Deposition Practice in the Surrogate's Court, A Pre and Post Objection Primer

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"The real voyage of discovery consists not in seeking new landscapes, but in having new eyes."

— Marcel Proust

In any litigation, the importance of the Discovery process, and in particular Depositions, cannot be overstated. The manner and approach with which evidence is obtained, including documents and witness testimony, are without question instrumental to successfully achieving the goals of your client. However, not all Courts deal with Discovery in the same way, and the unique procedures adopted by each Court substantially change the way even the most seasoned litigator crafts their litigation and Discovery strategy. To that end, a perfect illustration of how procedure can fundamentally shape litigation strategy presents itself when comparing the rules regarding Depositions in the Supreme Court vs. those in the Surrogate's Court - in particular during a Contested Probate Proceeding.

As most practitioners know, the Discovery process in Surrogate's Court involves the interplay between CPLR Article 31 and the Surrogate's Court Procedure Act ("SCPA"). The SCPA specifically provides that the CPLR governs procedural issues only where the SCPA remains silent, acting as a gap filler. Conversely, if a conflict emerges between a procedure specified in the SCPA and one included in the CPLR, the SCPA will control.[1]

Pursuant to SCPA 1404, and in stark contrast to the rules governing Depositions in the CPLR, pretrial Discovery in a Contested Probate proceeding has two distinct stages: pre-Objection Discovery, and post-Objection Discovery. Unlike in the Supreme Court, a potential Objectant in a Contested Probate proceeding - effectively the Plaintiff for purposes of comparison - may conduct examinations of specific witnesses before the

[1] See *Matter of Estate of Devine,* 126 A.D.2d 491 (1st Dep't 1987)

Objections - the equivalent of a Pleading - are even filed. Indeed, SCPA 1404 authorizes a potential Objectant to conduct both document Discovery, and examine the attesting witnesses and attorney draftsman of a Will prior to the filing of Objections[2]. The SCPA even goes so far, in the event the Will at issue contains and *in terrorem* clause, to authorize a pre-1404 Deposition of the Proponent and/or the nominated Fiduciaries[3] without triggering the clause itself. This pre-Objection Discovery is prescribed by statute with the intention that a potential Objectant can gather information about the facts surrounding the execution and drafting of the Will offered for Probate, and consider their likelihood of success before bringing suit.

After Objections have been filed – which they almost always are after pre-1404 Discovery has been completed - an Objectant may conduct further Depositions of the attesting witnesses, drafting attorney, and the Proponent of the Will, and engage in all types of Discovery authorized by CPLR Article 31, including non–party discovery. However, if pre-Objection testimony has been obtained from the attesting witnesses, draftsperson, and/or Proponent, the subjects of their testimony are thereafter off limits during the post-Objection examinations of these same witnesses. In most Surrogate's Courts, this second bite at the apple is not permitted unless new documentary evidence is disclosed and/or new lines of questioning are explored. This limitation can, of course, complicate matters if testimony obtained at the previous Deposition was not as thorough as needed. Nevertheless, post-Objection Depositions can prove fruitful if there are un-addressed facts that have since become known, or new issues subject to amended Objections.

Notably, in the event that Depositions of the attesting witnesses were taken before the filing of Objections, then pursuant to SCPA 1404(5) the pre-Objection Deposition expenses for the first two attesting witnesses are the responsibility of the Estate (with limited exceptions for out of State witnesses). Alternatively, if no Depositions were taken of these witnesses before the Objections were filed, or in the event post-Objection

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[2] Charles H. Groppe, Colleen F. Carew, Martin W. O'Toole, and Mark E. Haranzo, Harris 6th Edition, New York Estates: Probate Administration and Litigation, page 426§24:80, Volume 2, 2012 (citing SCPA1404 (4)).
[3] SCPA 1404

Depositions are needed to supplement the pre-Objection Depositions, then the Objectant is responsible for the full costs of the examinations, and for all other witnesses that they call to be deposed. Similarly, the Proponent of the Will is responsible for the Deposition costs of the post-Objection witnesses they call[4].

Unsurprisingly, CPLR 3114, which mandates that an interpreter must be provided if the witness insists, still controls in the Surrogate's Court - these costs also being allocated to the examining party. As a practice tip, if there is any question regarding a language barrier, err on the side of caution and retain an interpreter so that no issue can be made at a later time about a lack of understanding of a question, or a misstated response.

Most Surrogate's Courts require that all examinations before trial be held in the Court so that a ruling can be quickly obtained during the testimony without interruption or delay; the use of an attorney's office to conduct the deposition being rare absent a physical infirmity or some other extenuating circumstance requiring that the Deposition not be conducted at the Courthouse. If the Depositions take place outside the Courthouse, this sometimes gives the examining party more leeway than they would otherwise have as it is much more difficult to promptly get rulings and limit improper lines of questioning when the Court is not made immediately available.

Another unique component of a Deposition in a Contested Probate proceeding is the limitation imposed by the "three year-two year rule," which, pursuant to 22 NYCRR 207.27 restricts questioning to the three years before the signing of the Will, two years thereafter, or date of death – whichever comes first. However, this is only a general rule as special circumstances can extended this truncated period - but such allowances are rare, and subject to Court scrutiny before approval is granted. The three year – two year approach to disclosure is pragmatic, and intended to prevent the abuses which can emerge during the discovery process, i.e.: a "runaway inquisition," "wild goose chase,"[5]

[4] SCPA 1404 (5) directs practitioners to the CPLR regarding who bears the financial burden for post-objection Depositions. Unless otherwise directed by the Court, CPLR 3116 (d) states that the party taking the Deposition shall bear this expense.
[5] *Estate of Das*, NYLJ, 5/1/2009, at 31 [Sur Ct Nassau County].

or what is usually referred to as an open ended “fishing expedition.” However, this rule is not without exception as the scope of Discovery may be extended by the Court when “special circumstances” exist, such as when “a scheme of fraud or a continuing course of conduct of undue influence” is alleged,[6] or other good cause can be established warranting inquiry beyond these borders. If such an extension is granted, the relevant items to be discovered include, but are not limited to: the facts and circumstances leading up to the preparation of the Will, the preparation of the Will, and “the testator’s character and personality, his or her physical and mental condition, relationship with the beneficiaries and those persons disinherited.”[7] The more facts that can be presented to the Court in support of the “special circumstances” asserted, such as: the Decedent’s mental and/or medical condition beyond the time frame, the presence of a confidential relationship that had a long history outside the scope of the rule, or where there was a pattern of financial transactions departing from the Decedent’s ordinary expenditures, etc., the greater chance that the scope of the inquiry will be expanded.

Another practical consideration in Surrogate’s Court Deposition practice is that there is less flexibility with adjournments without Court notice and approval - the Discovery process as a whole often being subject to closer oversight by the Court attorney placed in charge of the case than that in Supreme Court. However, this control varies as some Surrogate’s Courts exercise close supervision and issue Discovery Orders shortly after and the Citation return date, while others exert far less control or docketing oversight than one might expect. Nevertheless, as with many things in life, courtesy counts when it comes to adjourning Depositions. There are limits though - multiple adjournments, adjournments that will upset a Court Ordered Deposition schedule of future contingent Depositions, and those that will cause the loss of testimony due to a witness’ unavailability, remain valid and accepted reasons for not consenting to an adjournment.

As with any stage of litigation, preparation for either pre or post 1404 depositions is key. It is clearly the better practice to be over-prepared in your review of the facts and operative documents (i.e.: previous testamentary plans, medical and financial records,

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[6] 22 NYCRR 207.27
[7] *Id.*

handwriting samples, etc.) than not. The examiner must not only know the facts of the case inside and out, but also have an equally thorough knowledge of the applicable statutes and common law as they relate to the matter. All the while juggling the interplay between the law and the facts, one must then invite the Deponent to give expansive answers (despite the best efforts of their counsel to keep their answers limited), yet at the same time ensure that the witness answers the question that has been asked. Thorough and detailed preparation beforehand will, without question, lead to a better Deposition experience, and a better record created.

This preparation process includes the attorney being well versed in the way that Objections are governed under the Uniform Rules of the Court (22 NYCRR 221.1; 221.2) so as to know how to craft the lines of questioning in proper form, and for which topics, though there are few, are off limits. Indeed, as proper objections at a Deposition are few and far between these days, one should be sure to avoid questions that are in improper form so as to avoid the ubiquitous “objection to form” as much as possible. When defending a Deposition, directing a witness not to answer is only allowed in the limited circumstances, i.e. where necessary to: (i) preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper, not relevant, and would, if answered, cause significant prejudice to any person.

Nevertheless, and perhaps more regularly than in most civil litigation, the Court attorney is often called in a Contested Probate proceeding to make a ruling on a particular issue or objection. Although not inevitable in all Will contest Depositions, more often than not there will be a disagreement that cannot be resolved between the parties, and will require Court intervention to resolve. If and when this occurs, be mindful of the limitations on objections, and be sure that you have a well thought out reason for pressing the point.

Perhaps the most important part of this process is developing a clear strategy so that both your thoughts, and the record, are organized. Planning that leads to well-structured and purposeful questions will better elicit the information sought. Structuring the lines of questioning with specific attention to the burdens of proof of the Deponent, and organizing them by subject - i.e.: due execution, capacity, undue influence, and fraud - builds a framework within which to obtain the testimony you need. However, this

framework should not be restrictive. The examining attorney should feel free to question the deponent extemporaneously, crafting their inquiries in reaction to the responses received, and constantly following up. Peripheral issues will emerge that must be explored, developed, and incorporated into the lager narrative being created as un-elicited testimony might come out that can prove valuable, evidence previously unknown might be produced, and positions of the Objectant that the examining attorney may not even considered might be revealed.

Overall, though the differences between Deposition practice in Supreme and the Surrogate's Court are pronounced, with a firm understanding of the SCPA's procedural directives those litigators who properly prepare will prove successful.

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