

Evidence Issues for Trust & Estate Litigation

CLE Materials

Wednesday, November 6, 2019

Noon – 1:15pm

Tavistock Country Club

MODERATORS

Anthony R. La Ratta, Esq.

Archer Law

Glenn A. Henkel, Esq.

Kulzer & DiPadova, P.A

SPEAKERS

Brenda Lee Eutsler, Esq.

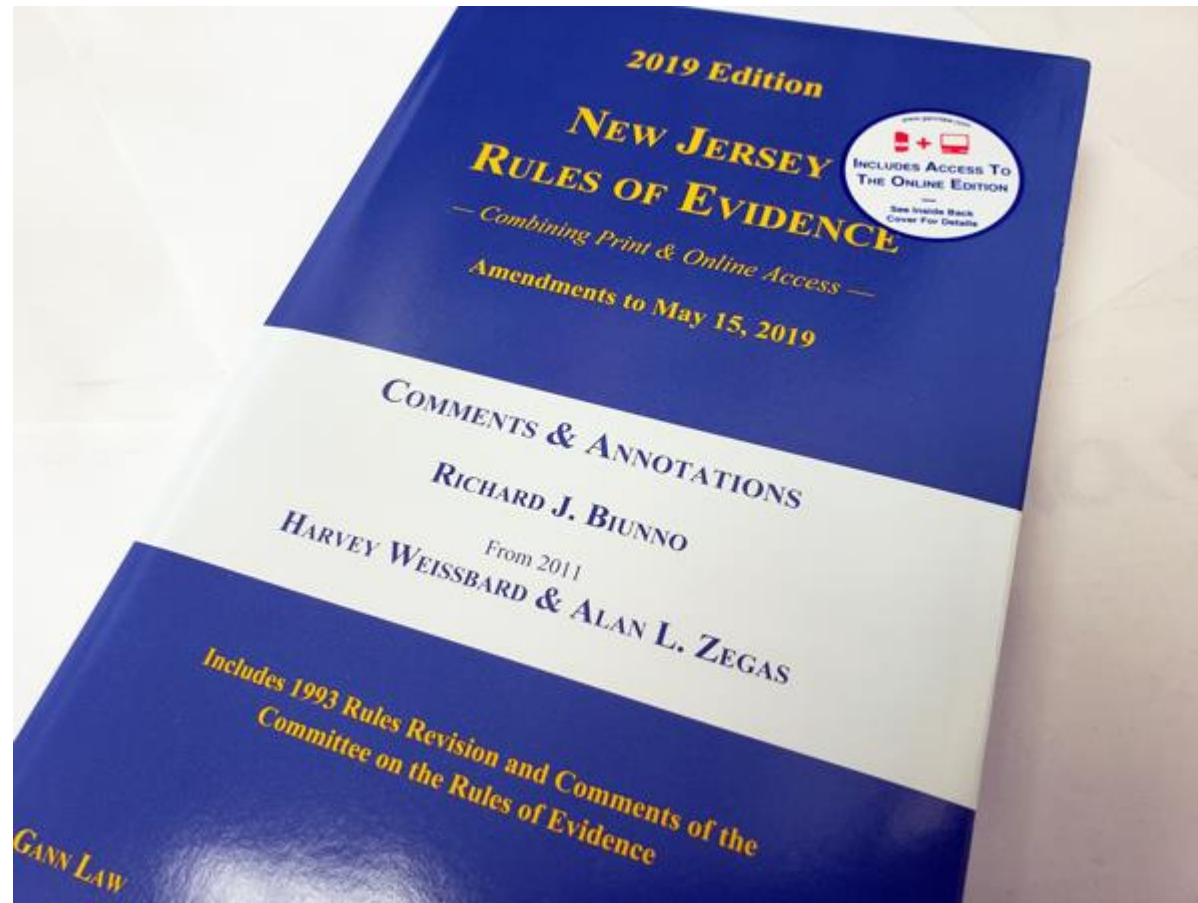
Brenda Lee Eutsler & Associates, P.A.

Melissa Osorio Dibble, Esq.

Archer Law



Evidentiary Issues in Probate Litigation



Topics Covered

- Documents
- Best Evidence Rule
- Authentication
- Persons
- Rules of Evidence
- Evidentiary Objections
- Dead Man's Statute
- Subpoena Process for Depositions and Trial & Service of Out-of-State Witness
- Managing Your Client

Documents

- Scrivener's File – the entire file, including emails, notes, invoices for services and payment records (important to now who paid and how)
- Will Trust documents at issue
- Prior Wills and Trust documents
- Other estate planning documents: Powers of Attorney, Healthcare Directives, etc.
- Beneficiary designation forms for non-probate assets (for date of death and prior thereto)
- Computer Data: Email, hard-drive
- Text messages/Social Media Posts

Documents

- Decedent's Diaries/Letters
- Exemplars of Decedent's handwriting
- Non-probate assets – statements at DOD and prior thereto
- Probate assets - statements at DOD and prior thereto
- Tax Returns – year prior to DOD and prior thereto
- Medical & Hospice Care Records for several years back
- Real Estate documents (HUD-1, deeds, seller's proceeds check with endorsement)
- Deposition Transcript (current action and prior proceedings)

Best Evidence Rule

N.J.R.E. 1001. Definitions

For purposes of this article the following definitions are applicable: (a) Writings. --"Writings," which include recordings, are defined in Rule 801(e). (b) Photographs. --"Photographs" include still photographs, X-ray films, video tapes, motion pictures and similar forms of reproduced likenesses. ***(c) Original. --An "original" of a writing is the writing itself or any counterpart intended by the person or persons executing or issuing it to have the same effect. An "original" of a photograph includes the negative or any print therefrom. With respect to electronically created documents, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."*** (d) Duplicate. --A "duplicate" is a counterpart, other than an original, produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and reductions, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.

N.J.R.E. 1002. Requirement of Original

To prove the content of a writing or photograph, the original writing or photograph is required except as otherwise provided in these rules or by statute.

Authentication

N.J.R.E. 901. Requirement of Authentication or Identification

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims.

Authentication Continued ...

N.J.R.E. 902. Self-Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(a) **New Jersey public documents.** --A document purporting to bear a signature affixed in an official capacity by an officer or employee of the State of New Jersey or of a political subdivision, department, office, or agency thereof.

(b) **Other domestic public documents.** --A document (1) bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or possession thereof, or of a political subdivision, department, office, or agency thereof, and a signature purporting to be an attestation or execution, or (2) purporting to bear a signature affixed in an official capacity by an officer or employee of such an entity, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer had the official capacity and that the signature is genuine.

(c) **Foreign public documents.** --A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, provided that either an apostille is affixed to the document certifying its genuineness pursuant to international agreement to which the United States is a party or the document is accompanied by a final certification as to the genuineness of the signature and official position (1) of the executing or attesting person, or (2) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

N.J.R.E. 902. Self-Authentication Continued

- (d) **Certified copies of public records.** --A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (a), (b), or (c) of this rule or complying with any law or rule of court.
- (e) **Official publications.** --Books, pamphlets, or other publications purporting to be issued by public authority.
- (f) **Newspapers and periodicals.** --Printed materials purporting to be newspapers or periodicals.
- (g) **Trade inscriptions and the like.** --Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.
- (h) **Acknowledged documents.** --Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.
- (i) **Commercial paper and related documents.** -- Commercial paper, signatures thereon, and documents relating thereto to the extent provided by applicable commercial law.
- (j) **Presumption under statute.** --Any signature, document, or other matter declared by state or federal law to be presumptively or prima facie genuine or authentic.
- (k) **Certificate of lack of record.** --A writing asserting the absence of an official record authenticated in the manner prescribed for public documents in paragraph (a), (b), or (c) of this rule.

Persons

- o Scriveners of current & previous EP documents
- o Witnesses and notaries on documents
- o Other persons present at signing of documents
- o Other professionals – brokers, accountants
- o Caretakers of decedent/hospice personnel
- o Family members/friends
- o Experts

Rules of Evidence

- N.J.R.E. 401-412 – Relevancy and Character
- N.J.R.E. 500-533 – Privileges (Confidentiality)
- N.J.R.E. 601- 615 – Witnesses Credibility
- N.J.R.E. 602 - Witness must have personal knowledge
- N.J.R.E. 701 -705 – Opinions and Expert Testimony
- N.J.R.E. 801-808 – Hearsay & Hearsay exceptions

Evidentiary Objections

- Ambiguous/Confusing – question capable of being interpreted in more than one way.
- Asked and answered – repetitive questions for emphasis or distraction (for depositions, use “harassing” for “form” objection)
- Beyond scope of direct, cross, etc. – unrelated to prior exam by opposing counsel
- Counsel testifying – examining counsel is making statements, drawing conclusions or answering for witness while on the stand
- Hearsay - response “Exception” – a seminar unto itself!
- Irrelevant/Immaterial – would not tend to prove or disprove a fact of consequence; motion to strike

Evidentiary Objections

- Witnesses:
 - Improper Opinion
 - Lay witness can only testify as to personal knowledge or perception
 - Qualified expert can give opinion except “net opinion”
 - Incompetent Witness or Testimony
 - Witness lacks personal knowledge, expert qualification or mental capacity
- Leading – question suggests the answer
- Misquoting witness or misstating evidence
- Non-responsive – witness not answering question posed or testimony is beyond scope of question.
- Privileged (see N.J.R.S. 501-509)
- Speculation – question calls for conjecture and allows opinion without personal knowledge.

Dead Man's Statute

N.J.S.A. 2A:81-2. Transactions with mentally incapacitated person; decedent; proof required (as revised 2014)

In a civil action that is commenced or defended by a guardian on behalf of a person who is mentally incapacitated or by a personal representative on behalf of a decedent, any other party who asserts a claim or an affirmative defense against the person who is mentally incapacitated or against the personal representative, that is supported by oral testimony of a promise, statement, or act of the person who is mentally incapacitated before the onset of mental incapacity, or of the decedent, shall be required to establish the same by clear and convincing proof.

Subpoena Process for Depositions and Trial

New Jersey Court Rule 1:9 governs the issuance of subpoenas.

Court Rule 1:9-1 specifically states that “a subpoena may be issued by the clerk of the court or by an attorney or party in the name of the clerk.” This means that it is acceptable for an attorney or party in an action to generate a subpoena and sign it in the name of the clerk, without having to submit the subpoena to the Superior Court Clerk’s Office for signature by the clerk.

Forms can be found at:

<https://njcourts.gov/courts/superior/subpoenas.html>

Service of Subpoena on Out-of-State Witness

Typically one of two possibilities for the applicable procedure: the Uniform Interstate Discovery and Depositions Act (the UIDDA) or a non-uniform state procedure.

- Under the UIDDA, an attorney presents an in-state subpoena directed to the out-of-state witness to the appropriate court clerk in the state where the witness is located. The clerk then issues an identical subpoena in the proper form for that state.
- For the handful of states with a non-uniform procedure, the options range from simply presenting a clerk with a notice of deposition to opening up a miscellaneous action and obtaining a court order.

Service of the subpoena must comply with the foreign state's rules and procedures on service of process. In-hand delivery by a sheriff or process server will nearly always suffice.

Managing Your Client

- Litigation Hold Letter
- Attorney Client Privilege
- Communications by client with family and friends by Text, Email, MOUTH
- Social Media: Facebook, Twitter, Instagram

For more information, please contact:

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Fax 856-428-7776
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Cherry Hill, NJ 08003

Tel: (856) 428-2266

Fax: (856) 428-7776

Attorneys for Plaintiff, ^

IN THE MATTER OF THE ESTATE OF

^, DECEASED

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
PROBATE PART
^ COUNTY

DOCKET NO. ^

Civil Action

**NOTICE TO PRESERVE
ELECTRONIC DATA**

TO:

Attorneys for ^

NOTICE IS HEREBY GIVEN to Defendant, ^, by Plaintiff, ^, that Plaintiff intends to discover Defendant's electronically stored and maintained data (hereafter "data"), whether stored locally or in "the cloud" by Defendant or another person or entity, and hereby instructs Defendant to preserve, until discovery is completed, all such data relevant to the claims and defenses of the parties to this litigation, and to maintain the layout and configuration of Defendant's electronic devices, including, but not limited to, cell phones, laptop computers, desktop computers, mini computers, palm computers, tablets, and digital store devices such as thumb drives, flash drives or similar USB store devices, any external hard drives and any wireless or remotely-accessed date storage devises. Defendant is prohibited from initiating or performing any activity, whether online or offline, which would or might result in the loss of

electronic data which may be relevant to the claims or defenses of any party matter in this litigation. Such activity includes, but is not limited to, the compression, rotation, destruction or erasure of data, the de-fragmentation of any hard drives and the purging of any databases. This Notice applies to data within Defendant's custody and control, as well as data within the custody and control of Defendant's agents and representatives.

For purposes of this Notice, data is deemed to be in Defendant's control if Defendant has the right to secure the document or a copy thereof from another person or entity.

BRENDA LEE EUTSLER & ASSOCIATES, P.A.
Attorneys for Plaintiff, ^

Dated: September 26, 2019

BY: BRENDA LEE EUTSLER, ESQUIRE

Plaintiff or Filing Attorney Information:

Name _____

NJ Attorney ID Number _____

Address _____

Telephone Number _____

Superior Court of New Jersey

_____ Division _____ County

_____ Part

Docket No. _____

_____,
Plaintiff,

v.

_____,
Defendant.

CIVIL ACTION

Subpoena Duces Tecum

STATE OF NEW JERSEY TO: _____

YOU ARE HEREBY COMMANDED to appear in person before the Superior Court of New Jersey,
_____ Division, _____ County, _____ Part, at the Court House located at
_____ on _____ at _____ a.m./ p.m. and there to testify as a witness in the above-
captioned matter.

YOU ARE ALSO COMMANDED to bring with you and to produce at that time the following
described books, papers, documents and other tangible things:

1. _____
2. _____
3. _____

Provided that if you are notified that a motion to quash the subpoena has been filed, the
subpoenaed evidence shall not be produced or released until ordered to do so by the court or the release
is consented to by all parties to the action.

Failure to appear or comply with the command of this Subpoena will subject you to the penalties
provided by law.

Dated: _____

Michelle M. Smith, Clerk of the Superior Court

PROOF OF SERVICE

I, _____, being over the age of 18, served the attached subpoena by delivering a copy to _____ at _____ and by handing him/her the fee of \$2.00 for one day's attendance and, if applicable, a mileage fee of \$_____, as allowed by law

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Date _____

Signature _____

Plaintiff or Filing Attorney Information:

Name _____
NJ Attorney ID Number _____
Address _____
Telephone Number _____

_____,
Plaintiff,
v.
_____,
Defendant.

Superior Court of New Jersey

Division _____ County

Part
Docket No. _____

CIVIL ACTION
Subpoena Ad Testificandum

STATE OF NEW JERSEY TO: _____

YOU ARE HEREBY COMMANDED to appear in person before the Superior Court of New Jersey,

Division, _____ County, _____ Part, at the Court House located at
_____ on _____ at _____ a.m./ p.m. and there to testify as a witness in the above-
captioned matter.

Failure to appear or comply with the command of this Subpoena will subject you to the penalties provided by law.

Dated: _____
Michelle M. Smith, Clerk of the Superior Court

PROOF OF SERVICE

I, _____, being over the age of 18, served the attached subpoena by delivering a copy to _____ at _____ and by handing him/her the fee of \$2.00 for one day's attendance and, if applicable, a mileage fee of \$ _____, as allowed by law.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Date _____ Signature _____

ARCHER & GREINER
A Professional Corporation
One Centennial Square
P.O. Box 3000
Haddonfield, NJ 08033-0968
(856) 795-2121
Attorneys for Plaintiff

BY: MELISSA OSORIO DIBBLE, ESQUIRE, Attorney ID: 031212010

IN THE MATTER OF THE ESTATE OF
MARY SMITH, DECEASED

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: PROBATE PART
ESSEX COUNTY

DOCKET NO.: CP-0000-0000

Civil Action

**SUBPOENA AD TESTIFICANDUM
DEPOSITION**

STATE OF NEW JERSEY TO:

[INSERT NAME AND ADDRESS OF DEPONENT]

YOU ARE HEREBY COMMANDED to attend and give testimony before a person authorized by the laws of the State of New Jersey to administer oaths at the offices of Archer & Greiner, One Centennial Square, Haddonfield, New Jersey 08033 on **Friday, August 16, 2019 at 9:30 A.M.**

You are also hereby commanded to bring and produce for inspection and copying the following documents:

Any and all documentation concerning the estate of Mary Smith, deceased.

PLEASE TAKE NOTICE that, pursuant to Rule 4:14-7, the subpoenaed evidence above shall not be produced or released until the date specified for the taking of the

deposition, and, if you are notified that a motion to quash the subpoena has been filed, you shall not produce or release the subpoenaed evidence until ordered to do so by the Court or the release of the subpoenaed evidence is consented to by all parties to this action.

PLEASE TAKE FURTHER NOTICE that failure to appear and/or failure to produce documents according to the command of this subpoena will subject you to a penalty, damages in a civil suit and punishment for contempt of Court.

ARCHER & GREINER, P.C.
Attorneys for beneficiary Teresa Thomas
Ross

By: _____
MELISSA O. DIBBLE, ESQUIRE

/s/Michelle M. Smith

MICHELLE M. SMITH, ESQUIRE, CLERK
SUPERIOR COURT OF NEW JERSEY

Dated: July 23, 2019

PROOF OF SERVICE

On July 23, 2019, I, Melissa O. Dibble, Esquire, being over the age of 18, caused a copy of the *Subpoena Ad Testificandum Deposition* to be served, via personal service, upon [INSERT NAME AND ADDRESS OF DEPONENT]

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

MELISSA O. DIBBLE, ESQUIRE

Dated: July 23, 2019



Melissa Osorio Dibble

mdibble@archerlaw.com
856-616-6146 Direct
856-673-7028 Direct Fax

Archer & Greiner, P.C.
One Centennial Square
Haddonfield, NJ 08033
856-795-2121 Main
856-795-0574 Fax
www.archerlaw.com

Re:

Dear :

Please be advised that your discovery obligations require that you preserve any documents (hard copy or electronically stored) that relate in any way to the subject matter of this litigation. The applicable Rules of Civil Procedure which impose these obligations require that, once litigation is reasonably foreseeable, a party is required to preserve all documents that may relate in any way whatsoever to the factual allegations being made in the lawsuit or which relate to any defenses that a party may assert.

Simply put, you have an affirmative obligation to preserve all documents, of any type, including but not limited to correspondence, e-mail and electronic data. "Document" includes all written materials including all drafts as well as finalized documents, attachments, letters, memos, notes (handwritten or typed), reports and tables (either printed or on the computer), e-mails and other electronic media, slides or other graphics, data stored on computer, audio or video tapes, "working" or other personal files, research and development memoranda, customer complaints and emails, chat room monitoring, and any notes, guidelines, procedures and minutes. Please be sure to preserve attachments to emails as well as emails in the "in-box," "sent items" and "deleted items" locations.

Electronic data is extremely volatile and fragile, and thus easily subject to inadvertent destruction. In connection with this lawsuit, you should preserve all relevant data and metadata – on computer systems, portable electronic media, servers, and other electronic data storage locations. Examples of these devices include, but not limited to personal computers, laptops, tablets, cell phones, smart phones, PDAs, portable hard drives, mp3 players, and flash drives. Electronic data includes e-mail and other electronic communications, word processing documents, spreadsheets, databases, calendars, telephone logs, contact manager information, internet usage files, manager notes and network access information. Accordingly, you should suspend destruction of documents, things, and other electronic data while this matter is pending, or until such items have been determined not to contain discoverable evidence.

To be clear, it is not sufficient to simply print electronic records subject to this Legal Hold for preservation, and then to alter or destroy the electronic copy. The electronic copy must also be maintained and preserved. You should continue to preserve backup tapes as well. Computerized data may not be erased or deleted at this time. The deletion or destruction of these materials may expose you to spoliation of evidence claims, inferences and other actions and sanctions in equity or at law. Courts have routinely issued Orders imposing severe sanctions, ranging from monetary sanctions (such as requiring the non-complying party to pay the other side's legal fees), to barring the use of certain evidence to support the non-complying party's case, to striking a party's claims or defenses altogether and entering a judgment in favor of the other side. Of course, we want to avoid these issues altogether and focus on developing our affirmative claims.

The requirement to preserve these materials is a continuing one and will last until the lawsuit ends. As new documents are created they must be preserved as well. Please do not discard, destroy or alter in any way any of the documents (electronic or paper), data compilations and tangible objects and backup tapes which relate to the claims and issues raised in this litigation.

Please let us know if you have any questions regarding this Litigation Hold Notice or the preservation duties created by the Court Rules. Thank you for your attention to this important component of the litigation process.

Very truly yours,

ARCHER & GREINER
A Professional Corporation

BY: _____
Melissa Osorio Dibble

MOD/lst