Conducting SCPA 1404 Discovery

Updated Case Citations

(To be read in conjunction with cases referenced/cited in 2008 Course materials)

submitted by

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SCPA § 1404 Discovery
2017 NYSBA CLE
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1. Who May be Examined (SCPA § 1404 [4])

    i. Pre-Objection Depositions are limited in scope to the Attesting Witnesses and the Attorney Draftsperson; unless

    ii. The Will includes an *in Terrorem*, or "*No Contest*," clause, and then the Proponent(s) – or, in the presence of special circumstances, any other party the Court deems necessary to determine the validity of the Will - may be examined as well (SCPA § 1404[4]; *see also* EPTL § 3-3.5).

a. Matter of Singer, 2009 NY Slip Op 9265, 13 N.Y.3d 447; 892 N.Y.S.2d 836; 920 N.E.2d 943

    "The Court of Appeals found, *inter alia*, that the conduct of the deposition did not amount to an attempt to contest, object to, or oppose the validity of the testator's estate plan. Rather, the son conducted the examination in order to make an informed decision as to how to proceed. Therefore, because the deposition of the attorney fell within the safe harbor provisions of EPTL 3-3.5 and SCPA § 1404, the son's bequest should not have been revoked" Matter of Singer, 2009 NY Slip Op 9265, ¶ 1, 13 N.Y.3d 447, 449, 892 N.Y.S.2d 836, 837, 920 N.E.2d 943, 944

b. Matter of Baugher, 2010 NY Slip Op 20359; 29 Misc. 3d 70; 906 N.Y.S.2d 856, 857 (Nassau Surr Ct). The court found, inter alia, that although neither the nominated successor executor nor the drafter of a prior instrument were included in EPTL 3-3.5(b)(3)(D) and SCPA 1404, they could be deposed without fear of triggering the will's in terrorem clause. However, because the court had no authority under SCPA 1420(3) to construe the will before its admission to probate, it could not determine whether conducting the examinations would actually violate the in terrorem clause. Matter of Baugher, 2010 NY Slip Op 20359, ¶ 1, 29 Misc. 3d 700, 701, 906 N.Y.S.2d 856, 857 (Sur. Ct.)

        i. Note: "The safe harbor [provision is] not exclusive, but whether or not the examination of someone not listed in the statute violate[d] a no contest clause apparently [could] only

be determined after the will [was] admitted to probate." (*see also* New York State Assembly, Memorandum in Support of A6838A, in the Governor's Bill Jacket).

c. In re Will of Weintraub, 40 Misc. 3d 1207(A); 975 N.Y.S.2d 370 (Nassau Surr Ct 2013). "[Upon application based upon] … special circumstances, the examination of "any [other] person whose examination the court determines may provide information with respect to the validity of the will that is of substantial importance or relevance to a decision to file objections to the will" (EPTL 3-3.5[b][3][D]; [***3] SCPA 1404[4]). Matter of Weintraub, 2013 NY Slip Op 51071(U), ¶ 2, 40 Misc. 3d 1207(A), 1207A, 975 N.Y.S.2d 370, 370 (Sur. Ct.)

d. Estate of James Pridgen, 2015 NYLJ LEXIS 816 (N.Y. Sur. Ct. June 4, 2015)

Pursuant to SCPA 1404 (4), no person who has been examined as a witness under that section shall be examined in the same proceeding under any other provision of law except by direction of the court. It is incumbent upon the party seeking re-examination to demonstrate that the information sought to be elicited was either unavailable at the time of the prior examination or that new facts have come to light which necessitate further examination (see Matter of Hodges, NYLJ, Feb. 2, 2009, at 46, col 6 [Sur Ct, Suffolk County 2009]). Estate of James Pridgen, 2015 NYLJ LEXIS 816, *6 (N.Y. Sur. Ct. June 4, 2015)

2. Who May Request the Examination

i. A party's standing to request Pre-Objection 1404 Discovery are not only limited their status as an interested party, but also by the nature and scope of their interest in the Estate, as well as any pre-death – and legally enforceable – agreements entered into with the Decedent (*see also* SCPA § 1410).

b. Estate of Robert Wallis, 2008 N.Y. Misc. LEXIS 4645 (Sur. Ct. July 9, 2008)

Waiver of a surviving spouse's right to conduct SCPA 1404 Discovery pursuant to a Stipulation of Settlement reached in a pre-death Spousal Support proceeding. "[The spouse] entered into the … stipulation voluntarily, without fraud or duress, and that there was no repudiation by decedent which would justify withdrawal of her waiver of her rights in decedent's estate, [the spouse] effectively waived her rights in the estate. She therefore is not an interested party in the probate proceeding and, a fortiori, has no standing to conduct discovery or to file objections to the propounded instrument (Matter of Sheeler, 190 Misc 894; Matter of

Greenstein, NYLJ June 2, 1994, at 31 col 1). Estate of Robert Wallis, 2008 N.Y. Misc. LEXIS 4645, at *11 (Sur. Ct. July 9, 2008)

c. Matter of Elyachar, 2015 NY Slip Op 25189, 48 Misc. 3d 852, 14 N.Y.S.3d 869 (Sur. Ct.)

An interested party that has Standing to Object to Probate of the Will pursuant to SCPA § 1410 has Standing to seek SCPA § 1404 Pre-Objection Discovery – this necessarily incudes interested parties that have a (contingent or present) pecuniary interest in the Estate, and would be adversely effected by the admission of a later in time instrument to Probate. Here, in a probate proceeding, decedent's wife and daughter had standing to pursue SCPA 1404 objections to decedent's will, based on the existence of a trust preventing them from receiving their inheritances 100% outright. The wife and daughter would have been adversely affected by the will's admission to probate because they would have done better in intestacy. Matter of Elyachar, 2015 NY Slip Op 25189, ¶ 1, 48 Misc. 3d 852, 853, 14 N.Y.S.3d 869, 870 (Sur. Ct.)

d. Estate of Sophie Dziubkowski, 2016 NYLJ LEXIS 4250 (N.Y. Sur. Ct. Dec. 20, 2016) (Post-Objection, but instructive)

Pre-Objection Discovery Demands for documents and testimony may be subject to enforcement Post-Objection, especially where the demands are for documents and testimony that are not only Material and Necessary, but are not subject to the attorney-client privilege pursuant to CPLR § 4503 (b).

3. Scope of the Examination (22 NYCRR 207.27)

i. "The examination may cover all relevant matters that would be the basis for objections to probate, namely the genuineness of the will, its valid execution, the testator's mental competence and his freedom from restraint and fraud." (McKinney's Practice Commentaries SCPA § 1404).

ii. However, "[i]n any contested probate proceeding in which objections to probate are made and the proponent or the objectant seeks an examination before trial, the items upon which the examination will be held shall be determined by the application of article 31 of CPLR. Except upon the showing of special circumstances, the examination will be confined to a three year period prior to the date of the propounded instrument and two years thereafter, or to the date of decedent's death, whichever is the shorter period" (22 NYCRR 207.27).

iii. Nevertheless, "[t]he [3 year/2 year] rule is not inflexible, since it is subject to exception in a case of special circumstances" (*see* Matter of Kaufmann, 11 AD2d 759, 202 N.Y.S.2d 423 [1st Dept. 1960]).

a. Fiddle v Fiddle, 13 Misc. 3d 827; 823 N.Y.S.2d 859 (Sullivan Surr Ct 2006)

"3 year/2 year" rule only applicable Post-Objection.

b. Matter of Bogen, 2014 N.Y. Misc. LEXIS 4826; 2014 NY Slip Op 32844(U) (New York Surr Ct 2014)

Enlargement of the "3 year/2 year" rule was warranted where persons substantially benefited under the propounded instrument were "stranger[s] to the blood," and where there is "some evidence of a design upon decedent's property."

c. Estate of Shirley W. Liebowitz, NYLJ, Feb. 18, 2016 at p.22, col.3 (New York Surr Ct 2016)

Special Circumstances warranting the expansion of the "3 year/2 year" rule are found where "[t]he propounded instrument contains significant bequests for the drafter and [a] business manager;" the propounded instrument presented a deviation from prior Testamentary Plan; and a fiduciary and/or confidential relationship existed.

d. Estate of Po Jun Chin, 2017 NYLJ LEXIS 900 (Queens Surr Ct 2017)

"Minor" enlargement of the "3 year/2 year" warranted where there not only a change in the Testamentary Plan, but factual evidence is offered supporting allegations of fraud and/or undue influence.

4. Party and Non Party Discovery (CPLR Article 31 Discovery)

i. "[T]he party conducting the [SCPA § 1404] examination is expressly entitled to document discovery under CPLR Article 31," which includes full party, and non-party Discovery (McKinney's Practice Commentaries SCPA § 1404; SCPA § 1404[4]).

a. Estate of Irene E. Powers, 2001 NYLJ LEXIS 3842 (Westchester Surr Ct 2001)

Broad Pre-Objection SCPA § 1404 Discovery is warranted so long as the documentation sought is Material and Necessary to determining the validity of the propounded instrument.

b. Estate of Carmine Rocco Lombardi, NYLJ, Mar. 1, 2013 at p.26, col.2; 2013 NYLJ LEXIS 5984 (Bronx Surr Ct 2013)

"[D]ocuments such as trust accountings are discoverable in probate proceedings if material and relevant…Issues as to whether the trust, executed one month after the will, was ever funded, how and when it was funded, and the source and amount of those funds, are relevant to testamentary capacity and the decedent's overall testamentary plan, if any, and whether or not the funds constitute assets of the estate." Accordingly, "…information about the insurance policies used to fund [an] irrevocable trust and the amount thereof…" is discoverable.

c. Matter of Demetrious, 2013 NY Slip Op 32128(U) (Nassau Surr Ct 2013)

The scope of allowable Discovery, and the definition of "Material and Necessary" is case specific. Where the "…propounded Will represents a dramatic deviation from Decedent's earlier pattern of advancements and testamentary dispositions made in prior wills, spurning respondents and giving rise to reasonable suspicion [of the validity of the proffered instrument]" the scope of allowable Discovery will be broader than where no such evidence of facts exist.

d. Estate of Bert Stern, 2014 NYLJ LEXIS 4253; NYLJ, Nov. 18, 2014 at Pg. p.22, col.4. (New York Surr Ct 2014)

As with all Discovery, the scope of party and non-party document production pursuant to SCPA § 1404 will be subject to the test Materiality and Necessity. In determining if demanded documents are material and necessary, the Court looks to the totality of the circumstances, including whether or not the production of documentation that is sought will "disgrace decedent's memory" (*see* CPLR § 4504[c]). Where documents may be Material and Necessary, but also may "disgrace decedent's memory," an *in camera* review may be warranted before production is Ordered.

5. Subject Matter of the Examination

The Subject matter of SCPA § 1404 examinations can best be understood in the context of the allowable Objections to Probate and Summary Judgment, i.e.: while it is limited to the collection of evidence that will establish the validity – or as the case may be, the invalidity of the Will - this is a necessarily broad investigation.

a. Matter of Templeton, 116 A.D.3d 781 (2nd Dept, 2014);
b. Matter of Engstron (Leaonard B. Harmon 2003 Trust), 47 Misc. 3d 1212(A) (Suffolk Surr Ct 2014);
c. Estate of Carmine Chiuchiolo, NYLJ, Jan. 22, 2015 at Pg. p.28, col.2 2015 NYLJ, LEXIS 5847 (Suffolk Surr Ct 2015);
d. Matter of Mallin, 2016 NY Slip Op 32032(U) (Nassau Surr 2016).

6. Costs of the Examination (SCPA § 1404[5])

i. Pre-Objection: the Estate shall bear the costs for the:

1. The initial production or commission and the examination of
(A) the first two attesting witnesses within the state who are competent and able to testify who are produced by the proponent, or
(B) if no witness is within the State and competent and able to testify, the witness without the state who resides closest to the county in which the probate proceedings are pending and who is competent and able to testify (SCPA § 1404 [a][1]); and

2. The stenographer and one copy of the transcripts of such examinations for the court and any guardians ad litem.

The costs of all other examinations, including subsequent examinations of the witnesses are borne by the party seeking such further examinations (SCPA § 1404 [a][2]).

ii. Post-Objection:

1. The costs of all Post-Objection Discovery, inclusive of Documents Discovery and Examinations Before Trial, shall be governed by CPLR Article 31 (SCPA § 1404 [a][2][b],[c]).

a. In the Matter of the Estate of Johanna Smith, 29 Misc3d 832 (Bronx Surr Ct 2010)

Pursuant to statute, absent "good cause," where the Deposition of "one competent witness who resides in the state" has been conducted at the expense of the Estate, the Estate will not pay expenses associated with taking the Deposition of a witness residing outside the State.

b. Estate of James Pridgen, 2015 NYLJ LEXIS 816, (Bronx Surr Ct 2015)

Where the Estate has satisfied the expenses for Depositions of the first two (2) attesting witnesses that reside within the State, all expenses for subsequent Pre-Objection examinations before trial shall be paid pursuant to the rules set forth in CPLR Article 31.

7. Timing of Objections (SCPA § 1410)

i. "The objections must be filed on or before the return day of the process or on such subsequent day as directed by the court; provided however that if an examination is requested pursuant to 1404, objections must be filed within 10 days after the completion of such examinations, or within such other time as is fixed by stipulation of the parties or by the court" (SCPA § 1410).

a. Matter of Scianni, 87AD3d 783 (3rd Dept, 2011)

Failure to file Objections to Probate for more than six (6) months after Pre-Objection Depositions were completed, coupled with the conclusory nature of the Objections themselves, constituted sufficient grounds for the Surrogate to reject the submission of Respondent's Objections to Probate.

b. In re Pascal - 102 A.D.3d 796 (2nd Dept, 2013)

The Surrogate has the power and authority to extend the deadline to file Objections to Probate at the Court's discretion.

8. Proving the Elements of Probate Objections

a. Matter of Falk, 2007 NY Slip Op 8774, 47 A.D.3d 21, 845 N.Y.S.2d 287 (App. Div.)

"The best practice is to discourage clients from executing a will outside the attorney's office or, at the least, without the supervision of an attorney. However, if the client insists and/or the circumstances demand, the attorney should deliver a written memorandum to the client explaining the fairly straightforward formalities, in clear and simple terms, which must be observed. The client should be requested to sign and return the memorandum after the execution ceremony, acknowledging with some detail that the instructions were followed. This simple procedure will, to a large extent, negate the need for a proceeding such as this and abrogate the possibility that a decedent's testamentary intent will be frustrated."

b. In re Estate of Scalone, 170 A.D.2d 507, 566 N.Y.S.2d 75 (App. Div. 1991)

Testatrix should be aware of the natural objects of her bounty and the nature and extent of her property. Further, the use of testimony of two subscribing witnesses more than adequately justifies the conclusion that the will was duly executed.

c. In re Estate of Pirozzi, 238 A.D.2d 833, 657 N.Y.S.2d 112 (App. Div. 1997)

Before admitting a will to probate, the trial court needs to be satisfied that the will was duly executed, even if no interested party filed any objections to the validity of the will. Among the requirements for due execution is that the testator must publish to the attesting witnesses that the document was his or her will. "Publication can be through words or actions, but something must occur to show that there had been a "meeting of the minds" between the testator and the attesting witnesses that the instrument they were being asked to sign as a witness was testamentary in character." Citing matter of Roberts, 215 AD2d 666.

d. Matter of Dane, 2006 NY Slip Op 6721, 32 A.D.3d 1233, 821 N.Y.S.2d 699 (App. Div.)

During the nonjury trial, the respondent's expert testified that his handwriting analysis was "inconclusive" meaning that he could not testify either that the signature on the 1992 will was genuine or that it was forged. However, the decedent's daughter and petitioner's handwriting expert testified that the signature on the 1992 will was in fact that of the decedent. Also, the attorney who witnessed the will signing testified that the decedent signed the will and there were two contemporaneous checks drawn on decedent's account and made payable to an attorney for will preparation.

The court concluded that the respondent failed to overcome the presumption of regularity and due execution arising from the fact that the will's execution was supervised by the attorney-draftsperson.

e. Matter of Taylor, 2011 NY Slip Op 51440(U), 32 Misc. 3d 1227(A), 936 N.Y.S.2d 61 (Sur. Ct.)

"Considering that all parties agree that the testator's signature changed after suffering injuries to the wrist of her writing hand, and considering that a person's signature is not always identical, it was incumbent upon the objectant to produce independent proof a forgery in addition to the conclusory, self-serving statement of herself and another disinherited distribute that the signature on the will is a forgery." Where the attorney-draftsman supervised the will's execution, there is a presumption of regularity that the will was properly executed in all respects.

Where the objectant intends to offer proof that the instrument has been forged by another, the proponent is entitled to particulars of the forgery, and where known, the name and addresses of the persons who forged the instrument.

f. Estate of Sozzi, 2002 NYLJ LEXIS 2863 (N.Y. Sur. Ct. July 1, 2002)

In a forgery allegation, the objectants have the burden of proof. To oppose a motion objectants should produce affidavits in opposition to a motion that alleges that the signature on the will is a forgery or competent evidence from an expert or other person familiar with decedent's handwriting which would indicate the signature is a forgery.

g. In re Estate of Kumstar, 66 N.Y.2d 691, 496 N.Y.S.2d 414, 487 N.E.2d 271 (1985)

When there is conflicting evidence or the possibility of drawing conflicting inferences from undisputed evidence, the issue of capacity is one for the jury.

h. Matter of Schlaeger, 2010 NY Slip Op 4631, 74 A.D.3d 405, 903 N.Y.S.2d 12 (App. Div.)

Proponent established prima facie due execution of the will with the affidavits and testimony of the attesting witnesses and attorney-drafter. Where, as here, the attorney-drafter supervises the execution of the will, there is a presumption of regularity that the will was properly executed in all respects. The attestation clause and self-proving affidavit give rise to a presumption of compliance with all statutory provisions and constitutes prima facie evidence of the facts attested to therein by the witnesses. There was no inconsistency in the evidence regarding which of the two attorneys present supervised the execution of the will and, in any event, such a discrepancy would be insufficient to overcome the presumption of due execution raised by the self-proving affidavit.

i. Matter of Estate of Paigo, 2008 NY Slip Op 6250, 53 A.D.3d 836, 863 N.Y.S.2d 508 (App. Div.)

"To establish fraud, it must be shown that . . . petitioner knowingly made a false statement which altered the testamentary disposition that would have been made in the absence of such a statement"

With regard to testamentary capacity, " 'the appropriate inquiry is whether the decedent was lucid and rational at the time the will was made' " Once a decedent's testamentary capacity is challenged, the proponent of the will must demonstrate that the decedent understood (1) the nature and consequences of executing a will, (2) the nature and extent of his [or her] property, and (3) the natural objects of his [or her] bounty and [the] relationship to them".

In a claim of undue influence, the burden is on the respondents to show that the decedent was actually constrained to act against his own free will and desire. Because direct proof of undue influence is rare, it may be demonstrated by circumstantial evidence of motive, opportunity and the actual exercise of such influence. Here, petitioner was not an attorney but drafted decedent’s will, named herself as executor of the estate, she is also a beneficiary of the will. She was the only person present when the decedent allegedly communicated his wishes as to how to dispose of his estate, she arranged the will execution ceremony. There were facts that needed to be assessed.

j. Matter of Nofal v. Nofal, 2006 NY Slip Op 9988, 35 A.D.3d 1132, 1133, 826 N.Y.S.2d 828, 829 (App. Div.)

To establish testamentary capacity, the evidence must demonstrate that the testator understood the consequences of executing the will, knew the nature and extent of the property being disposed of and knew the persons who were the natural objects of his or her bounty and his or her relationship to them. A presumption of testamentary capacity is created when an attorney drafts a will and supervises its execution, particularly if the evidence submitted includes an affidavit by one of the subscribing witnesses stating that the testator was mentally acute.

k. In re Will of Slade, 106 A.D.2d 914, 483 N.Y.S.2d 513, 514 (App. Div. 1984)

The proponent has the burden of proving that the testator possessed testamentary capacity and the court must look to the following factors: (1) whether she understood the nature and consequences of executing a will; (2) whether she knew the nature and extent of the property that she was disposing of; and (3) whether she knew those who would be considered the natural objects of her bounty and her relations with them.

Where opinion testimony is contradicted by the facts, the facts must prevail.

l. In re Hedges, 100 A.D.2d 586, 586, 473 N.Y.S.2d 529, 530 (App. Div. 1984)

It has long been recognized that old age, physical weakness and senile dementia are not necessarily inconsistent with testamentary capacity as long as the testatrix was acting rationally and intelligently at the time the codicil was prepared and executed

Furthermore, evidence relating to the condition of the testatrix before or after the execution is only significant insofar as it bears upon the strength or weakness of mind at the exact hour of the day of execution

m. In re Will of Walther, 6 N.Y.2d 49, 188 N.Y.S.2d 168, 169, 159 N.E.2d 665, 666 (1959)

To show undue influence, it must be shown that the influence exercised amounted to a moral coercion, which restrained independent action and

destroyed free agency, or which, by importunity which could not be resisted, constrained the testator to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist. It must not be the promptings of affection; the desire of gratifying the wishes of another; the ties of attachment arising from consanguinity, or the memory of kind acts and friendly offices, but a coercion produced by importunity, or by a silent resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear.

Lawful influences which arise from the claims of kindred and family or other intimate personal relations are proper subjects for consideration in the disposition of estates, and if allowed to influence a testator in his last will, cannot be regarded as illegitimate or as furnishing cause for legal condemnation.

Undue influence may also be proved by circumstantial evidence, but this evidence must be of a substantial nature. Evidence must be adduced from which inferences of undue influence can be reasonably drawn before a will should be denied probate. An inference of undue influence cannot be reasonably drawn from circumstances when they are not inconsistent with a contrary inference.
The mere fact that one is the sole legatee or sole distributee is not in itself evidence of the exercise of undue influence.

A mere showing of opportunity and even of a motive to exercise undue influence does not justify a submission of that issue to the jury, unless there is in addition evidence that such influence was actually utilized.

Intervention and undue influence can only be established by evidence that is not inconsistent with a contrary hypothesis.

n. Estate of Freilich, 2002 NYLJ LEXIS 1521, *4-5 (N.Y. Sur. Ct. Mar. 27, 2002)

With respect to undue influence, the party who alleges that undue influence was exerted upon the decedent, has the burden of establishing not only motive and opportunity but also that it was in fact exercised by a moral coercion which the testator was unable to resist and which constrained him to act against his free will (Matter of Kumstar, supra; Matter of Fiumara, 47 NY2d 845; Matter of Walther, 6 NY2d 49; Children's Aid Society v. Loveridge,

70 N.Y. 387). However, it is also recognized that undue influence is rarely practiced in front of others and usually must be established by circumstantial evidence. Some of the circumstances that have been considered are whether the provisions of the will are consistent with the testator's family relations, the condition of the testator's physical and mental health, whether the testator's attitude and testamentary disposition changed after the person who allegedly exerted the undue influence became involved in the testator's affairs, the degree to which others were excluded from dealing with the testator, whether the testator was subject to the control of the person who allegedly practiced the undue influence, and the acts and declarations of such person (Matter of Anna, 248 N.Y. 421, 424; Rollwagen v. Rollwagen, 63 N.Y. 504; Matter of Antoinette, 238 AD2d 762).

o. In re Henderson, 80 N.Y.2d 388, 390, 590 N.Y.S.2d 836, 837, 605 N.E.2d 323, 324 (1992)

A person of sound mind, acting with full knowledge of her affairs, competent to understand her relations to those whom she wished to benefit, may bestow her bounty as she likes. A testator's freedom to bequeath property in accordance with his or her wishes should not be diminished merely because the object of the testator's generosity happens to be an attorney with whom the testator has enjoyed a beneficial professional relationship. Attorneys often extend themselves on behalf of their long-time clients, and such acts of kindness and consideration do not, by themselves, constitute undue influence when they evoke reciprocal sentiments of gratitude and affection by the client. Accordingly, the Putnam inference of undue influence should not automatically be applied where an attorney-legatee has had a professional relationship with the testator but was not the attorney who drafted the testamentary instrument.

A question of undue influence often arises when a person in a position of trust and confidence becomes the object of the other party's generosity. Where a fiduciary relationship exists between parties, transactions between them are scrutinized with extreme vigilance. Such scrutiny is especially important when attorney-beneficiaries are involved, because the intensely personal nature of the attorney-client relationship, coupled with the specialized training and knowledge that attorneys have, places attorneys in positions that are uniquely suited to exercising a powerful influence over their clients' decision. While most attorneys exercise that power with scrupulous honesty, the risk of undue persuasion is sufficiently substantial as

to justify judicial inquiry, at least where there may have been no meaningful consultation or intervention by independent counsel.

p. Matter of Neenan, 2006 NY Slip Op 9250, 35 A.D.3d 475, 475, 827 N.Y.S.2d 164, 165 (App. Div.)

An inference of undue influence, requiring the beneficiary to explain the circumstances of the bequest, arises when a beneficiary under a will was in a confidential or fiduciary relationship with the testator and was involved in the drafting of the will. Although the inference does not shift the burden of proof on the issue of undue influence, it places the burden on the beneficiary to explain the circumstances of the bequest. The adequacy of the explanation presents a question of fact for the jury.

q. Matter of Rosasco, 2011 NY Slip Op 50673(U), 31 Misc. 3d 1214(A), 1214A, 927 N.Y.S.2d 819, 819 (Sur. Ct.)

The Restatement of Contracts fleshes out the elements of duress. First, "the doing of an act often involves, without more, a threat that the act will be repeated" (Restatement [First] of Contracts § 492 Comment d). As stated in the Restatement (Second) of Contracts: "Past events often import a threat" (id. § 175 Comment b).

Second, the standard for evaluating whether an "act or threat produces the required degree of fear is not objective," but subjective, that is, the issue is whether the threat of a wrongful act induced such fear in the testator "as to preclude the exercise by [her] of free will and judgment" (Restatement [First] of Contracts § 492 Comment a]). As explained in the Restatement (Second) of Contracts: "The test is subjective and the question is, did the threat actually induce assent on the part of the person claiming to be the victim of duress" (id. § 175 Comment c).

Finally, the motivation or intent of the person charged with duress is irrelevant: "duress does not depend on the intent of the person exercising it" (Restatement [First] of Contracts § 492 Comment a]).

r. In re Estate of Evanchuk, 145 A.D.2d 559, 536 N.Y.S.2d 110, 111 (App. Div. 1988)

In order to state a claim for fraud, the objectant is required to demonstrate that a person knowingly made a false statement to the testator which caused

him to execute a will that disposed of his property in a manner differently than he would have in the absence of that statement.

9. Relying on – and Rebutting – Presumptions in the Absence of Relevant Testimony

   a. Matter of Selvaggio, 146 A.D.3d 891

      The petitioners made a prima facie showing that the propounded will was duly executed pursuant to EPTL 3-2.1 by submitting the deposition testimony of the attorney-drafter and the witness to the will, neither of whom was a beneficiary thereunder, regarding the circumstances surrounding the signing of the will and the ceremony as supervised by the attorney-drafter. The attestation clause and self-proving affidavits accompanying the propounded will also gave rise to a presumption of compliance with the statutory requirements. The petitioners also established, prima facie, that the decedent understood the nature and consequences of making a will, the nature and extent of his property, and the nature and objects of his bounty.

   b. Matter of Shapiro, 2014 NY Slip Op 07395, 121 A.D.3d 1454, 1454, 995 N.Y.S.2d 805, 806 (App. Div.)

      "[I]f the attestation clause is full and the signatures genuine and the circumstances corroborative of due execution, and no evidence disproving a compliance in any particular, the presumption may be lawfully indulged that all the provisions of the statute were complied with, although the witnesses are unable to recollect the execution or what took place at the time"

      Absence of a self-executing affidavit does not prevent the presumption from arising, where, as here, the attestation clause is complete and the circumstances corroborate due execution.

   c. Matter of Falk, 2007 NY Slip Op 8774, 47 A.D.3d 21, 22, 845 N.Y.S.2d 287, 287 (App. Div.)

      When an attorney-draftsperson supervises the execution of a will, there is a presumption of regularity that the will was properly executed in all respects, but that presumption was not applicable here. One of the witnesses did sign an affidavit of attesting witness, but the affidavit falsely stated that the witness had witnessed decedent subscribe the will. Although the will contained an attestation clause, which normally raises a presumption of validity, the evidence presented varying accounts of what allegedly transpired with regard to whether decedent signed in the presence of any witnesses or acknowledged her signature, whether she declared that the instrument was her will, and whether

she requested that they sign the will. Accordingly, there was no meeting of the minds between decedent and the witnesses, and the petition for probate was properly denied.

d. Matter of Grancaric, 2009 NY Slip Op 9108, 68 A.D.3d 1279, 1279, 890 N.Y.S.2d 685, 686 (App. Div.)

Finding that will was not executed according to statutory requirements (see EPTL 3-2.1) was supported by evidence--jury was free to accept testimony of forensic handwriting expert, who explained his comparison of signature on will to other original documents known to have been signed by decedent and opined that signature on will was not genuine signature of decedent, and to reject testimony of attorney who supervised will execution, three witnesses to execution and petitioner's handwriting expert, who merely opined that there were "indications" that decedent was individual who signed will but could not state with degree of professional certainty that signature was "probably" decedent's writing.

e. Matter of Moskoff, 2007 NY Slip Op 4833, 41 A.D.3d 481, 481, 836 N.Y.S.2d 708, 709 (App. Div.)

When an attorney draftsman supervises the will's execution, there is a presumption of regularity that the will was properly executed in all respects. Furthermore, an attestation clause and self-proving affidavit give rise to a presumption of compliance with all statutory provisions.

f. In re Clapper, 279 A.D.2d 730, 718 N.Y.S.2d 468, 470 (App. Div. 2001)

The will contained a self-executing affidavit signed by the two attesting witnesses containing their opinion that decedent "was of sound mind, memory and understanding and not under any restraint or in any respect incompetent to make a Will." This type of attestation clause creates a presumption that the will was duly executed and constitutes prima facie evidence of the facts therein attested to by the witnesses (see, Matter of Ruso, 212 AD2d 846, 846-847; Matter of Yenei, 132 AD2d 870). Additionally, the surviving witness testified to compliance with the due execution requirements of the statute. No probative evidence was offered which would tend to rebut the presumption created by the attestation clause or dispute the corroborative [***3] testimony of the surviving attesting witness. Thus, Surrogate's Court correctly concluded that the requirements for the proper execution of a will were met.

g. Matter of Friedman, 2006 NY Slip Op 1354, 26 A.D.3d 723, 724, 809 N.Y.S.2d 667, 668 (App. Div.)

Objections to decedent's will were dismissed--fact that decedent was diagnosed with progressive dementia did not create triable issue of fact as to his mental capacity since two professionals opined that decedent was competent to sign his will, and attesting witnesses swore that decedent appeared competent at time he executed will--no question of fact existed as to issue of undue influence; respondents asserted that very magnitude of will, coupled with decedent's declining mental health, evinced fraud in securing his signature and that, based upon his declining mental health, he may have been unaware of his potentially disinheriting his older children; such contentions were speculative and did not rise to specificity required to demonstrate undue influence.

h. In re Estate of Leach, 3 A.D.3d 763, 772 N.Y.S.2d 100, 102 (App. Div. 2004)

When an attorney drafts a will and supervises its execution, a presumption of regularity is raised that the will was properly executed. A self-executing affidavit also creates a presumption that the will was duly executed and constitutes prima facie evidence of the facts therein attested to by the witnesses. Notably, this presumption cannot be overcome merely because the attesting witnesses are not able to specifically recall the will execution. Not being able to remember the details of the execution ceremony is not the same as testifying that the formalities described in the attestation clause did not occur.

i. In re Finocchio, 270 A.D.2d 418, 704 N.Y.S.2d 634, 635 (App. Div. 2000)

The presumption of proper execution of a will is not overcome by the mere failure of attesting witnesses to recall the will execution.

j. Estate of Anna Gallagher, 2009 NYLJ LEXIS 1086, (N.Y. Sur. Ct. May 22, 2009)

A will may be admitted to probate as an ancient document where it is more than 30 years old, taken from a natural place of custody and is unsuspicious in nature (Matter of Brittain, 54 Misc 2d 965 [1967]). Moreover, the attestation cause is entitled to weight in determining due execution (Matter of Cottrell, 95 NY 329, 335 [1884]).

The admission of a will to probate pursuant to the ancient document rule based upon the age of the instrument when probate is sought falls within the ancient document evidentiary rule under which a variety of documents that are at least 30 years old at the time of trial are received in evidence upon "their production from proper custody without proof of handwriting or of the death of the parties to their execution" (Matter of Barney, 185 App Div 782, 798 [1919] [citations omitted]).

Of course, where there is a prolonged unexplained delay between the decedent's death and the proferring of the will, that is a factor that the court may consider on the issues of whether the document is unsuspicious in nature or taken from a natural place of custody.

10. Ethical Considerations

a. In re Estate of Weinstock, 40 N.Y.2d 1, 386 N.Y.S.2d 1, 1, 351 N.E.2d 647, 647 (1976)

A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety. Model Code of Prof'l Responsibility EC 5-6.

b. In re Estate of Lowenstein, 158 Misc. 2d 320, 600 N.Y.S.2d 997, 998 (Sur. Ct. 1993)

N.Y. Est. Powers & Trusts Law § 13-2.1 requires that a contract to make a "testamentary provision" must be in writing and subscribed by the party to be charged therewith. However, the mere existence of a writing does not automatically render such an agreement enforceable. When the nominated executor is also the draftsman, even a writing to such effect is of doubtful value. Model Code of Professional Responsibility Canon 5-6 provides in part that a lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where the client wishes to name a lawyer as such, care should be taken to avoid even the appearance of impropriety.

c. SCPA 2307-a: Commissions of attorney executor
6-23 New York Civil Practice: SCPA § 2307-a (2017)

d. In re Estate of Putnam, 135 Misc. 311, 238 N.Y.S. 112, 113 (Sur. Ct. 1929)

Where an attorney draws a will for a client and is also named as a beneficiary in that will, the burden is cast upon the attorney to explain that the will represents the free, untrammeled and intelligent wishes of the testatrix.

e. In re Henderson, 80 N.Y.2d 388, 590 N.Y.S.2d 836, 605 N.E.2d 323 (1992)

"[W]here a fiduciary relationship exists between parties, 'transactions between them are scrutinized with extreme vigilance' " (Matter of Gordon v Bialystoker Ctr., 45 NY2d 692, 698, quoting Ten Eyck v Whitbeck, supra, at 353). Such scrutiny is especially important when attorney-beneficiaries are involved, since the intensely personal nature of the attorney-client relationship, coupled with the specialized training and knowledge that attorneys have, places attorneys in positions that are uniquely suited to exercising a powerful influence over their clients' decision. While most attorneys exercise that power with scrupulous honesty, the risk of undue persuasion is sufficiently substantial as to justify judicial inquiry, at least where, as here, there may have been no meaningful consultation or intervention by independent counsel.

f. In re Patterson, 2001 NYLJ LEXIS 161, (N.Y. Sur. Ct. Jan. 8, 2001)

It cannot be said with the requisite degree of certainty that the circumstances attendant to the making of decedent's 1994 will are purely issues of law without factual implications. More particularly, considering that, inter alia: (i) the documentary record is inconclusive regarding the decedent's knowledge and understanding of the amount of additional commissions attributable to both Merestead and the tangible personal property; (ii) the factual argument advanced by Wyckoff and accepted by the decedent as justification for awarding enhanced compensation to three executors is disputed; (iii) the direct and unambiguous provisions of Article THIRTEENTH which entitle the decedent's three co-executors, absolutely, to enhanced compensation are inconsistent with Wyckoff's own interpretation and application thereof; and (iv) Patterson has not been given the opportunity to test the credibility of Wyckoff, the witness to the will signing, and the statements each has made in their respective affidavits, all of which include alleged conversations and observations with and of the decedent, the court concludes that, at this juncture, Wyckoff's motion to dismiss the objections is premature.

Accordingly, pursuant to its authority under CPLR 3212(f), the court hereby denies the motion, without prejudice to renew upon completion of appropriate disclosure (see, e.q., Colicchio v. Port Auth. of N.Y. and N.J., 246 AD2d 464, supra; Seidman v. Booth Mem. Med. Ctr., 167 AD2d 530, supra).

g. St. Barnabas Hosp. v. N.Y.C. Health & Hosps. Corp., 7 A.D.3d 83, 775 N.Y.S.2d 9 (App. Div. 2004)

The law firm representing defendant New York City Health and Hospitals Corporation (HHC) in an action involving plaintiff hospital's former affiliation with

a HHC facility was improperly disqualified from continuing its representation of defendant solely because of its brief representation of plaintiff in a dispute with a billing vendor, especially where the attorneys who personally handled the prior representation were no longer with the firm. Plaintiff waived the firm's alleged conflict of interest both by its express written consent to such representation in a March 1998 retention letter concerning the firm's representation of plaintiff in certain employment litigation matters while negotiations involving a new affiliation agreement were ongoing, and by its unexplained delay of more than one year in making the disqualification motion. Consequently, although plaintiff set forth a colorable claim that the matters involved in the billing dispute were substantially related to the affiliation dispute, plaintiff's knowing waiver obviated the need for defendant to make a detailed showing to rebut the presumption of disqualification (*see* Code of Professional Responsibility DR 5-108 (a) (1) [22 NYCRR 1200.27 (a) (1)]). The firm had been HHC's outside counsel since 1976, and, under the circumstances, could not be deemed to have improperly "switched sides" in the dispute between HHC and plaintiff. St. Barnabas Hosp. v. N.Y.C. Health & Hosps. Corp., 7 A.D.3d 83, 84, 775 N.Y.S.2d 9, 10 (App. Div. 2004)

h. In re Hof, 102 A.D.2d 591, 478 N.Y.S.2d 39 (App. Div. 1984)

An application by the administratrix of an estate to disqualify the attorney for her co-administrator is granted, the attorney, who had previously represented both parties, having been dismissed by petitioner when he allegedly participated in the prosecution of a compulsory accounting proceeding seeking to surcharge her; as a result of the prior dual representation, confidences have developed leading inevitably to the possibility of conflict, and since there is an allegation that petitioner breached her fiduciary duties, it is manifest that the attorney's prior representation [***2] of her may well have been the source of information substantiating this claimed breach. The disqualification motion is not being made for tactical purposes, but involved is the obtaining of confidential information from a former client which will be used against that former client, and in such circumstances all that is required for disqualification is the adduction of facts which would make it reasonable to infer that the attorney gained some information about his former client of some value to his present client. In re Hof, 102 A.D.2d 591, 591, 478 N.Y.S.2d 39, 40 (App. Div. 1984)

Rule of Professional Conduct 1.7

NYSBA Ethics Opinions 649 and 797

Rule of Professional Conduct 1.6

i. Schneider v. Finmann, 2010 NY Slip Op 5281, 15 N.Y.3d 306, 907 N.Y.S.2d 119, 933 N.E.2d 718

The personal representative of an estate should not be prevented from raising a negligent estate planning claim against the attorney who caused harm to the estate. Despite the holding in this case, strict privity remains a bar against beneficiaries' and other third-party individuals' estate planning malpractice claims absent fraud or other circumstances. Relaxing privity to permit third parties to commence professional negligence actions against estate planning attorneys would produce undesirable results—uncertainty and limitless liability. These concerns, however, are not present in the case of an estate planning malpractice action commenced by the estate's personal representative.

Rule of Professional Conduct 1.14

Rule 1.14 creates a comprehensive framework for lawyers to use their professional judgment in order to help their clients with diminished capacities effectively without risking professional discipline.

j. Estate of Rothko, 84 Misc. 2d 830, 379 N.Y.S.2d 923 (Sur. Ct. 1975)

It is clear that where a fiduciary breaches his duty to the beneficiaries any loss to the estate must fall upon his shoulders and any profit derived from the breach, or profit which would have accrued to the estate if there had been no breach, will inure to the benefit of the estate. The beneficiaries, therefore, have various options or remedies available to them where there has been a breach of duty by an estate or trust fiduciary. The beneficiaries may have the option of not only charging the fiduciary with a loss or making him account for a gain but also of charging him with a gain which was not made but would have been made if the fiduciary had not violated his duty.

If the fiduciary in breach of his duty had transferred property, by sale or otherwise, to any third person, the beneficiary has a full right to follow such property into the hands of such person, unless that third person is a bona fide purchaser, for a valuable consideration, without notice. If the fiduciary has invested the property or its proceeds into any other property into which it can be distinctly traced, the beneficiary also has an election, either to follow the

same into the new investment, or to hold the fiduciary personally liable for the breach. All of these options or remedies are not always available to the beneficiaries but depend upon the facts of the particular case.

k. Wechsler v. Bowman, 285 N.Y. 284, 34 N.E.2d 322 (1941)

The law is well settled that it is the duty of an agent to act honestly towards his principal, and to use his utmost efforts to obtain for his principal the highest price possible for the property. In consequence the principal is entitled to recover from his unfaithful agent any commission paid by the principal and all moneys paid by a purchaser whether as a bribe to the agent of the seller or otherwise, on the theory that the purchaser was willing to pay that much more than the stated purchase price.

l. Matter of Clarke, 2009 NY Slip Op 9170, 71 A.D.3d 33, 891 N.Y.S.2d 342 (App. Div.)

In 2006, the attorney was indefinitely suspended from the practice of law for failing to register with the Office of Court Administration (OCA). According to OCA's records, the attorney had been delinquent in his attorney's registration since 1999. The committee's motion was predicated on findings that the attorney had previously engaged in a pervasive pattern of misconduct by deceiving his employer and four of its clients with respect to work that he completely failed to perform in five separate matters and by neglecting a total of six matters involving five separate clients. Although his treating psychologist was able to state with a reasonable degree of psychological certainty that the attorney's depression was a major contributing factor to his neglect of legal matters, she could not conclude that his depression and self-destructive behavior were causally linked to his repeated acts of intentional deceit. The court found, inter alia, that the attorney should be prospectively suspended for five years based on his violation of Judiciary Law § 468-a and former DR 1-102(A)(4) and DR 6-101(A)(3). Matter of Clarke, 2009 NY Slip Op 9170, ¶ 1, 71 A.D.3d 33, 34, 891 N.Y.S.2d 342, 343 (App. Div.)

11. Statutes & Rules

SCPA § 1404 - Witnesses to be examined; proof required
SCPA § 1406 - Proof of will by affidavit of attesting witness out of court
SCPA § 1410 - Who may file objections to probate of an alleged will
CPLR § 4503 – Attorney-Client Privilege
22 NYCRR 207.19 - Examinations before trial in contested probate proceedings
22 NYCRR 207.27 - Examinations before trial in contested probate proceedings
22 NYCRR 207.28 - Probate; filing of will; depositions; proof by affidavit
N.Y.Ct.Rules § 221.2 - Objections at depositions

22 NYCRR 221.3 - Communication with the deponent
EPTL § 3-2.1 - Execution and attestation of wills; formal requirements
SCPA § 302 – Pleadings
RPC – 1.2
RPC – 1.6
RPC – 1.7
RPC - 1.8
RPC – 1.14