NYSBA SPRING 2006 | VOL. 16 | NO. 2

Elder Law Attorney

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

Message from the Chair

Working With Other Professionals: Being a Part of the Aging Network

Unless you are a polymath, one of the main characteristics of your elder law practice will be the need to work with a large number of other professionals to properly serve your client. Our clients come to us with myriad problems and it is our job to be the hub of the wheel. We can bring in experts from other disciplines as they are needed. We do not practice in a vacuum; we can only operate successfully when we are a part of the entire aging network.

Doctor

The elder law attorney can be helpful in connecting the older person with a physician who is a specialist in the field of geriatrics. For example, the client who exhibits short-term memory problems would benefit from an evaluation by a physician who is board certified in geriatrics. A warning sign is the physician who simply says to a patient, "You are getting older, what do you expect." While the elder law attorney may not have a medical degree, it is likely that he or she is well aware of the medical literature that finds that fully one-third of short-term memory loss may be due to reversible medical conditions.

Geriatric Care Manager

It is common for the client who is in a rehabilitation facility after a stroke to ask whether home care or nursing home care is appropriate upon discharge. It is just as common to receive a call from a child in California concerned about her parents who are living alone in New York. A geriatric care manager (GCM) can be instrumental in situations like these by making an assessment. GCMs are usually nurses or social workers. There is a national certifying organization called the National Association of Geriatric Care Managers. The GCM has the training and resources to assess the medical, emotional and physical issues that would inform a decision. One of the most interesting trends is the addition of the GCM as a part of the professional staff of the elder law attorney.

Inside this Issue

NYSBA

Long-Term Care Insurance Agent

It is common for a client to ask an elder law attorney about long-term care insurance. There are many variables in evaluating a long-term care insurance policy (daily coverage amount, cost of living feature, length of coverage, etc.). There are many companies offering long-term care policies. An insurance agent who specializes in long-term care policies can be helpful in the process of determining whether a person should purchase a policy and if so, which policy.

Mortgage Broker

Clients who are house rich and cash poor may seek advice about reverse mortgages or home equity loans. There are mortgage brokers who have familiarized themselves with the particular needs of senior citizens.

Accountant

The elder law attorney frequently consults with the client's accountant. Sometimes the accountant is the person who has the best overall picture of the client's financial status. Sometimes the accountant is needed because the senior is unable to assist in locating records.

Hospital Discharge Planner

Many clients come to the elder law attorney at a time of crisis. It is common for a senior to be in a hospital and in immediate need of nursing home placement. A good working relationship with the discharge planner can have an enormous effect on the placement process.

Nursing Home Admission Director

When nursing home placement is necessary it is crucial for the elder law attorney to be able to work with the admission director. That person is in a position to make one of the most critical decisions that will impact the client's life. The elder law attorney must understand the particular characteristics of each nursing home. Clients expect the elder law attorney to be aware of the different cultures within the various nursing homes.

Social Service Agencies

There are many social service agencies that have programs specifically for seniors. These agencies can be extremely valuable in providing benefits to clients. Some of the programs are municipal, some are religiously based and some are philanthropic.

One of the positive aspects of aging is the fact that there are many services available. The greatest barrier that most clients face is difficulty in finding out about the various entitlements. The elder law attorney is in a unique position to help make the connection between the client and the services available.

Daniel G. Fish

Request for Articles

If you have written an article, or have an idea for one, please contact the new *Elder Law Attorney* Editor

Anthony J. Enea
Enea, Scanlan & Sirignano LLP
245 Main Street
3rd Floor
White Plains, NY 10601
E-mail: aenea@aol.com

Articles should be submitted on a 3½" floppy disk, preferably in Microsoft Word or WordPerfect, along with a printed original and biographical information.

Editor's Message

As I begin my tenure as Editor-in-Chief, I would first like to thank my predecessor, Steven M. Ratner, for all of his efforts and hard work in continuing the tradition of making the *Elder Law Attorney* a highly successful and respected publication. Fortunately, we will be hearing from Steven on a regular basis as he has agreed to keep our readers abreast of developments in California Elder Law. We wish him the best of luck in California. I would also like to thank my colleagues on the Board of Editors, Vincent Mancino, Joan L. Robert, Brian Andrew Tully and our newest member, Andrea Lowenthal, for their contributions and efforts. Without their hard work it would be impossible for the Section to provide you with a publication of this caliber on a regular and consistent basis.

While this edition of the *Elder Law Attorney* is going to print, practitioners of Elder Law and the public are again facing a difficult challenge. The enactment of the Deficit Reduction Act of 2005 in early February of 2006, with its onerous impact on Medicaid eligibility and the transfer of asset rules, has been the primary focus of most of our attention for a number of weeks. In upcoming editions of the *Elder Law Attorney* we will, of course, bring you up to date on all developments. In the interim, we have included for publication a memorandum prepared by the leaders of our Section summarizing some of the relevant provisions of the pending legislation. We have also included an article about the appraisal of real property which I believe you will find most interesting in light of the proposed legislation.

I am confident that you will find all of the articles and writings published in this edition interesting, informative and educational. Finally, I would also like to bring to your attention a new collaborative effort between Scott M. Solkoff and Howard S. Krooks to bring us up to date on Elder Law issues in Florida. We, of course, wish our colleague and friend, Howie, much continued success in his new practice in the Sunshine State.

Anthony J. Enea
Editor-in-Chief

A Call to Action
A Moment in History
Status of Deficit Reduction Act of 2005

The Elder Law Section has prepared a memorandum re the Status of the Deficit Reduction Act 2005 which you will find below. The following Section members actively participated in the creation of the Status report:

Dan Fish, Ellen Makofsky, Ami Longstreet, Tim Casserly, Lawrence Davidow, Howard Krooks, Michael Amoruso, Steve Silverberg, Lou Pierro and René Reixach. It is expected that more information will follow as it becomes available.

I. There Is Still an Opportunity for the House to Reject the Punitive Medicaid Provisions

In an agonizingly close vote of 51 to 50, with Vice President Cheney casting the deciding vote, the Deficit Reduction Act of 2005 (DRA) passed the United States Senate. However due to differences in the House and Senate versions, the legislation will have to go back to the House for another vote. The House is currently in recess. It is not clear when the House will reconvene to take that vote.

"This is a moment in history when the actions of NYSBA members can make a difference."

There is still time for NYSBA members to contact members of the United States House of Representatives to reject the proposed Medicaid provisions of the DRA that would punish the elderly who are threatened with the overwhelming cost of long-term care. This is a moment when decisive action is needed. This is a moment in history when the actions of NYSBA members can make a difference. Take the time to contact your House member and encourage your clients and organizations that you work with to do the same.

II. There Is Still Time for Clients to Act

The effective date of the DRA is the date that it is enacted. That would be the date it is signed by the President. Since the legislation must first return to the House of Representatives for a vote, there is a window of opportunity for clients to act.

The Elder Law Section will provide more in-depth analysis shortly. At this time we strongly suggest that you consult the actual text of the proposed legislation found at http://rules.house.gov/109/text/s1932cr/109s1932_text.pdf (the relevant Medicaid sections begin on page 220). We also recommend that members attend the NYSBA Elder Law Section-sponsored CLE seminar, The New Regime in Medicaid Planning—Changes Wrought by the Deficit Reduction Act of 2005—being held in six locations in the Spring. For more detailed information on this seminar visit the NYSBA website at http://www.nysba.org/spring2006.

If enacted as currently drafted, the DRA would impose three major changes in Medicaid eligibility. Note that the current rule—no penalty imposed for transfers if the applicant is seeking nonwaivered community Medicaid services—would remain unchanged.

1. Increase the Look-Back Period to 60 Months for All Transfers

Under the current law, there is a two-tiered look-back period. For transfers to or from certain trusts the look-back period is 60 months. For all other transfers, the look-back period is 36 months. The proposed legislation would create a single look-back period of 60 months for all transfers.

2. Change the Date the Penalty Period Begins to Run

Under current law, the date of commencement of the penalty period in New York is the first day of the month following the month in which an asset transfer was made. *Brown v. Wing*, 93 N.Y.2d 517, 693 N.Y.S.2d 475 (1999). Under the new rule, the penalty period would commence on the later of (1) the month following the month in which the transfer is made (existing law) **or** (2) the date on which an individual is both receiving institutional level of care (i.e., in a nursing home or receiving care at home under the Lombardi Program) and whose application for Medicaid benefits would be approved but for the imposition of a penalty period at that time. To start the penalty period, the individual must have $4,000 or less at the time they receive institutional level care and apply for assistance.

3. Homesteads With Equity Above $500,000 Would Render an Applicant Ineligible

This provision would not apply if a spouse or child under 21, or a child who is blind or disabled, reside in the home. States are given the authority to increase the home equity amount to up to $750,000. Homeowners could reduce their equity through a reverse mortgage or home equity loan.

In addition, there would be changes in other areas:

Annuities

Annuities would have to name the State as a remainder beneficiary and balloon payment annuities would be a countable asset.

Income First Rule

The "Income First" Rule would be mandatory, but the New York State Court of Appeals has already required it in *In re Golf*, 91 N.Y.2d 656 (1998).

Rounding Down of Penalty Period

No rounding down of penalty periods. Medicaid would impose penalty periods of a partial month for transfers of smaller amounts.

Aggregation of Multiple Transfers

Multiple transfers in more than one month would be aggregated.

Notes and Loans

Notes and Loans would have to be actuarially sound, with no balloon payment and not self-canceling upon the death of the lender.

Life Estates

The purchase of a life estate, if applicant does not reside in home for at least one year after purchase, would be considered a transfer of assets.

Continuing Care Retirement Communities

Continuing Care Retirement Communities could force spending of assets that were disclosed on application before applying for Medicaid, and certain deposits would be countable toward Medicaid eligibility.

Long-Term Care Partnership Insurance Policies

Long-Term Care Insurance Partnership policies would be expanded from the four states that currently offer it.

Keys to Comparing Two or More Residential Appraisals on the Same Property—An Attorney's Tool

By Howard Jackson

It has been said that real estate is the basis of all wealth. Clients of attorneys practicing in a variety of fields such as matrimonial, trusts and estates, real estate, land use, zoning, corporate, etc., have small- to large-scale real estate assets somewhere in the situation. Sometimes it is prominent and the situation is critical.

Many times an attorney will be confronted with a situation where there are two, possibly more, appraisals on the same property, typically a marital residence in a matrimonial case or a home or commercial property in a tax certiorari proceeding or multiple properties in an estate proceeding. To make matters worse, the spread between the appraisals are wide. Sound familiar?

Many have said that there can be an "honest" difference between two appraisal experts. When the gap between the appraisals is wide, logically how can it be an honest difference? There are also appraisers out there who will "accommodate" the client.

Attorneys advocate a position. But any good attorney knows that where there is a large gap between appraisals, it is likely that one appraisal is wrong. But which appraisal is it? Does the opposing attorney know?

Regardless of any of the abovementioned issues, knowing how to determine which appraisal is on solid ground and which isn't forms a critical step in the processing of any case.

This article is not intended to make the attorney an expert appraiser. Rather it is intended to give the attorney a keen eye in reviewing two or more appraisals on the same property so that the attorney will be able to effectively do the following:

- Determine which appraisal is on solid ground. (This is defined as a competent appraiser with good market data with technically appropriate analysis producing a consistent, logical and defendable estimate of value.)
- Determine if the differences between the appraisals is due to an "honest" difference of opinion or is one of the appraisers attempting to "accommodate" the interests of the client? Could the difference also be due to a lack of market data with two appraisers with very different amounts of experience interpreting the data differently due to their differentials in experience?
- Develop direct examination questions to establish the character and credibility of the expert appraisal witness while on the other hand being able to develop cross-examination questions to expose the character and credibility issues of the opposition appraiser as well as establishing that the opposition appraisal is not on solid ground.

This article is designed to leave the attorney with simple but very effective ways to consistently deal with the above issues. It will engender confidence and competence in this area. There is a book also available, written by this author, which takes this a step further since there is more space available. The name of the book is *The Real Estate Appraiser and the Law* and can be viewed and accessed by going to this web site, www.upublish.com/books/jackson-h.htm.

In the typical residential appraisal, the most common report produced is a FNMA (Fanny Mae) form report, a/k/a a "summary appraisal report." It contains concise aspects of the appraisal, such as identification of the property, site and building description, and provides cost approach and sales comparison approach to value. The income approach to value (the other of the three approaches) is rarely used since the residential home is purchased as an owner user not as an investment property.

The remainder of this article will demonstrate the simple key areas of comparison which are summarized as follows:

- Type of report: summary, self-contained or limited appraisal
- Type of appraisal
- Appropriate data selection
- Analysis of data
- Reconciliation and conclusions
- Ethics, character and integrity of the expert witness

Over 98% of the residential appraisals are completed using the FNMA single-family residential form report.

Outlined below is a set of steps to follow in order to effectively compare two residential appraisals. It is organized to emulate the FNMA form report. This form report has section headers scripted on the left margin beginning with subject then neighborhood, PUD, site, description of improvements, comments, cost approach, sales comparison analysis and finally reconciliation. Most all of the steps below will fall into one of these sections. Its simple but thorough organization is one of the main positive attributes of this form report. By following the steps indicated below, a difficult task of comparing two or more appraisals on the same property is made easy for even the novice attorney. The way to gain the most advantage from this article is to have the two or more appraisals on the same property immediately available.

As more appraisals are reviewed using the methodology listed below, the review and compare process becomes almost second nature.

The following are the steps:

1. **Credentials of the appraisers:** First and foremost, is the appraiser qualified to perform the appraisal in the first place? The appraiser should have at least 5 years experience for the simple residential appraisals (subdivisions for example) and more for the upper end or complicated residential appraisals. Additionally, the appraiser must demonstrate competence geographically, meaning the appraiser has prepared many appraisals in the same geographic area as the subject property. Oftentimes, a relatively new appraiser is pitted against a very seasoned and experienced appraiser in a situation with limited data. The appraiser with the limited experience is not as competent in interpreting the appraisal situation with limited data and, as a result, produces a value estimate which is not as reliable or accurate as the experienced appraiser.

2. **Any hypothetical or extraordinary assumptions used by any of the appraisers such as value upon completion for example:** This is perfectly legitimate as long as any assumption or condition is labeled prominently. Double check to see if both appraisals are using it. If one is and the other isn't, that alone could cause substantial differences in the appraisals.

3. **Date of value:** The date of value for both appraisals should be identical. Otherwise it could be comparing apples to oranges.

4. **Subject property:** Are the appraisers appraising the same property? Not only double check the street address but also the tax or parcel ID number.

5. **Property description:** This covers the site (land area and dimensions, waterfront or not or if located on a heavily trafficked road, for example). It also includes the type of house, square foot area, date of construction, quality of construction, effective age, number of rooms, bedrooms, baths and any other relative amenity.

6. **Cost approach:** This is one of the three approaches to value. Rarely is this used as the main focus of value so it will not be elaborated on further here. But in theory, the appraiser estimates the replacement cost new (material which is comparable but may not be exact). Then depreciation is deducted (physical, functional, economic). To the net result, the land value and on-site improvements are added. Generally, the cost approach sets the upper limit to value.

7. **Income approach:** Since most single-family homes are bought for owner/user purposes and not investment purposes this approach is not utilized.

8. **Sales comparison approach:** For single-family residential appraisals this is the primary approach. The appraiser will base the conclusion to value on this approach. There is no formal reconciliation process as in a commercial appraisal since this is the main approach to value utilized. This is the "guts" of the appraisal. In theory, sales of similar homes in the same area as the subject property are utilized to determine the "most probable selling price" of the subject. Normally three (3) comparables are presented on the form. But who said three is the appropriate amount to be utilized? It is the role of the appraiser to present a logical and defendable estimate of value. Showing three good sales is sufficient, but there are additional pages on the form where more comparables can be utilized. There are five (5) areas to look at carefully when comparing two reports: (a) Location of the comparables relative to the subject: Look at the map. Are they in the same geographic area? Is there a major thoroughfare and the subject is on one side while all the comparables on the other? This could be a completely different market area. (b) Data verification: Is it verified by at least two sources? (c) Date of appraisal: The comparables should be as close to the date of valuation or appraisal as possible. Due to lack of sales, this is not always possible. But if you

see that one appraisal has current sales and the other doesn't, this could be a red flag that something is not right. (d) Types of houses: In most cases the appraisers should use the same type of house as the subject property. If not, the comparables should be equivalent in terms of market desirability. (e) Adjustments to the comparables: Most all comparables are not exactly the same as the subject. For example, the subject might have a two car garage while the comparable has one. The appraiser would make an adjustment for this. The condition might be different. The square foot area of the houses could be different. For any differences the appraiser must make a market-supported adjustment, and in the report there is a separate column for this. Watch out for inconsistent or unreasonable adjustments. The appraisal report itself will actually contain them if you know what to look for. For example, in an upper-end Long Island, New York, home, the appraiser lists in the cost approach the cost new per square foot to build the house at $275.00 per square foot. The sales price per square foot (based upon the building area) of the comparables range from $350.00 per square foot to $533.72 per square foot (this includes the land). The appraiser makes an adjustment for excess GLA (Gross Livable Area) of only $50.00 per square foot. This means, for example, the subject property has 3,084 square feet, Comparable #3 has 5,500 square feet and sold for $1,950,000, the appraiser is only making a $108,500 adjustment for the almost 2,500 square foot living area difference which is almost the entire size of the subject. Does this seem logical or reasonable? The quick answer is "no." Also keep in mind that in this case, there were comparables available at or near the size of subject property. Would it surprise the reader to know that this appraiser's client would benefit greatly from a higher appraisal since the buyout price to this client would be higher? Another issue in the same appraisal, all of the comparables used were almost twice the size (size of house) than the subject property. Continuing on, after all the adjustments to the comparables are made, at the bottom of this section is a line called the "adjusted sales prices." Below that is an area for comments where the appraiser will discuss the comparables and which one or ones are the best indications of value for the subject property. Watch out for statements such as "the appraiser reconciles to a value" from wide conclusions of analyzed sales. This is often an indication that the appraiser isn't really sure.

Another red flag is the use of an average. An appraiser will come to a conclusion and the reader is left wondering "how did the appraiser come to such an exact conclusion?" This is often used by appraisers but it is not correct.

The good appraisers will sift through and analyze data. Combined with thoughtful explanations, the appraisal will lead the reader from Step A through Step Z along with the appraiser's conclusion to value. Many times a reader will not agree with the appraised value, but they will readily accept an appraisal that is logical, defendable, well presented and one that leads the reader from Step A through Step Z. When an appraiser—along with the appraisal—is used as an expert witness and exhibit, respectively, the one that is logical, defendable, well presented and the one that leads the reader from Step A through Step Z along with the conclusion to value, many times can make the difference between winning or losing a case.

The last part of the FNMA form is a place where the appraiser is valuing the property "as is" or "subject to completion," plus a "final reconciliation section" where the findings are tied together (usually a restatement of the sales comparison approach), a declaration of the effective date of the appraisal, the appraiser's signature, license, date of signature and the statement of the appraised value.

Did the appraiser do anything "out of the ordinary" or something that deviated from common and acceptable appraisal practices? This is where something is found to have been done either "out of the ordinary" or "deviated from common and accepted appraisal practice." This would set off a red flag. If we go back to the examples in #8, which was an actual case, the appraiser did something out of the ordinary. The appraiser used comparables that were twice the size of subject property when there were sales at or near the size of subject that could have been utilized. This automatically puts a strong upward bias on the appraisal. The appraiser then compounded this upward bias by making unreasonably low downward adjustments for the size differential (GLA differences). Then when you look at who the appraiser's client is and how the client benefits from a high appraisal, it doesn't take a rocket scientist to figure out what is going on. With this step-by-step analysis, these factors were detected within the appraisal and now the attorney, on cross-examination, can elicit

this from the appraiser and discredit not only the appraisal, but also the conclusion to value.

Conclusion

This article attempts to present a simplified, step-by-step guide to comparing two or more residential appraisals on the same property. The goal was to illustrate how two appraisals could be systematically reviewed and compared to see which one was technically competent and produced a logical and defendable estimate of value. This has been referred to as an appraisal "being on solid ground."

Assuming there are honest differences between the appraisals, this article endeavors to demonstrate how to hone in on these differences for the purpose of illustrating an aspect or aspects of a case. Two appraisals that are on solid ground are generally very close in their value estimates. If not, many times it is the result of assumptions that one or both of the appraisers is making.

"Assuming there are honest differences between the appraisals, this article endeavors to demonstrate how to hone in on these differences for the purpose of illustrating an aspect or aspects of a case."

In the instance where the differences between the appraisals were not a result of an honest difference of opinions, this article also showed how that situation should be detected, exposed and resolved.

In the final analysis, it is the mandate of the appraiser to produce a logical and defendable estimate of market value. When both or all of the appraisers involved strive for this goal, the differences between the appraisals (assuming two appraisers of equal caliber) should not be significant. Those steps necessary to properly compare appraisals were presented, examined and explained in a logical and simplified format for the ease of the reader.

Howard Jackson is an MAI member of the Appraisal Institute, ASA member of the American Society of Appraisers and Chairman of Integrated Real Estate Services, Inc. He has appraised all types of real estate around the United States for purposes such as mortgage financing, tax certiorari, condemnation, malpractice and equitable distribution. He has spoken throughout the United States for many organizations, institutions, colleges and universities. The topics range from real estate valuation, malpractice, expert witness testimony, computer science and applications in real estate, legal and economic issues. He has published numerous writings and books regarding appraisal, legal issues, computer applications and related subjects, including *The Real Estate Appraiser* and *The Law, Key Writings in Real Estate, Real Estate Values and You, Real Estate Financial Calculator Keystrokes* and *What is the "Market" in Market Value, Artificial Intelligence Application Concepts for the Real Estate, Financial and Land Information Services Industries, How Assessments, Tax Rates and Equalization Rates Affect Real Estate Values, The Realities of Rent Control—An Economic Disaster, The A-B-C's of Mortgage Financing, How a Property Can Have Two Different Values Simultaneously*. He is the only one in the profession to have published a law book that is used for continuing legal education dealing in the area of the essentials of expert witness testimony.

Mr. Jackson has been an adjunct associate professor of real estate at New York University, New York Institute of Technology, Hofstra University, Nassau Community College, New School for Social Research. His courses have been granted credit for appraisal certification, continuing education and continuing legal education (CLE) for attorneys in New York and New Jersey. He has qualified as an expert witness in Supreme Court since 1972, with his most recent case being September 2005. His offices are at 119 Second Street, Suite I-2, Garden City, New York (Tel: 516-294-1177; Fax: 516-294-1191; Web: www.integratedreal.com).

This article originally appeared in the Fall/Winter 2005 issue of the Family Law Review, *published by the New York State Bar Association, One Elk Street, Albany, New York 12207.*

NEW YORK STATE BAR ASSOCIATION

The officers and award committee members of the
Elder Law Section
congratulate the following
2006 Elder Law Section Award winners:

Hon. Joseph Covello
Hon. Joel K. Asarch
Vincent J. Russo, Esq.

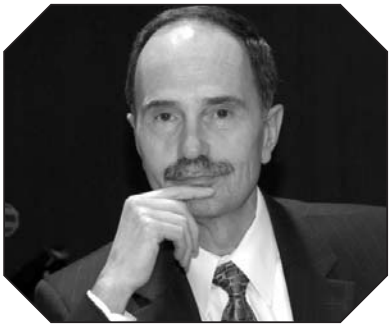
and

the following members of the Long Term Care Reform Committee:

Howard F. Angione, Esq.
Valerie J. Bogart, Esq.
Susan C. Bryant, Esq.
Michael D. Cathers, Esq.
Anthony J. Enea, Esq.
Robert J. Kurre, Esq.
Ellen G. Makofsky, Esq.
Louis W. Pierro, Esq.
Neil Rimsky, Esq.
Professor Anthony Szczygiel
Brian A. Tully, Esq.

Hon. Ann T. Pfau

Hon. Donna Siwek



Hon. H. Patrick Leis

SCENES FROM THE

ELDER LAW SECTION

2006 ANNUAL MEETING

JANUARY 24, 2006

NEW YORK MARRIOTT MARQUIS

Matthew Kiernan

Hon. Joel K. Asarch

Emily Franchina and
Hon. H. Patrick Leis

New York Case News

By Judith B. Raskin

Medical Records

Appellant hospital appealed from a decision granting a health care agent the right to hospital medical records after the patient was discharged. Appeal denied. ***Mougiannis v. North Shore-Long Island Jewish Health System, Inc., N.Y. L. J. Dec. 1, 2005 at 22, col. 1-6 (Nov. 21, 2005).***

Domenica Mougiannis executed a health care proxy in 1997 appointing her daughter, the petitioner, as her health care agent. When Ms. Mougiannis was hospitalized in 2002, she lacked the capacity to make medical decisions and the hospital granted petitioner access to her mother's medical records. However, after her mother's discharge from the hospital, petitioner was denied copies of the medical records based on the hospital's contention that petitioner was not a qualified person under PHL 18 *and that her authority to examine medical records ceased when no longer needed to make health care decisions as Mrs. Mougiannis was not hospitalized.*

The Supreme Court, in an Article 78 proceeding, held that petitioner was entitled to the medical records because *an agent under a Health Care Proxy* is a qualified person under PHL 18. The hospital appealed.

The Appellate Division agreed that the petitioner was entitled to her mother's medical records but disagreed that petitioner was a qualified person under PHL 18. The court stated it is "incongruous" that PHL 18 deems an Article 81 guardian a qualified person but not a health care agent. *Nonetheless,* the court found that *a Health Care agent under a proxy* petitioner was entitled to the medical records under PHL 2982(3). *This statute gives authority to the agent under a Health Care Proxy to receive medical information and records necessary to make informed decisions concerning health care.* The comprehensive authority given to the health care agent in the Health Care Proxy Law leads to an expansive interpretation of the health care agent's right to medical records.

Nursing Home Discharge

Petitioner brought an Article 81 proceeding to release her father from a nursing home that refused to discharge him. Granted. ***In re Topa,*** **2005 N.Y. Slip Op. 25465; 2005 N.Y. Misc. LEXIS 2419 (Sup. Ct., Queens County, Nov. 1, 2005).**

John Topa, age 94, sustained a leg injury. After hospitalization, he went to the Holliswood Nursing Home ('Holliswood") for rehabilitation. After treatment, Mr. Topa's daughter advised the nursing home that she was her father's health care agent and that her father was competent and could manage at home. The nursing home refused to discharge him. She then hired a geriatric care manager who determined that Mr. Topa had a high level of capacity. The care manager also examined Mr. Topa's home and found it to be a safe environment. Still the nursing home would not discharge him.

At Holliswood's suggestion, petitioner filed for guardianship in order to have her father discharged and to see his medical records. The court appointed a temporary guardian, Richard Spivak, Esq., who met with Mr. Topa and found him competent and desperately wanting to go home. Mr. Topa told Mr. Spivak he was very lonely. He had been mostly confined to his room even for meals. The facility told Mr. Spivak that the reason Mr. Topa was not discharged was that Adult Protective Services was investigating the initial injury. Upon investigation, Mr. Spivak found out this investigation had been dropped. Yet Holliswood's doctor told Mr. Spivak that while there were no medical reasons to keep Mr. Topa in the facility, it was his understanding that Mr. Topa would never be discharged because of the investigation. Mr. Spivak then signed out Mr. Topa against medical advice.

The petitioner sought costs and sanctions from Holliswood. The court found that Holliswood was a necessary party and therefore subject to the jurisdiction of the court. It was the facility's obligation under the circumstances to bring the guardianship proceeding and the facility was ordered to pay the petitioner's costs. However, the court denied the request for sanctions.

Thank you to the Law Firm of Somekh and Sarlis in Bellerose. The firm represented the petitioner and sent me a copy of the decision for this article.

Nursing Home Payment

Nursing home sought recovery from patient's son for its costs when Medicaid denied coverage. Denied. ***Grandell v. Devlin*****, 2005 N.Y. Slip Op. 51948U; 2005 N.Y. Misc. LEXIS 2677 (Sup. Ct., Nassau County, Nov. 29, 2005).**

When Patricia Devlin entered the plaintiff nursing home her daughter-in-law, Theresa, signed the admission agreement as financial agent. In doing so, Theresa agreed to pay any fees due the facility from

Patricia's funds. The agreement did not say that Theresa or patient's son, Charles, would be personally liable for nursing home charges. At the time Ms. Devlin entered the facility she was Medicaid eligible.

Ms.Devlin's Medicaid application was denied allegedly because of the failure of nursing home personnel to properly handle the application. The nursing home then billed Charles for $80,164. When Charles did not pay the bill, the plaintiff commenced this action against Charles. Charles responded by letter that he did not have an obligation to pay this bill. The nursing home used the letter as an answer and moved for summary judgment.

The court found the plaintiff's case without merit. The services were not rendered to Charles and Charles did not sign the agreement. Because Charles disputed the plaintiff's claim, summary judgment for an account stated was not warranted. The plaintiff claimed that Charles was responsible because he had an obligation as a parent to pay for the expenses of his minor child. The court found this not only inapplicable to the situation but demonstrative of the lack of merit of the case. Affidavits by nursing home personnel contained false statements.

The court awarded summary judgment and costs to Charles and scheduled a hearing to consider sanctions against the plaintiff.

Attorney's Fees

Appellant attorney appealed from an order in an Article 81 proceeding that failed to grant her fees from the incapacitated person's funds. Appeal denied. *Hobson-Williams v. Jackson,* 2005 N.Y. Slip Op. 25496; 2005 N.Y. Misc. LEXIS 2584 (Sup. Ct. Appellate Term, 2d Dep't Nov. 21, 2005).

The appellant attorney entered into a retainer agreement with petitioner to remove a guardian and to seek payment for her fees from the incapacitated person's funds. After the proceeding, the Civil Court of the City of New York, Queens County, did not grant the attorney fees from the incapacitated person's funds. The attorney appealed.

The Appellate Term held that the attorney's fees could not be paid from the incapacitated person's estate because the attorney did not comply with part 137 of the Rules of the Chief Administrator of the Courts. She failed to give the required notice to her clients that they had the right to appeal. She could not properly request her fees without pleading that she gave this notice. The case was dismissed with leave to replead.

Gifting by Power of Attorney

Defendant appealed from an order granting summary judgment to the Administratrix to recover gifts made by defendant attorney in fact to himself. Reversed. *Kislak v. Bourke*, 2005 N.Y. Slip Op. 10020; 2005 N.Y. App. Div. LEXIS 14578 (App. Div. 1st Dep't Dec. 22, 2005).

Raymond Maikowski executed a short form durable general power of attorney appointing the defendant as his attorney-in-fact. Paragraph (M) was modified to read: "making gifts to my spouse, children and more remote descendants, and parents in any amount, even to the attorney(s)-in-fact themselves." Using the power of attorney, the defendant transferred over $1 million to himself in the month prior and several days following Mr. Maikowski's death. The estate's Adminstratrix sought the return of these funds, arguing that the defendant had no authority to make these transfers to himself. The defendant argued that he was made an additional donee. He sought to compel the testimony of the decedent's attorney regarding the decedent's intent.

The Supreme Court, New York County, granted summary judgment to the Adminstratrix and ordered the defendant to return all of the funds. The court found that the language in paragraph (M) did not add the attorney-in-fact as an additional permissible donee. The defendant appealed.

The Appellate Division reversed. The court found the language in paragraph (M) ambiguous. The language was also not logical. If the decedent did not intend to add the defendant as a donee, it was not necessary to add the language "even to the attorney(s)-in-fact themselves" because the decedent's spouse, who was not an attorney-in-fact was the only other possible donee. Notwithstanding the language, an attorney-in-fact is entitled to the opportunity to present evidence of the principal's intent even where the document does not authorize the attorney-in-fact to make gifts to himself. The court therefore waived the attorney-client privilege. The petitioner was challenging defendant's right to make the transfers yet sought to deny him the opportunity to present evidence in his defense. As for the after-death transfers, the defendant clearly had no authority but the court did not address this issue because it was not included in the summary judgment order. This issue was remanded for further proceedings.

Judith B. Raskin is a member of the law firm of Raskin & Makofsky. She is a Certified Elder Law Attorney (CELA); and maintains memberships in the National Academy of Elder Law Attorneys, Inc., the Estate Planning Council of Nassau County, Inc., and NYS and Nassau County Bar Associations. She is the current chair of the Legal Advisory Committee of the Alzheimer's Association, Long Island Chapter.

Advance Directive News

The Nursing Home Dilemma

By Ellen G. Makofsky

It is no secret, people die in nursing homes. The thesis of this Advance Directive News column is that more people should die in nursing homes. Increased nursing home deaths, of course, should not be the result of poor care but rather as a natural end to a life.

Statistics show that currently more than 20 percent of the aging population die as residents of nursing homes. This is not an unexpected statistic. Residents of nursing homes are often old and frail.[1] The statistic which is disturbing is the one which demonstrates that 30 percent of all patients who die in a hospital were transferred to that hospital from a nursing home just a few days earlier.[2] It is this 30 percent of residents who have been discharged from the nursing home into the hospital that should rouse concern.

Nursing homes are understandably often hesitant to embrace death. One of the main tenets of modern-day nursing home quality standards is a denial of the idea that the facility is a waiting room for those about to die and that decline is inevitable for nursing home residents. The Department of Health along with nursing home administrators and their staffs are committed to improving the physical, mental and social health of nursing home residents and/or maintaining the status quo of the resident. The idea of maintenance and improvement over mere caretaking has directed nursing homes toward a less fatalistic care model. Of course, this change in itself is good. No one wants substandard care. The problem is that when a nursing home is treatment-based, and provides lots of physical therapy, occupational therapy and other health-promoting expectations, an unintentional byproduct may be created—the culture of death denial within the nursing home.[3]

Feeding into the death denial culture are Department of Health regulations that impose standards on nursing homes which assume that physical, mental and/or emotional decline may be signals of deficiencies in nursing home care unless demonstrated otherwise.[4] Nursing home administrators are very sensitive to regulatory risk. This sensitivity may in some cases dissuade the nursing home from encouraging the peaceful passing of the nursing home resident within the facility. Department of Health regulations skew nursing home care models away from the care of the dying. Thus, it is not uncommon for a dying resident to be transferred to the local hospital so the inevitable death will not occur in the nursing home and require that the quality of care of the resident be defended.[5]

Those who have resided in the nursing home for a period of time can find comfort in familiar surroundings. Each nursing home resident is unique with a different health history and individual preferences in regard to end of life. Hospital care often provides a more aggressive intervention than will be found in a nursing home. If the resident wants to forego hospital treatment, then the resident has the right to state such preference and have his or her wishes honored. Where there is a lack of capacity, and a health care proxy in place, the health care agent has the right to notify the nursing home not to call 911 or otherwise direct the resident to the local hospital. Our clients and/or those who serve as health care agents are often unaware that they have the right to refuse care. We need to educate them.

Endnotes

1. As is so aptly stated by Joanne Lynn, "Not long ago, people generally 'got sick and died'—all in one sentence and all in a few days or weeks. The end of life had religious, cultural, and contractual significance, while paid health care services played only a small part. Now most Americans will grow old and accumulate diseases for a long time before dying. Our health care system, . . . supplement[s] the body's shortcomings," [and makes] "it possible to live for years 'in the valley of the shadow of death.' " Joanne Lynn, "Living Long in Fragile Health: The New Demographics Shape End of Life Care," *Improving End of Life Care: Why Has It Been So Difficult? Hastings Center Report Special Report 35*, no. 6 (2005): S14.
2. Sandra H. Johnson, "Making Room for Dying: End of Life Care in Nursing Homes," *Improving End of Life Care: Why Has It Been So Difficult? Hastings Center Report Special Report 35*, no. 6 (2005): W37-S41.
3. Johnson, *supra* note 2 at S 37.
4. N.Y. Public Health Law § 2803.
5. Johnson, *supra* note 2 at S 37.

Ellen G. Makofsky is a partner in the law firm of Raskin & Makofsky with offices in Garden City, New York. The firm's practice concentrates in elder law, estate planning and estate administration. Ms. Makofsky is Chair-Elect of the Elder Law Section of the New York State Bar Association ("NYSBA"). Ms. Makofsky has been certified as an Elder Law Attorney by the National Elder Law Foundation and is a member of the National Academy of Elder Law Attorneys, Inc. ("NAELA"). Ms. Makofsky has spoken on the radio and appeared on television, and is a frequent guest lecturer and workshop leader for professional and community groups.

Guardianship News

By Robert Kruger and Anthony J. Enea

Robert Kruger

The following is a letter that was written by Robert Kruger and Anthony J. Enea and sent to Justice Ann T. Pfau, First Deputy Chief Administrative Judge of the Office of Court Administration of the State of New York at her invitation, to offer suggestions as to the Administration of Guardianships under Article 81 of the Mental Hygiene Law. The comments contained herein are a compilation of responses received from members of the Guardianship Committee.

Dear Justice Pfau:

As per your request, the following is a list of the major concerns of the members of our Committee, along with our suggestions for the possible remedy thereof.

1. Our members frequently complain of significant delays in the issuance of a Judgment and Order appointing a Guardian in an uncontested proceeding. Delays often exceed three months from the date of the hearing, thus prejudicing the alleged incapacitated person ("AIP"), who has pressing medical and financial issues. For example, access to financial resources may be impeded at a time when markets are volatile, or when nursing home placement, estate and/or Medicaid planning is needed.

Delays are partially attributable to the requirement imposed by many Courts that a transcript of the hearing be ordered.

To expedite the appointment process, we recommend two changes:

> (a) that the Courts routinely issue a short form temporary order of appointment of Guardian(s), with a bonding requirement where appropriate, and (b) that the form contain a checklist of provisions, for example, containing the names of the Guardians, the amount of the bond, and other simple relief (e.g. stipend for mother, permission to transfer assets, approval of nursing home placement) which can be noted and a copy given to counsel in lieu of ordering the minutes.

Anthony J. Enea

2. There are other delays, often (inexcusably) running into years, in reviewing and examining annual accountings. In some cases, the Court Examiners apparently lack the requisite experience, training, and knowledge to properly and expeditiously review an annual accounting. The delays created in doing so, unfortunately, have a significant ripple effect. See points 3 and 4 below. In addition, having only one Court Clerk to review the Court Examiner's Reports creates a chokepoint.

Although we believe the appointment of a Court Examiner Specialist is a positive step in addressing these problems, we also see the inexperience of some newly minted Court Examiners. The function of the Court Examiner is to verify that the Guardian is doing his/her job honestly and appropriately. It is not, as some might believe, to create bureaucratic obstacles.

Moreover, timeliness, while important, is no panacea. The Court may see the problem as one of oversight and discipline. We are concerned, to the contrary, that increased discipline will result in the departure of the experienced cadre of Court Examiners who hold the system together. After the system breaks down then, and only then (perhaps), will this point be understood. Flooding the system with new examiners will simply not work. New examiners need to be appointed, but not so many as to dilute the experience pool unduly. Candidly, it requires a book of business to warrant employing staff to do this job and, without staff, the Court Examiners cannot do it themselves.

3. As previously stated, delay in approving the annual accounting helps foster significant delays in both filing and approving the final accountings. For example, most Courts will not accept a final accounting for filing until all annuals on file have been approved.[1]

Even if all annuals have been approved, and the focus shifts to the finals alone, we believe that realistic deadlines are necessary for the Court Examiner or

Court Attorney to review all final accountings, and to submit his or her report. It is not unlike the appointment of a Guardian *ad litem* in Surrogate's Court. If an attorney, as GAL, doesn't perform within a reasonable time, the appointment will be revoked. Deadlines can easily be established in the Judgment and Order appointing the Court Examiner. The system needs to create a mechanism for accountability.

Moreover, delays are systemic, pervasive and costly to the incapacitated person. As the delays are occurring, the incapacitated person's assets are being depleted by the ongoing costs of the bond premiums being paid. To illustrate, the failure to timely approve the annual accountings or final accounting results in the continuation of a high bond premium long after the time the assets of the IP have been depleted. We believe that hundreds of thousands of dollars, and perhaps more, are unnecessarily being paid in bond premiums by Guardians statewide. Clients neither understand nor appreciate why they must pay unnecessary premiums because the Courts can't approve accountings promptly.

Nor can we understand why the receipt and release system, which works well in Surrogate's Court, is so difficult to implement in Guardianships. Finally, what function does the final accounting Clerk play when one reflects that an Examiner or Attorney has reviewed the final accounting in detail and that accounting elicits no objection? This Clerk, if not unnecessary, is in large part redundant.

4. Increasingly, our members are encountering significant problems in obtaining surety bonds for Guardians. Across the board, insurers are becoming more self-protective. One leading insurer has pinpointed the delays in reviewing annual accountings as the primary reason for his company's reluctance to write surety bonds. The concern is, if a Guardian is violating his or her fiduciary obligations, the surety has no way of protecting itself until the annual accounting is examined, and the surety is notified. Years of fiduciary mismanagement often accumulate before misdeeds are addressed. Sending annual accountings to the sureties does not work because (1) they have no means of following up and (2) they are loathe to institute legal action themselves because of the cost. They wait for, and rely upon, the Court Examiners doing their jobs and, if they don't, the impulse is to get out of this portion of the business because the profit margins are small. A recent reported case in Queens is an example of the price the surety is no longer willing to pay for inefficiencies in the system. Nor are the sureties willing to chase family guardians for premiums. One company requires payment of a lifetime's premiums before writing the bond. This is not the requirement of a marginal player; instead, this company is a major player in this area.

5. Lack of uniformity in practice and procedure by and between Judges within the same Court and statewide is another systemic problem that our members face. One common example is inconsistency regarding the necessity of offering medical testimony at the hearing. Some judges mandate medical testimony, while others ban it entirely. To require medical testimony often creates unnecessary expense for the AIP, because many doctors require payment in advance for services not otherwise covered by insurance or Medicare. The incapacities of the AIP, usually, can be described by lay witnesses and can be verified by the Court Evaluator.

A second example: In guardianships involving children who have received a medical malpractice or personal injury award, there are huge discrepancies in the attitudes manifested by Courts as to whether or not a care-giving parent (often the personal needs guardian) should receive compensation. Section 81.21(a)(1) of the MHL provides that the incapacitated person's funds can be used to support a person for whom he or she has no legal obligation to support. Some Courts are extremely grudging in response to such a request; some less so. Predictability consistently, however, is lacking.

But the most glaring problem is also the most delicate . . . the lack of insight, the lack of understanding, and the lack of interest of some judges. Most attorneys would opt without hesitation for a system where one or two judges preside, rather than the one we now have. One of the authors recalls a conversation with a judge in which he discussed the time it took him to learn the "culture" of the guardianship part. Not every judge in guardianship part is borne to the part, but some willingness to be there would be appreciated.

6. A regular and ongoing dialogue with members of the judiciary and their staff should be considered. Attorneys need to know what judges perceive as problems that can properly be laid at the feet of attorneys. Perhaps more importantly, we need to exchange ideas about handling problematic matters, such as family custody fights and granny napping cases, which torment counsel as much if not more than the Bench.

We might, under certain conditions, support mediation, mandatory or otherwise, or some such quasi judicial solution, because the family custody fights are difficult for both court and counsel. The unresolved baggage of childhood is often trotted out for the delectation of all.

We might also attempt to achieve consensus and uniformity on granny napping cases, of which the Texas case in the December 28th issue of the *New York Times* is but one egregious example.

We hope that Your Honor considers these suggestions constructive, in whole or in part, and we look forward to discussing them with you to the extent you believe warranted.

Respectfully yours,
Anthony Enea, Co-Chair
Robert Kruger, Vice Chair
Committee on Guardianship and Fiduciaries,
Elder Law Section,
New York State Bar Association

cc: Daniel G. Fish, Chair, Elder Law Section
Hon. Charles F. Devlin, Co-Chair
Committee on Guardianship and Fiduciaries

Endnotes

1. At least one County actually requires that the Guardian submit a petition seeking permission to file a final accounting. An Order to Show Cause seeking approval, with the final accountings attached, is all that should be required.

Robert Kruger is the Chair of the Committee on Power of Attorney Legislation, Elder Law Section, and Chair of the Subcommittee on Financial Abuse of the Elderly, Trusts and Estates Law Section, of the New York State Bar Association. Mr. Kruger is an author of the chapter on guardianship judgments in *Guardianship Practice in New York State* (NYSBA 1997) and Vice President (four years) and a member of the Board of Directors (ten years) for the New York City Alzheimer's Association. He was the Coordinator of the Article 81 (Guardianship) training course from 1993 through 1997 at the Kings County Bar Association and has experience as a guardian, court evaluator and court-appointed attorney in guardianship proceedings. Robert Kruger is a member of the New York State Bar (1964) and the New Jersey Bar (1966). He graduated from the University of Pennsylvania Law School in 1963 and the University of Pennsylvania (Wharton School of Finance (B.S. 1960)).

Anthony J. Enea, Esq. is a member of Enea, Scanlan & Sirignano, LLP. with offices in White Plains and Somers, New York. Mr. Enea is Certified as an Elder Law Attorney by the National Elder Law Foundation as accredited by the American Bar Association.* He is a member of the Executive Committee of the Elder Law Section of the New York State Bar Association as Co-Chair of the Guardianship and Fiduciary Committee. Since 1992 Mr. Enea has been the Co-Chair of the Elder Law Committee to the Westchester County Bar Association. He is also a member of the National Academy of Elder Law Attorneys and a Vice President of the Westchester County Bar Association. Mr. Enea is fluent in Italian.

***The National Elder Law Foundation is not affiliated with any governmental authority. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law.**

Mediation News

By Robert A. Grey

Welcome back to Elder Law Mediation! We actively solicit your mediation questions, comments and experiences, positive or negative. Please send them to Robert A. Grey, Esq., 38 Stiles Drive, Melville, NY 11747-1016 or rgrey@nysbar.com.

To Caucus or Not to Caucus, That Is the Question

In the world of mediation there is a misunderstood creature stalking the field. It is called the caucus. Pursuant to the requirements of General Obligations Law § 5-702, in plain language a caucus is known as a private meeting. It is a private meeting between the mediator and one side only. The other side will leave the room during the caucus (or the mediator and caucusing side will retire to a breakout room), and will not be informed of anything said during the mediation unless the party who said it wishes to disclose it or authorizes the mediator to disclose it. Of course, in fairness, after one side caucuses with the mediator the other side may also wish to caucus with the mediator. If so, the same confidentiality applies.

A caucus can be called by any of the participants or by the mediator. It is often used to explore areas that for some reason might be better discussed outside the presence of the other. For example, a party may wish to reveal something to the mediator but not to the other side, or may be unsure whether it is something that should be revealed at all. The mediator can then discuss the matter with the party and hash out whether or not it should be revealed in joint session, how it should be revealed, and by whom (the party or the mediator).

A caucus is an opportunity for private, unpressured discussion of issues which may be too sensitive or embarrassing to be addressed in joint session. "Reality checking" of possible unrealistic expectations can be explored, as well as whether the participant is acknowledging and considering his or her underlying goals, and whether those goals will be satisfied by what he or she is asking for. This can be beneficial to an attorney with client control problems. The caucus is also an excellent venue to explore the party's "BATNA" (Best Alternative to a Negotiated Agreement). In other words, what is the likely outcome if no agreement is reached in mediation? The party can reflect upon the expected time, aggravation, expense (both monetary and emotional) and risk of his or her BATNA, as well as the potential embarrassment of a public hearing of private matters.

The caucus also allows participants to suggest solutions which they do not want to bring up in joint session. Sometimes a party will propose a solution in caucus, but ask the mediator to present it in joint session. This can be effective because an idea presented by the neutral party may be acceptable to the other side, whereas the same idea presented by a party might not be. The caucus also provides time for participants to cool down and quietly review the progress of the mediation with the mediator. Participants sometimes feel that a mediation session is not going well, when in fact the mediator knows from experience that it is going quite well. If so, the mediator can reassure a doubting participant during a caucus.

The mediator may call a caucus for the same reasons, or to inquire discreetly of a participant if there is some underlying factor at play which could influence the mediation session that should be discussed with the mediator. A mediator's experience can be crucial in determining when, whether and if a caucus should be called by the mediator. Furthermore, the mediator's tact, wisdom, empathy and humor can greatly impact the efficacy of a caucus (as well as the overall outcome of the mediation session).

> *"A caucus is an opportunity for private, unpressured discussion of issues which may be too sensitive or embarrassing to be addressed in joint session."*

In the field of mediation there is presently a great debate about caucuses. There is a minority viewpoint that caucuses should never be used because the face-to-face "chemistry" of the mediation is diminished, thus possibly impacting the outcomes. At the opposite end of the spectrum is the viewpoint that caucuses must always be used. A common example is the "shuttle diplomacy" style of mediation that commences with a joint session but very quickly becomes a mediation wherein the mediator shuttles between the parties, who remain in separate rooms for nearly the entire mediation. However, the majority of mediators utilize caucuses when and if they or a partici-

pant feel a caucus would be beneficial. The number or lack of caucuses is not indicative of a successful or unsuccessful mediation session. During the mediator's opening statement he or she should announce his or her policy on the use of caucuses. If not, ask.

Robert A. Grey, Esq. maintains a practice in Melville, Long Island, New York, with an emphasis on providing Alternative Dispute Resolution (ADR), particularly Mediation and Arbitration, in areas such as elder law, trusts and estates, probate, family, matrimonial, commercial, *e*-commerce, construction, labor, employment, disability and discrimination disputes. He is admitted to practice in New York, Washington, D.C., the Federal Eastern and Southern Districts of New York, and the United States Supreme Court. His practice serves the entire New York City metro area, including Long Island and the lower Hudson Valley.

Mr. Grey has experience as a guardian, court evaluator, guardian *ad litem* and attorney for AIPs in guardianship proceedings. He is the author of the chapter on "Mediation in Guardianship Practice" in NYSBA's *Guardianship Practice in New York State, 2004 Supplement*, and has given presentations on mediation to various law school, bar association and community groups. He is a member of the NYSBA Elder Law Section, NYSBA ADR Committee, Suffolk County Bar Association Elder Law Committee, Queens County Bar Association Elderly and the Disabled Committee, and the National Academy of Elder Law Attorneys ("NAELA").

Snowbird News

Governor Bush Signs Bill Forcing Many Florida Medicaid Recipients Into Managed Care Plans

By Howard S. Krooks and Scott M. Solkoff

Howard S. Krooks

On December 9, 2005, the Florida legislature approved a sweeping change to Florida's Medicaid program that will force many of the state's 2.2 million-plus recipients into managed care plans over the next several years. Governor Jeb Bush has been arguing for quite some time that changes in the State's Medicaid program are needed. He signed the bill into law on December 16, 2005. Under the new law, a handful of big HMOs will be in charge of the long-term care of thousands of elderly Floridians.

Florida received approval from the Center for Medicare and Medicaid services on October 19, 2005, for its Section 1115 waiver application, which gives the State greater flexibility to implement this type of program. After receiving federal approval, it was up to the State legislature and the Governor to pass legislation implementing the waiver. However, in exchange for the waiver approval, the State was required to sign a budget neutrality agreement limiting the amount of federal dollars that will come into the State. This agreement requires the State to limit growth in Medicaid expenditures to 8% annually for each person during the five-year period of the waiver. While the State may save some money by cutting back on care, there will actually be fewer federal dollars coming in to the State of Florida as a result.

Initially, the State will implement the new program in only two counties: Broward (Hollywood/Fort Lauderdale area) and Duval (Jacksonville area). Eventually, however, the new program may be implemented statewide. This could have a devastating effect on Florida's Medicaid program. As more of its program falls under the neutrality agreement, if expenditures increase at a higher rate than anticipated, the State will not receive any increase in federal dollars to meet the increased costs. Rather, the State will be forced to use its own funds or cut back on the services it will provide. Because the State of Florida has already underfunded the other existing Medicaid waivers, there is little likelihood of there being enough dollars.

Scott M. Solkoff

The waiver granted to Florida by the Center for Medicare and Medicaid Services provides details on which Medicaid beneficiaries will be required to enroll under the new structure. Many children and parent Medicaid recipients, and most SSI beneficiaries who are not also enrolled in Medicare, will be required to enroll. While most pregnant women are exempt, those with the lowest incomes will be required to participate. Dual eligibles (those enrolled in both Medicare and Medicaid), children with chronic conditions, and persons with developmental disabilities will be required to participate at a later date. **While persons receiving long-term care in nursing homes are not currently covered under the new law**, the State has made it clear in its waiver application that it intends to broaden the scope of the waiver to encompass the vast majority of Medicaid beneficiaries, including individuals in nursing homes and hospices, all seniors, and persons receiving inpatient psychiatric services.

According to the timeline specified in the waiver application filed by the Florida legislature, enrollment will be phased in beginning in July 2006. The State estimates that by sometime in mid- to late 2007, more than 200,000 persons in Broward and Duval Counties will be enrolled in the new plans. This represents just under 9% of Florida's Medicaid recipients. In 2008, the program will be expanded to include three rural counties surrounding Duval—Baker, Clay and Nassau.

One of the fundamental changes which the State will implement through the waiver is a variation in the federal standard that requires states to ensure that each benefit category covered through Medicaid is sufficient in "amount, duration and scope to reasonably achieve its purpose." Under the waiver, managed care plans will be required to offer all mandatory Medicaid benefits; however, they will have flexibility to determine how much of such a service to offer provided that the plans offer an overall benefits package which is actuarially equivalent to the value of the current State Plan package for the

average member of the population. Thus, a plan might elect to offer more doctor visits, but less durable medical equipment. This new approach will apply ***only*** to adults and will not affect children receiving Medicaid benefits.

Non-institutionalized adults, people with disabilities and pregnant women with low incomes will be hardest hit by this new approach. The waiver allows the HMOs tremendous new flexibility in deciding which benefits will be offered and how much of any one benefit an individual would receive. While it is possible for a plan to offer new and additional benefits, generally waivers are not required to add benefits but rather to reduce benefits. In particular, persons with disabilities will face the harshest changes since they are less likely to be enrolled in a capitated managed care arrangement compared with low-income families. Also, adults with disabilities face greater risk under the waiver if the benefits package is inadequate since they tend to use more services.

Naturally, other states will be looking at the Florida waiver to see how it performs and to make its own determination as to whether such an approach might work elsewhere. We will keep the New York State Bar Elder Law Section updated on any developments in the Florida waiver.

Howard S. Krooks, J.D., CELA, is a partner in Elder Law Associates, P.A., with offices located in Boca Raton, Aventura, West Palm Beach and Weston, Florida. Mr. Krooks also serves as Of Counsel to Littman Krooks LLP, with offices located in New York City and White Plains, New York. Mr. Krooks is the Immediate Past Chair of the Elder Law Section of the New York State Bar Association and currently serves as the Co-Chair of the NYSBA Elder Law Section Compact Working Group. He also is Certified as an Elder Law Attorney by the National Elder Law Foundation. Mr. Krooks may be reached at hkrooks@elderlawassociates.com or (561) 750-3850.

Scott M. Solkoff is Chair of the Florida Bar's Elder Law Section and a principal with Solkoff Associates, P.A., a law firm exclusively representing the interests of the elderly and disabled throughout Florida.

The Golden State News

By Steven M. Ratner

My wife and I decided to move our family to San Diego last summer. After five successful years both at home and at work we were ready for a change. In this first edition of *The Golden State News*, I will summarize the steps I have taken to open an elder law firm in San Diego, and also share some of the successes and failures in my last five years of practice in New York. In the next issue, I intend to give an overview of the practice of elder law in California.

The hardest part of closing my New York practice was parting ways with my associate, Adrienne Arkontaky. Adrienne had spent the prior 13 years caring for her disabled daughter and was drawn to the practice of elder law after advocating for her daughter for so many years. Fortunately, Adrienne was offered, and accepted, a position at Littman Krooks LLP. She is a blessed person and Bernie's firm is lucky to have her.

I spent the second half of 2005 winding down my New York practice and building a practice in San Diego. The process of winding down my New York practice was surprisingly easy. I simply stopped taking cases that I could not expect to finish by the end of the year, and focused on a limited number of profitable cases that I could complete by the end of the year. I now have about 30 open files from New York and most of these files should be closed shortly.

I learned an important lesson in winding down my New York practice. Deciding which cases to turn away is every bit as important as deciding which to take. I found that even with far fewer cases, my net income remained the same (and was higher in some months). In my new San Diego practice, I plan to focus on a limited number of cases that have a high profit margin, which is more likely when the families are motivated to bring their cases promptly to completion.

During this transition, I committed to visiting San Diego every 6 weeks to lay the foundation for my new practice. On my first trip, I met with local elder law attorneys to learn the local practice and customs here. Two things became apparent. First, there are fewer attorneys practicing elder law in Southern California than in Metropolitan New York. Second, the field of elder law is not as well respected here. During a visit to one of the finer nursing homes in the county, the director was horrified to learn that my practice includes helping clients protect their assets from the high cost of long-term care. She cautioned that if I continued to practice in this area, I would not gain the respect of the local geriatric community.

On one such trip, I located an office, joined the local bar associations, and prepared a marketing plan—*my favorite part of being a lawyer*. Here is a short summary of my marketing efforts:

- I found space in a lovely suite that is only two miles from my home. It is important to have an office that gives your clients the right first impression, and I can now walk to work if I am feeling inspired. (I was seeking to correct the mistake I made in New York of having an office that was a one-hour commute from home.) Of course, it also doesn't hurt to see the sun set over the Pacific from my office window.
- I placed an advertisement in both of the local Jewish papers and committed to a full year run for both. I had tremendous success in New York with small ads in the local Jewish papers, but made the mistake of not keeping them running indefinitely.
- I am starting the first year of my new practice with two seminars at a local hotel. Though I'm not a fan of consumer seminars, I am hopeful that I will be able to generate good will and an awareness of my practice while keeping them simple and cost effective. These seminars are costing about $500 for the hotel facility, and $1,000 to place 16,000 inserts in the local paper for one of the larger retirement communities in the county.
- I am also participating in a health fair at a local senior center this month. One of the biggest challenges of manning a table at a health fair is just simply learning where they are all held. We are currently working on putting together a schedule of the 2006 fairs.
- I have been slowly building a mailing list of local professionals. I recently sent 100 letters to the directors of admissions at each local nurs-

ing home with a short update on the recent Senate bill, and expect to send another 400 similar letters to local accountants next week. Within 6 months, I hope to have 1,000 professionals on the list and send a monthly mailing to each.

- Next, I will start a monthly luncheon for local professionals. I am teaming up with a local foundation that will provide a speaker and also CLE credit for lawyers who attend the program. I wrote a column on how to set up such a lunch program in an earlier column in this publication.
- Finally, I am remaining active in local and national elder law bar groups. I recently attended a meeting of the Southern California NAELA chapter. The State Bar of California has no elder law section. The action here is either through the NAELA state chapters (there is both a Southern and Northern California chapter) and also through a group called California Advocates for Nursing Home Reform (CANHR). CANHR is largely responsible for helping California maintain one of the most generous Medicaid programs in the country. California has yet to enact many of the changes mandated by OBRA 1993. Want to give your exempt home to your grandchild or non-caretaker child? You still can in California. To learn more about CANHR, visit http://www.canhr.org.

In New York, it took me three years to build a practice that was profitable and I did this mainly by trial and error. I am hopeful that it will take half that time here. In the next issue, I will give a short overview of the practice of elder law in California.

Steven M. Ratner practices elder law with offices at 11622 El Camino Real, Suite 100, San Diego, CA 92130. Mr. Ratner can be reached by e-mail at smr_law@yahoo.com or by telephone at 800-836-1124. Mr. Ratner is the immediate past editor of the *Elder Law Attorney* and a former member of the Executive Committee of the Elder Law Section of the New York State Bar Association. Mr. Ratner is Of Counsel to Littman Krooks LLP with offices in White Plains and Manhattan. Mr. Ratner is a student pilot and is working towards his private pilot's license.

Book Review

Hormones and the Mind

By Edward L. Klaiber, M.D.

Reviewed by Lori R. Somekh

This is a fascinating book on a seldom-discussed aspect of the Alzheimer's disease puzzle. In my quest for information, I stumbled upon this book in conjunction with a 1997 *New York Times* cover article by Claire Warga, Ph.D., entitled "Estrogen and the Brain." I don't know if the hormone-Alzheimer's disease connection is a well-kept secret by accident or because of the controversy over Hormone Replacement Therapy ("HRT") spurned by the abrupt cessation of the Women's Health Initiative ("WHI") study in 2002 and the resulting panic to take women off hormone therapy. Regardless, the information in this book is so compelling that it merits serious consideration by anyone concerned about the prevention of Alzheimer's disease.

The author, Edward L. Klaiber, M.D., a psychoneuroendocrinologist, is the President of Broverman Research Foundation and former Chief of Clinical Research in the Department of Biological Research at Worcester State Hospital in Massachusetts. Klaiber, in a recent article, calls into question the validity of the WHI study which condemns the use of HRT, and he advances the theory that the decline in estrogen that women experience at menopause is a risk factor for Alzheimer's disease later in life.

In the way of background, in 2002 the WHI study, which studied a large sample of women with an average age of 62 to determine if HRT was protective against heart disease, was discontinued due to an increased incidence of breast cancer, clots and stroke in the synthetic estrogen/progestin leg of the study. Prior to the WHI study, approximately 8 million women in the United States were using estrogen replacement therapy and another 6 million were on a combination of estrogen and progesterone (Prempro), which is a synthetic estrogen combined with a synthetic progestin. This study was comprised of a group of women, most of whom were well past the age of menopause and had not taken HRT at the onset of menopause, but rather started later in life. As a result of the early termination of the WHI study, millions of women were advised to stop their HRT "cold turkey."

Klaiber's book addresses the influence that hormones have on the brain, which encompasses mood, cognition and memory, sexuality, PMS and Alzheimer's disease. Early in Klaiber's research, he and his colleagues discovered that when they gave estrogen to depressed women who had high monoamine oxidase ("MAO") levels in their brains, the MAO levels declined and the women's moods improved. Based on that and many other studies, Klaiber concludes that hormone modulation is a viable option for women with difficult-to-treat mood disorders and hormone imbalances.

With respect to Alzheimer's disease, Klaiber points out that women have a nearly three-fold incidence of Alzheimer's disease as compared to men. He maintains that many neuroscientists believe that estrogen loss plays a critical role in the genesis of this disease. Klaiber cites a series of studies demonstrating that estrogen usage significantly reduced the risk for Alzheimer's disease.

In addition to supporting his contention that estrogen protects the brain against Alzheimer's disease with numerous studies, the author also illustrates how it does this. He explains that physiological levels of estrogen reduce the generation of beta amyloid in human brain tissue. Beta amyloid is a sticky plaque that forms in the brain, causing cell death and a disruption of normal communication between nerve cells. It is toxic to brain cells, and it increases the cells' vulnerability to other toxins, which increases the level of toxic hydrogen peroxide and leads to the death of the cell. Additionally, estrogen stimulates neuronal growth factors that support the functions of acetylcholine (a primary messenger of cell-to-cell communication that forms the basis of memory and cognition) in the brain. An adequate level of estrogen is required so that brain cells responsive to acetylcholine may be primed by the growth factors that stimulate their development. Estrogen is also thought, Klaiber explains, to increase the amount of the neurotransmitters Serotonin, Norepinephrine and Dopamine in the synapses by reducing the level of MAO that degrades these neurotransmitters. Estrogen is also thought to improve blood flow to the brain and is believed to work synergistically with other drugs such as acetylcholinesterace (AchE) like Aricept or Cognex to improve memory and other cognitive functions.

In a December 16, 2005 article published in *HealthDay News*, Klaiber is reported to be critical of the design of the WHI study, claiming that the researchers made some major mistakes. His major criticism was that they put women in their sixties and seventies, who had not been on hormones before, on synthetic hormones for the first time. He argued that because these women were older, they were already at greater risk of cardiovascular problems. He also criticized the study for using daily progesterone rather than noncontinuous, cyclic administration of progesterone. He argued that HRT in other doses or delivery forms is not only safe but indeed has a positive health effect. He pointed to findings from the large-scale Nurses' Health Study, in which women were placed on hormone therapy in their forties and fifties and took the synthetic hormones cyclically rather than continuously. In that study, HRT was indeed shown to have a cardio-protective effect.

Another possible Alzheimer's disease risk factor that made an impression on me, which Klaiber addresses in this book, is overconsumption of sugar. Again, this implicates the endocrine system and the balance of the body's hormones (i.e., insulin, cortisol, adrenaline). A few other authors such as Claire Warga, Ph.D., a psychologist; Diana Schwarzbein, M.D., an endocrinologist and Uzzi Reiss, M.D., an OB/GYN, have also written about the effects of the endocrine system on the brain and the mind. Maybe because this is cutting-edge science, it doesn't appear to me to be getting a lot of attention in Alzheimer's and elder care circles. However, it would seem that we should stand up and take notice of those pioneers who may be onto the closest thing we've seen to a prevention strategy for the next generation of elders.

This book offers a refreshingly hopeful perspective on a devastating disease that overwhelms literally millions of families in the United States alone. It is a must read for anyone in the multidisciplinary field of elder care.

Section Committees and Chairs

Burial Rights Legislation
Michel Haggerty
6367 Mill Street
Rhinebeck, NY 12572
(845) 876-3300

Bylaws
Joan L. Robert
Kassoff Robert Lerner & Robert, LLP
100 Merrick Road, Suite 508W
Rockville Centre, NY 11570
(516) 766-7700

Client and Consumer Issues
Margaret Z. Reed
The Law Office of
Margaret Z. Reed
203 Delaware Avenue
Delmar, NY 12054
(518) 439-6001

Coalition of Bar Advocates
Walter T. Burke
Burke & Casserly, P.C.
255 Washington Avenue Ext.
Albany, NY 12205
(518) 452-1961

Communications
Steven T. Rondos
Raia & Rondos
466 Bay Ridge Parkway
Brooklyn, NY 11209
(718) 833-6338

Elder Law Practice
Sharon Kovacs Gruer
Sharon Kovacs Gruer, P.C.
1010 Northern Boulevard, Suite 302
Great Neck, NY 11021
(516) 487-5400

Estate and Tax Planning
Michael J. Amoruso
Amoruso & Amoruso, LLP
2975 Westchester Avenue, Suite 207
Purchase, NY 10577
(914) 253-9255

Family Law Issues
Rita K. Gilbert
Hyman & Gilbert
1843 Palmer Avenue
Larchmont, NY 10538
(914) 833-5297

Financial Planning and Investments
Timothy E. Casserly
Burke & Casserly, P.C.
255 Washington Avenue Ext.
Albany, NY 12205
(518) 452-1961

Guardianships and Fiduciaries
Hon. Charles F. Devlin
Office of Court Administration
Guardian and Fiduciary Services
111 Dr. Martin Luther King, Jr. Blvd.
White Plains, NY 10514
(914) 824-5721

Anthony J. Enea
Enea, Scanlan & Sirignano LLP
245 Main Street, 3rd Floor
White Plains, NY 10601
(914) 948-1500

Health Care Issues
Ellyn S. Kravitz
Littman Krooks, LLP
655 Third Avenue, 20th Floor
New York, NY 10017
(212) 490-2020

Insurance
Bruce L. Birnbaum
1025 Old Country Road, Suite 325
Westbury, NY 11590
(516) 794-9696, ext. 21

Leadership Task Force
Michael J. Amoruso
Amoruso & Amoruso, LLP
2975 Westchester Avenue
Suite 207
Purchase, NY 10577
(914) 253-9255

Legal Education
Bernard A. Krooks
Littman Krooks LLP
81 Main Street
White Plains, NY 10601
(914) 684-2100

Liaison to the Judiciary
Hon. Edwin Kassoff
Kassoff Robert Lerner &
Robert, LLP
100 Merrick Road, Suite 508W
Rockville Centre, NY 11570
(516) 766-7700

Liaison to Law School Professors and Students
Rose Mary K. Bailly
Law Review Commission
80 New Scotland Avenue
Albany, NY 12208
(518) 472-5858

Liaison to Legal Services and Nonprofit Organizations
Valerie J. Bogart
Selfhelp Community Services Inc.
520 Eighth Avenue, 5th Floor
New York, NY 10018
(212) 971-7693

Liaison to Public Agency and Legislation
Ronald A. Fatoullah
Ronald Fatoullah & Associates
425 Northern Boulevard, Suite 20
Great Neck, NY 11021
(516) 466-4422

Litigation
Gary E. Bashian
Bashian & Farber, LLP
235 Main Street, 6th Floor
White Plains, NY 10601
(914) 946-5100

Living Will Legislation
Amy S. O'Connor
McNamee, Lochner, Titus and Williams, P.C.
677 Broadway, P.O. Box 459
Albany, NY 12201
(518) 447-3335

Stephen J. Silverberg
Certilman Balin Adler Hyman LLP
90 Merrick Avenue, 8th Floor
East Meadow, NY 11554
(516) 296-7044

Lobbying
Howard S. Krooks
Elder Law Associates, P.A.
7000 W. Palmetto Park Road
Boca Raton, FL 33433
(561) 750-3850

Vincent J. Russo
Vincent J. Russo & Associates, P.C.
1600 Stewart Avenue, Suite 300
Westbury, NY 11590
(516) 683-1717

Long-Range Planning
Ami S. Longstreet
Mackenzie Hughes LLP
101 S. Salina Street, Suite 600
Syracuse, NY 13202
(315) 233-8263

Ellen G. Makofsky
Raskin & Makofsky
600 Old Country Road, Suite 444
Garden City, NY 11530
(516) 228-6522

Long Term Care Reform
Louis W. Pierro
Pierro & Associates, LLC
20 Corporate Woods Boulevard
3rd Floor
Albany, NY 12211
(518) 459-2100

Medicaid
René H. Reixach
Woods Oviatt Gilman LLP
2 State Street, Suite 700
Rochester, NY 14614
(585) 987-2858

Medicaid Legislation
Howard S. Krooks
Elder Law Associates, P.A.
7000 W. Palmetto Park Road
Boca Raton, FL 33433
(561) 750-3850

Vincent J. Russo
Vincent J. Russo & Associates, P.C.
1600 Stewart Avenue, Suite 300
Westbury, NY 11590
(516) 683-1717

Membership Services
Martin B. Petroff
Lamson & Petroff
9 East 40th Street, 13th Fl.
New York, NY 10016
(212) 447-8690

Persons Under Disability
Joan L. Robert
Kassoff Robert Lerner and Robert, LLP
100 Merrick Road, Suite 508W
Rockville Centre, NY 11570
(516) 766-7700

Power of Attorney Legislation
Robert Kruger
225 Broadway, Room 4200
New York, NY 10007
(212) 732-5556

Publications
Anthony J. Enea
Enea, Scanlan & Sirignano LLP
245 Main Street, 3rd Floor
White Plains, NY 10601
(914) 948-1500

Real Estate and Housing
Neil Rimsky
Cuddy & Feder, LLP
90 Maple Avenue
White Plains, NY 10601
(914) 761-1300, ext. 224

Technology
David Goldfarb
Goldfarb Abrandt Salzman & Kutzin LLP
350 Fifth Avenue, Suite 1100
New York, NY 10118
(212) 387-8400

ELDER LAW ATTORNEY

Elder Law Attorney is published by the Elder Law Section of the New York State Bar Association. Members of the Section receive a subscription to the publication without a charge.

ISSN 1070-4817

Elder Law Section
New York State Bar Association
One Elk Street
Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155