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The Senior Lawyer

A publication of the Senior Lawyers Section
of the New York State Bar Association

96-Year-Old Attorney Richard Woodman Still Practicing After 71 Years

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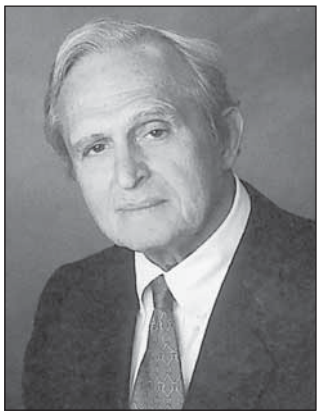

Greetings:

What a pleasure to greet you as you receive the second edition of our Senior Lawyer newsletter. A full year has now elapsed since our Section was sanctioned by the State Bar Association and we are busy pursuing our mission. With nearly 1,200 members, we are becoming more mature and influential month by month.

Our Fall Meeting, held jointly with the Elder Law Section at the Sagamore Resort at Bolton Landing, N.Y., was filled with useful programming (including an opportunity to meet with a life coach) and afforded us an initial opportunity to socialize a bit. Our eleven committees have been engaged in "doing their thing." Their names tell their story, e.g., Age Discrimination, Law Practice Continuity (of special value to sole practitioners in event of death or disability), Technology (with emphasis on the needs of seniors), Retirement Planning and Investments, Pro Bono (opportunities for seniors to remain engaged and to become "Emeritus Attorneys" with no OCA registration fee and no MCLE obligation under the Chief Judge's new rule), and Quality of Life (addressing social activities, discounts, useful Web sites, mentoring and other helpful services).

At the Association Annual Meeting at the Hilton New York our Section met on January 29. Approximately 100 of our members attended a program dealing with long-term care and investments, followed by a wine and cheese reception. Plans are under way for the remainder of 2010. Be a part of them! Check our Senior Lawyer page on the NYSBA Web site at www.nysba.org/sls and the significant quantity and quality of useful articles, Web sites, webinars, seminars and other valuable material posted there. I hope we can meet to get acquainted at one of our upcoming events.

Justin L. Vigdor

About the Senior Lawyers Section

As people are living and working longer, the definition of what it means to be a senior continues to evolve. The demographics affect us all, including lawyers. In July of 2006, the New York State Bar Association formed a special committee to recognize such lawyers and the unique issues that they face. As the result of the work of this committee, the House of Delegates approved creation of the first Senior Lawyers Section of the New York State Bar Association.

Lawyers who are age 55 or older have valuable experience, talents, and interests. Many such senior lawyers are considering or have already decided whether to continue to pursue their full-time legal careers or whether to transition to a new position, a reduced time commitment at their current position and/or retirement from a full-time legal career. Accordingly, the Senior Lawyers Section is charged with the mission of:

- Providing opportunities to senior lawyers to continue and maintain their legal careers as well as to utilize their expertise in such activities as delivering pro bono and civic service, mentoring younger lawyers, serving on boards of directors for business and charitable organizations, and lecturing and writing;
- Providing programs and services in matters such as job opportunities; CLE programs; seminars and lectures; career transition counseling; pro bono training; networking and social activities; recreational, travel and other programs designed to improve the quality of life of senior lawyers; and professional, financial and retirement planning; and
- Acting as a voice of senior lawyers within the Association and the community.

To join this new NYSBA Section, see page 57 for a Membership Application, go to www.nysba.org/SLS or call (518) 463-3200.

A Message from the Editors


Willard H. DaSilva

In this, the second issue of *The Senior Lawyer*, it is my turn to express some thoughts on what a senior lawyer is or could be.

To be a senior is to be the B. M. O. C. (Big Man on Campus). As a senior, you are the most important person, because others consider you have reached the pinnacle of your career. You are generally looked up to for your accomplishments and sought after for your sage advice regarding life and the law. As a Senior Court Attorney, I thought that I was at the peak of my career. However, there were higher titles to achieve such as Associate Attorney and Principal Attorney. In the New York State Bar Association, the Senior Lawyers Section is the peak of membership. Therefore, be proud to join the ranks of the Senior Lawyers Section, if you are eligible, and enjoy all that the title carries with it. As senior lawyers, we have goals to achieve. Now that some of us are retired or semi-retired, our lives and careers take a different course. We set out in yet another direction for the remainder of our lives. Hopefully, this new era will be as worthwhile as our earlier years.

Having served as a director of the Legal Aid Society for several decades, I have discovered how rewarding it is to do pro bono legal work for the less fortunate of our society. We all have talents in various fields of law. At this stage of our lives, it would be a wise and generous use of these talents to donate them to assist those unable to afford needed legal services.

Recently, the very first Pro Bono Week celebration was held at the Court of Appeals for the State of New York at Albany. Many communities in the state celebrated the week by providing various pro bono programs. In Oneida County, a local law firm and the County Bar Association sponsored the presentation of *To Kill a Mockingbird*. The movie was about a pro bono attorney, Atticus Finch, who donated his time and talents as a trial attorney in the defense of Tom Robinson, an alleged rapist. Tom was a black man in the South, accused by a white man and his daughter. No doubt many of you are familiar with this classic civil rights film. The movie was presented at the Stanley Theater, a performing arts theater in Utica, New York. In the morning, the movie was shown to area high school students free of charge. Approximately 600 teenage children attended the performance from all over central New York. That evening, the general public was invited to attend a showing of this classic film, also free of charge.


Donald J. Snyder

During this Pro Bono Week, many attorneys donated their services to assist area veterans with their various legal problems.

The Second Annual Pro Bono Week will be announced in the Fall of 2010. I would urge any readers of this message to promote such programs to make people aware of the pro bono contributions made by the legal profession.

There are so many ways to contribute your services in the cause of pro bono legal representation and education. It would be outstanding if each senior considered becoming involved in his or her local Legal Aid Society office. In Oneida County, some of our retired judges and attorneys donate a portion of their time each week to the staffing of the Legal Aid office. They answer telephone questions and interview potential clients. When invited, they speak at schools and community organizations about Legal Aid services, as well as the legal profession in general. Our local Bar Association also promotes a telethon program known as "Legal Line." Area residents are able to call approximately 50 attorneys with any legal question. No client / attorney relationship is established by these calls, but a great deal of free legal advice is provided to the local residents.

If you have expertise in the income tax field, you might help individuals with the preparation of their Federal and New York State income tax returns. You could volunteer to assist individuals in drawing their last will and testament, powers of attorney, living wills and health care proxies.

There are so many less fortunate people who need our legal expertise. As senior attorneys we can now provide free service to the needy in our communities. The rewards might be far greater than the payments received from fees for the same services provided in private practice. It has often been said that the more you give, the more you receive. By being giving seniors, we might receive as individuals the rewards of giving and our profession might receive a needed boost in its reputation among the public at large.

On behalf of myself and my co-editor, Willard H. DaSilva, I encourage each of you to join the Senior Lawyers Section of the New York Bar Association. Some attorneys who reach the age of 55 and beyond do not want to be considered old or done with lawyering. On

the contrary, you can be a tremendous asset to the legal profession.

For the first time in the history of our country, members of four generations are serving in the same workforce together. Sometimes, the younger generations may not understand communications written to them in cursive writing. Likewise, the older generations might not understand the twittering messages sent to them. Nonetheless, all members of these four generations are necessary in a smooth-running organization. People are living much longer, and they find themselves in better health. They may have need of additional income due to the challenges of a less robust economy. For whatever reason, we all have something to offer to one another. The point I've been trying to make is that you're never too old to be of service and to be vital in our society. Becoming a member of the Senior Lawyers Section of the New York State Bar Association will not have a negative effect on your talents and abilities. Rather, it will provide you with a forum to present your thoughts and ideas for the rest of the bar members. Some of the members of the Senior Lawyers Section are also members of the Young Lawyers Section, because they may be recently admitted to practice law. Please consider joining our growing ranks. We are fast becoming one of the largest sections of the New York State Bar Association.

As my co-editor Bill pointed out in our first edition, "To make this magazine most helpful to you, your input is needed. Comments good or bad are earnestly solicited to help make this link between the Section and you a two-way street, with feedback from you. If there is something you like, say so—so that we may provide more of that kind of article. Conversely, if you have a negative criticism, please speak up so that we may make this magazine what you want it to be. We would like you to look forward to each issue. We can make that happen—but only with your help. If you have a penchant for writing, submit your articles and comments to us. This is your magazine, and you have the opportunity to have your thoughts published, not just for your sake but for the benefit of the rest of us. So let us hear from you."

I have written this column for my co-editor, Willard H. DaSilva, and myself. In the next issue it will be his turn to express our thoughts and opinions in this space.

Donald J. Snyder, on behalf of my co-editor, Willard H. DaSilva, and myself

Lawyer, 96, Still Holding Chaos at Bay After 71 Years

Waterville's Woodman Credits "Good Health and a Good Assistant"

By Courtney Potts

Richard Woodman has been a lawyer for a long time.

How long? Put it this way—his daughter retired from her law firm two weeks ago as the Oneida County Bar Association recognized him for still working at his.

Woodman, 96, was among several lawyers honored at the association's holiday party earlier this month for having been in practice for more than half a century.

Richard Woodman, at 96, still goes to the office every day.

Even now, with 71 years behind him, he said he's still not ready to quit.

"I feel that the practice of law is probably the most honorable, necessary profession there is," he said. "If you didn't have law and order, what would you have? Chaos."

Woodman said he still sees clients, attends mandatory classes each year to keep up with changes in the law, and serves on the board of at least one local charity.

He encourages young lawyers to do pro bono, or volunteer, work to sharpen their skills and to give back to the community.

"I've tried hard to be a good lawyer, a good person and a good citizen," he said.

Rent Was $25 a Month

The son of an accountant, Woodman grew up in New Jersey and graduated from St. John's College in Annapolis, Md., in 1935. He worked in law offices during the day to put himself through night classes at New York Law School, and was admitted to the Bar in 1938.

After moving to Waterville in 1942, Woodman made just $30 per week. That was okay, he said, because his rent was only $25 per month.

A year later, he was drafted into the U.S. Army. Over the next three years, he fought in the Philippines, served in the Counter Intelligence Corps in New Guinea and went on to try cases as a Judge Advocate General's Corps lawyer.

Returning home to his wife, Mildred, he set about building a reputation as a skilled general practice lawyer, and later specializing in real estate and estate work.

> *"I feel that the practice of law is probably the most honorable, necessary profession there is.…If you didn't have law and order, what would you have? Chaos."*
> —Richard Woodman

Today, the practice that Woodman and partner William Getman run in Waterville is one of the oldest in the area, he said. It was founded in 1900 by the father of his first employer—lawyer and former National Bank of Waterville President Harold Fuess—and passed down through the years to become Woodman & Getman.

The two have worked together since 1976, and Woodman credits "good health and a good assistant" with much of his success.

Editor's Note

When this newsletter is published, Richard S. Woodman will be approaching his 97th birthday in June 2010 and 72 years of active practice of the law. Thank you, Dick, for your years of service and for the 44 years we have been associated.

Donald J. Snyder

"I don't work too hard," he said of his current schedule. "He (Getman) does most of the work now, but I do go to the office every day, and I still have some old clients."

"He's a Role Model"

For someone who doesn't work too hard, Woodman has quite a list of accolades.

Not only is he a former president of the Oneida County Bar Association, he's also a recipient of the group's highest honor—the Hugh R. Jones Award. The prestigious award is presented each year to an attorney who has provided outstanding service to the legal profession and community.

Michael Getnick—president of the state Bar Association and a local lawyer with Getnick Livingston Atkinson & Priore—said Woodman is highly regarded by the local law community and that he would not hesitate to let the elder counselor represent him.

The two first met almost 40 years ago when Getnick moved to the area as a legal aid attorney in 1970.

"I doubt that many people who practice for 71 years would be as active as he has been and continues to be in the practice of law," Getnick said. "He's a role model as to the ability to continue practice for those fortunate enough to have the health and the mental acumen to keep it up."

Woodman said many of the accomplishments that made him "the most fortunate person" aren't work related, however.

He and his wife were married for 63 years prior to her death four years ago. He has two daughters, two grandchildren and three great-grandchildren, with another great-grandchild expected next month.

This article originally appeared in the December 13, 2009 issue of the Observer-Dispatch*, published in Utica, N.Y., and is reprinted with permission.*

Introducing the New York State Attorney Emeritus Program

By Chief Judge Jonathan Lippman

New York's lawyers have a proud tradition of helping those in need. It is in that spirit that the Court System has created the Attorney Emeritus Program, which is intended to encourage retired attorneys to volunteer their legal skills and experience to help the growing number of New Yorkers who cannot afford a lawyer.

I have long believed that we should take better advantage of the valuable skills and experience of the many thousands of senior lawyers who are retired or contemplating retirement in the near future. That is why the Administrative Board of the Courts, consisting of me and the four Presiding Justices of the Appellate Division, recently amended the attorney registration rules, effective January 1, 2010, to create a new option whereby attorneys who certify on their attorney registration form that they are retired from the practice of law but want to continue to practice law on a pro bono basis may now register as "Attorneys Emeritus."

In return for enjoying this unique status, Attorneys Emeritus must agree to provide at least 30 hours annually of pro bono legal services to low-income clients under the auspices of qualified organizations, including legal services programs, bar associations, and court-sponsored volunteer lawyer programs. In order to be eligible, one must be a retired lawyer in good standing who is at least 55 years of age and has practiced law for a minimum of 10 years.

Upon enrolling in the Attorney Emeritus Program, retired lawyers will be connected with organizations that need pro bono lawyers in their area of the State. In most cases, volunteers will provide legal advice and assistance in a variety of civil and family law matters, including preparing petitions and other legal documents.

In designing this Program, we have tried to make it as convenient as possible while addressing several issues that senior lawyers traditionally cited as obstacles to engaging in pro bono activity. For example, we have arranged for malpractice insurance to be provided by the legal services program that the senior attorney signs up for. In the case of our many court-sponsored pro bono programs, volunteers will be covered by the defense and indemnification provisions of Public Officers Law § 17. Attorneys Emeritus will continue to be exempt from any mandatory continuing legal education requirements as well as the biennial $350 attorney registration fee. Finally, beyond the personal satisfaction derived from aiding someone in need, Attorneys Emeritus will receive a special acknowledgment from the Chief Judge and the New York State Bar Association President upon completion of 60 hours of pro bono service over a two-year period.

We are pleased to have the support and participation of The Legal Aid Society and many other organizations that are eager to make use of the skills of senior volunteers. We will work with these programs on an ongoing basis to make sure that retired lawyers enjoy a satisfying pro bono experience and provide quality legal services to clients. We are committed to providing appropriate training, mentoring and supervision, offering a wide selection of pro bono programs and opportunities around the state, and doing the best job we can of connecting volunteers to meaningful opportunities that match their areas of legal expertise or interest. The Program will be administered by Deputy Chief Administrative Judge Fern Fisher, who also serves as the Director of the Unified Court System's Access to Justice Programs and has done an excellent job of encouraging lawyer pro bono.

To kick off the Attorney Emeritus Program, I wrote a letter to thousands of retired lawyers last month urging them to become Attorneys Emeritus. It is important for retired lawyers to know that they do not have to wait until they receive their next attorney registration form to begin participating in this Program. They may enroll now by visiting our Web site at www.nycourts.gov and completing a short online form that both captures basic information about volunteers and provides information about the types of pro bono assignments that are available statewide. Retired lawyers who have questions about the Attorney Emeritus Program can call 877-800-0396 or email us at volunteerattorneys@nycourts.gov.

It is clear to me already that this initiative has struck a chord with senior lawyers who want to use their retirement years in a way that contributes to the public good. I hope that you will consider becoming an Attorney Emeritus and volunteering your time and legal skills to help some of the two million unrepresented New Yorkers who appear in our courts each year—many of them poor and vulnerable persons who need legal advice and assistance.

Jonathan Lippman was appointed Chief Judge of the State of New York and Chief Judge of the Court of Appeals by Governor David A. Paterson in January 2009, and confirmed by the New York State Senate in February 2009. He presides over the State's seven-member Court of last resort and heads the State's Unified Court System, overseeing a court system with a $2.7 billion budget, 3,600 state and locally paid judges and over 16,000 non-judicial employees in over 350 locations around the State. He received his B.A. from New York University, from which he graduated Phi Beta Kappa and *cum laude*, with a major in Government and International Relations. He received his J.D. from New York University School of Law.

"New York lawyers have an extraordinary history of helping those in need. We hope that eligible attorneys who have completed the active practice phase of their careers will embrace the role of Attorney Emeritus and put their valuable skills and experience to work on behalf of the many New Yorkers who cannot afford legal assistance. On behalf of the organized bar, legal services programs and the court system, I look forward to the growth of the Attorney Emeritus Program and to personally recognizing every attorney who completes this exemplary service."

— Chief Judge Jonathan Lippman

The new Attorney Emeritus status took effect on January 1, 2010, and was created by the Administrative Board of the Courts, consisting of Chief Judge Jonathan Lippman and the four Presiding Justices of the Appellate Division.

THE NEW YORK STATE UNIFIED COURT SYSTEM

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volunteerattorneys@nycourts.gov

877-800-0396

Are you retired,
or thinking about
retirement, but not quite
ready to put away the
briefcase and leave the law?

ATTORNEY EMERITUS
—New Status

The Unified Court system, in cooperation with the organized bar and legal services programs, has established a new "Attorney Emeritus" status for attorneys who certify that they are retired from the practice of law but want to volunteer their legal skills and experience to help the growing number of New Yorkers who cannot afford counsel.

THE NEW YORK STATE UNIFIED COURT SYSTEM

ATTORNEY EMERITUS

New Status

If you enroll as an Attorney Emeritus you will be matched with pro bono opportunities in your area of the state.

You will be fully trained to provide legal advice and assistance to low and moderate income New Yorkers through pro bono programs sponsored by legal services organizations, bar associations and the court system.

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THE NEW YORK STATE UNIFIED COURT SYSTEM

Q&A

volunteerattorneys@nycourts.gov

How can I become an Attorney Emeritus?

You may enroll as an Attorney Emeritus when you next receive your attorney registration form. Or you may enroll now by calling **877-800-0396** or going to **www.nycourts.gov** and completing a short online form.

What are the requirements for this new status?

You must be 55 years of age, be an attorney in good standing, and have practiced for a minimum of 10 years.

Will I be exempt from the $350 registration fee and the CLE requirements for active practitioners?

Yes. There will be no fee and no CLE requirements beyond the free training programs necessary to provide pro bono services.

How many hours of pro bono must I commit to performing?

In a 2-year registration period, you must perform a minimum of 60 hours of pro bono service under the auspices of an approved legal services organization in New York, including bar association pro bono programs and court-sponsored volunteer lawyer programs.

What kind of previous experience must I have in the area of law in which I will provide advice?

While helpful, no previous experience is required. You will be fully trained and supervised by the organization through which you provide legal services.

Will I be covered by legal malpractice insurance?

Yes. You will be afforded malpractice insurance coverage by the organization through which you perform legal services, and if you participate in a court-sponsored pro bono program you will be covered by the defense and indemnification provisions of Public Officers Law §17.

What kinds of assistance will I be asked to provide?

In most cases, you will sit down with those seeking assistance to advise them about their rights, the legal process and which next steps they should pursue. You may provide limited help to litigants to assist them in preparing petitions, complaints and other legal documents; or you may choose some programs in which you will become the attorney for the litigant and provide full representation.

What if I have additional questions about the program?

Please call 877-800-0396 or contact: **volunteerattorneys@nycourts.gov**.

Do I have to wait for my attorney registration materials to sign up for this new status?

No. You may enroll anytime by calling **877-800-0396** or going to **www.nycourts.gov** and completing the online form.

Workers' Compensation: Take a Second Look

By John H. Snyder

Have you ever had a client walk through your door with a Workers' Compensation question? Quickly you tell them, "I do not do Workers' Compensation. They speak their own language in Workers' Compensation and I usually walk out more confused then when I went in." Well, this article hopes that you consider taking that question. Of course, you might need to do a little background work first.

Workers' Compensation does have its own language. However, it is not as difficult as it seems, especially if you represent injured workers the system is designed for. Under Section 21 of the Workers' Compensation Law several presumptions exist in favor of the injured worker. As a wise person once told this pessimistic carrier attorney, "This is the 'Workers' Compensation system for a reason." That reason is to get benefits to injured workers as quickly and easily as possible. As a result, the benefit of the doubt goes to the claimant.

Since the system is set up for your success when representing claimants, a little knowledge goes a long way. If you are going to consider taking a case, a great place to start is with the New York State Workers' Compensation Handbook. This text is updated every year and is written by Ronald Balter from the claimant's bar, and Ronald Weiss, who typically represents employers and carriers. This text is a quick resource to answer both basic and more complex questions that might arise. Another excellent resource is to attend a CLE. The Torts, Insurance and Compensation Law Section is planning a seminar in late 2010 at multiple locations throughout the state.

The Workers' Compensation Board Web site is also an essential tool for anyone handling a Workers' Compensation claim. This site can be found at www.wcb.state.ny.us. This Web site has virtually all of the information necessary to initiate a Workers' Compensation claim with the Workers' Compensation Board. One of the most important links from this page is the Forms link located in the center at the top of the homepage. After clicking on the Forms page, you will find a complete set of all relevant forms necessary at any stage of a Workers' Compensation claim. Most of these forms can be completed and submitted electronically to the Board through this site.

Along the right side of the Workers' Compensation Board Web site are a number of links which can also be very helpful. These include Board releases or subject numbers which provide updates regarding many issues that seem to change quite frequently at the Board in recent times. In particular, procedural changes and physician certifications are often updated through the Board release link. Copies of the Workers' Compensation Law and the relevant regulations can also be found through the Laws and Regulations link on this page. Insurance coverage can also be verified through this page.

As mentioned above, forms are crucial to a successful Workers' Compensation claim. From an attorney perspective you want to make sure the Board knows who you are. This allows you to access files online, get notices from the Board and get paid when the time is right. R numbers are the way the Board identifies representatives who appear before them. R numbers can be obtained by utilizing the New York State Workers' Compensation Board Web site. They can also be obtained through the mail by contacting the Workers' Compensation Board Office of Operations at 100 Broadway, Room 402, Albany, NY 12241. Attorneys and licensed representatives can be placed on notice without the existence of an R number. However, an R number is required in order to obtain electronic access to Workers' Compensation Board files. As noted above, all matters before the Workers' Compensation Board are essentially electronic in nature. The Workers' Compensation Board no longer maintains paper files on newly indexed claims. Any paper that is sent to the Board is scanned and made a part of the electronic case folder, or ECF. One of the nice advantages of the electronic case folder system is the fact that it can be accessed from your own office at any time. However, in order to obtain this access, an R number should be pursued and obtained. Once you have an R number, it should be placed on all documentation filed with the Board.

The next important document as an attorney is the OC-400 Notice of Retainer. In order to be placed on notice in a Workers' Compensation claim, a Notice of Retainer needs to be filed with the Board. If you have an R number, it should be listed on the OC-400 form. If an attorney or licensed representative is representing an employer, then a form OC-406 should be filed. Typically, this only occurs in uninsured employer cases.

What Does Your Client Need to Do?

In order to commence a New York State Workers' Compensation claim, a C-3 should be filed. A C-3 is a very

important document because it does satisfy the statute of limitations for claim filing set forth in Section 28 of the Workers' Compensation Law. If the C-3 is not filed with the Workers' Compensation Board within two years of an alleged injury, then there is a possibility that the claim could be barred by the statute of limitations. The C-3 has recently been modified and can be found under the Forms link on the Board's Web site. The C-3 is now two pages long and comes with a HIPAA-related medical release as well. The HIPAA medical release portion of the form is known as Form C-3.3. This medical release should be completed any time where the claimant has suffered from a previous injury or illness that is similar in nature to the injury claimed.

Now What?

Now that you have filed your Notice of Retainer and C-3 claim form and you are waiting for a hearing from the Board, your next step is to make sure that medical evidence has been produced. Pursuant to the Board's new case assembling and case indexing procedures, a claim will not be indexed and identified as ready for a hearing until the form C-4 has been filed with the Board. It is important to note that medical report forms, such as the C-4, have also been recently updated and can be found at the Board's Web site. The traditional one-page C-4 has been greatly enhanced and is required to be filed before the Board will move forward with a claim. In general, a narrative office note from a physician will be deemed insufficient under the Board guidelines and therefore it is very important that any physicians treating the claimant understand that they should be utilizing the Board's new recommended forms.

Once a C-4 and C-3 have been filed, the claimant has taken the necessary steps to move the case toward resolution before the Board. In a perfect world for you and your client, the case will be accepted by the employer and carrier through the filing of a form C-669. If the case is accepted, then payment of medical treatment and indemnity benefits should commence. If a case is not accepted, then the carrier and employer should file a form C-7 indicating a controversy. A Notice of Controversy will trigger the Board's new streamlined adjudication process, or Rocket Docket.

In some situations, the carrier may not take any action. In fact, under the Board's current case assembling and indexing guidelines, it is possible that where a claimant files a C-4 and a C-3 and the employer and carrier file no documentation whatsoever, the case may not be scheduled for a hearing unless some additional action is taken by the claimant. Based on recent activity before the Board, it appears that where an employer and carrier take no action whatsoever in terms of filing a C-669 or a C-7, cases may not be indexed by the Board as they traditionally have been in the past through the use of a form EC-84. Until an EC-84 Notice of Indexing is filed, the carrier technically is not required to file a C-7. Once an EC-84 is filed with the Board, the carrier has 25 days within which to file a Notice of Controversy. Failure to properly file the C-7 may lead to penalties and the waiver of some defenses under Section 25(2)(b) of the Workers' Compensation Law. However, the Board is now filing Notice of Case Assembly forms rather than Notice of Indexing in many cases. If a Notice of Case Assembly form is filed in one of your claims and the carrier is not responding with either a C-669 or a C-7, a Request for Further Action may be a necessary step to move the case toward resolution. A Request for Further Action from a claimant is known as form RFA-1. This form can also be found through the Board's Web site in the Forms link. This is another form that is being updated by the Board as it moves toward more administrative filings. This form allows a party to request a hearing before the Board by informing the Board and all parties of outstanding issues that may exist. Monitor your file closely. Although a hearing is requested the Board may act administratively with a Proposed Decision. Review these Proposed Decisions carefully because if you do not object within 30 days, they become final and are not subject to appeal.

Controverted Claims

If a claim is controverted through the filing of a form C-7 by the employer and carrier, it is very important that the parties become familiar with the new requirements and timeline under the Board's streamlined adjudication process, or Rocket Docket. This timeline can also be found on the Board's Web site.

One of the new requirements for all attorneys involved in a controverted claim is the completion of form PH-16.2. This form is a pre-hearing conference statement. The goal of this form is to identify and limit issues in controversy as the case moves through the shortened litigation process. This form is due 10 days in advance of a pre-hearing conference. Since the pre-hearing conference is designed to be scheduled within 20 days of the filing of a C-7, obviously the time period within which to file this document is extremely short. The time period should be watched closely since it carries significant penalties. If the employer and carrier fail to properly file a pre-hearing conference statement, it can result in the waiver of all defenses to the claim. The failure to include relevant information or witnesses can also waive the right to call such witness or introduce evidence at a later time. From the claimant's perspective, the late filing requires a mandatory and substantial reduction of any attorney's fee request (the exact amount of the penalty is not specified in the statute). In a controverted claim, the legal representatives must also certify that the allegations or defenses being raised by the parties are legitimate in nature. The

Board has created a new form, OC-400.5, for use in certification of the defenses raised by an employer and carrier or for the allegations raised by a claimant in a C-3 for the claimant's representative. If the certification of the issues being raised by the parties is not filed, then a legal representative is not allowed to appear before the Board in the matter.

If the parties are unable to resolve the outstanding issues, then an expedited hearing will be scheduled by the Workers' Compensation Law Judge at the time of the pre-hearing conference. The expedited hearing is designed to occur within 30 days of the pre-hearing conference. Any IME which the employer and carrier desires to produce must be produced at least three days in advance of the expedited hearing. However, it is important to note that the form C-3.3 medical release must be filed by the claimant in order to continue with the expedited hearing process. Failure to file the Board's new medical release, where the claimant has a prior history of a similar injury, will lead to delay in the resolution of outstanding issues and the removal of the case from the expedited hearing calendar. It should also be noted that under the regulations, an employer and carrier are entitled to an adjournment from the expedited litigation process where a claimant retains representation less than 10 days prior to a pre-hearing conference taking place.

Once the case is scheduled for an expedited hearing, few, if any, adjournments will be granted. Adjournments can only be granted based upon a written request of one of the parties. Furthermore, if the request is found to be frivolous and not an emergency, a penalty of $1,000, payable by a representative of an insurance carrier, or $500, payable by a representative of a claimant, will be assessed. The only party who can request an adjournment without the potential for a penalty is an unrepresented claimant. The completion of all testimony, including medical depositions and the filing of transcripts, must be finished within 25 days of the expedited hearing or 85 days from the Notice of Controversy. A final hearing for any medical witness testimony or Bench Decision must occur within 90 days.

If a claim involves complex issues including an occupational disease issue, it should not be included in the Board's Rocket Docket procedures. Uninsured Employer's Fund cases are also excluded from the streamlined adjudication process.

Other Important Forms

In addition to the forms already mentioned, several forms are part of any typical Workers' Compensation claim. One form that should be reviewed early on in a case is the form C-240. This is the calculation of an individual's average weekly wage. More detail regarding the actual calculation process for an average weekly wage will be discussed in part two of the outline regarding the law's coverage. Since the average weekly wage is the basis for determining all awards made for indemnity benefits within a Workers' Compensation claim, this form should be identified early and checked for accuracy. Not only should the form contain a claimant's earnings per week, but it should also indicate the number of days worked per week throughout the year. The days worked is an important piece of the Board's average weekly wage calculation pursuant to Section 14 of the Workers' Compensation Law.

The C-11 is another important form to identify early on in the Workers' Compensation claims process. The C-11 is the employer's report of the time that an individual has missed from work. The form can also be helpful in determining whether the claimant's initial return to work is at regular pay or at some reduced rate or reduced hours. Obviously, this information needs to be checked with your client, but it is an early indication regarding potential awards that may exist on a file.

The form C-8/8.6 is a form documenting awards which are paid to the claimant. Any time awards are adjusted, an updated C-8/8.6 should be filed confirming the amount of awards being made. An employer and carrier's ability to adjust awards through the filing of a C-8/8.6 is governed by regulation 300.23. Any time an award is modified by the employer and carrier, accompanying evidence should be submitted supporting an award change. This evidence can include payroll information suggesting that a claimant has returned to work, or medical records indicating a return to work or change in disability, or proof of incarceration. In a situation where payments have been directed to continue at a specified rate by the Workers' Compensation Board, this rate cannot be independently modified without a hearing before the Board. However, clear evidence of no further disability or return to work can also be consistent with a reduction or suspension of payments consistent with Rule 300.23(b)(3).

Another important form which is seen in many Workers' Compensation claims is form C-8.1. A form C-8.1 has two parts and deals with issues regarding the authorization or payment of medical treatment. Typically, C-8.1 part A is a denial of further treatment authorization. C-8.1 part B's are generally questions regarding specific bills that have been submitted. If the treatment request involved in the C-8.1 is for an established body part, then generally the employer and carrier must produce contrary medical evidence of their own in order to be successful with any treatment denial. The failure to produce contrary medical evidence can lead to the automatic authorization of treatment pursuant to Section 13-a(5) of the Workers' Compensation Law.

Form C-107 is another form that will be seen in many Workers' Compensation claims. This form is filed

when an employer provides wages to a claimant while he or she is out of work. Recent changes to the Workers' Compensation Board Web site have actually removed form C-107 from the forms list. However, employer reimbursement remains available and many times a letter or standard form, depending on the company involved, will be submitted documenting the amount of reimbursement that is being requested. Typically, reimbursement comes from the Workers' Compensation rate of benefits awarded. In schedule loss of use claims, there is a potential for full reimbursement of all benefits previously paid at the time the schedule is awarded. However, full reimbursement should generally be specifically requested on any reimbursement form filed by the employer and carrier. Employer reimbursement is governed by Section 25(4) of the Workers' Compensation Law. Typically, as long as an employer reimbursement form is filed prior to any awards being made, then reimbursement is appropriate. However, in certain situations involving employee benefit plans that have been negotiated consistent with ERISA, any request for full reimbursement does require filing of the benefit plan along with the request for reimbursement. A number of cases have addressed this issue at both the Board and Appellate Division levels. Typically, these cases tend to involve telephone companies such as New York Telephone or Verizon or other large unionized employers. One of the first cases on this issue that is generally cited is *Staruch v. New York Telephone Company*, 277 A.D.2d 830 (3d Dep't 2000).

Last but not least in this brief discussion and overview of important Workers' Compensation forms is the form OC-400.1. As the claimant's attorney, this may be the most important form. This form is required to request any attorney fee greater than $450. Attorney fees less than $450 often taken at a regular Workers' Compensation hearing can be requested and approved without the filing of this form. However, larger fees submitted at the time of permanency, settlement or other lump sum awards must be filed with form OC-400.1. In recent years, this form has been modified to request more documentation regarding the time involved in the service of the Workers' Compensation claimant. The Board in the past has always followed a standard fee request of approximately 10% of money moving. That standard fee request in some situations has increased to as much as 15% depending on the nature of the work involved and the Judge to whom the request is submitted. However, the Board will clearly state that it does not award fees on a solely percentage basis and, therefore, the form OC-400.1 is crucial in terms of relaying the services that have been performed in justification of any fee request.

Hopefully, this is an incentive to consider taking on some Workers' Compensation claims. Certainly, this is just a starting point. This article provides some insight to get a claim started and gives some good resources where more complex questions can be answered.

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The "Senior Partner" Finds Himself of Counsel: What to Do

By Charles A. Goldberger

Five years ago my status in my law firm changed from senior partner to "of counsel" and I was looking for some other endeavor to take up the free time that this change in status allowed. I am not a golfer, I do not fish, I do not like sitting on the beach, and I certainly was not ready to retire. My greatest hobby is traveling, so when I received a blind e-mail asking senior lawyers to apply for a teaching job in Eastern Europe, I was intrigued. I responded to an organization known as the Center for International Legal Studies and inquired as to their program. The following is a portion of their Web site which gives a brief history of their organization and in particular the Senior Lawyers Visiting Professorship Program.

> The Center for International Legal Studies CILS / the Center—is a non-profit research, training and law publications institute, established and operating under Austrian Law and with its international headquarters based in Salzburg, Austria since l976. Its essential purpose is to promote the dissemination of information among members of the international legal community, through research and publication projects, post-graduate and professional training programs, and academic seminars, professional symposia and continuing legal education conferences.
>
> The Center provides observers on a regular basis at meetings of UNCITRAL and its Working Groups in Vienna and New York. The Center for International Legal Studies has a close cooperation with the Salzburg Seminar and Suffolk University Law School, Boston, Massachusetts. It has also worked with the law faculties of the University of Salzburg, Austria, the University of Amsterdam, the Netherlands, the University of Durham, England, the National University of Chile, the University of Arkansas, Little Rock and with the Clinton School of Public Service as well as with numerous other universities and educational organizations in Europe and the United States.
>
> Through its Senior Lawyers' Program, the Center places experienced Common Law practitioners in visiting professorships at institutions in East Europe and the former republics of the Soviet Union. More than 130 senior lawyers have taken up appointments in the first two years of the program.

I interviewed with the Director of the Program, Dennis Campbell, at Suffolk University Law School in Boston, MA, and was accepted into the program in 2006. I attended the one-week educational program in Salzburg, Austria, the home of the organization, which I found to be very enjoyable and very educational. The program consisted of a series of lectures and discussion groups involving noted European lawyers.

The teaching program is designed to give the Eastern European law school students an introduction to the United States legal system. Much of their system is still evolving after decades of a communist-style system. The purpose is not to have our system adopted in any of the countries of the program, but merely an educational program and a means of opening a dialogue between their countries' legal practitioners and senior United States lawyers.

My first assignment was in 2006 at the International University Audentes in Tallinn, Estonia. This being my first assignment, I did not know quite what to expect but I was pleasantly surprised when I arrived at the school in September. They had a number of professors from Western Europe and, in fact, one from the United States. English was the language of the law school. My class of 25 students consisted mostly of Estonian and Finnish students but included others from Hungary, Australia, Slovakia and one from the United States. I have no formal training as a teacher. My approach was informal. I encouraged discussions with the students. My area of teaching was United States litigation and arbitration. I led the class through a typical case from the time that a client first walked into the office until the appellate process had been completed. I used several of my completed cases as examples. I brought sample pleadings, photographs of clients, photographs of exhibits, portions of deposition testimony and the like, just to give the students an understanding of what I was talking about.

I also brought DVDs of some of the great American trial movies such as *12 Angry Men*, *Runaway Jury*, *The Verdict*, etc.

The movies were of particular interest to the students and I had to continually remind them that a large portion was "Hollywood," and not actual court room activity. Nonetheless, the students enjoyed the films very much. My wife and I were in Tallinn for ten weeks, which is much longer than is usual in the program. However, there was a one-week break in the middle of the semester and I only taught three days a week. This enabled us to travel quite

extensively. Tallinn itself is a very nice town with a beautiful Old Town. On weekends, we visited Helsinki, Stockholm, Oslo and St. Petersburg. During the intersection break, we flew to Prague and then to Croatia. While at Tallinn University, I was asked to give a final exam and give grades to the students which counted as part of their academic studies. I had terrific support from the faculty from the Dean down to the secretaries. Although I had my laptop, they gave me a computer terminal at the school, as well as any other support that I required. It was a thoroughly exhilarating experience and made me look forward to future assignments.

In the Fall of 2007, my wife and I visited the Ecological University of Bucharest in Romania, where I gave a similar program. However, the proficiency of the students in English was far less than it was in Estonia. In fact, I wound up using an interpreter for the lectures, which took something away from the program. There was also much less dialogue between myself and the students. In addition, the program only lasted for three weeks and there was no test or grading of the students. I think that the lack of proficiency of the students in English was caused by the fact that the students in Bucharest were older than the students in Estonia. In any event, I did not think that the program went over quite as well.

My third assignment was in the Spring of 2008 at the University of Belgrade Law School in Serbia. This was the only trip where my wife was unable to join me, so I only stayed in Europe for three weeks rather than doing some touring before and after the assignment. The students in Belgrade were again very conversant in English and a dialogue was easy to establish. I used the same format and the same DVDs for the program there.

In the Fall of 2009, I was assigned to the University of Szczecin Law School in Szczecin, Poland. Here again, the students were very fluent in English and the faculty was extremely helpful. My host professor was an Italian who had settled in Poland and did everything possible to make my stay enjoyable. He actually attended most of my lectures to help stimulate my dialogue with the students. In fact, this was the most successful experience to date in terms of the use of the Socratic method of teaching rather than the usual European lecture style.

In the Fall of this year, I am scheduled to teach the same course at the University of Vladivostok in Russia.

I am looking forward to this and hope it will be as successful as my previous assignments.

The assignments are pro bono. The universities provide accommodations, but air fare and all other expenses are the responsibility of the visiting professor. I am told that the expenses are tax deductible but since I am not an accountant or a tax attorney, I suggest one does not rely on this advice.

The accommodations have been very interesting.

In Tallinn, we had a very nice two bedroom apartment, not far from the university.

In Bucharest, we had a somewhat substandard apartment.

In Belgrade, I had a small apartment right in the law school, which was very interesting as it allowed for more interaction between myself, the Serbian professors and the students.

In Poland, we had a room in the university dormitory, which was somewhat austere and without any kitchen facilities. Needless to say, my wife is a good sport and is always up for a challenge.

The only requirement for the program is that a lawyer must have twenty years of significant practice experience in the area in which he or she proposes to lecture. The subject areas for the teaching programs are not limited, but there is a great deal of interest in corporate and business law, intellectual property, litigation, arbitration, and criminal procedure. The subject matter, the length of appointment and dates of teaching are matters of negotiation with each individual university, once you are assigned.

My wife and I found these assignments to be very interesting. I think that I learned as much from the students and faculty about their countries and their legal systems, as they learned from me. I would recommend this program to any Senior Lawyer who is looking for a new and different teaching experience and the ability to travel and live with the people of Eastern Europe. I found that while each teaching assignment experience was different, they were all very rewarding.

If you would like any further information or would like to discuss the program, please feel free to communicate with me at my e-mail address set forth below.

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Bankers Beware—The Taxman Cometh

Federal Tax Liens and Security Interests in Accounts Receivable, Equipment, and Inventory

By Patrick G. Radel

Suppose your client, Lender Bank, extended a line of credit to XYZ Corporation, secured by a lien on the company's accounts receivable, inventory, and equipment. The bank properly and timely filed all of the necessary forms to perfect its lien. A year later, Lender Bank learns that the Internal Revenue Service has filed a tax lien against XYZ. Lender Bank calls you and asks whether it should be concerned about the priority of its lien. At first, you think not, because of the age-old legal maxim "first in time, first in right." However, the fact that you are dealing with the IRS gives you pause, making you wonder whether the government might have afforded itself an exception to the general rule.

Your concern is well-founded. As you suspected, the IRS has special rights that may surprise and alarm your commercial lending clients. Under the Tax Lien Act, a federal tax lien is generally effective upon assessment, even if other lienholders and creditors had no knowledge of the tax lien.[1] While the Internal Revenue Code provides limited protection for secured lenders,[2] several potential pitfalls await the unsuspecting lender in the maze of statutory provisions and judicial decisions interpreting those provisions. This article surveys the law in New York and offers some suggestions for lawyers representing lenders.

The Internal Revenue Code provides, in pertinent part, that:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.[3]

Federal law, not state law, determines the priority of an IRS tax lien with respect to rival liens created under state law.[4] To that end, while the IRS tax lien generally holds priority over all other liens, the Internal Revenue Code provides limited protection for other creditors of the debtor. Specifically, Section 6323 of the Code provides, in pertinent part, that the tax lien "shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor" until forty-five (45) days after a notice of the tax lien is filed with the applicable state authority.[5] This is known as the "safe harbor" provision.

Therefore, under the well-recognized "first in time, first in right" principle, if a lender's security interest was granted by the terms of a written agreement, properly perfected, and attached to the debtor's property before a federal tax lien was filed, or within the forty-five (45) day "safe harbor" period after filing, the lender's security interest will have priority over an IRS tax lien as to that property.[6]

However, it is important to note that the holder of the security interest has priority over the IRS only if two elements are satisfied—(1) the holder's security interest must be perfected before the tax lien was filed or within the safe harbor period and (2) the holder's interest must have attached to the property before the tax lien was filed or within the safe harbor period.[7] Perfection and attachment are related, but distinct, legal concepts. The distinction can have significant practical consequences.

In New York, the perfection element is satisfied by complying with the well-recognized requirements of the Uniform Commercial Code ("UCC").[8] For example, in the hypothetical outlined above, Lender Bank satisfied the perfection element by filing UCC financing statements with the New York Department of State before the IRS filed its lien.

Satisfaction of the second element (attachment) can be more complicated. Under the Internal Revenue Code, a security interest is not considered to have attached to a piece of property unless and until that property "exists."[9] The question of whether a piece of property exists is often easily answered. A piece of commercial equipment is a tangible item of property and the debtor's ownership of the equipment can generally be established as of a specific date. The lender's security interest attaches to an identifiable piece of equipment in the debtor's possession upon perfection. In addition, if the security agreement covered "after-acquired" property (i.e., property obtained by the debtor after the security agreement was signed), the lender's lien will attach to that property when the debtor acquires it, provided the debtor acquired the property

prior to the filing of the tax lien or within the safe harbor period. With regard to this property, the holder of the security interest will defeat the IRS in a priority contest.

What about intangible property, such as accounts receivable and inventory? When does a security interest attach to that type of property? In New York, the answer depends upon the application of a legal theory called the "doctrine of choateness."[10]

The federal courts in New York have held that accounts receivable do not exist until they have become "choate." A receivable does not become choate, and therefore does not exist, until "the services giving rise to the accounts receivable are performed and payment becomes due."[11] As such, the lender's security interest cannot "finally attach until the accounts receivable came into existence, that is until the services were rendered and the debt became owing."[12] However, so long as the receivable has become due and owing, it will be considered choate even if the precise amount of the debt is subject to final calculation or computation.[13]

An analogous rule applies to security interests in after-acquired inventory and equipment. A security interest in inventory and equipment is not considered choate, and therefore does not attach, until the property is actually acquired by the debtor.[14]

The practical impact of the choateness doctrine is profound. In the hypothetical outlined at the beginning of this article, Lender Bank has priority over the federal tax lien only as to receivables, equipment, and inventory generated or acquired before the IRS lien was filed or within forty-five (45) day safe harbor period immediately thereafter. Until the tax liability is paid in full, the IRS will hold a priority lien against all receivables generated for services performed after the safe harbor period. In like manner, the bank's security interest in all inventory and equipment acquired after the safe harbor period will be subject to the satisfaction of the IRS lien.

Upon learning that the IRS has filed a tax lien, Lender Bank must decide whether it will continue lending to XYZ Corporation. This decision should be governed by several considerations. The bank should compare the amount of the tax lien to the indebtedness. In addition, Lender Bank should determine what percentage of its collateral is vulnerable under the doctrine of choateness. If XYZ Corporation's line of credit is based upon a formula or percentage of existing accounts receivable and inventory, the bank should factor in the tax lien when deciding what, if any, additional credit should be extended.

Depending on the amount of the tax lien, Lender Bank may find it necessary to freeze the credit line, declare a default, and may wish to immediately move to protect and liquidate the existing accounts receivable and inventory in which the bank still has priority. The bank should act quickly, because accounts receivable and inventory are subject to rapid turnover, which may be used in the course of XYZ's business only to be replaced by collateral subject to the IRS's priority lien.

It may also be possible for Lender Bank to reach an agreement with the IRS. Under certain circumstances, the IRS might be persuaded to afford continued priority to the bank's interest in spite of the choateness doctrine. The IRS is authorized under the tax code to issue a subornation certificate, provided that it is satisfied that "the amount realizable by the United States from the property to which the certificate relates, or from any other property subject to the lien, will ultimately be increased by reason of the issuance of such certificate and that the ultimate collection of the tax liability will be facilitated by such subordination."[15] As such, Lender Bank may be able to reach a subornation agreement with the IRS if the bank can show that XYZ's business operations depend upon continued lending by the bank.

"[A]ttorneys representing commercial lenders must be cognizant of the implications that the filing of a federal tax lien may have on their client's security interest in accounts receivable, equipment, and inventory."

It should also be noted that the concerns raised by the choateness doctrine remain relevant even if Lender Bank had loaned a lump sum of money to XYZ with no continuing financing in place. In that situation, the bank will need to determine whether it should take action to liquidate the accounts receivable and inventory, which are vulnerable under the doctrine of choateness and subject to rapid turnover, before they are used as cash collateral by XYZ and replaced by collateral in which the IRS will have a primary lien.

With respect to collateral that is not subject to turnover and replacement (e.g., equipment), Lender Bank's lien should not be jeopardized by the filing of the IRS tax lien so long as the collateral was acquired prior to the expiration of the safe harbor period. However, the bank should still consider the impact of the IRS lien on XYZ's business and determine what action, if any, may be necessary to protect its collateral position before any further deterioration of XYZ's business and financial condition occurs.

In sum, attorneys representing commercial lenders must be cognizant of the implications that the filing of a federal tax lien may have on their client's security interest in accounts receivable, equipment, and inventory. These attorneys should advise their clients to carefully consider and weigh the impact of the lien when making decisions regarding continued financing and the need to take action to protect their collateral position.

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Endnotes

1. 26 U.S.C. § 6322; *see also Don King Productions, Inc. v. Thomas*, 945 F.2d 529, 533 (2d Cir. 1991).
2. 26 U.S.C. § 6323.
3. 26 U.S.C. § 6321.
4. *Nat'l Communications Ass'n v. Nat'l Telecommunications Ass'n*, No. 93-Civ-0926, 1995 WL 236731, at *13 (S.D.N.Y. Apr. 21, 1995).
5. 26 U.S.C. § 6323 (a).
6. *Nat'l Communications*, 1995 WL 236731, at *13 (S.D.N.Y. Apr. 21, 1995); *Evangelista v. United States*, No. CV 90-4307, 1992 WL 360346, at *3–*4 (E.D.N.Y. Aug. 12, 1992).
7. 26 U.S.C. § 6323 (h)(1).
8. N.Y.U.C.C. § 9-317 (a)(2).
9. 26 U.S.C. § 6323 (h)(1).
10. *Don King*, 945 F.2d at 533–34.
11. *Nat'l Communications*, 1995 WL 236731, at *15; *see also Lerner v. United States*, 637 F. Supp. 679, 681-82 (S.D.N.Y. 1982) ("[C]ourts have held that a federal tax lien takes priority over a security interest in accounts receivable, because the security interest is not choate until such time as the underlying amount becomes certain.").
12. *Nat'l Communications*, 1995 WL 236731, at *16; *see also Evangelista*, 1992 WL 360346, at * 5.
13. *Nat'l Communications*, 1995 WL 236731, at *16.
14. *Lerner*, 637 F. Supp at 681–82 (quoting *Rice Inventory Co. v. United States*, 625 F.2d 565, 572–73 (5th Cir. 1980)).
15. 26 U.S.C. § 6325 (d)(2).

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Advance Directive News: Living Longer but Dying Slower

By Ellen G. Makofsky

Americans are living longer and dying differently, and the legal profession has been on the forefront responding to these developments. The idea of surrogate health-care decision-making is a relatively modern idea. The seminal cases *Cruzan*, *In re O'Connor* and *In re Eichner*[1] were each decided within the last three decades. The Health Care Proxy Law was first enacted in 1991.[2] Emerging case law and new legislation were the legal reactions to changes in the way more and more Americans were dying.[3]

Thirty years ago most deaths occurred as a sudden cataclysmic event. In 1978 heart attack, stroke and accidents were leading causes of death. These deaths were fast: the deceased was dead and the family and friends were left to mourn. Society mobilized to reduce these deaths with changes in technology and behavior. As a result of these efforts we now have a national 911 system, new pharmaceuticals, portable affordable defibrillators, stents, CPR, mandatory seat-belt laws and changes in smoking habits, diet and exercise. Since 1970 we have seen improved technology, education and new medical interventions reduce fatal heart attacks by 52%, reduce death due to stroke by 63% and reduce accidental deaths by 36%.[4] In 1908 the average person's life span was 47 years and in 2008 it was 78 years. An amazing two-thirds of these gains have occurred since 1960 as a result of the mobilization against sudden death. Life expectancy in America continues to grow.[5]

While Americans are living longer they are dying differently. Today the majority of deaths tend to occur slowly and incrementally. Statistics reveal a 102.8% increase in deaths attributed to chronic respiratory ailments.[6] Deaths caused by Alzheimer's disease have doubled since 1980 and it is expected that such deaths will increase in years to come. Instead of a loved one dying suddenly, today's family is more often faced with a slow death requiring many health-care decisions along the way.

Where we die has also changed. Society has confined sickness to hospitals and more and more of the aged and chronically ill to nursing homes. In 1920 75% of Americans died in their own homes, while in 1994 the figures reversed, and 75% of all Americans now die in hospitals or other institutions.[7] While the overall number of hospitals in the United States has declined, the number of intensive care beds has increased.[8] And this has occurred while Americans were living longer and more of them were succumbing to slow deaths. The manner of dying and the manner of its treatment have been moving in opposite directions.[9] We have the technology to breathe for the patient, drugs to sustain blood pressure, feeding tubes for nutrition and hydration and the machinery to sustain the lungs, kidney and bladder. We have medical technology that in many cases cannot cure the patient but can prolong the patient's life. We need to have a way to say no more.

Forty years ago, advance directives were less imperative. Sudden death did not require endless medical decision-making. Slow death is different. It forces the patient and the family to make choices and to face mortality. The provisions in the law that allow surrogate health-care decision-making provide the patient faced with a slow death a way to remain in control of the life that remains.

Endnotes

1. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (U.S. 1990); *In re O'Connor*, 72 N.Y.2d 517, 534 N.Y.S 2d 886 (1988); *In re Eichner* (*In re Storar*), 52 N.Y.2d 363,438 N.YS.2d 266 (1981).
2. N.Y. Pub Health Law Article 29C.
3. The idea for this column was born during a keynote address given by Stephen P. Kiernan, author of Last Rights: Rescuing the End of Life from the Medical System (New York, St Martin Griffin 2007) at the Fall 2008 Institute presented by the National Academy of Elder Law Attorneys (NAELA). Mr. Kiernan's book is quite instructive and I recommend it heartily.
4. A. Jemal, E. Ward, Y. Hao *et al.*, *Trends in the Leading Causes of Death in the United States, 1970-2002*, JAMA (2005), 294(10): 1255–1259.
5. Stephen P. Kiernan, Last Rights; Rescuing the End of Life from the Medical System (New York, St Martin Griffin 2007), 15–17.
6. Ahmedin *et al.*, 1256.
7. Kiernan, Last Rights, p.10.
8. The number of hospitals declined by 16% between 1980 and 2003 while intensive care beds increased 11% during the same period.
9. Kiernan, *Last Rights*, p. 27.

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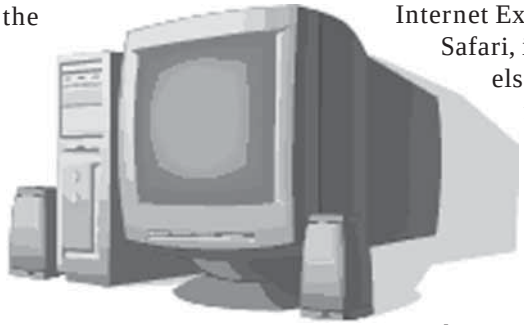
Technology: Seniors Using Cloud-based Applications and Data Storage

By James P. Duffy III and Charles E. Lapp III



For many persons, young and old, the problems of installing and maintaining software on a personal computer are challenging. For Senior Lawyers, most of whom did not grow up in the computer age, the problems can be daunting. Nevertheless, to make effective use of a personal computer (which can be a desktop, laptop, or mini), it is necessary to have access to useful, up-to-date programs, such as e-mail, word processing, contact management, time and record keeping, and so on. The good news is, as this article will discuss, there are now ways to have others maintain these programs and for the user to access them remotely.

There is considerable discussion these days, such as at the LegalTech show that just took place at the Hilton New York immediately following the NYSBA Annual Meeting that was held in the same hotel, about "Cloud Computing," which is sometimes simply called the Cloud, and "Software as a Service," which is sometimes abbreviated as SAAS. While there are not yet fully accepted general definitions of these terms, both make use of the Internet to host software applications, or programs, and to store data and information associated with those programs. Of course, whenever the Internet gets involved, there are numerous problems about security, data backup, downtime, and the like, that are mostly beyond the scope of this article. For our purposes, it is sufficient to say that, while these problems exist, for small users, they are not as much of a problem as they might be for large corporate users. In addition, the security of the Cloud is rapidly improving as it gains popularity.

Using the Internet to support law firm activities is not a new concept. In fact, firms like Westlaw and LexisNesis have used it for years. Without the Internet, Westlaw and LexisNexis and their emerging competitors could not offer the services that they do for the cost they presently offer. The Cloud and SAAS move this concept forward to provide even more interactive services and to relieve the user of the burdens of installing and maintaining programs that are or could be useful to lawyers depending on the needs of their practices.

There are many programs now available on the Internet that make it unnecessary to have the program installed on your computer. Because these programs are easily accessed through your web browser, such as Internet Explorer, Google Chrome, Firefox, and Safari, it is now possible to have someone else install the software and maintain it for you. More important, because the Cloud and SAAS make it possible to store the data that has been used in the web-based application, the user is not tied to any specific computer. Any computer that can access the web with a suitable web browser can be used to access the program and the user's stored data. This means that the user can access work product from an office computer, a home computer, a free computer in an airport lounge or Internet cafe, etc., which greatly enhances mobility and access to important data and information.

This article will briefly discuss a few of these programs that might be of use to Senior Lawyers. Most of these programs are free or low cost, and all eliminate the need to have any software installed on a personal computer or to maintain any data on a personal computer. More important the programs and associated data are fully accessible by web browser. Thus, it is possible to work from home as well as from the office using the same program and data.

Google has many programs that are web-based that might be of interest to Senior Lawyers. For example, Google has a suite of free or low cost programs called Google Apps that includes e-mail, calendar, document creation, retrieval, and storage, contact management, and many other features, depending on how sophisticated the user wishes to get. The Google Apps document module contains basic word processing and spreadsheet programs that might suffice for Microsoft's Word and Excel programs. The Google Apps e-mail, calendar, and contacts features might be a good alternative to Microsoft's Outlook. While beyond the scope of this article, Google Apps Docs also provides the ability to share documents via the web with clients and colleagues and keep track of the various changes reviewers might make. In fact, this article was prepared using Google Apps Docs, and the co-authors collaborated using the document-sharing feature.

For those who wish to keep track of time and billing matters, there are a number of web-based applications. Two that are receiving much attention in the legal press at the moment are Clio and Time4Bill. Both have most, if not all, of what a single practitioner or a small law firm

might need to maintain a reasonably efficient practice. Clio is specifically directed toward lawyers and may be easier for Senior Lawyers to use than Time4Bill which is more broadly focused. Time4Bill also includes a basic accounting module, while Clio does not, but Clio can easily interface with Intuit's Quickbooks module, which would be an extra charge. Most online law office management applications have an interface to online banking facilities so that the user can accept payments by credit card that can easily be transferred to the user's bank account. For example, Clio interfaces with PayPal and Law Charge, the latter being a service specifically for lawyers, while the former is of more general application and requires manual transfer of funds to an associated bank account. The transfer from PayPal can be done using the web to any bank that has online banking.

Senior Lawyers should not overlook the advantages of online banking, which has been available for many years now, for their professional and personal use. Most banking transactions can be handled online, including the payment of bills either electronically (telephone, credit card, and most other large companies have electronic payment facilities that work with online banking) or by paper check (for those payees who do not have electronic payment arrangements with your bank) that the bank will mail to the payee at no charge. Some banks, such as ING Direct, are only Internet-based, and many such Internet banks pay interest on checking balances. Online websites like Mint can also help keep track of multiple bank accounts and other financial accounts, such as brokerage accounts, for better management and classifications of receipts and disbursements.

Also, the Internet can give Senior Lawyers access to legal resources without the need to maintain a large, expensive library. In addition to Westlaw and LexisNexis mentioned above, there are numerous other no-cost and low-cost services that enable attorneys to conduct legal research from almost any computer. Findlaw is a free service that has many legal resources available. Fastcase and TheLaw.net are low-cost services that offer many, but not all, of the advantages of Westlaw and LexisNexis. Some law schools, such as Cornell and Pace, have well developed websites with considerable legal research resources. While Westlaw and LexisNexis are the most expensive of the legal research services available, they are also the "gold standard" of online legal research. Happily both companies have recently introduced new and improved services that may, possibly, result in lower costs to solos and smaller law firms. There is some talk that they may also offer "senior discounts."

It is even possible to prepare simple tax returns on the web using a web-based service from TurboTax as well as other web-based services. However, the preparation of income tax returns is beyond the scope of this article.

To take advantage of what is available through the Cloud and SAAS, a Senior Lawyer will need a few simple tools:

First is a basic computer with a suitable web browser. Fortunately, these are relatively cheap to buy, easy to operate, and not expensive to keep relatively up to date for a few years—while computers will last much longer, technical advances usually make most computers obsolete in three to five years. Even basic computers usually come with at least one version of a suitable web browser installed and ready to use. Also, these types of computers are often found at no cost or low cost in hotel business centers, airport lounges, Internet cafes, and many other places.

Second is a high-speed Internet connection. For home or office use, it is necessary to have an Internet Service Provider, or ISP, to provide the connection. Most Internet connections in hotels, airport lounges, etc., are high-speed. For those who do not have a high-speed Internet connection at home or the office, a local ISP, usually the local telephone or cable TV company, can provide one for a relatively modest monthly cost.

Given the simplicity of using a web browser and the availability of practical and useful Cloud-based and SAAS programs and data storage, there is really no reason for Senior Lawyers not to establish a basic degree of computer literacy and enhance their ability to practice law at whatever level they may choose. The tools exist for doing so and are reasonably accessible at a modest cost. As already noted, some tools are no cost.

Guardians Ad Litem in Housing Court

By Gerald Lebovits, Matthias W. Li and Shani R. Friedman

I. Introduction

Each year, thousands of adults suffering from physical, mental, or other incapacities are found incapable of adequately defending or prosecuting their rights in proceedings before New York City Civil Court, Housing Part, commonly called Housing Court. Many of these adults are elderly.[1] Many suffer from physical debilitation, mental illness, and substance addiction.[2] Many are victims of physical, mental, and financial abuse. Many are unable to receive benefits to which they are entitled. Many have no one who will help them. Many cannot even come to court.

As dictated by Civil Practice Law and Rules (CPLR) Article 12, Housing Court must appoint a guardian ad litem (GAL) to advocate for and assist the incapacitated person, who is then known as a ward.[3] The standard under CPLR 1201 is that Housing Court must appoint a GAL for "an adult incapable of adequately prosecuting or defending his rights." All involved must aid the incapacitated using the least restrictive means to intervene in their lives. Governmental agencies like Adult Protective Services (APS),[4] a division of the New York State Department of Social Services (DSS), and the court itself affect the ability of GALs to advocate for their wards.

Consequences, including involuntary relocation and the eviction of those who deserve protective services, come not only from the merits of Housing Court litigation but also from incapacitated litigants' lack of legal representation;[5] the lack of affordable housing in New York City; tenants, landlords, charities, and government personnel scrambling over scarce resources; the poverty suffered by most Housing Court litigants with diminished capacity; and the hectic pace of Housing Court proceedings. Those who serve as GALs perform an invaluable service defending societal values and maintaining the integrity of the Housing Court and summary eviction proceedings by protecting those most in need. But simply appointing a GAL does not resolve all the problems for the incapacitated, the adverse parties, or the court itself. Frustrations and delays beset too many cases involving GALs.[6]

This article discusses the role GALs play in Housing Court and the law affecting GALs, wards, and potential wards.

II. The GAL's Duties

Until 1962, when CPLR 1201 was enacted, GALs were called "special guardians" when they served in special proceedings like summary nonpayment and holdover proceedings. Whether in a special proceeding or a plenary action, a GAL is "an officer of the court with powers and duties strictly limited by law and he may act only in accordance with the instructions of the court and within the law under which appointed."[7] Translated from Latin, ad litem means "for the suit."[8]

Housing Court may appoint a guardian on its own initiative,[9] even when a potential ward opposes the motion. The CPLR contains no requirement that a prospective ward agree with the appointment, and case law permits the appointment. In the 1998 case of *Anonymous v. Anonymous*, for example, the Appellate Division, First Department, affirmed the Supreme Court's appointment of guardian ad litem despite the defendant's objection.[10] It is difficult in practical terms to appoint a GAL without the ward's consent and cooperation, and it makes the GAL's work challenging if the ward does not consent. The GAL will nevertheless help the court by presenting an objective assessment after an investigation. Due process will be satisfied by the GAL's and the court's always considering the ward's best interests; by allowing the ward to speak and be heard, at least to an adequate extent, on whether to appoint a GAL and on any other relevant issue that might arise during the proceeding; and by permitting the ward to hire an attorney.

In appointing a GAL, the court may set out the GAL's duties in a court order. Doing so can help assure that the GALs will do what they are required to do in each specific case, assuage the opposing party that the proceeding will move relatively expeditiously, and assure the public that appointing the GAL is appropriate.

The GAL's primary obligation "is to act in his or her ward's interest."[11] Although the scope of the GAL's duties is narrow, the GAL takes on a variety of roles, acting simultaneously as an advocate, social worker, and liaison between the ward, APS, social service agencies, the marshal, the ward's family, opposing counsel, and the court. The GAL is often called upon to establish a relationship with the ward to understand the ward's concerns and wishes.

The GAL might also engage in settlement negotiations, become familiar with what benefits the ward may receive, and assure that the ward receives required services from appropriate agencies. The GAL may not control the ward's finances, but the GAL intervenes with social service agencies, the Social Security Administration, the New York City Housing Authority, SCRIE, Section 8, and APS, among others. The GAL might hire an attorney for the ward, perhaps by seeking the aid of The Legal Aid Society, Legal Services for New York City, MFY Legal Services, Inc., Northern Manhattan Improvement Corp. Legal Services, or a law school clinic like Cardozo Bet Tzedek Legal Services. The GAL might also proceed to trial, with or without an attorney representing the ward.

A GAL's role is limited to the action or proceeding before the court. The role of a Mental Hygiene Law (MHL) Article 81 guardian, often called a "community guardian," is far broader. An Article 81 guardian can be appointed after a Supreme Court proceeding as a guardian of the ward's property, person, or both, and not merely for a piece of litigation. GALs are also different from law guardians who represent children in Supreme Court matrimonial actions, from family court law guardians, and from family court and surrogate's court guardians.[12]

MHL Article 81 guardians have more expansive powers, such as the ability to relocate a ward, than Housing Court GALs. For an MHL Article 81 guardian to be appointed, the ward must be found incapacitated or agree that appointing an MHL Article 81 guardian is necessary.[13] In MHL Article 81 proceedings, proof of the ward's incapacitation must be based on clear and convincing evidence that "the person is unable to provide for personal needs and/or property management; and the person cannot adequately understand and appreciate the nature and consequences of such inability."[14] Because MHL Article 81 guardians have greater powers over their wards than Housing Court GALs do, the law establishes the higher standard of competency to appoint an Article 81 guardian, as opposed to the lower standard of incapacity to defend or prosecute rights in order to appoint a Housing Court GAL.

The incompetency standard for a Housing Court GAL appointment is less than and different from the incompetency standard for an MHL Article 81 guardian. Were the law otherwise, GALs would be appointed only after the Supreme Court declared an individual incompetent.

MHL Article 81 sets out a method for the courts to determine a litigant's competency, and "until that is done the courts should not have to decide case by case whether a particular party is of sufficient mentality to be a suitor or defendant."[15]

Once appointed, a Housing Court GAL is assigned to a specific proceeding. In a nonpayment proceeding, a ward routinely has rental arrears, often sizeable by the time a GAL is appointed, and might also not be paying ongoing use and occupancy. A ward who meets APS guidelines and becomes an APS client is entitled to receive services. These services include APS's applying on the ward's behalf for a grant to cover arrears and for voluntary or involuntary financial management, a program by which APS will oversee paying the rent and housing bills with the ward's funds to assure that the rent will be paid and not squandered or allowed to sit unused. If the ward is not an APS client, these applications may be made to another social service agency like Self Help or the Jewish Association for Services for the Aged (JASA).

Holdover proceedings are often initiated because of alleged nuisances, sometimes caused by outstanding psychological or physiological conditions like obsessive-compulsive disorder, dementia, or Alzheimer's. Common nuisances include having unmanageable pets or hoarding, called a Collyer's condition after the Collyer brothers, who hoarded in a New York townhouse in the 1950s. These nuisances might create a fire hazard, odors, or a rodent or garbage infestation. In cases of a tenant-ward's unmanageable-pet problem, inappropriate behavior, or hoarding, the GAL, working with APS and the landlord, will coordinate with the necessary agencies or third parties, such as Animal Control, a psychiatrist, JASA, or a company to which APS contracts out for a cleaning to resolve the nuisance. Although the court has the power in a pending proceeding to grant access to a landlord to effect repairs, the Housing Court GAL does not, however, have the authority to allow cleaners into the apartment without the ward's consent and may not force the ward to comply. Only an Article 81 guardian may force compliance.

Under a March 2007 Civil Court Advisory Notice[16] and a March 2007 binding directive[17] from the New York City Civil Court's Administrative Judge, issued in response to a 2007 decision of the Appellate Term, First Department, in *BML Realty Group v. Samuels*,[18] GALs must fill out a GAL Case Summary form,[19] which they must retain in their files for three years. The Case Summary form documents the GAL's contacts with the ward, the GAL's advocacy efforts, and the steps the GAL took to follow through with the plan set forth in any stipulation of settlement. The court may require the GAL to submit the case summary form or may question the GAL on the record. If the court requires the GAL to submit the case summary form, the judge may direct on the GAL appointment order that the GAL submit it. The case summary form is not intended to be placed in the court file unless the file is sealed. The GAL might be asked to give the administrative judge a copy of the summary.

III. Conflicts Arising from the GAL's Role

As an officer of the court, the GAL is required to investigate fully and fairly and to keep the court informed about the information obtained during the investigation of the ward.[20] GALs who advocate for litigants with diminished capacities often face moral and ethical dilemmas arising from that investigation and from the tension between advocating for their wards and being officers of the court. Can the GAL both report objectively to the court and still always advocate in the ward's best interests? May the GAL's judgment be substituted for the ward's?

If the GAL and the ward disagree on how to handle the case, should the GAL go forward if doing so means contradicting the ward's wishes? If a ward is in a nursing home, hospital, or rehabilitative institute and is unlikely to resume tenancy at the location in dispute, should a GAL be allowed to enter into a stipulation of settlement on the ward's behalf in which the ward surrenders the apartment if the ward opposes that settlement? If a landlord offers significant incentives for the tenant to surrender posses-

sion, may a GAL sign a stipulation to relocate the ward if the ward refuses to leave? If a ward wants a trial in a non-payment case but has no valid defense, and the GAL can get a stipulation of settlement offering the ward needed time to pay the arrears, may the GAL act contrary to the ward's intentions and risk an eviction post-trial for failure to pay a possessory judgment in five days?

No apparent or uniform answer exists for these questions. Addressing these questions was a New York County Lawyers' Association (NYCLA) Task Force on Housing Court Resources Subcommittee, which held a conference in October 2004 and issued a report on Housing Court GALs.[21] NYCLA's Board of Directors approved the Task Force's final report, called *Report on Resources in the Housing Court*, on February 5, 2007.[22] The final report incorporates all the subcommittee's recommendations.[23]

NYCLA's final report, tracking its Subcommittee Report, advises that "[i]f there is no agreement between the GAL and the respondent (and counsel for the respondent, if any), the Housing Court Judge is to evaluate the respondent to determine whether the respondent has sufficient capacity to decide how the case should be resolved."[24] If the ward has sufficient capacity, NYCLA would urge the court to refer the case for trial or another proceeding. If not, NYCLA would urge the court and the GAL to refer the case to APS for an Article 81 proceeding.[25] Only Article 81 guardians have the power to compel wards to accept settlements.

Other authorities and practitioners agree with NYCLA's position. According to those who hold this view, GALs are not vested with the authority to settle cases. CPLR 1207, they argue, "grants authority to the representatives of an infant or a person judicially declared incompetent to settle claims, but does not include guardians ad litem among the representatives with settlement authority."[26] They contend that a fair reading of CPLR 1207 is that "the legislature did not authorize guardians ad litem to settle claims on behalf of the individuals they represent, unless the ward has been declared incompetent."[27] For support, they cite *In re Estate of Bernice B.*, in which the New York County Surrogate's Court found in 1998 "that a GAL cannot bind her adult ward to a settlement of which the ward disapproves unless the ward's incapacity to participate in the litigation (or in its settlement) has been established under the special procedural safeguards afforded by the [MHL]."[28] They also cite *Tudorov v. Collazo*, in which the Appellate Division, Second Department, wrote, as to CPLR 1207, that if a ward objects to a GAL's attempt to settle a case, "a guardian ad litem is not authorized to apply for approval of a proposed settlement of a party's claim. . . ."[29] They additionally note that the concept of a GAL's "stepping into the ward's shoes" appears in "training manuals" only and has no case law support.[30]

Others have a different opinion. They might agree that the GAL may not settle a proceeding without court approval. But, they argue, the court may approve a GAL's proposed settlement of any proceeding, including ones that surrender possession, and the ward's desires are relevant but not determinative. For proponents of this view, the relationship between a GAL and a ward is different from that of attorney-client, in which the attorney must follow the client's wishes but in which a GAL might be obliged out of necessity to act contrary to the ward's desires and to support a settlement position adverse to what the ward wants.

Some courts have allowed GALs to act contrary to their wards' wishes. The Appellate Division, Third Department, in *In re Feliciano v. Nielson*, for example, quoting from dictum from the Court of Appeals in *In re Aho*, held that "a guardian ad litem is not to be viewed as an 'unbiased protagonist of the wishes of an incompetent' and may even act contrary to the wishes of its ward."[31]

Many judges agree with *Feliciano*. One, in a law journal article, has written that "[t]he GAL steps into the shoes of the ward. . . ."[32]Another, in a training outline, has explained that "[a]lthough the ward's desires are relevant, they are not determinative. Thus, a guardian ad litem may have to act contrary to the ward's desires and maintain a position adverse to the ward."[33] A third, Justice Fern A. Fisher, the New York City Civil Court Administrative Judge, whose office oversees the GAL program, submitted a Comment in opposition to the NYCLA Subcommittee Report, arguing that a GAL must act in the ward's interests but may act in opposition to the ward's preferences.[34] The Comment notes the difference in the statutory procedure to settle claims by infants, judicially declared incompetents, and conservatees and the role of the judge and GAL in settling claims against respondent-tenants not judicially declared incompetent but who nevertheless are incapable of adequately defending their rights.[35] The Comment looks to the CPLR's legislative intent and argues that "the legislature considered and rejected CPLR 1207 and 1208's application to actions where the GAL is appointed to defend the interests of a party," including respondent-tenants in Housing Court.[36] Justice Fisher argues that if the ward and the GAL disagree, and the judge does not find that an Article 81 proceeding is warranted, the case should not be sent out for a trial that can lead to an eviction.

Justice Fisher opines, therefore, that the judge should determine whether to so-order a settlement or recommendation if the ward disagrees with the settlement the GAL recommends.[37] In making that determination, the court and the GAL should consider the least-restrictive alternatives when intruding into the ward's autonomy.

Practical concerns underlie the belief that a GAL, supervised by the court and acting with the court's permission, should be allowed to urge a court to disregard a ward's irrational wishes. Just because the court or a GAL wants to refer the matter for an Article 81 guardian does not mean that APS will accept the case or that the Supreme Court will appoint an Article 81. GALs and Housing Court judges are not the wards' attorneys and do not prepare

the papers for Supreme Court. The ward might be evicted if an Article 81 guardian is not appointed. Not accepting a fair stipulation that a GAL negotiates might also result in possible injustices because Article 81 proceedings are lengthy, drawn-out affairs. Even if the Housing Court matter is stayed pending an Article 81 proceeding, possible injustices might include denying landlords legitimate use and occupancy (which APS will not pay if it seeks an Article 81 guardian) and forcing the ward's neighbors to tolerate the ward's allegedly intolerable behavior.

After NYCLA issued its Subcommittee Report and Justice Fisher issued her Comment, the Subcommittee issued a Minority Report but adhered to its majority views.[38] NYCLA's final report, approved, as mentioned above, in February 2007, considered and rejected Justice Fisher's Comment.

The reality is that GALs, to some valid extent, make decisions that affect their wards. In striving to "protect and assist a party, [GALs] do substitute their judgment and decisions for the decision making that the party otherwise would exercise in a proceeding and curtail the party's autonomy and freedom in that respect."[39] This curtailment of the ward's autonomy ranges from invasions into the ward's financial independence in the form of APS involuntary financial management, to the GAL's coordinating a heavy-duty cleaning, to emergency hospitalization or institutionalization of the ward, to the GAL's recommending an MHL Article 81 guardianship proceeding. In an Article 81 guardianship proceeding, the Article 81 guardian is even more involved in the ward's life than a Housing Court GAL may ever be.

When a disagreement between the GAL and the ward's attorney arises over how to handle the ward's case, should the GAL, as an officer of the court, report this to the court, and whose position should prevail? One author has opined "that [the lawyer] can seek judicial removal of the present guardian [ad litem] and appointment of a new guardian ad litem . . . [and] then the attorney can seek judicial resolution of the disagreement with the guardian [ad litem], or can withdraw from the case."[40] According to a civil court advisory opinion, "a GAL should allow the attorney to handle all the legal paperwork related to the case unless the attorney takes action contrary to the ward's welfare."[41] If there is a conflict, or when the GAL believes that the attorney is not doing the work, the GAL should notify the judge, and the matter should be discussed and resolved on the record.[42] Disagreements between the GAL and the ward's attorney might develop because they have different practical and ethical obligations toward the ward and might differ about what is in the ward's best interests.

Attorneys also experience conflicts. As the New Jersey Supreme Court in *In re M.R.* explained, "[g]enerally, the attorney should advocate any decision made" by the incapacitated person, and "[o]n perceiving a conflict between that person's preferences and best interests, the attorney may inform the court of the possible need for a guardian *ad litem*."[43] But if the client opposes a GAL, the attorney may move for a GAL only if the client is incapacitated and "if there is no practical alternative, through the use of a power of attorney or otherwise, to protect the client's best interests. . . ."[44] If that happens, the attorney may not be a witness at a contested hearing.[45]

A question exists whether a GAL may perform purely legal work on the ward's behalf, such as drafting a memorandum of law. Some GALs who are attorneys will perform legal work out of kindness to their wards and generosity to the court. Although it is often difficult to find an attorney for the ward, the better practice is for GALs not to perform legal work and, instead, to do their best to retain an attorney. As three experts explain:

> Even when the guardian ad litem is a lawyer, he or she cannot take on the dual role of acting as both guardian ad litem and legal counsel. Guardians ad litem and counsel for defendants perform different roles. The guardian ad litem is an officer of the court whose role is to protect the interests of the ward and report to the court. The attorney, while an officer of the court as well, must be a zealous advocate for the client in an adversarial process. The two roles are distinct, as are the obligations.[46]

It is difficult for an attorney-GAL to see a defect in the pleadings and not point it out to the court. Courts often tolerate GALs who do legal work. It would be unseemly for a court, having heard a GAL argue a meritorious legal issue for a ward, to disregard the argument, not because of its merits, but because the GAL perhaps should not have been the one to make it. The line between an attorney-GAL and an attorney is sometimes blurred.

Another issue arising out of the GAL's role is whether private legal malpractice insurance will protect GALs. GALs need not be lawyers.[47] GALs should be indemnified by legal malpractice insurance, some argue, because GALs are involved in legal proceedings and perform at least quasi-legal, if not fully legal, work to protect their wards. The NYCLA Task Force on Housing Court Resources Subcommittee's report notes, however, that "[t]here is a diversity of opinion among private attorneys with regard to whether private legal malpractice insurance will cover work performed as a *pro bono* GAL in Housing Court."[48]

The New York State Attorney General has issued an opinion stating that court-certified volunteer GALs are entitled to state indemnification under the Public Officers Law § 17(1)(a) because they are state-sponsored volunteers.[49] Under Public Officers Law § 17(1)(a), GALs are entitled to state indemnification only if they are deemed an "employee" and not independent contractors. If the court determines that GALs, paid or unpaid, are inde-

pendent contractors, then GALs would not be entitled to state indemnification. Under a New York State Attorney General Advisory Opinion dated October 24, 2006, paid GALs will not be indemnified under the Public Officers Law because they are not volunteers.[50] Unless the Attorney General issues a different opinion or the Legislature amends the law, some compensated GALs, who are at risk of being sued by incapacitated, paranoid wards, might be disinclined to serve. Other GALs will serve but will be victimized by frivolous litigation. Several groups, including the New York State Bar Association's Real Property Law Section's Landlord and Tenant Proceedings Committee, have therefore proposed legislation to compel the state to indemnify Civil Court GALs.[51]

GALs have some protection, however, from lawsuits by their wards. The Civil Court in *Lau v. Berman* has held that a ward may not sue a GAL absent the ward's first obtaining court approval, and that the ward's failure to do so must result in dismissing the action: "Once a court appoints a guardian to represent an incapacitated person, litigation against the guardian as representative of the incapacitated person may not proceed without permission of the court which appointed the guardian."[52] The court found that a suit against a GAL for breach of duty, conspiracy, and defamation for acting against the ward's interests must be treated differently from other actions because "[a] guardian ad litem may be obliged to act contrary to the wishes of the incompetent and adopt a position that is adverse to the position of the ward."[53]

IV. Who May Be Appointed to Serve as a GAL?

Because issues involving incapacitated litigants are critical to the court, the litigants, and the public, the New York City Civil Court has a GAL program in place. The court trains and certifies GALs, serves as a liaison to other agencies and stakeholders, and in general administers the GAL program.

To become a certified Civil Court GAL, the appointee must undergo a court-approved daylong training program. The training, overseen by the Civil Court Administrative Judge's office, is currently offered twice each year in two live training sessions, usually in January and June. Video replays of the trainings can be viewed in between the scheduled live sessions.[54] Attorneys admitted to the bar for at least two years can receive a total of six free Continuing Legal Education (CLE) credits for completing the training.[55]

Applications to serve as a Housing Court GAL are available online.[56]

Court certification is not necessary for trained pro bono professionals associated with social service agencies"[57] or for students affiliated with a law school's elder-law clinic.[58]

Courts must take the proposed GAL's financial ability into account under CPLR 1202(c) when determining whether the GAL can provide for the ward's best interests.[59] Before a court may make an appointment, the proposed GAL must sign an affidavit "stating facts showing his ability to answer for any damage sustained by his negligence or misconduct."[60] These facts include the GAL's assets, income, and liabilities.[61] CPLR 1202(c) is not always used in summary proceedings, in which Housing Court GALs have vastly fewer powers than Supreme Court Article 81 guardians and in which Housing Court monitors its GALs more closely than other courts do. GAL appointment orders in Housing Court sometimes provide that the GAL will serve without bond. Some appointment orders even provide that GALs need not comply with CPLR 1202(c) affidavit requirement.[62] The fear is that compelling GALs to submit these affidavits is an onerous demand that might decrease the available pool of GALs who could assist Housing Court litigants. A Civil Court directive provides, however, that "Judges must insure that [a CPLR 1202(c)] affidavit is filed."[63]

Housing Court GALs need not file a notice of appointment under § 36.2(c) of the Rules of the Chief Judge, but judges; judicial hearing officers; and their spouses, children, and parents are disqualified from service as a GAL.[64]

It is widely agreed that private law firms should be encouraged to serve as GALs, given the level of legal training and expertise that attorneys possess. Private attorneys serving as GALs increase the efficiency of the GAL appointment and training process.[65] But a GAL need not be an attorney.[66] Nor must a GAL be a doctor when the ward is mentally impaired.[67]

V. How GALs Are Appointed

A GAL may be appointed upon APS motion under CPLR 1202(a), or the court may appoint a GAL on motion or "at any stage of the action upon its own initiative."

CPLR 1201 lists three categories of persons who must appear by a GAL: (1) certain infants; (2) certain adjudicated incompetents or conservatees; and (3) individuals "incapable of adequately prosecuting or defending [their] rights." This article addresses the third category.

As to potential wards who might be incapable of adequately defending their rights, the court should hold a hearing to ascertain the need to appoint a GAL for them even when they have competent counsel or when they and their attorneys object to appointing a GAL.[68] The court in *Fran Pearl Equities Corp. v. Murphy* found that a hearing is required to determine whether to appoint a GAL.[69] According to *Silver & Junger v. Miklos,*[70] the court may appoint a GAL without a hearing if it relies on APS's psychiatric documents and the petitioner's letter to APS supporting the need for a GAL. A hearing is not required if the proposed ward and opposing party agree, on consent, that a GAL is needed or would be helpful to resolve the proceeding. No hearing is required when GAL appointment can be based on the court record and documentation that raise no issues of fact.

If the court before which the proceeding is pending does not appoint a GAL, an application for a GAL may also be made under CPLR 1202(a)(1) on motion by "an infant party if he is more than fourteen years of age." CPLR 1201 additionally provides that unless the court appoints a GAL, an infant shall appear by a parent having legal custody or, if there is no parent, by another person or agency having legal custody. The phrase "having legal custody" refers to judicially determined custody. Allowing a parent or legal guardian to appear without appointing a GAL eliminates an unnecessary application to the court. Appointing a GAL is required if "the right to custody exists neither by parenthood or by decree."[71]

CPLR 1202(a)(2) provides that a motion to appoint a GAL may be brought by a "relative, friend or a guardian, committee of the property or conservator." A government agency like APS or DSS has standing to move for a GAL, given its duties under Social Services Law § 473 and 18 N.Y.C.R.R. 457. APS has standing as a friend of the court to move to appoint a GAL without moving to intervene in the proceeding.[72]

Under CPLR 1012(a)(1), a court must permit a person to intervene as a party when a state statute confers the right to do so.[73] A protective services agency must have a network of professional consultants and service providers and may be involved with health, mental health, aging, and legal and law-enforcement agencies.[74] The Social Services Law does not give a protective services agency the right to intervene to seek a GAL for a party.[75] In a special proceeding in the Housing Court, therefore, APS intervention is permitted only by leave of the court.[76]

CPLR 1202(a)(3) provides that a motion to appoint a GAL may be brought by "any other party to the action if a motion has not been made under paragraph one or two within ten days after completion of service."[77] The "other party" may be the opposing one or the opposing party's counsel. Courts interpret CPLR 1202(a)(3) to require a party who knows, or believes, that the opposing party suffers from a mental condition to bring that condition to the court's attention.[78] This is especially true of the opposing side's attorney, who is an officer of the court. The opposing side has a duty to inform the court of an adversary's incapacity, especially when evidence in a prior proceeding between the two parties suggested that a guardian was required. In *Jackson Gardens LLC v. Osorio*, the court found that "[t]he fact that a guardian was found to be needed in a prior case, between the same parties, six months prior, clearly placed a duty on the petitioner to inform the court, and makes his failure to do same inexcusable."[79]

Even when a litigant has insufficient proof to move for a GAL, the litigant still has an obligation to bring the potential ward's mental disability to the court's attention.[80] Securing a judgment and evicting a tenant the landlord knew was mentally incapacitated and in a nursing home can subject the landlord to claims for wrongful eviction and property damage.[81] Not only does moral obligation require informing the court of a litigant's possible incapacity, but a legal one does as well.

Sometimes a landlord will have a duty to inform the court that a tenant might need a GAL if for no reason other than that the nuisance allegations that form the grounds for the holdover suggest a pattern of bizarre acts that might warrant a GAL. On the other hand, sometimes counsel will be only too glad to raise the matter of appointing a GAL so as to frazzle a nervous, unrepresented litigant or cause a court to question the litigant's rationality and good faith.

A court-approved GAL is appointed when a Housing Court judge submits a Guardian ad Litem Request form to the borough's Housing Court Supervising Judge or GAL coordinator, who maintains a list of court-approved GALs. The Housing judge may request a GAL who has particular experience or specialization. The Supervising Judge or GAL coordinator gives the appointing judge two or three names from the list, and the appointing judge's court attorney contacts the first of the two or three to assess availability and interest. The potential GAL may accept only if the court makes the initial contact; no other party to the case may arrange for the appointment. The court attorney informs the potential GAL of the basic facts of the case, including whether the ward is an APS client. If the potential GALs decline appointment, the Supervising Judge or GAL coordinator provides new names.

Once a person agrees to serve as a GAL, the appointing judge or court attorney prepares an order of appointment, which, when completed and signed by the appointing judge, is submitted to the Supervising Judge. The court attorney then mails the order and the papers in the court file to the GAL.

A judge may also directly appoint a potential ward's relative, friend, therapist, or social worker to serve as the GAL, although the judge should be on guard for the potential of a conflict of interests. A judge who makes a direct appointment need not submit anything to the Supervising Judge or GAL coordinator, and the Supervising Judge or GAL coordinator will not give the appointing judge a list of potential GALs. According to a Civil Court advisory notice, those non-court-certified individuals, "as a condition of the appointment, must participate in training specified by the Administrative Judge."[82]

CPLR 1202(c) provides that no GAL appointment is valid unless the GAL files written consent of the appointment with the court. A court may not appoint a GAL who is unwilling to serve.

VI. Housing Court's Authority to Appoint a GAL

The Civil Court, including its Housing Part, has the authority to appoint a GAL in a summary proceeding[83] and need not refer a GAL motion to a Supreme Court judge. Under CPLR 1202(a), "[t]he court in which an action is triable may appoint a guardian ad litem at any stage in the action."[84] Even if an adjudication of incompe-

tency has not been made, the court must appoint a GAL if court intervention is required to protect the best interests of a litigant incapable of adequately asserting claims and rights.[85]

One Civil Court judge in three decisions published more than 15 years ago wrote that Housing Court does not have the jurisdiction to appoint GALs.[86] All other courts have disagreed. These courts, from the Appellate Term down,[87] have explained that Civil and Housing Court judges "ha[ve] the duty to protect a litigant who is incapable of protecting his or her interests"[88] and "'the inherent' power to appoint a guardian ad litem."[89]

VII. When Can a GAL Be Appointed?

Housing Court must appoint a GAL for litigants in a pending proceeding if the court finds, based on a preponderance of the evidence, that the litigants are incapable of adequately prosecuting or defending their rights.[90] A determination of incompetency, unlike in an Article 81 proceeding, is not required.[91] The Court of Appeals in the seminal *Sengstack v. Sengstack* found that although a GAL appointment should not be used to evade a formal declaration of incompetency, the court still has a duty to protect a litigant who might be incompetent but not formally declared incompetent.[92]

Under CPLR 1202, a GAL may be appointed at any stage of the action or proceeding. The Appellate Division, First Department, in *In re Beyer*, confirmed in 1964 that CPLR 1202(a) allows courts to appoint GALs at any stage and "to a complex of situations, some of which may antedate the technical institution of the proceeding."[93] The court may, therefore, appoint a GAL before the action or proceeding begins. That might occur when a landlord's attorney serves a petition and notice of petition and alerts the court to appoint a GAL rather than allow a tenant to be evicted for failing to answer the petition in a nonpayment proceeding or for being absent at an inquest in a holdover proceeding.

In actions or proceedings involving incompetents, the court should wait for the application of the persons entitled to move for the appointment of a GAL before the court appoints the GAL. If that procedure might endanger the incompetent's interests, then the appointment can be made at the inception of the action or proceeding—for example, in an order to show cause before the petition and notice of petition are served.[94] The court may also appoint a GAL after the parties have agreed on a settlement[95] or after a judgment is entered[96] or at the appeals stage.[97]

An action or proceeding against litigants incapable of adequately protecting their interests may not proceed without notice to the court of the litigant's incapacities and a court inquiry.[98] Following the proposition set out in *Vinokur v. Balzaretti* that "[t]he public policy of this State, and of this court, is one of rigorous protection of the rights of the mentally infirm,"[99] a hearing should be conducted whenever a question of fact arises about whether a GAL is required.[100] Questions of fact might concern a potential ward's alleged delusional behavior, poor judgment, and sub-clinical manifestations.[101] The court in *Weingarten v. State* held that when a party eligible under CPLR 1202(a) applies for the appointment of a GAL for an individual who resides in a mental institution, a rebuttable presumption arises that the individual is incapacitated.[102]

CPLR 1201 dictates that a litigant's mental impairment less than incompetency may support appointing a GAL.[103] A GAL must be appointed if a potential ward does not understand the nature of the legal proceeding or the possible consequences of the court's judgment.[104]

The proposed ward's physical impairments may also warrant appointing a GAL if the proposed ward is pro se and unable to appear in court to defend or assert a claim.[105] A GAL will also be appointed when the litigant is unable to appear in court because of incarceration.[106] In *Leibowitz v. Hunter*,[107] the court granted a motion to appoint a GAL to aid a plaintiff in a coma due to injuries sustained in a car accident. Some courts have declined to appoint a GAL if the potential ward's physical incapacity was not linked to a mental incapacity.[108]

The court will take a host of factors into account to determine whether a litigant requires a GAL. A litigant's decreased mental ability or physical agility caused by advanced age,[109] disease,[110] or drug or alcohol abuse[111] is relevant. Patients in psychiatric institutions presumptively require a GAL's assistance.[112] Courts will consider affidavits from neighbors, physicians, and others capable of attesting to the litigant's mental and physical capabilities.[113]

Not only are tenants eligible to receive a GAL, but landlords are as well. A GAL may also be appointed in any Housing Court proceeding, not just an eviction proceeding. Although GALs are seen most commonly in nonpayment and holdover proceedings, they serve in illegal lockout and HP (repair) proceedings.[114]

The GAL's role ends when the case is dismissed, discontinued, settled, or otherwise resolved. A new GAL is required for every new proceeding,[115] although the judge who believes that the GAL performed satisfactorily and developed a positive relationship with the ward may appoint the same GAL for the new proceeding.

VIII. Vacatur of Judgments

Most courts, if pressed, will vacate a final judgment of possession and warrant of eviction if they find that an individual required a GAL during the action or proceeding but did not have one, regardless of whether an attorney represented the tenant at the trial.[116] In *124 MacDougal St. Assocs. v. Hurd*, the court vacated a default judgment against a tenant who needed a GAL and an Article 81 guardian.[117] Courts have vacated foreclosure, divorce, and money judgments more than a year after the default for mentally incapacitated defendants.[118]

If the court, once notified that a tenant is incapacitated, fails to make the appointment or give careful consideration to the need for a GAL, it is "improvident and requires the reversal of the judgment."[119] Most courts will similarly vacate a judgment and restore a party to possession if they find that the party was unable to defend rights in the proceeding adequately.[120] Of import is a March 2007 Civil Court Advisory Notice stating that "if it appears that a respondent is incapable of adequately defending against a proceeding, the court should appoint a guardian ad litem and any default judgment entered prior to the appointment in most instances should be vacated. Failure to vacate the default judgment maybe [*sic*] reversible error."[121]

When APS moves for a GAL, it will often tell the court on the landlord's application that the motion to vacate the judgment may be held in abeyance. Many GALs never move to vacate the judgment. They will use the judgment's nonvacatur as a bargaining tool, if the ward will not otherwise be prejudiced, to get more time to satisfy the judgment. Often landlords consent to giving wards time to satisfy the judgment if the judgment is not vacated. Landlords also consent to GALs in close cases on the condition that the court not immediately vacate the judgment.

An out-of-court stipulation signed by a tenant incapable of adequately defending his or her rights will be vacated if the tenant required a GAL.[122] If a tenant is "unable to address a particular topic without going off on a tangent"[123] and otherwise is unable to defend legal rights, the default judgment should be vacated and a GAL appointed.

In *Roe Corp. v. Doe*,[124] the court vacated a judgment of possession after finding that the petitioner-landlord, who knew about the respondent-tenant's incapacities, had a legal obligation to inform the court that the tenant was incapacitated.[125] In *V.K.*, the court went even further, holding that '"a petitioner, in any proceeding, [must] be extremely diligent' in determining whether a party may be under a disability requiring a guardian ad litem."[126] If a party fails "to notify the court of an adversary's disability before obtaining a default judgment, [it] is a fraud on the court and a basis to vacate the judgment."[127]

IX. When GALs Are Not Required

Some courts will not vacate a judgment despite the ward's incapacitation. These courts will deny a motion to appoint a GAL even after a default and eviction, and even when the landlord knew about the tenant's infirmities.[128] In *Kalimian v. Driscoll*, the court found that the fact that counsel represented the tenant played no role in determining whether the tenant was prejudiced by the absence of a GAL,[129] but the court in *Hertwig-Brilliant v. Michetti* found that failure to appoint a GAL was harmless because competent counsel represented the litigant, who was also helped by family.[130] Some courts will not appoint a GAL when the respondent waits two years in the proceeding until the eve of the trial to move for a GAL.[131] The court in *321 W. 16th St. Assocs. v. Wiesner*, for example, refused to appoint a GAL late in the proceeding.[132]

A court will deny a motion to appoint a GAL and vacate a judgment if the potential ward does not prove an incapacity to prosecute or defend rights.[133] Thus, a motion will be denied if the letter of the psychologist who examined the tenant does "not state that [the] tenant was incapable of defending her rights or that appointment of a guardian was needed. . . ."[134]

When a motion to appoint a GAL is made, the court must balance the litigant's interests with those of third parties, such as other tenants in the building, to assess whether to appoint a GAL. At first, litigants might appear unable to defend their rights adequately. After further assessment, the court might determine that the potential ward does not need a GAL.[135]

Some courts have declined to appoint a GAL on the ground that appointing one will not help a recalcitrant litigant. *Stratton Coop., Inc. v. Fener*[136] was a nuisance proceeding in which the tenant repeatedly refused access to her home or to cure hazardous accumulations.[137] In that case, the Appellate Division, First Department, affirmed the final judgment and the decision finding that appointing a guardian (an Article 81 guardian in this instance) would not have resolved the issue of access and that the rights of the other tenants needed to be acknowledged. The court balanced the tenant's needs with the rights of the other tenants in the building whose health and safety were at risk.

Similarly, in *Pinehurst Constr. Corp. v. Schlesinger*,[138] a nuisance holdover proceeding, although the Appellate Term dissent argued that the final judgment after trial should be reversed because it appeared that the tenant was an "elderly, chronically sick, and apparently disturbed tenant,"[139] the majority found no basis to conclude that appointing an Article 81 guardian, "even if warranted, would remedy the long-standing, acute problems posed by tenant's aggressive, antisocial behavior."[140]

Having a history of mental impairment is insufficient by itself to require either the appointment or continued service of a GAL. The incapacity could have disappeared by the time the new action or proceeding began.[141]

X. Removing a GAL

A court's disagreement with a guardian's choices is insufficient to warrant replacing the guardian. In *Sutherland v. New York*,[142] the plaintiff's mother accepted a lump sum monetary offer from the city to settle her and her child's claims, despite the trial court's view that the child's best interests required that payment be made over a period of years. The trial court entered an order removing the mother as guardian and replacing her with a GAL. The Appellate Division, First Department, reversed, finding that the disagreement was insufficient to warrant removing the natural parent as GAL.[143]

Likewise, the court in *Stahl v. Rhee* found that a plaintiff's mother's refusal to accept a settlement on her son's behalf was insufficient to replace the mother, acting as legal guardian, with a GAL.[144] The plaintiff became severely mentally retarded from his exposure to antibacterial skin cleanser prescribed for him shortly after his birth. According to the Appellate Division, Second Department, Supreme Court improperly discharged the plaintiff's mother as the plaintiff's guardian and inappropriately replaced her with a court-appointed GAL when the plaintiff's mother refused to accept a proposed settlement "under any circumstances" because it would not cover her son's expenses.[145] The Appellate Division held that the mother's decision was not unreasonable, arbitrary, or capricious, especially absent proof of a conflict of interest between the mother and the infant plaintiff. The Second Department therefore reversed the Supreme Court's decision removing the child's mother as his legal guardian.[146]

Courts have the power to remove a GAL on their own motion if a GAL, in the GAL's capacity as an officer of the court and as the person charged with protecting the ward's rights, engages in conduct that prejudices or harms the ward.[147] The court in *De Forte v. Liggett & Myers Tobacco Co.* found that "[t]he rights of an infant cannot and should not be lost through the obdurate, unreasonable and uninformed conduct and opinion of the guardian ad litem."[148] A judge who determines that the GAL is acting against the ward's best interests should remove the GAL. If the Civil Court removes the GAL from its list of certified GALs, each Housing judge overseeing a particular case decides whether to remove the GAL while the proceeding is pending. A court may further vacate a warrant of eviction and restore a tenant to possession, even after the marshal executes the warrant of eviction, if the GAL's ineffective assistance caused the eviction.[149]

A court should be wary about defaulting a ward whose GAL did not appear. Under CPLR 1203, no default may be entered until 20 days after a GAL is appointed.[150] Even after that time passes, the court should not begin to consider a default judgment against the ward until the court inquires diligently into what caused the default. If the GAL is responsible for the default, the court should consider relieving the GAL, appointing a new GAL, and informing the Administrative Judge.

Sometimes a GAL behaves egregiously, although not necessarily toward the ward. In *Hitchcock Plaza, Inc. v. Clark*, a GAL spat on an associate of the opposing side's law firm.[151] The law firm moved for sanctions against the GAL. The court denied the motion because the GAL was not a party or an attorney, sustained the spitting charge and referred the GAL to the Administrative Judge.[152]

When the judge or the Civil Court's GAL program believes that a GAL is performing inadequately, they must do their best to investigate the matter promptly. A complaint against a GAL triggers due process rights. Under § 36.3(e) of the Rules of the Chief Judge, "The Chief Administrator [of the Courts] may remove any [GAL] from any list for unsatisfactory performance or any conduct incompatible with appointment from that list, or if disqualified from appointment pursuant to this Part. A [GAL] may not be removed except upon receipt of a written statement of reasons for the removal and an opportunity to provide an explanation and to submit facts in opposition to the removal." The Chief Administrator's duties to consider removing a Civil Court GAL are delegated to the Civil Court's Administrative Judge.

XI. Proper Advocacy

The courts must determine whether a GAL has represented the ward's best interests. Courts have the continuing responsibility to supervise the GAL's work.[153] In a New York City Civil Court Advisory Notice dated March 2007, the court advised that judges must assess the adequacy of the GAL's advocacy for the ward before it may so-order a stipulation that a GAL wishes to enter into.[154] The judge must assess whether the GAL has met with the ward and attempted to have a home visit, whether the GAL has determined what the ward desires as an outcome of the case, and whether the GAL has investigated and weighed all the factors in the case and recommends a settlement in the ward's best interests. The GAL must also develop a plan to assist the ward in obtaining repairs, money, or other assistance to comply with the proposed stipulation and follow through with the plan to assist the ward. The GAL must inform the court whether the ward agrees with the proposed settlement. Finally, the GAL must try to locate a missing ward and take all possible steps to get the ward to come to court.

In making these assessments, the court must allocute on the record any significant stipulation, such as one that settles a proceeding. The court should not simply sign the stipulation as if were a two-attorney stipulation, even if the GAL is an attorney.[155]

The court's supervisory role limits a GAL's advocacy. Once again, as three experts explain:

> If a settlement does not compromise a ward's property rights (*e.g.*, if there is no provision that a default will result in the issuance or execution of a warrant of eviction, or that a property right will be surrendered), then the court may determine that a settlement is appropriate without further action to protect the ward, and the court—not the guardian ad litem—may approve the settlement. On the other hand, if the ward's property rights are implicated (*e.g.*, if the settlement provides for a warrant or surrender), the court must make an initial determination whether it can approve the settlement.[156]

The GAL's duties and the court's obligations are fact specific. The more the ward gives up in terms of a settlement, the more the GAL must investigate, advocate, and explain.[157] Likewise, the court must assure the integrity of the proceedings and protect the ward's rights by inquiring, examining, and allocuting on the record.[158]

XII. Service Issues

Before any action or proceeding may go forward, the ward or potential ward must receive the petition and notice of petition underlying the proceeding as well as any motion to appoint a GAL.[159] The RPAPL and the CPLR require service so that the ward or the ward's guardian, committee, or conservator will get notice of any pending action or proceeding.[160]

a. Service of Petition and Notice of Petition

Under RPAPL § 735, the petition and notice of petition must be personally delivered on the respondent, delivered and left with a person of suitable age and discretion who resides or is employed at the property sought to be recovered, or served by conspicuously placed service.[161] Properly serving the petition, notice of petition, and any predicate notice is especially important when the landlord knows that the tenant resides in a hospital, nursing home, or other institution.[162] The landlord's failure to mail additional copies of the petition and notice of petition to this additional, alternative address will result in a dismissal of the proceeding.[163]

In the nonpayment summary proceeding *Parras v. Ricciardi*,[164] the court vacated the default judgment awarded to a petitioner-landlord who failed to mail additional copies of the petition and notice of petition to the nursing home where the tenant-respondent was residing.[165] The court found that "when the landlord knows the tenant is living in a nursing home, the tenant must be served with the petition and notice of petition at the nursing home in order for the court to have jurisdiction over the summary proceeding."[166] The court also found that RPAPL § 735(1)(a) forbids a default against tenants not served at their other residential address even if the petitioner does not learn about the other residence until the person preparing the affidavit of nonmilitary service discovers the tenant's whereabouts in connection with preparing the affidavit of investigation.[167]

In RPAPL § 735(1)(a), "residence" "means the particular locality where the tenant is actually living at the time the summary proceeding is commenced."[168] This residence might be a location different from the premises of which the landlord seeks possession. Even proper service at the nursing home would not have been satisfactory in *Parras*, though, because the landlord knew that the respondent was mentally incompetent and did not inform the court of that fact before it obtained a default judgment.[169]

b. Service Upon the Ward of a Motion to Appoint a GAL

CPLR 1202(b) requires that a notice of motion to appoint a GAL "be served upon the guardian of [the ward's] property, upon [the ward's] committee or upon [the ward's] conservator" or, if none exists, then "upon the person with whom [the ward] resides."[170] CPLR 1202(b) also requires personal service on the potential ward if that person is over the age of 14 and has not yet been judicially declared incompetent.[171] The court must deny a motion not served on the potential ward.[172] Unless there is a judicial declaration of incompetence or court determination of the litigant's mental condition, the potential ward must be given an opportunity to be heard.[173] The court in *Beach Haven Apts. Assocs. LLC v. Riggs* held that "it is critical that the proposed ward be properly served so that he is aware of the motion and the basis upon which APS seeks the imposition of a guardian ad litem and so that he can appear in court and argue for or against the motion."[174]

XIII. Compensation for GALs

CPLR 1204 sets forth the compensation that GALs may receive for their services.[175] In proceedings in which the ward is an APS client, APS, through the New York City Human Resources Administration (HRA), will provide compensation of $600 for the entire action or proceeding, whether or not the GAL is an attorney or has special skills.[176] The GAL order should include a note that HRA will pay the GAL $600 in exchange for the GAL's services.[177] An exception to the normal APS compensation policy could entail the court's asking HRA to approve a higher fee when the GAL provides more services than usually required.[178] A court that believes that the ward is or will be an APS client may appoint the GAL immediately with the understanding that a determination whether APS will compensate the GAL will be made later.[179]

Upon either the GAL's or the GAL's attorney's filing an affidavit that shows the services rendered, the court may, in the case of a ward who is not an APS client, enter an order granting the GAL reasonable compensation. The compensation may "be paid in whole or part by any other party or from" the ward's recovery or other property.[180] If the GAL seeks more than $500 in compensation in a non-APS case, then the GAL or the GAL's attorney "must file with the fiduciary clerk, on such form as is promulgated by the Chief Administrator, a statement of approval of compensation, which shall contain a confirmation to be signed by the fiduciary clerk that the [GAL or the attorney retained by the GAL] has filed the notice of appointment and certification of compliance."[181] No compensation may be awarded unless the GAL "has filed the notice of appointment and certification of compliance form."[182]

Details about compensation for Civil Court GALs are available on the court's Web site.[183]

Compensation "shall not exceed the fair value of services rendered."[184] What qualifies as reasonable compensation varies from case to case. So long as a GAL can support the request for compensation with an application "supported by [an] itemized documentation showing the work performed and his hourly rate"[185] and the "fees are fair and reasonable,"[186] the court will award the requested compensation. The GAL was able to meet this standard in *C.F.B. v. T.B.* and was awarded nearly $8,000.[187] In a different case, *Bolsinger v. Bolsinger*, the Appellate Division found that "[i]n fixing the fee, the dollar value for nonlegal work performed by an attorney who is appointed a guardian ad litem pursuant to CPLR 1202 should not be enhanced just because an attorney does it."[188] Rather, other factors must be considered to determine the appropriate compensation. In *Bolsinger*, the court stated that these factors include fixing the compensation "'with due regard to the responsibility, time and attention required in the performance of [the GAL's] duties,' the result obtained, and the funds available to the person who must bear the cost of the guardian ad litem's services."[189]

A court that deems a GAL's compensation excessive will reduce the amount. In *In re First National City Bank* (*In re Springett's Trust*), the court found that the GAL "rendered extensive services for a period of almost five years"[190] and that "his services were of considerable assistance to the court."[191] But the court relied on the other factors to reduce the amount awarded from the requested $8,000 to $4,000.[192]

Courts will take the paying ward's net worth into account to determine the reasonableness of the GAL's compensation. In *In re Becan*, a 1966 case, the court determined the tenant's net worth to be small because his estate totaled less than $2,500.[193] The court noted additionally that the appointed GAL expended a minimum amount of effort. The court reduced the original $250 award to the GAL to $100. The court found that because the GAL was a guardian of the court who was appearing in an accounting of the estate of an incompetent veteran, the GAL was "bound to conscientiously perform [his] respective duties, with the understanding that [he] may be asked to accept most moderate compensation for [his] services."[194]

CPLR 1204 permits GALs to be compensated from the proceeds of the ward's award and allows payment to be made by "any other party," including the party whom the GAL does not represent. In *Perales v. Cuttita*,[195] the Appellate Division, Third Department, held that the Special Term had acted within its discretion when it required the Commissioner of Social Services to pay the attorney for services rendered as a GAL for residents of adult-care facilities.

CPLR 1204 restricts the GAL's compensation to be paid from a non-party. In *In re Baby Boy O.*, the GAL went uncompensated because the mother did not receive a recovery from which the GAL could be paid.[196] Because the Commissioner of Social Services was not a party to the proceeding, moreover, the Commissioner could not be directed to pay the GAL. A party can be ordered to pay the GAL if that party's actions led to appointing the GAL. In *In re Ault*, the court found that CPLR 1204 directs that "a party may be charged with payment of the compensation of a guardian ad litem only where the actions of such party generated unnecessary, unfounded or purely self-serving litigation that resulted in the appointment of a guardian."[197]

XIV. The Role of Adult Protective Services

APS is a governmental agency created under New York's Social Services Law § 473 for New York City's five boroughs.[198] To be eligible for APS services, individuals must be at least 18 years old; not reside permanently in a hospital, nursing home, or rehabilitation facility; and as a result of mental or physical impairments be unable to meet the following three criteria. The first of these criteria is that prospective clients be unable to "meet their essential needs for food, shelter, clothing, or medical care"[199] or protect themselves from "physical, sexual, or emotional abuse, active, passive or self-neglect or financial exploitation."[200] The second criterion is that the individuals be "in need of protection from actual or threatened harm due to physical, sexual or emotional abuse, active, passive or self-neglect or financial exploitation, or by hazardous conditions caused by the action or inaction of either themselves or other individuals."[201] The third criterion is that the individuals have "no one available who is willing and able to assist."[202] APS does not consider the individuals' income in determining whether to aid them.

Title 18 N.Y.C.R.R. 457 sets forth the criteria to determine whether someone needs APS services. Individuals and organizations may refer individuals to APS, either by telephone or the Internet. APS then responds to the referral by conducting an assessment. APS will assist clients to get grants for rent arrears, medical and psychiatric care, services like Meals on Wheels and home care, public assistance, and other programs to enable clients to remain at home. APS's mission is to provide services while using the least-restrictive measures possible. APS occasionally needs to use more-restrictive measures, such as putting the client on financial management, referring the case to its Office of Legal Affairs to appoint a GAL, and, if necessary, referring the case to an Article 81 guardian who can enforce an order to conduct a heavy-duty cleaning or to arrange to relocate a ward to a more affordable apartment or a setting with a suitable level of care.

From time to time APS will accept as a client someone whom the courts, landlords' attorneys, and tenant advocates might agree does not need a GAL. Courts, landlords' attorneys, and tenant advocates are also surprised occasionally to learn that APS will not accept someone they agree should have a GAL. One explanation for the incongruence is that the APS acceptance criteria as outlined above differ from the CPLR 1201 standard for appointing a

GAL: that the person be an adult incapable of adequately prosecuting claims and defending rights.

APS assessments are designed to satisfy APS acceptance criteria and not CPLR 1201, even though APS will submit its assessment reports to Housing Court pursuant to a motion to secure a GAL under CPLR 1201 and to vacate a judgment if one exists. Judges and practitioners are occasionally stymied by APS reports that do not directly cover the factors helpful in deciding whether a potential ward has or had the physical or mental wherewithal to litigate. These factors, typically absent from APS assessments, include whether the potential ward understands the court process and the contours of the specific litigation.

When an APS assessment concludes that a potential ward is severely mentally retarded, one can assume that the potential ward is or was unable to prosecute claims and assert defenses. The ward is therefore entitled to a GAL and to vacate the judgment under CPLR 1201. Less clear is when the assessment finds the potential ward depressed. A valid assessment of clinical depression under DSM IV means that the potential ward is incapable of prosecuting and asserting claims and defenses. But mere nonclinical depression is different. Just because someone is depressed, a natural state for someone facing eviction, does not mean that the person is or was unable to prosecute claims and assert defenses, even if it might mean that the depressed person is entitled to APS services.

Similarly unhelpful is psychiatric terminology in reports that Housing judges often see using the words "rule out," as in, "rule out bipolar disorder." "Rule out" means that the psychiatrist does not rule something out—that the psychiatrist cannot say that the potential ward is not bipolar. This is different from ruling something in—that is, saying that the ward is bipolar. A "rule out" formulation is relevant, if at all, on the possibility that something cannot be or was not excluded. The formulation is inadmissible if offered as proof of a conclusion. Only if based on a reasonable degree of certainty or similar belief expressing a probability supported by a rational basis is expert medical opinion testimony admissible as a conclusion.[203]

If APS does not accept a client during the proceeding, the Housing judge who wants to appoint a GAL must find and appoint a volunteer. The typical ward cannot afford to pay for a GAL, and volunteers are hard to find.[204] But the Civil Court's GAL program makes prospective GALs aware that they are expected to accept at least three pro bono cases a year.

Sometimes, despite the court's requests, APS will reject a client during the proceeding and, instead, seek a GAL and judgment vacatur only after the case has concluded with a final judgment, when the tenant is on the verge of an eviction. This problem also arises when the landlord or its counsel does not inform the court that a GAL might be needed or when the presiding judge or court staff abdicate their responsibility to inquire or do not possess the sensitivity to appreciate the need for a GAL.

When any of these things happen, or do not happen, cures that might have affected a proceeding at its early stage occur at the end of the proceeding and require the results to be undone and redone. That should not be the goal. The goal, as well-explained by three thoughtful commentators, is to "obviate the need for litigation at the back-end of the proceeding. Weaving a tighter safety net for tenants with diminished capacity in order to identify them earlier in the proceedings would result in: (1) greater integrity to the judicial process; and (2) judicial resources more rightfully expended at the onset of the litigation as opposed to the end, when the court is required to vacate a default or warrant and begin the proceedings again."[205]

If APS determines that a potential ward is ineligible for its services, Housing Court may not compel APS to reverse its decision. As the Appellate Term, First Department, has written, "The landlord-tenant court [is] not authorized to direct a reinvestigation or reconsideration of tenant's case."[206] To obtain a review under 18 N.Y.C.R.R. 404.1(f), the potential ward must contact the Fair Hearing Section at the New York State Office of Temporary and Disability Assistance (OTADA). The potential ward can either fill out the online fair-hearing request form at http://www.otda.state.ny.us/oah/default.asp or mail or fax the fair-hearing request form, also available on the OTADA Web site, to P.O. Box 1930, Albany, New York 12201. During the hearing, the potential ward presents reasons why APS should have accepted the case. A review of the fair-hearing determination is made by a CPLR Article 78 proceeding in Supreme Court.

APS's tool *APS Search*[207] allows authorized individuals to look up APS clients by name and address. There has been a change in the APS Search Protocol in Housing Court. *APS Search* is now limited to cases that Housing Court refers to APS. This new limitation reflects confidentiality concerns over the names of APS clients not subjects of specific search inquiries. Previously, names of all APS clients close to the search terms would appear when searching by name or address. APS is required to keep these names and addresses confidential because they are not the subjects of the specific inquiry.

APS Eviction Units operate under an agreement with the New York City Department of investigation Marshal's Bureau. They visit and assess clients and potential clients threatened with imminent eviction. Shortly before or at the moment of eviction, marshals will alert APS to investigate if the court directs them to do so, perhaps on an order directing a landlord to direct the marshal to notify APS before an eviction, or if anyone else, including a tenant, makes a legitimate request.[208] APS develops service plans for clients eligible for APS services. APS will petition, by order to show cause, the court to appoint a GAL to assist clients with eviction proceedings in Housing Court in cases referred by a marshal.

In 2006, APS referred 1751 clients for GALs.[209] APS also petitions Supreme Court to appoint under Article 81 of the Mental Hygiene Law. In 2006, APS referred 768 clients for Article 81 guardians.[210]

If APS seeks an Article 81 guardian, its representatives, or the GAL after speaking to APS representatives, will seek a Housing Court stay of the execution of the warrant. Much litigation arises at this point because, from the landlord's perspective, APS will not pay rent in the interim and because APS, a busy agency that does not quickly seek Article 81 guardians, will perform triage, handling its most pressing, eviction-ready cases first and the rest later. Landlords will suggest that judges deny applications to stay the warrant to force APS's Office of Legal Affairs to seek an Article 81 guardian faster, but that puts the judge in an untenable position, given the possibility that a disabled tenant might be evicted because the court wanted to push APS into action. And more delays ensue once an Article 81 guardian is sought.

If the person is eligible for APS assistance based on a preliminary determination, APS will evaluate the potential ward to determine whether a GAL is required. APS will make this determination by using such methods as a home visit and through a psychiatric evaluation by one of its staff medical personnel. If APS determines that a GAL is required, APS will request that a GAL be appointed. Determining whether APS will accept a case takes four to six weeks. Referrals in Housing Court are often made by the judges, who contact the borough APS representative, who acts as a liaison and friend of the court. This process often takes another two to four weeks for a GAL to appear in court on the ward's behalf after the court signs the order appointing the GAL.

Although APS decisions affect Housing Court's ability to address a ward's needs, Housing judges lack the authority to compel APS to act or not act: "[A]n administrative determination regarding social services benefits is not reviewable in the Housing Court."[211] Consequently, the process in some cases will frustrate judges, GALs, and landlords, when APS does not initially accept a case when the court makes a referral and does so only much later, after a final judgment has been rendered.

In *Vega v. Eggleston*, a 2002 action in Supreme Court, New York County, the New York Legal Assistance Group represented a class of plaintiffs against the commissioner of HRA and others, who were represented by the New York City Corporation Counsel and the New York State Attorney General.[212] The court signed a so-ordered a consent stipulation in 2003 in which APS promised to improve its assessment and intake process in a wide variety of matters, including eviction prevention and housing relocation. As relevant to Housing Court GALs, the consent order's goal is two-fold. First to assure the "APS will address, promptly and appropriately, the eviction preventing and housing relocation service needs of clients who appear to be APS eligible while they are being assessed for APS services when delaying such services until after initial Assessment would be harmful to the client."[213] Second, to assure the APS, during the referral and assessment process, will "take all reasonable steps appropriate under the circumstances to prevent the eviction of, or to attempt to relocate, the client on or before the eviction date."[214]

XV. Conclusion

New York's adult population, especially the growing senior-citizen segment, will continue to require advocacy in Housing Court due to mental and physical impairments. The pool of qualified GALs must keep pace. What is best for the ward, landlords, GALs, the GAL program, and the court are expedient, fair resolutions. All involved in the process must strive to enable GALs to serve the ward, the court, and society and to minimize the disruptions and intrusions into the lives of incapacitated individuals with tenancies in jeopardy.

Endnotes

1. *See* New York City Dep't for the Aging, *Quick Facts on the Elderly in New York City*, *available at* http://home2.nyc.gov/html/dfta/downloads/pdf/quickfacts.pdf (last visited Aug. 11, 2007) (reporting that according to 2005 Census, approximately 943,000 New York City dwellers are over 65 and that approximately 2.4 million individuals are over 65 in New York State).
2. *See* N.Y.C. Dep't of Health and Mental Hygiene, Div. of Mental Hygiene, *Prevalence and Cost Estimates of Psychiatric and Substance Use Disorders and Mental Retardation and Developmental Disabilities in N.Y.C.* iv (2003), 9, *available at* http://www.nyc.gov/html/doh/downloads/pdf/mh/mh-2003prevalence.pdf (last visited Aug. 11, 2007) (noting that about 366,000 individuals in New York City have psychiatric and substance-abuse disorders).
3. For two excellent pieces on GAL law and practice, see JEANETTE ZELHOF, ANDREW GOLDBERG & HINA SHAMSI, *Protecting the Rights of Litigants with Diminished Capacity in the New York City Housing Courts*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 733 (2006); JUDITH J. GISCHE, *Guardian ad Litem Appointments in Civil Proceedings for Adults Incapable of Adequately Prosecuting or Defending Their Rights*, 19 WESTCHESTER B.J. 289 (1992).
4. Adult Protective Services was formerly known as Protective Services for Adults (PSA).
5. *See generally* PARIS R. BALDACCI, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 659 (2006) (discussing problems facing pro se litigants in Housing Court).
6. One Housing Court judge has written that "[o]ur sense of concern and frustration is heightened at times by the perceived inaction, delay and bureaucratic impenetrability of government agencies and programs (Adult Protective Services [APS]) . . . [and] the perceived delay in related matters in other courts (*e.g.*, Supreme Court Article 81 proceedings). . . ." Marc Finkelstein, Guardians Ad Litem in Housing Court 4 (unpublished outline revised for N.Y. St. B. Ass'n Cttee on Landlord-Tenant Proceedings (Sept. 14, 2006) (on file with author) (alteration original).
7. *De Forte v. Liggett & Myers Tobacco Co.*, 42 Misc. 2d 721, 723, 248 N.Y.S.2d 764, 766 (Sup. Ct. Kings County 1964) (citing *Honadle v. Stafford*, 265 N.Y. 354, 356, 193 N.E. 172, 173 (1934); *Lee v. Gucker*, 16 Misc. 2d 346, 347, 186 N.Y.S.2d 700, 702 (Sup. Ct. N.Y. County 1959)).
8. BLACK'S LAW DICTIONARY 46 (8th ed. 2004).
9. *See City of N.Y. v. Tillis*, N.Y.L.J., Feb. 9, 2000, at 29, col. 4 (Hous. Part Civ. Ct. N.Y. County 2000) (noting Housing Court's bringing application for GAL on its own motion).

10. *See* 256 A.D.2d 90, 91, 681 N.Y.S.2d 494, 494 (1st Dep't 1998) (mem.).
11. *Pettas v. Pettas*, 88 Misc. 2d 955, 957, 389 N.Y.S.2d 537, 539 (Sup. Ct. Nassau County 1976).
12. In the Family Court of the State of New York in the City of New York, law guardians are private practitioners or lawyers from The Legal Aid Society, Lawyers for Children, the Society for the Prevention of Cruelty to Children, or the Children's Law Center whom the judge assigns to represent a child in Family Court under the Family Court Act. N.Y.C. BAR ASS'N, *Introductory Guide to the New York City Family Court* 4 (2006) (Gerald Lebovits, principal author), *available at* http://www.abcny.org/pdf/famguide_ms.pdf (last visited Aug. 11, 2007). For the differences between guardians in Family Court and Surrogate's Court, see *id.* at 38 ("The Family Court has similar jurisdiction and authority as the Surrogate Court about the guardianship of the person of a minor, a child 17 years or younger. Normally, guardianship petitions of the person of a minor are filed in the Family Court. The Surrogate's Court has the power over the property of a minor and may appoint a guardian of the person, the property, or both the person and the property."). For an excellent piece on legal guardians and children, see CROSS-BOROUGH COLLABORATION, THE BASICS: BECOMING A LEGAL GUARDIAN IN NEW YORK STATE (2002), *available at* http://www.brooklynbar.org/vlp/booklets/81441CBCBasicGuardiansrcb.pdf (last visited Aug. 11, 2007).
13. *See* N.Y. MENTAL HYG. LAW § 81.02(a)(2) (McKinney's 2007).
14. *Id.* § 81.02(b).
15. *Sengstack v. Sengstack*, 4 N.Y.2d 502, 509, 176 N.Y.S.2d 337, 342, 151 N.E.2d 887, 890 (1958).
16. Fern Fisher, Admin. Judge, N.Y.C. Civ. Ct., Advisory Notice, *Settlements in GAL Cases* (eff. Mar. 8, 2007), *available at* http://nycourts.gov/courts/nyc/housing/directives/AN/gal.pdf (last visited Aug. 11, 2007).
17. Fern Fisher, N.Y.C. Civ. Ct., Directives and Procedures, *GAL Case Summary* (eff. Mar. 7, 2007), *available at* http://nycourts.gov/courts/nyc/housing/directives/DRP/drp178.pdf (last visited Aug. 11, 2007).
18. 15 Misc. 3d 30, 31, 833 N.Y.S.2d 348, 349 (App. Term 1st Dep't 2007) (per curiam) (vacating judgment because GAL, despite not having met or visited tenant, entered into stipulation for judgment of possession to landlord, despite parties' knowledge that APS intended to file for Article 81 guardianship).
19. CIV-LT-57, *GAL Case Summary* (eff. Feb. 2, 2007), *available at* http://nycourts.gov/courts/nyc/housing/pdfs/gal%20pdfs/casesummary.pdf (last visited Aug. 11, 2007).
20. *Riley v. Erie Lackawanna R.R. Co.*, 119 Misc. 2d 619, 621, 463 N.Y.S.2d 986, 987 (Sup. Ct. Chautauqua County 1983).
21. N.Y. County Lawyers' Ass'n (NYCLA), *Task Force on Housing Court Resources Subcommittee Report*, *available at* http://www.nycla.org/siteFiles/Publications/Publications468_0.pdf (last visited Aug. 11, 2007) [hereinafter "*NYCLA Subcommittee Rpt.*"]. The recommendations of the groups that participated at the NYCLA conference appear at 3 Cardozo Pub. L. Pol'y & Ethics J. 591 (2006).
22. N.Y. County Lawyers'Ass'n (NYCLA), *Report on Resources in the Housing Court*, *available at* http://nycla.org/siteFiles/News/News59_1.pdf (last visited Aug. 11, 2007) [hereinafter "*NYCLA Final Rpt.*"].
23. *Id.* at 8–14, 19–21.
24. *Id.* at 12; *accord NYCLA Subcomm. Report*, *supra* note 21, at 12.
25. *Id.*
26. ZELHOF ET AL., *supra* note 3, at 745.
27. *Id.* This proposition has case law support: "Although a guardian ad litem appointed for an incapacitated adult party may prosecute or defend the claims and rights of such a party, the guardian ad litem is the only CPLR 1201 representative who is not expressly authorized by statute to apply for court approval of a proposed compromise of the claims of such incapacitated party pursuant to CPLR 1207." *DeSantis ex rel. Qualtiere v. Bruen*, 165 Misc. 2d 291, 295, 627 N.Y.S.2d 534, 537 (Sup. Ct. Suffolk County 1995).
28. 176 Misc. 2d 550, 553, 672 N.Y.S.2d 994, 997 (Sur. Ct. N.Y. County 1998) (cited in ZELHOF ET AL., *supra* note 3, at 763 n.112).
29. 215 A.D.2d 750, 750, 627 N.Y.S.2d 419, 419 (2d Dep't 1995) (mem.) (cited in Paris R. Baldacci, *Addressing the Challenge of Persons with Diminished Capacity in Housing Court: Index of Materials* 212, 213 (unpublished outline for N.Y.C. Bar Ass'n CLE, Dec. 7, 2005).
30. ZELHOF ET AL., *supra* note 3, at 762 ("MFY [legal services] attorneys have heard references during court appearances, and have seen references in training materials for guardians ad litem, to the concept of 'stepping into the shoes' of wards. An electronic search of reported cases in New York State does not provide guidance as to the content of this phrase.").
31. *Feliciano v. Nielson*, 290 A.D.2d 834, 835, 736 N.Y.S.2d 510, 512 (3d Dep't 2002) (quoting *In re Aho*, 39 N.Y.2d 241, 247, 383 N.Y.S.2d 285, 288, 347 N.E.2d 647, 651 (1976)).
32. GISCHE, *supra* note 3, at 290.
33. FINKELSTEIN, *supra* note 6, at 21.
34. *See* Fern A. Fisher, *Comment to the NYCLA Task Force on Housing Court Resources Subcommittee Report on Standardized Procedures in Cases Where GALs Are Appointed for Respondents with Diminished Capacity* 6 (2006).
35. *Id.* at 1–2.
36. *Id.* at 2.
37. *Id.* at 6.
38. *See NYCLA Subcommittee Rpt.*, *supra* note 21, at Addendum.
39. *N.Y. Life Ins. Co. v. V.K.*, 184 Misc. 2d 727, 732, 711 N.Y.S.2d 90, 95 (Hous. Part Civ. Ct. N.Y. County 1999).
40. Neil H. Mickenberg, *The Silent Clients: Legal Aid and Ethical Considerations in Representing Severely and Profoundly Retarded Individuals*, 31 Stan. L. Rev. 625, 634 (1979) (footnotes omitted).
41. N.Y.C. Civ. Ct., Advisory Notice, *GAL Cases Where There Is Also an Attorney of Record* (eff. Apr. 18, 2007).
42. *Id.*
43. *In re M.R.*, 135 N.J. 155, 177–78, 638 A.2d 1274, 1285 (1994).
44. N.Y. St. B. Ass'n, Cttee. on Prof. Ethics, Op. 746 (July 18, 2001); *accord* ABA Formal Ethics Op. 96-404, *Client Under a Disability* (Aug. 2, 1996).
45. *Id.*
46. ZELHOF ET AL., *supra* note 3, at 771.
47. *Bolsinger v. Bolsinger*, 144 A.D.2d 320, 321, 533 N.Y.S.2d 934, 934 (2d Dep't 1988) (mem.).
48. *NYCLA Final Rpt.*, *supra* note 22, at 13.
49. Op. Att'y Gen. No. 2006-F3. *available at* http://www.oag.state.ny.us/lawyers/opinions/2006/formal/2006-F3.pdf (last visited Aug. 11, 2007).
50. Op. Att'y Gen. No. 2006-F5, *available at* http://www.oag.state.ny.us/lawyers/opinions/2006/formal/2006-F5.pdf (last visited Aug. 11, 2007).
51. The legislation, proposed by retired Housing Judge Bruce Gould and written by Dov Treiman, Esq., both Committee members, would provide as follows: "Subdivision (j) of section 110 of the New York City Civil Court Act is added to read as follows: (j) In actions and proceedings before the Housing Part, guardians ad litem appointed by the court pursuant to Article 12 of the civil practice law and rules shall be deemed state employees solely for the purposes of 'the Public Officers Law Section 17, titled, Defense and indemnification of state officers and employees.'"
52. *Lau v. Berman*, Index No. 18375CVN2004, at 4 (Civ. Ct., N.Y. County) (Kern, J.) (unpublished opinion) (quoting *Aho*, 39 N.Y.2d at 247, 383 N.Y.S.2d at 288, 347 N.E.2d at 651) (explaining that a "guardian ad litem may [not] be regarded as an unbiased protagonist of the wishes of an incompetent").

53. *Id.* (citing *Smith v. Keteltas*, 27 App. Div. 279, 50 N.Y.S. 471 (1st Dep't 1898)).

54. N.Y.C. Civ. Ct., Housing Part, *Prospective Guardians Ad Litem*, *available at* http://www.nycourts.gov/courts/nyc/housing/GALprospective.shtml (last visited Aug. 11, 2007).

55. *Id.*

56. *See* http://www.nycourts.gov/courts/nyc/housing/pdfs/GALapplication.pdf (last visited Aug. 11, 2007).

57. 22 N.Y.C.R.R. Part 36.1(b)(3) (Rules of the Chief Judge).

58. *Soybel v. Gruber*, 132 Misc. 2d 343, 347, 504 N.Y.S.2d 354, 357 (Hous. Part Civ. Ct. N.Y. County 1986). In *Soybel*, at issue was the then-extant Brooklyn Law School's Senior Citizen Law Office.

59. *See Backerman v. Coccola*, 189 A.D. 235, 237, 178 N.Y.S. 423, 424 (1st Dep't 1919).

60. N.Y. C.P.L.R. 1202(3)(c) (McKinney's 2007).

61. *Weingarten v. State*, 94 Misc. 2d 788, 791, 405 N.Y.S.2d 605, 607 (Ct. Cl. 1978).

62. FINKELSTEIN, *supra* note 6, at 20 ("Guardian ad litem orders do often provide that the guardian ad litem is to serve without bond. . . .") & 21 ("[I]t might be argued that the specific affidavit requirement of 1202(c) is not necessary for GAL's in Housing Court.").

63. N.Y.C. Civ. Ct., *Housing Part Guardian ad Litem*, LSM 153 (revised) (eff. Sept. 30, 2005), at 2, *available at* http://www.nycourts.gov/courts/nyc/civil/directives/LSM/lsm 153.pdf (last visited Aug. 11, 2007).

64. *Id.* at 1.

65. *NYCLA Final Rpt*., *supra* note 22, at 9. For the benefits of serving as a Housing Court GAL, see William J. Dean, Pro Bono Digest, *Service as a Guardian ad Litem*, N.Y.L.J., July 3, 2006, p. 3, col. 1 (quoting private practitioners who serve as volunteer GALs, including this: "My greatest accomplishment as a lawyer will always be my work on behalf of a mentally disabled indigent client, for whom I served as a guardian ad litem.") (quoting Lisa E. Cleary, Esq.).

66. *Bolsinger*, 144 A.D.2d at 321, 533 N.Y.S.2d at 934.

67. *Barnes v. MRG Partners*, N.Y.L.J., Nov. 29, 2000, at 29, col. 3 (Hous. Part Civ. Ct. N.Y. County).

68. *See Kalimian v. Driscoll*, N.Y.L.J., Mar. 6, 1991, at 22, col. 3 (Civ. Ct. N.Y. County) (vacating jury verdict despite presence of counsel because tenant was "unable to effectively cooperate with [counsel] at trial, post-trial and on appeal and does not fully understand the legal and practical consequences of subject summary proceedings"), *aff'd*, N.Y.L.J., July 20, 1992, at 23, col. 4 (App. Term 1st Dep't) (per curiam).

69. N.Y.L.J., Jun. 16, 1989, at 25, col. 5 (App. Term 1st Dep't) (per curiam).

70. N.Y.L.J., Aug. 24, 1994, at 23, col. 4 (Hous. Part Civ. Ct. Bronx County).

71. *Villafane v. Banner*, 87 Misc. 2d 1037, 1038-39, 387 N.Y.S.2d 183, 184 (Sup. Ct. N.Y. County 1976).

72. *N.Y. Life Ins*. 184 Misc. 2d at 731, 711 N.Y.S.2d at 93.

73. N.Y. C.P.L.R. 1012(a)(1) (McKinney's 2007).

74. N.Y. Soc. Serv. L. § 473(2)(a) (McKinney's 2003).

75. *N.Y. Life Ins.*, 184 Misc. 2d at 729, 711 N.Y.S.2d at 93.

76. *See* N.Y. C.P.L.R. 401 (McKinney's 2007); *N.Y. Life Ins.*, 184 Misc. 2d at 731, 711 N.Y.S.2d at 94.

77. N.Y. C.P.L.R. 1202(a)(3) (McKinney's 2007).

78. *See, e.g.*, *Sarfaty v. Sarfaty*, 83 A.D.2d 748, 749, 443 N.Y.S.2d 506, 507 (4th Dep't 1981) (mem.) ("[P]laintiff had the burden to bring the condition of defendant's mental state to the court's attention so that it could make suitable inquiry and determine whether a guardian should have been appointed for her to protect her interests and before a default judgment could be entered against her."); *Barone v. Cox*, 51 A.D.2d 115, 118, 379 N.Y.S.2d 881, 884 (4th Dep't 1976); *Parras v. Ricciardi*, 185 Misc. 2d 209, 214, 710 N.Y.S.2d 792, 796-97 (Hous. Part Civ. Ct. Kings County 2000) ("When a creditor becomes aware that his alleged debtor is or apparently is incapable of protecting his own legal interests it is incumbent upon him to advise the court thereof so . . . the court may thereafter in its discretion appoint a guardian ad litem to protect the defendant's interests.").

79. N.Y.L.J., July 11, 2001, at 25, col. 6 (Hous. Part Civ. Ct. Queens County).

80. *State of N.Y. v. Getelman*, N.Y.L.J., Sept. 7, 1993, at 25, col. 6 (Sup. Ct. Albany County).

81. *See Benenson v. Dimonda*, N.Y.L.J., Jan. 16, 2002, at 22, col. 1 (Civ. Ct. Kings County); *Parras*, 185 Misc. 2d at 213-14, 710 N.Y.S.2d at 796.

82. N.Y.C. Civ. Ct., LSM 153 (revised) (eff. Sept. 30, 2005), at 2, *available at* http://www.nycourts.gov/courts/nyc/civil/directives/LSM/lsm 153.pdf (revised) (last visited Aug. 11, 2007).

83. *See, e.g., N.Y.C. Hous. Auth. v. Hart*, N.Y.L.J., May 16, 1990, at 29, col. 3 (Civ. Ct. N.Y. County 1990).

84. N.Y. C.P.L.R. 1202(a); *accord* Finkelstein, *supra* note 6, at 8 (noting that Housing Court judges have authority to appoint GALs).

85. *Stane v. Dery*, 86 Misc. 2d 416, 417, 382 N.Y.S.2d 607, 608 (Sup. Ct. N.Y. County 1976); *Soybel*, 132 Misc. 2d at 343, 504 N.Y.S.2d at 354.

86. *See 1199 Hous. Corp. v. Jackson*, N.Y.L.J., Mar. 20, 1991, at 22, col. 6 (Hous. Part Civ. Ct. N.Y. County) ("[T]here is no basis for a guardian ad litem to be appointed by this court. . . ."); *Silgo 22nd St. Assocs. v. Hennies*, N.Y.L.J., Apr. 24, 1991, at 22, col. 6 (Hous. Part Civ. Ct. N.Y. County 1991) (same); *Zuckerman v. Burgess*, N.Y.L.J., Mar. 13, 1991, at 22, col. 3 (Hous. Part Civ. Ct. N.Y. County 1991) (same).

87. *BML Realty Group*, 15 Misc. 3d at 31, 833 N.Y.S.2d at 349; *83 E. Assocs. v. Mager*, N.Y.L.J., Nov. 10, 1992, at 21, col. 1 (App. Term 1st Dep't) (per curiam) (finding, given documentation submitted supporting tenant's mental condition, that "it was an abuse of discretion for [Housing Court] to have denied, without a hearing, the motion to ascertain whether tenant was capable of . . . adequately defending her interests in the litigation").

88. *Soybel*, 132 Misc. 2d at 347, 504 N.Y.S.2d at 357.

89. *466 Assocs. v. Murray*, 151 Misc. 2d 472, 476, 573 N.Y.S.2d 360, 363 (Civ. Ct. N.Y. County 1991).

90. *N.Y. Life Ins.*, 184 Misc. 2d at 728-729, 711 N.Y.S.2d at 92 ("The standard of proof to establish the grounds for a guardian ad litem is a preponderance of the evidence.").

91. *In re Lugo*, 8 A.D.2d 877, 877, 187 N.Y.S.2d 59, 61 (3d Dep't 1959) (mem.), *aff'd*, 7 N.Y.2d 939, 197 N.Y.S.2d 740 (1960); *Anonymous v. Anonymous*, 3 A.D.2d 590, 594, 162 N.Y.S.2d 984, 988 (2d Dep't 1957); *Stane*, 86 Misc. 2d at 417, 382 N.Y.S.2d at 608.

92. *See* 4 N.Y.2d at 509, 176 N.Y.S.2d at 342.

93. 21 A.D.2d 152, 154, 249 N.Y.S.2d 320, 322 (1st Dep't 1964).

94. *See id.* at 155, 249 N.Y.S.2d at 324.

95. *See Riley v. Erie L. R.R. Co.*, 119 Misc. 2d 619, 619, 463 N.Y.S.2d 986, 986 (Sup. Ct. Chautauqua County 1983).

96. *See, e.g.*, *Parras*, 185 Misc. 2d at 215, 710 N.Y.S.2d at 797.

97. *See In re Application of King*, 284 A.D. 748, 749, 135 N.Y.S.2d 495, 496 (2d Dep't 1954).

98. *See id.* at 214, 710 N.Y.S.2d at 796.

99. 62 A.D.2d 990, 990, 403 N.Y.S.2d 316, 316 (2d Dep't 1978) (mem.).

100. *See Shad v. Shad*, 167 A.D.2d 532, 533, 562 N.Y.S.2d 202, 203 (2d Dep't 1990).

101. *Grasso v. Matarazzo*, N.Y.L.J., Apr. 8, 1998, at 32, col. 3 (Hous. Part Civ. Ct. Kings County); *Kings 28 Assocs. v. Raff*, 167 Misc. 2d 351, 353, 636 N.Y.S.2d 257, 258 (Hous. Part Civ. Ct. Kings County 1995).

102. 94 Misc. 2d at 790, 405 N.Y.S.2d at 607.

103. *Jonas Equities v. Brunelle*, N.Y.L.J., Feb. 6, 1991, at 25, col. 2 (Hous. Part Civ. Ct. Queens County), *rev'd on other grounds*, N.Y.L.J., Jun. 29, 1992, at 32, col. 6 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).

104. *1021-27 Ave. St. John HDFC v. Hernandez*, N.Y.L.J., May 6, 1992, at 23, col. 3 (Hous. Part Civ. Ct. Bronx County).

105. Finkelstein, *supra* note 6, at 10.

106. *Wenzel v. Wenzel*, 122 Misc. 2d 1001, 1003, 472 N.Y.S.2d 830, 834 (Sup. Ct. Suffolk County 1984).

107. *Lebowitz v. Hunter*, 45 Misc. 2d 580, 581, 257 N.Y.S.2d 434, 435 (Sup. Ct. N.Y. County 1965).

108. *See, e.g., S. Indust., Inc. v. Esray Fabrics, Inc.*, 81 A.D.2d 647, 647, 438 N.Y.S.2d 341, 342 (2d Dep't 1981) (mem.).

109. *Bird v. Citibank, N.A.*, 102 A.D.2d 718, 719, 477 N.Y.S.2d 1, 3 (1st Dep't 1984) (mem.); *Vinokur*, 62 A.D.2d, at 990, 403 N.Y.S.2d at 316.

110. *In re Christopher*, 177 Misc. 2d 352, 354, 675 N.Y.S.2d 807, 807 (Sup. Ct. Queens County 1998).

111. *Anonymous v. Anonymous*, 256 A.D.2d 90, 91, 681 N.Y.S.2d 494, 494 (1st Dep't 1998) (mem.) (appointing GAL due to defendant's "chronic irrational and agitated state attributable to alcohol and substance abuse and defendant's consequent and manifest inability to assist his attorneys in his defense").

112. *Weingarten*, 94 Misc. 2d at 790, 405 N.Y.S.2d at 607 ("[W]hen an application is made for appointment of a guardian ad litem to represent a person who resides in a mental institution, whether on a voluntary basis or pursuant to court commitment, such residence creates a presumption that the person involved is unable to adequately prosecute or defend his rights.").

113. *See, e.g., 466 Assocs.*, 151 Misc. 2d at 474, 573 N.Y.S.2d at 361.

114. *See Acosta v. Beka Realty LLC*, N.Y.L.J., Oct. 3, 2005, at 17, col. 1 (Hous. Part Civ. Ct. Kings County) (appointing GAL in HP proceeding).

115. *Kirso Prop. Co. v. Brief, Comm'r of Soc. Servs. of City of N.Y.*, N.Y.L.J., Jun. 29, 1998, at 30, col. 3 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).

116. *See, e.g., Kalimian*, N.Y.L.J., July 20, 1992, at 23, col. 4 (App. Term 1st Dep't) (per curiam) ("The fact that tenant was represented by counsel in the trial proceedings is of little, if any, relevance in determining whether she was prejudiced by the absence of a guardian ad litem.").

117. *124 MacDougal St. Assoc. v. Hurd*, N.Y.L.J. Feb. 2, 2000, at 28, col. 4 (Civ. Ct. N.Y. County).

118. *See Parras*, 185 Misc. 2d at 215, 710 N.Y.S.2d at 797.

119. *See, e.g., Rakiecki v. Ferenc*, 21 A.D.2d 741, 741, 250 N.Y.S.2d 102, 103 (4th Dep't 1964) (mem.).

120. *N.Y.C. Hous. Auth. v. Beverly B.*, N.Y.L.J., Apr. 13, 2005, at 20, col. 1 (Hous. Part Civ. Ct. Kings County).

121. N.Y.C. Civ. Ct., Adv. Notice, *Default Judgments in GAL Cases* (eff. Mar. 8, 2007), *available at* http://nycourts.gov/courts/nyc/housing/directives/AN/*default*.pdf (last visited Aug. 11, 2007) (citing, among others, *Oneida Nat'l Bank & Trust Co. Cent. N.Y. v. Unczur*, 37 A.D.2d 480, 326 N.Y.S.2d 458 (4th Dep't 1971)).

122. *See e.g., Grasso*, N.Y.L.J., Apr. 8, 1998, at 32, col. 3.

123. *Deepdale Gardens Third Corp. v. Knox*, N.Y.L.J., Oct. 1, 1996, at 26, col. 1 (Sup. Ct. Queens County).

124. N.Y.L.J., Jan. 15, 2003, at 21, col. 5 (Dist. Ct. Nassau County) [incorrectly labeled "Richmond County District Court" in N.Y.L.J.].

125. *See Id.*

126. *N.Y. Life Ins.*, 184 Misc. 2d at 737, 711 N.Y.S.2d at 97 (quoting *In re Estate of Bacon*, 169 Misc. 2d 858, 864, 645 N.Y.S.2d 1016, 1020 (Sur. Ct. Westchester County 1996)).

127. *See, e.g., Hotel Pres. v. Byrne*, N.Y.L.J., Mar. 12, 1999, at 26, col. 1 (App. Term 1st Dep't) (per curiam) (vacating default judgment because petitioner knew or had reason to know that respondent was incapable of protecting her interests when judgment was entered); *Jackson Gardens*, N.Y.L.J., July 11, 2001, p. 25, col. 6 (vacating default judgment because petitioner knew that respondent-tenant had GAL in prior proceeding); *Surrey Hotel Assocs., L.L.C. v. Sabin*, N.Y.L.J., June 29, 2000, at 28, col. 4 (Hous. Part Civ. Ct. N.Y. County) (vacating judgment because petitioner had accepted rent from APS and complained about tenant's behavior); *Glick v. Quintana*, N.Y.L.J., Nov. 30, 1992, at 27, col. 4 (Civ. Ct. N.Y. County) (vacating default judgment because petitioner knew that respondent had a GAL in two prior proceedings).

128. *See, e.g., Greene v. Resch*, 114 Misc. 2d 780, 783, 452 N.Y.S.2d 314, 316 (Hous. Part Civ. Ct. Kings County 1982) (denying vacatur of judgment even though opposing party knew about tenant's mental incapacity).

129. N.Y.L.J., July 20, 1992, at 23, col. 4 (App. Term 1st Dep't) (per curiam).

130. *In re Hertwig Brilliant*, N.Y.L.J., Nov. 9, 1993, p. 26, col. 1 (Sup. Ct. N.Y. County 1993).

131. *See, e.g., 355 W. 85th St. Corp. v. Tremblay*, N.Y.L.J., Apr. 3, 2002, at 18, col. 5 (Hous. Part Civ. Ct. N.Y. County).

132. *See* N.Y.L.J., Nov. 19, 1998, at 32, col. 4 (App. Term 1st Dep't) (per curiam).

133. *See Urban Pathways, Inc. v. Lublin*, 227 A.D.2d 186, 186, 642 N.Y.S.2d 26, 26 (1st Dep't 1996) (mem.).

134. *Wilson Han Assocs., Inc. v. Arthur*, N.Y L.J., July 6, 1999, at 29, col. 4 (App. Term 2d Dep't 2d & 11th Jud. Dists. 1999) (mem.).

135. *See S. Indus.*, 81 A.D.2d at 647, 438 N.Y.S.2d at 341 (finding that physical impairment alone did not render tenant unable to defend his interests adequately).

136. 211 A.D.2d 559, 559, 621 N.Y.S.2d 77, 78 (1st Dep't 1995) (mem.).

137. *Id.*, 621 N.Y.S.2d at 78.

138. 12 Misc. 3d 26, 816 N.Y.S.2d 815 (App. Term 1st Dep't 2006) (per curiam).

139. *Id.* at 29, 816 N.Y.S.2d at 817 (Gangel-Jacob, J., dissenting).

140. *Id.* at 27, 816 N.Y.S.2d at 816.

141. *See Arcieri v. Arcieri*, 49 Misc. 2d 223, 224, 266 N.Y.S.2d 1020, 1021 (Sup. Ct. Kings County 1966) (finding that prior institutionalization did not evidence existing incompetency).

142. 107 A.D.2d 568, 568, 483 N.Y.S.2d 307, 308 (1st Dep't 1985) (mem.).

143. *See id.* at 569, 483 N.Y.S.2d at 308.

144. 220 A.D.2d 39, 44-45, 643 N.Y.S.2d 148, 152 (2d Dep't 1996).

145. *Id.* at 43, 643 N.Y.S.2d at 151.

146. *See id.* at 46, 643 N.Y.S.2d at 153.

147. *N.Y.C. Hous. Auth. v. Maldonado*, N.Y.L.J., Apr. 13, 2005, p. 19, col. 3 (Hous. Part Civ. Ct. Bronx County).

148. 42 Misc. 2d 721, 723, 248 N.Y.S.2d 764, 766 (Sup. Ct. Kings County 1964).

149. *See Pomeroy Co. v. Thompson*, N.Y.L.J., Sept. 18, 2002, p. 20, col. 6 (Hous. Part Civ. Ct. N.Y. County) (finding that GAL, APS, and N.Y.C. Department of Investigation failed to protect ward's tenancy because no one submitted application for grant for arrears before eviction), *aff'd*, 5 Misc. 3d 51, 784 N.Y.S.2d 278 (App. Term 1st Dep't 2004) (per curiam).

150. N.Y. C.P.L.R. 1203 provides that "[n]o judgment by default may be entered against an infant or a person judicially declared to be incompetent unless his representative appeared in the action or twenty days have expired since appointment of a guardian ad litem for him."

151. 1 Misc. 3d 906(A), 781 N.Y.S.2d 624, 2003 N.Y. Slip Op. 51524(U), at *1, 2003 WL 23109709, at *3, 2003 N.Y. Misc. LEXIS 1635 (Hous. Part Civ. Ct. N.Y. County, Dec. 19, 2003) (Gerald Lebovits, J.).

152. The GAL in the proceeding was eventually removed from the Civil Court's GAL program.

153. *BML Realty Group*, 15 Misc. 3d at 31, 833 N.Y.S.2d at 349 (*quoting N.Y.C. Hous. Auth. v. Jackson*, 13 Misc. 3d 141(A), 2006 N.Y. Slip Op. 52265(U), 2006 WL 3437858, at *1 (App. Term 2d Dep't 2d & 11th Jud. Dists. Nov. 17, 2006) (mem.)).

154. N.Y.C. Civ. Ct. Advisory Notice, *Settlements in GAL Cases* (Mar. 8, 2007) *available at* http://nycourts.gov/courts/nyc/housing/directives/AN/gal.pdf (last visited Aug. 11, 2007).

155. *Id.*

156. Jeanette Zelhof et al., *Protecting the Rights of Litigants with Diminished Capacity in the New York City Housing Courts*, 3 Cardozo Pub. L. Pol'y & Ethics J. 733, 765 (2006).

157. *See id.* at 763.

158. *See id.*

159. N.Y. Real Prop. Acts & Proc. L. 735 (McKinney's 2007).

160. *Id.*

161. *Id.*

162. *See Parras v. Ricciardi*, 185 Misc. 2d 212-13, 710 N.Y.S.2d 792, 795.

163. *Id.* at 212–13, 710 N.Y.S.2d at 795.

164. *Id.* at 212, 710 N.Y.S.2d at 795.

165. *Id.*, 710 N.Y.S.2d at 795.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*, 710 N.Y.S.2d at 796.

170. N.Y. C.P.L.R. 1202(b) (McKinney's 2007).

171. *Id.*

172. *Andrews v. Mensch*, 100 Misc. 2d 79, 81, 418 N.Y.S.2d 527, 528 (Dist. Ct. Suffolk County 1979) ("Nevertheless, CPLR 1202 requires that notice be given to the person who would be represented and since no such notice has been given in this instance, the court is inclined to deny the motion with leave to renew upon proper papers."); *see also Weingarten*, 94 Misc. 2d at 790, 405 N.Y.S.2d at 607.

173. *Bocina v. Schlau*, 125 Misc. 2d 682, 683, 480 N.Y.S.2d 93, 94 (Sup. Ct. Suffolk County 1984) (citing *Weingarten*, 94 Misc. 2d at 790, 405 N.Y.S.2d at 607)).

174. N.Y.L.J., Jul. 29, 2005, at 20, col. 1 (Hous. Part Civ. Ct. Kings County).

175. N.Y. C.P.L.R. 1204 (McKinney's 2007).

176. *See* New York State Unified Court System: Existing Guardians Ad Litem. http://www.courts.state.ny.us/courts/nyc/housing/GALexisting.shtml#forms (last visited Aug. 11, 2007).

177. *See id.*

178. *See id.*

179. *See id.*

180. N.Y. C.P.L.R. 1204 (McKinney's 2007).

181. 22 N.Y.C.R.R. 36.4(b)(1) (McKinney's 2007).

182. *Id.* 36.4(b)(2).

183. *See* New York State Unified Court System: Exisiting Guardians Ad Litem. http://www.courts.state.ny.us/courts/nyc/housing/GALexisting.shtml#forms (last visited Aug. 11, 2007).

184. 22 N.Y.C.R.R. 36.4(b)(4) (McKinney's 2007).

185. *C.F.B. v. T.B.*, 9 Misc. 3d 1105(A), 806 N.Y.S.2d 443, 2005 N.Y. Slip Op. 51412(U), at *5, 2005 WL 2185481, at *4, 2005 N.Y. Misc. LEXIS 1902, at *12 (Sup. Ct. Erie County May 24, 2005).

186. *Id.*

187. *See id.*

188. *Bolsinger*, 144 A.D.2d at 321, 533 N.Y.S.2d at 934.

189. *Id.*, 533 N.Y.S.2d at 935 (quoting *In re Becan*, 26 A.D.2d 44, 48, 270 N.Y.S.2d 923, 930 (1st Dep't 1966), and *In re Lydia E. Hall Hosp. (Cinque)*, 117 Misc. 2d 1024, 1025, 459 N.Y.S.2d 682, 683 (Sup. Ct. Nassau County 1982)).

190. 35 A.D.2d 927, 927, 316 N.Y.S.2d 575, 576 (1st Dep't 1970) (per curiam).

191. *Id.*, 316 N.Y.S.2d at 576.

192. *Id.*

193. 26 A.D.2d at 48, 270 N.Y.S.2d at 930.

194. *Id.*, 270 N.Y.S.2d at 930.

195. 127 A.D.2d 960, 961, 512 N.Y.S.2d 565, 566 (3d Dep't 1987).

196. 298 A.D.2d 677, 679, 748 N.Y.S.2d 811, 813 (3d Dep't 2002).

197. 164 Misc. 2d 272, 274, 624 N.Y.S.2d 351, 353 (Sur. Ct. N.Y. County 1995).

198. For an explanation at APS's Web site of what the agency does, see http://www.nyc.gov/html/hra/downloads/pdf/adult_protective_services.pdf (last visited Aug. 11, 2007).

199. APS Memorandum W2-244, Rev. Jan. 2005 [hereinafter "APS Memorandum"].

200. *Id.*

201. *Id.*

202. *Id.*

203. *See, e.g., Matott v. Ward*, 48 N.Y.2d 455, 423 N.Y.S.2d 645, 399 N.E.2d 532 (1979).

204. The New York City Bar Association used to be a source of volunteer GALs. The City Bar's GAL program no longer exists, even though program details still appear on the City Bar's Web site. See http://www.abcny.org/CityBarFund/CommunityOutreachLawProgram.htm (last visited Aug. 11, 2007).

205. Zelhof et al., *supra* note 3, at 749.

206. *Marypat Realty Corp. v. Hernandez*. N.Y.L.J., Dec. 31, 2002, p.18, col. 1, 2002 N.Y. Slip Op. 50504(U), at *1, 2002 WL 31940717, at *1 (App. Term 1st Dep't) (per curiam).

207. *See* APS Search page, *available* at https://a069-webapps3.nyc.gov/APSearch/login.aspx (last visited Aug. 11, 2007). APS Search requires a username and password.

208. Marshals must make a "reasonable effort" before executing a warrant to determine whether a resident of a household is at risk. N.Y.C. Dep't of Investigation, *N.Y.C. Marshals Handbook of Regulations*, Ch. 4, § 6.6 (eff. Oct. 24, 1997), *available at* http://www.nyc.gov/html/doi/html/marshals/mar4.html#6s6 (last visited Aug. 11, 2007).

209. APS Memorandum, *supra* note 199.

210. *Id.*

211. *Marypat Realty*, N.Y.L.J., Dec. 31, 2002, p.18, col. 1, 2002 N.Y. Slip Op. 50504(U), at *1, 2002 WL 31940717, at *1 (citing *Jonas Equities*, N.Y.L.J., June 29, 1992, at 32, col. 6).

212. *See* index number 401210/02.

213. *Id.* at 10, at ¶ 11.

214. *Id.* at 10, at ¶ 12.

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Unfinished Business—Lessons Learned in the Litigation of *EEOC v. Sidley & Austin*[1]

By John C. Hendrickson[2]

When I was invited to comment on my experience in the litigation of *EEOC v. Sidley & Austin*,[3] there was some back and forth about what lessons or implications of that case might prove most interesting to a room full of lawyers and their guests. It was suggested that my "perspective in the development of the jurisprudence of the ADEA as it applies to partners in partnerships and LLPs" might fill the bill. I did not share my concern, but I was reminded at the time of *The New Yorker* cartoons I have seen depicting crowds of post-luncheon lawyers soaking up considerable wisdom from renowned speakers to the tune of equally massive amounts of sawing wood—that is, of snoring.

"The consent decree which we negotiated memorializes the respect, trust, and good faith with which the participants acted and a mutual determination to resolve what is past and to look to the future."

So my thought was that I really ought not to burden an audience with my thoughts about jurisprudence. I'm not sure how much I know about that subject anyway. In our office, the practical imperatives of the cases we do and our determination to do the best we can with the resources we have are the twin engines which drive our practice.

But I do have some comments which have been taking shape in my mind during the *Sidley & Austin* litigation, and since. I think of putting them on the record as in the nature of "unfinished business" or "lessons learned," and I propose to share them.

How the Case Was Litigated

I begin with an assessment of my office's view of the Sidley firm and how the case was litigated, and then add some background. Those who followed the *Sidley & Austin* litigation could readily observe that the case was litigated with considerable grit and determination on both sides and under the microscope of the media. No one involved was saying, "Spare the horses." What outside observers may not have been aware of is the high regard in which we at EEOC held Sidley—and still do. Our view was and is that there was an organizational violation of the federal Age Discrimination in Employment Act which warranted our intervention. But it was never personal. In our view, all of the Sidley lawyers on both sides of the case were professional colleagues worthy of respect, then and now. The consent decree which we negotiated memorializes the respect, trust, and good faith with which the participants acted and a mutual determination to resolve what is past and to look to the future.

Background

One afternoon in the winter of 1999-2000 I received a telephone call from an individual who identified himself as a former partner of Sidley who—along with 30 or so of his colleagues—had recently been kicked out of the partnership. He obviously had not had a clue this was coming and spoke with some feeling about overhearing those in his situation referred to in elevator chit-chat by others—younger—in the firm as "deadwood." Although the call was a surprise, the fact that the caller believed that he and others had been victims of age discrimination was not.

After all, the media had been full of stories about the changes going on at Sidley and the highest ranking members of the firm were *repeatedly* quoted about the changes being made to benefit *younger* members of the firm and to implement changes in the firm's retirement *age.* More telephone calls followed—usually apparently from pay phones—and the caller was identified only as "Mr. Sidley."

Beginning to connect the dots, on my recommendation, the EEOC District Director in Chicago opened what the EEOC refers to as a "directed investigation," which does not require the filing of a formal charge of discrimination by an individual. Sidley objected that it was a partnership and that, therefore, there could not have been an employer-employee relationship between the firm and the partners expelled. Absent such a relationship, the EEOC would, of course, not have had coverage.

The EEOC countered that whether or not there was an employer-employee relationship was an issue EEOC had authority to *investigate*, and in a pivotal decision Judge Posner enforced an EEOC subpoena directed to the firm.[4] By that time, the EEOC's investigation of Sidley & Austin was no longer "under wraps," since the necessity of the subpoena enforcement action has made it a matter of public record in the District Court.

There followed an administrative determination of reasonable cause to believe that there had been a violation of the Age Discrimination in Employment Act, a failed effort to resolve the case through voluntary conciliation and without litigation, and, finally, litigation in the Northern District of Illinois.

In April 2003, the U.S. Supreme Court decided *Clackamas Gastroenterology Associates v. Wells*, adopting the EEOC guidelines on when partners, directors and shareholders are properly considered employees for purposes of the federal employment discrimination laws. The *Clackamas* decision was profoundly damaging to Sidley's cause. Damaging because at Sidley, our discovery revealed, virtually *everything* was governed and controlled by a small executive committee and an even smaller management committee—both of which were self-perpetuating and not elected by the partners.

Nearing the end-game, Sidley moved for partial summary judgment on the issue of whether the Commission could obtain monetary relief for the individual victims of discrimination, although they had not filed charges. *EEOC v. Waffle House*[5] controlled that issue. Judge Posner again ruled in favor of the Commission[6] and the Supreme Court denied *certiorari.* On October 5, 2007, Judge James B. Zagel entered the consent decree negotiated by the parties which provided for $27.5 million in monetary relief and certain detailed injunctive relief. (The full text of the decree is published in the October 9, 2007 edition of the *BNA Daily Labor Report.*) Of overarching importance, the decree memorialized Sidley's agreement that the partners who were victims were *employees* within the meaning of the ADEA and that it could not be asserted otherwise in any enforcement proceeding under the decree.

Reality-Based Enforcement

During the course of the litigation and since, there has been considerable discussion and speculation about what the EEOC was up to in pursuing the litigation against Sidley. Was the case part of a policy to go after law firms? Was the EEOC looking to rewrite the laws and regulations defining partnerships and the employer-employee paradigm? Was the EEOC Chicago District Office, as some suggested, simply out of control?

It ought not to have been so difficult to figure us out. Those who have followed our litigation over the years know that, although we may occasionally be on the cutting edge, we do not bring goofy lawsuits. The over-the-top employment discrimination claims which from time to time garner so much ridicule, and which appear to have been so divorced from reality, have not been coming from the EEOC or from the Chicago District Office. To the contrary, the cases we bring are solidly grounded in the real world of today's workplace.

For example, the *Mitsubishi* case, which at the time seemed so novel and controversial, was, in fact, a long, hard slog through an all-too-real swamp of sexual harassment in which hundreds of women were being dragged down into the muck. It had its roots not in any theory we dreamed up but, rather, in the ordinary experience of automobile workers in Bloomington-Normal, Illinois, assessed in the context of then applicable law. What counted was not what the auto industry and auto workers may have looked like in the past but what was going on in that plant *right now.* It was what I would call a reality-based litigation effort. The same was true of *EEOC v. Sidley & Austin.*

We are of the view that our litigation ought to match up with the reality of what is going on in a changing workplace. Our world, our economy, our business organizations, our workplaces are continuously changing—and changing with such speed that we often find it difficult to get our minds around the pace of the change, or to recognize its consequences.

When I came out of law school, documents were typed and duplicates produced by interleaved sheets of carbon paper. When I came out of law school women and minorities in law firms were rare. Becoming a partner in large law firm was the functional equivalent of being tenured at a university, and partners routinely and continuously interacted with their partners face-to-face.

Today, everything has changed. Carbon paper has disappeared from law offices. Typewriters are used, if at all, only to address the occasional envelope. Case reporters and law books and law libraries, once the bricks and mortar supporting the very heart of the profession, now exist mostly in cyberspace. *Everything* is produced on keyboards, laptops, and monitors. Some courts will accept *only* electronic filings.

Established law firms now implode, explode, reload and unload continuously.

Supposed partners are strung out in enormous office complexes and around the world. Many almost never interact with each other, may have virtually no voice in their own compensation or destiny, no role in governance, and no expectation of genuine long-term job security. Some would argue that the *American Lawyer* annual survey of profits per partner memorializes the new code of professional collegiality.

The organization and control of the work and the workplace have changed. There is still a sentimental attachment to the old models, but the reality is that the models are artifacts. Only a few will argue that investment banks, securities and commodities exchanges, medical practices, accounting firms, and law firms are the same now as they were thirty years ago.

As a result, in some circumstances it may not be as easy as it once was to say, without much thought, who is an employer and who is an employee, or to say which organizations can operate outside the parameters of the federal employment discrimination laws and which cannot.

But we think some cases are clearer than others. We thought, for example, that the kind of firm Sidley has stated itself to be—how it has *actually* operated and been governed for a long time—combined with applicable statutory and case law obliged us to challenge the age-based practices the firm so publicly announced.

The lesson here is not that the EEOC has suddenly decided to challenge discrimination against authentic partners or employer-entrepreneurs in professional service firms. The lesson is that when conditions have changed so much—or that when pre-existing conditions are so fully revealed—that individuals who may have been called partners are, in reality, properly seen as employees, we will take the position that the employment discrimination laws apply.

The "Rich White Guy" Argument

We will not yield that position because some may seize upon it as an opportunity to criticize us for how we utilize our resources and how we do our jobs. In connection with the *Sidley & Austin* case, for example, the question was raised as to whether, given the Commission's limited resources, we could justify challenging discrimination against and pursuing relief on behalf of individuals who were said have the financial means to do it themselves. Inside the EEOC, we described it as the "rich white guy" argument.

I have from time to time wondered whether the question was being put to us *seriously*. I have wondered first because the question was virtually always put to us by members of the defense bar. Plaintiff's side employment discrimination lawyers appeared to *get it* in a way defense counsel did not.

I have also wondered because the question seems largely to have disappeared, to have lost traction, since the entry of the October 2007 consent decree. This may be because it is now recognized that a $27.5 million consent decree in a case involving a groundbreaking statutory coverage issue is *not* likely *except* in litigation initiated by EEOC.

But whatever "take" one has on the question, it remains true that the law is the law. The EEOC has never been in the business of looking the other way whether discrimination occurs at the top or the bottom of our economy. None of the federal employment discrimination statutes includes a "means test," one way or another. The powerful and the privileged who engage in employment discrimination will not find us receptive to the argument that the victims of their discrimination have done "well enough," or that the relative success of those who have borne the burden of discrimination would justify a decision not to utilize our resources to challenge discrimination against them, or that discrimination which we would otherwise confront ought not warrant our attention, even if it is illegal. As far as we are concerned, these are all non-starters. No one gets a pass.

Let me close on this subject with two observations. First, the utilization-of-resources issue is not as real as it may appear. I can tell you that I am not aware of any piece of litigation, or any administrative process, in Chicago or nationally, which the Commission did *not* pursue because of the demands of the *Sidley & Austin* case. As long as I have been Regional Attorney, the resources have *always* been made available to do *all* the litigation the General Counsel has considered appropriate. Had the Commission's caseload been, in fact, populated by cases brought on behalf of "rich white guys," had other "more worthy" cases been sidelined by the demands of the *Sidley & Austin*, the resources debate might necessary. But that never happened.

Finally, the fact that no one at Sidley ever filed a formal charge of discrimination makes a telling point. If the EEOC had not moved on the case no one would have, notwithstanding the fact that the *Sidley & Austin* scenario was one of the most well-publicized and obviously discriminatory fact patterns of the nineties. The point is that it is virtually certain that, if the EEOC had declined to act in the absence of a formal charge, *no law enforcement action would ever have been brought against the firm with respect to the events of 1999.*

It Was Never Just About Lawyers and Law Firms

Much of the attention focused on the *Sidley & Austin* case, particularly the attention of *lawyers*, appears to have been *because the firm is a law firm*. Moreover, at least some of the criticism directed at the EEOC in connection with the case also appears to have been *because the firm is a law firm.*

The thinking appears to have been that there was something untoward or unfair about the EEOC's initiation of litigation against Sidley because neither the firm nor the profession could anticipate such a move, particularly after Justice Powell's 1984 concurrence in *Hishon v. King & Spalding.*[7] That was the case in which Mr. Justice Powell made "clear [his] understanding that the Court's opinion [holding a discriminatory refusal to promote an associate to partner actionable] should not be read as extending Title VII to the management of a law firm by its partners."

In his majority opinion enforcing EEOC's administrative subpoena, Judge Posner appeared almost to scold the EEOC. "Sidley has respectable arguments on its side," he wrote, "not least that the functional test of employer status toward which the EEOC is leaning is too uncertain to enable law firms and other partnerships to determine in advance their exposure to discrimination suits."[8] Judge Easterbrook, concurring in the judgment, was even more

critical: "Sidley and other large partnerships need to plan their affairs; their members need to know their legal status. Can large law firms adopt mandatory-retirement rules? It is disappointing that the EEOC should profess, some 30 years after the ADEA's enactment, that it hasn't a clue about the answer."[9]

I attended the oral argument in the Seventh Circuit in *Sidley & Austin*. The argument was, I think, revealing about the "backstory" behind the court's shots at the Commission. My recollection is that the court pressed counsel for an explanation of the EEOC's pursuit of discrimination among law firm partners and was agitated that counsel apparently could not cite chapter and verse of a Commission regulation or policy statement specifically addressing that particular subject—the application of the law to *law firms.* That should not have been a surprise inasmuch as, with respect to the matter of *employers subject to the law*, there is nothing inherently special or distinct about law firms as such. Unfortunately, the questions and the answers appeared to pass each other on parallel tracks.

What might have advanced the colloquy would have been a quicker explanation—before another question from the bench—that the EEOC does not, really, pay significant attention to the particular lines of business of employers in carrying out its regulatory mandate or in the conduct of investigations and litigation. In this respect, we are not unlike the Securities and Exchange Commission. As far as the coverage of its statutes is concerned, it is of no great consequence to the SEC whether a public company is engaged in the manufacture of automobiles or pharmaceuticals, the rental of real estate or rolling stock, the sale of vanilla lattes or cheeseburgers. The same with us. It is not significant. What we cover is all things related to the *interaction of employers and employees whatever their business.*

As for the "partnership question"—who are employers and employees—the EEOC has long maintained a *Compliance Manual*. It is a public document. It includes agency directives and guidance on issues—including coverage—which arise in the conduct of agency investigations. It memorializes the agency position on those issues. At all relevant times, it included the *Enforcement Guidance on Partners, Officers, Members of Board of Directors, and Major Shareholders,* which the Supreme Court endorsed in *Clackamas Gastroenterology Associates v. Wells*[10]—the decision which was the beginning of the end for Sidley.

Had the impact of the *Enforcement Guidance* and the irrelevance of Sidley's line of business been more fully appreciated, and had the appearance of the Commission on the brief and before the court been read as signaling institutional adoption of the position stated (which it was), the shots we took from the court might not have been fired.

I raise the point not merely to respond to what I believe was undeserved criticism from the Seventh Circuit, but also to make clear that we at the EEOC always saw the case as having, beyond the specific enforcement objectives, three overarching themes.

The first, it is true, was developing the issue of the application of the Age Discrimination in Employment Act to the modern mega-law firm and the attorney partners of those firms. That is an area, or, if you will, an "industry," in which the Commission did not have a history of enforcement activity. So when the *Sidley & Austin* scenario presented itself so directly—seeming, if you will, to intentionally challenge the application of the law, we believed it was appropriate to move in that direction.

The second theme was developing the issue of the application of the ADEA to the new forms of organizations through which many kinds of professional services and other goods and services are delivered. These are not just law firms, and they are not just staffed with lawyers. But if they are employers within the meaning of the employment discrimination laws, then they ought to follow the law with respect to all of those who may be appropriately designated as employees.

The third theme was related to the second. That was to open the door to the application of the federal employment discrimination laws generally—including prohibitions against race and other forms of discrimination—to a multiplicity of employers and employees who may have seen themselves, until now, as acting in an environment beyond the restraint or protection of those laws.

But it was never just about lawyers and law firms.

Where Are We Going from Here?

Since I began work on *EEOC v. Sidley & Austin*, I have been asked where today's law firms are or should be heading in the wake of our case. For those who really want to pursue the subject, let me refer you to an article wonderfully titled *Partner Shmartner*, by Professor David Wilkins of Harvard Law School.[11] I think the professor got it right when he wrote: "Judge Posner challenged law firms to prove that those who wear the partner label actually continue to function as such. In so doing, Judge Posner deftly exposed the biggest challenge facing the elite corporate bar: how to operate like a business without actually turning into one."[12]

Let me break off a small piece of that challenge and speak only to the directional choice law firms face in attempting to avoid a call from the EEOC.

There is plenty of room remaining in the world for law firms like Sidley and its brethren to continue to operate as Sidley has historically: governance and control in all things vested in a highly centralized and not neces-

sarily representative or elected management team. That is what Sidley had, but it was *not* what got Sidley into trouble with the EEOC. What got Sidley into trouble was the highly volatile combination of age discrimination and an organizational structure which brought many of its partners within the statutory status of "employee."

There is also plenty of room for law firms comparable to the one I joined when I came out of law school. There was a management committee, but it was periodically elected by the partners; there were annual meetings at which there was considerable wrangling about how the pie was going to be sliced, and, although I was an associate, there was a palpable sense that virtually all the partners had a say in the governance and control of the firm. That paradigm may not be deemed workable in the world of modern mega-firms. But if the objective is to anchor in the safe harbor which the federal employment discrimination laws provide to genuine partners, it has its merits.

"Age discrimination is…like any other form of discrimination, unnecessary, counter-intuitive, counter-productive, bad for business, and contrary to our national interest. That is so whether the business at issue is the law business or any other."

We are, of course, talking about a spectrum. At one end is a high level of centralized governance and control and a low level of protection against statutory coverage. At the other is a low level of centralization and higher level of protection against statutory coverage. Either way, the *Clackamas* decision must be required reading for all those who propose to choose a spot along that spectrum.

The greater wisdom, however, is to avoid employment discrimination altogether. To rely not only upon how our organizations are structured and governed but upon their dedication to non-discrimination in all things related to employment and to working together. None of us has to be "covered" to know that the federal employment discrimination statutes are not just the law but statements of our national policy.

My belief is that the national policy against age discrimination makes sense not only because it is just, but also because it accords with what experience actually teaches us. Experience teaches that, in fact, age is a poor proxy for judgment and ability in many lines of work. That is probably especially true in the legal profession, where really useful knowledge and reliable judgment are so critically important and so much a product of experience. Some of the finest legal work we have seen throughout our history—in the law schools, in the best firms, in the agencies, before the bar, and on the bench—has been the work of older lawyers, many well past 70.

Separating lawyers on the merits, because they cannot or are not performing, is one thing. And, that's *not* discrimination. Separating lawyers on account of their age group is something else altogether. It may provide a short-term illusory boost to a firm's standing in the *American Lawyer* profits-per-partner rankings. *Somebody* is going to be grabbing a bigger piece of the pie. But as far as I know the case has never been made that, over time, separating attorneys on the basis of age adds real value to the firm, improves legal services to clients, or in any way enhances the profession.

Age discrimination is, in my judgment, like any other form of discrimination, unnecessary, counter-intuitive, counter-productive, bad for business, and contrary to our national interest. That is so whether the business at issue is the law business or any other.

But I am an optimist. Age discrimination does not, I think, have long-term historical roots in the legal profession, and major bar associations are now coming out against it.[13] I hope we are beginning to move in a better direction. I believe *EEOC v. Sidley & Austin* points in that direction.

Certainly, I believe that the EEOC will continue to push in that direction. Note that on January 28, 2010, EEOC's New York District Office filed suit against Kelley Drye & Warren, LLP, challenging that firm's alleged mandatory retirement policy. Accordingly, while many lessons were learned in *Sidley & Austin*, one lesson, especially, should have been reinforced: Our mission includes challenging age discrimination wherever we find it, and that is a mission we will continue to pursue.

Endnotes

1. This paper is based upon remarks of the author first delivered at the Bureau of National Affairs / Hinshaw Culbertson 2008 Legal Malpractice & Risk Management Conference in Chicago on February 28, 2008, and has been circulated since then. There has been renewed interest in the paper since the filing of *EEOC v. Kelley Drye & Warren, LLC*, in New York, and the most recent revisions—predominantly "proof" corrections—were made February 16, 2010.
2. This paper is presented by the author in his personal capacity; it has not been "vetted" by the U.S. Equal Employment Opportunity Commission, and does not necessarily reflect the official views of the Commission or of any official of the Commission. The author was lead counsel for the EEOC in *EEOC v. Sidley & Austin*. Other attorneys in the EEOC Chicago District Office who litigated the case in the District Court were Supervisory Trial Attorney Gregory Gochanour and Trial Attorneys Deborah Hamilton, Laurie Elkin, and Justin Mulaire. The Commission was represented in the 7th Circuit by Carolyn Wheeler and Jennifer Goldstein of EEOC's Appellate Services in Washington. *All* of the attorneys who worked on the litigation made important contributions to its success.

3. At the time the lawsuit was filed, the firm was known as Sidley & Austin. Thereafter, it merged with the Brown & Wood law firm and was known as Sidley Austin Brown & Wood. At the time the consent decree resolving the case was entered, it was known as Sidley Austin. For the sake of simplicity the case is generally referred to herein as *EEOC v. Sidley & Austin* or *Sidley & Austin.*

4. *EEOC v. Sidley Austin Brown & Wood,* 315 F.3d 696 (7th Cir. 2002). *See* Leonard Bierman & Rafael Gely, *So You Want to Be a Partner at Sidley & Austin?,* 40 Houston Law Rev. No. 4 , p. 969 at 1000–1001 (Winter 2003) ("Judge Posner's October 24, 2002 opinion in the *Sidley* case is arguably one of the most important in terms of affecting the nature of the practice of law in many years. Traditionally, becoming a partner in a firm like S&A was a really big deal. Law firm associates toiled assiduously for years… in the hope they would reach the 'brass ring' of partnership, and more or less be 'tenured' and 'set for life.' But, as Bob Dylan has put it, 'The times they are a-changin.' * * * [T]he sad reality is that the thirty-two demoted equity partners at S&A were not 'real' partners. S&A reneged on its…'deal' with these individuals and [they] should be entitled to statutory redress.")

5. 122 S. Ct. 754 (2002).

6. *EEOC v. Sidley Austin,* 437 F.3d 695 (7th Cir. 2006).

7. 467 U.S. 69 (1984).

8. *EEOC v. Sidley Austin Brown & Wood,* 315 F.3d 696 at 707 (7th Cir. Oct. 24, 2002).

9. *Id.* at 708.

10. 123 Sup. Ct. 1673 (2003).

11. *Partner Shmartner: EEOC v. Sidley Austin Brown & Wood,* 120 Harvard L.Rev. 1264.

12. Professor Wilkins ended his "appreciation" of Judge Posner's decision with a telling critique of modern mega-law firms' relentless pursuit of ever higher rankings on the "profits per partner" scale. He wrote, "In the not-so-distant past, elite firms had a message that was both credible and attractive as to why the best and the brightest young people entering the practice of law should want to spend their careers in these institutions.… Today, this…has largely been reduced to a single reward: money. And, as evidenced by firms' growing anxiety over associate attrition—particularly over those who leave for the perceived greater satisfaction of public service, greater stability of in-house legal departments, or greater financial rewards of investment banks and hedge funds—money is proving inadequate to the task." *Id.*

13. In his November 28, 2007 story in The National Law Journal, headlined *Law Firms Face New Rules on Retirement,* Leigh Jones cites *EEOC v. Sidley & Austin* as one of the three leading factors "driving firms to rethink their [retirement] policies." Jones writes, "Third is the recent settlement between the U.S. Equal Employment Opportunity Commission and Sidley & Austin. In October, the 1,859-attorney law firm agreed to pay a $27.5 million settlement to end a closely watched age discrimination suit brought by the EEOC on behalf of 32 former partners. Although the conclusion of the case did not include a decision on its merits, the specter of a multimillion-dollar hit has created some anxiety among law firms with age-based retirement."

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Special Needs Trusts: A Primer

By Anthony J. Enea

It has been well documented that millions of "baby boomers" are coming of age, and that their aging will have a significant impact upon our medical and long-term care infrastructure. However, the one aspect of the aging of the baby boomers that is overlooked is that the baby boomers are the parents and care givers for millions of non-elderly disabled children, and the impact their aging will have on the care and well being of said children.

Little has been done to educate the aging baby boomers as to what steps they should take to provide for the future care and well being of their non-elderly disabled children.

Special Needs Trusts, a/k/a Supplemental Needs Trusts, play an important role in the planning for a disabled child. They are generally considered the legal centerpiece of a plan for a disabled person.

I. Three (3) Basic Types of Supplemental Needs Trusts

A. "Third Party SNT"

A Third Party SNT is a Trust created and funded by someone other than the disabled beneficiary. It is generally created by a parent, grandparent or sibling. The source of funds used to fund a Third Party SNT is not from the disabled person. A disabled beneficiary's funds should never be used to fund a Third Party SNT. Any individual can fund this type of Trust for a disabled beneficiary without affecting the beneficiary's entitlement to government benefits.

It is important to note that the SNT can be "Inter-Vivos" or "Testamentary." The spouse of a disabled beneficiary or the parent of a minor disabled beneficiary cannot create and fund an "Inter-Vivos" SNT and get the protections under § 7-1.12 of EPTL for government benefits. However, the spouse or parent can fund and create a "Testamentary" Trust for the disabled beneficiary.

All too often we tend to think of SNTs as Inter-Vivos Trusts. However, their use in Testamentary documents such as a Last Will should be given consideration.

EPTL 7-1.12 codifies *In re Escher*, 94 Misc. 2d 952, *aff'd*, 75 A.D.2d 531, 426 N.Y.S.2d 1008. In *Escher*, the Bronx County Surrogate's Court held that a testamentary Trust established by parents of a disabled daughter which provided that principal was to be used only for the "necessary support and maintenance of daughter" was protected from the claim of the State for reimbursement of the amount it had paid on behalf of the daughter. The Court found that the Testator had intended principal be used for the daughter during her lifetime.

It should also be noted that the funding of a Third party SNT has Medicaid planning benefits for the Grantor of the Trust. The transfer is considered an exempt transfer. Thus, no period of ineligibility is created. *See* 42 U.S.C. 1382c(a)(3).

"[T]he one aspect of the aging of the baby boomers that is overlooked is that the baby boomers are the parents and care givers for millions of non-elderly disabled children, and the impact their aging will have on the care and well being of said children."

B. "Self Settled SNT or First Party SNT"

Self Settled Trusts are authorized by the Omnibus Budget Reconciliation Act of 1993 ("OBRA93"). These are SNTs funded with a disabled beneficiary's own funds, or funds to which he or she is entitled such as a personal injury award or inheritance. In order for the disabled beneficiary to establish and fund a Self Settled SNT, he or she must establish the following:

(a) Must be disabled (proof of SSI or SSD generally sufficient);

(b) Must be under the age of 65 to establish it (as of the date the assets are transferred to the Trust);

(c) Must be established for the benefit of the disabled beneficiary, by a parent, grandparent, guardian or court. Once established it may be funded by the disabled beneficiary. If the disabled beneficiary has no parent or grandparent, it will be necessary to obtain a Court order, pursuant to Article 81 of Mental Hygiene Law or SCPA 2101 and 202.

The transfer of a disabled beneficiary's funds to the Self Settled SNT creates no look back period or ineligibility period for Medicaid nursing home benefits, so long as the disabled beneficiary is un-

der the age of 65 at the time the gift to the Trust is made.

(d) Must have a "Payback Provision." Upon the death of the disabled beneficiary all remaining Trust principal and accumulated income must be paid back to Medicaid to reimburse Medicaid for all benefits paid to the disabled beneficiary during his or her lifetime. Any funds left over may be paid to the named beneficiary of the Trust.

C. "Pooled Self Settled SNT"

A Pooled Self Settled SNT is one that must be managed by a non-profit association. For example, the United Jewish Appeal ("UJA") and the New York State Association of Retarded Citizens ("NYSARC") sponsor such Pooled Trusts for disabled persons.

The funds transferred to the Trust are pooled in the Trust, but a separate account is established for each individual beneficiary. The beneficiary can be under or over the age of 65. However, if the beneficiary is over the age of 65 there is a penalty period for assets transferred to the Pooled Trust for Medicaid nursing home benefits. These Trusts are usually utilized where there is no family member to act as a Trustee or when the beneficiary is over age 65.

Depending on the terms of the Pooled Trust, the disabled person may be able to provide how the remaining balance of his or her account is to be distributed upon his or her death; however, this would be subject to a payback to Medicaid. If the balance on death is retained by the Pooled Trust, then Medicaid is not entitled to a payback of the benefits paid.

Pooled Trusts play an important role when the disabled beneficiary has fixed income that exceeds the monthly amount permitted by the Medicaid home care program. For example, if a Medicaid home care applicant has income in excess of the permitted $767 per month for the year 2010, he or she is allowed to contribute said excess income to a Pooled Trust. The Trust will then pay the disabled beneficiary's household expenses such as mortgage, rent and taxes which he or she would not be allowed by Medicaid to pay. The Pooled Trust in many cases allows the beneficiary to remain at home and still be eligible for Medicaid Home Care.

D. When Is a Court Order Required to Create and Fund a Self Settled SNT?

If the disabled beneficiary is competent, and has a parent or grandparent willing to be the creator, a Court Order is not required. If the disabled beneficiary is mentally incapacitated, then regardless of the existence of a parent or grandparent, a Court Order is required for the assets or income of the beneficiary to be transferred to the SNT. If the disabled person is competent, and has no parent or grandparent, a Court Order is required.

Court Orders are normally obtained within an Article 81 Guardianship (can be a single transaction guardianship), or if the matter involves an inheritance, or if funds are received by a developmentally disabled or mentally retarded person, then within a 17A Proceeding in the Surrogate's Court.

II. General Drafting Considerations for SNTs

The following are some provisions to consider including in an SNT:

(a) Make specific reference to *In re Escher* within the body of the Trust, and that the Trust is intended to comply with *Escher*.

(b) Make specific reference to EPTL 7-1.12 within the body of the Trust, and that the Trust is intended to comply with its provisions.

(c) Utilize the requisite provision that the Trust corpus is to be used on behalf of the disabled individual to "supplement" and "not supplant" government benefits such as Medicaid and SSI, and that the funds are not to be used for basic needs such as food, clothing and shelter. However, despite the aforestated provision it is still important to give the Trustee the power to make distributions to meet the beneficiary's basic needs (food, clothing and shelter), even if it will diminish or impair the beneficiary's receipt of government benefits. This is commonly referred to as the "Notwithstanding Consequent Effect" provision of an SNT.

Third Party Trusts should also provide that the Trustee has the full and absolute discretion to pay out principal and income. However, the use of an ascertainable standard such as "for health, education, maintenance or support" should be avoided.

III. Drafting Considerations for a SNT to be Approved by Court

When requesting that the Court approve an SNT, the Petition to the Court seeking said approval should articulate the following:

(a) The disabled beneficiary's life expectancy and life care plans;

(b) Projected growth of funds;

(c) Project how long the funds will last.

With respect to Court-Ordered SNTs, the Courts have required different drafting requirements. *(See In re DiGennaro*, 202 A.D.2d 259 (2d Dep't 1994), *In re Goldblatt*,

162 A.D.2d 888 and *In re Morales*, N.Y.L.J., 7/28/95 (Supreme Court, Kings Co.). In *Morales*, the Court offered a model SNT to be used in New York City. The Department of Social Services must be notified when a Court-Ordered Self Settled SNT is being requested.

In drafting an SNT it is important to be familiar with the specific disability the beneficiary of the Trust is afflicted with. For example, the needs of a competent physically disabled non-elderly beneficiary will be different than those of someone who is mentally incapacitated and physically disabled. The competent physically disabled beneficiary can be actively involved in the decisions concerning the drafting and implementation of a Self Settled SNT and his or her future care plan. For example, he or she can be made a member of an Advisory Committee to the Trustees.

It is also important to know what government benefits program or programs will support the beneficiary. Will it be institutional or non-institutional? This will provide the attorney draftsman an idea as to how Trust assets can be used, and the specific terms to be contained in the Trust as well as for the preparation of an additional memo to Trustees about their use.

For example, a severely developmentally disabled individual residing in a group home may have more predictable needs than an individual suffering from a psychiatric illness who resides in federally subsidized housing and is receiving outpatient mental health services.

The individual suffering from a psychiatric illness who resides in the federally subsidized housing will most likely be receiving SSI, and any distributions for food or shelter by the Trustee of the SNT will impact the SSI coverage.

Conversely, the individual in the group home may be receiving basic community Medicaid without SSI, so the Trustee may be free to use Trust funds to support a reasonable housing arrangement and provide other necessities that will enhance the beneficiary's ability to reside in the community.

It is important to consider the functional level of the beneficiary and his or her ability in an advisory capacity to participate in decisions regarding Trust expenditures and management.

IV. Sole Benefits Trust ("SBT")

Finally, I thought it would be important to describe a relatively new special type of SNT that has been gaining increased popularity. Generally, a Sole Benefits Trust ("SBT") is a special type of Third Party Trust. It will not be counted as an available resource to the Trust beneficiary for purposes of determining his or her Medicaid and SSI eligibility so long as it is set up as a Third Party SNT. The Third party funding an SBT may do so without incurring a transfer penalty for purposes of his or her own eligibility for Medicaid and SSI.

This is often used when a Plaintiff settling a claim or suit will want to set aside funds from the settlement to provide for a disabled friend, child or grandchild while still preserving his or her own eligibility for Medicaid or SSI.

A Sole Benefits Trust must meet all of the Third Party SNT requirements. It must provide that the beneficiary is the only person who will benefit from the funds in the Trust, presently and at any time in the future. The Trust must also provide that the assets in the Trust will be spent or distributed in a manner that is "actuarially sound." Assets are to be distributed each year in an amount that is calculated to deplete the Trust within the beneficiary's remaining life expectancy.

A Sole Benefits Trust does not have to meet the "actuarially sound" requirement if it is an exempt SNT or Pooled Trust under OBRA93 and the Foster Care Independence Act of 1999 (FICA). However, it would then lose its primary advantage over an OBRA93 and FICA exempt Trust in that it does not need to be created by a Court, parent, grandparent or legal guardian of the beneficiary, and is not required to contain a State payback provision. It is recommended that an SBT be actuarially sound in order to maintain the flexibility it has. It only needs to provide a minimum amount be paid to the beneficiary that will deplete the Trust over his or her life expectancy.

An SBT can be funded with a lump sum or annuity. However, it must be fully funded before the beneficiary reaches the age of 21. It is administered the same as a Third Party SNT to preserve the beneficiary's eligibility for Medicaid or SSI. Any Third Party can transfer funds to a Sole Benefits Trust.

In the situation where the beneficiary's ability to qualify for Medicaid or SSI is not a concern, the SBT can be administered to provide for the beneficiary's general health, education, welfare, support, maintenance and comfort, so long as the Trust is created for the Grantor's blind, disabled or minor child, or for any other disabled individual under age 65, and the Trust meets the SBT requirements. The Grantor's transfer of assets to fund the Trust will not subject the Grantor to a transfer penalty for Medicaid.

Where there is a concern about Medicaid or SSI eligibility for the Plaintiff and the beneficiary, neither the Plaintiff, the beneficiary, the spouse of the Plaintiff or beneficiary may act as a Trustee. Otherwise, the assets in the Trust would be considered an available resource, and adversely affect Medicaid and SSI eligibility. If the beneficiary's eligibility for Medicaid and SSI is not an issue, the beneficiary and his or her spouse could act as Trustee.

V. Effect of Medicaid Lien on Funding of an SNT

The U.S. Supreme Court's decision in *Arkansas HHS v. Ahlborn*, 547 U.S. 268, 126 S. Court 1752 (2006), dramatically impacted the law on Medicaid liens and the funding of Supplemental Needs Trusts.

Under *Ahlborn*, when a Medicaid recipient receives a personal injury settlement following the payment by Medicaid of medical costs, the Medicaid lien amount is limited to the amount of proceeds meant to compensate the recipient for medical costs, and not for damages for pain and suffering, lost wages and loss of future earnings. This rule also applies to the personal injury settlement or award of a minor.

In *Ahlborn*, there was an agreement apportioning the settlement between medical costs and other damages, but the Court held the result would be the same for a Judge-allocated settlement or a jury award which establishes liability for both medical care and other kinds of damage.

Prior to *Ahlborn*, the rule in New York was that a valid Medicaid lien may be enforced against the entire amount of a personal injury settlement, award or verdict before the proceeds are transferred into a Supplemental Needs Trust. *See Cricchio v. Pennisi* and *Link v. Town of Smithtown*, 90 N.Y.2d 296, 683 N.E. 2d 301.

VI. Conclusion

The use of a properly drafted Special Needs Trust will help give the parents of a non-elderly disabled child a level of comfort in knowing that they have taken a significant step in assuring the future care and well being of their child. It is truly the cornerstone of any planning for a disabled person.

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New York State Bar Association

State Legislative Priorities for 2010

Integrity of New York's Justice System

An independent, well-functioning judicial system, accessible to all, is a bedrock principle of our democracy. The courts, more than any other arm of government, are the bulwark of liberty. As the State of New York faces the challenges and limitations presented by a down economy, the Governor and the Legislature must ensure that adequate resources are provided so that the courts can meet their essential role.

For the courts to meet properly their essential role, all segments of society must have access to the courts. An independent judiciary is meaningless if the aggrieved cannot come before it. An independent judiciary also relies upon effective counsel. Despite the many pro bono hours attorneys provide to the indigent each year, adequate government funding is necessary to ensure access to the justice system for those who are poor and most vulnerable. State-supported funding for civil legal services for the poor remains inadequate. Adequate funding provided by a dedicated revenue stream is necessary and prudent. The investment of resources to promptly protect individual rights will save countless dollars that would otherwise be spent by government for social services, housing and other programs.

Further, in too many areas of the state, the current system of appointive counsel has not served the criminal justice system well. The right to the effective assistance of counsel is guaranteed by both the federal and state constitutions. Because of concerns that constitutional standards are not being met in all circumstances, an independent Indigent Defense Commission should be established, with broad powers to adopt standards, evaluate existing programs and service providers, and generally supervise the operation of New York's public defense system.

Wrongful convictions cast serious doubt on a fundamental assumption of our criminal justice system - that the innocent are protected. The eradication of wrongful convictions is essential to restore and maintain the public's trust and confidence in our criminal justice system. The Association has identified several steps to lessen the likelihood of wrongful convictions.

The State Bar also will continue to urge the adoption of judicial salary reform as part of a program to provide adequate resources for the justice system.

Uniform Mediation Act

The Uniform Mediation Act (UMA) establishes a standard process for mediation. Under the UMA, mediation would remain voluntary. Most importantly, the UMA would resolve any question regarding the confidentiality of mediation and, therefore, the protection of attorney-client confidentiality. Current law provides for mediation confidentiality in some circumstances. For example, confidentiality is protected by the Community Dispute Resolution Centers Program, Judiciary Law, Article 21-A, and offers to compromise, CPLR 4547; but these rules are specific to the particular proceedings. The UMA is expected to increase the use and usefulness of mediation by standardizing the process and, most importantly, protecting confidentiality. The increased use of mediation would reduce the costs of disputes for individuals and businesses in New York, and demand upon the courts.

The Compact for Long-Term Care

The Compact would provide a fair and equitable way to finance long-term care for elderly and disabled persons in New York, in contrast to the current "all-or-nothing" approach that requires individuals to be impoverished before they qualify for Medicaid. The Compact would promote personal responsibility on the part of the elderly and chronically disabled for a fair share of their long-term care costs. After payment of that fair share by the individual, the government would provide a financial subsidy for additional long-term care services, without requiring that the individuals be impoverished. This initiative is designed to increase use of private funds for long-term care, but still maintain the safety net that Medicaid was intended to provide.

Equal Legal Rights for Same-Sex Couples

Under current state law, there are significant differences in the legal treatment of marital relationships and committed same-sex relationships in a wide range of matters such as property rights, financial support, responsibilities to children, health care, Social Security, long-term care, domestic violence, access to the court system, and other issues. In June 2009, the State Bar adopted a position to recognize same-sex marriage as the only remedy adequate to protect the rights of same-sex couples.

Support for the Legal Profession

A core mission of the New York State Bar Association is to represent the interest of the legal profession. In that regard, the Association will work to protect the independence of the judiciary, enhance access to the courts, promote affirmative legislative proposals that benefit the profession, and oppose those proposals that would burden it. The Association will work to ensure that attorneys are able to protect their clients' interests and effectively engage in the practice of law.

New York State Bar Association

Federal Legislative Priorities for 2010

Integrity of the Justice System

At all levels of government an independent, well-functioning judicial system, accessible to all, is a bedrock principle of our democracy. The courts, more than any other arm of government, are the bulwark of liberty. The following priorities would help to uphold and increase the integrity of the justice system: (i) funding and lifting restrictions on funds for civil legal services; (ii) protection of the attorney-client relationship; and, (iii) creation of new federal judgeships.

Increased Funding and Lifting Restrictions on Funds for Civil Legal Services

The Legal Services Corporation (LSC), created in 1974 to ensure that all Americans have access to a lawyer and the justice system for civil legal issues, regardless of their ability to pay, provides grant funding to independent local legal services programs to ensure that these goals are met. Since 1996, Congress has approved and expanded provisions that restrict how LSC grantees may expend both their LSC and non-LSC funds. As a result, millions of dollars from state and local governments, private donors, and other non-LSC sources are restricted in the same way that the LSC funds are restricted. This prevents legal service providers' clients from having access to the full range of legal tools available to clients of private attorneys. The Association supports adequate funding of legal services and the elimination of unreasonable restrictions on the use of funds by those who provide legal services to the indigent.

Protection of the Attorney-Client Relationship

The assurance that a client's candid conversations with his or her attorney will be confidential is a critically important element of our justice system. The Association has opposed the encroachment on the attorney-client privilege by policies of the United States Department of Justice and other federal government agencies. Those policies pressure organizations to waive their attorney-client privilege and related attorney work-product protection, to refuse to pay counsel fees to employees suspected of impropriety, and to fire employees who assert constitutional or other privileges. The Association supports the Attorney-Client Privilege Protection Act and other proposals to protect the attorney-client relationship.

Creation of Federal Judgeships

The Association supports the Federal Judgeship Act, which would address the increased caseloads that burden federal courts. This legislation would establish a total of 63 new permanent and temporary judgeships across the country. The bill would provide for appointment of two additional permanent judges for the Second Circuit Court of Appeals, three additional permanent district court judges (S.D.N.Y., E.D.N.Y., and W.D.N.Y.), and two additional temporary district court judges (S.D.N.Y. and E.D.N.Y.). These new judges are needed to handle the ever increasing caseloads in those courts.

Repeal of the Defense of Marriage Act (DOMA)

DOMA (PL 104-155) was enacted in 1996, and currently defines marriage as a union of one man and one woman for the purpose of federal recognition, and relieves states of the obligation to recognize same-sex couples' marriages validly performed in another state. HR 3567 would grant federal recognition to same-sex marriages entered into in any state that allows them, regardless of the couple's state of residence. Such recognition would cover federal laws, thereby granting marital federal benefits, such as those provided in the tax code and Social Security Act. The Association supports recognition of same-sex marriages to remedy legal inequity currently imposed on same-sex couples and supports repeal of DOMA.

Support for the Reporter Shield Law (Free Flow of Information Act)

A federal shield law is necessary to protect journalists from intrusive demands for information and documents obtained in the course of news gathering or reporting. Congress should adopt a federal shield law modeled on the New York State Shield Law (Section 79-h of the state Civil Rights Law), with provisions substantially similar to those contained in the New York statute. Forty-nine states, including New York, have shield law protection. The protection of state laws is, however, seriously eroded if there is no similar protection afforded by federal law. The Second Circuit Court of Appeals has interpreted federal laws as affording journalists a privilege with respect to confidential materials, but other federal courts have held to the contrary. The conflict between federal and state law leads to uncertain and potentially conflicting outcomes, depending on where litigation is brought or where a grand jury or other investigative inquiry is pending, thus undermining the effectiveness of state shield laws.

Reduction of Global Warming

In April 2009, the Association approved a report relating to the implementation of reforms that would reduce greenhouse gas (GHG) emissions and prepare for the inevitable impacts of climate change. Although specific actions may be taken by state and local governments, the most important legislative steps must be accomplished by the federal government. Therefore, the Association supports federal legislation that would make a number of changes in energy and environmental policies aimed at reducing emission of gases that contribute to global warming. A bill has passed in the House and is awaiting Senate action.

Age Discrimination Committee

A meeting of the Age Discrimination Committee was held on December 8, 2009 with approximately a dozen members attending either in person at the offices of Duane Morris LLP or by telephone. Richard Martin, staff liaison, was also kind enough to attend by telephone.

Two of the attendees, Jerome Lefkowitz and Richard Rifkin, had also been members of the Special Committee on Age Discrimination in the Profession. A link to that Special Committee's 2007 *Report and Recommendations on Mandatory Retirement Practices in the Profession* is on the Age Discrimination Committee's Web page. Attending in person as a special guest was Louis Graziano, a senior trial lawyer at the New York office of the Equal Employment Opportunity Commission.

After issuing its 2007 *Report and Recommendations*, which was approved by the Association's Executive Committee and House of Delegates on March 30, 2007, the Special Committee conducted a survey of New York law firms with respect to their partnership retirement practices, the results of which gave rise to the Honor Roll set forth on the Special Committee's Web page. There was a discussion on how best to obtain copies of the survey's results and copies of the documents used in the survey, and Messrs. Lefkowitz and Rifkin volunteered to spearhead that effort.

The principal focus of the meeting was the discussion and ultimate approval of a draft of the proposed *Welcome and Statement of Purpose* to be included on the Age Discrimination Committee's Web page. The text, as it now appears on the Committee's Web page, is as follows:

Welcome and Statement of Purpose

The basic purpose of this Committee is to help senior lawyers, as well as younger members of the bar, to become more familiar with this area of the law as it may affect their careers and to help promote changes that will end age-related discriminatory practices affecting attorneys. As part of this effort, the Committee intends to continue the excellent work of the Special Committee on Age Discrimination in the Profession.

The Special Committee's Mission Statement, as set forth in its *Report and Recommendations* (pp.1-2), was as follows:

> The Committee shall study and report on practices in the profession that disadvantage lawyers because of age, including those that may arise from:
>
> - law firm hiring and firing practices
> - mandatory retirement policies
> - "up-or-out" policies
> - age-based hierarchical staffing of cases
> - policies concerning retaining of counsel
> - the fixing of time charge rates
> - non-compete clauses, combined with mandatory retirement policies, that prevent retired attorneys, who otherwise might wish to continue to practice law for a number of years, from engaging in such practice
> - other age-discriminatory practices affecting attorneys, as the Committee may identify.
>
> The Committee shall take a balanced and objective approach in its examination of these issues, and its report will take into account the rationale and perspective of law firms or other legal employers and their policies and practices in these areas. If reform is needed, the Committee shall recommend steps to promote changes and end any age-related discriminatory practices affecting attorneys. The Committee's report shall recommend changes in law or policy, where appropriate, and shall set forth model policies, best practices and other guidance on these issues, to help facilitate positive changes and promote a more enlightened attitude on this subject within the profession.

The *Report and Recommendations* also stated (p.2) that

> the issues implicated by our Mission Statement were so important and com-

plex that, given the constraints of time, to attempt to address all of them in a single report would unduly divert our focus and delay presentation of our recommendations. Therefore, we focused our efforts on an issue we felt to be of prime importance (although by no means the only significant issue): the practice of so-called 'mandatory retirement' of law firm partners. However, as we note in our section contrasting practices in the public sector with those of private law firms [pp.9-10], the practices employed in the former – in which age discrimination is clearly outlawed—provide important insights and suggest areas for future study by this or other committees.

* * *

Membership Committee

The Senior Lawyers Section of the New York State Bar Association has done extremely well during its first year of operation. As of January 12, 2010 we had 1,073 members. Needless to say the overwhelming majority of the members have been admitted for more than 10 years. More than 65% of the members are sole practitioners or members of firms of five or fewer members. More than 80% of the members are male. Our membership is spread throughout each judicial district in the State, with the largest numbers coming from the First District, Ninth District and Tenth District.

As you know, the Section did not charge any dues during this first year. In 2010 the dues will be $20. It will be interesting to see if there is any appreciable shrinkage in our membership.

The Membership Committee continues to look for means to recruit new members to our Section and would be appreciative of any ideas that any members may have. In fact we invite you to join the Membership Committee by contacting either one of us at the e-mail addresses below.

John Marwell
jmarwell@smdhlaw.com

Charles Goldberger
cgoldberger@mgslawyers.com

* * *

Program and CLE Committee

Our Committee's first task was to work with the Elder Law Section on the program for the Fall meeting, which was held at The Sagamore Resort on October 29–31, 2009. At the request of our Section's members, three sessions led by a certified life coach, Rosemary C. Byrne, Esq., were added to the program and were very well attended. Other topics at the Fall meeting which were of great interest to our Section members were financial planning for the transitioning attorney, Medicare issues, and practice management for a solo or small firm when an emergency strikes. The Sagamore is a beautiful venue, and the Fall Meeting was a satisfying mix of continuing education, networking, and socializing.

Our next focus was our first solo program, which was presented on January 29, 2010 at the NYSBA's Annual Meeting. Surveys of our Section's membership revealed that a majority is very interested in financial issues pertaining to retirement, and our program was tailored to address the particular concerns most frequently cited by the members. The program, entitled "Financial Planning for Life After the Dark Suit," had six segments: How Do I Know if I Have Enough—Budget and Taxes; Lump Sum v. Annuity—a Tough Choice; Longevity—Good News and Bad News; The Issue Nobody Wants to Deal With and the Penalty for Ignoring It [long-term care insurance]; Asset Allocation and Diversification—What Do They Really Mean?; and What Is the Best Investment for Retirement?

Our speakers were extraordinarily qualified: Walter T. Burke, Esq., who is a member of our Section's Executive Committee; Michael J. Garibaldi, CPA, ABV, CFF, Israeloff Trattner & Co., P.C.; and Ann Marie Franke, CFP, CRPC, Resident Director, Merrill Lynch Global Wealth Management. The program was well attended, and the topics and the speakers were enthusiastically received by the attendees.

Currently, we are exploring the possibility of using the Web to present programs of interest to our Section's members. In addition, our next major project is the Fall 2010 meeting. We welcome any and all suggestions for program topics and speakers and encourage you to join us in the work of our Committee.

Carole A. Burns
Willard H. DaSilva

* * *

Senior Lawyer Quality of Life Committee

What Is the Senior Lawyer Quality of Life Committee?

Just exactly what does the Quality of Life Committee DO? The answer, my colleagues, is not "written in the wind": it is with ***YOU***! ***YOUR*** personal input and vision, regarding the Committee's mission and selective goals, will define who we are and what we do. Our overall objectives should be designed to *educate, enlighten*, and *enhance* the lives, in a variety of ways, of those seniors who will join with us, and who are willing to get actively engaged in one or more of the Committee's enriching projects now being developed.

We urge ALL seniors, including those members who have not yet joined the Senior Lawyers Section, to take a few moments to review the list below, and check those areas which may be of interest to you, and to indicate your willingness to serve as a subcommittee Chair or Co-Chair.

- Quality of life issues
- Career continuity
- Career changes
- The desire and opportunity to:
  - Render pro bono service
  - Serve on boards
  - Mentor other attorneys
  - Take educational courses relevant to seniors
  - Social activities for seniors

If you're still not sure if you want to sign on, take a quick look at some of the exciting and beneficial topics you can work on with us: see www.nysba.org/SLSMaterialsOfInterest.

The character and future of the Senior Lawyer Quality of Life Committee will be defined by your collective responses. Please take a few moments to let us know your interests and to share YOUR vision with us. Just click on mbarrylevy@spcblaw.com.

M. Barry Levy

* * *

Member News

Judge David N. Hurd Receives William Brennan Award for Outstanding Jurist

Honorable David N. Hurd was presented the William Brennan Award for Outstanding Jurist by the New York State Association of Criminal Defense Lawyers at its Annual Dinner in Manhattan on January 28, 2010.

The award recognizes judges who have protected the rights of citizens in a meaningful way. It is named for William Brennan, Justice of the United States Supreme Court from 1956 until 1990. Justice Brennan was the first recipient of the award, accepting it at his last public appearance as a sitting Justice of the Supreme Court.

Judge Hurd was appointed United States District Judge for the Northern District of New York in 1999. He was previously a United States Magistrate Judge, and a trial attorney in private practice. Judge Hurd, a graduate of Cornell University and Syracuse University School of Law, is a member of the New York State Bar Association, the Albany County Bar Association, the Rome Bar Association, and the Oneida County Bar Association. He is also a member of the Order of the Coif and is a Fellow in the American College of Trial Lawyers.

Section Committees and Chairs

The Seniors Lawyers Section encourages members to participate in its programs and to volunteer to serve on the Committees listed below. Please contact the Section Officers (listed on the back page) or Committee Chairs for further information about these Committees.

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NEW YORK STATE BAR ASSOCIATION

NYSBA **Membership Application Senior Lawyers Section**

Section membership is available to current NYSBA members who are age 55 or over.

Join the Senior Lawyers Section now by returning the application or by one of these other convenient ways:

1. VISIT – www.nysba.org/SLS **2. E-MAIL –** membership@nysba.org **3. CALL –** 518.487.5577 or 800.582.2452

YOU MUST FIRST BE A MEMBER OF NYSBA TO JOIN OUR SECTION

To be eligible for membership in the Senior Lawyers Section, you **must first** be a member of NYSBA. You must also be age 55 or over.

☐ As a current member of the New York State Bar Association, I want to join the Senior Lawyers Section. **I enclose my payment of $20 for Senior Lawyer Section dues.**

☐ I wish to become a member of the NYSBA and the Senior Lawyers Section. Please send me a New York State Bar Association application.

☐ I am a Section member — please consider me for appointment to committees marked.

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SENIOR LAWYERS SECTION COMMITTEES

Join one or more committees of your choice from the list below:

___ Age Discrimination (SLS1100)
___ Employment Opportunity (SLS1200)
___ Law Practice Continuity (SLS1300)
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___ Pro Bono (SLS1400)
___ Program and CLE (SLS1020)
___ Publications (SLS1500)
___ Retirement Planning and Investment (SLS1600)
___ Senior Lawyer Quality of Life (SLS1700)
___ Technology (SLS1800)

The Senior Lawyers Section is currently looking for members of the Section to help build its substantive committees. The Section's leadership welcomes volunteers. To become involved, please contact: SeniorLawyers@nysba.org. Participation in Section committees is a benefit of membership.

Please return payment and application to:

Membership Services
New York State Bar Association
One Elk Street, Albany, NY 12207

The Senior Lawyer

Submission Guidelines

The Senior Lawyer welcomes the submission of articles of timely interest to members of the Section in addition to comments and suggestions for future issues. Articles should be submitted to any one of the Co-Editors whose names and addresses appear on this page.

For ease of publication, articles should be submitted via e-mail to any one of the Co-Editors, or if e-mail is not available, on a disk or CD, preferably in Microsoft Word or WordPerfect (pdfs are NOT acceptable). Accepted articles fall generally in the range of 7-18 typewritten, double-spaced pages. Please use endnotes in lieu of footnotes. The Co-Editors request that all submissions for consideration to be published in this *Journal* use gender-neutral terms where appropriate or, alternatively, the masculine and feminine forms may both be used. Please contact the Co-Editors regarding further requirements for the submission of articles.

Unless stated to the contrary, all published articles represent the viewpoint of the author and should not be regarded as representing the views of the Co-Editors, Board of Editors or the Section or substantive approval of the contents therein.

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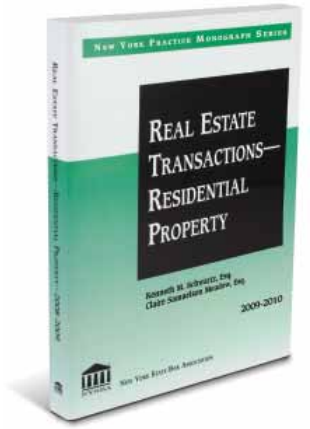

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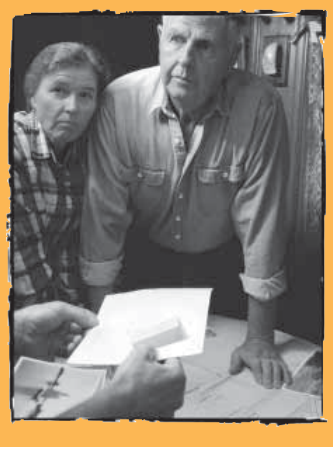

Each year in communities across New York State, indigent people face literally millions of civil legal matters without assistance. Women seek protection from an abusive spouse. Children are denied public benefits. Families lose their homes. All without benefit of legal counsel. They need your help.

If every attorney volunteered at least 20 hours a year and made a financial contribution to a legal aid or pro bono program, we could make a difference. Please give your time and share your talent.

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