

Drafting Estate Planning Documents for Non-English Speaking Clients

One communication barrier that some clients face is they speak very little or no English. A language barrier issue should not bar a competent client from making his or her own wishes known just like any other client. It is important for the attorney drafting estate planning documents for a client who does not speak English to take certain steps, as discussed herein, to not only ensure proper drafting and execution of the documents, but to also minimize the risk of the documents being challenged on grounds such as lack of testamentary capacity or undue influence or fraud, which could be based on a language barrier argument.

Last Will and Testament

In New York, every person eighteen years of age or over, of sound mind and memory, may execute a Will.¹ The potential issue that a non-English speaking client might face is demonstrating that he or she is of sound mind and does not lack testamentary capacity.

When confronted with a Will contest based on lack of testamentary capacity, courts look to the following factors: (1) whether the testator understood the nature and consequences of executing a Will; (2) whether the testator knew the nature and extent of the property he or she was disposing of; and (3) whether the testator knew those who would be considered the natural objects of his or her bounty and his or her relations with them.² It is imperative that an attorney be able to communicate with his or her

client about what a Will is and how it operates, what the client's wishes are, who the client's family members are and what their relationship is with the client, and the nature and extent of the client's assets. This is problematic for the attorney who does not speak the same language as the client.

In addition, there are formalities for the due execution of a Will, which include the testator's signature at the end of the Will performed in the presence of at least two attesting witnesses, or acknowledged by the testator to the attesting witnesses, and the testator declaring to the attesting witnesses that the instrument is his or her Will.³ The fact that a testator cannot speak, read, or write English does not preclude him or her from making a valid Will in the English language where the Will is drawn by an attorney pursuant to the client's instructions, and at the time of execution, the Will is first read to the client in English, and then those matters which the client does not understand are explained to him or her in his or her native tongue.⁴ It is critical that the attorney establish that the non-English speaking client understands the nature and contents of the Will and communicates such understanding to the attesting witnesses.

To overcome these hurdles, the attorney should obtain the services of a certified translator who speaks the same language as the client.



Lisa R. Valente

This step should be taken at the outset of the relationship during the initial meeting and followed through until execution of the documents. Furthermore, the attorney should be mindful to take impeccable notes to help support the validity of the Will should there ever be a challenge to it. In addition, the attorney should consider asking the translator for a transcript of the translation or an affidavit as to the circumstances surrounding the communications that took place.

Procedurally, New York's Surrogate's Court Procedure Act (SCPA) requires that the attesting witnesses to the signing of a Will be examined before the court prior to a Will being admitted to probate.⁵ To avoid hauling the witnesses into court, it is common practice to have the attesting witnesses sign an affidavit in accordance with SCPA §1406, which sets out the circumstances of the execution of the Will. This affidavit should include language that "the testator at the time of execution was in all respects competent to make a will and not under any restraint."⁶ In the case of a non-English speaking client, the attorney should modify the affidavit to reflect that the testator was under a restraint to communicate in the English language, but that such restraint was overcome by some other means of communication such as by using the services of a certified translator.

Living Trusts or Powers of Attorney

For one reason or another, lifetime trusts are often used to carry out a client's wishes as an alternative to a Will. Similar to the statutory requirements to create a Will, any person, over the age of eighteen, can dispose of real and personal property by lifetime trust.⁷ However, a lifetime trust is often viewed more like a contract than a Will; thus, requiring a higher level of mental capacity to create than a Will.⁸ This higher contract standard of capacity focuses on whether the person is able to understand the nature and consequences of a transaction and make a rational judgment concerning it.⁹

Again, it is important to establish that the client understands the terms of any trust document that he or she is signing. Since witnesses are not required for the creation of a lifetime trust in New York,¹⁰ it is even more crucial that the attorney document the details of his or her conversations with the client. These duties imposed on the attorney are heightened when representing a non-English speaking client.

A Power of Attorney is another powerful and useful tool often used when drafting estate planning documents for a client. In simple terms, it allows the "principal," the client, to appoint an agent(s) to act on behalf of the principal should the principal be unable to make his or her own financial decisions. Depending on the client's wishes, it can grant very broad

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The NCBA Lawyer Assistance Program is directed by Beth Eckhardt, PhD, and the Lawyer Assistance Committee is chaired by Henry Kruman, Esq. This program is supported by grants from the WE CARE Fund, a part of the Nassau Bar Foundation, the charitable arm of the Nassau County Bar Association, and NYS Office of Court Administration.
*Strict confidentiality protected by § 499 of the Judiciary Law.



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PRO BONO ATTORNEY OF THE MONTH

By Karen Marie Scaduto

Steven M. Bernstein



The Nassau County Bar Association (NCBA) is excited to honor Steven M. Bernstein as our Pro Bono Attorney of the Month for March 2020. Mr. Bernstein has enjoyed an impressive and fulfilling career since graduating from New York University School of Law in 1961 and joining the New York State and federal bars. He began his pro bono activities with the NCBA two years ago. This past year, he donated numerous hours at Foreclosure Settlement Conferences at the Nassau County Supreme Court, appearing with homeowners who are facing foreclosure, counseled them, and connected them with nonprofit housing counselors to pursue debt remediation options. Many of the homeowners he served secured settlements and discontinuances of their actions.

Mr. Bernstein is a seasoned expert in foreclosure matters and manages several conferences during each hectic court session. He has been an incredible asset to the program, calming frightened homeowners and guiding them to grasp realistic expectations and options to resolve their difficulties.

Mr. Bernstein is a native New Yorker, residing in Long Beach since the age of four. In 1958, Steven Bernstein graduated from

the University of Pennsylvania, Wharton School of Finance and Commerce, with a B.S. in Economics. From there, he went on to New York University School of Law and earned an LLB in 1961. His article titled “*Collegiate Jurisdiction of the State Commission Against Discrimination*,” was published at 16 N.Y.U. Intra Law Review 286 (1961). His first honor was being chosen as a community ambassador to Israel in 1961. He had a fascinating two-month trip with the “Experiment in International Living.” He returned home and briefed the community on his experiences living with an Israeli family, working on a kibbutz, and meeting judges of the Israeli Supreme Court.

Mr. Bernstein started his remarkable legal journey in private practice, gaining experience in litigation and developing advocacy skills to assist underserved and vulnerable populations. This was the beginning of a distinguished career and life-long commitment to civil rights and service to others. From 1968 through 1973, he served as a senior trial attorney, and then as the attorney in charge of the Civil Division of the Legal Aid Society in Rockaway, Queens.

In 1974, he became the founding project director for Legal Services, NYC at the Brooklyn Branch and served there through

the end of 2009. Through his dedication and leadership, he nurtured a staff of excellent attorneys who protected the legal rights of countless Brooklyn residents and improved the lives of many who did not have the resources to secure private representation. His work involved civil litigation, including housing, consumer fraud, disability, and welfare rights. Mr. Bernstein clearly has a unique ability to connect with clients and understand their needs.

Shortly after his retirement, Mr. Bernstein began working for the New York Peace Institute as a certified mediator and continues to offer his time and expertise to this project. Fifty percent of conflicts brought before these mediators result in settlements that promote the beneficial interests of all parties. He began volunteering with the Nassau County Bar Association’s Pro Bono Mortgage Foreclosure Project in September 2018 and remains an active and invaluable contributor. Somehow, he finds time to offer additional volunteer hours to Cordoza Law School as a judge for its Moot Court Program.

Steven Bernstein has been married to his beloved Gloria for 55 years and they have one son who is a paramedic. Throughout his life, he has also volunteered extensively with his religious communities, including the Lido Beach Synagogue and Young Israel of Long Beach. He served as President of the Lido Beach Synagogue and was involved in reframing its constitution and charter.

When he is not helping others, Mr. Bernstein enjoys walking on the boardwalk and traveling, especially cruising. The Mortgage Foreclosure Project and the Nassau County Bar Association are immensely grateful that this outstanding and generous attorney and truly wonderful human being has joined our mission to serve homeowners in Nassau County.

Karen Marie Scaduto was the Settlement Coordinator for the Mortgage Foreclosure Project and has relocated for an opportunity in Manhattan. We wish her all the best and know she will be missed. Anyone who wishes to volunteer can contact Gale D. Berg, Director of Pro Bono for the Nassau County Bar, at gberg@nassaubar.org.

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powers to the agent. The General Obligations Law (GOL) governs the creation and use of a Power of Attorney and provides, in part, that it must be signed and dated by a principal with capacity.¹¹ The statute defines capacity as the “ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in a power of attorney, or the authority of any person to act as agent under a power of attorney.”¹²

Given the extensive powers that can be granted to an agent under a Power of Attorney, it is important that the attorney feel confident that the client, the principal under the Power of Attorney, understands the nature and consequences of the document. This is even more important when interacting with a non-English speaking client. The attorney representing a non-English speaking client must exercise extreme caution when drafting and supervising the signing of a Power of Attorney to ensure that the client understands the nature and consequences of signing the Power of Attorney.

Again, retaining the services of a certified translator can assist the attorney in assessing the non-English speaking client’s understanding of the documents and ensuring that the client is comfortable signing the documents.

Practice Tips

If the attorney representing the client speaks the same native language as the client, the attorney should keep detailed notes as to the attorney-client communications and demonstrate to the witnesses to the execution of the documents, if any, that the client understands what he or she is signing.

If the attorney is not fluent in the native language of the client, the services of a certified translator should be enlisted for the initial interview of the client and all following meetings with the client including the signing of the documents.

Do not use family members as translators! Not only could this create doubt as to what the family member is actually translating to the client, this could also be viewed as exerting undue influence on the signing party.

In the case of a Will, amend the SCPA §1406 affidavit of attesting witnesses to reflect that the testator acknowledged that his or her knowledge of the English language was limited and

state the client’s native language. Furthermore, state in the affidavit that the instrument was read aloud and translated to the testator in his or her native language by the translator. Finally, include in the affidavit that the testator was not under any restraint other than the inability to read, write, and converse in the English language.

Have the translator sign an affidavit as to his or her qualifications and the circumstances surrounding the attorney-client communications and the execution of the documents.

Keep *detailed notes* of all communications with the client including how the communications were exchanged. The attorney should take every step possible to ensure that the client’s wishes are carried out and keeping detailed notes will help avoid any individuals unhappy with the documents from using the communication challenge as grounds for claims of lack of due execution, lack of testamentary capacity, undue influence, or fraud.

As a last resort, refer the client to another attorney who is fluent in the client’s native language.

Conclusion

No statute pertaining to the making of a testamentary disposition, creation of a lifetime

trust, or providing for the appointment of an agent requires the party making the disposition or appointment to read, write or speak English. Rather, the statutes require the party signing the instrument to be of sound mind or to have the requisite capacity; in other words, the signing party must have the capacity to *understand* and *comprehend* the document that he or she is signing. Making sure the non-English speaking client *understands* and *comprehends* what he or she is signing is key.

Lisa R. Valente is a bilingual attorney with a fluency in Portuguese at Makofsky Law Group, P.C. located in Garden City. The firm concentrates its practice on elder law, Medicaid, estate planning, guardianships, probate, and estate administration.

1. EPTL § 3-1.1.
2. *Estate of Kumstar*, 66 N.Y.2d 691 (1985).
3. EPTL § 3-2.1.
4. *In re Watson*, 37 A.D.2d 897 (3d Dept. 1971).
5. SCPA § 1404.
6. SCPA § 1406.
7. EPTL § 7-1.14.
8. *Matter of Goldberg*, 153 Misc.2d 560 (Surr. Ct., N.Y. Co. 1992).
9. *Id.*
10. EPTL § 7-1.17(a).
11. GOL § 5-1501B(1)(b).
12. GOL § 5-1501(2)(c).

NCBA New Members

We welcome the following new members

Attorneys

Peter Ackerman

Amy Berkowitz-Ortiz

Matthew Albert Gray

Benjamin Kaplan
McLaughlin & Stern, LLP

Alanna Eileen McGovern
Miller & Milone, PC

Amanda Seelmann

Abrams, Fensterman,

Fensterman, Eisman, Formato,
Ferrara, Wolf & Carone, LLP

Steven C. Stern
Sokoloff Stern, LLP

Students

Jade L. Garza

Angelica Morra

Jasmine Ann Vega

COMMITTEE REPORTS

Plaintiff’s Personal Injury

Meeting Date: February 2020

Chair: Ira Slavitt

At the meeting held in February 2020, a CLE presentation was delivered by Nassau County Supreme Court Justice Randy Sue Marber and her Principal Law Clerk, Mili Makhijani, who spoke about pre-trial practice issues that they commonly encounter and best practices for lawyers to follow.

The next meeting is scheduled for Tuesday, March 10, 2020 at 12:30 PM, at which time guest speaker Mark Yagerman will present a lecture on various issues related to trial preparation, including how to get your evidence to court in admissible form and how recent amendments to the CPLR can help lawyers for plaintiffs.



Michael J. Langer

Save the Date: Tuesday, May 5, 2020, 5:30 to 7:30 PM, at which time a CLE program entitled “Why Civility in the Practice of Law Matters,” will be jointly presented by the Plaintiff’s and Defendant’s Personal Injury Committees and will feature a panel of judges and attorneys.

The Committee Reports column is compiled by Michael J. Langer, a partner in the Law Offices of Michael J. Langer, P.C. Mr. Langer is a former law clerk in the

United States Court of Appeals for the Second Circuit, and a former Deputy County Attorney in the Office of the Nassau County Attorney. Mr. Langer’s practice focuses on matrimonial and family law, estate and commercial litigation, and criminal defense.