be a legal fee."[5] As the named executor of the estate, upon the client's death, you, the attorney-draftsperson will be the petitioner before the Surrogate's Court, seeking Letters Testamentary and, if necessary, Letters of Trusteeship.

Who will be retained to do the legal work? The most natural choice is your firm, and therein lies the inherent conflict of interest and the potential for liability in the event your acts as a fiduciary are objected to by a beneficiary (at any stage) or by the court upon the filing of the final accounting.

There are different hurdles to clear in taking on fiduciary responsibility. It is a fundamental premise that the last will and testament or trust document naming you a fiduciary must not be a product of undue influence—you simply cannot in any manner suggest or influence a client to name you as executor, trustee or attorney for the probate estate. It is equally as true that there is no ethical proscription against serving as fiduciary should you be asked. Needless to say, when two such diametrically opposed principles exist, litigation arises.

As a result, an abundance of case law exists in which New York courts have after inquiry, nullified the fiduciary appointment by the testator where it has found that the testator was unduly influenced to make that

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appointment. Even if the appointment in and of itself is not nullified, the circumstances surrounding your appointment and whether or not it was the product of overreaching or fraud may be raised by any interested party at anytime—or by the court itself at the time you file your account as fiduciary.[6]

The focus here is on how your appointment came about, and the provisions with respect to the same. If you draft the instrument, are appointed a fiduciary and provide that you are to receive commissions in excess of the statute, you may be especially criticized by the court. For example, the Suffolk County Surrogate's Court found, where an attorney draftsman was not only named an executor, but that the provisions of the appointment permitted that attorney to earn commissions in excess of those provided for by statute, that those provisions were "self-serving and motivated by sheer greed, and [it] was, therefore, the product of constructive, if not actual fraud." *Matter of Will of Klenk*, 151 Misc.2d 863, 574 N.Y.S.2d 438 (1991). The court went on to deny the attorney-draftsman commissions based on those findings. It also denied the attorney and his firm any legal fees in connection with the handling of the estate, ruling that "it is axiomatic that legal fees may not be awarded counsel where there is a breach of the Code of Professional Responsibility." id. [citations omitted].

This brings us to a second ancillary issue that arises if and when you, as executor, retain yourself or your firm as counsel to the estate or trust (which you, as fiduciary, will have the power to do), thereby giving rise to dual fees, each of which will be the subject of court scrutiny. Thus, even if the court finds that appointment was not the product of undue influence such that one hurdle has been cleared, others are ahead. For example, you must also comply with the statutory disclosure provisions with respect to attorney/fiduciaries, discussed infra. Upon a finding that you failed to properly disclose the cost of an attorney's appointment as fiduciary to the testator (as to the payment of both legal fees and commissions), a variety of penalties may be brought to bear—from reduction or elimination of legal fees and/or commissions to a finding that you are guilty of "passive malpractice,"[7] and/or constructive fraud—and you may face disciplinary action.

In *Klenk*, supra, the Surrogate, in denying legal fees based upon a finding that the fiduciary appointment was a product of overreaching and/or actual or constructive fraud, stated that "a denial of a fee under these circumstances is an effective sanction," but did not stop there. At the conclusion of the matter, the Surrogate found that the "attorney-draftsman's flagrant violations of the Canons of Professional Responsibility cannot be ignored, and consequently, the Chief Clerk of the court is directed to forward a copy of this decision to the appropriate Grievance Committee for its consideration."

It is a **fundamental premise** that a **will or trust** document naming you a **fiduciary** must not be a product of **undue influence**. It is equally as true that there is **no ethical proscription** against serving as fiduciary should you be asked.

The second piece of advice, therefore is to familiarize yourself with the provisions of the Surrogate's Court Procedure Act, specifically SCPA §2307-a which recognizes the potential minefield of conflict. It provides the statutory framework on which the court relies in calculating executor's commissions—case law provides the guidance needed with respect to legal fees, and the impropriety that arises when legal fees are charged for executorial work, which work is being compensated through the payment of commissions. Failure to follow the framework will have negative consequences, which are avoidable.

SCPA §2307-a sets forth those disclosure provisions that must be followed if the attorney who agrees to act as executor is to be entitled to a full executor's commission, as follows:

> Attorney-fiduciary may receive both a statutory commission and legal fee, if such attorney, prior to the will execution, informs the testator that: (1) any person, including an attorney is eligible to serve as executor and (2) that absent a contrary agreement, an attorney who serves as executor is entitled to receive a statutory commission and reasonable compensation for legal services. Testator must acknowledge the same by signing a written disclosure form. Failure to obtain testator's written acknowledgment will result in attorney-fiduciary's commission cut by half. Where multiple fiduciaries serve, then reduction is proportionate to their interests.[8]

There are model forms that change from time to time based on case law and statute. Be certain that when you have a client sign a disclosure form, that you are using the most current form or you will find your commissions reduced by half at the time of accounting.

The Second Step

Assuming you have not unduly influenced the testator to appoint you a fiduciary and that you have properly obtained the signed disclosure forms in accordance with SCPA 2307-a, what next?

Again, the most practical piece of advice involves record-keeping. When you account as a fiduciary you will, as part of your estate and/or trust accounting, be seeking court approval of both your legal fee and your commissions earned in accordance with the percentage schedule as set forth by statute. Always, without fail, remember that you cannot and will not be compensated twice for the same work.[9]

Legal work is paid for based on services performed pursuant to the retainer agreement that should have been signed at the time you engaged your firm to act as counsel to the estate. Be certain that you do not bill the estate for legal services when you are performing the work of a fiduciary, and that your record-keeping is in good order and contains a full and complete description of the type of work performed. Even experienced attorneys, unwittingly and without forethought, fall into this trap and find themselves denied fees and/or commissions for a failure to separate the time spent on actual legal work and that spent on executorial work. This may be construed as "double dipping," and while it may have been an innocent error, it is not one taken lightly by the Court, and is one which may be easily avoided with good record-keeping.[10]

It is axiomatic in today's world, where hourly fees are how most of us earn our living that we all must account for our time on a daily basis. It does not go without saying, however, that all of those hours can be billed as legal work to the estate when it is executorial in nature.[11] Know the difference, keep separate records, review the records prior to submitting an accounting and make certain that you do not bill any part of your legal

fee for time you spent working on executorial matters.

The Final Step

At the end of every case, it is manifest that the lawyer who has performed services wants to be paid in accordance with the retainer agreement signed by his or her client. Similarly, the fiduciary would also like to receive the statutory commission earned for the executorial duties performed (or in the case of a trust, the trustee's commissions that may be ongoing on a yearly basis going forward). The difference for an attorney/fiduciary is that it is not the retainer agreement that is the ultimate arbiter of fee and not just the statute which is the ultimate arbiter of commissions. Each of these items is, as stated at the outset of this article, subject not only to the objections that may be raised by beneficiaries at the time of filing of the appropriate accounting, but also to the sua sponte review of the Court.

Attorney/fiduciaries earn the ire of the court rather than the fees and/or statutory commissions they seek when they pay themselves fees and/or commissions in advance of court approval. Many a cautionary tale exists in case law.[12] If you are acting as attorney for the estate and as a fiduciary, at the time of execution of the retainer agreement, there should not be a retainer advanced to you from any beneficiary or from any of the estate assets after you begin to martial them. Every dollar paid to you and/or your firm, whether for legal fees or commissions must be approved by the court in advance of the money being paid. If the estate is one which will not be closed out for an inordinate amount of time, the statute permits the attorney to make a fee application during the pendency of the proceeding. At that time, you will have to submit your time records and an affidavit and request the fee on notice to all interested parties who will have the right to come in and object. Again, the same word of warning—do not bill for executorial work performed as part of your legal fee.

Failure to follow these very basic rules regarding payment may result in a possible reduction of fees, a surcharge equal to at least the amount of interest that would have been earned on the monies advanced to you, a finding of passive malpractice, a referral to the Grievance Committee or all of the above. The thing to remember is that all of this is within your control and is avoidable when you play by the book.

Last Word of Caution

Read your malpractice policy carefully. Some, but not all, will cover you for any errors or omissions you may commit as a fiduciary. Do not rely on your belief that you are acting as an attorney for the estate and therefore, have malpractice coverage. If you don't have the appropriate coverage and are taking on the work of a fiduciary, you should consider obtaining appropriate insurance. If you fail to do so, or if your carrier declines coverage for fiduciary malfeasance for any reason, you may find yourself not only in the midst of a Surrogate's Court litigation with respect to fees and commissions, but simultaneously commencing an action for declaratory judgment to determine coverage issues with your insurer.

In conclusion, while it may seem like the most innocent of requests, and in many cases the highest compliment when a client asks you to serve as executor and/or trustee, think long and hard about the risk and reward. Only you can decide if the potential for liability is something you are willing to take on and if you are up to the task before agreeing to act. As stated eloquently by then Nassau County Surrogate C. Raymond Radigan, ruling in *Matter of Estate of Harris*:

> The Bar must be prepared to withstand scrutiny of their professional conduct and particularly so when they have failed to avoid the appearance of impropriety by becoming personally interested in the event for which they are retained as counsel. Professional responsibility is also premised upon standards greater than the simplicity of procedural rules or evidentiary practices. [13]

Put more simply, but no less eloquently: Look before you leap.

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1. See *Matter of Stortecky (Wiggins)*, 85 NY 2d 518, 626 N.Y.S.2d 733 (1995), wherein the Court of Appeals held that under SCPA §2211(1), the Surrogate's Court is authorized to inquire, sua sponte, into all matters set forth in a fiduciary's accounting even where no objections have been filed.

2. See *In re Estate of Wrobleski*, New York Law Journal, June 4, 2008, p. 41 (Sur. Ct. Kings County) (Sur. Johnson), wherein failure of an attorney to follow the procedures set forth in SCPA 2307-a resulted in the executor's commission due to the attorney-fiduciary being reduced to one half.

3. See *In re Dubin*, 87 A.D.2d 282, 451 N.Y.S.2d 436 (1982). The Appellate Division, Second Department, imposed a one-year suspension upon an attorney-fiduciary who was found to have committed overreaching and thereafter also failed in his fiduciary responsibility as an executor and trustee of an estate.

4. For the remainder of this Article, the word "fiduciary" shall refer to either an executor or a trustee whether in a trust created under will or an inter vivos trust.

5. Wood, Carew & Hyde, "Selection of Fiduciaries and the Role of the Attorney Draftsperson, Ethical Obligations, Administrative Powers, Simultaneous Death and Tax Apportionment," 282 PLI/Est 211 (Sept. 1999).

6. *Matter of Will of Klenk*, 151 Misc2d 863, 574 N.Y.S.2d 438 (Surr. Ct. Suffolk Cty. 1991), in which the Surrogate held that the decedent's spouse was not estopped from claiming that the attorney's fiduciary appointment was the result of constructive fraud and overreaching at the accounting stage even where the spouse had separate counsel from the inception of the estate proceeding. The Surrogate went on to deny all legal fees to the attorney-draftsman and his firm as a sanction for their breach of the Code of Professional Responsibility.

7. This scrutiny will most often arise at the time of filing of the final accounting in the Surrogate's Court, and the fact that beneficiaries did not object to the attorney's appointment as executor at the time the last will and testament was offered for probate will not bar those beneficiaries from objecting to what they rightly or wrongly perceive as double fees. See *Estate of Thron*, 139 Misc.2d 1045, 530 N.Y.S.2d 951 (Surrogate's Court, Bronx Cty., 1988) wherein the Court held that the decedent's sons were not estopped from objecting to a claim for commissions and attorney's fees made by the attorney-draftsperson of the decedent's will by virtue of their failure to object to the appointment in the probate proceeding. See also *Matter of Weinstock*, 40 N.Y.2d 1, 386 N.Y.S.2d 1, 351 N.E. 647; *Matter of Laflin*, 111 A.D.2d 924, 491 N.Y.S.2d 35; *Matter of Harris*, 123 Misc.2d 247, 473 N.Y.S.2d 125.

8. McKinney's SCPA. §2307-a.

9. See *In re Estate of Schoonheim*, 158 A.D.2d 183, 557 N.Y.S.2d 907 (1st Dept. 1990) (the court may require a fiduciary to separate his billings for his legal and fiduciary services); *In re Estate of Poulos*, 280 A.D.2d 336, 723 N.Y.S.2d 1 (1st Dept. 2001) (where the attorney/co-executor of the estate appointed himself attorney for the estate, he was not entitled to supplemental fees where there was no clear showing that he had differentiated between executorial and legal services).

10. See *Estate of Thron*, supra, 139 Misc.2d at 1051, wherein counsel claimed, without any time records, to have spent 100 hours on the legal work related to the probate of the estate prior to the filing of his accounting. The court stated that it did not "have the confidence that counsel had that he could accurately recall the time spent without the aid of contemporaneously kept records" and went on to hold that "counsel performed or should have been able to perform the preaccouting services listed in his affidavit in at least twenty percent less time. Moreover, approximately half of the time appears to have been spent on services which are executorial in nature and for which one cannot be compensated at the same rate as for legal services."

11. See *Estate of Thron*, supra, 139 Misc.2d at 1051, wherein the court held that where there is an overlapping of executorial and legal services, there would be a reduction of the legal fee where counsel is also the executor. See also *Matter of Moore*, 139 Misc.2d 26, 526 NYS2d 377; *Estate of Sherwood*, New York Law Journal, May 19, 1988, p. 15, col. 5.

12. See *Estate of Thron*, supra, 139 Misc.2d at 1052, in which the court surcharged the attorney-fiduciary for having taken executors' commissions without a court order. See also *Matter of Estate of Stalbe*, 130 Misc.2d 725, 497 N.Y.S.2d 237 (Queens Co. Surr. Ct., 1985), where the attorney for estate took a legal fee prior to court approval. The court held that the taking was the basis for an "automatic surcharge" and went on to issue a stern warning to the bar, stating that "members of the Bar are admonished once again that when they act as both attorney and sole fiduciary for an estate they may not take any portion of their legal fee in advance of accounting without prior permission of the court." (SCPA §2111). They are also admonished that no fiduciary, regardless of whether he is an attorney or not, may receive an advance payment of commissions without court approval. (SCPA §§ 2310, 2311).

13. *Matter of Estate of Harris*, 123 Misc.2d 247, 473 N.Y.S.2d 125 (1984).

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