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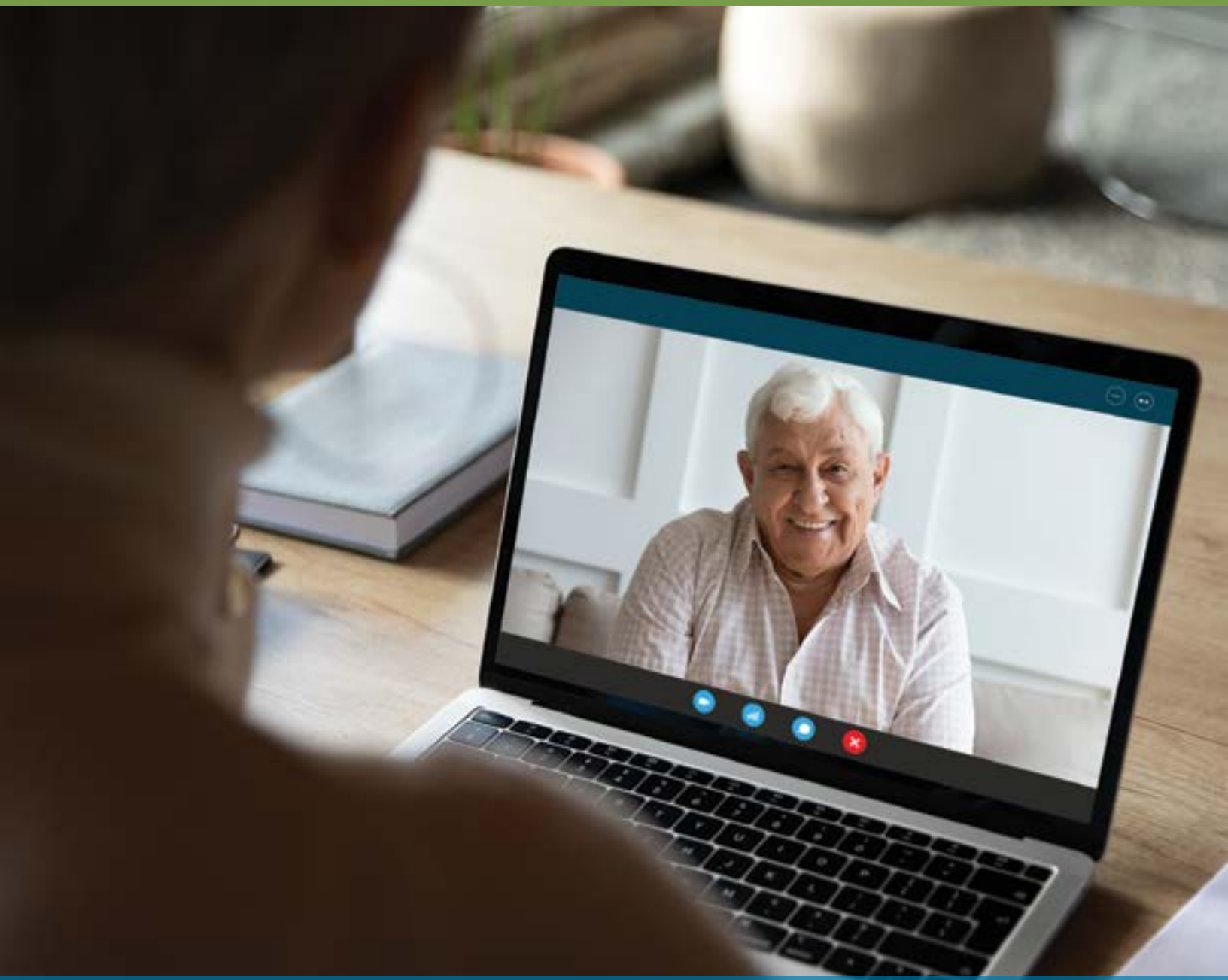
Elder and Special Needs Law Journal

A publication of the Elder Law and Special Needs Section of the New York State Bar Association



Update on ELSN Task Force on Long-Term Care Facility Reform and Oversight

The Mediation Advocate: Changes in Attorney Paradigms in Guardianship, Elder Law and Estate Contests

Compliance Mandate to Increase Hospital Capacity During COVID-19 Epidemic: What Is the Cost?

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Message from the Section Chair

By Matthew Nolfo

Happy and healthy New Year to all. Looking forward to a 2021 with less COVID-19 and more interaction with our families, friends, clients and colleagues.

It continues to be challenging to be the Chair of this Section during COVID-19. But some good things have been happening. We have made progress in dealing with the New York State Department of Health (DOH) on the new transfer rules that affect Community-Based Long-Term Care (CBLTC), on the Power of Attorney legislation, and in a variety of other areas, thanks to the help of many Section members.

Matthew Nolfo

Status of CBLTC Transfer Rules and Related Changes

The officers and other members of the Section continue to advocate for our clients in light of the imminent implementation of the new CBLTC transfer rules. We have had several meetings with DOH and have sent them several memos advocating for our positions. The most recent meeting was on December 8, 2020. We have followed up with DOH since then and are in the process establishing a "working group" between our Section and DOH to try to resolve the differences we still have.

Look-Back

The DOH had again confirmed that the look-back will only apply to transfers made on or after October 1, 2020 and that there will be no retroactive application of the new law.

The DOH had determined that it would begin implementing the new law as of April 1, 2021 with respect to either new applications for CBLTC or for conversion applications from basic Medicaid to Medicaid with CBLTC services. The DOH has advised that for a new application filed before the April 1, 2021 where a gift had been made on or after October 1, 2020, that the transfer would not be subject to a penalty. Moreover, the Federal Public Health Emergency (PHE) Declaration was just renewed for another three months and will last through April 20, 2021. As a result, DOH has just now advised this should mean that all of the COVID-19 easements, such as the ban on terminating or reducing Medicaid, should continue through July 1, 2021 and that everything else under GIS 20 MA/04—Coronavirus (COVID-19) —Medicaid Eligibility Processes During Emergency Period—should also be extended. As a result, DOH advised that the implementation date of the new transfer rules has been moved from April 1, 2021 to July 1, 2021.

As we have previously emphasized, the aforementioned advisements by the Department of Health have not been reduced to written policy and at this time are "unofficial," and all Section members should proceed with some level of caution until an ADM is issued.

Commencement of Penalty Period

The question of when and how a penalty on any gift will be triggered if a new application is made after the implementation date appears fairly clear. The DOH has advised that this will require the standard forms for CBLTC Medicaid along with a simplified form to be filled out by a doctor. This will be a medical form devised by DOH intended to indicate whether CBLTC services are needed. We have offered to help DOH in developing this medical form.

Pooled Trusts

This issue remains the most unresolved with respect to how payments of income for home care recipients ages 65 or older will be treated. The Department of Health has advised that a penalty will be assessed for any income contributions made to pooled trusts that are not used for the benefit of the pooled trust beneficiary in the same month those income contributions are deposited. While DOH realizes that as a practical matter, not only would this be difficult to administer on a monthly basis, but that there are also expenses that our clients have that are not due on a monthly basis such as real estate taxes, homeowner's insurance, and other one-time expenses that cannot always be planned for. As such, DOH seemed willing to consider other ways to monitor pooled trusts on or after the implementation date of the new law.

In our dealings with DOH, we have asked that there be a presumption that every deposit into a pooled trust will be used for the pooled trust beneficiary and will therefore be considered a compensated transfer. In the event that there is an accumulation of contributions at any time that are not used for the beneficiary, we have asked for Medicaid not to impose a penalty but instead give the

beneficiary a reasonable time to use the funds on his or her behalf and to treat the overage as a resource problem and not a penalty problem. This request has been advocated by our Section as well as a number of pooled trust organizations that have collectively made similar proposals to DOH, with whom we have conferred on various occasions. At this time, DOH has advised that they do not feel they can alter their position without permission from CMS.

Recently, a decision was issued by Minnesota's highest court (The *Pfoser* case) which appears to support the notion that transfers to a pooled trust for beneficiaries who are 65 and older are exempt transfers because they can be deemed to be made for valuable consideration. This case is being closely reviewed by our Legislative Committee.

Immediate Need

We also asked that the immediate need attestation form for Home Care services be amended to include a statement about the applicant not having made any disqualifying transfers that would make the applicant ineligible for home-based Medicaid for any period of time. This request was partially objected to by DOH. The DOH has advised that an attestation can be made with respect to gifts of bank accounts and real estate because its AVS system can easily verify whether gifts of these types of assets were made. But thus far, DOH has advised that a look back will apply for transfers of other types of assets. Moreover, DOH could not confirm that the medical portion of the Immediate Need Application will only require the current physician's order or the more involved assessments that are provided for under the amendments to 18 N.Y.C.R.R. 505.14 and 18 N.Y.C.R.R. 505.28. This is something the working group between our Section and DOH would seek to resolve if possible.

Undue Hardship

There is currently no undue hardship exemption for transfers that could be disqualifying for home-based Medicaid and we are working with DOH on a provision that would make sense to protect applicants who have made gifts that would cause a penalty and cannot be easily returned. We are confident that we will be able to get DOH to include some type of undue hardship provisions as part of the implementation of the new gift and penalty rules for CBLTC.

Increased ADL Requirements

As set forth above, the new law also requires an increased number of activities of daily living for the "functional" piece of a home care Medicaid application. The requirement will either be three out of six ADLs, all of which would require some level of "physical maneuvering" or, in the case of someone with cognitive impairment, it would require the need for supervision with at last two ADLs. It is not clear when these heightened ADL requirements will be implemented. There are also many questions around the procedure that would be required to confirm the need for ADL assistance. This is something that we are seeking clarification on from DOH.

Homestead

During our December 8 call, we set forth our position that under the new look-back provisions, since ownership of the home does not affect the applicant's eligibility for CBLTC services, the transfer of the home should be exempt as a transfer made exclusively for a purpose other than to qualify for Medicaid and such transfers should be permitted to be made to persons or entities that are not deemed to be exempt if the transfer was made by an institutionalized person. Social Services Law Section 366(5)(d)(3)(iii); 18 N.Y.C.R.R. Section 360-4.4(c)(2)(iii)(d)(1)(ii). *See also Mondello v. D'Elia*, 39 N.Y.2d 978, 355 N.E.2d 286, 387 N.Y.S.2d 232. On the call, DOH preliminarily disagreed with our position. Thanks to the research done by Section member Richard Weinblatt, we have since set forth the reasons why we believe our position is correct and have forwarded our position to DOH in early January.

Power of Attorney Legislation

As many of you know, after several years of advocacy, the legislation that amends the current Power of Attorney law proposed through this Section was passed by both houses of the legislature in July and signed into law by the Governor in December. However, the new law is subject to a chapter amendment agreed to by the Governor and the legislature. The new form will take effect on June 13, 2021. The overall goals of the new law have been achieved. Among many other changes, Powers of Attorney only have to substantially comply with the wording in the statute; the Gifts Rider has been eliminated and Powers of Attorney may now be signed at the direction of the Principal. In addition, the Chapter Amendment will require two witnesses (one of whom can be the notary) for all Powers of Attorney. There has already been a webinar done on the new form and there will be at least one further webinar done before the effective date of the new form. Special thanks to David Goldfarb, Ellen Makofsky, Bob Freedman, Jeff Asher, Tara Pleat and many others for seeing this important affirmative legislation through to fruition.

Section Task Force Activity

While many of our Section committees are working hard for our client base, our task forces have been particularly busy.

Our Task Force on Long-Term Care Facility Reform and Oversight has over 30 members and has three

subcommittees: Education and Resources, Advocacy for Legislative Change and Community Outreach.

The task force has already put on a series of webinars and CLE programs. They have also developed an online library on long-term care resources, including federal and state laws and regulations, agency oversight and enforcement, advocacy resources, and litigation topics. The library will be launched in partnership with Albany Law School's Government Law Center. Mentored by task force members, law students will develop and update the informational materials in exchange for free bar membership and trainings. The goal is to create a library that is comprehensive, user friendly and accessible to all. It is expected to be operational in 2021.

The task force has also developed a pamphlet and online resource, entitled: *Know Your Rights for Visitation in Nursing Home During COVID,* which is being prepared in partnership with the NYSBA's communication office. This is a brief guide to visitation rights in long term care facilities for residents, families and advocates.

Further, our Section has already voted to support three bills that the task force believes will be helpful to our clients that will be reintroduced in this legislative session. These bills focus on: 1) improving staffing ratios; 2) amendments to the new, heightened ADL changes to ensure that all persons with any form of cognitive impairment have an easier path to being deemed functionally eligible for long-term community based services; and 3) to curb abuse in adult homes. Moreover, the task force has also asked us to support the "Essential Visitation Bill" (A.1052/S.614), which authorizes and directs the Department of Health to develop rules, regulations and guidelines authorizing and regulating the visitation of personal care visitors and short-term compassionate care visitors, including but not limited to family members, at nursing homes and residential health care facilities.

Finally, at the February 3, 2021 Executive Committee Meeting, we did vote to make this Task Force on Long-Term Care Facility Reform and Oversight a permanent part of the ELSN, as we feel reform for long term care facilities will be an ongoing effort.

The Task Force for Remote Witnessing and Notarization, which is a joint venture between our Section and the Trusts and Estates Law Section, has also been meeting regularly. This task force has proposed affirmative legislation to amend the New York State Executive Law to protect documents signed during the COVID-19 emergency as long as the relevant Executive Orders were substantially complied with. This protects both consumers and attorneys who have executed documents under Executive Orders 202.7 and 202.14 since the onset of the pandemic. Our Section voted in favor of this proposed legislation during a cabinet call in August and the Big Bar approved this in November and now we are seeking a sponsor for the legislation to be approved. In addition, this task force is now working on developing legislation that would make some or all of the provisions of the aforementioned Executive Orders permanent. While it appears that making remote notarization permanent will require an easier drafting and legislative process, a bill that would make remote witnessing permanent will likely take more time and will be met with more opposition and may require several attempts and revisions before it becomes law.

Finally, our third active Task Force, that being the Unauthorized Practice of Law, had a significant meeting with the Fraud Unit of the Attorney General's office. Task force members Sal DiCostanzo, Judi Grimaldi and Bob Kurre reviewed their concerns about non-lawyers rendering Medicaid planning advice to consumers and the AG's office agreed to open an investigation into these issues. It is expected that as these type of cases are identified, we will be able to review the facts with the AG's office to determine whether appropriate action should be taken. Perhaps the most significant result of the meeting is the fact that the task force made the AG's office aware of a problem that was not on their radar but now it is thanks to the efforts of our task force members.

Annual Meeting

The Annual Meeting took place remotely on January 19 and January 26. The Meeting was very ably chaired by Naomi Levin and Michael Dezik. The first segment included an Elder Law Update by Deep Mukerji, a piece for Medicaid eligibility and services for children with disabilities and the non-aged disabled by Tara Pleat, and a segment on the many developments of Tele Health technology by Michelle Chu. The second part included a discussion by Rick Marchese of new planning techniques that are likely to be used once the CBLTC transfer rules are implemented, a discussion by Anthony Proscia of how our increasing reliance on technology can be handled ethically, a review by Lindsay Heckler of Involuntary Nursing Home Discharge Planning, and then an overview by David Goldfarb of the new Power of Attorney forms that will become effective in June. There was also a very touching tribute to our former Chair, David Stapleton, who was a true gentleman and supporter of our Section. In addition, we announced that the David Stapleton Memorial Scholarship will be a regular part of our award ceremony.

Spring UnProgram

We are planning a virtual Unprogram for the Spring. The program is slated for April 22, 2021. It will be chaired by Antony Eminowicz, Shari Hubner and Mary Fern Breheney with help from our Technology Chairs, Dan Miller and Mike Dezik. The Executive Committee meeting is slated for the evening before on April 21, 2021.

2021 State Budget

The state budget was released in early 2021 and as of the time that this letter was written, there were no significant cuts proposed to be made that would significantly affect our clients. This is likely due to the expectation that the Biden administration will assist the state with its budget deficit and the fact that the CBLTC rules have yet to be implemented. As of the time that this letter was issued, the budget is not yet in its final form. If the budget ends up only presenting minor challenges to our client base for this year, this will enable us to focus more on the final implementation details of the CBLTC transfer rules, the new Power of Attorney form rollout and to revisit other existing and new legislative and practice priorities that have been overshadowed by the new CBLTC transfer and related changes.

Finally, a special thanks to all those Section members who have been so helpful this year. As the year progresses, the list just keeps getting longer. I am grateful for all of your support. I also encourage Section members who have not been involved with the Section to look into our various committees and task forces and consider volunteering.

Sincerely,

Matt Nolfo, Chair of the ELSN Section

Message from the Co-Editors

By Katy Carpenter and Patricia Shevy

Katy Carpenter

Patricia Shevy

We asked and you answered. For the last few editions of the *Journal*, we have had to beg, borrow and steal to get articles for submission. And at the end of every message, we have asked for articles. This time you delivered. Keep it coming! In this edition we have a great combination. We are excited to read articles from several authors new to the *Journal* together with articles from our Section committee chairs.

As with all things this past year, the 2021 Annual Meeting is different. I have been going to the Annual Meeting for close to 20 years. Years ago, I would go for the day, taking Amtrak down and back from Albany (or Hudson when I lived in Schoharie) same-day for our Section's program. The Elder Law and Special Needs Annual Update always has been and always will be a big draw for me. I learn something from the program every single year. Over the years, as I met and began to know Section members from all over New York State, I started staying a little longer. The cocktail parties and after-program activities started to mean more. I had other Section members with whom I "needed" to catch up. Now, to me, the annual meeting means spending time with friends, learning a whole lot and getting the most out of my NYSBA membership.

In 2021 the Annual Meeting went virtual. We Zoomed and got the Annual Update and all the fantastic programming but we missed the human interaction. The getting to know you. The catch-up. The friendship. Let's hope for a healthy 2021 so that we can spend the 2022 Annual Meeting together in person.

In this edition, Bob Mascali and Amy O'Connor's article details the propriety of "flat fees" that many of our Section members utilize and the circumstances under which an attorney may properly seek to withdraw from a litigated matter when faced with valid health concerns. The NYCLA opinion deals with some of the ethical obligations and challenges raised by the COVID-19 pandemic.

As mentioned in the Matt Nolfo's message, our Section Task Forces work tirelessly to promote the Section's goals. Joanne Seminara and David Kronenberg, as co-chairs of the ELSN Task Force on Long-Term Care Facility Reform and Oversight, have provided us with an update on the effect of COVID-19 on long-term care facilities in our communities. While the Task Force consists of over 30 Section members currently, it has broken into smaller groups. If, after reading Joanne and David's article, you would like to participate in one of these smaller groups, please reach out to our NYSBA liaison, Cathy Teeter, through NYSBA's website.

Be on the lookout in 2021 for the Section's continuing education programs. Together with the Trusts and Estates Law Section, our Section is organizing a full-day Article 81 training program with representatives from both upstate and downstate courts. We will also provide additional programming on the Power of Attorney legislation along with traditional programming.

There will be a few changes to the *Journal* beginning this year. We will continue to have three editions. The editions won't be based on season, as we learned through 2020 that sometimes life gets in the way, and the spring edition becomes the summer edition. Our next *Journal* is targeted for summer with an article submission deadline of March 1. We also hope to provide a special edition on supported decision making.

We look forward to the continuation of the flood of articles. Remember, if you have never written an article before, our Board of Editors will help you. Lee Hoffman and Eric Einhart took up the task this edition and were of great assistance in getting this *Journal* to print.

Stay safe and healthy.

Tricia and Katy

Some Ethical Musings During a Pandemic

By Robert P. Mascali and Amy S. O'Connor

Two Ethics Opinions published by the New York State Bar Association in October and a Formal Opinion from the New York County Lawyers Association are of particular relevance to members of the Elder Law and Special Needs Section. The NYSBA opinions deal with the propriety of "flat fees," which many of our members utilize, and the circumstances under which an attorney may properly seek to withdraw from a litigated matter when faced with valid health concerns. The NYCLA opinion deals with some of the ethical obligations and challenges raised by the COVID-19 pandemic.

Robert P. Mascali

Amy S. O'Connor

NYSBA Ethics Opinion 1202

The holding in this opinion is that a lawyer may by written agreement charge a fixed fee for a matter as long as it is not excessive, and the lawyer specifies the services that are included in the engagement. Except as permitted by Rule 1.8 (e) the client must remain liable for the costs. It is acceptable for the lawyer to require advance payment of fees but may not establish a ***minimum*** fee, unless specifically set forth in the agreement. Although a lawyer may charge a non-excessive minimum fee, the fee cannot be ***non-refundable*** and if the lawyer is discharged, the lawyer must return any unearned fees. The lawyer may agree with the client that the client need not pay a portion of the legal fee if the client believes the lawyer's services do not merit the additional amount.

The ethical rules that are implicated are 1.5(a), 1.5(b), 1.5(d)(4), 1.8(e), 1.16(e). Following is an abridged analysis of the Opinion as published:

Rule 1.5 of the New York Rules of Professional Conduct (the "Rules")—the fee rule—prohibits a lawyer from charging a fee that is illegal or excessive, and it explicitly recognizes fixed fees in its listing of the considerations that determine whether a fee is excessive. See Rule 1.5(a)(8) ("whether the fee is fixed"). See also N.Y. State 942 § 11 (2012) (whether a flat fee is excessive depends on the facts; a flat fee is not necessarily excessive but neither is it necessarily reasonable); N.Y. City 2015-2 (a flat fee is ethically permissible if it satisfies the other requirements of Rule 1.5). A fixed fee is often appropriate in matters frequently performed by the lawyer, where it is possible for the lawyer to accurately estimate the cost of performing the services. It is beneficial to the client since the client knows in advance the cost of the services and is not subject to inefficiencies that may increase the fee in the case of hourly billing. As in all representations, the lawyer should communicate to the client the services the lawyer will perform for the fixed fee. See Rule 1.5(b) (the lawyer shall communicate the scope of the representation).

Except as permitted by Rule 1.8(e), the client must remain liable for court costs and the expenses of litigation and the Rules permit advance payment of fees but with the emphasis on whether such payments constitute funds of the lawyer or client.

Robert P. Mascali is an attorney with over 40 years' experience in the nonprofit, government, and private sectors. He is a senior consultant with the Center for Special Needs Trust Administration, Inc., a national nonprofit organization that administers special needs trusts throughout the United States. He is the managing attorney of Bourget Law Group in Falmouth, Mass. and is of counsel to Pierro Connor and Strauss, LLP in New York City and Albany, New York. He concentrates in the areas of Special Needs Planning for persons with disabilities and their families and care givers, Long-Term Care Planning, and Elder Law and Estate Planning. He serves on the Executive Committee and is the Section's liaison to the National Academy of Elder Law Attorneys (NAELA) and Co-chair of the Ethics Committee and the Mental Health Committee. He is also a member of Massachusetts NAELA and is the Past President of the New York Chapter of NAELA. He is a member of the Academy of Special Needs Planners and is a frequent presenter and author on topics dealing with elder and special needs law and planning.

Amy S. O'Connor concentrates her practice in the areas of estate planning, estate administration and elder law. She is Senior Counsel of Whiteman Osterman & Hanna LLP in Albany, New York. Prior to joining the Whiteman firm in July 2020, she was a partner at McNamee Lochner PC. O'Connor received a J.D. degree from Notre Dame Law School and a B.A. degree, cum laude, from Duke University. She has been an active member of the Elder Law and Special Needs Section of NYSBA and currently serves as Vice-Chair of its Ethics Committee.

Rule 1.5(d)(4) prohibits a non-refundable retainer fee and the Opinion goes on to discuss the prohibition against non-refundable fees under the Code and distinguishing between non-excessive minimum fees and non-refundable retainers. In addition, fees paid to a lawyer in advance are nonrefundable only to the extent they have been earned. Nevertheless, Rule 1.5(d)(4) also permits a lawyer to enter into a retainer agreement containing "a reasonable minimum fee clause if it defines in plain language and sets forth the circumstances under which such a fee may be incurred and how it will be calculated.

Rule 1.5(a) identifies the factors relevant for determining if a fee is excessive. These factors apply to a minimum fee. See N.Y. State 599 (1989) (listing factors in the former New York Lawyer's Code of Professional Responsibility, which are nearly identical factors to the factors in Rule 1.5). The factors in Rule 1.5(a), which are not intended to be exclusive, include:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

The Opinion goes on to state that a fee paid before legal services are rendered is a payment on account unless expressly identified in the retainer agreement as a minimum fee, and if the initial payment is not a minimum fee and a lawyer subsequently properly withdraws from the representation or is discharged by the client before the services are completed, then the lawyer must return any unearned fee.

NYSBA Ethics Opinion 1203

While for the most part procedures have been implemented to attempt to ensure the safety and well being of litigants, attorneys and court staff during COVID-19, the pandemic has brought to light issues that will be with us as practitioners for years to come. One of those is the need for withdrawal from representation based on attorney health concerns.

The Opinion, while specifically dealing with an attorney in the Immigration Court and the effects of COVID-19, would seem to be applicable in any litigated matter where the lawyer has valid health concerns and holds that an attorney may withdraw from representation, with the permission of the court, based on fear of contracting COVID-19 as a result of in-person appearances in the proceeding, where such fear renders it difficult for the attorney to carry out the representation effectively.

Noting that at the time of the inquiry there were no COVID-19 safety protocols or procedures in place to mitigate the spread of the coronavirus, the lawyer was concerned that appearing in-person would present a substantial health risk for the lawyer and, by extension, the lawyer's family.

The issue was whether an attorney who believes that continued representation of a client before a tribunal endangers the attorney's health withdraw from that representation?

New York Rule of Professional Conduct 1.16 governs the ethical obligations of a lawyer with regard to the withdrawal from representation of a client and subsection (b) permits withdrawal when "the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively." The question then becomes whether continued representation is ***difficult***, not ***impossible***. The Opinion went on to discuss that the Rule utilizes a flexible standard that requires consideration of the ways in which the fear of contracting COVID-19 could impede effective representation by the lawyer.

Clearly a lawyer's fear of contracting COVID-19 (or presumably any type of contagious disease) could render it difficult to carry out the representation effectively because that fear might subtly but powerfully undermine the effectiveness of the representation in a number of ways. For example, the lawyer might be reluctant to spend time with the client in-person to understand the case and communicate the client's options. The lawyer might also consent prematurely to a disposition that ends the proceeding, even though it is likely that a more favorable disposition could be obtained later, following additional appearances, motions, or conferences—frankly, there are a number of possibilities for such influences that could negatively impact the representation. The standard required for Rule 1.16(d) "permissive withdrawal" would be met by any of these influences, or like influences, to which the inquirer would be susceptible.

Of course, under Rule 1.16 c (10) withdrawal can be accomplished without material adverse effect on the interests of the client, if the client "knowingly and freely assents to termination of the employment." However,

where, a client is being represented before a "tribunal," permission of that tribunal may be required for the withdrawal regardless of the ground for withdrawal. The first sentence of Rule 1.16 (d) provides:

> If permission for withdrawal from employment is required by the rules of a tribunal a lawyer shall not withdraw from employment in a matter before that tribunal without its permission.

If in a particular case the tribunal grants a motion to withdraw, then Rule 1.16(e) will require the withdrawing lawyer to "take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including by giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly repaying any part of a fee paid in advance that has not been earned and complying with applicable laws and rules."

NY County Lawyers Association Formal Opinion 754-2020

The NYCLA's Formal Opinion addresses the ethical obligations when lawyers and staff work remotely. If all or most of a law firm's legal and nonlegal staff work remotely, the firm and its lawyers must determine whether additional measures are necessary to discharge the firm's duties of competence, confidentiality and supervision. This Opinion holds that it is ethical to operate a law office remotely provided that appropriate attention is given to compliance with a lawyer's duties of confidentiality, competence and supervision, and appropriate safeguards are implemented to ensure compliance with the Rules of Professional Conduct.

The relevant ethical Rules of Professional Conduct are 1.1, 1.6, 5.1 and 5.3. Following is an abridged analysis of the Opinion.

The Opinion initially addresses whether the Rules prohibit a law firm from operating 100% remotely. Rule 7.1(h) requires that law firms have a principal office address in New York. This Opinion states that prior Opinions do not suggest that there is any ethical impropriety if a law firm that maintains a physical office space in New York works 100% remotely.

Duty of Confidentiality

Rule 1.6(a) prohibits a lawyer from knowingly revealing confidential information. Under this rule, lawyers have a duty to ensure that each client's confidential information remains protected from disclosure while the lawyer is working remotely. When working remotely, the law firm should address the following items to fulfill its duty of confidentiality:

- Ensure information is transmitted securely to remote computers.
- Establish procedures to secure and back-up confidential information stored on electronic devices and in the cloud.
- Design remote workspaces to mitigate the risk of an inadvertent disclosure of confidential information.
- Ensure the security of remote forms of communication such as video conferencing.

Cybersecurity practices that may assist lawyers to meet their ethical duties of confidentiality include:

- Avoid use of unsecure WiFi systems when accessing or transmitting confidential information.
- Use virtual private networks that encrypt information.
- Use two-factor or multi-factor authentification to access firm networks.
- Maintain computer systems firewalls and anti-malware software.
- Back-up data stored remotely and require strong passwords.
- Create firm security and confidentiality policies.
- Train employees on security protocols, data privacy and confidentiality policies.

Duty of Competence

Rule 1.1 requires a lawyer to provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. Competent representation includes an obligation to understand the risk and benefits of technology used in practice. NYCLA Formal Op. 749. Given the conditions of working remotely, the lawyer must determine whether he or she can competently represent the client. Factors to consider include:

- Can the lawyer and client communicate efficiently?
- Has the client been properly prepared for testifying remotely?
- Has an agreement been reached on procedures to question a witness, interpose objections and communicate privately with the client?
- Consideration of legal grounds to refuse remote testimony.
- Potential civil or criminal liability resulting from giving testimony under less than ideal conditions.

If a client is not proficient with technology, the lawyer must recognize that representing the client remotely may present important challenges to competent representation and the lawyer must adjust the manner of representation and determine what is in the best interest of the client.

Duty of Supervision

Rules 5.1 and 5.3 concern the responsibility of law firms, partners, managers and supervising lawyers to provide oversight and supervision to other lawyers and nonlawyers. Law firms must make reasonable efforts to ensure that the firm has implemented procedures that will make certain that staff, consultants or others working with the firm who have access to confidential client information comply with the Rules when accessing client data from remote locations. Further, the work of nonlawyers who work remotely must be adequately supervised. To discharge this duty requires the establishment of policies and procedures to address the unique supervision issues when an entire firm is working remotely. The law firm should address the following challenges to fulfill its duty of supervision:

- Monitor use of firm networks for work purposes.
- Tighten off-site work procedure to minimize entry points for data breaches.
- Address firm cybersecurity procedures, use of secure networks and appropriate storage of client data and work product.
- Ensure working at home does not significantly increase the inadvertent disclosure of confidential information through distraction by others in the home.
- Ensure sufficient "live" remote sessions between supervising attorneys and supervised attorneys to achieve effective supervision.

The NYCLA Formal Opinion addresses the ethical obligations and challenges of law firms working remotely and concludes that it is ethical to operate a law office remotely provided that appropriate attention is given to compliance with a lawyer's duties of confidentiality, competence and supervision, and appropriate safeguards are implemented to ensure compliance with the Rules of Professional Conduct.

Testamentary Capacity and the Elusive Lucid Interval

With Tips for Assessing Capacity During the COVID-19 Pandemic

By Christina Lamm

Introduction

Assessing client capacity is a regular occurrence for elder law and estate planning attorneys. The process is made more complex because there are different levels of capacity required to execute different documents. This article will focus on testamentary capacity and how to proceed when it is "questionable." To make a determination of whether a client has capacity, the attorney must sometimes act as an untrained psychologist, an often difficult task in the murky world of capacity.

This year the COVID-19 pandemic has made judging client capacity even more difficult. With the rapid change of events and the sudden shutdown, attorneys were no longer conducting in-person interviews. Not only were initial client intakes done virtually or over the phone, but Executive Orders from the governor allowed for virtual will executions and notarization. Assessing a client's capacity virtually or over the phone adds another level of complexity to estate planning, something elder law attorneys are still working to traverse.

Testamentary Capacity

Testamentary capacity is the lowest form of capacity required by the law and has been so for centuries.[1] This hearkens back to the strong public policy that a person should be able to direct the way his or her estate should be distributed at death. In New York, the determination of testamentary capacity is governed by *Estate of Kumstar*.[2] In *Kumstar,* the Court of Appeals stated:

> In a will contest that "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 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."[3]

This standard must be proven by a preponderance of the evidence.[4] The issue of capacity only goes to the jury when the evidence surrounding a testator's capacity is conflicting or there is a possibility of drawing different conclusions.[5] The proponent is entitled to a presumption of testamentary capacity through the affidavits of the attesting witnesses alone.[6] The mere fact that the witnesses to the execution of a will stated that the they observed no physical or mental impairment in the testator that would affect decedent's ability to comply with steps one though three is enough to shift the burden of proof to the contestant.[7] The contestant is then required to show by a preponderance of the evidence that the testator lacked capacity by more than mere allegations.[8]

Christina Lamm

Even the documented existence of Alzheimer's Disease, for example, is not enough to prove that a person lacked testamentary capacity, because this type of capacity is really about the slim time period when the testator was actually sitting down signing his will.[9] The proponent of the will must only demonstrate that the testator had a "lucid interval" at the time of execution.[10]

Lucid Interval

A lucid interval is defined in this context as "a period of time during which the person was coherent and the threshold for testamentary capacity is met."[11] A testator with diagnosed dementia, mental illness, or even incompetence can have a lucid interval sufficient to execute a valid will.[12] *In re Estate of Williams*[13] illustrates this point. The court in *Williams* found the testator to be competent to execute a will despite presence of medical records showing the testator had been diagnosed with permanent dementia and that his doctor indicated he did not always know the date.[14]

Complicating matters even further are recent studies suggesting that the idea of a "lucid interval" is simply a legal fiction ensconced in decades of precedent which ef-

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fectively allows the courts to arrive at equitable solutions to complex problems using their own judgment.[15] A 2015 article in the *Journal of the American Academy of Psychiatry and the Law* delves into this very issue, citing numerous clinical studies.[16] The studies conclude that these cognitive fluctuations, or "good days and bad days," generally are attention based and short-lived.[17]

Objections Expected

Whether the testator satisfied the three *Kumstar* factors discussed above is, on a basic level, judged by the people in the room at the time of the will execution, i.e., the attorney and the other witnesses. If and when a will contest is initiated the supervising attorney's judgement of the testator's capacity is questioned and scrutinized. The supervising attorney and the other witness(es) will have to testify about the testator's capacity. If a testator who ofttimes suffers from diminished capacity executes his or her will during a lucid interval how does a proponent demonstrate that? Witnesses will be called and examined, but unless they knew the testator before the signing of the will how can one truly say the testator was lucid both during the execution and when giving the attorney instructions? The question of testamentary capacity, and particularly a lucid interval, is subjective and must be judged on a case-by-case basis by evaluating the testator's mental capacity both at the planning stage and the execution stage.

Once the attorney determines that the client possesses the requisite capacity to execute a will during a his or her lucid interval and moves forward, extra care should be taken to make sure there is strict adherence to the formalities of EPTL 3-2.1. Additionally, there is a presumption of testamentary capacity that follows if a will has a self-proving affidavit, signed by the attesting witnesses, attached to it, hence shifting the burden of proving a lack of testamentary capacity to the objectant(s) to the will.[18] The objectant(s) would then be called upon to raise concrete issues of fact, not mere conclusory allegations, in order to overcome the presumption.

This can prove to be a steep hill for the objectant to climb as "proof." Opinions of doctors that have not examined the testator are given the least weight and it is increasingly difficult to gain access to records of the decedent's medical history on the dates surrounding the will execution.[19] Even a diagnosis of dementia on its own is insufficient to conclude that the testator lacks testamentary capacity.[20] Furthermore, evidence of the testator's general capacity directly before or after the drafting of the will is allowed to come to light, and while this evidence will be admitted, its significance depends entirely on its relevance in regard to the "strength or weakness of mind" at the time of execution.[21]

Going Above and Beyond

Notwithstanding the fact that rebutting a presumption of testamentary capacity can be difficult, preparing for the challenge beforehand can tip the scales. These situations of diminished capacity are exactly the kind where "something more" than the mere formalities of a will execution will go a long way in making sure the wishes of the testator are carried out after death.

One simple and effective way to protect a client with diminished capacity is to take detailed contemporaneous notes surrounding the drafting and execution of the client's will. Memory fades, but the notes stating that the testator understood what was in the will, who were the beneficiaries under the will, and that the testator executed the will only after drafts were reviewed and changes made will go a long way in disputing evidence of incapacity. The attorney should interview the client alone and ask open-ended questions to document and memorialize the client's capacity.

While it is generally not recommended for an attorney to use formal clinical instruments themselves to measure a potential client's capacity as attorneys lack the in-depth training needed to use and interpret these clinical tests,[22] it could be beneficial to have one or more medical/psychological exams conducted around the time of the will execution if a challenge is expected. A client's longtime personal physician could also make a statement that the client was generally of "sound mind" around the time of the will execution. These medical exams or statements could then be stored in the file ready for use should the need arise. The attorney should bear in mind that if a psychological evaluation is conducted and there are real questions of capacity, having that record on file would backfire. An attorney trying to show that a client experiences the lucid intervals requisite for testamentary capacity would not benefit from a mental exam showing severe cognitive impairment.

Another tool that can be used in the right case is videotaping of the execution along with some videotaped questions as to the disposition of property. However, be careful because videotaping may have more drawbacks than advantages. Videotaping itself can make a person nervous, particularly a person with diminished capacity, which could in fact exacerbate the issue.[23]

Assessing Capacity During the COVID-19 Pandemic

COVID-19 has changed the landscape of estate planning. The practice of law turned virtual overnight and assessing a client's capacity is inherently more difficult when not done in person. From Zoom to Skype to Facetime, practitioners now need to sit in front of a screen with their clients, many of whom are elderly, to determine whether or not this person, whom they have never

met before, has the requisite capacity to dispose of their earthly possessions. This novel situation is also happening in the midst of an anxiety producing situation, the likes of which has not been seen in over 100 years. On a general level, many elderly clients have never used these virtual mediums. Just talking to somebody virtually can cause confusion and anxiety. A client with diminished capacity would likely experience these feelings on an even greater scale, causing it to be difficult, if not impossible, to say for sure whether the client is coherent and satisfies the three *Kumstar* factors.

There are steps that can be taken in order to mitigate some of these issues. First and foremost, the attorney should make sure that the client is comfortable with the virtual platform being used. If the client is not, a practice session could come in handy to help the client familiarize him or herself with the process of signing on and using the features of the platform. If that does not work, a telephone call may be the better route for the initial client intake. While the attorney will not be able to visually assess the client, the telephone will likely be familiar to the client and should not cause undue confusion.

Attorneys conducting virtual meetings should also engage the clients in extensive conversation, even more than they would under face-to-face circumstances. This allows for the attorney to really assess what the client does and does not understand. Can the attorney say for certain the client understands the nature and consequences of making a will; knows the nature and extent of his or her property; and knows the natural objects of his or her bounty and relations with them?[24] Ask the client to detail his or her finances, who are his or her nearest relatives, and if relevant, why he or she is making distributions that would differ from who would inherit in the absence of a will. It is critical to **take the notes** and document in written form what was said at the time of the will execution. Additionally, many of these virtual platforms allow for recording of the meetings. In certain instances, it may be beneficial to record the sessions.

Conclusion

Testamentary capacity is not black and white; it is gray. Determining whether a person you just met has the necessary capacity to execute a valid will is not something that can be taken lightly. Again, as an attorney, and not a psychologist, it boils down to instincts and whether the attorney feels comfortable putting his or her reputation on the line. If an attorney decides to move forward with a client who possesses questionable capacity, it is strongly recommended that additional steps are taken to help ensure that the testator with diminished capacity did, in fact, experience those lucid intervals.

Endnotes

1. See *In re Seagrist's Will*, A.D. 615, 620 (1st Dep't 1896), *aff'd*, 153 N.Y. 682 (1897); *Clapp v. Fullerton*, 34 N.Y. 190, 197 (1866); and *In re Delmar's Will*, 243 N.Y. 7, 10-11 (1926).
2. *Estate of Kumstar,* 487 N.E.2d 271 (N.Y. Ct. of App. 1985).
3. *Id.* at 272; quoting *In re Slade,* 483 N.Y.S.2d 513, 514 (App. Div. 4th Dep't 1984).
4. *See In re McCloskey*, 763 N.Y.S.2d 187 (App. Div. 4th Dep't 2003).
5. *Id.*
6. *In re Estate of Johnson*, 775 N.Y.S.2d 107, at 109 (App. Div. 3d Dep't 2004).
7. *Id.*
8. *Id.*
9. *In re Minasian*, 540 N.Y.S.2d 722, 722 (App. Div. 2d Dep't 1989).
10. *Estate of Buchanan,* 665 N.Y.S.2d 980, 983 (App. Div. 3d Dep't 1997).
11. Sarlis, Jim, *The Nature and Extent of a Testator's Property: What Degree of Awareness is Required for Testamentary Capacity in New York,* NYSBA Trusts and Estates Law Section Newsletter (Vol. 45, No. 3).
12. *In re Cookson*, 49 Misc.3d 1219(A) (N.Y. Surr. Ct., 2015).
13. 787 N.Y.S.2d 444 (App. Div. 3rd Dep't 2004).
14. *Id.* at 446.
15. Shulman, Kenneth I., Hull, Ian M., Sam DeKoven, et al., *Cognitive Fluctuations and the Lucid Interval in Dementia: Implications for Testamentary Capacity*, J. Am. Acad. Psychiatry Law 43:3, 287, 288 (2015).
16. *Id.*
17. *Id.* at 289.
18. See *In re Schlaeger*, 74A.D.3d 405, 407 (1st Dep't 2010).
19. See *In re Swain*, 125 A.D.2d 574 (2d Dep't 1986).
20. See *In re Friedman*, 26 A.D.3d 723 (3d Dep't 2006).
21. *In re Hedges*, 100 A.D.2d 586, 592 (2d Dep't 1984).
22. ABA Commn. on L. & Aging & Am. Psychological Assn., *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005), 20.
23. *Id*. at 21.
24. *Estate of Kumstar,* 487 N.E.2d 271 (N.Y. Ct. of App. 1985).

Creative Approaches to Senior Housing for Persons with Cognitive Impairment

By Deborah S. Ball and Neil T. Rimsky

In 2019, Judie Grimaldi, a former Section chair, introduced the Real Estate and Senior Housing Committee to an approach to care for seniors with cognitive impairment which she studied in a Dutch suburb outside of Amsterdam. The housing system offered an alternative to traditional nursing homes for individuals with dementia. In the *Elder and Special Needs Law Section Journal*—Winter 2019, Judie discussed how the concept of providing cluster homes grouped by lifestyles offered residents the opportunity to live in environments that were reflective of their interests. Judie also described a particularly unique concept—encouraging residents to be outdoors, walking about independently. This includes "community" spaces such as a restaurant and movie theater, in addition to greenspace.

Essentially, by recreating familiar surroundings, residents would feel less disoriented and more independent, which in turn leads to better physical and mental well-being. The practical implementation of this model extends from residents preforming mundane household tasks to enjoying hobbies or entertainment based upon their prior lifestyles. Moreover, taking advantage of strolling outside promotes a sense of normalcy that does not exist in a typical institutional setting.

The current reality in New York State is that most cognitively impaired seniors have very few options available to them.

Deborah S. Ball

Neil T. Rimsky

Nursing homes have difficulty maintaining proper staffing to assist with basic needs, let alone providing individualized attention to residents. As most nursing home patients are on Medicaid, there is simply no funding available for implementing large scale "quality of life" programs. We have all seen and experienced the limitations of the nursing home model. The COVID-19 pandemic has only intensified the problems, especially with regard to social isolation and lack of stimulation. However, these issues have long existed in nursing homes.

Assisted living facilities promote a better quality of life for their residents than nursing homes can provide. Conceivably, residents have more opportunity for social en-

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Neil T. Rimsky is the Chairman of the Trusts, Estates and Elder Law group at Cuddy & Feder LLP. He concentrates his practice in the areas of elder care, estate planning, disability planning, probate, estate and trust administration, gift and generation-skipping tax transfer planning, asset protection, special needs planning and guardianships. He advises clients relating to government programs available to assist seniors with health care needs, particularly custodial care and the array of housing options available to them. Rimsky has helped many couples with health care and estate planning, working in conjunction with a variety of professionals including accountants and geriatric care managers. He advises clients on long-term care insurance and protection of assets while providing for future care needs. He regularly helps families with disabled children. This type of planning involves an in-depth knowledge of the services available in the community as well as legal issues, including private and institutional supplemental needs trusts.

gagement and live-in apartments rather than institutional settings. Unfortunately, the reality is that even the most luxurious of these residences do not focus on the personal needs of the individual residents, including encouraging life's passion and maintaining a feeling of independence.

The Real Estate and Senior Housing Committee has formed a task force to examine the possibilities of creating something new, as well as enhancing the existing models. What role can we play in improving the lives of seniors with cognitive impairment? Our committee assembled a list of professionals who are stakeholders in Senior Housing to study the concept by the use of our combined expertise to determine how best to import some of the ideas. The task force members extend beyond the legal community. This working group includes social workers, as well as participants who manage facilities, who designed facilities, who developed facilities. Many of the members of this working group have extensive experience in studying senior housing, from both a legal and "the future of elder care" perspective. The future of elder care will increasingly focus upon the housing options that are available. Our task force spent weeks trying to develop a mission statement that succinctly reflects the ideals and concerns to be addressed. Here is the result:

> The Housing Task Force seeks to create an innovative model that changes the narrative on aging with dementia, from its current focus on safety and health, to one that offers personal assistance, meaningful activities and medical care, and where residents can spend their days comfortably, safely, and with maximal independence. Our proposed model will be a non-institutional environment with residential units that incorporate the cultural and personal preferences of the residents, including their choice of food, activities, décor, and entertainment. Residents of our community will be encouraged to participate in community life, maintain their highest level of independence, and engage in self-care to their greatest potential.

This language suggests a shift in focus from safety and health to a way of life which combines personal assistance and medical care, meaningful activities, in a residential environment reflecting the cultural and personal preferences of residents.

We found that too often, concern was strictly on safety. To be clear, no one on the task force would suggest anything other than a safe environment for individuals with cognitive impairments. The point is that the emphasis should be shifted. We should be taking other personal preferences into consideration and finding ways to reduce social isolation and the feeling of helplessness, often endured in silence, by this population.

In the ideal model, perhaps something similar to Dutch concept could be developed in which the cultural backgrounds and lifestyles, language preferences and food preferences would be considered in creating individual life plans for residents. Presently, these are conceptual goals based upon the recognition that existing models do not offer any such choices or accommodations. We recognize that we will not solve all of the problems discussed here. For instance, we cannot single-handedly develop our own models. Nonetheless, our task force consists of dedicated people who care about making a difference by formulating a roadmap towards implementing realistic changes.

What we can do is explore new ideas and approaches. We will look at the current statutory framework. Does the current statutory framework meet the creative needs of our model?

Is it possible to develop an environment similar to the Dutch model? The question of whether site space and costs are too insurmountable must be examined. If this particular system cannot work in our state, the task force will research adapting components of this concept, at least with respect to offering more individualized lifestyle options to promote a more dignified way of living for people with cognitive impairments.

Our committee intends to produce a carefully researched study of these issues in the form of a White Paper or other scholarly report.

In the meanwhile, we thought it helpful to share some of the ideas and options that presently exist throughout the state.

Green House Project. Designed to improve quality of life and quality of care, the Green House Project is based on the concept of individual units with a bathroom, kitchen and outdoor spaces. There are local facilities that incorporate the POD concept. At Sarah Neuman nursing home, which is the Westchester Division of the Jewish Home and Hospital, a section of the facility consists of a pod with several rooms around a central location which provides the basic services, such as meals and entertainment. Each pod can be different, allowing the facility to cater to the specific needs of different cultural groups.

The Village Model and the Village-to-Village Network. Although not a facility, the "village" offers a self-sustaining model that can be replicated. Each village provides services, including transportation and entertainment for local participants who are asked to contribute a modest fee.

Naturally Occurring Retirement Communities (NORCs). Hardly a new concept, we mention NORCs as a model for the intelligent use of facilities and the cooperation of private and public services.

The Housing Task Force, in addition to looking at models to provide a better experience for the cognitively impaired, is looking into issues related to development, costs and the cooperation of private and public resources.

Elderly Clients, Not Ancient Technology

By Daniel R. Miller

I will always remember the day I tried out a cable modem. I was at The Wiz electronic store in Long Island and my mind was blown. The dial-up days of 56k were over. Not only was I on the phone, but I could also surf the internet simultaneously; incredible. This was an advancement in technology that revolutionized the world. My father, Ira Miller, was a chair of the "new" Technology Committee for the New York State Bar Association and less than a year ago we were disagreeing as to whether his 1986 typewriter belonged in our new office space. Times have changed, our world has changed, and as elder law practitioners we need to keep up with the evolving technology in our practice to best serve our clients. This article serves as a broad overview of different technologies you as a practitioner can investigate (no matter the size of your firm) to improve your client's experience while maximizing your time. This article will focus primarily on two topics: 1) automation and 2) practice management systems.

Automation

The word "automation" gets tossed around often, but to me is one of the most important aspects of utilizing technology to your advantage. Automation is essentially the technology by which a system of processes is created to increase speed and productivity; it also minimizes errors if configured properly. So how do you automate? It is really a two-step process. Step one, and this is the hardest step, is to figure out what your process is. Step two is determining which steps in your process are done repeatedly and may require minor changes. With automation I can send emails, draft documents, schedule client calls and meetings with our firm, share instructional videos, and gather information from clients. Sounds like a lot of work to automate these processes, right? It is, but if done properly it can be streamlined and save you a considerable amount of time.

For example, I have been appointed as court evaluator in a guardianship case. Step one, what is my process after being appointed? I normally ask for affidavits of service from petitioner's counsel. I call or email court-appointed counsel to go visit the alleged incapacitated person, contact interested parties to the case, speak with the petitioner and their counsel, write my court evaluator's report and send the report to the court prior to my hearing date. This is my standard process and as there are not many changes from appointment to appointment, I was able to automate every step of the way. First, I enter information for all parties of interest to the case into my practice management software as well as pertinent dates, when the order to show cause was signed, and the court and judge I am appearing in front of. Now with a few clicks, I have drafted emails, letters, and part of my court evaluator's report. So, here is how I can automate the process above.

Daniel R. Miller

- **(Email)** Affidavits of Services from Petitioners Counsel: "Dear PETITIONERS COUNSEL, I was appointed as Court Evaluator in the Guardianship of AIP'S NAME by Order to Show Cause dated OSC DATE by the Honorable JUDGE'S NAME. At your earliest convenience, please provide affidavits of service in the above matter. Thank you in advance." Using document automation all the fields that are capitalized are filled out for me. I can double click to draft the email, make any changes that I would like, and then press send. Petitioner's counsel's email address is already filled in for me to send out the email as well.
- **(Email)** Contact Court Appointed Counsel: "Dear COURT APPOINTED COUNSEL's NAME, I look forward to working with you. When are you available to visit the AIP'S NAME at AIP's address? Here is a link to my schedule (insert Calendly link or other scheduling software) so we can find a mutually convenient time to go visit AIP's NAME."

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> Calendly is a great tool for scheduling. It provides a link with your availability to the recipient, so they can schedule a meeting in your calendar. The amount of time saved instead of going back and forth trying to pick a date is significant. Calendly will only provide times that you are available. Calendly will also provide text / email reminders of the meeting to the participants automatically (another automation trick and one less thing for you to think about). Calendly can also accept payment if you charge a fee for your meeting. Calendly is not the only scheduling software; Microsoft Bookings and Lawtap are other scheduling tools to consider for your practice.

- (**Document—Letter)** Contact Interested Parties: "Dear INTERESTED PARTY 1, My name is Daniel Miller and I have been appointed by the Honorable JUDGE'S NAME as Court Evaluator in the in the Guardianship hearing of AIP's NAME. You have been named as an interested party to this proceeding. You will see my name as Court Evaluator in the Order to Show Cause that has been mailed to you. My job as Court Evaluator is to conduct interviews to learn more about AIP's NAME. As Court Evaluator, I act as the eyes and ears of the court and create a report detailing my interviews and recommendations as to the Guardianship. I would like to speak to you about AIP's NAME. Please contact my office at your earliest convenience." By using document automation, I can draft this letter to all interested parties within minutes and have all envelopes printed and ready to be sent.
- (**Document—Report)** Draft Court Evaluators Report: My Court Evaluator's report is prepopulated with the names of all parties involved. It will insert names, addresses and telephone numbers into the document. It will also insert the date of the order to show cause, date of the hearing, and even add financial information and perform calculations.
- (**Email)** Send Court Evaluators Report to Judge's Court Attorney: "Dear COURT ATTORNEY, Attached find my court evaluator's report in the Guardianship of AIP's NAME. Please let me know if I may distribute my report in advance of the hearing. I will bring courtesy copies for all parties on the day of the hearing. Thank you in advance."
- **Task List**: Each of the above steps will be given a due date based on the order to show cause and the hearing date automatically.

Automation can be used for any practice area and can be used to standardize your practice. Now that I have illustrated how the process works, you are probably wondering how these values are inputted into my emails and documents? The short answer is software and practice management systems.

Practice Management/Customer Relationship Management (CRM)

A practice management system should be the cornerstone to running a successful law firm. It handles multiple aspects of an elder law practice. It creates invoices, tracks calls and emails, accepts payments, manages your contacts, manages tasks for you or members of your team, integrates with your bookkeeping software, shares the calendars of members of your firm, generates reports on billing and time spent in each practice area, and most importantly can allow for document automation. There are several different practice management systems for an attorney to choose from. I recommend a cloud-based system, meaning that it can be accessed anywhere you have internet and updated on all computers. This is particularly important due to the pandemic. Some options for cloud-based practice management software's are Clio, LEAP, Practice Panther, Smokeball, Zola Suite, Centerbase, and Cosmolex. This by no means is an exhaustive list of the practice management software you can use. It is important to evaluate the various practice management software once you have determined your firm's needs. Most software programs allow for a trial period, so give them a try before you buy and be careful not get locked into a contract.

Besides document automation, some of my other favorite functions are tracking time automatically for emails, electronically signed retainers by e-signatures or docu-sign, and automatic credit card payments applied to client accounts. All in all, technology is your friend and can standardize and improve your practice. The more streamlined your process is, the easier it will be to seamlessly transition to automation and provide an exceptional experience to all your clients.

Member Spotlight: Myles Fischer

Interview by Katy Carpenter

Q: Where are you from?

A: I'm from Suffern, New York, in Rockland County. It was a wonderful place to grow up.

Q: Where is your favorite place you have traveled to?

A: The Finger Lakes with my wife. I love the wineries, the scenery, the relaxing atmosphere and the food.

Q: Did you have a turning point in your career?

A: Leaving a smaller firm for an opportunity at a larger firm where I was able to focus my practice on tax planning; putting that LLM to use!

Q: What led you to work in the field of elder law and estate planning?

A: My desire to help people in a practical sense. Trusts and estates affects everyone in so many ways; there are just so many opportunities to be helpful and provide value to those seeking advice. I also really enjoy the human interaction and individual relationships.

Q: What is your favorite part about your job?

A: Solving complicated problems—I like math. Using creative solutions to achieve planning objectives.

Q: Tell me about an accomplishment that you consider to be the most significant in your career thus far.

A: Just weeks ago I found out I passed the Florida Bar exam. The exam was postponed multiple times, the format changed, subjects added and removed; it was grueling. Unlike the summer following law school when my sole responsibility was to prepare for the New York Bar, this time work and family were added to the mix and life was more complicated. Passing was very rewarding.

Q: Where do you see yourself in five years?

A: Doing the same work, continuing to help people, and having a successful practice throughout New York and Florida.

Q: What did you want to be when you were younger?

A: A marine biologist. It began with a book report on sharks and then I just couldn't get enough of the mystery of ocean life.

Q: Tell me a little about your family.

A: I'm married and have two wonderful, happy girls: Morgan (3) and Sydney (5). I met my wife in law school and she is a law clerk to a judge on the Appellate Division—so she wins all the arguments.

Q: Are there hobbies you look forward to outside of work?

A: Spending as much time with my family as possible.

Q: Do you have any advice to give?

A: Work hard and be a good person. Your clients and colleagues will appreciate it and good things will happen.

Q: Is there anything else you want people to know about you?

A: I'm an aspiring bbq pitmaster.

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New Member Spotlight: Arthur Conte

Interview by Katy Carpenter

Q: Where are you from?

A: Long Island—I spent most of my childhood in Port Washington and now live in Lindenhurst.

Q: Where is your favorite place you have traveled to?

A: Hawaii is hands down the best place I have traveled and will ever travel to. I went there for my honeymoon. My wife and I kayaked to a waterfall in Kauai, went sightseeing in Maui and visited Pearl Harbor and saw the USS Arizona in Honolulu.

Q: Did you have a turning point in your career?

A: I worked for a few law firms since my admission to the Bar in 2015, and I realized that I wanted to do things according to my vision of how to treat clients, run a business and work with other employees. I also wanted control over my work-life balance, so I started my own firm in 2018.

Q: What led you to work in the field of elder law and special needs?

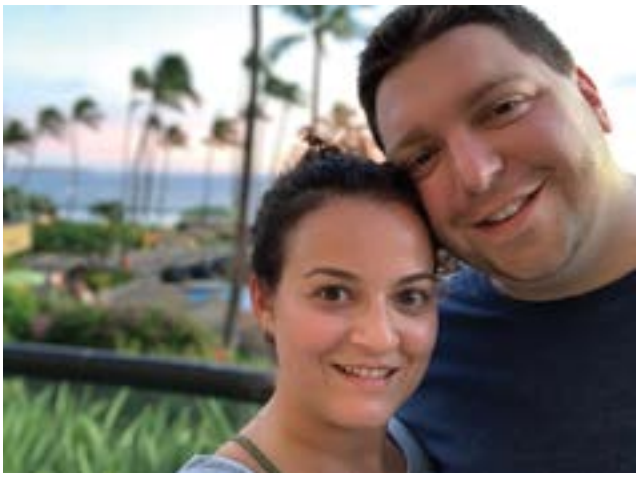
A: My grandmother had estate planning and elder law issues and I saw the contention in my own family. I also interned for an elder law firm while in law school and really believed it was the right fit for me. I believe it is a field that grows more necessary as time goes on yet is somewhat undervalued. I hope to teach others how important it is to care about these areas of law. I hope to be a professor one day, even if adjunct, to bring these issues to light.

Q: What is your favorite part about your job?

A: The flexibility to help clients. I love having control over who to accept as clients and assisting those who genuinely need help, even if doing so is on a pro bono basis. It helps me put my head on the pillow at night. I also don't think I could ever have a career that doesn't deal with the client/consumer directly.

Q: Tell me about an accomplishment that you consider to be the most significant in your career thus far.

A: **B**ecause I started my own practice, I was able to work on this one pro bono project with a local non-profit helping a disabled veteran open his father's estate



and fix many issues that enabled him and his brother to obtain Medicaid and SSI benefits. It was genuinely one of the most impactful cases I've ever had and will stick with me a long time. I don't know if I would have been able to partake in that case if I wasn't on my own.

Q: Where do you see yourself in five years?

A: Hopefully working and growing my firm, perhaps partnering up with other attorneys. I hope that the type of practice I have takes a more holistic approach to clients and their issues, especially with elderly clients obtaining Medicaid benefits, not just qualifying them for benefits, but helping them with a wide range of long term care issues, for instance.

Q: What did you want to be when you were younger?

A: Not a lawyer! I wanted to be a firefighter . . . as I grew up I realized I was not brave enough to stand on a 12-foot ladder by myself, so firefighter was out of the question. Once I was in high school, I joined the debate team, and the rest is history.

Q: Tell me a little about your family.

A: I got married in 2019, and my wife, Kristen, and I are expecting our first child in January. My parents and my in-laws all live nearby as does my older sister, brother-in-law and niece who is almost two years old. We're a close bunch, and I owe a lot of gratitude to my entire family—I wouldn't be where I am professionally without all of their help.

Q: Are there hobbies you look forward to outside of work and the law?

A: Yeah! I am a golfer and general sports fan enthusiast. I also build computers; that was a big hobby growing up and I've kept it to this day.

Q: Do you have any advice to give?

A: To new and upcoming attorneys: learn to adapt. Things may be scary, different or adverse, but things in our profession change all the time and learning to pivot quickly is imperative. To colleagues: hiring and mentoring is not just teaching the law but learning to be resourceful and advocate for clients.

Q: Is there anything else you want people to know about you?

A: I'd like to think my personality is that of being a big helper and I think we as lawyers should try hard to remember that even though our work lives can be consumed by the deadlines, the litigation, the adversarial process or the difficulties of our practice area, try to remember that whatever we do during the day, try to make sure it furthers the goal of helping someone.

Adventures in a Busy Elder Law/T&E Office

A Comic Strip by Antony Eminowicz

Details Matter

By Penny B. Kassel

For the first four years of my legal career, I handled medical malpractice matters almost exclusively. For the past 33 years, my practice has been devoted entirely to elder law matters. Perhaps because of my experience with malpractice cases, I often think to myself that the field of elder law is ripe for committing malpractice.

First of all, most elder law attorneys see a high volume of clients. Each case presents with different facts and issues, all of which must be addressed with a full command of current laws. Elder law practitioners must keep up to date with changes to the laws related to: Medicaid, Medicare, taxes (gift/estate/capital gains), trusts, wills and guardianships, among other things. On top of that, we must follow up with our clients to ensure that they complete a proposed estate plan, sign all documents properly and file the documents in the appropriate place. Just keeping track of all of the clients, the status of their documents, estate plan, Medicaid application, for example, is a monumental task. It is so easy to miss details, but the consequences of overlooking just one small thing can be great and can create a tremendous amount of exposure to liability for the attorney.

Many clients come to the office alone, many come with their children. When a client comes to the office to execute a document alone, such as a Power of Attorney, we supervise the execution knowing that we must follow up with the agents, often children, to sign as well. Often that can be done at a later time without any problem.

While meeting recently with two clients who retained me to prepare and submit a Medicaid application for nursing home care, I noticed a problem—a big problem. Both clients had been to other well-established and respected elder law attorneys. Both had executed a properly drafted Medicaid asset protection trust and funded it with their homes. The transfers of the respective properties had been done more than five years prior. Naturally, both clients were under the impression that their homes were protected, and now their spouse needs nursing home care.

Since the terms of the trusts were proper and I noted that the deeds to the homes were dated more than five years prior, I concentrated on gathering other relevant information about the potential applicant's assets and transfers. Toward the end of the meetings, I looked more closely at the dates of the trusts, deeds and the signatures of the parties. The trusts were dated at the beginning of the instrument and that date was the same as the date of the deeds. Then I looked a little further and noticed that although the grantors signed the date of the deed and the "date" of the trust, the trustees did not sign the respective trust instrument until a later date. Probably eager to get everything signed with the client in the office, the attorneys apparently supervised the signing, dated and notarized, without thinking about the fact that the respective trust was not yet in effect as it had not been fully executed. As a result, in both instances the transfer of the real property to the "trust" was never effectuated because there was no trust yet in existence. Of course, the clients were shocked to learn that their largest asset, which they thought was protected, was not.

Penny B. Kassel

Per New York's Estates, Powers and Trust Law § 7-1.17:

> (a) Every lifetime trust shall be in writing and shall be executed and acknowledged by the person establishing such trust and, unless such person is the sole trustee, by at least one trustee thereof, in the manner required by the laws of this state for the recording of a conveyance of real property or, in lieu thereof, executed in the presence of two witnesses who shall affix their signatures to the trust instrument.

This is a mistake that any of us could make, but it is a reminder of how important it is to pay attention to all the details, no matter how routine they may appear to be at the time.

Penny B. Kassel is a partner with McLaughlin & Stern, LLP. Prior to joining M&S, Kassel had her own law firm for 30 years. With a Master's Degree in Counseling and after working for a pharmaceutical company, Kassel spent many years handling personal injury and medical malpractice cases. For more than 33 years she has devoted her time to estate planning and administration and to elder law matters. Kassel presents seminars and discussion groups to attorneys and lay people with regard to elder law matters and guardianships for elderly or infirmed/handicapped family members. She is a frequent lecturer for medical facilities, bar associations, financial planners and community organizations.

Compliance Mandate to Increase Hospital Capacity During COVID-19 Epidemic: What Is the Cost?

By Antonia J. Martinez

Laws and regulations motivated by good intentions sometimes lead to unintended consequences. A compliance mandate to increase hospital capacity during the new coronavirus health crisis inadvertently led to increase in fatalities and community spread of the virus. Below are cases highlighting situations the author confronted in her practice.

Case #1

On March 25, 2020 New York State required all hospitals statewide to increase capacity by 50% in order to deal with the high volume of patients flooding the health care system. On March 18, 2020 my client, Adam, 83, was hospitalized with fever and pneumonia and tested positive for the coronavirus. Six days later he was discharged from the hospital without confirming he no longer had the virus. EMS brought him to his apartment where he lives alone with no one to care for him. No aide from his health care agency would come because Adam had tested positive. His daughter briefly met Adam at his apartment since no one else would come. In a highly weakened state, Adam could barely walk. His daughter pleaded with EMS to take him back to the hospital but EMS said it must follow the discharge order. Clearly this was not a safe discharge plan and two hours later, Adam fell, hit his head and was taken to the hospital where he was admitted. When Adam was re-tested for the coronavirus within 24 hours of his second hospitalization, the results came back positive. Three days later, the hospital attempted to discharge Adam to a Skilled Nursing Facility (SNF) without first having received a negative test result in violation of the Centers for Disease Control's (CDC) earlier policy that a patient must have two negative results in 24 hours before discharge from a hospital.

The Department of Health (DOH) mandate to increase hospital capacity statewide to address the needs of the ever-growing number of coronavirus patients had unintended consequences for individuals who were still infected and returned to the community. In this situation his daughter, who resided in a different county, was left to be Adam's advocate and caretaker. She had the potential to also become a "superspreader" by contracting the virus and bringing it back to her own community. Despite the state's good intentions, the application of the mandate at a time when the health care system was experiencing significant pressure led to rushed judgments and outcomes that potentially furthered community spread of the disease.

Antonia J. Martinez

One week later the SNF where Adam was admitted to was designated a hospital due to the volume of positive coronavirus cases. Adam was afebrile for three weeks and the hospital wanted to discharge him home as soon as possible. Adam's legal representative requested a coronavirus test prior to discharge but Adam's doctor said that there were not enough tests available. The legal representative was advised to vociferously object to any discharge, in writing, as being unsafe, and to underscore the fact that Adam lives alone and there is no one to care for him. Several days later, the hospital agreed to administer two tests seeking two negative test results within 24 hours, consistent with CDC policy. On April 8, 2020, Adam was tested. The first test result was negative, the second test administered 12-18 hours later yielded a positive result. Adam was then transferred to a skilled nursing facility. Did this action contribute to community spread?

Case #2 in a Different New York County

Peter was 86 years old and has been in a SNF since November 2, 2019 after suffering a stroke, leaving his left side paralyzed with many other medical issues and concerns. Peter had had no visitors since early February when the nursing home stopped allowing anyone other than personnel into the facility, making it impossible to see his wife. She was distraught.

Antonia J. Martinez devotes substantially all her professional time to Trusts and Estates and Elder Law matters. She is principal of Antonia J. Martinez, LLC. She is Co-chair of the Elder Law and Disabilities Committee of the New York Women's Bar Association, and a member of the Executive Committee of the NYSBA Elder Law and Special Needs Section, serving as Co-chair of its Elder Abuse Committee. Martinez is a speaker at Continuing Legal Education programs as well as community programs. Her articles in *The Elder Law Times*, *Professional Planning for Wealth & Lifestyle Preservation* are distributed to the general public.

On April 10, 2020, the author was informed that Peter had the coronavirus. How did Peter contract the coronavirus since no outside visitors were in close contact with him since the lockdown? Either an infected health care worker transmitted the virus to Peter, or a SNF resident transmitted the virus to other residents after being in contact with an asymptomatic health care worker who had coronavirus. What steps was the SNF taking in April 2020 to ensure protection of non-coronavirus residents? Peter miraculously recovered from the virus. After a month, Peter was once again diagnosed with coronavirus and passed away. The last time his wife saw him was in February.

Preventing visitation of residents without routinely and carefully screening staff proved to be an ineffective method to mitigate the spread of the virus within the SNF. Furthermore, this practice had the cruel and unintended consequence of many residents dying alone without the presence and comfort of their loved ones. Unfortunately, mandatory testing of staff occurred after Peter passed away.

Case #3 in a Third New York County

Carly was a therapist in her late 70s, spunky and outspoken, highly intelligent and full of life. She was still working part time when she fell and fractured her hip while in her own home requiring surgery. She thereafter opted to go to a skilled nursing facility in order to get the physical therapy required to allow her to return to her active lifestyle. Prior to her transfer to the facility, she was assured by personnel that she would be in a COVID-19 free environment. While in the facility, Carly sought a discharge after she learned that another resident tested positive. She was free of any fever and was discharged. However, the next day Carly developed a fever of 103. Her husband drove her to the hospital where she was admitted. Although they wore masks while she was at home for only 24 hours and stayed in separate rooms, he, too, contracted the coronavirus. While he has since recovered from the coronavirus, he never saw his beloved Carly again.

Case #4 Nine Months Later

Nine months later, though steps had been taken to limit the spread, it's unclear how much has changed. At 93, Ronnie was vibrant, engagingly witty and fully enjoyed life. Before the pandemic, she liked to go out on the weekends to dance.

Due to a urinary tract infection and weakness, she entered the hospital coronavirus free. Prior to her transfer to a SNF for the purpose of getting physical therapy, Ronnie was tested and remained coronavirus-free during her first 14 days at the SNF while under quarantine. During Ronnie's initial stay at the SNF, the family had not been permitted entry and visited outside her window at the facility. Following the quarantine, Ronnie was introduced to a roommate. Two weeks later, Ronnie's daughter received a call: "Your mother tested positive for the virus."

One wonders how Ronnie contracted the virus and will surmise either her roommate passed it to her, or she came into contact with an infected health care worker. Although protocols have been put in place since the spring of 2020, this set of facts makes one wonder whether SNFs are in compliance with required testing standards or following infection-control practices. Ronnie did not spend Thanksgiving with her family. She passed away the day before. A complaint has been filed with the Nee York State Department of Health.

Helpful Information

New York's health care system in the spring of 2020 was burgeoning out of control. Since those difficult months, the Elder Law and Special Needs Section established a Task Force on Long-Term Care Facility Reform and Oversight. The task force vociferously advocates and provides educational tools to benefit residents of long-term care facilities. Join them in their effort.

To see the latest New York State updates go to the New York State Department of Health website's *What You Need to Know* page at https://coronavirus.health.ny.gov/home.

Information relevant to nursing home visitation may also be found at https:/health.ny.gov/press/releases/2020/index.htm.

A NYS DOH Advisory dated November 4, 2020 established protocols for return of salon services in SNFs and Adult Care Facilities. See https://coronavirus.health.ny.gov/salon-services-adult-care-facilities.

To make a complaint about something you have observed or a client has experienced, contact the Nursing Home Complaint Hotline at 888-201-4563 or file a complaint at https://apps.health.ny.gov/surveyd8/nursing-home-complaint-form.

To determine how one nursing home fares as compared to another, go to https://www.medicare.gov/care-compare/.

For the latest coronavirus national updates, go to coronavirus.gov or https://www.coronavirus.gov.

You can also review the policies of the Centers for Disease Control and Prevention (CDC) by going to https://www.cdc.gov/coronavirus/2019-ncov/index.html.

The Elder Abuse Committee of the NYSBA Elder Law and Special Needs Section, co-chaired by Antonia J. Martinez and Lorese Phillips, together with Vice Chair Nina Daratsos, welcomes your active participation. Join us during our monthly guest speaker program.

Special Needs Planning: Back to Basics

By Melissa Negrin-Wiener

Many of us are seeing an increased need for special needs planning in our practices. But not all elder law attorneys are well-versed in this area of the law. It's often good to get back to basics. Understanding the types of Special Needs Trusts is the best place to start to assist clients that have a child or children with a disability.

Executing a Last Will and Testament should be the first order of business for clients with a special needs child. It is important to make sure that the will directs that the inheritance for the disabled child be held in a Special Needs Trust (also called a Supplemental Needs Trust or SNT) for his or her benefit. SNTs permit disabled individuals to retain funds from an inheritance without eliminating or reducing government benefits, such as Medicaid or Supplemental Security Income (SSI) benefits.[1]

In addition, an inter vivos SNT for the benefit of a client's disabled child can be created during the client's lifetime. An inter vivos SNT can be funded with either the funds of the client (Third Party SNT) or funds from the disabled beneficiary (First Party SNT). SNTs are highly favored under the law but have particular rules. As there are generally two types of inter vivos SNTs, it is important to know which trust is right for your client, as well as any consequences that must be addressed after the passing of the SNT beneficiary.

Third Party Special Needs Trusts

The main concept behind any SNT is to "supplement," rather than "supplant," any benefits the disabled child may receive from government programs.[2] Third Party SNTs are special needs trusts established by an individual, such as a parent or grandparent, and funded with their assets for the benefit of another individual, such as a child or grandchild with a disability. The Third Party SNT does not hold any assets of the beneficiary and the beneficiary cannot serve as trustee.[3] Generally, the trustee is permitted to make such distributions to third parties to meet the disabled beneficiary's needs for food, clothing, shelter or health care not otherwise provided by the beneficiary's current benefits.[4] Third Party SNTs may be established and funded during the creator's lifetime (inter vivos or living SNT), or may be established in a Last Will and Testament (testamentary SNT) and therefore not created or funded until the death of the testator. In either case, the creation or funding of the Third Party SNT has no effect on the beneficiary's eligibility for government benefits.

Finally, there is no payback requirement to New York State because another individual's assets are used to fund the Third Party SNT. Instead, any assets remaining in the Third Party SNT at the time of the beneficiary's death may be inherited by other family members or beneficiaries as directed by the terms of the SNT.

Melissa Negrin-Wiener

First Party (Self-Settled) Supplemental Needs Trusts

In the past, a First Party SNT (otherwise known as a "self-settled" SNT) had to be established by a parent, grandparent, legal guardian or by court order for a beneficiary under the age of 65.[5] However, after the passage of the Special Needs Trust Fairness Act in December of 2016, a disabled person who has capacity can create his or her own special needs trust for themselves.[6] The trust must be funded with the assets of the beneficiary, such as lawsuit settlement proceeds, retroactive government benefits or an inheritance which was left outright to that person.

The assets held in a properly established First Party SNT are not countable assets for the purposes of eligibility for government benefits, and thus the disabled beneficiary can continue to receive benefits such as SSI and Medicaid. The trust must be a payback trust and therefore any funds remaining in the trust upon the death of the

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beneficiary are subject to be paid back to the government as reimbursement for the costs of care during the lifetime of the disabled beneficiary.[7] While reasonable fees for the administration of the trust and any tax liability imputed to the First Party SNT may be paid prior to paying back the government, funeral expenses and preexisting debts of the beneficiary cannot be paid from the SNT after the death of the beneficiary and prior to repayment. As such, the trust should not allow for the payment of funeral expenses after the death of the beneficiary. Instead, the trustee can purchase an irrevocable pre-paid funeral plan for the beneficiary.

Disbursements from SNTs

In general, and depending on the beneficiary's receipt of certain means-tested benefits, funds held in a SNT can be used to pay for food, clothing, shelter or health care of the disabled beneficiary.[8] Examples include personal care items, vacations (the beneficiary's share and expenses for a necessary caregiver), transportation (including purchase of a car or van), purchase of a home, modifications to a home (such as installation of ramps or wheelchair accessible bathrooms), computer equipment, special medical or therapeutic equipment, personal care aides, and medical care not provided by government programs. It is important to note that the payment for such items must be made directly to the service provider, retailer or vendor. In other words, principal from a SNT cannot be distributed directly to the disabled beneficiary for any purpose.

However, in making distributions for food, shelter, or health care, trustees need to be aware of the possible impact on benefits. For example, if a trustee pays the beneficiary's food or housing expenses, SSI benefits may be reduced by up to one-third. This may be an acceptable tradeoff to pay for the desired quality of housing, if the trust permits it. Additionally, the trustee should also only be paying for medical or health expenses not otherwise covered by existing benefits (such as Medicare or Medicaid).

Oftentimes a judicial accounting may be required to settle the SNT after the passing of the beneficiary. This is required for all First Party SNTs, and may be required for Third Party SNTs where the remainder beneficiaries will not accept an informal settlement. It may also be prudent to account to the local department of social services (DSS) on an annual basis so any issues they may have can be addressed at the time. The trustee also has the option to seek court approval of major expenditures (such as the purchase of a home) on notice to DSS. Accordingly, trustees should be advised to keep very careful records, including invoices and receipts, for all expenditures made from a SNT. Maintaining good records will help to avoid objections as to the validity of the disbursements made by the trustee, avoid trustee liability, and make the settlement process easier.

Pooled Trusts

A pooled trust is a type of SNT that is established and maintained by a non-profit organization which pools the funds of a number of individuals in separate accounts for investment and management purposes.[9] A pooled trust can be funded by a parent, grandparent, legal guardian or the individual with special needs him or herself. There are both first party and third party options for pooled trusts, and they are a valuable planning tool for individuals who are either over 65 (and can no longer create a standard First Party SNT) or those who do not have a trusted friend or relative to serve as trustee (and the amount to be held in trust is too small for a corporate trustee). Typically, upon the death of the beneficiary the remaining trust assets are retained by the non-profit organization. However, there are some options that allow for the designation of a portion of the remainder to beneficiaries, after any required repayment of government benefits.

17-A Guardianships

In New York State, when a person turns 18 years of age, he or she is assumed to be legally competent to make decisions until and unless a court determines otherwise. This means that no other person, including their parents, can make medical, financial or personal decisions for them. If the individual is deemed to lack capacity to make medical decisions, the Family Health Care Decisions Act allows some medical decisions to be made by parents, but has its limits.[10] As such, parents of children with special needs should plan for the child's care beyond the age of 18. The preferred option is for the adult child to execute a power of attorney and health care proxy to name decision makers, as long as the adult child has the capacity to do so. Otherwise, if parents wish to continue to make important decisions for their child after age 18, such as medical care and residential placement decisions, they must become the legal guardians of the adult child.

There are two types of guardianship for incapacitated individuals from two separate statutes: Mental Hygiene Law Article 81 and Surrogate's Court Procedure Act Article 17-A. An Article 81 guardianship, brought in Supreme Court, is a more flexible form of guardianship that can grant the guardian tailored powers. It is typically utilized for older adults who require a guardian, such as those with substantial cognitive decline. On the other hand, an Article 17-A guardianship, brought in Surrogate's Court, is utilized for individuals with intellectual or developmental disabilities and grants very broad authority to the guardian.

A 17-A guardianship covers most decisions that are usually made by a parent for a child, including health care and financial decisions. The court can appoint a guardian of the person, the property or both. Certifications are required from two physicians or a physician and a psychologist attesting that the adult child is not able to manage his or her affairs because of an intellectual disability or developmental disability.

The world of special needs is highly detailed and concentrated. As there is more and more of a call for these services, elder law practitioners should be aware of the basics to help guide clients and know when to reach out to colleagues for these services.

Endnotes

1. Est. Powers & Trusts 7-1.12.
2. *In re Escher*, 94 Misc. 2d 952, 407 N.Y.S.2d (Surr. 1978), *aff'd mem.*, 75 A.D.2d 531 (1st Dep't 1980), *aff'd*, 52 N.Y. 1006, 438 N.Y.S. 2d 293 (1981); Est. Powers & Trusts 7-1.12.
3. Est. Powers & Trusts 7-1.12.
4. Est. Powers & Trusts 7-1.12.
5. Pub. L. 103-66 (1993).
6. 42 U.S.C. 1396(d)(4)(A).
7. Pub. L. 103-66 (1993).
8. Est. Powers & Trusts 7-1.12.
9. Social Security Administration Program Operations Manual System (POMS) § SI 01110.200.
10. New York Public Health Law § 2994-D.

The Mediation Advocate: Changes in Attorney Paradigms in Guardianship, Elder Law and Estate Contests

By Beth Polner Abrahams, Harriette M. Steinberg and Elizabeth Pollina Donlon

Beth Polner Abrahams

Harriette M. Steinberg

Elizabeth Pollina Donlon

In 2019, Chief Justice Janet DiFiore issued a statewide initiative[11] requiring parties and their attorneys to use the process of 'alternative dispute resolution' for all litigation matters, including mediation. With the initiative in place, each judicial district established protocols (and ADR coordinators) to initiate programs and/or to facilitate the operation of programs in the various courts and their parts. That initiative did not stop even when New York State shut down due to COVID-19. While the courts were temporarily closed, mediators continued their work mediating disputes with online platforms, including Zoom and Skype video conferencing, and the term ODR—Online Dispute Resolution—became popular.

In mediation, the role of the attorney is fundamentally different from the attorney's role in litigation. While the mediation role of the attorney (sometimes known as mediation advocate) uses a different skill set to address the resolution of a conflict, the professional services rendered by the mediation advocate are as valuable and as billable as the services of a litigation attorney.

This article will outline some of the essential dimensions of the mediation advocate's role in the mediation of guardianship, elder law, and trust and estate contests, which often involve the dynamics of family relationships.

Introducing Your Client to Mediation

First, the mediation advocate should educate the client about mediation and its process. Most clients arrive

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Harriette M. Steinberg is the owner of Harriette M. Steinberg, Esq., PC and has maintained her law and mediation practice on Long Island for close to four decades. She has brought her mediation and collaborative divorce skills to her legal concentrations in Trusts and Estates, Guardianship proceedings, and Elder Law areas of practice, as well as her Matrimonial and Family Law concentrations. Steinberg is a member of the Nassau County Bar Association, NYSBA, the American Bar Association, NAELA, and the New York Association of Collaborative Practitioners.

Elizabeth Pollina Donlon considers herself to be a "recovering" trusts and estates lawyer. Since 2013, she has been a New York State certified mediator under Part 146 and recently completed the required certification to mediate contested estate matters in Suffolk County Surrogate Court. She is a volunteer mediator with CMS, a nonprofit Queens County mediation program, in their Surrogate Court, community and small claims mediation programs. Pollina Donlon also serves as a mediation advocate for pro se litigants as part of the federal EDNY Mediation Advocacy Program concentrating largely in employment discrimination disputes. She is a former chair of the Nassau County Bar Association Dispute Resolution Committee. During that tenure, she spearheaded the creation and implementation of the NCBA Court-Referred Guardianship Mediation Pilot Project and serves as a volunteer coordinator and as a mediator in the Project.

for their initial appointment very sure of their positions, their version of the dispute, and what they expect from their attorney. They want their side of the story told, they want to be vindicated, and they want to "win." Particularly in the area of elder law, guardianship, and estate disputes, your client's position may stem from years of family dysfunction, pent-up anger, perceived wrongs, struggles with the care of a disabled child or ill parent, lack of communication, a systemic inability to communicate within the family, or all of the above.

Mediation is a process by which an impartial neutral party (the mediator) assists the parties and their counsel[22] in navigating complex legal and often emotional issues and in enabling the parties to reach a self-determined and negotiated resolution. The goal of mediation is to promote client empowerment rather than ceding such authority to a third party, i.e., a judge or arbitrator.

Mediation offers a non-adversarial approach to settlement by operating within the following principles. These principles should be fully explored with your client:

- The primary goal of the mediation process is to foster dialogue and problem-solving approaches with the guided assistance of the neutral facilitator—the mediator; and
- The mediation process is designed to assist the parties and their counsel reach a self-determined resolution of one or more of the issues in the matter; and
- The mediation process allows for creative solutions which can be customized for the parties' circumstances without there being a judicially determined "winner and loser"; and
- Mediation is confidential. A written confidentiality agreement is signed by all parties, their attorneys, and the mediator. The obligation of confidentiality assures that the parties can share sensitive information which may contribute to shaping the resolution of the dispute without concern that what is "said" will be used in litigation if the parties cannot reach a settlement of some or all of the issues; and
- Mediation is flexible. While many mediators prefer to meet with all the parties in a general or joint session, the process also allows breakout rooms (including within video online conference tools) to enable the mediator to speak privately (caucus) with parties and their mediation advocates (their counsel); and
- Mediation can be less costly[33] than litigation financially, emotionally, and in terms of the expenditure of time; and
- Mediation keeps control of the process with the parties, their mediation advocate, and the selected mediator.

Mediation offers rich settlement opportunities to the client and the mediation advocate. It's important to remember that you don't have to be a litigator to be a well-versed mediation advocate. Further, as a mediation advocate, you benefit from the early adoption of these principles. These principles and the ideas behind mediation—particularly if chosen before litigation is commenced—should be fully introduced to the client. Such a discussion will serve to instill in that client and, by word of mouth, other future clients, the benefits of mediation as a productive settlement process and will establish mediation (and your role as mediation advocate) as a favored choice in dealing with these types of conflicts.

Given the presumptive dispute resolution mandate within the courts, it is important to inform clients that most, if not all, matters are likely to be referred for mediation once the matter is commenced in court. In the authors' opinion, it is, therefore, far more effective to consider a private mediation approach prior to even starting litigation.

Retaining the Mediation Advocate

Representation should begin with a written retainer agreement that describes the nature of your services as mediation advocate. Although the New York Code of Professional Responsibility doesn't specifically address the contents of this type retainer agreement, you should anticipate and discuss with your client whether representation will be solely for the mediation (limited scope representation), or whether representation will continue if a settlement agreement through mediation is not achieved. Remember that if there is no settlement, when you serve as mediation advocate and plan to continue as the litigation attorney, you will remain bound by the same mediation confidentiality agreement[44] as the client participants.

Mediation Advocate's Preparation

Mediation requires a client-focused preparation.[55] The preparation for this process is not the same as for litigation. Yes, you must know the facts and law of your case, and the strengths and weaknesses of the case. However, you are not preparing a direct examination of your client; you are not preparing a cross examination of the other participants. Instead, you are preparing your clients to communicate the issues as they see them, the emotions or feelings the clients want heard, and the points of disagreement the clients believes exist. This preparation includes "brainstorming" with your client for possible settlement options, as well as exploring possible obstacles to your clients' proposals.

Most mediators, including the authors, use a pre-mediation screening process. In addition to conflicts checks, pre-mediation screening assures that there are no issues of violence between any parties or participants to the mediation, no orders of protection, no senior abuse, and no child abuse.[66]

The pre-mediation contact is generally conducted between the mediator and mediation advocate(s) and their clients. However, if all parties are represented and the participants agree, then the pre-mediation contact can be conducted solely with the mediation advocates; or, if any or all participants are pro se, between the mediator and individual participant(s), including the mediation advocate if one has been retained.

Some mediators ask for a confidential pre-mediation written statement from the mediation advocate(s) summarizing the issues of dispute and the positions of the participants. Pre-mediation written statements are also a good way for the mediation advocate to prepare for the mediation. The statement usually includes answers to the following queries:

- What are the positive aspects of your client's case?
- What are the negative aspects of your client's case?
- What do you think your client might be willing to explore as possible solutions?

Preparation also means instructing your client on how to listen and how to refrain from judging the other participants' comments when "their version of truth" is expressed.

Finally, your preparatory role as the mediation advocate includes helping set realistic expectations for your client. Mediation is often not about facts or law. It is about the interests of the participants. Ultimately, mediation means reaching a satisfactory (but not perfect) resolution in the dispute by identifying the parties' real interests, i.e., the emotional generators of the clients' positions. Identifying the clients' interests requires a key skill set that must be developed by the mediation advocate, as well as by the mediator.

Mediation Advocate's Role in Mediation

The mediation advocate can also serve as a source of information. The neutral mediator does not act as a subject-matter expert, nor does the mediator evaluate the pros and cons of contested issues from a legal perspective. For example, even if the mediator is knowledgeable about a particular area, the mediator can neither educate nor opine on whether a pooled income trust may be used to shelter excess income; if life insurance with a beneficiary designation passes through probate or to the named beneficiary; what per stirpes means, etc.

If the parties agree, it is the mediation advocate(s) who may be able to provide that information. Some mediators ask open-ended questions to elicit subject matter information which might help the parties understand the legal perspectives, or even limits, of the disputed issues.

Once the mediation session begins, it's helpful to remember that neither your client nor you, as the mediation advocate, should focus on convincing or impressing the mediator. Keep in mind that the mediator is not a judge or advocate for either side. The session is about the clients, not you. With your help, the mediator is there to support the participants through the process, facilitate dialogue using specific skills, and promote creative ideas for resolution.

Other dimensions of serving as mediation advocate during the mediation include:

- Acting as a problem-solver and encouraging your client to be a problem-solver.
- Refraining from exaggeration or false statements.
- Refraining from adversarial "tactics."
- Overcoming the fear of sharing information due to fear of exploitation. Share unless there's a reason for not sharing. (Example: "My client is open to continuing a relationship . . .").
- Making sure your client's interests are met. In the authors' experience, the single most important aspect of negotiating through the mediation process is understanding what truly motivates your client.
- Preparing to agree with the opposing mediation advocate when he or she is right or makes a good point.
- Maintaining a positive attitude and not being discouraged if the dispute doesn't settle right away. The mediation may take several hours or multiple sessions. Be prepared to stay the course until the dispute is resolved or until the mediator concludes that an impasse has been reached.

Closing the Mediation

As with most settlement agreements, the mediated settlement is generally reduced to a writing and all participants sign the mediation agreement. In general, matters that are pending in court may require court approval.

For private mediation between parties, the written mediation agreement provides the contractual basis for moving forward on such decisions as who will serve as Article 81 guardian pre-petition, visitation with family members, Medicaid planning, who will serve as administrator in an estate, the timing for the sale of a home, the selection of a realtor, etc. Needless to say, the mediation

advocates must carefully review any settlement agreement in a collaborative approach.

Mediation can protect the continuing relationships between the parties, who are usually family members.[77] As a mediation advocate, you play a valuable professional role. That role is an essential part of today's emerging alternative dispute resolution processes. The best part of being a mediation advocate is that even if mediation does not result in an agreement, it doesn't mean that the mediation failed. If your client, with your help, comes away with having felt heard—maybe for the first time ever—you will have succeeded in your role as a mediation advocate.

Endnotes

1. Press release of Office of Court Administration found at https://ww2.nycourts.gov/ip/adr. Presumptive dispute resolution includes but is not limited to mediation, court-led settlement conferences, early neutral evaluation (in matrimonial disputes) and arbitration.
2. Pro se litigants (and pro se participants pre-litigation) also use mediation. However, the focus of this article is on the role of the attorney as mediation advocate.
3. This is particularly true in the MHL Article 81 guardianship arena where a petitioner can be directed to pay the legal costs of the alleged incapacitated person, court evaluator, and the alleged incapacitated person's counsel when a matter is dismissed by the court. *See, e.g.*, MHL 81.16 and Supplementary Practice Commentaries.
4. A typical confidentiality clause includes the following:

   > The participants and mediator agree that the mediation process is private and confidential. All written and oral communications in connection with or during any mediation session are deemed confidential and may not be disclosed or used for any purposes outside of the mediation and are inadmissible for any purpose in any proceeding by any participants to the mediation. Any and all privileges and rules of evidence regarding the confidentiality of settlement discussions shall apply to all discussions, conduct occurring during the course of mediation, documents prepared for the purpose of or in the course of, or pursuant to the mediation. A mediation communication is not subject to discovery nor admission into evidence, but this privilege does not extend to the underlying facts of the dispute. Evidence that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery by reason of its use in mediation.

5. Attorneys can play an important role in mediation as "agents of reality." An attorney in mediation might view themselves as collaborating with the mediator to 'reality check' the potential outcomes of, for example, a contested guardianship or estate matter, and to help their client frame the discussion and potential solutions possible outside of a courtroom and the rules of evidence. *See* "Sharing a Mediators Powers: Effective Advocacy in Settlement," Dwight Golann, ABA Dispute Resolution Section (2013).
6. Whether a particular matter will commence or continue if abuse is disclosed or is determined is based upon the particular rules governing the mediation. Those rules will vary depending upon the source of the mediation (for example, the court), the mediation organization (for example, a nonprofit dispute resolution center), or the contractual arrangement with a private mediator.
7. *See Mom Always Liked You Best: A Guide for Resolving Family Feuds, Inheritance Battles and Eldercare Crises*, Arline Kardasis, Rikk Larsen, Crystal Thorpe and Blair Trippe, 2011 (Amazon.com).

Update on ELSN Task Force on Long-Term Care Facility Reform and Oversight

By Joanne Seminara and David Kronenberg

As we head into 2021, we want to update our Section members on the work of the Elder Law and Special Needs Section's Task Force on Long-Term Care Facility Reform and Oversight. For the past eight months, we've had the honor of serving as co-chairs of the task force and collaborating, almost daily, with our incredible roster of colleagues from across New York State who volunteer with us. It is our hope that this task force will become a permanent Special Committee of the Elder Law and Special Needs Section. We cannot do this alone and we encourage participation of any section member who would like to join our effort.

While our impulse to create the task force was a reaction to the devastating effect of COVID-19 on long-term care facilities in our communities and more specifically, the death and suffering of so many of our clients and their families, it immediately became clear to us that no examination of the pandemic's effect would be appropriate without first understanding the pre-existing conditions at these facilities. It was evident that COVID-19 was merely the spotlight that starkly exposed systemic problems in how care and services are provided to residents in a great number of facilities across New York State. We also recognized (and learned more about) a history of failure to enforce the laws and standards of care prior to the pandemic, which had a direct correlation to how ill-equipped these facilities were to appropriately care for their residents when confronted with such an infectious disease.

So, then we got to work. We organized the task force into three subcommittees: **Education and Resources**, **Advocacy for Legislative Change** and **Community Outreach**. We asked our subcommittee chairs to describe the status of their efforts to date:

Education and Resources Subcommittee

The Education and Resources Subcommittee's co-chairs are Andria Adigwe of Hinman, Howard & Katell, LLP in Binghamton, and Nina Loewenstein of the Disability Law Center in Massachusetts. The Education and Resources Subcommittee has been actively working on two projects: first, planning a series of legal education programs and webinars to educate attorneys as well as the wider community of advocates, service providers, family members, and others on various topics relating to long-term care and avenues for reform; and second, developing an online library of resources in long-term care and its legal issues.

Joanne Seminara

David Kronenberg

CLE and Informational Webinars: The Education and Resources Subcommittee is pleased to be planning and cosponsoring several of its webinar programs together with the Long-Term Care Community Coalition (LTCCC), a leader in education and data analysis supporting the rights of nursing facility and assisted living facility

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Joanne Seminara, a partner of the elder law firm of Grimaldi & Yeung LLP, has practiced law for over three decades. Licensed in New York and New Jersey, she concentrates on elder law, estate and trust planning, including estate tax and Medicaid and special needs planning. She is experienced in other practice areas including residential and commercial real estate, corporate law, employment law and land use and zoning matters. Seminara regularly speaks at community education seminars on estate, trust and tax matters and conducts CLE seminars. In 2015 Seminara, with Judith Grimaldi, authored her first book entitled, Five @ Fifty-Five; Five Essential Legal Documents You Need by Age 55. She is Co-chair of the Elder Law and Special Needs Ethics Committee and Co-chair of the ELSN Special Committee on Long Term Care Facility Reform.

residents. The series, which is free and open to the public, began in October with a foundational legal education program on nursing home laws and regulation, oversight of facilities, and the context and history leading to the devastation of COVID in nursing homes. The webinar presentation by Richard Mollot, executive director of LTCCC and John Dalli, of Dalli & Marino, LLP, drew at least 265 attendees that day. Next, the subcommittee coordinated an informational program in November on nursing homes residents' rights, focused on the long-term care ombudsman program, visitation, involuntary discharges, and discharge planning rights. New York City's Regional Ombudsmen Coordinator Deirdre Garrett-Scott and the Director of the Open Doors Transition Program Suzanne DeBeaumont joined attorneys Lindsay Heckler of Center for Elder Law and Justice and Daniel Ross of Mobilization for Justice (MFJ) for a webinar that drew over 170 attendees. On December 3, Richard Mollot and Tanya Kessler of MFJ presented a CLE webinar on adult care facilities, and Lindsay Heckler presented a CLE on involuntary discharge hearings at the statewide ELSN Annual Meeting program in January.

Our Subcommittee and LTCCC are currently developing a CLE program on federal changes in nursing facility policy and regulation, and what to expect from the new Biden administration. This promises to be an exciting and timely presentation, featuring Toby Edelman of Center for Medicare Advocacy, Eric Carlson of Justice in Aging, and Cathy Hurwit, who was a health care policy advisor to the Biden campaign following a career of Congressional legislative experience in health care issues, and Richard Mollot of LTCCC. The subcommittee is also developing a program on COVID-19 and Office for People with Developmental Disabilities facilities and group homes, and a program on alternatives to large congregate nursing facilities, including community-based supports and housing as well as smaller home-like facilities. The subcommittee could not present these programs without the participation and expertise of non-profit organizations whose staff advocate every day for long-term care facility residents. The task force wishes to support the work of these vital non-profits and has arranged for donations to the non-profit agencies contributing to these programs.

The Library: The Education and Resources Subcommittee has developed an outline for an online library on long-term care resources, including federal and state laws and regulations, agency oversight and enforcement, advocacy resources, and litigation topics. The subcommittee is thrilled to be able to launch the library in partnership with Albany Law School's Government Law Center. Mentored by subcommittee members, law students will develop and update the informational materials in exchange for free bar membership and trainings. The goal is to create a library that is comprehensive, user friendly and accessible to all. It is expected to be operational in 2021.

Advocacy for Legislative Change Subcommittee

The Advocacy for Legislative Change Subcommittee's co-chairs are Lindsay Heckler, Supervising Attorney at the Center for Elder Law & Justice in Buffalo and Guilia Marino, of Marino & Marino, P.C. in Great Neck. This subcommittee has analyzed multiple pieces of legislation and has written memos of support for three bills:

(1) A.2954(Gunther)/S.1032A (Rivera) Safe Staffing for Quality Care Act,

(2) A.4416C(Gottfried)/S.3460A(Rivera) Relates to Violations of Safety Conditions in Adult Care Facilities, and

(3) A.10486(Gottfried)/S.8403(Rivera) An act to amend the social services law, in relation to eligibility for medical assistance for personal care services for persons with traumatic brain injury, cognitive impairments, developmental disabilities, blindness, or visual impairment.

With the subcommittee's recommendations, the ELSN Section's Executive Committee voted unanimously in favor of our Section supporting these three bills.

Throughout the session, the state legislature actively introduced numerous bills aimed at addressing the COVID-19 crisis and the longstanding issues in long-term care. The subcommittee continued to review and analyze the bills throughout the session, and members recently met with legislative staff to discuss legislation pertaining to in-person visitation in nursing homes.

Community Outreach Subcommittee

The Community Outreach Subcommittee co-chairs are Judith D. Grimaldi of Grimaldi & Yeung LLP in Brooklyn and Linda Redlisky of Rafferty & Redlisky, LLP in Pelham. The goal of this subcommittee is to recruit a statewide network of advocates as local "eyes and ears," foster relationships both with local long-term care providers and community stakeholders, and support the work of the regional chapters of the New York State Ombudsman Program and other advocacy organizations to enhance the quality of care provided to residents.

Linda Redlisky and David Parker developed a pamphlet, entitled: **Know Your Rights for Visitation in Nursing Home During COVID,** to be prepared in partnership with the NYSBA's communication office. Judith D. Grimaldi and ELSN Treasurer Britt Burner recently met with Claudette Royal of the New York State Office of Aging and a representative of the Ombudsman Program to plan an ELSN Section's training for our section's District Delegates and any other interested NYSBA members on resident rights in nursing homes and how to collaborate with Ombudsman program. The program is tentatively scheduled for March 2021 subject to NYSBA CLE department schedule.

The subcommittee is working on an article for the *Journal* on how to advocate for clients who reside in nursing homes and other long-term care facilities using the federal and state nursing home rights laws and the patient-centered focus of these laws. The article will be to be drafted by members Patrick Conway and Deidre Baker.

Finally, subcommittee members Holly Mosher and Aytan Bellin, who specialize in litigation, are gathering data on any reported nursing home noncompliance issues with the goal to develop an online resource of material with a simplified consumer tab for public and client use on nursing home resident rights, advocacy and how to research nursing home and long-term care facility quality standards and ratings. This project may be a perfect addition to the Education and Resources Subcommittee's online Library described above.

A Call for Involvement

Colleagues, the progress of our work on this Special Committee depends on participation. If you are a member of the Elder Law and Special Needs Section and would like to be an active member in our efforts, please let us know by contacting us directly or through the Section's listserv community. During this time where we have been forced to be physically separate, our shared goal of increasing the quality of resident care in long-term care facilities has brought us together in a powerful way. We welcome you to join us.

Retirement Account Treatment for Employed SSI-Related Medicaid Applicants

By Nicholas N. Khayumov

Many of our colleagues and clients already know that in order for an individual in New York to qualify for non-MAGI Medicaid, the individual will need to have less than the applicable resource limit (currently $15,900 for a single individual).[1] In determining whether someone is eligible, qualified retirement accounts, such as 401(k)s, IRAs, etc., are afforded with the opportunity to be disregarded as a resource. Each qualified retirement account owned by the applicant can be disregarded, so long as the retirement account in question is in "payout status" and the applicant is receiving distributions based on the applicant's life expectancy. If this is the case, the underlying value of the retirement account will not count as an available resource, but the distributions that are made will count as income.[2]

However, for certain retirement plans, such as Employer-Sponsored 401(k) Plans, distributions from the plan can only be made after the employee has been terminated. Though rare, some SSI-related Medicaid applicants *may still be classified as employed* at the time of application. Their termination may result in unintended consequences, such as forfeiting access to the employer-sponsored health insurance coverage for the applicant and the applicant's family as well. In these rare instances, it is crucial to review the retirement plan in detail. There may be an option, for example, to rollover the 401(k) into a different retirement plan that would allow for distributions without first requiring a termination.

If that is not an option, and the applicant cannot access the retirement fund without first being terminated, should the local Department of Social Services treat the retirement account as an available resource?

The answer is **no**. The applicable Medicaid guidelines and rules seem to account for such a scenario. On Pages 316 of the Medicaid Reference Guide, "a retirement fund is not a countable resource if an individual must terminate employment in order to obtain any payment." As such, the entire retirement account will not be counted a countable resource nor as income since no distributions can be made. Naturally, if the Medicaid recipient is ever terminated from his or her employment, the retirement account will be at risk of losing its exempt status, unless it is placed into payout status in line with the Medicaid recipient's life expectancy at that time.

Nicholas N. Khayumov

Endnotes

1. *See* GIS 19 MA/12 at https://www.health.ny.gov/health_care/medicaid/publications/docs/gis/19ma12.pdf.
2. *See* GIS 98 MA/024 at https://www.health.ny.gov/health_care/medicaid/publications/docs/gis/98ma024.pdf.

Nicholas N. Khayumov's practice is focused on estate planning and Medicaid planning. He counsels individuals and families in planning for long-term care needs for themselves and their loved ones and provides guidance and advocacy in the Medicaid application and long-term care authorization process. Handling virtually all of the firm's Medicaid planning matters, he is well versed in elder law, asset protection, and navigating the complicated Medicaid arena. His clients are located throughout Westchester, Putnam, Rockland, and Nassau counties, as well as New York City.

Before joining Hollis Laidlaw & Simon, Khayumov worked at several Manhattan-based law firms, concentrating in trust and estate planning, commercial litigation, and dispute resolution. Khayumov is a New York native and is fluent in English and Russian, and conversant in Spanish.

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