New York Law Journal

WWW.NYLJ.COM

An ALM Publication

VOLUME 245—NO. 33

FRIDAY, FEBRUARY 18, 2011

Expert Analysis

SURROGATE'S PRACTICE AND PROCEEDINGS

Expert Disclosure In Surrogate's Court

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Given the complexity of our practice, we find a corresponding reliance upon experts to testify to contested matters in the Surrogate's Courts. Expert testimony has been offered where the issue concerned the effects of medication upon a testator's capacity to execute a will,[1] the valuation of property,[2] the genuineness of handwriting,[3] or the prudence of a trustee's investment decisions.[4] This article will explore the use of expert testimony and the scope of permitted disclosure of experts in Surrogate's Court proceedings.

Witnesses: Lay vs. Expert

As a general rule, a lay witness may only testify to facts and is prohibited from offering an opinion as to the effect or meaning of such facts. It is up to the judge or jury to draw conclusions based upon testimonial or documentary evidence as to what occurred. Unlike a lay witness,[5] an expert is called upon to render an opinion (provided it can be said with a reasonable degree of certainty) based upon his or her particular expertise as it relates to the established facts. It is within the court's discretion whether to permit expert testimony and up to the trier of fact whether to accept or reject such opinion.

Expert testimony is offered to clarify an issue that requires professional or technical knowledge. Thus, an expert should possess the requisite skill, training, educational background, or experience from which it can be assumed that the opinion is reliable. In rendering an opinion, the expert may rely on data, evidence in the record, facts personally known, or professionally reliable material.[6] The expert witness may not assume material facts that are not supported by the evidence.

> The Surrogate's Court Procedure Act contains no specific rule governing disclosure from experts; thus, the rule contained in the CPLR applies.

A party should select an expert who is familiar with the underlying issue. Concerning investment issues, the expert should certainly be familiar with the applicable standard of review, prevailing industry practices and the standards governing fiduciary investment (i.e., prudent person rule and prudent investor rule depending on the time period in issue). An expert should be able to provide the trier of fact with the context for his or her opinion having reviewed the relevant evidence, such as the account, documents relating to the fiduciary's investment decisions, other testimony, professional publications and other relevant material.

Where the dispute concerns whether the fiduciary acted prudently in managing the estate or trust, both sides may wish to bring in experts to testify what the appropriate conduct would have been by a prudent person in like circumstances. Such issues are usually determined in the context of a contested accounting proceeding.

Since its adoption in 1995, much has been written about a trustee's duty to invest and manage property in accordance with the prudent investor standard under EPTL 11-2.3 "to exercise reasonable care, skill and caution to make and implement investment and management decisions as a prudent investor would for the entire portfolio…." Under the prudent investor rule, and even under the prudent person rule, proof of investment losses alone will not suffice, an objectant must establish that the fiduciary acted negligently.

Consideration should be given to the trustee's expertise in making investments (i.e., a lay person or professional fiduciary),

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whether investments were regularly reviewed, the fiduciary's delegation decisions, delays in decision making or in distribution if any, and whether there was a concentration in any one asset. Not surprisingly, a trial of a contested accounting proceeding can quickly devolve into a battle of experts, each one opining whether the trustee exercised reasonable care, skill and caution.

Qualification of Experts

It is within the court's discretion whether a witness will be qualified to testify at trial as an expert. Once qualified it is for the trier of fact to determine the weight to be accorded the expert's testimony. There is a distinction. In a contested accounting, the Surrogate is the trier of fact and the fact that the judge has qualified a witness as an expert does not require the judge to accept that expert's opinion. A party should avoid being lulled into a false sense of victory merely because the court has permitted the party's expert to render opinions that support his or her position. A court may find that notwithstanding the witness' expertise, his or her testimony should be given little weight.

A recent example is found in *Matter of JPMorgan Chase Bank*,[7] where the accounting corporate trustee offered expert testimony that it acted prudently by holding a concentration of Kodak stock for more than 20 years. The bank's expert, a chief fiduciary officer of a different bank, testified in support of the trustee's decision to hold a concentration of stock—based on its claim that it was waiting for the right time to sell. The Westchester County Surrogate found that the other evidence adduced at trial did not support this expert's opinion and thus did not credit it.

Similarly, in *Matter of Gentry*,[8] the Nassau County Surrogate qualified a real estate broker as an expert witness concerning the rental value of premises finding that the witness was qualified by virtue of his experience as a broker and his general familiarity with the community where the property was located, even though he was not a licensed real estate appraiser. However, in reaching its decision on value, the Surrogate said that he was giving "little or no weight" to the witness' testimony because the broker had little experience in providing appraisals of rental value of properties, he was not directly familiar with the community where the property was located and arranged few rentals there, he had not made a thorough inspection of the interior of the premises and did not know its condition or the number of rooms, and he had extrapolated certain information and made unwarranted assumptions which undermined the value of his opinion.

Surrogate Eve Preminger employed a novel procedure in preparation for the trial over the valuation of Andy Warhol's art. She proposed that prior to trial each side provide his or her adversary with the experts' direct testimony in affidavit form. This procedure enabled the opposing party to fully prepare for cross-examination at trial.

Independent Expert

In exceptional circumstances where expert testimony is required to achieve a just disposition, the court may appoint an independent expert to review the disputed issue and present his or her findings.[9] This is often the case where the court is confronted with experts whose opinions are diametrically opposed to one another. In such a circumstance, the court may appoint an independent expert to review the disputed issue and present his or her findings, thus enabling the court to assess the expert testimony offered by each side.

In *Matter of Winston*, the court appointed an independent appraiser to assess the value of the decedent's jewelry business, one of the central issues in dispute. The court in Westchester County found the independent appraiser's report to be invaluable in its understanding of the value and marketability of the business.

In *Matter of Atkinson*,[10] the executors called a trust officer from another bank to testify as to the "custom and usage" of estate management in the banking industry. The trust officer expert also testified that the estate was properly administered. The objectants subpoenaed a trust officer from yet a different bank to testify as to custom and usage in the banking industry. Previously, the Appellate Division had ruled that the Surrogate prematurely quashed a subpoena based on the rule that a witness cannot be compelled to give his expert opinion against his will,[11] finding that the line between expert and fact testimony can be difficult to discern and that testimony concerning general custom and usage in the banking industry is a matter of fact, but testimony concerning the incident at issue would fall in the realm of expert testimony.

The Bronx Surrogate denied the objectant's request to appoint an independent expert, finding that additional expert testimony was not necessary and that the objectant's recourse was cross-examination of the executors' expert. On appeal, the Surrogate's denial of the request for the appointment of an independent expert was upheld. The Appellate Division found that there was

no lack of expert testimony to base a decision upon, and that the Surrogate was in the best position to assess whether further expert testimony was required and to determine whether the estate was prudently managed.

Obtaining Disclosure

Because an expert's opinion may be critical to establishing a central issue in a case, a party who intends to call an expert is required to divulge the name of the expert and provide a synopsis of the expert's testimony.

The Surrogate's Court Procedure Act (SCPA) contains no specific rule governing disclosure from experts; thus, the rule contained in the CPLR applies. The rule relating to expert disclosure is found in CPLR §3101(d), which provides that in preparation for trial "upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion."

The disclosure under CPLR 3101(d) provides the adversary with an opportunity to prepare for cross-examination. A review of the expert's qualifications and the opinion to be rendered should be made, and the adversary should be prepared to inquire about the information the expert relied upon in rendering the opinion.

Timing of Disclosure

At first blush, the statute appears straightforward. However, the absence of guidelines as to the timing of the disclosure and what constitutes "reasonable disclosure" has frustrated practitioners. In other words, although the statute provides that this disclosure is to be provided "on request" it is silent as to when the response to the request must be made. "The lack of guidelines is not necessarily undesirable," as Surrogate Lee Holzman noted in *Matter of Boggia*:[12]

> When the Legislature concluded that there should be disclosure as to certain particulars about which an expert is to testify at the trial as well as to the identity of the expert in all actions other than for medical, dental or podiatric malpractice, it also concluded that, instead of automatically precluding expert testimony at the trial based upon noncompliance with the disclosure requirement, it was wiser to grant flexibility to the court by permitting it to make any order that may be just under the particular circumstances.

The flexibility Surrogate Holzman speaks of is designed to balance the parties' respective interests and address some of the practicalities of litigation. The costs associated with retaining an expert may be prohibitive. Thus, a party may wish to save money by retaining an expert only when it is clear that the matter will go to trial. Or, it may not be practical for a party to retain an expert until after he or she has obtained sufficient information during discovery for the expert's review. Of course, allowing late disclosure of an expert could hinder an adversary's preparation for trial.

Noncompliance with the statute may or may not result in an order precluding a party from offering an expert at trial. Preclusion for failure to comply with disclosure until shortly before trial is improper unless there is proof of intentional or willful refusal together with a showing of prejudice to the opposing party.

Most courts resolve such disputes by directing the party making the late disclosure to provide the adversary with detailed information about the expert and the anticipated testimony and give the opposing party an opportunity to review it and sufficient time to retain his or her own expert.

Even where a party seeks to retain a different expert on the eve of trial, the court may permit the retention and provide the adversary with time to prepare. For example, in *Rushford v. Facteau*,[13] the expert whose identity had been disclosed was unable to testify. The court allowed another expert, not previously disclosed, to testify in the disclosed one's place. The court said that if the other party needed time to prepare for cross-examination, an appropriate adjournment would be permitted.

Unlike federal practice, where the deposition of an expert is considered routine, under the CPLR, except in specified circumstances, an expert deposition is a rarity absent a court order on a showing of special circumstances, and subject to restrictions as to scope and cost as the court deems appropriate. It has been held that neither the novelty of the expert's opinion nor the claimed flaws underlying the expert's opinion rise to the level of special circumstances.[14]

Typically, the deposition of an expert has been limited to situations where the expert has examined an object or place that is no longer in the same condition that it was in when examined. Even in those circumstances, the testimony is limited to questions concerning the expert's factual observations concerning condition.[15]

Subject Matter

Another common problem with expert disclosure is the extent to which the expert's proposed testimony must be disclosed. CPLR 3101(d) requires disclosure of the expert's testimony in reasonable detail together with the substance of the facts and opinion upon which the expert will rely.

There is no requirement that a party provide the fundamental factual information upon which an expert's opinions were made, just the substance of the facts and opinions.[16] The distinction is not always apparent and again appears to be fact-driven. In *Matter of Chase Manhattan Bank*, Surrogate Edmund Calvaruso noted that "case law has interpreted reasonable detail to hold that preclusion is warranted where responses to disclosure are 'so general and nonspecific that the [other party] has not been enlightened to any appreciable degree about the content of this expert's anticipated testimony.'"

The court went on to define the issue as "whether petitioner's responses have provided objectants with an adequate understanding of what will be testified at trial." In making the determination, a court is likely to consider whether the underlying facts, known to all parties, are not in dispute.

A Novel Approach

Where it appears that expert testimony will be required, the parties should agree to a schedule for the exchange of the identity of any proposed expert. In most matters, expert disclosure should follow the completion of discovery of the underlying facts because the expert will have to review the information in order to formulate an opinion. The agreement should also provide for amending or supplementing the notice in the event that additional facts are discovered.

The authors are familiar with a novel procedure employed by Surrogate Eve Preminger in preparation for the trial over the valuation of Andy Warhol's art. Each side had indicated that numerous experts were expected to testify. Surrogate Preminger proposed that prior to trial, each side provide his or her adversary with the experts' direct testimony in affidavit form. This procedure enabled the opposing party to fully prepare for cross-examination at trial. The parties were spared costly pretrial preparation and discovery disputes and avoided potential disputes related to the timing and content of the experts' reports.

Moreover, since this was a non-jury matter where the court was going to carefully review all of the trial evidence, having the expert's direct testimony by affidavit and only testimony on cross-examination and re-direct, greatly streamlined the trial. Not a bad idea for attorneys and courts to consider in the appropriate case. This approach might not be appropriate before a jury. In a jury trial, you will want the jury to hear your expert render his opinion and to reinforce before the jury all of the "bad acts" committed which form the basis for his or her opinion.

Sadly, space does not permit us to discuss some of the other issues relating to the use of experts in the Surrogate's Court, which the authors hope to address in a future article.

1. *Matter of Greene*, 20 Misc.3d 599 (Sur. Ct. Westchester Co. 2008).

2. *Matter of Winston*, NYLJ, Sept. 26, 1994, 32:5 (Sur. Ct. Westchester County); *Matter of Gentry*, NYLJ, Jan. 4, 2001, at 37, col 6 (Sur. Ct. Nassau Co).

3. *Matter of Sylvestri*, 44 N.Y.2d 260 (1978).

4. *Matter of JP Morgan Chase Bank*, 27 Misc.3d 1205(A) (Sur. Ct. Westchester Co. 2010).

5. However, an attesting witness differs as he or she is called upon to opine on a testator's capacity to execute a will.

6. *Matter of Gentry.*

7. 27 Misc.3d 1205(A) (2010).

8. Note 2, supra.

9. 117 A.D.2d 843 (3d Dept. 1986).

10. Note 9, supra.

11. 103 AD2d 960 (3d Dept. 1984).

12. *Matter of Boggia*, NYLJ, March 4, 1991, p. 31, col. 2 (Sur. Ct. Bronx Co.).

13. 280 A.D.2d 787 (3d Dept. 2001).

14. *Padro v. Pfizer Inc.*, 269 A.D.2d 129 (1st Dept. 2000).

15. *Coello v. Progressive Ins. Co.*, 6 A.D.3d 282 (1st Dept. 2004).

16. *Krygier v. Airwelf Inc.,* 176 A.D.2d 700 (1991).