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ONEONONE

A publication of the General Practice Section
of the New York State Bar Association

A Message from the Chair

Greetings! I hope you all enjoyed your summer.

In the start of this new fiscal year, I come to you no longer as Editor of *One on One*, but as the new Chair. Following in the footsteps of Paul O'Neill, Jr. will not be an easy task. For the past year, Paul has enhanced the Section with his wisdom and has strengthened the Section with his leadership and experience. Last year, Paul set out on a mission. This year, he has passed the baton to me to continue the initiatives of establishing the Section as a valuable and useful resource to its members. With that comes growth and knowledge.

In these difficult economic times when everyone is cutting back and tightening their belts, knowledge, ethical standards and education are the foundation on which we can best serve our membership and clients. Last year we created and implemented a series of programs in various judicial districts, and this year we are more committed than ever to continue to enhance these programs so that our members can develop and build on relationships throughout the Section. A sharing of issues and concerns is paramount in our industry and can only be achieved through the support and participation of our membership.

Our Section's participation in this year's New York State Bar's Section Membership boat ride was another successful event. The Section attracted a large number of new members and a good time was had by the more than 400 lawyers on board. We commend the Bar's initiative in creating the event and the Young Lawyers Section and other Sections involved in making the event a success.

Inside

NYSBA

While we are committed to building on last year's initiatives, our mission does not stop there. In the months ahead, we are also committed to growing the Section and enhancing our resources so that each member will always have a pool of resources to turn to—a case or precedent cited in one of the articles in our Section on the Web site, a Webinar or teleconference being offered on a specific area of law that you may not be familiar with, or perhaps just the cultivation of a new relationship with a fellow member developed through one of our networking opportunities.

"A well-rounded lawyer needs to know aspects of all areas of the law and that is what the General Practice Section seeks to help you achieve."

Finally, I would be remiss if I did not say that I look forward to the coming months and working with my new officers: Leonard E. Sienko, Jr., Chair-Elect; Martin S. Kera, Secretary; and Joel E. Abramson, Treasurer.

The General Practice Section is a resource for all attorneys—be that an attorney from a large firm, a medium-size law firm or a sole practitioner or in-house counsel. A well-rounded lawyer needs to know aspects of all areas of the law and that is what the General Practice Section seeks to help you achieve.

On behalf of myself, and my fellow officers, we invite every member to become more involved. Volunteers on various committees and article contributions are encouraged and welcomed and our doors are always open. Please respond to my recent letter and join a Committee.

Sincerely,
Martin Minkowitz

Catch Us on the Web at WWW.NYSBA.ORG/GP

The General Practice Section invites you to browse our Web page for information to help you manage your daily practice of law. One of our primary goals is to enhance the competence and skills of lawyers engaged in the general practice of law, to improve their ability to deliver the most efficient and highest quality legal services to their clients and to enhance the role of general practitioners and to provide a medium through which general practitioners may cooperate and assist each other in the resolution of the problems and issues of practicing law.

Visit our site at www.nysba.org/gp to find out more about: Upcoming Events; Publications and Forms; Articles and Resources; CLE and much more.

From the Editor

When I first started working with Marty Minkowitz a number of years ago on a variety of projects and not-for-profit Associations, I never thought that I would ever get myself so involved in the legal profession. I was even more elated and thrilled when Marty invited me to work with him on the *One on One* Newsletter.

My first exposure to this new adventure was on the boat ride last July. Being curious and inquisitive I spoke to everyone on board—in every Section. And then I met the leadership of the General Practice Section. I was taken aback by the conversation and commitment that each one expressed because their only concern was how to bring the best possible resources and opportunities to its Section members. The conversation revolved around: "How do we keep their education process growing? What can we offer them to enhance their areas of interest and expose them to the best of the best in the industry? How do we nurture their ethical and professional standards? How do we help them be the best possible attorney they can be?" A difficult undertaking for such a small group of professionals. And then I realized, I answered my own question. They are just that . . . professionals. Never before had I seen such commitment from a group looking to help and further someone else's career and not their own.

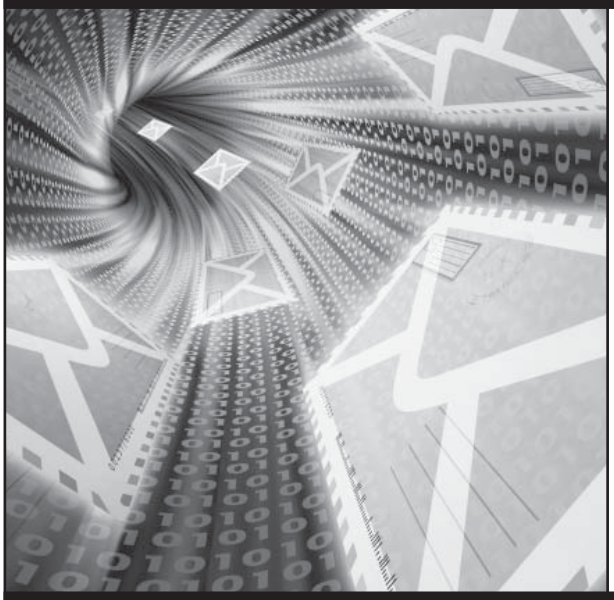
Having worked with attorneys for the past ten years, I've often felt as if I were or should have been one. Well, I am not an attorney. I am a resource . . . a resource to be shared and used by every member of the General Practice Section. A place where members can go to ask questions about the Section and help point them in the right direction.

In the coming months, I hope to hear from you. I invite you to share your thoughts on how we can enhance the Section's Newsletter or author an article for one of our upcoming issues. Over the years I have learned that any group is only as good as its members and their participation.

I look forward to working with the officers, executive committee and the General Practice Section membership.

With kind regards,
Maria C. Sclafani

Request for Articles



If you have written an article you would like considered for publication, or have an idea for one, please contact the *One on One* Editor:

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Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information.

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Assisting the Consumer Debtor: Becoming Aware of Potential Affirmative Claims

By Daniel Schlanger

Most small-firm lawyers and general practitioners get at least an occasional request from an individual client seeking help in dealing with creditors, whether it be the client who has just been sued on old credit card debt that he or she thought was long since resolved or forgotten, the client whose children have racked up significant debt for which the creditor now seeks to make the client responsible, the client who guaranteed someone else's auto loan, the client who has been harassed by collectors for years and wants your help in negotiating fair, enforceable settlements to put the matter behind him, etc.

Indeed, when I shifted from working on consumer-protection issues as a legal aid attorney to working on these issues in private practice, one of the big surprises was the large group of solvent, middle-class individuals with significant consumer-debt-related problems who were in need of counsel and assistance. Indeed, putting aside the many individuals who are out of work and/or currently "underwater" with regard to credit cards, auto loans, mortgages, etc., our office frequently receives calls from sophisticated, educated and employed potential clients who are involved in disputes or actual litigation regarding alleged personal debts.

The purpose of this three-part series is to share with New York practitioners, in brief outline, a few successful techniques and strategies for helping clients with these types of problems, focusing in particular on the client facing collection/litigation regarding old credit card debt where, for a variety of reasons, bankruptcy is not desirable or appropriate. The good news is that the consumer debt collection industry is, for the most part, a sloppy, volume-based industry that works on the assumption that the debtor will neither know his or her rights nor obtain counsel. This reality, combined with fairly vigorous, fee-shifting federal statutes regarding unfair collection practices, means that a debtor represented by knowledgeable counsel is often in a much stronger position than might otherwise be presumed. The reader will note that although many of these techniques and strategies are litigation-oriented, many are at least as useful in the context of negotiating settlement.

In **Part I** of the series (which you are reading), I focus on potential affirmative claims a debtor may possess. These types of claims are crucial inasmuch as they can radically change the relative bargaining positions of the parties, putting the debtor in a position to settle the debt for a fraction of what would otherwise be possible or even, in certain cases, allow the debtor to dictate a settlement in which creditor not only waives the obligation but pays the debtor, as well. These claims are also critical because the fee- shifting nature of many of the federal statutes can be the deciding factor in whether any form of extended representation is financially feasible for the client and the firm.

"[W]hen I shifted from working on consumer-protection issues as a legal aid attorney to working on these issues in private practice, one of the big surprises was the large group of solvent, middle-class individuals with significant consumer-debt-related problems who were in need of counsel and assistance."

In **Part II** of the series, which will follow, I review potential defenses to state court collection actions. In **Part III**, I will review issues relating to the vacating of default judgments, focusing on judgments obtained through the routinely deficient service of process that has sadly become the norm in collection actions.

The Best Defense Is a Good Offense

A. Assess the Case for Potential Fair Debt Collection Practice Act Claims

Recognizing a colorable Fair Debt Collection Practice Act, 15 U.S.C. § 1692 *et seq.* (FDCPA) claim against the collector or the collection firm can radically improve the client's bargaining position. It is not uncommon that the collector and/or its law firm, faced with defending a strong, fee-shifting action in federal court, will quickly conclude that even where the debtor's case does not involve significant actual damages, it is in the debt collector's best interest to agree to mutual releases, dismissal of the state court collection action, and an additional payment to the consumer, including attorney's fees.

The FDCPA is a detailed, federal statute meant to prevent unfair and/or deceptive collection practices. It contains a multitude of extremely specific requirements—for example, dictating the types of disclosures that a collector's first and subsequent written communication must contain, requiring that collector validate the debt upon request and cease contacting the consumer in the interim, requiring the collector to stop calling any consumer who requests to be contacted only in writing, prohibiting direct contact with represented consumers, prohibiting contact with third parties, such as the consumer's employer or relatives, etc. The FDCPA also contains much more sweeping prohibitions against unfair and deceptive collection practices, e.g., making unlawful the "false representation of the character, amount, or legal status of any debt" (§ 1692e (2)(A)) and barring the "the collection of any amount (including interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law" (§ 1692f(1)).

Although it doesn't cover the original creditor, entities that buy debts after default (e.g., most "debt buyers"), or who undertake collection activity on behalf of another (e.g., debt collection law firms), are covered under the statute. Although the $1,000 statutory penalty per action (plus actual damages) is fairly modest, the prevailing consumer is entitled to *mandatory* attorney's fees (§ 1692k(3)). Moreover, with a limited exception for certain bona fide errors, the collector operates under a strict liability standard, i.e., the consumer need not show any bad intent on the part of the collector (although it certainly never hurts!) (*Russell v. Equifax*, A.R.S., 74 F.3d 30 (2nd Cir. 1996)).

Although a full review of the FDCPA is beyond the scope of this article, it bears noting that failure to include required written disclosures, inaccurate descriptions of the law or the debtor's rights, threats to take legal action where no action is realistically contemplated, telephone harassment, failure to acknowledge prior payment, filing of time-barred debt, and failure to maintain licensure required by the New York City Department of Consumer Affairs, are all fairly commonplace and may constitute grounds for a successful FDCPA claim.

Because identification of a valid FDCPA claim can be a "game changer," it is crucial that counsel to the debtor familiarize himself or herself with the statute and get enough information from the client to recognize potential violations. Likewise, it is crucial that counsel be aware of the FDCPA's one-year statute of limitations.

B. Assess the Case for Potential Fair Credit Billing Act Claims

A full discussion of the federal Truth In Lending Act,15 U.S.C. § 1601 *et seq*. (TILA), an inordinately complex and heavily litigated statute, is not appropriate here but, particularly in the credit card context, the practitioner should be aware of a subsection of the TILA entitled the Fair Credit Billing Act, 15 U.S.C. § 1666-1666j (FCBA), which provides significant rights to credit card holders and which can often provide valid grounds for counterclaims or third-party claims that will greatly increase the debtor's bargaining position. The statute is particularly likely to be applicable where the debtor has previously disputed the charges with the credit card company or where the client is currently in the midst of such a dispute.

In general, the FCBA imposes concrete obligations upon credit card companies vis à vis disputes with the credit card holder, including the requirement that upon timely notice from the credit card holder, the creditor "make appropriate corrections in the account of the obligor, including the crediting of any finance charges on amounts erroneously billed . . . or send a written explanation or clarification to the obligor, after having conducted an investigation, setting forth to the extent applicable the reasons why the creditor believes the account of the obligor was correctly shown in the statement" (15 U.S.C. 1666(a)(3)(B)). The Act also limits the right of the creditor to report a disputed amount as delinquent, to close an account based upon a dispute, or to charge interest on the disputed amount. The statute has a two-year statute of limitations.

Like the FDCPA, the FCBA contains limited statutory damages, but also contains mandatory fee shifting provisions that are extremely useful in forcing resolution of disputes. Common violations include failure to conduct a credible investigation despite clear notice from the consumer, reporting of disputed balances to third parties (e.g., credit reporting agencies) and failure to segregate disputed portions of the bill from the portion upon which interest and fees can legitimately accrue.

C. Assess the Case for Potential Fair Credit Reporting Act Claims

The Fair Credit Reporting Act, 15 U.S.C. § 1681-1681x (FCRA), regulates both the Credit Reporting Agencies (e.g., TransUnion, Experian, Equifax, etc.) and the entities that provide the agencies with information, i.e., many, many creditors and debt-collection companies. The statute is detailed and heavily regulated and the following serves only to flag a few pertinent points in order that the interested practitioner can investigate further on his or her own.

A basic familiarity with the statute is necessary for several reasons. First, if your client disputes the accuracy of a credit report entry with the agency, the agency is obligated to ask the provider of that information to investigate. Not only can the credit reporting agency be liable for continued listing of inaccurate information but crucially for purposes of this discussion, the confirmation of inaccurate information by the provider (who may well be the plaintiff or potential plaintiff in the collection action that prompts the consumer to arrive in your office) is actionable under the FCRA which, like the FDCPA and the FCBA, contains mandatory fee-shifting provisions.

There is also a second, practical consideration: now more than ever, bad credit can have tremendously negative impacts on a client's financial well-being, making it difficult or impossible to borrow money and, in some cases, threatening job eligibility. Thus, it behooves the attorney representing the debtor to provide the consumer basic information on how to correct inaccuracies on his or her credit report that often accompany debt-collection-related problems.

D. New York General Business Law § 349 (Deceptive Trade Practices Act)

Virtually every state has an unfair and deceptive trade and practices (UDAP) statute, and New York is no exception. Unfortunately, New York's UDAP law is not particularly strong, barring only deceptive conduct while leaving non-deceptive but nonetheless unfair acts and practices outside its purview. Rather GBL § 349(a) bars "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in [New York]." Furthermore, the act contains no statutory penalty for violation, and caps punitive damages at $1,000 (§ 349(h)). The statute also does not provide for mandatory fee shifting, stating that "the court may award reasonable attorney's fees to a prevailing plaintiff." § 349(h). Not surprisingly, courts are most likely to exercise their discretion to award plaintiff fees where the court believes the victims of the deception to be vulnerable, the public interest to be highly implicated, and the defendant to have acted in bad faith. *See,* e.g., *Independent Living Aids, Inc. v. Maxi-Aids, Inc.*, 25 F. Supp.2d 127 (E.D.N.Y. 1998).

Nonetheless, the act can be extremely useful in certain situations. For example, in cases where the client has suffered actual damages as a result of collection–related deception, it provides a basis for relief that does not require the practitioner to prove the elements of fraud, such as reliance and bad intent. Rather, the consumer need only show: (a) that the alleged act is "consumer-oriented"; (b) that defendant made a material misrepresentation; and (c) that the misrepresentation caused the consumer harm (*Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 (Ct. of Appeals 2000)). Second, in absence of a counterclaim many New York courts, in practice, allow a plaintiff to discontinue an action without consent of the defendant (the CPLR notwithstanding). This practice allows for unilateral dismissal without prejudice even after an answer has been filed. Maintaining a counterclaim is thus useful to prevent unilateral dismissal without prejudice where counsel may be able to achieve dismissal with prejudice, monetary payment, credit report correction and/or other useful terms through negotiation. Third, § 349 covers entities such as original creditors who are not reachable under the Fair Debt Collection Practices Act.

E. Don't Forget Your Common Law Claims

Depending upon the situation, the debtor may have valid claims under breach of contract, negligence, fraud or other common law theories of liability. Libel claims may be appropriate and viable in contexts where an entity on the creditor's "side of the fence" (the creditor, a collection company, a collection firm) has transmitted false information about an alleged debt to a third party such as a credit reporting agency, a neighbor or an employer) subject "to such an action's rigorous limitations, which require not only that the statements be false but that the agency was motivated by express malice or actual ill will or that the information in its credit report demonstrates wanton and reckless negligence" (*Zampatori v. United Parcel Service*, 125 Misc.2d 405 (Ct. of Appeals, 1984)). Likewise, invasion of privacy may be viable where there has been, for example, persistent telephone harassment. (Note, however, that the degree to which the FCRA pre-empts state law claims for libel and invasion of privacy is unsettled. *See Fashakin v. Nextel Communications*, 2006 WL 1875341 (E.D.N.Y. 2006)).

Of course, one benefit of many common law claims is the potential availability of punitive damages. Another advantage is that like GBL § 349, but unlike claims under the FDCPA, FCBA and FCRA, the common law claims typically avoid the complex statutory coverage issues that may sometimes arise under the federal statutes.

F. Consider Third-Party Liability

Oftentimes, the client's strongest claim will lie not against the named plaintiff in the state court collection suit that prompts the consumer to seek legal representation, but against the debt-collection law firm that represents the plaintiff and, more to the point, that is often responsible for all or much of the pre-litigation collection activity on the account. In this regard, the practitioner should be aware that most of the major collection law firms in New York have entire staffs of "account specialists" who manage all of the functions regularly associated with debt collection, e.g., pre-litigation phone calls, dunning letters, negotiations, etc. In this author's experience, the city and state courts (which process thousands upon thousands of default

judgments every year) and the federal courts, as well, are aware that the law firms involved provide a wide range of collection-related services well beyond those traditionally associated with a law firm. Perhaps for this reason, judges do not—in the author's experience—have the traditional distaste for actions naming law firms as parties in the consumer protection context as they do in other settings.

Nor should practitioners assume that the party suing their debtor client is necessarily insulated from liability for a previous holder's actions. Although there are numerous exceptions, as a general rule "it is now beyond dispute than an assignee takes subject to all defenses or counterclaims which the mortgagor possessed against the assignor . . ." (*Northern Properties, Inc. v. Kuf Realty Corp.*, 30 Misc. 2d 1, 3 (Westchester 1961)). In this regard, it is important to note that most plaintiffs other than the original creditor will have great difficulty meeting the requirements for establishing holder in due course status, because of the requirement that such a holder take "without notice that it is overdue or has been dishonored or of any defense or claim against it on the part of another" (UCC § 3-302(1)).

The statutes and considerations discussed above are not by any means exhaustive. Indeed, there are numerous other potentially applicable state and federal statutes. Rather, this article is meant merely to flag some of potential claims a typical debtor may have which may not otherwise be apparent to the attorney who does not practice in this area with any regularity. Awareness of these claims can lead to significantly improved outcomes for clients and can transform otherwise financially unfeasible representation to representation that is worthwhile both for the small-firm lawyer and for the client.

Finally, a cautionary note: The practitioner should not be surprised by potential clients who know just enough about the statutes listed above to be dangerous. In particular, the author notes the phenomenon of the client who based on "online research" becomes convinced that any perceived violation of these statutes, real or imagined, no matter how arguable, minuscule or hyper-technical should excuse the client from his or her liability for a genuinely incurred and otherwise valid debt. Although many of the debt collector or debt collection firm's obligations are in the nature of strict liability, common sense, judgment and real-world sense of the "equities" are always necessary.

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Securing Legal Representation in Workers' Compensation

By Martin Minkowitz and Robert M. Fettman

Martin Minkowitz

The attorneys who represent clients before the Workers' Compensation Board are a very specialized and skilled group. Their practice requires them to be fluent in the Workers' Compensation Law and Regulations as well as to have working knowledge of other areas of the law. To counsel their clients they need an understanding of certain relevant parts of the law such as the Domestic Relations Law, Tax Law, Criminal Law and the Civil Practice Laws and Rules, just to mention a few. This is so regardless of whether they are representing the claimant or the employer. Generally, counsel who represent employers do not represent claimants, nor do claimants' counsel generally represent employers.

Employers can engage an attorney usually through their workers' compensation insurance company if insured, or individually if self-insured, and pay any agreed counsel fee. Fees to be paid for legal counsel and representation of the employer or the insurance carrier may be freely negotiated between the parties, and are not subject to approval by the Workers' Compensation Board.

Completely different rules govern the representation of a claimant. Legal fees paid to claimants' counsel *are* subject to approval by the Workers' Compensation Board. A claimant may represent him- or herself before the Board or may elect to hire an attorney or licensed representative to represent them. A licensed representative is a specialized type of professional license created by statute, which, in effect, permits non-lawyers to practice law before the Board to a limited extent. The justification for permitting non-lawyers to obtain a license to represent claimants before the Board is believed to have emanated from a perceived lack of availability of counsel in certain parts of the state. However, before practicing before the Board, the attorney or licensed representative must file a notice of retainer and appearance and, when appropriate, a notice of substitution, on forms prescribed by the Board, immediately upon being retained. A copy of such notice must also be provided to the insurance carrier, self-insured, or other representative of the employer at the time of filing. In fact, an attorney or licensed representative who fails to file a notice of retainer and appearance is precluded from collecting a legal fee. (12 N.Y.C.R.R. § 300.17).

Robert M. Fettman

To protect the claimant's award of benefits from being too heavily encumbered by a legal fee, the attorney or licensed representative is not permitted to enter into an agreement with the client (claimant) regarding such fee. Instead, the retainer is subject to a fee that is set by the Workers' Compensation Board after an award of compensation has been successfully achieved. Subjecting a claimant's counsel fee to the Board approval is intended to protect claimants from giving up a portion of their award without proper benefit from counsel and to provide sufficient economic care of the injured worker or his or her family (*Krug v. Offerman, Fallon, Mahoney & Cassano*, 214 A.D.2d 889, 624 N.Y.S.2d 683 (3d Dep't 1995)). Indeed, it is a misdemeanor for any person or firm to receive a fee for services rendered on behalf of a claimant except in an amount determined by the Workers' Compensation Board (WCL § 24).

Challenges to the constitutionality of the law requiring the claimant's counsel fee to be approved by the Board have been found to be without merit. In *Crosby v. State Workers' Compensation Bd.*, 57 N.Y.2d 305, 456 N.Y.S.2d 680, 442 N.E.2d 1191 (1982), it was argued that this requirement gives an advantage to the employer. However, the New York Court of Appeals opined that protection of the claimant by the restrictions imposed by WCL § 24 is reasonably related to the legislative objective of the WCL, and that the restrictions do not violate the freedom to contract, due process, or right of privacy of a claimant.

The Workers' Compensation Board's Discretion in Determining the Fee of Claimant's Counsel

Whenever a legal fee is requested, the Board has broad discretion to consider whether the amount requested is commensurate with the services rendered, having due regard for the financial status of the claimant and whether the attorney or licensed representa-

tive engaged in dilatory tactics or failed to comply in a timely manner with Board rules. However, in no case may the fee be based solely on the amount of the award.

If the Board, based on substantial evidence, has concluded that all of the conditions for awarding a fee have been met and makes the award, its decision is final and will not be disturbed on appeal unless it acted in an arbitrary, capricious or unreasonable manner, or otherwise abused its discretion (s*ee Pavone v. Ambassador Transport*, *et al.*, 26 A.D.3d 645, 809 N.Y.S.2d 640 (2006)). If a penalty is claimed for a late payment of a claimant award, it is considered additional compensation to the claimant. In such a case, if the efforts of the attorney or licensed representative contributed to obtaining the additional award, the attorney or a licensed representative may be entitled to receive a fee with respect to such added compensation. However, if the Board determines that an attorney's or licensed representative's efforts did not in any way benefit the claimant in the claim for compensation benefits, it may refuse to award a fee. The representation in and of itself is not a benefit unless the claimant receives or will receive some economic benefit from the services (*see Marshall v. Savannah Sausage Corp*., 192 A.D.2d 954, *lv. denied*, 82 N.Y.2d 655 (1993)).

Historically, No Fee to Claimant's Counsel for Obtaining Medical Benefits

Once awarded, the legal fee becomes a lien on all of the compensation encompassed by the award from which the fee will be paid, even taking precedence over a claim by an employer for reimbursement of an advance payment of compensation. (*Dickman v. City of New York*, 25 A.D.2d 931, 270 N.Y.S.2d 304 (3d Dep't 1966), *aff'd*, 18 N.Y.2d 969, 278 N.Y.S.2d 208, 224 N.E.2d 717 (1966)).

Because the claimant's counsel's fee becomes a lien against the award of compensation, and the applicable statute (WCL § 2(6)) defines the term "compensation" as the "money allowance" paid to the claimant, the general rule has been that if no money flowed to the claimant there was nothing for the lien to attach to. However, it was always a question as to whether an attorney could obtain a fee for successfully obtaining medical benefits for the claimant, because it was generally understood among the claimants' bar that no fee would be awarded for such a representation, even when successful. Consequently, it became difficult to engage counsel if the only benefit was medical, even if that benefit was very substantial. In fact, medical benefits have always been one of the largest costs in the workers' compensation system.

In one case involving an authorization for future medical treatment where no money was passing, the court held that it was not an abuse of discretion for the Board to refuse to award counsel fees *(Cummins v. North Med. Family Physicians*, 283 AD2d 861, 861–63 (2001), *lv. denied* 96 N.Y.2d 720 (2001)). Because no money passed in *Cummins*, the court found that an award would have essentially been equivalent to an "add-on" legal fee, which, although authorized in some jurisdictions, was not permitted in New York under such circumstances.

Shea v. Icelandair: Rule Is Not Hard and Fast

The understanding that an attorney cannot receive a fee for obtaining medical benefits for a claimant has been a significant problem for workers' compensation claimants in New York, although this has not universally been the case throughout the country. Recognizing the problem, the Appellate Division recently determined that this is not a hard-and-fast rule in New York (*Shea v. Icelandair*, N.Y. 876 N.Y.S.2d 225 (3rd Dep't 2009)).

The issue in *Shea* arose when a WCL § 32 settlement (which permits parties to enter into an agreement settling any or all issues in a claim for workers' compensation benefits, subject to the Board's approval) was made to reimburse the claimant for medical and travel expenses incurred, from which it was agreed that counsel would receive a counsel fee. The Board approved the § 32 settlement but rejected the counsel fee on the ground that an award of medical and travel expenses is not an award of "compensation" under the statute subject to a lien for counsel fees. On review, the Court concluded that the existing law permits the award of counsel fees even when no money passes to the claimant. The Court returned the matter to the Board to reconsider its determination, because the Board had incorrectly concluded that counsel fees were precluded by the germane statutes, and thus had not exercised its broad discretionary review of counsel's requested fee.

In *Shea*, the Appellate Division noted that the New York Court of Appeals often has stated that the Workers' Compensation Law should be broadly construed to effectuate the humanitarian and economic purposes of the law. (*See Neacosia v. New York Power Auth*., 85 N.Y. 2d 471(1995); *Smith v. Thompkins Co. Courthouse*, 60 N.Y. 2d 939 (1983)). Citing the Court of Appeals decision in *Neacosia*, the court concluded that "the term 'compensation' [as defined by the WCL] should be liberally construed to advance the interest of the injured employee" and thus should include awards of medical and travel expenses. (*See Keser v. N.Y.S. Elmira Psych. Ctr*., 92 N.Y. 2d 100 (1998)).

Applying this standard to claimants with "medical costs only" issues, the Appellate Division concluded that in the interest of making counsel available, fees can be awarded to claimant's counsel even if no money is flowing to the claimant by the award. The court concluded that narrowly construing the term "compensation" to the exclusion of claims involving disputes about only medical benefits would essentially leave such claimants to find an attorney willing to undertake their cases on a pro bono basis.

The court pointed out that the majority of states, when afforded interpretive leeway by their statutes, have permitted counsel fees in medical-only cases noting, among other reasons, that "enhancing the availability of representation is more in tune with the purposes undergirding the Workers' Compensation Law." (*Shea* at 226). The Court stated that permitting counsel fees to attach in medical-only cases was in the best interest of the WCL, and that any potential abuse by counsel in requesting fees under such circumstances is minimized by the statutory requirement that all such requests are subject to the Board's approval.

After *Shea*, it is clear that the Workers' Compensation Board now has the discretion to make an award of counsel fees even if the representation was only to obtain medical benefits. Counsel will request a fee, which presumably will be paid either as an add-on cost to the employer, or its carrier, a charge to the claimant, or as a reduction of the benefit to be paid to the medical provider (which would leave a balance for the claimant to assume).

The decision of the *Shea* Court in reinterpreting the lien of an attorney to allow lawyers to seek a fee for these substantive services rendered to a claimant is an important and long overdue significant benefit to claimants.

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Insurance Fraud (The Latent Crisis)

By Donald T. DeCarlo

Introduction

Now with an economy in crisis we have: The makings of the next crisis insurance industry crisis . . .

When discussing the subject of "insurance fraud," it is important to place the term in its proper context. Fraud is generally defined in the law as an intentional misrepresentation of material existing fact made by one person to another with knowledge of its falsity and for the purpose of inducing the other person to act, and upon which the other person relies with resulting injury or damage. Fraud may also be made by an omission or purposeful failure to state material facts, which non-disclosure makes other statements misleading.

A fraudulent act would result in the payment of benefits or the payment or reimbursement of expenses when the same are not warranted, or the affording of insurance coverage or protection in exchange for the payment of inadequate premium.

This general description of fraud is intended to distinguish the completely fraudulent situations from those scenarios where the system is being abused. While there is the potential for overlap between the instances of fraud and those of abuse, it is important to attempt to distinguish between the two.

Fraud Versus Abuse

What distinguishes fraud from abuse? In the simplest terms, fraud occurs when someone *knowingly and with intent to defraud* presents or causes to be presented any written statement that is materially false and misleading to obtain some benefit or advantage, or to cause some benefit that is due to be denied. If there is no material written or verbal lie, there may be abuse, but it does not rise to fraud.

The presence or absence of a specific, provable false statement is the deciding factor. To separate fraud from abuse, it is necessary to look for the material written or verbal lie that was presented or caused to be presented. For example, in workers' compensation, engaging in some form of employment while receiving temporary disability payments might be an abuse, or it might be fraud, depending upon the circumstances. If temporary disability benefits continue when the claimant has returned to work, and no one ever asks the claimant, "Are you working?," there is an abuse of temporary disability benefits, but there is no written or verbal lie and therefore no action that attains the level of employee fraud.

Using the same example, however, if someone, such as the adjuster or the doctor, specifically asks the claimant, "Are you currently working?"—and the claimant replies, "No," and thus lies, and that lie is transcribed in a written instrument (e.g., doctor's report or employer's claim form), there is fraud if the false statement is relied upon to determine the amount and payment of temporary disability. Again, it is the written of verbal act that moves it into the realm of fraud.

In separating criminal fraud from abuse, consider the following elements:

- There is always a false representation—the lie;
- The lie must be intentional or knowingly made;
- The lie must be made for the purpose of obtaining a benefit the claimant is not due, denying a benefit that is due, or obtaining insurance at less than the proper rate;
- The lie must be material, that is, it must make a difference: "If the truth had been told, would you have done anything differently?"

Types of Fraud

What are the different types of fraud? The following details the major types of fraud along with several examples to illustrate what is involved:

- insureds who receive improper benefits through intentional deception;
- employers who avoid payment of proper insurance premiums, often to gain a competitive advantage in the marketplace;
- health care providers, attorneys, and others who bill for services not rendered, misrepresent their services, receive kickbacks for referrals and/or contribute to a worker receiving improper benefits;
- employers, carriers, and medical agents/experts who knowingly act to deny or dispute legitimate claims;

- organized fraud rings that have made a practice of recruiting people to file phony injury claims. The claimant is sent to medical clinics or legal referral centers (commonly known as "claim mills"), which in turn refer them to doctors or lawyers who are in on the scheme.

Employer Fraud

Employer fraud occurs when the employer knowingly misrepresents the truth in order to avoid, deny or accrue benefits or knowingly lies about entitlement to benefits to discourage an injured person from pursuing a legitimate claim, or falsifies policy-related information.

The most obvious form is that of concealing payroll or other forms of premium for basis for determining premium. Example: Determination of insurance premium. For purposes of determining an employer's workers' compensation premium, the system relies upon the employer reporting fully the amount of wages paid. This reporting of payroll is not done on an individual employee basis, but rather the cumulative wages of all employees by classification of employment.

The employer may submit financial statements that reflect only a portion of the actual payroll, or may provide an estimate of payroll that is knowingly understated. While this form of fraud is often detected at the time of payroll audit, it is not unusual for the delay factor to result in inadequate premiums paid by the employer for a couple of years.

The above delays proper payment of premium until audit, which can be considered an interest-free loan to the fraudulent employer. The employer doesn't pay the right premium and many months or years later the fraudulent premium reports are uncovered on audit.

Medical fraud or attorney fraud and so-called "fraudulent mills" are topics for another article and it is clear the costs are in the hundreds of millions.

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WAYS TO PREVENT WORKERS' COMPENSATION FRAUD CHECKLIST

- Have in place a clear and concise written policy statement about the importance of promptly reporting all accidents.
- Require prompt reporting of claims and convey that report immediately.
- Reenact accidents to determine what happened and how the hazard can be avoided in the future.
- As an employer, remain in contact with the medical provider and injured worker to discuss return to work options.
- Determine whether any workers are deemed to be independent contractors.
- Review all renewal applications to determine if current payroll reported is consistent with business.
- Review all renewal applications to identify any substantial changes in employee classifications.
- Scrutinize all medical and vendor billing to ensure that the services rendered are required.
- Be alert for multiple claims of the same or similar nature coming through a particular medical facility and/or firm of attorneys.

A Lawyer Walks Into a Psychologist's Office

By Olga Pugachevsky, Ph.D.

A lawyer walks into a psychologist's office. He sits down, turns off his BlackBerry, since I insist, and starts talking. "Never thought it would come to this, me going to see a psychologist. Always thought that I could deal with everything myself. You just think it through, figure out what's best, and just do it. But with this brief, I just don't know." "What about it?" I ask.

"Well, they rushed it, and it was a lot of work, and we had a very short time to finish. And there were some first-year associates working for me, and I never worked with them before, and I just did not have time to check everything they did. There was just no time."

"Law as a career path usually attracts hard-working, ambitious people who are ready to push themselves to do their very best. That 'very best' creates immediate problems because there is no limit to striving for perfection."

There is a pause; he is getting himself together to tell me what is really bothering him, not a small feat for a person who is used to being in control.

"Well, I can't get it out of my head that there might be a mistake. It's also a very high profile case, you see . . . and the big bosses loved it, and everybody else loved it. But I don't think they checked everything, so if anybody bothers to really read it through they might find that mistake, and it will be a big deal. Of course, I am not sure if there is a mistake. I actually wanted to go back and check everything again, but it's just not possible. It's huge and I have other stuff to do. And even if I find something now, what will I do then? Go to them and say, 'Sorry?' And maybe they haven't noticed and it was better just to stay put. And then I begin worrying that some of our cases might be weak, and start thinking why did we decide to use those, and then I think that they trusted me and I might have let them down, and they don't know yet. I am going on vacation in two weeks. Wanted to go for a long time, but now I am thinking what good would it be if I can't stop thinking about this? I wake up at five in the morning and just lie in bed and think. Because I can't even concentrate on what I have to do now, so this work is suffering, and I have a deadline, and you know how things are. Everybody says it's good work and that I should stop worrying about it, and I know that I should just get myself together and just stop thinking about this, and move on. But I can't!"

A big chunk of my private practice consists of lawyers and, at this point, I came to think of anxiety as almost a professional hazard, especially in these uncertain times. Law as a career path usually attracts hard-working, ambitious people who are ready to push themselves to do their very best. That "very best" creates immediate problems because there is no limit to striving for perfection. Where does one draw the line between "not good enough" and "good enough"? For example, how well thought out, double-checked and cross-checked, how polished should a document be before one can say, "It is as good as it is going to be. I am going home"? What if one is working on a rush deadline and knows that the final product can only be of a certain quality if it is to be delivered on time? What if it might affect somebody's life?

"I understand that I should stop worrying but I just can't do it." That is usually when my clients show up at my door, when they understand that they should do something or stop doing something, and can give themselves all the rational explanations why . . . but they simply cannot do it. For most people it is a scary moment, feeling as if a huge muscle, the good old will power that had served one so well all of his or her life, is not working properly any longer. The thing is that this has nothing to do with will power. And yes, there are different strategies to deal with the situation.

What Is Going On?

Actually, that man who stepped into my office was already ahead of the game because he could formulate his problem, and was prepared to deal with it in a new way. He felt scared but was able not to ignore what was going on with him. Paradoxically what he experienced as being out of control was actually the first necessary step to gaining control.

One of the problems of our rational age is that we decided that things must always make sense, and if they do not, then we are not quite sure how to handle the situation and frequently prefer to ignore it altogether. Emotions very often make no sense, cannot be logically justified just because they obey a very different set of rules. The first basic rule of an emotion is: "An emotion is always already there." If you are anxious, sad, happy, or angry, even if you wish you were not, or think that you should not be because it makes no sense, then already you have no right to feel like you are a bad person. But the priceless reward for letting oneself feel what one really feels is the freedom of choice because one can then decide whether to express what

he or she feels or not, how, when, and where to express it, and also how to cope. Ignoring an emotion means simply giving up control, because the emotion will always manifest itself in some roundabout way, with your psychological system, so to speak, taking charge behind your back.

Thus, in case of anxiety the first step is always to figure out one's personal signs of being anxious. It may be as easy as recognizing the fine line between productive worrying, as in, "I am not sure that document is good enough, let me go and double check," and excessive anxious reaction, as in, "I sent it out but I think something might not be quite right, can't stop thinking about it." Sometimes a question as simple as, "Can I do anything now to change the situation?" may be a useful tool to distinguish between the two.

Unfortunately, anxiety can wear many disguises. When a person says to himself or herself sternly, "I should not worry about this," not only is it an impossible command, but the "should not" might block one's intuitive perception of oneself. Then one might stop feeling his or her worry directly but might, for example, become irritable or upset with some really insignificant event, or just miserable for no apparent reason. To make things even more complicated, the "should not" itself can be embedded so deeply that it would work automatically, suppressing anxiety and thus switching its simple straightforward expression to an alternative route. I knew people who got alerted that something was going on if they started misplacing small things, like keys, others who knew when they found themselves suddenly obsessed with organizing their apartments, and others still, whose sign was a certain kind of a headache, or stomach discomfort. It really did not matter what their personal sign was; what mattered was that they knew.

What Should Be Done?

The next step is the strategy. My favorite one is based on the notion of inner speech that some conceive of as a monologue, as every person's ongoing inner narrative that proceeds unnoticed most of the time, and others as an inner dialogue, a number of intertwined narratives.

The inner narrative usually remains unnoticed because it is taken for granted; after all, it has always been there as long as the person can remember But, in a sense, it is an extremely powerful self-regulating system that is always functioning by default, carrying one through life, and feeling anxiety may be just one of the signs of its malfunctioning, so to speak.

Once recognized and acknowledged, the system can be modified. A good place to start discovering the style of your inner narrative, in case of excessive worrying, may be to ask oneself, "In what exact words do I worry?" Your answer can give you a good clue to your private style of treating yourself.

Since every person is truly unique the possibilities are endless. However, there are some themes and patterns that are more common than others. Just a couple of examples:

There is a self-accusatory pattern that is based on always telling oneself, no matter how hard one tries, that one should or should have done better, worked harder, paid more attention. Masquerading as the "voice of reason," the "harsh taskmaster" is anything but. Ironically, to be able to realistically evaluate the level of one's performance, good or bad, has to be dismissed first. In reality what one is dealing with is actually a piece of internalized early dialogue between oneself and his or her overdemanding caregiver. Needless to say, it has nothing to do with any ongoing situation.

Another common pattern is a circular narrative that often unfolds into a scenario of highly unlikely catastrophic events. One person described it as a phenomenon of his thoughts "snowballing," meaning that an initial thought begins to evoke new concerns, each one more and more anxiety provoking. The issues themselves are not getting resolved but continue to go round and round in one's mind. It is very difficult to escape this type of narrative if one is already engaged in it. However the circular pattern usually has a recognizable beginning, a particular first thought idiosyncratic to every person. If identified as a personal trigger this thought begins to function instead as a personal red signal not to proceed further with the habitual line of thinking since the route to a rational decision is certainly not this one.

I guess it all comes down to the old maxim, "Thou should know thyself," which, of course, is much easier said than done. It took us ten sessions to get my client back on track. It was hard work, but in the end, it paid off. And, yes, his brief turned out to be perfectly fine.

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Sell It or Save It? Spell It Out

By Jennifer N. Weidner

As estate planning attorneys, we routinely draft Durable General Powers of Attorney for our clients. In Powers of Attorney, we often include broad powers for real estate transactions, and we often address limited gifting powers. It is also not a rare occurrence for our clients to include in their Wills bequests and devises of specific realty or personal property.

It is, therefore, easy to imagine the following situation in routine estate planning: a grandchild of an aging client of yours contacts you to let you know that your client has moved from her residence into a nursing home, and that your client is showing some signs of diminished mental capacity. Your client has significant wealth and is a private-pay resident at the nursing home.[1] The grandchild, who is agent for his grandmother pursuant to a Power of Attorney you prepared, would like to discuss selling his grandmother's residence as it is unlikely that his grandmother will return to the residence. He explains that there are expenses associated with maintaining the empty residence that will deplete the assets that would otherwise pass under the residuary clause of her Will. Your client's Will specifically devises the residence to the grandchild, and the grandchild is one of several residuary beneficiaries. The grandchild also proposes to give the tangible personal property located in his grandmother's home to the legatees of such property listed in his grandmother's Will, to the extent the Power of Attorney authorizes gifts to those individuals, or alternatively to sell the property at auction.

How would you advise the grandchild as agent for your client regarding these issues, assuming that your client's capacity has in fact diminished so that advising her directly is no longer an option, and you are satisfied that she will never be able to return to her home? If the grandchild sells the property, will the devise of the property to him adeem, causing the proceeds to pass under his grandmother's residuary estate? If he fails to sell the property, has he violated a fiduciary duty by wasting the principal's assets, to the ultimate detriment of the remainder beneficiaries?

If your client had been adjudicated an incompetent and a conservator or committee had been appointed for her under former New York Mental Hygiene Law (MHL) Articles 77 or 78, then Section 3-4.4 of the New York Estates, Powers and Trusts Law (EPTL) would apply to preserve the incompetent's general testamentary plan if faced with sales of specifically bequeathed property by the conservator or committee during the incompetent's lifetime.

EPTL 3-4.4 reads as follows:

> In the case of a sale or other transfer by a committee or conservator, during the lifetime of its incompetent or conservatee, of any property which such incompetent or conservatee had previously disposed of specifically by will when he was competent or able to manage his own affairs, and no order had been entered setting aside the adjudication of incompetency at the time of such incompetent's death, or the conservatorship continued through the date of the conservatee's death, the beneficiary of such specific disposition becomes entitled to receive any remaining money or other property into which the proceeds from such sale or transfer may be traced.

EPTL 3-4.4 has not been amended since the enactment of MHL Article 81, which replaced the former conservator statutes with a guardianship regime; however, EPTL 3-4.4 has been applied to situations in which guardians disposed of property during an incapacitated person's lifetime.[2] In addition, the implementing legislation to MHL Article 81 provides that when a statute uses the terms conservators or committees, "such statute shall be construed to include the term guardian . . . unless the context otherwise requires."[3] Therefore, even without amendment of EPTL 3-4.4 to refer to guardians as well as conservators and committees, it appears that if your client were adjudicated an incapacitated person, your client's guardian could sell your client's specifically bequeathed property and the traceable proceeds would be payable to the specific devisees or legatees through your client's estate.

It is not likely, however, that your client could lean on EPTL 3-4.4 to preserve the value of the specific bequest as to him if he were to sell his grandmother's residence as her attorney-in-fact after she moved to the nursing home. There are few cases considering the statute's application to sales or transfers of property by an

attorney-in-fact during the principal's lifetime. In two of the three reported cases the author's research has found, the courts rejected the application of EPTL 3-4.4 to transactions performed by attorneys-in-fact.

In 1979, the Niagara County Surrogate's Court declined to apply EPTL 3-4.4 to a circumstance in which specifically devised real property was sold by a testator's attorney-in-fact during the testator's lifetime and alleged (but not adjudicated) incapacity.[4] The court based its determination on EPTL 3-4.4's reference to an "adjudication of incompetency" together with EPTL 1-2.9's definition of "incompetent" as "a person judicially declared to be incapable of managing his affairs."[5] Since the testator had never been judicially declared incompetent at the time of the transaction, the court concluded that the situation was outside the express terms of EPTL 3-4.4. The court explained that "the purpose and effect [of EPTL 3-4.4] is to preserve the testamentary intent against a contrary disposition made by the representative of a testator judicially disabled from making such disposition himself."[6] The court seemed to direct that without an adjudication of incompetency, we may not presume that a testator would be unable to change the terms of his Will to address lifetime transactions.

In 1993, the Appellate Division, Second Department, agreed with the holding of the Dutchess County Surrogate's Court that the doctrine of ademption applied when an attorney-in-fact sold property which had been bequeathed by the principal to her stepchildren under her Will.[7] The stepchildren of the deceased principal alleged that the Power of Attorney was unlawfully obtained and that the attorney-in-fact exercised it to convert assets of the principal to the attorney-in-fact's own benefit, including the proceeds of the sale. The court determined that because the subject property was conveyed during the lifetime of the principal, it was not part of her estate. Therefore, the bequest adeemed. The court did not specifically discuss EPTL 3-4.4, but cited several cases in support of its conclusion. Of the several cases cited, only one—*Estate of Kramp*—considered a transfer by an attorney-in-fact.

More recently, the Kings County Surrogate's Court reviewed, in what it called an "issue of first impression," the following set of facts: an attorney-in-fact requested the principal's broker to raise cash from the principal's investment account to meet the principal's expenses, and the broker sold stock which had been specifically bequeathed under the principal's Will.[8] The court determined that absent the application of EPTL 3-4.4 to the transfer of the stock by the attorney-in-fact, the bequest would adeem and therefore the transfer by the attorney-in-fact would inadvertently "destroy decedent's testamentary plan even though he was acting to protect her financial interests."[9] The court stated that EPTL 3-4.4 was a very narrowly drafted law; as such it

> provides an exception to ademption where the transfer was made by a committee or conservator during the lifetime of its incompetent. . . [T]he statute is silent as to transfers made utilizing a power of attorney by someone acting on behalf of an incompetent although not adjudicated an incompetent by a court of law.[10]

The King's County Surrogate's Court acknowledged that EPTL 3-4.4 was "meant to accommodate the competing interests of allowing a fiduciary to sell the property of an incapacitated person if necessary, while retaining so far as possible the testamentary plan of a person who had lost her capacity to change it."[11] The Court reasoned that it would be erroneous to assume that every principal whose attorney-in-fact sold specifically bequeathed property was mentally incompetent to change his or her Will. In conclusion, the Court opined that EPTL 3-4.4 was a "middle of the road approach between a strict identity theory of ademption and an intention theory."[12] Ultimately, the Court determined that it did not have to decide whether a specific bequest adeems when it is sold by an attorney-in-fact for a non-adjudicated incompetent individual, because in the instant case, the parties had entered into a stipulation of settlement regarding the proceeds of the property.

The language and considerations of the Kings County Surrogate's Court may suggest a basis for an argument that if your client's grandchild sold your client's home and contents under a Power of Attorney while your client was incompetent, the bequests should not adeem as to the specific legatees. The Court did not actually reach a point of conclusion, however, but merely articulated what the arguments could be if it had to make a determination. Thus, under the current statutory and case law, the sale of your client's home and contents by her attorney-in-fact would likely cause the bequests to adeem and the proceeds to pass under the residuary clause of your client's Will. So how then are we to advise your client's attorney-in-fact?

If the expenses of maintaining the home and personal property until your client's death are substantial, and your client would likely be found incompetent by a court of law, your client's grandchild may consider seeking an appointment as your client's Guardian. As your client's Guardian, he could sell the property and the bequest would not adeem, and he could then transfer the specifically bequeathed personal property (if not sold) to the specific legatees as gifts. If he sold the personal property, the traceable proceeds would be pay-

able to the specific legatees through your client's estate. A risk in this approach beyond the expense, however, is that in light of your client having established advanced directives, the guardianship may not be deemed necessary. Courts do not grant guardianships capriciously, and there is an abundance of cases in which courts declined to grant guardianships where the alleged incapacitated person had executed advanced directives during his or her capacity and therefore had agents in place for any needed decisions or transactions.[13]

If your client's Power of Attorney authorized her attorney-in-fact to establish and fund trusts on her behalf, her grandchild could consider establishing a trust to receive the property. The trust could direct the sale upon the event the property becomes useless to the grantor. The trust could also direct that the proceeds be held in trust until the grantor's death, at which time the proceeds would be payable to the specific devisee or legatee named in the grantor's Will. However, since the establishment and funding of the trust would be for the purpose of preserving a devise or bequest to the agent, and therefore would benefit the agent, the agent may find himself being called upon to prove the activities were pursuant to the principal's wishes.

Obviously, if your client were competent to make a Will at this time, she could execute a Codicil directing that if any specifically devised or bequeathed property were sold during her lifetime, the traceable proceeds would pass to the specific devisees or legatees of such sold property. This would also avoid similar problems if any other property subject to one of the many specific bequests is sold.

It is time to consider amending EPTL 3-4.4 to include circumstances and factors under which an attorney-in-fact may sell a principal's property and hold the proceeds for distribution to the specific devisee or legatee in the principal's estate. In the meantime, consider obtaining your estate planning clients' directions for such an event and incorporate those provisions into the clients' advance directives and testamentary instruments.

Endnotes

1. Author's note: In this case study, the client can afford to privately pay her nursing home costs and is not concerned with Medicaid eligibility issues, and therefore Medicaid qualification and resource issues are outside the scope of this article. If the principal under the Power of Attorney was receiving Medicaid assistance or a Medicaid application was foreseeable in the future, the agent would have additional issues to consider, such as, for example, possible Medicaid ineligibility periods or transformation of protected assets into available resources.
2. *See Estate of Oppenheim*, N.Y.L.J., Jan. 29, 2007, p. 39, col. 3 (Sur. Ct., Suffolk Co.).
3. N.Y. Session Laws: 1992 N.Y. Laws ch. 698, § 4.
4. *Estate of Kramp*, 100 Misc. 2d 724, 420 N.Y.S.2d 80 (Sur. Ct., Niagara Co. 1979).
5. *Id.* at 82.
6. *Id.*
7. *LaBella v. Goodman*, 198 A.D.2d 332, 603 N.Y.S.2d 885 (2d Dep't 1993).
8. *In re Crowell*, N.Y.L.J., Dec. 3, 2002, p. 27, col. 3 (Sur. Ct., Kings Co.).
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *See, e.g.*, *In re Isadora R.*, 5 A.D.3d 494, 773 N.Y.S.2d 96 (2d Dep't 2004); *In re Sol Lowe*, 180 Misc. 2d 404, 688 N.Y.S.2d 389 (Sup. Ct., Queens Co. 1999); *In re Guardianship of Albert S.*, 286 A.D.2d 684, 730 N.Y.S.2d 128 (2d Dep't 2001); *In re O'Hear* [*Rodriquez*], 219 A.D.2d 720, 631 N.Y.S.2d 743 (2d Dep't 1995).

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The Perennial Problem Discharge—How It Hurts the Patient, the Provider, the Payer and the Health Care System

By James G. Fouassier

Everyone acknowledges that the ever increasing cost of health care in this country, the aging out of the "baby boomers," the apparent inability of current health care funding mechanisms to support adequate medical and hospital care, and the need to provide a minimally acceptable level of health care for the large portion of the uninsured and underinsured are posing virtually insurmountable problems. One focus of the discussion has been "unnecessary" care and treatment, and whether the root causes may be attributed to inefficiency, greed or both. Payers no longer want to pay for high-intensity medical care and treatment when lower levels are equally if not more medically appropriate given the specific condition and circumstances of a particular patient. From this paradigm has developed a costly and administratively cumbersome system of utilization reviews, clinical guidelines, peer review organizations, internal and external appeal mechanisms and litigation, as different constituents vie for the ever shrinking health care dollar. Health care providers are also faced with the advent of denials of claims based upon the concept of "adverse events," sometimes called "hospital acquired conditions." Providers do not want to render unnecessary care and incur the legal and financial risks that may arise from such behavior in today's closely regulated and monitored environment.

Acute care general hospitals are intended to serve acutely ill patients. People who are not acutely ill should not and, more importantly, *cannot* be maintained in facilities designed to provide acute levels of care. State licensure for such facilities expressly contemplates the medical care and treatment of the acutely ill. Furthermore, hospitals have a legal and moral obligation to keep themselves accessible to the most acutely and severely ill patients, and they cannot do so if they are required to manage patients with chronic long term conditions. This is precisely why the law imposes separate licensure and operational requirements on subacute, rehabilitation, and long term care facilities different from those for acute care hospitals.[1] Chronically ill patients no longer requiring inpatient care should be transferred to facilities which are specifically designed and licensed for long term care and are best able to provide for their extended medical needs. Most acute care hospitals simply are not able to extend optimal long term chronic care.

The parameters of our undertaking are best summed up by the accreditation requirements of the Joint Commission:[2]

> The hospital's processes for transfer or discharge are based on the patient's assessed needs. To facilitate discharge or transfer, the hospital assesses the patient's needs, plans for discharge or transfer, facilitates the discharge or transfer process, and helps to ensure that continuity of care, treatment and services is maintained.

Joint Commission Comprehensive Accreditation Manual for Hospitals, January 2007, at Standard PC.15.

"[H]ospitals have a legal and moral obligation to keep themselves accessible to the most acutely and severely ill patients, and they cannot do so if they are required to manage patients with chronic long term conditions."

Standard PC.15.20 recites that discharge "is based on the patient's assessed needs and the hospital's capabilities." The discharge process must be driven exclusively by the medical needs of the patient as determined by the health professionals who have assumed his or her care, and not by a variety of social or financial factors which at best are only peripherally relevant.

Consequently a hospital cannot effect a discharge that is not safe and medically appropriate given the condition of the patient. Such a discharge would be unethical and possibly negligent, giving rise to liability under common law tort and contract theories. For Medicare providers, improper discharges are expressly prohibited by regulation. Medicare regulation[3] allows a Medicare patient to be transferred only to an "appropriate facility" where the patient can receive post-hospital care; such a facility is expressly defined as one which can meet the patient's medical needs.[4]

Barriers to Proper and Timely Discharges

This article will not delve into issues related to lost revenue. While it is tempting to critics to attribute all discharge planning to a hospital's financial motives, as if the need to remain solvent were some kind of evil, for our present purposes I limit our discussion to discharge decisions that are dictated solely by the needs of the patient. I note the obvious, however, in stating that

when we consider the needs of the patient, his or her finances almost always will be a factor. When medical care is unreimbursed by an insurer or other third party payer, the cost of the care becomes the patient's personal financial responsibility. Unreimbursed acute hospital care costs may well exceed hundreds or thousands of dollars a day. Such an expense rapidly builds up, and will have to be satisfied from the assets of the patient if there is no insurance coverage or if benefit programs such as Medicare or Medicaid do not pay all of the costs of the admission or service. Absent denials issued concurrently by a payer engaged in utilization management, it is not possible to determine with any degree of accuracy how much of an inpatient bill will be paid by third parties, since hospital bills are not generated and submitted until discharge, but in the situation I have described it is likely that the patient's responsibility will be substantial. When the patient is unable or unwilling to pay such costs, the financial loss is borne by the provider.[5]

Institutional or Systemic Barriers

One significant barrier to timely discharge is the unavailability of medically appropriate subacute, rehabilitative or long term chronic/custodial facilities or services. This usually is because no appropriate bed (or even facility) is available. A ventilator dependent dialysis patient in need of chronic long term care may be difficult to place because of the limited number of facilities offering dialysis for vent patients. Add to the mix a mobility issue such as paralysis or morbid obesity and placement becomes even more problematic. As the economy continues to deteriorate and health care costs (especially for such high intensity care) continue to escalate, this institutional barrier will present more and more often. Short of engaging in projects to expand facilities to accommodate subacute specialty beds, new acquisitions or strategic alliances with subacute, rehabilitation or long term care facilities may be the only viable options if the uncompensated costs of continued acute hospital care become excessive.

Another routine obstacle, much more common and becoming a greater problem as the economy worsens, is the lack of a means of payment, or inadequate insurance or health plan coverage, for the required care. An acute care hospital is compelled by EMTALA[6] to accept an acutely ill patient presenting through the emergency department. There is no similar obligation imposed by law on a subacute, rehabilitation or chronic long term care facility such as a skilled nursing facility. If the patient (or his family) cannot pay or cannot guarantee personal financial responsibility for services not covered or paid "short"[7] by a health plan, the patient is not accepted. This issue is relevant not only in the context of institutional placement. Many patients, when stable, optimally might be accommodated at home with adequate support tailored to the patient's needs, but vendors will not commit to providing necessary home health aides and nurses, durable medical equipment or pharmaceuticals without payment. A hospital will not discharge a patient to his or her home without such support in place because the discharge would be medically inappropriate and possibly unsafe, and the deficiencies well may result in a rapid readmission. Hence home placement also is frustrated for lack of funds.

Sometimes discharge planning is complicated by the absence of a legal representative for an incompetent or incapacitated patient unable to facilitate his or her own discharge by approving admissions and by filing applications for insurance and health plan benefits, Medicare or Medicaid, and who might access and collate the documentation necessary to support such applications. Most subacute, rehabilitation and long term care facilities insist that the person purporting to sign admission papers and obligate payment be someone with appropriate legal authority to act.[8] Rare is the patient (especially a younger one now suddenly suffering the effects of a catastrophic illness or severe trauma) who had the foresight to execute a durable power of attorney, a health care proxy or another advance directive allowing an agent to act as decision maker on his or her behalf. In these cases the only viable option is for a family member or the hospital to commence proceedings for the appointment of a guardian.[9] This work must be done by an attorney and is expensive. Where family members are unwilling or just as often unable to pay for the legal services, the hospital may be the only party that has sufficient interest and the wherewithal to incur the expense. Guardianship proceedings are also time consuming. Staff members must assist counsel in the preparation of necessary affidavits and documents and appear in court as witnesses. Court calendars are congested and, barring a true emergency, hearing dates will be scheduled next in the order of filing. If there is resistance by the family or even by the patient, the proceedings may be more protracted. In this writer's experience, it is not unusual for a routine proceeding, from the filing of initial papers to the issuance of an order appointing a guardian, to the guardian accepting and qualifying, to average three months or more.

One of the more difficult institutional issues is presented by the regulations governing approval of Medicaid eligibility for follow-up care. Medicare or some unusually generous commercial insurance or health plan will cover some subacute and chronic care only for relatively short courses of treatment. Most chronic care providers, knowing this, will decline to accept a patient without either a commitment to pay privately or approved Medicaid eligibility, for fear of being "stuck" with the patient after any short term coverage is exhausted. Unlike Medicare, which is a government entitlement program, Medicaid eligibility is a function of financial need. Since younger patients and/or those

with financial means generally are not eligible, the issue of obtaining Medicaid to cover long term chronic care usually does not even arise until the illness or injury occurs, the patient already is in the hospital bed, and the need for a funding source for an appropriate plan of long term care presents itself. Consequently, all of the work and all of the time consumed in the complex environment of Medicaid application and eligibility (including the appeal of initial denials of eligibility via "fair hearings" and even possible lawsuits) is borne at the expense and exposure of the hospital.

Social Barriers

Occasionally a reluctant physician or other medical professional frustrates a discharge; usually the impetus is a personal or long-standing professional relationship with the patient or family member which influences decision making. There may be an honest but unfounded difference of opinion with other members of the medical team (as, for example, a medical clearance inhibited by a last minute "psychiatric consult" gratuitously rendered to be sure a patient is "competent" to approve his own discharge). When these issues do present themselves they generally can be addressed peer to peer and may be relegated to the realm of "discipline." This problem is not insurmountable as long as the hospital's administration demands appropriate consultation and consensus among all members of the patient's medical care team.

A greater social barrier to a timely discharge is a lack of cooperation by the patient or family in the discharge process or the outright refusal of the patient to consent to the discharge. There are many reasons. Subjective dissatisfaction with the recommended facility or nursing home is one. The refusal, unwillingness or inability to marshal assets and commit financial resources is another. Notwithstanding acceptance by an appropriate rehabilitation or chronic care facility, sometimes the patient or family refuses to consent to discharge or to sign admission papers. This last tactic frustrates the subacute or chronic care facility's ability to bill for its services and be paid for the care it renders and, quite understandably, is often fatal to any acceptance. (Objecting family members sometimes make known their complaints to the facility considering accepting the patient, a strategy that often results in a declination.) Patient and family concerns also may be expressed in terms of distance, cleanliness, reputation, or a myriad of other factors not directly relevant to the medical propriety of the facility; sometimes the issues are advanced precisely to impede discharge from the hospital. Often the patient or family is unwilling to accept the medical diagnoses, prognoses and recommendations of the hospital staff for necessary subacute, rehabilitative, custodial and other long term care and discharge planning because the patient or family believes that their loved one will receive the "best" care by remaining in the hospital. This is especially so when the issue is palliative care for terminally ill patients. Transfer to hospice is an acknowledgment of pending death, a bitter reality understandably difficult for some to accept.

Sometimes a patient can return home with varying degrees of support. Here again, family cooperation is essential. Only the most expensive health plan or insurance policy will pay for as much home care as would be optimal; usually the family has to assist in some manner during certain periods of the day or night. Consequently, a lack of participation or the unwillingness or inability to supplement the cost of the home care services can preclude this alternative even if otherwise medically appropriate. (Ironically, a hospital sometimes finds itself opposing a family's request for a home discharge because the family refuses to acknowledge that it is unable to provide an appropriate level of care and unrealistic in considering the extent of resources that must be devoted to the patient. Families frequently advance the offer to take the patient home in an effort to preserve the patient's assets notwithstanding that the suggestion clearly is not in the patient's best interests.)

The cooperation of the patient and family also is essential to marshalling patient assets and securing coverage from third parties, especially Medicaid, so there are funds from which to pay for additional rehabilitative or chronic care. The refusal of a patient or family members to disclose and expose assets which must be made available to satisfy Medicaid eligibility requirements denies the availability of the most common source of funding for any subacute or chronic care. Once again, since facilities rendering such care are not mandated by law to accept an indigent patient or bear the burden of extensive uncompensated care, placement is unlikely and the patient remains in the hospital's acute care bed. Presumably, if a guardian is appointed he or she will be empowered to take control of a patient's assets to effect Medicaid planning, to make all applications for Medicaid and other government benefits and to approve both the hospital discharge and the follow-up admissions, committing the private financial resources of the patient, if any, including any private insurance, with Medicaid later assuming liability once the asset thresholds are met.

Unfortunately these processes are complex and time consuming, more so when the patient or family opposes the activities of the hospital and even goes so far as to secure legal counsel to assert that opposition.

Exposure for the Patient

Patients who unnecessarily remain at acute care hospitals are at risk to develop decubitii (commonly known as "bed sores"), assorted antibiotic resistant conditions such as MRSA and VRE[10] and other "hospital acquired conditions."[11] A patient's strength dete-

riorates as physical and occupational therapy needs cannot fully be addressed over the long term. Hospital care and services made necessary as a result of "hospital acquired conditions" may not be compensated even when there is a third party source of payment (e.g., Medicare's comprehensive new plan to deny payments for certain "adverse events," an idea now being picked up by Medicaid and commercial health plans).

Furthermore, a not insignificant concern today is that when a patient is uninsured or underinsured, the patient and/or family may be required to address significant acute care hospital costs that are substantially greater than charges incurred at facilities providing care at lower acuity levels. Insurers are quick to deny continued stay and inpatient courses of treatment as "not medically necessary," thus cutting off hospital payment even when a source of reimbursement otherwise exists. Hospitals take seriously their responsibility to advocate for patients requiring continued acute care in the face of aggressive denial strategies by insurers, but when continued inpatient care is not required, a hospital will not assert the contrary in bad faith. Consequently, when uncompensated days are incurred because of a lack of cooperation in the discharge process it is neither unfair nor unlawful (given proper notice and appeal rights) that the patient be held financially accountable.

Exposure for the Payer

It is beyond cavil that insurers and other institutional payers do not want to pay for acute care services when non-acute services are more medically appropriate. Payers also will not pay for services which, although medically necessary, may not have been required had earlier placement of a patient into a more appropriate level of care avoided the condition for which services now are required, regardless of whether they were "avoidable," i.e., caused by some culpable provider conduct. In light of the impending financial crisis caused by increasing healthcare costs and overstretched dollars and resources, one would imagine that this impetus alone would have generated more interest among the payer community in facilitating problem discharges. Unfortunately, other than simply denying continued care as unnecessary, most plans and payers do little to work with hospitals to address this growing problem.[12]

Exposure for the Hospital

A hospital incurs significant costs for unreimbursed care. Legal remedies against patients for large balances generally are illusory given the patients' financial limitations and inability to pay. The patients themselves, as well as family members purporting to act for the patients, often are particularly aware that their financial circumstances have rendered them "judgment proof" and that threats of financial liability asserted to secure cooperation in discharge planning are meaningless.

Equally important is the impact of a problem discharge on other patients; those who are acutely ill and present either through the hospital's emergency department or by transfer from other facilities unable to perform the necessary acute care services required for the immediate health, safety and well-being of the patient. Simply put, the treatment of acutely ill patients is compromised, and relevant federal and state regulations adversely implicated, when acute care beds are occupied by non-acute patients. The problem discharge patient still has to be fed, cleaned and administered whatever regimen of medication and therapies may be required, with some additional time devoted to rendering necessary chronic care services like physical therapy. In the meanwhile nursing staff are distracted from the care of acutely ill patients, some of whom are "doubled up" or even left in the hallways in the vicinity of the emergency department.

"Hospital acquired conditions"[13] may result in legal liability against a hospital. The nature and extent of the regulatory, licensing, quality of care, and other medical and legal criteria implicated by such an unfortunate series of events are beyond the scope of this article, but the reader will discern that the issues are of real consequence. In the meantime, data reflecting "hospital acquired conditions" and excessive lengths of stay are being collated by a variety of insurers and payers such as Medicare, as well as by federal and state health authorities, and may adversely impact overall reimbursement, quality of care obligations, eligibility for grants and participation in other government funding programs, and in the public perception of a hospital as inefficient and even dangerous.

More hospitals are striving to meet developing goals for greater transparency of patient satisfaction data. Use of survey methodologies and data development such as the Press-Ganey HCAHPS initiative, and the use of such patient satisfaction data by CMS in determining levels of Medicare reimbursement, add yet another element to the paradigm.[14] One cannot contemplate patient satisfaction being more adversely affected than by a 14-hour delay in admission from the emergency department or an admission to a hospital hallway or alcove with only screens for privacy.

The billing of services in this context also raises the specter of fraud and abuse. The reader's attention is directed to the recent case of *U.S. ex rel Raymer v. University of Chicago Hospitals*,[15] in which overcrowding and overcensus issues, *inter alia,* were raised as the bases of claims of fraudulent and abusive billing practices. There may be false claims consequences not only for billing for acute care services and treatment rendered to non-acutely ill patients but, more importantly, for

billing for acute care services rendered to acutely ill patients in substandard, quality-inhibited circumstances (i.e., knowingly and intentionally billing for services rendered in contravention of licensing requirements). The gravamen of the issue from the perspective of the regulators is that the provider is billing and the government is paying for what purportedly are acute care services but the beneficiaries are not receiving an acceptable level of services.

Would our federal and state regulators excuse a hospital's ability to render optimal treatment to the greatest number of acutely ill patients who would present in the event of an influenza pandemic or another terrorist attack because the hospital has been unable to discharge patients who just did not want to leave?

Remedies

I previously addressed proceedings in the nature of guardianship. Here in New York State, guardianship proceedings for "incapacitated" adults are maintained pursuant to the provisions of Mental Hygiene Law Article 81. Jurisdiction over similar proceedings for minors is in the New York Family Court under Family Court Act § 661 and in the New York Surrogate's Court under Surrogate Court Procedure Act article 17.

Hospitals, both individually and through their trade associations, might consider advocating for the adoption of laws such as the New York Family Health Care Decision Act,[16] which has been introduced in the state legislature every year since 1992 but has yet to pass. The Act would apply when a once competent adult has failed to designate a health care proxy or give other "clear and convincing" evidence of intentions (such as a "living will"). The procedure is much faster and more economical than the existing guardianship system. As proposed, it is the hospital which would be able to designate a "surrogate" decision maker from a list of persons established by the law, with the surrogate then making medical decisions. No court intervention would be required either to invoke the act or to empower the surrogate decision maker. While the proposal requires the surrogate to take into account the wishes of both the patient and the family, the surrogate will be expected to act independently in the best medical interests of the patient, regardless of patient or family opposition.

Another idea gaining some support is to improve the efficiency of the guardianship process by establishing "transfer authorization panels." The idea, developed by Robert Swidler, General Counsel to Northeast Health in Albany and the Editor-in-Chief of this publication, is to effect a medically appropriate transfer or discharge decision prior to the institution of the guardianship proceeding. A three-person panel at every hospital (consisting of a health care professional, a local DSS representative and a layperson from the community) would serve as a standing committee empowered to approve a transfer or discharge after reviewing the medical records, consulting with treating physicians and meeting with the patient to discuss discharge or transfer proposals. Some determination of a lack of capacity would be a condition precedent to approval of the plan. To induce subacute, rehabilitation and skilled nursing facilities also to accept the plan, the hospital could agree to institute a guardianship proceeding after the transfer or discharge.[17]

Every hospital administration should adopt a uniform patient discharge and placement policy making clear that while the hospital always will act in patient's best medical interests in recommending necessary medical care and appropriate discharge, the hospital must manage the process and not allow a patient or family member to frustrate necessary subacute, rehabilitation or custodial care by subjective or improper behavior that is not in the patient's best interests, and which exposes the patient to adverse medical consequences and the hospital to legal liability and economic loss. This requires a commitment that oppositional conduct by patients and their families, no matter how sincere or well motivated, will not be allowed to divert attention from the appropriate medical needs of the patient as determined by the hospital's medical staff. In New York State this is not inconsistent with existing law and regulation. New York Department of Health regulations make clear that discharge planning should be a collaborative effort between the hospital, the patient and the family. Family participation is excused, however:

> (ii) when the hospital has made a reasonable effort to contact a patient's family / representative in order to provide an opportunity to participate in the discharge planning process or to explain the reason for transfer or discharge, and the hospital is unable to locate a responsible family member/representative, or, if located, such individual refuses to participate. The reasons a patient's family/representative did not participate in the discharge planning process or did not receive an explanation of the reason for a patient's transfer or discharge shall be noted in the patient's medical record. A reasonable effort shall include, but not be limited to, attempts to contact a patient's family/representative by telephone, telegram and/or mail.
>
> 10 N.Y.C.R.R. 405.9(f)(6)(ii).

The mandate to discharge patients no longer acutely ill is clear and unequivocal:

> **Patients discharged from the hospital by their attending practitioner shall not be permitted to remain in the hospital** without the consent of the chief executive officer of the hospital except in accordance with provisions of subdivision (g) of this section [governing appropriate appeal rights for Medicare and non-Medicare patients]

10 N.Y.C.R.R. 405.9(f)(7)(ii) (emphasis added).

The hospital's policy also should include provisions for legal action to compel a patient's discharge when all else has failed.

In a typical situation the patient and family have been advised that the patient no longer is acutely ill and requires an alternate level of care. The patient (or family) either refuses to acknowledge the validity of the determination or else agrees with the staff but proceeds to frustrate the discharge by any means possible. If the hospital determines that the patient has financial assets the threat of a self-pay bill (if legally permissible) often will elicit some level of cooperation. On the other hand if the patient is "judgment proof" a suit for money damages is a waste of time. If there is some valid basis to maintain a guardianship then the good faith assertion that the hospital will so act may encourage a family to cooperate with the discharge plan. Keep in mind, however, that in most jurisdictions some objective indicia of "incapacity" are required. A patient in full command of his mental faculties is not "incapacitated" as that term is defined in the statute. In New York such case law as exists on point is clear on this.[18]

Two additional avenues of legal redress present themselves. The first is a summary proceeding for eviction which, in New York, is governed by section 713(7) of the New York Real Property Actions and Proceedings Law. This is the standard "landlord-tenant" proceeding. The second is a plenary action for trespass, with an application for preliminary injunctive relief, enjoining the patient from further refusal to accept an appropriate placement.

Under the common law as applicable in most states the patient is at best a licensee of the hospital, with no possessory interest.[19] When the license terminates or is revoked and her or she refuses to remove from the premises, such person is deemed to be a trespasser and is subject to eviction by self-help, without any recourse to the courts.[20] A hospital obviously should not employ such a heavy-handed procedure: besides being poor policy, most states and many participating facility agreements establish some degree of "due process" for patient discharges generally, and Medicare patients also are entitled to separate notice and appeal procedures commonly known as HINN;[21] all of this effectively precludes self-help. Eviction should contemplate the technical revocation of the patient's "license" on adequate notice to the patient and the family, along with appropriate appeal information. The hospital then may institute a summary proceeding for possession in the local equivalent of a "landlord-tenant" court.[22] The hospital may seek the appointment of a guardian *ad litem* to represent the patient during the pendency of the proceeding if there is any indication that the adult patient is "incapable of adequately prosecuting or defending his rights" (New York Civil Practice Law and Rules 1201). If the patient retains his or her own counsel, it is questionable whether the court will discern the need for a GAL, but strategically it may be preferable to deal with someone other than the patient directly.

The summary proceeding will result in a quick hearing.[23] Unfortunately, in most states the jurisdiction of a local landlord-tenant court to fashion an appropriate remedy is limited. [24] Landlord-tenant courts are not designed to accommodate the unique needs of persons with significant medical issues. All those courts usually can do is grant possession of premises and ancillary relief in the form of money damages; they cannot compel the patient to accept any kind of placement. Thereupon the patient may continue to refuse to cooperate. The hospital's only remedy then would be to secure an order of eviction and seek the assistance of the Sheriff, who literally will put the patient out at the curb. Only in the clearest case where there is no foreseeable need for assisted care is this acceptable. Alternatively, the hospital may have made arrangements for an ambulette to take the patient home or to a subacute facility or SNF which previously extended acceptance, or anywhere else the patient wanted to go. What if the patient flatly refuses to leave? Does the hospital staff strap him onto a gurney and roll him out the door? In addition, the admitting facility almost certainly will require an affirmative acknowledgment of consent to an admission, if for no other reason than to secure a guarantee of payment or authorize the facility to bill a third party payer. What if the patient refuses to sign the admission papers and the facility declines to accept him? Since the hospital cannot facilitate an unsafe discharge it has secured a pyrrhic victory at best.

The other alternative is a plenary action for trespass, with a request for a preliminary injunction prohibiting the patient from refusing the next viable placement, and the possible assistance of a guardian *ad litem*. This sounds complicated but, upon contemplation, may be the preferable way to proceed. In New York the failure of the patient to vacate upon revocation of the "license" is a *de facto* trespass,[25] and is actionable as such. The public policy implications of a refusal to vacate a much-needed acute care bed, together with the "continuing nature" of the trespass and the insufficiency of any remedy based on money damages should satisfy the equitable requirements for injunctive relief

notwithstanding that the trespass remedy is legal in nature. This procedure, in the specific context of hospital discharges, initially was adopted in New Jersey[26] and in the federal courts in Washington, D.C.[27] More recently a New York court also adopted the "trespass and injunction" procedure (*Wyckoff Heights Medical Center v. Rodriguez*, 191 Misc. 2d 207, 741 N.Y.S.2d 400 (Sup. Ct., Kings Co. 2002)). The *Syracuse Law Review* cited the *Wyckoff Heights* case in its nationally recognized "Survey of New York Law" as follows:

> Finally, of particular importance to acute care hospitals, a New York court authorized hospitals to discharge patients who refused to leave. This decision is significant for acute care hospitals because it marks the first time that a New York court has recognized the authority, and even the duty, of a hospital to compel patients who no longer need its services to leave, so that it can keep its services available to the acutely ill.
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> 53 Syracuse L Rev 629 (2003).

The *Wyckoff Heights* procedure has since been followed in Connecticut.[28] One important *caveat*: The New York court made much of the fact that the proper discharge and appeal notice requirements set out in regulations[29] were "meticulously followed." Strict compliance with every notice and due process requirement is essential. All acute care general hospitals should be familiar with the Medicare HINN procedures and the NODMAR[30] or equivalent notice and appeals processes applicable in their jurisdictions or which may apply pursuant to their contracts with particular plans and payers. (Remember that just because the plan cuts off payment does not mean that other contract provisions respecting member notices and appeals no longer apply.)

In the context of eviction or injunction a guardian *ad litem* may be of particular assistance in reaping the practical benefits of any court order. It is not beyond possibility that the patient will refuse the mandate of the court to accept the next available placement, even if threatened with a contempt citation. The court will not compel a medically unsafe discharge. In the exercise of its equitable and general jurisdiction, however, a court could invest the GAL with the authority to consent to any discharge planning and admission as otherwise would be appropriate, upon the court's direction. Most courts of general jurisdiction are empowered to appoint a referee or receiver to act on behalf of a party who is unable or unwilling to comply with its orders.[31]

An Interesting Footnote and a Dose of Reality

On Sunday, August 3, 2008, in a front-page story entitled "Deported, by US Hospitals," the *New York Times* reported on several noteworthy cases in which hospitals faced with the crushing costs of unreimbursed hospital care effected the discharge of seriously disabled patients to their home countries. The subjects of the lead, Luis Alberto Jiminez and Martin Memorial Medical Center, are parties to litigation which, when finally resolved, may bear upon the issues raised in this article. The intermediate appellate decision of the Court of Appeal of Florida, Fourth District, is entitled, *Montejo Gaspar Montejo, as Guardian of the Person of Luis Alberto Jiminez v. Martin Memorial Medical Center, Inc.*, 935 So.2d 1266, 2006 Fla. App LEXIS 14039 (8-23-08). The underlying facts are as follows.

In February 2000, Luis Alberto Jimenez, an undocumented native of Guatemala who was living and working in Florida, sustained brain damage and severe physical injuries as a consequence of a car crash. Jimenez was transported to Martin Memorial Medical Center and remained there until June 2000, when he was transferred to a skilled nursing facility. The injuries suffered by Jimenez rendered him incompetent and a circuit court judge appointed a guardian of Jimenez's person and property. On January 26, 2001, Jimenez was readmitted to Martin Memorial on an emergency basis and, as of November 2001, was still incapacitated and still receiving medical care at Martin Memorial. The guardian then filed a plan indicating Jimenez would require 24-hour care at a hospital or skilled care facility for the next 12 months. The costs of Jimenez's medical care were mounting; he was indigent and Medicaid refused to pay because he was an undocumented alien.

The hospital convened a discharge planning committee for Jimenez, and it determined that the next level of care he needed was traumatic brain injury rehabilitation. Qualified facilities in Florida would not accept Jimenez because he was indigent and did not qualify for Medicaid. The treating physicians had determined that Jimenez had reached a "therapeutic plateau," that remaining at the hospital would not improve his condition, and that the hospital, as an acute care facility, could not provide for his long-term therapy needs. Consequently the hospital intervened in the guardianship proceedings, claiming that its acute care facility was not appropriate for long-term rehabilitative care, and sought permission from the guardianship court to discharge the patient and have him transported to Guatemala for further care.

The hearing court found that federal law required the hospital to demonstrate that the discharge plan was medically appropriate.[32] In attempting to meet this burden, and over the hearsay objections of the guardian, the hospital offered a letter from the Vice Minister of Public Health in Guatemala which stated: "[T]he system of the Rehabilitation and Orthopedic Hospital 'Dr. Edwin Harold von Ahn,' is ready to give the necessary care to Mister Luis Alberto Jimenez, 28 years of age and originally from the City of Antigua Guatemala, Sacate-

pequez [sic] and will do so as soon as he arrives to this country. We will evaluate and transfer him to the most appropriate facility for the treatment of his condition. The medical treatment to be available will be without any cost to Mister Jimenez."

Following a hearing the guardianship court granted the hospital's request to effect the discharge over the guardian's objections and authorized the hospital to provide transportation and an attendant at the hospital's cost. Subsequently, and on the same day that his motion for a rehearing was denied, the guardian filed a notice of appeal as well as an application to stay the guardianship court's order. The hospital's response was due by 10:00 a.m. the following day but sometime before 7:00 a.m. the hospital took the patient to the airport via ambulance and transported him by private plane to Guatemala.

In an opinion issued on May 5, 2004, the appellate court reversed the order of the guardianship court that had authorized the hospital to transport Jimenez to Guatemala. In the opinion's final paragraph, the panel wrote that it was reversing not only because there was insufficient evidence that Jimenez could receive adequate care in Guatemala, but also that because of the collateral involvement of federal immigration authorities, the guardianship court lacked subject matter jurisdiction to authorize the transportation of the patient.[33]

Arguing that the effect of such a ruling was to render the transfer order void *ab initio*, the legal guardian then instituted suit for false imprisonment and unlawful detention. The trial court dismissed the action, finding that the guardian had no standing, the hospital had absolute immunity by virtue of the prior court order allowing it to act, and that because of that prior order, the plaintiff as a matter of law could not establish at trial that the detention was unlawful. The appellate court again reversed, finding that the underlying order was void as a matter of law.[34] Such a void order (as opposed to one merely voidable) could not confer immunity, especially when the subject of the order was a private right or benefit rather than a public one. At trial, it held, the plaintiff could show that the detention and subsequent actions by the hospital were unwarranted and unreasonable under the circumstances. In particular, and most relevant for our purposes, the appeals court made much of the fact that it earlier had vacated the initial order allowing the hospital to act because the proposed discharge might have been unsafe, citing its earlier decision in the same case.

The hospital also had argued that the appeal was moot because the patient was gone and federal immigration law precluded his readmission. The court turned that argument back against the hospital, however, by using it to bolster its finding that the guardianship court had no subject matter jurisdiction to authorize the hospital to transport the patient to Guatemala in the first place because federal immigration law preempts deportation.[35] In addition, the mootness argument obviously is only possible because the hospital itself effected the departure before the court could rule on the pending motion for stay.

"At the end of the day the hard decision as to whether to 'evict' a patient (yes; evict *is the way it will read in the newspaper and* evict *is the word that will be used on the 10:00 p.m. news) will require a careful analysis of all of the financial, legal and ethical questions presented by the particular patient in a specific clinical context."*

As to the merits, the guardian had argued that there was no substantial competent evidence to support the discharge from the hospital. At the evidentiary hearing the hospital attempted to satisfy the federal discharge requirements, as well as the hospital's own discharge requirements, by offering into evidence the letter from the consulate. The guardian objected to this letter as hearsay, but the trial court admitted it. The letter constituted the only basis upon which the guardianship court issued its decision. The letter was not admissible in evidence under any exception to the hearsay rule, the court found, and the hospital in its brief had not responded to the argument that it was precluded. Even if the letter had been admissible, the court held that it lacked the relevant degree of specificity necessary to satisfy either the federal regulations or the hospital's own discharge procedures. In fact, the court found that the only admissible evidence as to whether appropriate care would be available in Guatemala was the testimony of the guardian's expert, to the effect that that there were no public healthcare facilities providing traumatic brain injury rehabilitation in Guatemala.

Not reported in the decisions but buried in the news article is the fact that the hospital had arranged for Jimenez's transfer not just to his home town but specifically to a local hospital that would have been able to care for his needs. It was that local hospital, not Martin Memorial, that later effected the arguably improper discharge to his home.

The action continues as of the date of this writing. The guardian is seeking millions of dollars in damages.

Conclusion

At the end of the day the hard decision as to whether to "evict" a patient (yes; *evict* is the way it will read in the newspaper and *evict* is the word that will be used on the 10:00 p.m. news) will require a careful

analysis of all of the financial, legal and ethical questions presented by the particular patient in a specific clinical context.[36] It should not even be considered unless the provider has in place a comprehensive, properly adopted policy addressing the several most likely circumstances under which such a decision might become necessary, and unless the provider is certain that all of the patient's due process has been meticulously observed, especially whatever prior notice and appeal rights are established by law, regulation and the provider's own procedures.

Endnotes

1. *See, e.g.*, NY Pub. Health L Articles 28 (hospitals); 28-D (nursing homes); 35 (radiological diagnostic centers); 46-B (assisted living facilities); *also, generally*, Article 2 Title 2 (Public Health Council).
2. The Joint Commission, formerly the Joint Commission for the Accreditation of Healthcare Organizations, is an independent, not-for-profit organization. The Joint Commission accredits and certifies more than 15,000 health care organizations and programs in the United States. Joint Commission accreditation and certification are recognized nationwide as symbols of quality that reflect an organization's commitment to meeting certain performance standards. Its stated mission is to continuously improve the safety and quality of care provided to the public through the provision of health care accreditation and related services that support performance improvement in health care organizations. www.jointcommission.org.
3. 42 C.F.R. § 482.43(d).
4. 42 C.F.R. § 482.21(b)(2).
5. In the wake of federal class actions challenging the tax-exempt status of not-for-profit hospitals, a number of states adopted legislation mandating financial assistance or charity care for "indigent" patients. In New York, eligibility is based on a percentage of the federal income poverty level. NY Pub Health Law § 2807-k(9-a); *see also* Letter of Richard F. Daines, MD, Commissioner, to hospital chief executive officers dated June 22, 2007.
6. Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd; *see also* 42 C.F.R. § 489.24.
7. A "short" payment implies a payment less than what a provider will accept. The concept is relevant when a provider is not being paid a fixed negotiated rate as a part of a provider network but instead is "out of network" for the patient's insurer or, alternatively, when the patient is uninsured.
8. Contrary to popular opinion, absent a valid power of attorney or health care proxy a "spouse" or adult child is not legally empowered to make financial or health care decisions for an incapacitated or incompetent adult. In New York, for powers of attorney established by statute see General Obligations Law §§ 5-1501 through 5-1506; for health care proxies and agents see Pub Health Law §§ 2980 through 2994.
9. New York Mental Hygiene Law Article 81. The burden of proof which must be met by a party seeking the appointment of a guardian is high. In New York, under Article 81 an appointment requires proof by the standard of "clear and convincing evidence" that the patient is likely to suffer harm because he or she is unable to provide for his or her own personal needs or manage his or her property *and* that the patient cannot adequately understand and appreciate the nature and consequences of his functional limitations and inabilities. Where a patient is *unable* to cooperate with discharge planning due to some physical or mental limitation, a showing of need usually is straightforward (regardless of what the family says or does); a patient *able but unwilling* presents an entirely different situation. See the discussion in the main article, *infra*. A stubborn or recalcitrant patient with a "difficult personality" still may be capable of understanding the risks inherent in remaining in an acute care hospital bed, or the financial or social problems he perpetuates, but if he also is capable of making his own personal and financial decisions, a court will not appoint a guardian for him. *See, e.g., Matter of Louis Koch* (Sup. Ct., Queens Co. 11-16-99, 16743/99): "The Court recognizes and appreciates [the hospital's] dilemma. It is beyond question that Mr. Koch is a difficult and uncooperative individual. He continues to be a patient at [the hospital] despite the fact that he has not been in need of acute care [for five months]. Nevertheless, [the guardianship provision of] the Mental Hygiene Law is not the appropriate vehicle to redress the predicament in which [the hospital] finds itself."
10. *Methicillin-resistant Staphylococcus aureus*, or MRSA, must be treated with other strong antibiotics. Some strains of *Enterococci* are resistant to Vancomycin are called *Vancomycin-resistant Enterococci*, or VRE, and also are very difficult to treat.
11. On July 31, 2008, the Centers for Medicare & Medicaid Services (CMS) announced new Medicare and Medicaid payment and coverage policies to improve safety for hospitalized patients. The Inpatient Prospective Payment System (IPPS) FY 2009 final rule expands the list of selected hospital-acquired conditions (HACs) that will have Medicare payment implications that began on October 1, 2008. In addition, CMS has announced the initiation of three Medicare National Coverage Determinations (NCD) proceedings for "wrong surgery," a category of "never events" included in the National Quality Forum's (NQF's) list of Serious Reportable Adverse Events. Further, the Agency has issued a State Medicaid Director (SMD) letter outlining the authority of State Medicaid Agencies to deny payment for selected hospital-acquired conditions. *See* http://www.cms.hhs.gov/apps/media/press/factsheet.asp?Counter=3224&intNumPerPage=10&checkDate=&checkKey=&srchType=1&numDays=3500&srchOpt=0&srchData=&keywordType=All&chkNewsType=6&intPage=&showAll=&pYear=&year=&desc=&cboOrder=date.
12. Securing the cooperation of participating plans in the discharge process is an issue rarely considered, let alone the subject of discussion. Most plans and payers have little interest in utilization review and case management if a hospital's reimbursement methodology is case based as opposed to charge based. Overlooked is the obvious: case based rates such as "DRGs" are intended to pay providers for acute services, not custodial care. At the same time, the participating provider agreement prohibits balance billing the member if the payer pays the required rate. Hospitals are advised to consider contract provisions that engage their plans and payers in the discharge process, such as by requiring the plan to advise the member that any reimbursement to the hospital is not intended to pay for any days not medically necessary. An additional remedy, if allowed by law, would be an express reservation of right to balance bill the member for unnecessary days as "non-covered,"notwithstanding that the days would have been encompassed by the case based rate if otherwise medically necessary if, upon written notification by the facility to the member, he or she still remains inpatient. (This would be akin to the situation allowed by Medicare when a HINN notice is sustained.) The remedy would not apply, of course, when a discharge or transfer may not be effected in a safe and medically appropriate manner through no fault of the patient.
13. *See* note 11, *supra*.
14. As to Press-Ganey, *see* http://www.pressganey.com/cs/our_services/hcahps_integrated. As to Medicare reimbursement and patient satisfaction, *see* http://www.cms.hhs.gov/hospital-qualityinits/30_hospitalhcahps.asp.
15. 2006 U.S. Dist. LEXIS 7943 (2-28-06).

16. For the text of the most recent proposal see Assembly Bill No. 5406-A (2005).

17. Readers may learn more about Mr. Swidler's particular proposal by contacting him at swidlerr@nehealth.com.

18. *See*, *e.g.*, *Matter of Louis Koch (Mt Sinai), supra* at note 9.

19. New York Real Property Actions and Proceedings Law § 713:

> Grounds where no landlord-tenant relationship exists. A special proceeding may be maintained under this article after a ten-day notice to quit has been served upon the respondent in the manner prescribed in section 735, upon the following grounds: * * * * * 7. He is a licensee of the person entitled to possession of the property at the time of the license, and (a) his license has expired, or (b) his license has been revoked by the licensor, or (c) the licensor is no longer entitled to possession of the property; provided, however, that a mortgagee or vendee in possession shall not be deemed to be a licensee within the meaning of this subdivision.

20. *See*, *e.g.*, *Wales v. Giuliani*, 916 F. Supp. 214, 1996 U.S. Dist. LEXIS 1433 (E.D.N.Y.), citing *Livingston v. Tanner*, 14 N.Y. 64 (1856):

> Nor could the owner, before entry, maintain an action of trespass against [a tenant at sufferance] (4 Kent, 117; 2 Black. Com., 150; Cruise's Dig., tit. 9, ch. 2.). But the owner could enter upon the tenant at sufferance and dispossess him by force, and reap the crops, and thus determine the tenancy, and the tenant could have no remedy by action. (Wilde v. Cantillon, 1 Johns. Ca., 128; Hyatt v. Wood, 4 Johns. R., 150; 2 Black. Com., 150.) This was upon the general principle that where one had no interest or property in the soil, and no exclusive possession, trespass quare clausum fregit could not be maintained. There can be no doubt whatever that, before our statutes on the subject of notice to tenants at will and by sufferance, the plaintiff might have either entered upon the defendant and dispossessed him, or brought ejectment and recovered possession without any demand or notice whatever.

21. "Hospital issued notice of noncoverage"; *see* Social Security Act §§ 1154(a), 1154(e), 1879; *see also* 42 C.F.R. §§ 411.404, 412.42(c), 489.34.

22. After the 10-day notice to quit has been served; *see* New York RPAPL § 713, *supra*.

23. In New York the hearing or trial may not be adjourned more than ten days from the initial return date without the consent of both sides. N.Y. RPAPL § 745(1).

24. In New York these courts of limited jurisdiction may award possession and an incidental judgment for money damages to abide the possessory interest awarded (RPAPL § 747) but not injunctions generally (see NY Civil Court Act § 209(b) and parallel provisions in the New York Uniform District, City Town and Village Court Acts).

25. *Wyckoff Heights Medical Center v. Rodriguez*, 191 Misc. 2d 207, 741 N.Y.S.2d 400 (Sup. Ct., Kings Co. 2002)).

26. *Jersey City Medical Center v. Halstead*, 169 NJ Super. 2, 404 A.2d 44 (Superior Ct., Chancery 1979).

27. *Lucy Webb Hayes National Training School v. Geoghegan*, 281 F. Supp 116 (D.C. Dist. Columbia 1967)).

28. *Midstate Medical Center v. Doe*, 49 Conn. Supp. 581, 898 A. 2d 282 (2006).

29. 10 N.Y.C.R.R. 405.1.

30. "Notice of discharge and Medicare appeal rights," required to be given to the Medicare beneficiary when the hospital determines that acute care no longer is required or that the hospital no longer can deliver the appropriate level of care to the beneficiary; 42 C.F.R. § 422.620.

31. In New York *see, e.g.*, Civil Practice Law and Rules (CPLR) 5106; CPLR Article 64.

32. As a Medicare provider, the hospital was required to comply with federal discharge requirements contained in 42 U.S.C. § 1395X(ee) and 42 C.F.R. § 482.43. Under 42 C.F.R. § 482.43(d), the patient can be transferred by a hospital only to an "appropriate facility" where the patient would receive post-hospital care. Such a facility is defined as one which can meet the patient's medical needs. 42 C.F.R. § 482.21(b)(2). 59 Fed. Reg. 64149. An argument can be made that the appellate court took these sections out of context, in that they apply only to Medicare beneficiaries and are not intended to affect the discharges of all acute care hospital patients.

33. *Montejo v. Martin Mem'l Med. Ctr., Inc,* 874 So. 2d 654 (Fla. 4th DCA 2004).

34. *Montejo v. Martin Mem'l Med. Ctr., Inc*, 935 So. 2d 1266 (Fla. 4th DCA 2008).

35. Federal immigration law apparently preempts deportation while certain activities are pending. The court cited to *Florida Auto. Dealers Industrial Benefit Trust v. Small*, 592 So. 2d 1179 (Fla. 1st DCA 1992), an ERISA preemption case, in support of its holding that federal immigration law, like ERISA, completely preempts state courts of subject matter jurisdiction to grant orders which may result in "deportation." This is a curious line of reasoning based on a convoluted interpretation of federal preemption and its application to the facts, effectively denying the guardianship court subject matter jurisdiction over issues falling squarely within its statutory jurisdiction under state law because of the supposed existence of a "federal question."

36. An excellent analysis of the interaction of the law, medical ethics and clinical needs in effecting problem patient discharges is presented by Robert Swidler, Terese Seastrum and Wayne Shelton in "Difficult Hospital Inpatient Discharge Decisions: Ethical, Legal and Clinical Practice Issues," *The American Journal of Bioethics,* Vol. 7(3):23–28 (2007).

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Tailoring Your Arbitration Proceeding with the New CPR Protocol

By Lawrence W. Newman

There is uncertainty in every form of dispute resolution: judges may handle their calendars differently; courts in various parts of this country have different practices. Moreover, unless a locality has only one judge, there is uncertainty as to who will hear the case. But there is some predictability in that there are codified rules of procedure, both general and local, that govern the way procedural matters are to be dealt with.

"The approach that an arbitral tribunal will take in a given case cannot be easily predicted."

In arbitration, on the other hand, there is less certainty. The rules of arbitral institutions deliberately leave open to the arbitrators and the parties the fashioning, in particular cases, the ways in which arbitrations will be conducted. Arbitrators come from varying backgrounds. They may be businessmen, former judges, engineers or, most frequently, lawyers. Drawing on their experience, they bring to arbitration proceedings their own understanding as to how proceedings should be conducted. A former judge may have a strong sense of how to run proceedings, whereas a businessman may have no well-formed ideas.

The differences are most evident in two areas—the extent of discovery permitted by one party of an adversary's documents and the way in which witnesses are examined in hearings. These differences in arbitrators' practices manifest themselves most often when the arbitrators or the parties are from different nations. Arbitrators from different cultures have varying ideas about how proceedings should be conducted.

The approach that an arbitral tribunal will take in a given case cannot be easily predicted. An arbitral institution may, in an international case, appoint arbitrators or a chairman from a culture quite different from that of one or more of the parties or of the arbitrators appointed by them. The parties often have little way of knowing the background and culture of the arbitrators who will be appointed and therefore of the way in which the arbitration will be carried out. Even when each party appoints its own arbitrator, the chairman, who has great influence over procedural matters, may have unpredictable procedural predilections.

For example, an American party may expect to support its case by obtaining documents from its adversary through an order that it hopes to get from the arbitrators. But when the arbitration comes to pass, the American party may learn, to its dismay, that the chairman or other panel members abhor the concept of "discovery" and believe that, unless there are exceptional circumstances, neither party should be obliged to produce to the other side or the tribunal any documents other than those it chooses to present in support of its case. Conversely, a European party may go into an arbitration never thinking that any of its internal documents could see the light of day in the proceedings. But an American-oriented tribunal may take it as a given that the parties will engage, prior to the evidentiary hearing in the case, in an exchange of each other's documents, including internal documents.

Similarly, a party may believe it to be an important part of its case to take the depositions, prior to the hearing, of witnesses from the other side or of third parties in order to learn more about the other party's case. The arbitrators may, however, reject such a notion. A party may expect to put its witnesses on the stand in the arbitration to present their direct testimony orally. But the arbitrators may, in the interest of economy, order that all direct testimony be presented in the form of written witness statements. A party may expect to obtain admissions from an adversarial witness on cross-examination but may be told that his time for such an inquiry is sharply limited by the tribunal.

When businessmen experience these kinds of culture shocks, and thereafter the arbitration turns out badly for them, they may turn against arbitration as a means of dispute resolution. Cognizant of the finality of arbitration, with its virtual lack of an appellate process, these persons may not, in the future, want to take the risks of agreeing to arbitrate when they cannot have some reasonable confidence that the proceedings will be conducted in a way they can predict.

Recently, steps have been taken to enable users of arbitration to obtain greater predictability as to the procedures that will be followed in their arbitrations. The International Institute for Conflict Prevention & Resolution (CPR) issued, in January of this year, its *Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration*, which addresses the various ways in which arbitrations may be conducted and enables the parties to consider and select among them.[1] The CPR Protocol breaks new ground by setting out alternatives, called "modes," as to the varying levels of procedural complexity from which parties may elect to have their arbitration governed. Their choices can be made as early as the time when they enter into

their agreement to arbitrate, set forth in the dispute-arbitration clause contained in the document setting out the deal made by the parties.

With respect to disclosure of documents, the Protocol suggests that the parties include, in their agreement to arbitrate or in a stipulation after the dispute arises, the following language: "The parties agree that disclosure of documents shall be implemented by the Tribunal consistently with Mode [__] in Schedule 1 of the CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration."

The modes in Schedule 1 permit the parties to select among, at one extreme, no disclosure of documents other than of documents that each side will present in support of its case to, at the other end of the spectrum, "pre-hearing disclosure of documents regarding non-privileged matters that are relevant to any party's claim or defense, subject to limitations of reasonableness, duplication and undue burden" (Schedule 1, Mode D). The two modes in between these two extremes, modes B and C, provide, generally, for the pre-hearing disclosure of documents "essential to a matter of import in the proceeding for which a party has demonstrated a substantial need." Mode B limits this disclosure to documents in the possession of another party, and Mode C provides, in addition, for disclosure of the documents in the possession of persons who are noticed as witnesses by the party requested to provide disclosure.

Thus, the parties have the capability, by incorporating by reference a mode from one or more of the schedules in the CPR Protocol, of establishing the general scope of the document disclosure that will be permitted in their arbitration. What is important is that once a mode is selected, the arbitrators are obligated not to deviate from the parties' selection of the mode of documentary disclosure unless they determine that "there is compelling need for such disclosure"—to deal with such situations as the occurrence of unexpected events not taken into account by the parties when they selected their disclosure modes (§ 1(c)).

The Protocol also deals with electronic disclosure and, again, breaks new ground by providing descriptive language setting out various levels of electronic disclosure ranging from the minimal to the most liberal. Thus, Mode A limits disclosures by each party to copies of electronic information in support of that party's case in "reasonably usable form" such as printouts. On the other end of the spectrum, Mode D provides full documentary disclosure similar to what would be permitted in a U.S. court—information regarding non-privileged matters that are "relevant to any party's claim or defense, subject to limitations of reasonableness, duplicativeness and undue burden."

The middle two electronic-disclosure modes (modes B and C) permit the parties to limit the extent of their other electronic disclosure in various ways: by the number of designated custodians whose electronic information is to be produced; by the dates of creation of the electronic information; and by the ways in which the electronic information is stored. In any event, Mode B also provides that there may not be disclosure of information "other than reasonably accessible or active data." Mode C is similar to Mode B except that it permits the parties to enlarge the number of custodians whose electronic information will be produced and to provide for a wider time period to be covered. The parties may also, under Mode C, agree to permit, "upon showing a special need and relevance," the disclosure of "deleted, fragmented or other information difficult to obtain other than through forensic means."

"The CPR Protocol breaks new ground by setting out alternatives . . . as to the varying levels of procedural complexity from which parties may elect."

In addition, Schedule 2 of the Protocol provides that parties selecting modes B, C or D must meet and confer, prior to an initial scheduling conference with the tribunal, concerning the "specific modalities and timetables for electronic information disclosure" (*see* Schedule 2, Mode D). In dealing with electronic information, the Protocol goes further than other institutions, such as the American Arbitration Association and the Chartered Institute of Arbitrators, which, although they address in their guidelines the phenomenon of electronic disclosure, do not attempt to describe or categorize various levels of disclosure of electronic information.

The Protocol also deals with the varying ways in which the testimonies of witnesses at arbitration hearings must be presented. Section 2 of the Protocol directs parties' and arbitrators' attention to the option of presenting the direct testimony of witnesses through written statements submitted in advance of the hearings. The practice of shortening hearing time through the use of witness statements is well known in international arbitrations but is relatively seldom used in domestic arbitrations. The Protocol describes the ways in which witness statements may be used and recommends that some introductory questioning of the witness be permitted, prior to the interrogation of the witness on cross-examination (§ 2(a)).

The Protocol also addresses the possibility of the use of discovery depositions—the taking of the testimony of witnesses prior to their appearance at the evidentiary hearing before the arbitrators. The Protocol does not encourage the use of discovery depositions, stating that they should be permitted only where the testimony is expected to be material to the outcome of

the case in and where certain exigent circumstances apply. These circumstances include where witness statements are not being used, the parties agree to the deposition and/or the witness is not likely to be available to testify before the tribunal (§ 2(c)).

The Protocol contains two provisions relating to cross-examination of witnesses.[2] The Protocol also suggests that the form and length of cross-examination should be such as to afford a fair opportunity for the testimony of a witness to be fully clarified and/or challenged (§ 2(g)).

As with respect to documentary disclosure, the parties are afforded, in Schedule 3, different modes of presenting witnesses, ranging from the submission in advance of witness statements to no witness statements with some depositions.

Thus, the Protocol suggests to the parties to a prospective or existing arbitration that they may wish to exercise their right to select the kinds of disclosure and witness testimony they want by agreeing to make applicable one or more of the modes in the Protocol schedules. They may make their selection when they are entering into their agreement to arbitrate or later on, such as at the time of the scheduling hearing with the arbitrators. The Protocol, which offers suggestions to the arbitrators concerning the expeditious handling of arbitrations, suggests to arbitrators that in any event, the scope and timing of disclosure may be taken up at a scheduling conference (Schedule 1(e)(1)).

The modes may be used not only for arbitrations under the CPR Arbitration Rules but also for proceedings under the rules of other arbitral institutions or those governing ad hoc arbitrations. The Protocol is intended to be applicable to both domestic and international arbitration proceedings.

It is to be hoped that the use of the modes of the Protocol will serve to remove some uncertainty from the minds of parties and counsel contemplating the resolution of commercial disputes in arbitration by affording them a greater measure of predictability in the proceedings by which their disputes will be resolved. Moreover, it may well be that disputes will be resolved with greater efficiency through the use of the Protocol's modes. To the extent that the participants in arbitration have a clearer understanding of the procedural avenues down which they will likely proceed, there will be fewer time-consuming detours for collateral disputes about procedural issues.

Endnotes

1. *See* CPR Website, www.cpradr.org.
2. Section 1(e)(3) and § 2(g)—the Protocol suggests that a party may use documents not previously disclosed by it to the other party if the documents are used only for the impeachment of the other party's witnesses (§ 1(e)(3)).

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Beyond *Graev*

By Robert Z. Dobrish and Erin McMurray-Killelea

"It Depends on What the Meaning of the Word 'Is' Is."

William Jefferson Clinton (*Starr Report*, Footnote 1,128)

Lawyers, generally, rely upon the common sense interpretation of terms used by them in agreements without the necessity of explaining what every one of those terms mean. We rely, additionally, on New York courts' affection for and tendency to unquestioningly honor agreements and interpret them under their plain meaning. Enter *Graev.*[1] The Court of Appeals's *Graev v. Graev* decision is a reminder to matrimonial lawyers of the myriad agreement-drafting pitfalls faced even in the agreements we know so well. The separation agreement in *Graev* provided for cessation of the wife's maintenance upon certain "termination events," among them "cohabitation of the wife with an unrelated male for a period of sixty substantially consecutive days." The agreement did not define "cohabitation." This is a word exceedingly familiar to matrimonial lawyers, the meaning of which was seldom brought into question.

Suspicious after hearing a rumor that his ex-wife was sharing her vacation home with a boyfriend in the summer of 2004, Mr. Graev hired a private detective to chronicle the couple's comings-and-goings. After confirming his suspicions, Mr. Graev ceased his support payments to his ex-wife in September 2004. Ms. Graev sought enforcement of the agreement. After a hearing, the Supreme Court ruled that the word "cohabitation" as used in the agreement included shared household expenses as an essential element of "cohabitation" and distinguished the "warm" relationship Ms. Graev had with her boyfriend from "cohabitation." Specifically, the court found that Ms. Graev and her boyfriend did not operate as an "economic unit" and were, thus, not cohabiting. On appeal, Mr. Graev maintained that "cohabitation" was an ambiguous term requiring consideration of parol evidence to determine the intent of the parties. In a 3-2 decision affirming the lower court, the First Department found that Ms. Graev's relationship was not a "termination event" contemplated by the separation and found that "cohabitation" had an unambiguous, plain meaning that contemplated an economic partnership. In rendering its decision, the First Department relied primarily upon *Scharnweber,*[2] which had held that "cohabitation" must involve financial interdependence by a couple living together. The First Department stated that in drafting the agreement the attorneys were presumed to have been aware of the case.[3] In the absence of evidence that Ms. Graev and her boyfriend were sharing expenses, the First Department found that they were not "cohabiting."

In a 4-3 decision, the Court of Appeals reversed, finding that "cohabitation" was an ambiguous term requiring extrinsic evidence to determine the parties' intent. According to the majority, "cohabitation" could mean "any number of things" and that neither the dictionary nor case law provided an "authoritative or plain meaning" for "cohabitation." Drawing upon several New York cases which addressed "cohabitation" and *Black's Law Dictionary*, the Court stated that "cohabitation" could comprise myriad non-dispositive factors outside of an economic partnership, among them a sexual relationship.

After decades of inclusion in countless separation and divorce agreements, the term "cohabitation" has been deemed ambiguous by the Court of Appeals. Could other similarly unquestioned terms be next? A sampling of New York cases reveals that "cohabitation" is not the only seemingly plain term in separation agreements that has been deemed ambiguous and litigated. Several litigants have found themselves dragged back into court to ascertain the meaning of apparently innocuous terms in their agreements, and *Graev* poses the risk of opening the floodgates for similar battles.

Medical and Dental Expenses

Provisions setting forth responsibility for medical and dental expenses have inspired a significant amount of litigation across the state. Parties may run into trouble regardless of whether they draft such provisions broadly by providing for allocation simply of "medical expenses" or whether they narrowly categorize such expenses. In *C.F v. R.F.,*[4] the Rockland County Family Court included ophthalmological and dental expenses within the "medical expenses" a husband was responsible for in a separation agreement. *C.F. v. R.F.* distinguished a similar provision debated in *Palyswiat v. Palyswiat,*[5] which found that a father was not responsible for pediatric expenses where the provision provided only for coverage of "orthodontic, dental, and ophthalmological care." The court drew upon New York's Education Law and concluded that dentistry and ophthalmology fall within the "practice of medicine" because both diagnose and treat pain, deformities, and physical conditions and, thus, were "medical expenses." *Robinson v. Robinson*[6] used the same Education Law to exclude "family therapy" and the son's tuition in a learning disability-focused boarding school

from "medical expenses" for which the father was responsible under a separation agreement.

In *Arnold v. Fernandez*,[7] the Third Department deemed orthodontic expenses "dental expenses" for which the husband bore responsibility under the parties' separation agreement. ("Orthodontics is that branch of dentistry which deals with the development, prevention, and correction of irregularities of the teeth . . . [and] are clearly dental expenses and within the plain language of the agreement.") Similarly, a husband contested his responsibility for his ex-wife's "pharmaceutical expenses" under a separation agreement in *Stewart v. Stewart*.[8] The wife suffered from spinal stenosis and, as a result, filled prescriptions for several medications, among them Milk of Magnesia, Vitamin C, cod liver oil, and Tylenol. Her doctor prescribed these over-the-counter medicines because it was far less expensive for the wife to purchase the items via prescription. The husband maintained that he was not responsible for reimbursing his wife for such expenses. Finding little help from *Black's Law Dictionary*, case law, or *Stedman's Medical Dictionary*, the court deemed "pharmaceutical expenses" ambiguous and concluded that the only "logical" definition of such expenses was for drugs and medicines available solely by prescription. The court included in its definition "peripheral items necessary to administer such medicines," such as syringes, but excluded certain medical equipment available only via prescription such as eyeglasses, crutches, and hearing aids. One might also wonder whether therapy by a social worker or psychologist would be considered a "medical expense" and under which circumstances therapy itself might be considered "non-elective."

"Working" and "Wages"

Provisions pertaining to prosaic concerns such as employment and earnings are equally open to interpretation. *Dube v. Horowitz*,[9] permitted the use of parol evidence to interpret a provision which calculated spousal support payments based on the husband's "wages." Prior to signing the agreement, the husband requested that references to his "gross income" be substituted by "wages" and the wife agreed. When the husband retired early from his job, he stopped paying support to the wife and maintained that his pension income did not constitute "wages." The court found that "wages" included retirement income by relying on case law and the husband's expertise as a retired labor specialist and by construing the "wages" provision against the husband who insisted on the provision. *Didley v. Didley*[10] similarly deemed ambiguous a provision which obliged the husband to pay the wife maintenance for as long as he was "working." The *Didley* separation agreement provided that the wife would receive weekly income and earnings pursuant to a shareholder agreement for the company of which the husband was a majority shareholder. The wife waived maintenance so long as the settlement agreement remained in effect. Later, the company was sold and the husband became its employee. The parties entered into a modification agreement under which the husband agreed to pay the wife weekly maintenance while he was "working." The husband's employment was later terminated and he ceased paying maintenance and argued that the modification obliged him to pay maintenance only if he was "working" at the company where he was employed at the time he signed the modification. The court deemed "working" an ambiguous term and left the determination of its meaning to the lower court.

"Full-Time Residence"

Canter v. Canter[11] addressed a provision in a modification agreement which required the husband to pay child support until the youngest child completed four years of college "provided she continues to maintain her full time residence with the Wife during said period." The wife sought a declaratory judgment regarding this provision, arguing that because she would maintain a full-time residence for their daughter while she was in college the husband was still responsible for child support. The husband moved for summary judgment, maintaining that he had no child support obligation if their daughter attended an out-of-town college. The court deemed "full-time residence" ambiguous and looked to correspondence between the parties preceding their entry into the modification agreement, which revealed that the husband repeatedly proposed that he pay support only if their daughter was living at home. The court ultimately granted the husband summary judgment because the wife proffered no extrinsic evidence supporting her interpretation of "full-time residence."

"With regard to," "incidental thereto," and Other Seemingly Harmless Phrases

Separation agreements nearly always attempt to define obligations by including connective phrases such as "with respect to," "in connection with," "with regard to" and "incidental thereto." Again, such attempts can backfire. *Nirenberg v. Nirenberg*[12] deemed ambiguous a provision which stated that the parties shall bear pro rata responsibility for "any and all income taxes due with respect to such returns." The court found that one could not conclude with certainty whether the provision referred to the total annual tax obligation of the parties or the unpaid balance of taxes owed as reflected on a tax return and remitted the matter to the trial court for a hearing. Similarly, the *Robinson*[13] court, discussed *supra*, addressed the parties' dispute over whether the husband's responsibility to provide the child "with a college level education and to pay the costs incidental thereto" included covering tuition at a highly specialized boarding school. The court

found for the husband and declined to infer his intention to pay tuition for specialized schooling designed to enable the child to enter college. Though *Robinson* did not deem the provision ambiguous, the parties undoubtedly spent much time and money litigating a provision that did not provide for all contingencies. Also poised for challenge are counsel fee clauses which entitle one party to fees from the other for services "incidental" to or "rendered" and incurred "in connection with" a case. *See, e.g., Clemens v. Clemens*[14] (interpreting phrase "for all services incidental thereto" in counsel fee case).

Conclusion

In her dissent, Judge Victoria A. Graffeo deems *Greav* as a harbinger for couples seeking to settle their differences. Judge Graffeo notes that "[t]he majority's rule creates uncertainty, making it difficult for parties to understand their obligations and responsibilities." Judge Susan Phillips Read, writing for the majority, countered that the "wisest rule, of course, is for parties in the future to make their intention clear by more careful drafting." Indeed. The decision leaves the matrimonial bar asking which other old standbys in agreements could be open to debate. Surely, simple, oft-invoked terms matrimonial lawyers include without a second thought in agreements cannot be open to interpretation. Think again. In this sense, *Graev* is merely a reminder of extant risks matrimonial lawyers face in drafting agreements with unexamined, boilerplate language. What do *Graev* and its antecedents teach us as matrimonial lawyers? That much can be left open to interpretation and that unexamined language in agreements can come back to haunt us all.[15] This poses quite a conundrum to those of us in the field who wish to draft agreements in a cost-effective manner and for our clients, who, understandably, seek finality and resolution through agreements. *Graev* opens a Pandora's box for matrimonial lawyers in that a host of oft-invoked terms in agreements could likely be found ambiguous: for example, "day-to-day," "routine" and "major" decision-making, "reasonable" visitation and attorneys' fees, "necessary" medical and mental health expenses, and "gainful" employment, to name but a few. On the other hand, perhaps *Graev*'s impact will not be as onerous as some fear. In early March 2009, the Second Department in *Kosnac v. Kosnac*[16] found clear and unambiguous a provision stating that as each child becomes emancipated "support for such child shall cease and the child support paid shall be reduced proportionally." Time will tell the extent to which Judge Graffeo's warnings are warranted.

Endnotes

1. *Graev v. Graev*, 11 N.Y.3d 262, 2008 WL 4620698 (2008).
2. *Scharnweber v. Scharnweber,* 105 A.D. 2d 1080 (4th Dep't 1984).
3. The First Department's reliance on *Scharnweber* is questionable given that it is a 24-year-old Fourth Department case that had been cited in just four other decisions, none of which were issued by the First Department and just one of which came down in the past 15 years. *Clark v. Clark*, 827 N.Y.S.2d 159 (2d Dep't 2006), *Tricoles v. Tricoles*, 609 N.Y.S.2d 261 (2d Dep't 1994), *Salas v. Salas*, 513 N.Y.S.2d 770 (2d Dep't 1987), *Brown v. Brown*, 505 N.Y.S.2d 648 (2d Dep't 1986).
4. *C.F v. R.F.*, 671 N.Y.S.2d 925 (Fam. Ct., Rockland Co. Mar. 6, 1998).
5. *Palyswiat v. Palyswiat*, 84 A.D.2d 638 (3d Dep't 1982).
6. *Robinson v. Robinson*, 512 N.Y.S.2d 315 (Sup. Ct., Erie Co. Feb. 17, 1987).
7. *Arnold v. Fernandez*, 184 A.D.2d 805 (3d Dep't 1992).
8. *Stewart v. Stewart*, 738 N.Y.S.2d 536 (White Plains Cty. Ct. Jan. 30, 2002).
9. *Dube v. Horowitz,* 258 A.D.2d 724 (3d Dep't 1999).
10. *Didley v. Didley*, 194 A.D.2d 7 (4th Dep't 1993).
11. *Canter v. Canter*, 91 A.D.2d 1180 (4th Dep't 1983).
12. *Nirenberg v. Nirenberg*, 203 A.D.2d 980 (4th Dep't 1994).
13. *Robinson, supra,* note 6.
14. *Clemens v. Clemens*, 130 A.D.2d 455 (2d Dep't 1987).
15. There is also the danger of latent ambiguity, which courts have defined as emanating from a situation where the confusion arises not from the language, but from a future occurrence plainly not contemplated by the parties when they entered into the agreement. For example, *Lerner v. Lerner*, 120 A.D.2d 243 (2d Dep't 1986) explores the potential for latent ambiguity with respect to insurance provisions in separation agreements. The *Lerner* agreement provided for the husband's obligation to include his sons as irrevocable beneficiaries on "any and all future insurance that the Husband may take out during his lifetime . . ." When the husband died, his second wife received a check from the husband's pension plan and group-life insurance policy on which she was the sole named beneficiary. The second wife refused to distribute two-thirds of this amount to the husband's two children, arguing that the husband's pre-retirement death benefits of a pension plan were not "future insurance" contemplated by the separation agreement. The Second Department found the agreement's language facially plain, yet deemed the situation *latently* ambiguous.
16. *Kosnac v. Kosnac*, 875 N.Y.S.2d 504 (2d Dep't 2009).

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Protecting a Subtenant from Losing Its Leasehold upon Termination of the Prime Lease or Foreclosure of a Building Mortgage

By L. Stanton Towne

In today's real estate market, a subtenant needs to consider the possibility that the tenant (the subtenant's sublandlord) will become insolvent, leading to a termination of the lease to the tenant (herein the "Prime Lease") or that the building landlord will become insolvent, leading to a foreclosure sale of the building landlord's interest in the building, or that both of these possibilities will occur. In order to protect itself from losing its leasehold in these situations, the subtenant should enter into appropriate agreements with the building landlord and the holder of any mortgage on the building.

Termination of the Prime Lease

In order for a subtenant to be protected from losing its leasehold upon a termination of the Prime Lease, the subtenant should enter into with the building landlord either (a) a subordination non-disturbance and attornment agreement (the "Landlord Subtenant SNDA") or (b) a contingent or standy lease (a "Standby Lease") as described below. Although the former is more common, for reasons discussed below the latter is to be preferred.

If a Landlord Subtenant SNDA is used, it should provide that if the Prime Lease terminates for any reason (with possible exceptions for casualty or condemnation or other situations varying from transaction to transaction) prior to the scheduled expiration date of the sublease, the subtenant will become a direct tenant of the building landlord for what would have been the balance of the term of the sublease. A number of aspects of the Landlord Subtenant SNDA warrant special attention:

> ***First***, building landlords will generally prefer that the Landlord Subtenant SNDA provide that from and after the date on which the subtenant becomes a direct tenant of the building landlord the subtenant shall pay rent to the building landlord equal to the higher of the rent provided for in the sublease or the rent for the sublease premises which would have been payable under the Prime Lease if it had continued in effect. This obviously is not favorable to the subtenant.
>
> ***Second***, the building landlord may prefer that the Landlord Subtenant SNDA provide that from and after the date on which the subtenant becomes a direct tenant of the building landlord the non-rental terms of the Prime Lease shall be substituted for the non-rental terms of the sublease. Often a subtenant has no reason to object to this.
>
> ***Third***, the Landlord Subtenant SNDA should provide that the direct lease arising between the building landlord and the subtenant upon termination of the Prime Lease shall have priority from the date of the Landlord Subtenant SNDA and shall not be subordinate to any mortgage granted after date of the Landlord Subtenant SNDA unless the mortgagee provides to the subtenant an SNDA in a form to be attached to the Landlord Subtenant SNDA or equivalent.
>
> ***Fourth,*** the Landlord Subtenant SNDA should be recorded and should either (a) not include a provision subordinating the Landlord Subtenant SNDA to mortgages granted after the date of the Landlord Subtenant SNDA (the simpler and common approach) or (b) provide that the Landlord Subtenant SNDA shall not be subordinate to any mortgage granted after the date of the Landlord Subtenant SNDA unless the mortgagee provides to the subtenant a Lender Subtenant SNDA in a form to be attached to the Landlord Subtenant SNDA or equivalent.

A Standby Lease is an alternative to a Landlord Subtenant SNDA. A Standby Lease is a lease of the premises devised by the sublease which provides that its term shall commence upon (and only upon) the termination of the Prime Lease for any reason (with possible exceptions for casualty or condemnation or other situations varying from transaction to transaction) prior to the scheduled expiration date of the sublease. A suggested model term commencement provision for a Standby Lease is set forth on Exhibit A to this Article. A Standby Lease is preferable to a Landlord Subtenant for a number of reasons:

First, a Standby Lease eliminates the need for the building landlord or its counsel to review the sublease to determine whether its provisions will work properly when converted into a direct lease as called for by a Landlord Subtenant SNDA. As noted above, some building landlords seek to avoid this problem by providing in the Landlord Subtenant SNDA that the non-rental terms of the Prime Lease are deemed substituted for the non-rental terms of the sublease, but the Standby Lease offers a much more direct route to accomplish this.

Second, the Standby Lease appears (at least to this author) to offer a better method to achieve the goal of point ***Third*** above. Although I've found no cases on this, I think a subtenant's lawyer would rather defend the proposition that the delayed commencement date should not cause the Standby Lease to lose its priority rather than the proposition that the direct lease arising under the Landlord Subtenant SNDA should have priority from the date of the Landlord Subtenant SNDA.

Third, because the Standby Lease looks and reads like a regular lease in almost every detail, it should be easier (and certainly no harder) to process through the lender approval process than a Landlord Subtenant SNDA.

Both the Landlord Subtenant SNDA and the Standby Lease should provide for avoidance of doubt (a) that among the types of terminations of the Prime Lease covered by the Landlord Subtenant SNDA or the Standby Lease is a termination of the Prime Lease by reason of the foreclosure of a superior mortgage, and (b) that if the building landlord rejects the Prime Lease in bankruptcy and the sublandlord retains legal possession under Section 365(h) of the federal Bankruptcy Code, then for the purpose of the Landlord Subtenant SNDA or the Standby Lease the Prime Lease shall not be deemed to have terminated unless and until such legal possession under Section 365(h) terminates. The effect of a building landlord bankruptcy upon a subtenant is further discussed below.

Foreclosure of a Building Mortgage

In order for a subtenant to be protected from losing its leasehold upon a foreclosure of a building mortgage, the subtenant should enter into a subordination non-disturbance and attornment agreement with the holder of any mortgage on the building (a "Lender Subtenant SNDA") existing at the time of the making of the sublease.

The Lender Subtenant SNDA should be drafted with three different fact patterns in mind:

Fact Pattern A: Foreclosure of the mortgage and termination of the Prime Lease as a part of the foreclosure process.

Fact Pattern B: Foreclosure of the mortgage after an earlier termination of the Prime Lease, which termination previously led to a direct lease relationship arising between the building landlord and the subtenant.

Fact Pattern C: Foreclosure of the mort-gage and continuation of the Prime Lease in effect between the purchaser in foreclosure and the tenant under the Prime Lease, followed by a subsequent termination of the Prime Lease

In order to protect the subtenant in Fact Pattern A and B, the Lender Subtenant SNDA should provide that, in either such case, upon foreclosure, a direct lease relationship shall arise between the purchaser in foreclosure and the subtenant. All of the issues addressed in the prior section of this article regarding termination of the Prime Lease are also applicable in this context, e.g., (i) the Lender may want to provide that the rent will be the higher of the rent payable under the sublease or under the Prime Lease, (ii) the Lender may want to substitute the non-rental terms of the Prime Lease for the non-rental terms of the sublease. Of course, if a Standby Lease has been used, rather than a Landlord Subtenant SNDA, the Lender Subtenant SNDA can be simpler because it can simply provide that, in either Fact Pattern A or B above, upon foreclosure, the Standby Lease will become effective between the purchaser in foreclosure and the subtenant.

In order to protect the Subtenant in Fact Pattern C, the Lender Subtenant SNDA should also provide that if the Prime Lease is in effect at the time of the foreclosure and is not terminated in the foreclosure, then the Landlord Subtenant SNDA or the Standby Lease (whichever shall have been used) shall continue in effect between the purchaser in foreclosure and the subtenant. This protects the subtenant from a termination of the Prime Lease occurring after the foreclosure.

Bankrupcty of the Landlord

A Lender Subtenant SNDA drafted as described above will protect the subtenant from losing its leasehold upon a foreclosure of a building mortgage. However, if the building landlord commences (or has commenced against it) a federal bankruptcy proceeding,

there is at least one fact pattern in which the subtenant is exposed to a possible loss of its leasehold.

The federal bankruptcy code gives a bankrupt person or entity the right to reject any unexpired lease or executory contract (by which performance remains due to some extent on both sides).[1] This right is commonly invoked by tenants in bankruptcy, but is also available to landlords in bankruptcy. In order to protect tenants from being evicted (and in keeping with the notion that a lease is, in part, a conveyance, not merely a contract), Section 365(h) of the federal Bankruptcy Code provides that if a landlord rejects a lease the term of which has commenced, the tenant retains its rights under the lease and, while the landlord is released from its affirmative obligations (e.g., repairs, etc.), the tenant is entitled to set off against the rent its damages arising from the failure of the landlord to perform those affirmative obligations.[2] For this reason, landlords do not as a rule reject leases in bankruptcy because there is no economic benefit for them to do so and even if they do, tenants can remain in possession.

Although there is, as far as I know, no court decision on point, it is likely that a bankruptcy court would consider a Landlord Subtenant SNDA to be an executory contract, not a lease, and therefore to be not entitled to the benefit of Section 365(h). Based on this, if the building landlord were to reject the Landlord Subtenant SNDA, the subtenant would have a difficult to value and presumably worthless unsecured damage claim against the building landlord, but would not retain its rights under the Landlord Subtenant SNDA. The mere rejection of the Landlord Subtenant SNDA would not necessarily result in the subtenant's losing its leasehold because, at the time of the rejection, the Prime Lease might remain in effect or the sublandlord might retain possession under Section 365(h), but if the Prime Lease or such possession under Section 365(h) were to be subsequently terminated (e.g., by reason of default thereunder by the sublandlord) the subtenant would no longer be entitled to invoke the Landlord Subtenant SNDA and thus would lose its leasehold.

The Standby Lease does not offer a solution to this problem because, as noted above, Section 365(h) only protects leases the terms of which have commenced, and we are here concerned about a bankruptcy of the building while the Prime Lease remains in effect (and so the term of the Standby Lease has not commenced).[3]

In order to protect the subtenant from a bankruptcy of the building landlord the transaction could be restructured from the start as a true direct lease from the building landlord to the subtenant, as follows:

- The building landlord and the intended subtenant enter into a direct lease (a "Replacement Lease") covering the intended sublease premises for the intended sublease term.
- The building landlord and the existing tenant modify the Prime Lease to exclude the intended sublease premises for the term of the Replacement Lease, i.e., for a term ending upon the expiration or earlier termination of the Replacement Lease.
- The intended subtenant as tenant under the Replacement Lease and the holder of the existing mortgage enter into a traditional subordination, non-disturbance and attornment agreement covering the Replacement Lease.
- The existing tenant guarantees the obligations of the intended subtenant as tenant under the Replacement Lease.
- As necessary, the parties enter into agreements to reproduce the intended economics of the transaction using the modified structure. For example, if (a) the intended subtenant was to have paid a higher rent per square foot, and (b) the landlord was to have received a portion of the subleasing profit, the economics of this structure could be reproduced by (i) setting the per square foot rent under the Replacement Lease to be equal to the sum of (x), the per square foot rent under the Prime Lease, plus (y), the per square foot profit which the tenant would have been required to pay to the building landlord, (ii) excluding the per square foot profit from the tenant guaranty of the Replacement Lease, and (iii) the tenant and the intended subtenant entering into a separate agreement requiring the intended subtenant to make a monthly payment to the tenant equal to the profit which the tenant would have made under the sublease. Other deal economics would require more complicated agreements.

Obviously the Replacement Lease structure can only be employed if both the building landlord and the tenant are sufficiently motivated.

Conclusion

By following the approach outlined in this article, a subtenant can protect itself from losing its leasehold upon a termination of the Prime Lease or a foreclosure of a building mortgage, except in the very unusual case in which the Landlord Subtenant SNDA or Standby Lease is rejected in bankruptcy and then the Prime Lease is subsequently terminated. If the subtenant is unwilling to accept this risk and the building landlord and the tenant are sufficiently motivated, the transaction can restructured as a direct lease from the start, as outlined above.

Endnotes

1. 3 COLLIER ON BANKRUPTCY, ¶ 365.02 (Alan N. Resnick *et al.* eds., 15th ed. rev. 2007).
2. 11 U.S.C. § 365(h) (2009).
3. *Id*.
4. The parties should separately consider each type of termination. For example, the tenant (subtenant) may want to exclude termination of the Prime Lease by the Prime Lease Tenant by reason of Landlord default or may not want to exclude termination of the Prime Lease by the Prime Lease Tenant by reason of fire or other casualty.

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Exhibit A

Suggested Model Term Commencement Provision for Standby Lease

If

(a) prior to [the scheduled expiration date of the Sublease], the term of the Prime Lease shall expire or be terminated with respect to the Premises [defined to mean the premises demised by the sublease and this Standby Lease] for any reason including but not limited to (i) termination by Landlord by reason of default by Prime Lease Tenant, (ii) termination by Prime Lease Tenant by reason of default by Landlord, (iii) exercise by Landlord or Prime Lease Tenant of any termination right or option provided for in the Prime Lease, (iv) voluntary surrender of the Prime Lease, (v) foreclosure of any mortgage (unless the Prime Lease continues in effect between the purchaser in foreclosure and Prime Lease Tenant), and (vi) termination by Landlord by reason of rejection in bankruptcy by Prime Lease Tenant under 11 U.S.C. §365(g), *excluding*, however, any termination of the term of the Prime Lease arising out any exercise by Landlord or Prime Lease Tenant of any termination right or option arising out of any casualty or condemnation,[4] and

(b) immediately prior to such termination, the Sublease was in full force and effect (or Tenant was in legal possession of the Premises pursuant to 11 U.S.C. § 365(h));

then the term of this lease shall commence immediately following such expiration or sooner termination of the term of the Prime Lease and, unless sooner terminated as herein provided or by operation of law, shall expire on [the scheduled expiration date of the sublease], it being understood that unless the conditions of clauses (a) and (b) above are satisfied the term of this lease will never commence. If Landlord shall reject the Prime Lease pursuant to 11 U.S.C. § 365(g) and Prime Lease Tenant shall remain in legal possession of the Premises pursuant to 11 U.S.C. § 365(h) then, for purpose of the preceding sentence, the term "Prime Lease" shall include such continuing legal possession.

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Ethics Opinion No. 830

Committee on Professional Ethics of the New York State Bar Association

6/11/09

Topic: Solicitation; advertising; public education for laypersons

Digest: A lawyer may ethically contact lay organizations to inform them that he is available as a public speaker on legal topics, but must adhere to advertising and solicitation requirements under the Rules where the communication is made expressly to encourage participants to retain the lawyer or law firm.

Rules: 1.0(a), 7.1(a), 7.3(a), (q), (r)

Question

1. May a lawyer contact an organization of laymen and inform them of his availability as a public speaker on legal topics?

Opinion

2. Before *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), New York's Disciplinary Rules prohibited attorneys from engaging in any and all forms of solicitation. In N.Y. State 379 (1975), this Committee said that those pre-*Bates* Disciplinary Rules prohibited an attorney from initiating any contact to lay organizations. However, as explained in N.Y. State 508 (1979), the New York Code of Professional Responsibility was substantially revised in 1978 in the light of *Bates.* As amended, DR 2-103(A) prohibited only those solicitations that were "in violation of any statute or court rule." Also before *Bates*, certain Ethical Considerations in the Code permitted lawyers to participate only in educational programs conducted or sponsored "under proper auspices" (such as bar associations). After *Bates*, the Ethical Considerations were amended and those restrictions were eliminated.

3. Accordingly, N.Y. State 508 went on to determine that a law firm may organize and promote by mail legal seminars expressly designed for non-lawyers. The Committee explained that "with advertising now permitted and the requirements of the Code relating to sponsorship now repealed, much of the rationale for the traditional prohibition on lawyers organizing and promoting legal seminars, or other programs of public education for lay persons, has been removed." The Committee noted, however, that it did not have the power to pass on whether such direct mailing constituted improper solicitation under New York Judiciary Law § 479, or whether § 479 was constitutional under *Bates* and its progeny.

4. Today, Rules 7.1 and 7.3 of the New York Rules of Professional Conduct, which took effect on April 1, 2009, control attorney advertisements and solicitations. Specifically, Rule 7.1 generally regulates "advertising" by lawyers and Rule 7.3 regulates "solicitation" by lawyers (which is a special form of lawyer advertising).

5. An "advertisement" is defined by Rule 1.0(a) (in the Terminology rule) as follows:

> "Advertisement" means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.

6. "Solicitation" is defined in Rule 7.3(b) as follows:

> For purposes of this Rule [7.3], "solicitation" means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.

7. Rule 7.3(a) of the Code prohibits a lawyer from engaging in "solicitation" by the following means (among others):

> (1) by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client; or

(2) by any form of communication if:

(i) the communication or contact violates Rule 4.5, Rule 7.1(a), or paragraph (e) of this Rule.

8 Rule 7.1(a) prohibits any lawyer advertising that "(1) contains statements or claims that are false, deceptive or misleading; or (2) violates a Rule."

9. Comment 9 to Rule 7.1 expressly recognizes that "lawyers should encourage and participate in educational and public-relations programs concerning the legal system, with particular reference to legal problems that frequently arise." Comment 9 further notes that "[a] lawyer's participation in an educational program is ordinarily not considered to be advertising because its primary purpose is to educate and inform rather than to attract clients." However, "a program might be considered to be advertising if, in addition to its educational component, participants or recipients are expressly encouraged to hire the lawyer or law firm." In that case, Rules 7.1 and 7.3 would regulate the communications. (The Comments have been adopted only by the New York State Bar Association, not by the Courts.)

10. We also note that Rule 7.1(q) expressly permits a lawyer to "accept employment that results from participation in activities designed to educate the public to recognize legal problems, to make intelligent selection of counsel or to utilize available legal services." Further, Rule 7.1(r) provides that "[w]ithout affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as the lawyer does not undertake to give individual advice."

11. Applying these rules, definitions, and Comment 9 to this inquiry, a lawyer may contact a lay organization to alert the organization that the lawyer is available as a public speaker on legal topics. However, if the communication is made expressly to encourage participants in the program to retain the lawyer or law firm, then the communication falls within the definitions of "advertisement" and "solicitation," and such communications concerning the program must comply with Rules 7.1 and 7.3.

12. As previously noted, this Committee lacks jurisdiction to determine whether such communications are permitted under § 479 of the Judiciary Law, which prohibits solicitation by attorneys, and likewise lacks jurisdiction to determine whether § 479 remains constitutional in light of *Bates* and its progeny.

Conclusion

13. For the reasons stated, and subject to the qualifications set forth above, a lawyer may ethically contact lay organizations to inform them that he or she is available as a public speaker on legal topics.

(Inquiry No. 8-09)

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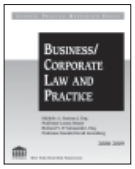

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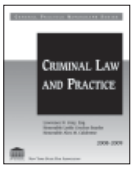

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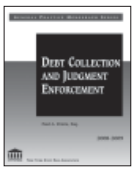

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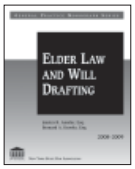

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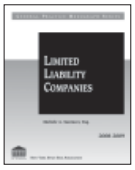

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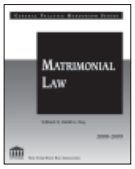

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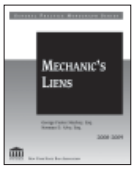

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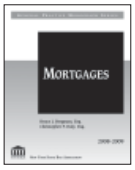

Authors: Bruce J Bergman, Esq.; Christopher P. Daly, Esq.
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