NYSBA SPRING 2015 | VOL. 25 | NO. 2

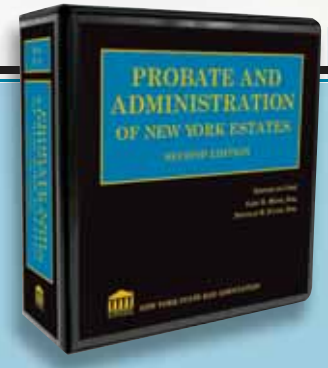
Elder and Special Needs Law Journal

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

Inside

NYSBA

From the NYSBA Book Store



Probate and Administration of New York Estates,
Second Edition

EDITORS-IN-CHIEF
Douglas H. Evans, Esq.
Sullivan & Cromwell LLP, NY

Gary R. Mund, Esq.
Attorney-at-law, NY

PRODUCT INFO AND PRICES
2015 / 1,096 PP., loose-leaf
PN: 40054

NYSBA Members	**$185**
List Price	$220

$5.95 shipping and handling within the continental U.S. The cost for shipping and handling outside the continental U.S. will be based on destination and added to your order. Prices do not include applicable sales tax.

Probate and Administration of New York Estates is a compendium of vital information covering all phases of estate administration, from securing the will through final accounting. It is a handy, single-volume source for quick answers to both straightforward and perplexing estate administration issues, and an authoritative source of background information for further research, if necessary.

This revised second edition includes substantial updates and rewrites, bringing all topics up to the current state of the law, and in particular, addresses many thorny tax issues in the ever-changing landscape of estate taxation.

Get the Information Edge

NEW YORK STATE BAR ASSOCIATION
1.800.582.2452 www.nysba.org/pubs
Mention Code: PUB3066

NYSBA

Table of Contents

Message from the Chair

As I write this message for the Spring *Journal*, I am looking out the window at another snowstorm. The winter certainly has been difficult and disruptive. Our Annual Meeting, scheduled for January 27, 2015, was cancelled due to the weather. Even on the rescheduled date of February 9, 2015, the weather did not cooperate, and attendance was a bit lower than it had been in prior years. Nonetheless, the Annual Meeting was a huge success and those who were able to attend benefited from the terrific program that was presented.

Although in the midst of a snowstorm it is hard to imagine that spring will ever arrive, it will be upon us before we know it and my term as Chair of the Section will soon come to an end. Looking back, much has been accomplished, and much remains to be done.

We completed our first year under our new name as the "Elder Law and Special Needs Section." More of our members are expanding their practices into the area of special needs. Our Special Needs Planning Committee remains active, and we added a new permanent Special Education Committee chaired this year by **Adrienne Arkontaky**.

Elder abuse continues to be a major issue in our society. This year we focused on raising awareness of this issue among our members. We strengthened our Elder Abuse Committee chaired by **Joy Solomon** and dedicated a portion of the program at our Fall Meeting to this important topic.

On August 5, 2014, the New York State Department of Health issued a policy directive (GIS 14 MA/15) that effectively prohibited married individuals receiving MLTC services from contributing their excess income to a supplemental needs trust. This directive was premised upon New York State's interpretation of Section 2404 of the federal Affordable Care Act. Our Section challenged the legality of this directive, and as a result the Department of Health rescinded its directive. This is an example of how our Section's efforts have a direct benefit on the lives of the elderly and disabled.

Our Executive Committee decided that it will run the Spring UnProgram every other year instead of every year. This year, there will be no UnProgram but it is scheduled to return in the spring of 2016.

It is essential for the continued viability of our Section to attract younger members. This year, discounted rates were offered to attorneys admitted five years or less at all of our CLE programs. It was a pleasure to meet so many new members at these programs, and I am encouraged for the future of our Section.

All three of our CLE programs were a tremendous success, in large part due to the efforts of the program co-chairs. I am fortunate to have had such capable people chairing each of these meetings and owe them all a debt of gratitude.

The Summer Meeting was held at Hersheypark, Hershey, Pennsylvania. In addition to the timely and informative CLE presentations, it was a real family event with approximately fifty children in attendance. The meeting could not have been the success that it was without the efforts of program Co-Chairs **Joseph A. Greenman** and **Sara Meyers**. They did a terrific job and I thank them for it.

Our Fall Meeting was held at the Doubletree Hotel in Tarrytown, New York. Thanks to our program Co-Chairs, **Jeffrey Asher** and **Judith Nolfo McKenna**, the program was excellent. There was standing room only with more than 200 members attending.

Our Annual Meeting completed the trio of successful CLE programs. Program Co-Chairs, **Fern Finkel** and **David Okrent** designed a fabulous program. There were more than 350 attorneys in attendance despite the rescheduling and the inclement weather on the day of the program.

I am grateful for the efforts of our fabulous NYSBA staff, **Lisa Bataille**, **Kathy Heider**, **Adriana Favreau** and **Lori Nicoll**. Without them, our programs could not have been as successful as they were.

As noted above, much remains to be done. Our Section is now working tirelessly on responses to the Governor's 2015 proposed budget. The budget contains two provisions that are of particular concern to persons in need of Medicaid services. The first provision is the elimination of spousal refusal for the community Medicaid program. The second provision is to eliminate temporary personal care services to people in immediate need.

Although under Federal law there is a right of spousal refusal for Medicaid nursing home benefits, the State is not required to permit spousal refusal in community Medicaid cases. The proposed change is to eliminate the right of spousal refusal in community Medicaid cases unless the spouse both refuses to support and is absent from the home. If enacted, this provision will encourage separation or divorce and force many individuals into nursing homes.

In a recent case, *Konstantinov v. Daines*, the Appellate Division, First Department, declared that the provision of emergency care to persons who are in immedi-

ate need of personal care services and are applying for Medicaid is required under SSL §133. The proposed budget provisions would reverse the Court's decision. As a result, persons in immediate need of temporary personal care services will be left to languish in a hospital or at home without care until the Medicaid application is approved and services are commenced. Even in the best of circumstances, this will mean that persons in need of personal care services will not receive such services for at least four months. This, of course, is an unacceptable situation.

On February 26, 2015, members of our Section went to Albany to lobby the legislature and the Governor's office to defeat these proposed budget changes. The members who participated with me in this lobbying effort were the Co-Chairs of our Legislation Committee, **Matthew Nolfo** and **Ira Salzman**, as well as **JulieAnn Calareso**, **David Goldfarb**, **Valerie Bogart**, **Amy O'Connor**, **Rene Reixach**, **Deepankar Mukerji**, **Stephen Silverberg**, **Jeffrey Asher**, **Tara Anne Pleat**, **Lou Pierro** and **Judith Grimaldi**. Our members did an excellent job in presenting our Section's concerns and I thank each of them for devoting their valuable time and efforts to advance our Section's interests. I am hopeful that these proposed budget provisions will be defeated.

There are so many people who deserve my thanks for all of their hard work and dedication this past year. From committee chairs, vice-chairs and district delegates, the list goes on and on. Although I cannot list every name here, each of you has my sincere thanks.

I would like to give special thanks, however, to my fellow officers, **JulieAnn Calareso**, **David Goldfarb**, **Martin Hersh**, **Judith Grimaldi** and **Martin Finn**, as well as our immediate past Chair **Frances M. Pantaleo**. It has been a privilege and pleasure to serve with these dedicated and competent professionals. I would also like to give special thanks to **David Kronenberg** and **Adrienne Arkontaky** for the wonderful job that they have done with *Elder and Special Needs Law Journal*.

One year passes by very quickly, and as of June 1, 2015, **JulieAnn Calareso** will replace me as Chair of our Section. Having served with JulieAnn as an officer of our Section, I am confident that our Section will be in good hands and that she will have a successful year as Chair. I know that JulieAnn will be able to rely upon the officers that served this year as well as our incoming Treasurer, **Tara Anne Pleat**, for the support that she will need in the upcoming year.

It has been an honor and a privilege to serve as Chair of our Section. I am, as all of you should be, proud to be an Elder Law and Special Needs attorney with the opportunity to represent some of the most vulnerable members of our society. Although my term as Chair is coming to an end, I look forward to my continued involvement with our Section in the years to come.

I am always available to you if you have any questions or concerns. I can be reached at raw@hwclaw.com or at (631) 582-5151.

Richard A. Weinblatt

Message from the Co-Editors in Chief

Dear Readers,

Here we are, finally! Spring has come and we welcome the change of season. And with the change of season, it is that time again to pass the torch to new Section leaders including new editors of this prestigious *Journal*. It is incredible how fast time flies. It seems like only yesterday, we were trying to learn to navigate our way through the process of editing the *Elder and Special Needs Law Journal*, worried that we would never be able to fill the shoes of our predecessors. We both learned so much in the process and gained a tremendous respect for all of the previous editors and Section leaders.

Tara Anne Pleat and Judy Nolfo McKenna, two very highly regarded and active members of our Executive Committee, have accepted appointments to be co-editors. We are confident that both Tara and Judy will bring fresh ideas to the table and we are also confident that we leave this very special publication in great hands. However, before we say goodbye, we want to thank our incredible leadership, including David T. Stapleton who first entrusted us with this appointment; Fran Pantaleo, who had the vision to lead a movement to change the Section's name to capture the essence of our work with individuals with special needs, and finally Richard Weinblatt, who sparked new interest in our Section, secured vital legislative victories through his leadership and supported the establishment of new committees based on the changing needs of our membership. We also congratulate JulieAnn Calareso on her upcoming appointment as Chair of the Section. We are so honored to be part of this team.

We also thank our editorial staff including Britt Burner, our Production Editor; Lee A. Hoffman, Sara Meyers, Tara Anne Pleat, Patricia Shevy, George Tilschner and Lauren Mechaly. Their patience with our sometimes "short" deadlines is so deeply appreciated. We also want to thank the tireless staff of the Publications Department of the New York State Bar Association. Wendy Harbour and Lyn Curtis, we could not have done this without you. Thank you Wendy and Lyn for helping two new editors "learn the ropes" and for always producing such a great publication that we are all so very proud of. We also thank, of course, the many authors including our columnists who provided interesting and informative articles and gave their valuable time to contribute to the *Journal*.

We both are so honored to be part of this endeavor and it is truly a bittersweet time for both of us. As always, we encourage the membership to contribute to the *Journal*, volunteer to edit or write a column. We look forward to moving into new leadership roles but will cherish forever the time we spent in these positions.

Enjoy this Spring edition with articles including "Ethics and Elder Abuse: An Attorney's Obligations" by Malya Levin and Deirdre Lok, continuing the ongoing series brought to you by our Section's Elder Abuse Committee; "Attorney Confidentiality in the Cyber Age" by Steven N. Solomon offering valuable tips and considerations for protecting our data and attorney-client relationship when using today's modern technology; "A Brief Guide to Benchmark Medicaid Coverage" by David Goldfarb; A letter to our Section from Jason A. Helgerson, Medicaid Director at the New York State Department of Health, informing us about updates to the New York State Partnership for Long-Term Care; "The Transfer of an Incapacitated Person Outside the Jurisdiction of New York State" by Leslie Francis and Christine Mooney, with a focus on the Uniform Adult Guardianship and Protective Proceedings Act; "Understanding the 'Undue' in 'Undue Influence'" by Anthony Enea; "Special Education Law Lingo" by Eileen Libutti, Jennifer Frankola and Julie Ruggieri offering a primer on the myriad acronyms in Special Education law; and, finally, Ethics Poll #11 brought to us by our Section's Ethics Committee and written and compiled by Natalie J. Kaplan, Phillip Tribble and Judith Raskin.

Enjoy the warm weather and for one last time, happy reading and writing…….

Regards,
Adrienne and David

Ethics and Elder Abuse: An Attorney's Obligations—Part 1

By Malya Levin and Deirdre Lok

This article is part of an ongoing series brought to you by the Section's Elder Abuse Committee. It is based on a presentation given at the Fall 2014 Elder Law and Special Needs Section Meeting.

Malya Levin

For attorneys, elder abuse is often inextricably linked with ethical dilemmas. Wherever a lawyer learns or suspects that elder abuse is present, that lawyer is faced with a host of difficult questions and possible responses. The way an attorney responds to such cases can have a significant impact on the relationship between the attorney and the client in question, the attorney's reputation and the life of the older adult client. It is not an overstatement to say that the way an attorney chooses to respond to cases of suspected elder abuse can define that attorney's career. Moreover, given that one out of every ten people aged 60 and older who lives at home suffers abuse, neglect or exploitation,[1] this issue is highly relevant to all attorneys serving the older adult population.

These observations reflect the attitudes of elder law attorneys across the country. In a national study, elder law attorneys listed complex ethical issues and elder abuse as two of the most frequent issues that arise in their practices. These are also two of the areas where attorneys most feel that they need additional continuing legal education.[2] Taken together, these statistics seem to reflect elder law attorneys' perception that they are not sufficiently equipped to respond to the frequent scenarios in which they are presented with cases of potential elder abuse and the ethical quandaries that often accompany them. Difficult ethical situations are often much less difficult when attorneys prioritize educating themselves about the frameworks that should govern their conduct and structure their practices with an eye towards protecting themselves and their clients.

Ethical dilemmas can begin as soon as an older adult walks into an attorney's office. Consider the following scenario:

Chelsea brings in her mother, Hillary, to a local elder law attorney's office to change Hillary's will. Chelsea speaks for her mother during the intake and advises the attorney that she will become the sole beneficiary under the new will, and that it will effectively exclude her two brothers. Hillary, at age 72, seems physically mobile and healthy, but seemed slightly confused or forgetful when the conversation turned to the specifics of her financial matters. She seemed to have a dependent but caring relationship with her daughter. The attorney agrees to make the changes to the will, and set up a time to review the documents with Hillary. But as they leave, the attorney overhears Chelsea tell an associate to send the bill to her. Should the attorney accept payment from Chelsea? More importantly, who is the client and who decides the terms of Hillary's will?

Deirdre Lok

Case Analysis

An attorney must first ascertain who the client is in this scenario. In this case, though Chelsea may have sought out the attorney's services, scheduled the appointment and given most of the direction regarding the matter, the will that is being created is still Hillary's and the provisions it makes affect her assets. Therefore, she is the client. All directives regarding the terms of Hillary's will must come from Hillary.

The New York Rules of Professional Conduct generally prohibit an attorney from accepting payment for legal services from a third party. If an attorney does accept payment from a third party, three conditions must be fulfilled.[3] First, the attorney must obtain written consent from the client. In this case, the attorney never met with Hillary privately, and therefore had no opportunity to discuss the payment arrangement and obtain Hillary's consent. Second, the payment structure must not interfere with the "lawyer's independent professional judgment or with the client-lawyer relationship."[4] In this case, Chelsea has taken control of the relationship by instructing the attorney. Finally, the attorney must protect the client's confidential information. Here, the attorney has not properly established attorney-client confidentiality by meeting with Hillary alone and giving her the opportunity to disclose any information she wants to share. Therefore, based on the facts above, the attorney may not accept payment from Chelsea.

Best Practices

There are several best practices that elder law attorneys can put in place as part of their initial client intake that will help prevent situations like the one described above. First, an attorney should have the universal practice of meeting with a new client alone. This practice can be explained in advance to relatives or friends who call on behalf of new clients. During this initial meeting, an attorney should discuss the fee structure and any other basics of the attorney-client relationship. This should include a discussion about any family members, friends or caregivers that the client would like to assist or advise them over the course of the representation. At times, a trusted family member or friend can be tremendously helpful in making the older adult comfortable and providing advice and support.[5] However, it is also possible for an older adult to feel pressured to make legal decisions he or she is not comfortable with and are not in that person's best interest because of an overbearing third party. This can be particularly devastating when the transaction is actually part of a larger pattern of elder abuse intended to harm the older adult. The attorney can independently evaluate the client's description of the relationship and decide if it is appropriate to proceed.

This initial meeting is also an appropriate time to establish attorney-client confidentiality and to give the client the opportunity to share in confidence anything the client feels is relevant to the representation. This should include the basics of the matter for which the attorney is being retained and any reservations or mixed feelings that the client has about the matter. The client's disclosures, and even non-verbal cues when describing the work to be done or relationships with family members, may give the attorney valuable information about whether elder abuse may be present.

If an attorney does get an inkling from this conversation that the client may be a victim of elder abuse, the attorney must continue, gently but directly, to ask questions of the older adult in order to better understand the situation and to be able to advise the client appropriately. This may involve a change in the work the attorney will do or even a refusal by the attorney to complete the work. It also may be appropriate to provide the client with local non-legal resources that may be able to assist. A list of community elder abuse resources, organized by Section District, can be found on the Elder Law Section's website at http://www.nysba.org/ElderAbuseResourceGuide/.

Finally, an initial confidential meeting is an appropriate time for an attorney to take note of any possible capacity issues that a client may exhibit. When a third party is present at an initial meeting and does a good deal of the talking, it is far easier for capacity issues to be concealed with social skills or cooperativeness. The opportunity to review the basics of the representation with the older adult alone will allow the lawyer to spot potential capacity issues much more easily. A scenario in which a third party brings an older adult with questionable capacity to see an attorney, and, as in Hillary's case, wants the attorney to do work that benefits the third party, contains a big red flag for elder abuse which should be further explored.

In Part II of Elder Abuse and Ethics we will discuss an attorney's ethical obligations related to capacity issues and assessment in more depth, and some best practices that will assist elder law attorneys in addressing elder abuse cases where a victim's capacity is at issue.

Endnotes

1. U.S. Dept. of Justice and Health and Human Services. Elder Justice Roadmap Project Report: Setting Priorities to Respond to an Emergent Public Health, Justice, Financial & Social Crisis, June 2014.
2. Nina A. Kohn & Edward D. Spurgeon, *A Call To Action On Elder Law Education: An Assessment and Recommendations Based On A National Survey*, 21 U. Ill. Elder L.J., 345 (2014).
3. 22 NYCRR 1200 Rule 1.8(f).
4. *Id*. at 1.8(f)(2). See also 22 NYCRR 1200 Rule 5.4(c).
5. See NY CPL Law §190.25(3)(h). This new law, enacted in September 2014, recognizes of the critical role that supportive caregivers provide. When a vulnerable elderly person testifies before a grand jury, the law allows a social worker or informal caregiver to accompany the older person throughout the proceedings.

Malya Levin is a Staff Attorney at The Harry and Jeanette Weinberg Center for Elder Abuse Prevention at the Hebrew Home at Riverdale. She is the inaugural recipient of the Weinberg Center's Brooklyn Law School and David Berg Center Law and Aging Fellowship. She graduated from Brooklyn Law School *cum laude* in June 2012.

Deirdre Lok is the Assistant Director and General Counsel for The Harry and Jeanette Weinberg Center for Elder Abuse Prevention at the Hebrew Home at Riverdale. Prior to joining The Weinberg Center, Ms. Lok was a Deputy Prosecuting Attorney in Oahu, Hawaii. Ms. Lok graduated *magna cum laude* from New York University and received her law degree from Brooklyn Law School.

Attorney Confidentiality in the Cyber Age

By Steven N. Solomon

In today's world most lawyers use computers, the internet, cloud storage, e-mail, text messaging and portable devices that can access all of these technological wonders. These devices and modalities have become an integral part of the practice of law. While generally a boon to lawyers they are not without their pitfalls. They have allowed us to collect a tremendous amount of data that can be used in the representation of our clients; however, they also created the potential where this data can be inadvertently disclosed, to the detriment of not just our client but to our law office.

A lost or stolen laptop may contain not just Attorney-Client information and Attorney Work Product but also medical records, Social Security information, bank account numbers or other information that could lead to identity theft or fraud, against our client or others. Even if this data is not physically on a laptop or smart phone, the ability to access it remotely from the device is present.

Our communications can also put confidentiality at risk. Even an inadvertent e-mail, fax or text message to the wrong individual could have disastrous consequences. An email sent to or from your office can have its content scanned if anyone is using the email services of Gmail,[1] Yahoo,[2] or Microsoft,[3] to name a few.

Surprisingly, The New York Rules of Professional Conduct only state that, *"A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person...."*[4] The body of the rules is silent, though, as to how we are to handle maintaining that confidentiality. It is not until you look at the comments that you will read about protecting confidentiality but only as it applies to communication:

> When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to use a means of communication or security measures not required by this Rule, or may give informed consent (as in an engagement letter or similar document) to the use of means or measures that would otherwise be prohibited by this Rule.[5]

In trying to determine how best to protect the data that we have obtained, it would be prudent to look at the steps that have been implemented by medical entities under HIPAA. The U.S. Department of Health and Human Services Office of Civil Rights has come out with The Privacy Rule[6] and The Security Rule,[7] in order to help protect and keep health information private.

None of the rules issued by the Office of Civil Rights go into detail of how to protect the data but rather concentrate on identifying where the systems or procedures may be weak. They have left the implementation up to the covered entities (i.e., doctors, hospitals and other healthcare entities) and their Business Associates (Attorneys, Billing Services etc…) to figure out the type of security system or measures to take.

It should be noted that many law firms may be subject to HIPAA security rules depending on their type of practice and what data they have. A violation of the rules or a breach of the data could be extremely expensive for the law firm. The subsequent paragraphs will attempt to provide (relatively) simple procedures that all lawyers can implement to protect confidentiality:

For your laptops, tablets, smartphones or other mobile devices that can store or access data, the first line of defense is to password protect the device. A simple password will prevent the casual exposure of any information. It of course goes without saying that the more complex the password the harder it is for someone to get access to the data (this means don't use 123456 or anything similar).

The next step that needs to be done is to encrypt the storage system on your mobile device. For those using iPhones and iPads, this can be done simply by

setting your pass code.[8] For all but the newest Android devices you must separately encrypt the storage by manually going into the Security settings.[9] For laptops and even desktop computers the hard drive can be easily encrypted. For Macintosh computers the procedure is pretty straightforward in that you just need to go to the Security & Privacy pane of System Preferences to turn it on.[10] For Windows machines you will be able to use the built-in encryption depending on the version that you have. If you have a compatible Windows version, it is also a straightforward procedure.[11] Before proceeding with any of the above, **make sure to create a Backup** just in case something goes wrong. It is also important to encrypt any portable flash drives as these can be easily lost. If you wish to read more about why you should use encryption, you can read an article by Chris Hoffman entitled, *Not Just For Paranoids: 4 Reasons To Encrypt Your Digital Life*.[12] Should you wish an alternative to the built-in encryption methods take a look at an article by Joel Lee, entitled, *TrueCrypt Is Dead: 4 Disk Encryption Alternatives For Windows*.[13]

Secure communication with our client, colleagues, or anyone of import, for us to do our work properly, is paramount. As stated above, e-mail may not be secure to send messages or files. The use of e-mail has been addressed by the NYSBA in Ethics Opinion #709.[14] Section 4D of this opinion, from 1998, allows for regular e-mail communication but does note that "A lawyer who uses Internet e-mail must also stay abreast of this evolving technology to assess any changes in the likelihood of interception as well as the availability of improved technologies that may reduce such risks…."[15]

The big complication with secure communication is the fact that all parties must be using the same system to communicate. Think of it as all parties needing to speak the same foreign language. For e-mail security, there is PGP/OpenPGP (PGP[16] is the commercial version while OpenPGP[17] is the free open source version). This is a type of encryption that can be used with any type of e-mail service and can also be used to encrypt and send files. The downside is that it is not the most user friendly system to implement.

Hush Mail is an e-mail service that will send encrypted mail to an individual and will let them know that there is a message waiting. Upon being notified they will then need to go to Hush Mail and answer a question correctly that you had created so as to prove their identity.[18] Virtru is a similar service in that the recipient must prove his or her identity before gaining access to the e-mail.[19] The big difference with Virtru is that it is an e-mail add-on and will work with web-based e-mail like Gmail, Yahoo and Outlook, and is also able to be used in various web browsers, Outlook, Mac Mail, and mobile devices.[20]

For more instantaneous communication, there are secure chat and texting apps. TextSecure[21] and ChatSecure[22] are two such apps that can be used with Android and Apple mobile devices. If you are at your computer there is Adium[23] for Mac and Pidgin[24] for Windows. These Instant Messaging clients can work with established services like AIM, Jabber and many others.

For those overly concerned with mobile phone call security, there is RedPhone for Android[25] and Signal for iPhone.[26] These are both made by the same company and allow for cross platform secure communication, as long as all parties are using the app.

In conclusion, it is most important to realize what data/information you have and how you plan to store, transport, transfer or use it. This should guide you on what you need to do in order to secure the information. Failing to take the most basic steps in securing your devices is an open invitation to disaster. Remember that a device can be easily replaced but that the data contained within it can have disastrous effects not just to our clients but to ourselves as well should that information be exposed.

Endnotes

1. David Cerny, *Google: We scan all Gmail messages*, available at http://rt.com/usa/google-terms-service-scan-964/ (last updated Apr. 17, 2014).
2. *Yahoo Mail FAQ*, https://info.yahoo.com/privacy/us/yahoo/mail/ymailfaq/ (accessed Jan. 8, 2015).
3. Christopher Zara, *Microsoft Rips Email-Snooping Google, But Is Outlook Any More Private Than Gmail?*, International Business Times, http://www.ibtimes.com/microsoft-rips-email-snooping-google-outlook-any-more-private-gmail-1094118 (Feb. 19, 2013).
4. New York Rules of Professional Conduct §1.6(a), http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=50671 (accessed Jan. 8, 2015).
5. *Id.* at §1.6, Comment [11]).
6. The Privacy Rule, 45 CFR Part 160 and Subparts A and E of Part 164, http://www.gpo.gov/fdsys/pkg/CFR-2007-title45-vol1/content-detail.html (follow hyperlink to individual sections of Federal Register or download complete Title 45, Oct. 1, 2007).
7. *Id.* at 45 CFR Part 160 and Subparts A and C of Part 164.
8. Apple, *iOS: Understanding data protection, Learn how to enable and verify data protection,* http://support.apple.com/en-us/HT202064 (accessed Jan. 8, 2015).
9. Jill Scharr, *How to Encrypt Your Android Phone or Tablet*, Tom's Guide, http://www.tomsguide.com/us/how-to-encrypt-android-device,news-17774.html (Oct. 28, 2013).
10. *OS X: About Filevault 2*, http://support.apple.com/en-us/HT4790 (accessed Jan. 8, 2015).
11. Ian Paul, *A beginner's guide to BitLocker, Windows' built-in encryption tool,* PC World, http://www.pcworld.com/article/2308725/a-beginners-guide-to-bitlocker-windows-built-in-encryption-tool.html (May 30, 2014).
12. Chris Hoffman, *Not Just For Paranoids: 4 Reasons To Encrypt Your Digital Life*, MakeUseOf, http://www.makeuseof.com/tag/not-just-for-paranoids-4-reasons-to-encrypt-your-digital-life/ (Mar. 29, 2013).
13. Joel Lee, *TrueCrypt Is Dead: 4 Disk Encryption Alternatives For Windows*, MakeUseOF, http://www.makeuseof.com/tag/

truecrypt-dead-4-disk-encryption-alternatives-windows/ (Jun. 30, 2014).

14. New York State Bar Association Committee on Professional Ethics Opinion #709 - 09/16/1998 (55-97), http://old.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&CONTENTID=6317&TEMPLATE=/CM/ContentDisplay.cfm (accessed Jan. 8, 2015).
15. *Id*.
16. Symantec Corp., http://www.symantec.com/products-solutions/families/?fid=encryption (accessed Jan. 8, 2015).
17. GnuPG Project, https://www.gnupg.org/ (accessed Jan. 8, 2015).
18. Hush Communications Canada Inc., https://www.hushmail.com/about/technology/how-it-works/ (accessed Jan. 8, 2015).
19. Virtru Corp., https://www.virtru.com/how-it-works (accessed Jan. 8, 2015).
20. Virtru Corp., https://www.virtru.com/other-platforms (accessed Jan. 8, 2015).
21. Whisper Systems, https://whispersystems.org/#encrypted_texts (accessed Jan. 8, 2015).
22. The Guardian Project, https://guardianproject.info/apps/chatsecure (accessed Jan. 8, 2015).
23. Adium Team, https://www.adium.im/ (accessed Jan. 8, 2015).
24. Pidgin, https://pidgin.im/ (accessed Jan. 8, 2015).
25. Whisper Systems, https://whispersystems.org/#privacy (accessed Jan. 8, 2015).
26. Whisper Systems, https://whispersystems.org/blog/signal/ (accessed Jan. 8, 2015).

Steven N. Solomon is the founder of Solomon Law & Consulting, PLLC, a healthcare and privacy law firm located in NYC. Besides being an attorney, he is also a licensed Doctor of Podiatric Medicine and additionally holds a degree in Computer Science. Should you have any questions please feel free to contact him at ssolomon@DrSolomonLaw.com or (646) 679-4077.

The New York Bar Foundation Announces The Honorable Joel K. Asarch Scholarship Recipients

The New York Bar Foundation has announced the law student recipients of fellowship and scholaship programs administered through the Foundation.

The awards offer law students valuable experience assisting attorneys in different aspects of the legal profession. The funding is made possible by the support of sections of the New York State Bar Association and other donors.

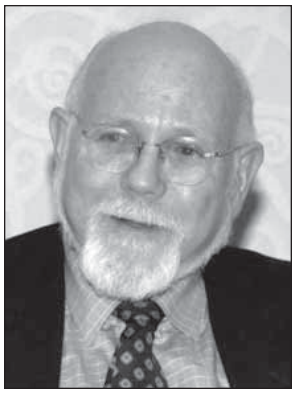
The Honorable Joel K. Asarch Scholarship of the Elder Law and Special Needs Section encourages law students, through an elder law clinic experience, to learn about important legislative developments, regulations, and case laws impacting the elderly and to assist with representation to elderly clients struggling with a variety of legal issues and problems related to aging and incapacity. Two $2,500 scholarships were awarded. The recipients are:

Vanessa Cavallaro, Touro Law School. "I am very honored and grateful to receive the 2015 Honorable Joel K. Asarch Elder Law and Special Needs Section Scholarship. I have heard what a special person Judge Asarch was within the Touro Law Center and greater legal community. I am honored to continue my advocacy work for the aging population in the name of someone so esteemed. Receiving this award is a major highlight of my law school career and one I will remember fondly. This scholarship has enabled me to focus on schoolwork instead of the financial constraints of tuition. I thank the New York Bar Foundation, and Elder Law and Special Needs Section for selecting me to receive their annual scholarship, I look forward to participating in this section of the New York State Bar Association throughout my career."

Chelsea Breakstone, City University of New York. "The New York Bar Foundation's Honorable Joel K. Asarch Elder Law and Special Needs Section Scholarship is an essential source of funding to support me in interning this semester with the Legal Aid Society and co-authoring a scholarly article on low-income elderly and aging populations faced with guardianship proceedings. I am very humbled by the award and thankful to all those involved. I am looking forward to continuing the work started as a student intern in CUNY's Elder Law Clinic by pursuing a career serving the low-income elderly and aging populations of New York."

A Brief Guide to Benchmark Medicaid Coverage

By David Goldfarb



The Affordable Care Act expanded Medicaid coverage beyond traditional Medicaid beneficiaries. In New York, many of the people eligible under the expansion were already eligible under existing New York Medicaid programs such as Family Health Plus. Under expanded Medicaid there are two categories of Medicaid: Benchmark Coverage and Standard Coverage.[1] "Benchmark Coverage" is now defined in Social Services Law § 365-a(1); "Standard Coverage" replaces the prior traditional Medicaid categories and is now also defined in Social Services Law § 365-a(1).

"Benchmark Coverage" is the expanded coverage under the federal Affordable Care Act.[2] This expanded coverage is based on income eligibility and tied to an applicant's Modified Adjusted Gross Income (MAGI).[3] Benchmark coverage replaces Family Health Plus. Family Health Plus (Social Services Law § 369-ee) is repealed effective January 1, 2015; employer partnerships for family health plus (Social Services Law § 369-ff) were repealed effective January 1, 2014. Family Health Plus was phased out as persons began to receive coverage under the Affordable Care Act.[4] Like Family Health Plus, Benchmark Medicaid has no resource test and does not allow a spend down to income eligibility.

The Benchmark benefit is similar to the Medicaid Standard Coverage benefit but does not include institutional long term care.[5] Since Benchmark Medicaid does not include the aged, blind or disabled who are eligible for Standard Medicaid, long term care services are generally not applicable. However "medically frail" individuals who are otherwise entitled to Benchmark Coverage and who need long term nursing home services can remain in their MAGI eligibility group and receive nursing home care. These individuals are not required to have a disability review, have no resource test and are not subject to a transfer of asset look-back period.[6]

There are basically four groups under Benchmark Coverage.[7] **These groups do not allow a spend down to the income eligibility level**. For a list of MAGI and non-MAGI eligibility groups see Attachment II to 13 OHIP/ADM 03. The groups are as follows:

1. The adult group consists of individuals between age 19 and 65, not pregnant, not entitled to enroll in Medicare Part A or B, and not otherwise eligible for and enrolled in mandatory coverage under the State's Medicaid State Plan. Income eligibility for the adult group is 138% of the Federal Poverty Level (FPL) (this includes a 5% income disregard).
2. Pregnant women and infants under one year of age are eligible for Benchmark Medicaid with MAGI household income up to 223% of the FPL.
3. Children at least one year of age but younger than nineteen years of age are Benchmark Medicaid eligible with MAGI household income up to 154% of the FPL.
4. An individual who is a pregnant woman or a member of a family that contains a dependent child living with a parent or other caretaker relative is eligible for Medicaid under the Low Income Families (LIF) category of assistance (this group is also eligible for Medicaid at the higher 138% of FPL).

The FPL for 2015 for a single individual is $11,770 per year or $980.83 per month. However eligibility for these groups also depends on household size.[8]

MAGI-based income is based on IRC Section 36B(d)(2)(B). MAGI budget methodology uses income tax rules; therefore, all deductions allowed by the Internal Revenue Service (IRS) are allowed when calculating self-employment income. Previously depreciation, depletion, amortization and 179 expenses were added back into self-employment income for ADC-related and single individuals and childless couples.[9] The modifications to adjusted gross income are: excluded foreign income, tax exempt interest, and non-taxable Social Security benefits. Benchmark Coverage will generally be available for individuals whose MAGI is under 138% of the federal poverty line. For pregnant women and children under one year, MAGI can be up to 223% of the federal poverty line. These figures include a 5% income disregard.[10]

Medicaid "Standard Coverage" replaces the prior Medicaid categories.[11] To receive Standard Coverage Medicaid a recipient must be "categorically" eligible, that is, eligible for or receiving public assistance, 18 NYCRR § 360-3.3(a), or "medically needy," that is, eligible for a related public assistance program except that he does not satisfy the income or resource limits.[12]

Endnotes

1. 2013 N.Y. Laws 56 Part D.
2. Social Services Law § 365-a(1); 42 U.S.C. § 18022(b).
3. Social Services Law § 366(1)(a)(6)–(8); IRC § 36B(d)(2)(B).
4. Social Services Law § 369-ee(5)(d), *added by* 2013 N.Y. Laws 56 Part D § 14-a.
5. Social Services Law § 365-a(1).
6. 13 OHIP/ADM-03 (09/25/2013) at III.F.
7. *Id.*
8. *See* NHELP's *Advocate's Guide to MAGI* at http://www.healthlaw.org/publications/agmagi#.U7QrOLGGrJk.
9. GIS 14 MA/007 (03/21/2014).
10. Social Services Law § 366(1)(b)(2).
11. Social Services Law § 365-a(1).
12. 18 NYCRR § 360-3.3(b).

David Goldfarb is a partner in Goldfarb Abrandt Salzman & Kutzin LLP, a firm concentrating in health law, elder law, trusts and estates, and the rights of the elderly and disabled. He is the co-author of *New York Elder Law* (Lexis-Matthew Bender, 1999-2012) now in its fifteenth release. Mr. Goldfarb formerly worked for the Civil Division of The Legal Aid Society (New York City). He was the Chair of the Association of the Bar of the City of New York's Committee on Legal Problems of the Aging from 1996-1999. He has written extensively on legal and civic issues including two op-eds in the *New York Times*.

NEW YORK STATE OF OPPORTUNITY. | Department of Health

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Acting Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

February 11, 2015

Dear Elder Law and Special Needs Section Member:

Counseling clients on planning for long-term care has become a vital part of estate planning, and I'd like to make sure you are aware of recent changes to the New York State Partnership for Long-Term Care (the Partnership). As you may already know, the Partnership is a unique New York State program that combines private long-term care insurance and Medicaid. Its goal is to help New Yorkers prepare for the possibility of needing nursing home care, home care, or assisted living services. The program works by allowing an individual/couple who purchases a Partnership insurance policy and exhausts the benefits, to hold onto all of their assets under the Medicaid program in extended care situations.

Over the past two decades, a great deal has been learned about the Partnership. In addition to enabling individuals to provide for their long-term care needs while keeping what they've worked hard to acquire, the program is helping to create a sustainable Medicaid program, a trend that is expected to continue and grow.

A primary goal of the Partnership is to expand on this success by making Partnership insurance more accessible and desirable to larger segments of the population. Based on past surveys of Partnership agents and consumers, some of the biggest obstacles to purchasing Partnership insurance have been premium cost and lack of 'reciprocity' in other states with regard to Medicaid. Recently, steps were taken by the Partnership to address these obstacles:

- A new two-year nursing home/four-year residential care or home care total asset plan (2-4-50 Plan). This shorter duration policy, when combined with Medicaid, will still offer a lifetime of care while allowing the covered person to protect all of his or her assets, but at a lower cost. The annual premium cost to consumers is reduced by up to 24%, but 100% asset protection is preserved.

- A new lifetime inflation protection option of 3.5% compounded on an annual basis. This is in addition to the existing 5% option. The new option results in a lower cost policy while still making sure the daily benefit amount keeps pace with inflation over the life of the policy. The annual premium cost to consumers is reduced by up to 38%, depending on age at purchase.

- When combining these two changes, the annual premium cost to consumers is reduced by up to 53%, depending on age at purchase, again continuing to offer 100% asset protection under Medicaid.

Empire State Plaza, Corning Tower, Albany, NY 12237 | health.ny.gov

- Participation in federal reciprocity: Covered persons wishing to move out of New York can now access a portion of the Medicaid benefit from their policy in 40 other reciprocal states. These include Florida, New Jersey, Pennsylvania, North Carolina and Connecticut, states that New York's older population are most likely to move to. In reciprocal states, Total Asset Plans will be considered Dollar for Dollar Plans, or plans that allow for the disregard of assets under Medicaid up to the total amount of benefits paid out by the insurer on behalf of the covered person (not 100% asset protection as in New York).

These exciting changes, combined with the continuation of the 20% New York State tax credit, make New York the #1 state for LTC insurance. I encourage you to visit our website at www.nyspltc.org to learn more, and to work with a qualified agent near you to better serve your clients. The Partnership can be a valuable tool for your clients interested in planning for the uncertainties that lay ahead.

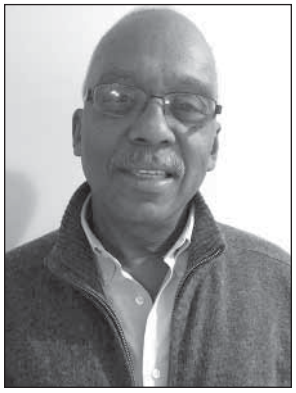
Sincerely,

Jason A. Helgerson
Medicaid Director
Office of Health Insurance Programs

Empire State Plaza, Corning Tower, Albany, NY 12237 | health.ny.gov

The Transfer of an Incapacitated Person Outside the Jurisdiction of New York State

By Leslie Francis and Christine Mooney



Leslie Francis

Christine Mooney

The appointment to serve as either the Personal Needs or Property Management Guardian pursuant to Article 81 of the Mental Hygiene Law is a challenging and rewarding task. In all cases, it is important that the individual or entity appointed by the Court have the requisite expertise to meet the needs of the incapacitated person. A guardianship becomes complicated for the Court appointed guardian when the incapacitated person has no family or close friends in the jurisdiction. Our joint experience as attorneys brings distinct skillsets to bear on the issue. Recent developments in guardianship law have highlighted the extensive responsibilities of an Article 81 guardian, the importance of collaboration and collegiality. This is a fundamental component for achieving a good result for the ward. This article provides a series of informational tips for anyone serving as an Article 81 guardian and the necessary steps to effectuate the transfer of the incapacitated person outside of the state of New York.

The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) was signed by Governor Andrew Cuomo on October 23, 2013. The law became effective on April 21, 2014 and is codified as Article 83 of the Mental Hygiene law, sections 83.01-83.45. The purpose of the law was to "address the issue of jurisdiction over adult guardianships and other protective proceedings, providing a mechanism for resolving multi-state jurisdictional disputes."[1]

The Full Faith and Credit Clause of the U.S. Constitution states, "full faith and credit shall be given in each state to the public acts and proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."[2]

The Full Faith and Credit Clause found its origin in the Article IV of the Confederation. The Supreme Court has invoked the clause to police state-court proceedings in three contexts: (1) determining when a state must take jurisdiction over claims that arise in other states; (2) limiting the application of local state law over another state's law in multistate disputes; and (3) recognizing and enforcing judgments rendered in sister-state court.[3] Upon close examination of the Clause, one cannot help but notice a clear conflict between the language of the first sentence and that of the second. In the first sentence, we see the use of the word "*shall,*" the standard interpretation being, in the legal sense, to express what is mandatory or used to express a command or exhortation. In the second sentence, the term "*may*" is used with regard to proving the validity of the acts, records and proceeding and the enforcement of same. The word *"may"* in the context of the second sentence, rather than indicating a directive, seems to be used to indicate possibility or probability.[4]

Notwithstanding the inherent dichotomy in the language of the clause, case law has established its validity. One of the first cases to interpret the meaning and application of the full faith and credit clause was *Mills v. Duryee*.[5] In an action brought in the Circuit Court of the District of Columbia, the equivalent of a state court for this purpose, on a judgment from a New York Court, the defendant endeavored to reopen the whole question of the merits of the original case by a plea of "nil debet."

It was answered in the words of the first implementing statute of 1790 (1 Stat. 122), that such records and proceedings were entitled in each State to the same faith and credit as in the State of origin, and that inasmuch as they were records of a court in the State of origin, and so conclusive of the merits of the case there, they were equally so in the forum State. The Court adopted the latter view, saying that it had not been the intention of the Constitution merely to reenact the common law—that is, the principles of private international law—with regard to the reception of foreign judgments but to amplify and fortify these. In *Hampton v. McConnell*,[6] some years later, Chief Justice Marshall went even further, using language which seems to show that he regarded the judgment of a state court as constitutionally entitled to be accorded in the courts of sister-states not simply the faith and credit on conclusive evidence but the validity of final judgment.[7]

Another interpretation of the clause can be found in the case of *Pennoyer v. Neff*, a case familiar to all lawyers for their days in law school. In the language of the Court:

> The force and effect of judgments rendered against nonresidents without personal service of process upon them, or their voluntary appearance, have been the subject of frequent consideration in the courts of the United States and of the several States, as attempts have been made to enforce such judgments in States other than those in which they were rendered, under the provision of the Constitution requiring that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State;" and the act of Congress providing for the mode of authenticating such acts, records, and proceedings, and declaring that, when thus authenticated, "they shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are or shall or taken.[8]

Despite the clear application of the clause found in case law with regard to out-of-state judgments, there are exceptions to this doctrine. This has been the recognition of the finding of incapacity by an out of state court. It became increasingly apparent to the Uniform Law Commission that the existence of fifty distinct guardianship statutes presented a number of issues for court appointed guardians and their wards. The appointment of a guardian in most jurisdictions gave the guardian the power over the person and property of the incapacitated person (the "IP") within that particular state. Issues began to arise when the IP was taken on vacation, visited family outside the jurisdiction, or the care plan for the IP necessitated the need to transfer the IP to another jurisdiction. The need to file for a new guardianship presented undue financial hardship for the IP's estate.

The UAGPPJA has been adopted in forty-one states. Most recently, The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act was adopted in New Hampshire on March 5, 2015 under Chapter 464-C. The only remaining states that have not adopted the statute are Wisconsin, Michigan, Kansas, Texas, Louisiana, Georgia, North Carolina and Florida. This presents additional challenges for an Article 81 guardian.

The purpose of the statute is to provide clarification on jurisdictional issues related to the personal and property needs of the IP. The statute is meant to simplify the process for the transfer of a guardianship. Article 83 of the New York Mental Hygiene Law provides the mechanisms for the transfer and recognition for transfer and registration within the state of New York.

Transfer of the Guardianship Outside the State of New York

As a guardian, one of the most important roles the guardian will have is to enlist the support of the IP's family and to provide the IP with a suitable environment. In some cases if an independent guardian is appointed, there may be a family member who was ineligible to serve or the family members may not live within the jurisdiction. This presents an additional set of obstacles for the guardian. Based upon our experience, the adoption of the UAGPPJA in another state did not help to effectuate the smooth transition or recognition of the guardianship.

In this particular case, the IP had no family or close friends in the state New York. Approximately six months after the appointment of a guardian, the IP expressed a desire to move to another state. She wished to be closer to her nieces. The guardian filed a motion with the Court requesting permission to move the IP to another state on a trial basis. The Court granted permission to transfer the IP, pay for the cost of the transfer by medical ambulette and hire legal counsel in the new jurisdiction to effectuate the transfer of the guardianship.

The IP was successfully relocated with the assistance of the nieces. However, it quickly became apparent that the transfer would not be as smooth as initially expected. The transfer jurisdiction had adopted the UAGPPJA. The attorney retained in the transfer jurisdiction was unable to obtain clarity from the Court with regard to whether the Court would accept a transfer application or if there was a need to file a new petition. It was not clear how the transfer jurisdiction would apply it in the case of a contested guardianship.

After the transfer of the IP, one of the biological children appeared and began to cause issues for both the family members and the guardian. The adult child contested the guardianship. Counsel filed a motion requesting recognition of the findings by the New York Courts. The guardians were required to participate in Court conferences by telephone. The transfer court also requested certified copies of all documents related to the Article 81 proceeding in New York. The issues raised by the adult child led to an extensive increase in the cost of the proceeding in the transfer state. The final legal costs were three times higher than the initial cost of the proceeding in New York.

These circumstances presented a myriad of issues in the care of the IP. During the pendency of the transfer proceeding, the IP became ill and required hospitalization. In addition, the adult child began to cause visitation issues at the facility where the IP was a resident. On multiple occasions the local police were called to the facility. In addition, the adult child contacted a local elder abuse service to advocate on behalf

of the IP. The involvement of multiple parties led to a complicated and complex transfer that took well over a year to complete.

During the pendency of the proceeding, the legal fees increased dramatically. In addition, it became necessary for the transfer state to spend hours examining all of the original documents in the New York proceeding. The adult child had not been appointed as the initial guardian in the Article 81 proceeding in New York at the request of the IP. The transfer court also raised issues about the continued incapacity of the IP and the necessity for the guardianship to continue.

At the conclusion of the proceeding, the legal fees far exceeded the initial amount approved by the Court. The guardian filed a request with the Court in New York for permission to pay the additional legal fee. The New York Court did not grant the permission and deferred the matter to the transfer jurisdiction. This resulted in an additional hearing and the need for the guardians to testify about the extent of the proceedings.

It is clear that the interests of the IP should always be at the forefront of any care and living arrangements. In particular, in situations where the IP is capable of expressing his or her desires, those wishes should be respected to the greatest extent possible. However, the implementation of statutes in complicated legal matters does not **always** provide for a smooth transition.

The IP is still successfully living in the transfer jurisdiction with another independent attorney guardian. However, the key to the success of the guardianship has been a multitude of factors. The successor guardian took the time to fully understand all aspects of the case. This included a review of all the initial documents in the guardianship. It also involved a leap of faith on the part of the successor guardian. The guardian was willing to understand the family dynamic and the multitude of issues caused by the adult child.

If a guardian is going to facilitate the transfer of an IP to another jurisdiction the following steps should be effectuated prior to the transfer. An application for recognition of the transfer should be filed prior to the transfer of the IP. The guardian should also ensure that there is permission to transfer funds to the receiving jurisdiction to facilitate the payment of bills and necessities for the IP. The appointment of another guardian in the jurisdiction is vital to ensure that there are no gaps or changes in the level of care for the IP. The management of care for an IP across state lines in a contested guardianship creates enormous obstacles for anyone serving in this capacity.

Endnotes

1. Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, New York State Assembly, 2013. Bill number, A00857.
2. U.S. Const. art. IV, § 1.
3. O'Hara, E. (2012). The heritage guide to the constitution. The Heritage Foundation.
4. Merriam-Webster's Dictionary, 2015.
5. 11 U.S. 481 1813.
6. 16 U.S. 234 (1818).
7. Cornell University Law School, Legal Information Institute, https://www.law.cornell.edu/anncon/html/art4frag1_user.html.
8. 95 U.S. 714 (1878).

Leslie L. Francis is an Assistant Professor at CUNY-Queensborough Community College ("QCC") in Bayside, NY where he teaches Business Law and Business Management. He has taught for fifteen years, five years at QCC and ten years as an Adjunct Professor at CUNY-York College in Jamaica, NY.

Additionally, Mr. Francis is an attorney duly admitted to practice law in the States of New York and Connecticut and in the federal district courts of the Eastern and Southern Districts of New York. Prior to becoming a full-time professor in 2010, Mr. Francis operated a sole practice in Nassau County, New York where he handled Family Law cases, among other areas of practice.

Christine Mooney is an Associate Professor at CUNY-Queensborough Community College (QCC) in Bayside, NY where she teaches Business Law and Principles of Finance. She has taught for more than ten years. Additionally, Ms. Mooney is an attorney duly admitted to practice law in the State of New York. Ms. Mooney concentrates on elder law issues with a focus on guardianships.

Understanding the "Undue" in "Undue Influence"

By Anthony J. Enea

Frequently, a potential client or fellow attorney will express to me their strong opinion that a Last Will & Testament is definitely the product of "Undue Influence." I am often confident that they truly believe this to be the case. However, in most instances their belief is not supported by the facts, and results from their having placed too much emphasis on the word "influence," and not enough emphasis on the word "undue."

While undue influence is one of the most frequently alleged objections to the probate of a Last Will & Testament, it is also one of the most misunderstood and over-relied upon objections to probate. It is an objection whose burden of proof is extremely difficulty to meet, and only in rare instances satisfied by the evidence.

Undue Influence is defined in *Black's Law Dictionary* as follows:

> Persuasion carried to the point of overpowering the will, or such a control over the person in question as prevents him from acting intelligently, understanding, and voluntarily, and in effect destroys his, and constrains him to do what he would not have done if such control had not been exercised... Undue influence consists (1) in the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority, for the purpose of obtaining an unfair advantage over him; (2) in taking an unfair advantage of another's weakness of mind; or (3) in taking a grossly oppressive and unfair advantage of another's necessities or distress.

As can be seen from the above definition, it is much more than just influencing the testator's decisions vis a vis the beneficiaries and amounts bequeathed in one's Last Will & Testament. Merely encouraging and influencing the testator's decision will not rise to the level needed to prove undue influence. It has to rise to the level of breaking one's free will, judgment, or volition.

The definition seems to inherently require someone who is in some form of a weakened state, whether it be physical, medical or emotional. This can result because of one's advanced age, and the infirmities and dependencies (physical and emotional) often associated with aging. However, again because the emphasis is on "undue," it would be necessary to demonstrate the significant level of dependency and weakened state of the testator.

The burden of proving undue influence rests upon the objectant to the Last Will & Testament.[1] It is proved by a preponderance of the credible evidence which demonstrates motive to influence, opportunity to influence, the use of the opportunity, and that moral coercion destroyed the testator's free will.

In *Matter of Burke*, 82 AD2d 260, 269 (1981), the Appellate Division, Second Department, provided a highly informative description of undue influence:

> Undue influence is seldom practiced openly, but it is, rather, the product of persistent and subtle suggestion imposed upon a weaker mind and calculated, by the exploitation of a relationship of trust and confidence, to overwhelm the victim's will to the point where it becomes the willing tool to be manipulated for the benefit of another.

The Court in *Matter of Burke* emphasized the repetitive and persistent nature of the influence required to reach the requisite level of undue influence, as well as the need for the testator to be a person in a weakened condition. Additionally, the Court noted the importance of trust and confidence. *In Matter of Burke*, the Court further opined that circumstantial evidence may be used to show persistent suggestions imposed upon a weaker mind. To be sufficient, the circumstantial evidence must be the only reasonable conclusion drawn from the facts.[2] However, if the facts can also reasonably support a contrary inference, then the Surrogate must conclude that undue influence is not present.[3]

Some of the factors to be considered in proving undue influence are: (1) motive to influence (2) opportunity to influence, (3) opportunity to influence used and (4) moral coercion destroyed testator's free will. The Courts have held that..... "without a showing that undue influence or fraud was actually exercised upon the decedent, evidence that opportunity and motive existed to exert such influence will not suffice to raise a triable issue as to whether the Will reflected the intent of the testator."[4]

The potential existence of a "confidential relationship" by and between the alleged influencer and the testator is an issue that necessitates careful examination once the issue of undue influence has been raised. In *Matter of Bach*, 133 AD 2d 260, 269 (1987), the Appellate Division, Second Department, held that the burden of

establishing undue influence rests upon the objectant to a Will. However, where there is a confidential relationship between the decedent and the beneficiary, the mere bequest alone may permit an inference of undue influence if no satisfactory explanation for the bequest is provided. For example, the inference can be operative where there is no familial relationship and/or long-standing friendship or relationship to the testator.

The types of relationships which are generally categorized as confidential relationships are (a) Attorney-client (b) Doctor/Nurse-Patient (c) Priest/Cleric-Parishioner (d) administrator of nursing home-patient (e) financial adviser-client. If the existence of a confidential relationship is established by the trier of fact, the burden of disproving the existence of undue influence will shift to the proponent of the Last Will. The finding of the existence of a confidential relationship significantly and detrimentally impacts the admission of a Last Will to probate.

If the existence of a confidential relationship of the nature described above has been identified, thus shifting the burden to the beneficiary, it is then still necessary to identify and allege the circumstances evidencing the undue influence. For example, did the individual with the confidential relationship to the testator: (a) participate in the preparation or execution of the Last Will; (b) did he or she direct the testator to the attorney draftsperson of the Will; (c) does the Will benefit the individual with the confidential relationship to the extent that he or she receives more than he or she would receive in intestacy; (d) did the individual with the confidential relationship to the testator exercise control over the testator's affairs; (e) was the testator dependent upon the alleged individual with the confidential relationship; for example, is there a dependence of a physical and medical nature relevant to the individual's health, safety and well-being? Both the testator's mental and physical health need to be assessed and examined. In the cases where the bequests under the testator's Last Will favor the testator's attorney/draftsperson, there is an inference of undue influence.[5]

In the cases where a Last Will excludes the natural objects of the testator's bounty in favor of his or her attorney, said Last Will is automatically viewed with suspicion. If the attorney is unable to provide a satisfactory refutation, then the inference of undue influence will be warranted. The attorney must explain that the gift was freely given in a "Putnam Hearing."[6] The Putnam Inference will also apply to physicians, nurses, clerics and administrators of nursing homes and other senior living facilities.

It should also be noted that generally when undue influence is alleged as an objection to probate, it is accompanied by an independent objection that the Last Will is a product of "fraud" practised upon the testator. Fraud is defined in Black's Law Dictionary as follows:

> An internal perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury...

The objectant has the burden to demonstrate by clear and convincing evidence that a knowingly false statement, misrepresentation or accusation was made that caused the testator to dispose of his assets differently in the absence of the above fraud. Unlike undue influence, fraud must be established by a fair preponderance of the evidence.[7] The objectant must demonstrate actual fraud and not constructive fraud.

In conclusion, while at first blush it may appear that a Last Will is the product of influence exercised upon the testator, the real issue is whether the influence exerted rose to the level of being deemed "undue." Doing so in most cases is a difficult challenge. Undue influence is relatively easy to allege but difficult to prove.

Endnotes

1. Connelly v. Connelly, Misc. 4 3d 1019(A), 798 N.Y.S.2d 343 (Sup. Ct. Kings County, 2004).
2. Matter of Walther, 188 NYS 2d 168, 172 (1959).
3. In re Ruef, 1800 AD2d, 203, 204 (2nd Dept. 1917).
4. In re Zirinsky, 43 AD3d 946, 948 (2nd Dept. 2007).
5. In re Putnam's Will, 257 N.Y.2d 140 (1931).
6. In the Matter of Christine D. Henderson, 80 N.Y.2d 388 (1992).
7. In re Beneway, 272 A.D. 463, 71 N.Y.S.2d 361 (3d Dept. 1947).

Anthony J. Enea is the managing member of the firm of Enea, Scanlan & Sirignano, LLP of White Plains, New York. His office is centrally located in White Plains and he has a home office in Somers, New York. Mr. Enea is the Past Chair of the Elder Law Section of the NYSBA. Mr. Enea is the Past President and a Founding Member of the New York Chapter of the National Academy of Elder Law Attorneys (NAELA). He is also a member of the Council of Advanced Practitioners of NAELA.Mr. Enea is a Past President of the Westchester County Bar Association. He is the President of the Westchester County Bar Foundation. He is a Vice President of the Columbian Lawyers Association of Westchester County. **Mr. Enea wishes to acknowledge the assistance of his Associate, Samantha Lyons, in the preparation of this article.**

This article originally appeared in the Spring/Summer 2015 issue of One on One, *published by the General Practice Section of the New York State Bar Association.*

Special Education Law Lingo

By Eileen Libutti, Jennifer Frankola and Julie Ruggieri

Eileen Libutti

Jennifer Frankola

Julie Ruggieri

As an attorney one would think we are well versed enough to understand the gist of most conversations, even in technical areas of the law. However, practicing law in the field of special education can be a whole new language to many attorneys, and off-putting to parents who find themselves in need of educational advice. Dealing with a child's special education needs should not require fluency in a second language but it does require knowledge of various acronyms discussed at meetings and proceedings. Our "Special Education Law Lingo" list can be your starting point. Some of these terms are New York City specific and are indicated by (*). The following is not an all encompassing list or explanation of the special education process, but it can be a guideline to help you navigate the beginning stages with a family encountering challenges with their school district and the education of a child with learning challenges or special learning needs.

IDEA: *Individuals with Disabilities Education Act.* A federal law implemented in 2004, guaranteeing particular services and rights to children with special needs and learning disabilities.[1]

IEP: *Individualized Education Plan.* This is a plan or program that is written by school officials, either the Committee on Special Education or the Committee on Preschool Special Education. This plan serves the child, between ages 3-21, who is recognized by law as having a disability and guarantees that the child receives specialized educational instruction and other related services. This is a legal document.[2]

IESP: *Individualized Education Services Plan*. This is a plan for those students designated as having special needs in New York, but have been placed into a private school by the parents. In essence, the **IESP** functions the same as an **IEP**, except that the child is not in a public school.

CSE: *Committee on Special Education Meeting*. A legal proceeding in which representatives and evaluators from the school, who may or may not know the student, gather to determine if the child will be designated under the law as having a disability, and the plan for the student's program and services. Parents are included in these meetings and should make all efforts to attend and represent the needs of their child. The result of the meeting is a special education classification and an Individual Education Plan that, among other things, incorporates the services that must be provided to the student. Often these meetings can proceed with as few as one evaluator, but sometimes the meetings can include: the parent, general education teacher, special education teacher, school district representative, school physician, a school psychologist, parent advocate, or upon request, someone else with knowledge of the student.[3]

CPSE: *Committee on Preschool Special Education*. A legal proceeding in which evaluators from the preschool, who may or may not know the student, gather to determine if the child, who is older than 3 but has not yet entered Kindergarten, will be designated under the law as having a disability. Just as with the CSE, parents are included in these meetings and should make all efforts to attend and represent the needs of the child. The result of the meeting is a special education classification and an Individual Education Program that, among other things, incorporates the services that must be provided to the student. During the transition from preschool to Kindergarten, if the student continues to require special education services, the CPSE will make a referral to the CSE for a new IEP for the Kindergarten year.[4]

CBST*: *Central Based Support Team.* If the IEP team determines there is no appropriate public education available that meets the needs of the special needs student, it will defer to the **CBST** (in NYC only) for further evaluation into an appropriate non-public school.

IFSP: *Individual Family Service Plan*. This is a plan that is written through Early Intervention. It serves the child, from birth through the age of 2, and his or her family, in outlining levels of development and early intervention services that the child should receive in order to meet advancement goals.

CAP: *Commissioner's Advisory Panel*. A group made up of individuals with disabilities, parents of special needs students, special education teachers, among others, who meet three times each school year and advise the Governor, Legislature, and Commissioner on issues dealing with the education of special needs students.

FBA: *Functional Behavioral Assessment*. An evaluation, with parental consent, to determine why a student with a disability displays problem behavior that interferes with his or her and/or other classmates' ability to learn or puts them or others at risk of injury. The functional behavioral assessment's results include identifying the behavior, determining where the behavior comes from and assessing why and how it happens.[5]

BIP: *Behavior Intervention Plan*. Based on the **FBA** results, the behavior intervention plan identifies trouble behavior and the way in which it impedes on the child's ability to learn and meet promotion criteria. The plan must include information regarding the inappropriate behavior in varied settings, different situations, and the frequency throughout the school day. Any helpful accommodations or interventions that aid the student in minimizing or decreasing the inappropriate behavior will be reported in the BIP.

MDR: *Manifestation Determination Review.* This review meeting takes place when special needs students are involved in an incident requiring disciplinary action and the student is either showing signs of pattern bad behavior or has been removed from his or her current placement for more than 10 days.

Public School Placement Process

FAPE: *Free and Appropriate Public Education*. The IDEA ensures that all special needs children are entitled, under the law, to a free and appropriate education at no cost to the parent, paid for by the public school. In exchange for federal funding, this federal statute obligates states to provide a FAPE in the LRE.[6]

LRE: *Least Restrictive Environment*. The least restrictive environment for a special needs student is to place them as often as possible in opportunities to learn alongside general education students. Therefore, the less a special needs student is separate from general education students or removed from opportunities to learn with general education students, the better for the special needs student.[7]

LEA: *Local Education Agency*. The school district.

Community School: A general education, public school.

Classification: One of 13 identified disabilities recognized by the IDEA, which allow for the provision of services.

District 75*: New York City's district of special education resources. These include schools, organizations, home and hospital instruction, and vision and hearing services that offer special education and other related services for children with disabilities. This is not a specific place, and is located throughout the city.[8]

NPS: *New York State Approved Non-Public School.* Private schools, funded by the state, that provide special education programs. These schools are not within the the local school district or New York City Department of Education but they have been approved as an acceptable substitute in situations where the DOE cannot provide the necessary services for a special needs student.

FNR: *Final Notice of Recommendation.* This is a letter from the DOE to the parents that indicates in which school the child will be placed for special education services.

Burlington/Carter: Case names that are used to refer to tuition reimbursement cases, where a student is placed in a special education setting by the parents, and the parents intend to seek tuition reimbursement.[9]

10-Day Notice Letter: Parents that are contesting their child's school placement and believe their child was denied a **FAPE** must submit a letter 10 days prior to the student starting school in a private setting, informing the school district that the parents are removing the child from the public school, rejecting the recommended placement, and requesting tuition reimbursement for the non-public or private school.

Nickerson/P-1 Letter*: *Non-Public School Eligibility Notice.* If the parent has cooperated fully and not delayed the process, a letter may be sent by the NYCDOE after 60 days has passed since the date of consent for referrals if the child still has not received a final notice of recommendation for a special class.

Connors Case: Situations in which parents believe their child was denied a **FAPE** have removed the child and placed him or her into a non-public or private school but cannot afford the tuition. Instead of paying tuition and seeking reimbursement after an impartial hearing on the merits, these parents request that the **DOE** make direct payments to the school.

Comp-Ed: *Compensatory Education*. Past violations of **Child Find** provisions or a gross failure to offer or implement an **IEP** may result in compensatory education, or services intended to make up for past denial of **FAPE**. Students are compensated for lost time through additional therapy, summer services, or other services.

Child Find: A requirement by law under the IDEA that holds the school responsible for identifying, locating, and evaluating children with disabilities within its jurisdiction, even if the child is in private or non-public school.

DOE*: *Department of Education (outside of NYC this is known as the public school district).* The NYC DOE is the United States' largest school district with over 1.1 million students.

IHO: *Impartial Hearing Office.* If a parent contests the DOE's final student placement and believes the child is being denied a Free and Appropriate Public Education (**FAPE**), the parent can initiate a legal proceeding in the Impartial Hearing Office called a *due process hearing*. The DOE and the parent, who can be represented by a lawyer, can offer evidence, witnesses, and present arguments for a determination by the *Impartial Hearing Officer.*[10]

SRO: *State Review Office.* Once the first phase of the *due process hearing* has been completed and a decision has been rendered by the *Impartial Hearing Officer*, the parent or the DOE, or both, can appeal the decision. This appeal is sent to a *State Review Officer* and a decision will be made, albeit after a somewhat lengthy wait, which will be the final decision on the matter unless it is appealed for a second time to the Federal District Court. There are very few states that have this "two-tier" system.[11]

SEA: *State Educational Agency*. Each state has an agency that controls and is responsible for educational matters. New York's **SEA** is the New York State Education Department.

Neurological Evaluation: This is a medical evaluation by a neurologist to identify if the student has a dysfunction of the brain that may impede the ability to learn. This evaluation also tests the child's nervous system and reactions. It can be appropriate for students with seizures, fine motor delays, ADD/ADHD, and different neurological syndromes.

Psychoeducational Evaluation: This is the most common name given to an academic assessment by school districts. It should be a complete assessment of the student's strengths and weaknesses, utilizing standard assessment tools, but very often when performed by a school district the assessment is limited. It can be administered by a school psychologist.

Neuropsychoeducational Evaluation: This is an evaluation completed by a neuropsychologist. This is a series of standardized tests assessing academic skills and overall brain function. It is more comprehensive than a psychoeducational evaluation.

WPPSI/WISC: *Wechsler Preschool and Primary Scale of Intelligence/Wechsler Intelligence Scale for Children.* The Intelligence Scale for Children is an evaluation for children ages 6-16 that tests cognitive abilities through verbal comprehension index, visual spatial index, fluid reasoning index, working memory index, and processing speed index. The Preschool and Primary Scale evaluates children ages 6 months–7 years.

WIAT-III: *Wechsler Individual Achievement Test—Third Edition*. An evaluation to assess academic achievement in people ages 4-85. The central focus is on reading, writing, math, and oral language.

ABLLS-R: *Assessment of Basic Language and Learning Skills–Revised.* A tool for assessment and curriculum provided under services to assist language instruction and enable successful communication for children with autism or other developmental disabilities.

DSM-V: *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition.* The DSM-V is a text that is commonly used as the authority on psychiatric diagnosis, classifications, and treatment recommendations.[12]

Disabilities

LD: *Learning Disability.* A disorder by which one of the ways a student understands or uses language has turned into difficulty listening, thinking, speaking, reading, writing, spelling, or performing math equations.

ED: *Emotional Disability.* A student with emotional disturbance displays a prolonged inability to learn in school due to intellectual, sensory, or health factors, among other obstructing behaviors.

ADHD: *Attention Deficit Hyperactivity Disorder*. An inability to remain at attention during an activity and some impulsive or hyperactive behavior.

ADD: *Attention Deficit Disability.* An inability to remain at attention and keep concentrated on the task at hand.

CAPD: *Central Auditory Processing Disorder*. The brain's inability to process auditory information. These children cannot interpret differences in the sounds of words.

SID: *Sensory Integration Disorder*. An inability to process and respond to the stimuli outside the body. SID is often a condition associated alongside other disorders such as autism or ADHD.

PTSD: *Post Traumatic Stress Disorder.* Due to a stressful past event, this disorder can result in flashbacks of trauma and cause avoidance of daily activities.

ODD: *Oppositional Defiant Disorder*. A disorder that culminates in a continuous pattern of troublesome behavior toward authority figures.

PDD: *Pervasive Developmental Disorder*. This refers to a group of disorders that generally involve an inability to develop socialization, communication, or imagination skills. This diagnosis is no longer recognized in the DSM-V and is now referred to as Autism.

Dyslexia: A learning disability that is language-based and affects a student's ability to read, write, and/or pronounce words.

Services

Para: *Para-professional.* A person who assists either a classroom or a student, one-on-one, during school. The paraprofessional can provide such varied aid as managing behaviors, providing health services, assisting in transportation or in using the bathroom, among other things. Typically, a paraprofessional is not a certified teacher.

OT: *Occupational Therapy*. This type of therapy addresses issues of motor, visual motor, sensory motor, and self-care skills. Occupational therapists help practice implementing skills and tools to facilitate the student's ability to participate in both in school activities as well as daily life activities. **OT** can be satisfied by therapists within the school or by therapists outside of school that work under **RSA**s.

PT: *Physical Therapy.* This therapy involves using physical activities to preserve or develop the student's balance, ambulation, coordination, and gross motor development. **PT** can be satisfied by therapists within the school or by therapists outside of the school that work under **RSA**s.

SLT: *Speech/Language Therapy*. A speech language pathologist works on the student's auditory processing to enhance the ability to articulate and understand sounds and language.

AT: *Assistive Technology*. Any mechanism by which a student with a disability is aided in the learning process or in performing a task. Assistive technologies can include graphic organizers, personal FM listening systems, portable word processors, speech-recognition programs, talking calculators, and tape records, among others.

RSA: *Related Service Authorization.* This letter grants special education students the approval to receive certain therapies that encourage developmental, corrective, or other supports to aid in learning and daily activities. While paid for by the Department of Education, these services are satisfied by providers independent of the Department of Education because the Department was unable to offer the student the services.

SETSS*: *Special Education Teacher Support Services.* The special needs student stays within the general education classroom for the majority of the school day but is either pulled out of the classroom for more intensive work with a special education teacher or a special education teacher pushes into the classroom to provide intensive assistance to the student in the general education setting. (Sometimes referred to as Resource Room.)

SEIT: *Special Education Itinerant Teacher*. A certified special education teacher provides services geared toward the child's IEP in an environment outside the classroom.

EI: *Early Intervention.* The Early intervention process by which students receive services from birth to age 3. These special education teachers and service providers can work with children in a natural setting up until they are age 3. They can help prepare the child and family as they embark on the **IFSP** process.

RTI: *Response to Intervention*. A program implemented by schools centered on monitoring effective academic and behavioral support in addition to general education. It is often a way for the school to offer services not provided for in the IEP and it acts as an early intervening service for students that are not, or have not yet been, classified as special needs.

ABA: *Applied Behavioral Analysis.* This is a research based teaching process by which repeated nonstandard behavior in students with autism is treated. This also can be used academically by using repeated scenarios and an awards based system to address student's atypical behaviors and academics. This should be provided under the supervision of someone with a *BCBA* credential, or Board Certified Behavior Analyst.[13]

FM Unit: A personal listening system that is worn by a student to amplify the teacher's voice and enable the student to better focus on the teacher's lesson.

TEACCH: *Treatment and Education of Autistic and Related Communication Handicapped Children.* This is an approach to education geared toward assisting students along the autism spectrum.

PECS: *Picture Exchange Communication System*. This is a system whereby non-verbal children are able to communicate without words through pictures. This communication aid is often utilized for children with autism.

DIR: *Developmental Individual Differences Relationship-Floortime.* This program, developed by Stanley Greenspan, M.D., is premised on developing relationships with the autistic student to engage and develop the student. Also known as "Floortime."

Lindamood-Bell: A teaching method designed to improve sensory-cognitive functions for reading and comprehension that has aided students with learning challenges.

Orton Gillingham: A teaching method geared toward individuals with dyslexia that offers specific instruction to enhance reading ability and aid in reading at grade level. Teachers can be board certified in the Orton-Gillingham Methodology.

Wilson: A reading system based on Orton-Gillingham principles to teach the structure of language to those with difficulties learning by other means or those who require multisensory language instruction.

DBT: *Dialectical Behavior Therapy*. This is a psychological therapy that aims to treat and reduce behaviors associated with a spectrum of disorders including suicidal, borderline personality disorder, dependence, depression, eating disorders, and post-traumatic stress disorder.

RTF: *Residential Treatment Facility*. Treatment centers, licensed by the New York State Office of Mental Health, that provide 24 hour, supervised mental health services, educational services, and other therapies to children or adults.

Endnotes

1. 20 U.S.C. § 1400 (2004).
2. *A Guide to the Individualized Education Program.* (2007). U.S. Department of Education. http://www2.ed.gov/parents/needs/speced/iepguide/index.html.
3. *Special Education in New York State for Children Ages 3-21, A Parent's Guide.* (2004) The University of the State of New York The State Education Department, Vocational and Educational Services for Individuals with Disabilities. http://www.p12.nysed.gov/specialed/publications/policy/parentguide.htm# ; *for the NYC CSE district breakdown see* http://schools.nyc.gov/Academics/SpecialEducation/ContactsResources/cse.htm.
4. *Committees on PreSchool Special Education (CPSEs).* New York City Department of Education. http://schools.nyc.gov/Academics/SpecialEducation/ContactsResources/cpse.htm.
5. *Functional Behavioral Assessments (FBAs).* (2011) New York State Education Department Office of P-12 Education, Office of Special Education. http://www.p12.nysed.gov/specialed/publications/topicalbriefs/FBA.htm.
6. *Doe v. Board of Education*, 9 F.3d 455, 459-60 (6th Cir. 1993), *cert. denied,* 114 S. Ct. 2104 (1994).
7. *T.M. ex rel. A.M. v. Cornwall Cent. School Dist.*, 752 F.3d 145 (2d Cir. 2014).
8. *About D75.* New York City Department of Education. http://schools.nyc.gov/Academics/SpecialEducation/D75/AboutD75/default.htm.
9. *Burlington School Committee v. Department of Education*, 471 U.S. 359, 105 S. Ct. 1996 (1993); *Florence County School District Four v. Carter*, 510 U.S. 7, 114 S. Ct. 361 (1993).
10. *Impartial Hearing Office.* The New York City Department of Education. http://schools.nyc.gov/Offices/EnterpriseOperations/ChiefFinancialOfficer/DFO/ImpartialHearingOffice/default.htm.
11. *New York State Review Officers (SROs).* (2014) New York State Education Department Office of State Review. http://www.sro.nysed.gov/.
12. American Psychiatric Association. (2013). *Diagnostic and Statistical Manual of Mental Disorders* (5th ed.). Washington, DC.
13. 83A N.Y. Jur. 2d Physicians, Etc. § 180.50.

Eileen Libutti is the managing partner of Lewis Johs NYC office and oversees the firm's Education practice. Eileen graduated from New York Law School. Her twenty years of experience as a trial lawyer has equipped her to skillfully litigate on behalf of her clients. Eileen lives in New York City with her husband and her twins, Dennis and Dylan Rose.

Jennifer Frankola is an attorney and a former full-time public school teacher. She holds a Master's in Education from NYU and understands the complexities of the public school system and appreciates the needs of students and their families. Jennifer has taught and advocated for students with disabilities and guided families through the maze of educational services in the New York Metropolitan area.

Julie Ruggieri is an attorney with special education law experience in New York City. A graduate of Loyola University New Orleans College of Law, she is admitted in both New York and New Jersey.

Ethics Poll #11 Results

By Natalie J. Kaplan, Phillip Tribble and Judith B. Raskin

Scenario

By now, Fuss Bujjet and Neet-O. Nelson have been partners for twelve years. Files and records have accumulated and together they decide it's time for a housecleaning. Neet-O. said to Fuss: "Let's get rid of these old files. No one could expect us to keep them for twelve years. Let's weed out everything from before, say, 2010 and shred them." Fuss said, "Fine."

Then she looked at the rows of check ledgers and boxes of bank statements and said, "While we're at it, let's get rid of these too. If we ever need them, we have copies of checks in client files anyhow." Neet-O. agreed. So they dug in, separating the pre-2010 files and piling up pre-2010 ledgers and bank statements. Then they called in a shredder to complete the job.

They don't know it yet, but, at the beginning of 2015, Bujjet and Nelson will be summoned for a record review by the Disciplinary Committee. The Committee will request production of all office financial files from 2009 to the present. Fuss and Neet-O. will have a very uneasy sense that they might be in trouble when they can't produce them. Will they ever!

Question

What four important Rules of Professional Conduct ("RPC") did Fuss Bujjet and Neet-O. Nelson violate?

A. Rules requiring ten-year retention of retainer agreements, bills, bank documents and office financial records.

B. Rules requiring seven-year retention of retainer agreements, bills, bank documents and office financial records.

C. Rules requiring five-year retention of retainer agreements, bills, bank documents and office financial records.

D. I don't know.

Results and Commentary

The distribution below shows the results from 192 entries received:

Answer

"B." RPC 1.15(d), "Required Bookkeeping Records," requires the retention of many kinds of financial records, including bookkeeping records, for "seven years after the events they record." (RPC 1.15(d)(1)). Keeping them for seven years is the simple part. But, the Rule is by no means simple, and it pertains to lots more than the records of the bookkeeper! (The title cannot be taken literally.)

Rule 1.15, generally, pertains to fiduciary responsibility and mishandling of client property.[1] The retention of records is only a portion of the Rule. Ethics Professor Roy Simon cautions, in *Simon's Rules of Professional Conduct Annotated* (2014 ed.) ("*Simon's Rules*"), that Rule 1.15 is "the most strictly enforced rule in the RPC. Even minor or unintentional infractions of the detailed provisions are met with swift and often harsh discipline…." Rule 1.15 is a Rule for us to know well.

Analysis

Eight kinds of records are listed in R. 1.15(d)(1).[2] Fortunately, they reduce conceptually into four categories: 1) Retainer agreements and closing statements, 2) Client bills, 3) Bank documents, and, 4) Bookkeeping records. Only the bank documents are to be kept in the original form. The rest may be paper or electronic copies.[3]

Of the above four categories, the first three are relatively straightforward. The category of Retainer agreements and closing statements, (d)(1)(iii), includes those statements filed with the Office of Court Administration (d)(1)(vii). Bills to clients are to encompass both legal fees and expenses, (d)(1)(v), including the expenses of non-employee consultants, such as other lawyers, investigators and accountants (d)(1)(vi).[4] Virtually all original bank documents are to be retained. This includes: checkbooks, check stubs, statements, cancelled checks (when the bank returns them) and duplicate deposit slips, (d)(1)(iv).

Lastly, "Bookkeeping records," as we use it here, are office-generated records relating to any bank ac-

Response	Count	Percent
A. Rules requiring ten-year retention of retainer agreements, bills, bank documents and office financial records.	21	10.9%
B. Rules requiring seven-year retention of retainer agreements, bills, bank documents and office financial records.	154	80.2%
C. Rules requiring five-year retention of retainer agreements, bills, bank documents and office financial records.	2	1.0%
D. I don't know	15	7.8%

count that "concerns or affects" the attorney's practice of law. And it is with respect to these "Bookkeeping records" where the details are bedeviling.

Each bank account requires the creation of an office record, which notes seven items, concerning deposits and withdrawals: 1) date of deposit, 2) source of funds, 3) description of funds (e.g., cash, check, money order), 4) date of withdrawal or check, 5) amount withdrawn, 6) recipient or payee, and 7) purpose of payment (d)(1)(i). Inexplicably, it fails to list the "amount" deposited. This should be presumed an eighth required item.

For Attorney Special Accounts—alternatively known as Attorney" Trust" Accounts or Attorney "Escrow" Accounts, RPC 1.15(b)(2)—items are listed which appear to duplicate those of the previous list: 1) the names for whom the funds are retained, 2) individual payees and 3) amounts paid (d)(1)(ii).[5]

Rule 1.15(i) requires production of all of these records, kept "as specified," upon subpoena or notice. The failure to comply with the notice is considered a separate, punishable violation of the Rules.

Endnotes

1. The complete title of RPC 1.15 is a mouthful: "Preserving Identity of Funds and Property of Others; Fiduciary Responsibility; Commingling and Misappropriation of Client Funds or Property; Maintenance of Bank Accounts; Record Keeping; Examination of Records."
2. The complete text of RPC 1.15(d)(1) "Required Bookkeeping Records" is included below:

   1. A lawyer shall maintain for seven years after the events that they record:

   i. The records of all deposits in and withdrawals from the accounts specified in Rule 1.15(b)[funds belonging to another person] and of any other bank account that concerns or affects the lawyer's practice of law; these records shall specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement;

   ii. a record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed;

   iii. copies of all retainer and compensation agreements with clients;

   iv. copies of all statements to clients or other persons showing the disbursement of funds to them of on their behalf;

   v. copies of all bills rendered to clients;

   vi. copies of all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed;

   vii. copies of all retainer and closing statements filed with the Office of Court Administration; and

   viii. all checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips.
3. For more detailed treatment of electronic storage, back-up and cloud storage, we recommend *Simon's Rules* at p. 824 *and* NYSBA Ethics Ops. 840 and 850.
4. The Rules also provide that records be kept of payments to independent contractors who were not associated with individual client matters (d)(1)(vi).
5. We note the apparent duplicate mention of "payees" and "amounts withdrawn" and "paid."

Changing of the Chairs

Richard A. Weinblatt and JulieAnn Calareso

The Executive Committee of the Elder Law and Special Needs Section presents Richard A. Weinblatt with a gift for his exemplary service as our Section Chair.

Section Committees and Chairs

Client and Consumer Issues
Shari S.L. Hubner
Van DeWater and Van DeWater, LLP
P.O. Box 112
Poughkeepsie, NY 12602
shubner@vandewaterlaw.com

Melinda Bellus
Legal Services of the Hudson Valley
90 Maple Avenue
White Plains, NY 10601
mbellus@lshv.org

Diversity
Pauline Yeung-Ha
Grimaldi & Yeung LLP
9201 Fourth Avenue, 6th Floor
Brooklyn, NY 11209
pyeung@gylawny.com

Deepankar Mukerji
Keane & Beane, PC
445 Hamilton Ave., 15th Floor
White Plains, NY 10601
dmukerji@kblaw.com

Elder Abuse
Joy S. Solomon
The Hebrew Home At Riverdale
Administration Office
5901 Palisade Avenue
Riverdale, NY 10471
jsolomon@hebrewhome.org

Estates, Trusts and Tax Issues
Patricia J. Shevy
The Shevy Law Firm, LLC
7 Executive Centre Drive
Albany, NY 12203
patriciashevy@shevylaw.com

Robert J. Kurre
Kurre Schneps LLP
1615 Northern Blvd., Suite 103
Manhasset, NY 11030
rkurre@ksesqs.com

Ethics
Natalie J. Kaplan
Elder Law on Wheels
477 Madison Ave., Suite 530
New York, NY 10022
nkaplan@elderlawoffices.com

Financial Planning and Investments
Ronald A. Fatoullah
Ronald Fatoullah & Associates
60 Cutter Mill Road, Suite 507
Great Neck, NY 11021
rfatoullah@fatoullahlaw.com

Guardianship
Robert Kruger
Law Office of Robert Kruger
99 Park Avenue
26th Floor Penthouse
New York, NY 10016-1601
rk@robertkrugerlaw.com

Ellyn S. Kravitz
Abrams, Fensterman, Fensterman,
Eisman, Formato, Ferrara
& Wolf, LLP
630 Third Avenue, 5th Floor
New York, NY 10017
ekravitz@abramslaw.com

Health Care Issues
Tammy Rose Lawlor
Miller & Milone, P.C.
100 Quentin Roosevelt Blvd., Ste. 205
Garden City, NY 11530
TLawlor@millermilone.com

Legal Education
Frances M. Pantaleo
Bleakley Platt & Schmidt LLP
One North Lexington Avenue
White Plains, NY 10601
fpantaleo@bpslaw.com

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

Legislation
Matthew Nolfo
Matthew J. Nolfo & Associates
275 Madison Avenue, Ste. 1714
New York, NY 10016
mnolfo@estateandelderlaw.net

Ira Salzman
Goldfarb Abrandt Salzman
& Kutzin LLP
350 Fifth Avenue, Ste. 4310
New York, NY 10118
salzlaw@aol.com

Liaison to Law Schools
Margaret M. Flint
John Jay Legal Services
Pace Law School
80 North Broadway
White Plains, NY 10603-3711
gflint@law.pace.edu

Peter J. Strauss
Drinker Biddle & Reath
1177 Avenue of the Americas
New York, NY 10036
advocator66@gmail.com

Marianne Artusio
Touro College Jacob D Fuchsberg
Law Center
225 Eastview Drive
Central Islip, NY 11722
MarianneA@tourolaw.edu

Mediation
Antonia J. Martinez
Antonia J. Martinez, LLC
P.O. Box 883
Croton On Hudson, NY 10520
elderlawtimes@yahoo.com

Beth Polner Abrahams
Polner Abrahams Law Firm
350 Old Country Road, Suite 101
Garden City, NY 11530
Beth@bpabrahamslaw.com

Medicaid
Valerie J. Bogart
New York Legal Assistance Group
Evelyn Frank Legal Resources Program
7 Hanover Square, 18th Floor
New York, NY 10004
vbogart@nylag.org

Rene H. Reixach Jr.
Woods Oviatt Gilman LLP
2 State Street, Suite 700
Rochester, NY 14614
rreixach@woodsoviatt.com

Membership Services
Salvatore M. DiCostanzo
McMillan, Constabile, Maker
& Perone, LLP
2180 Boston Post Road
Larchmont, NY 10538
smd@mcmplaw.com

Pauline Yeung-Ha
Grimaldi & Yeung LLP
9201 Fourth Avenue, 6th Fl.
Brooklyn, NY 11209
pyeung@gylawny.com

Mental Health Law
Suanne L. Chiacchiaro
45 Wintercress Lane
East Northport, NY 11731
slc4law@optonline.net

Mentoring
Richard A. Marchese Jr.
Woods Oviatt & Gilman LLP
700 Crossroads Building
2 State Street
Rochester, NY 14614
rmarchese@woodsoviatt.com

Anne E. Dello-Iacono
Raskin & Makofsky
600 Old Country Road, Suite 444
Garden City, NY 11530
anne@raskinmakofsky.com

Practice Management
Miles P. Zatkowsky
Dutcher & Zatkowsky
1399 Monroe Avenue
Rochester, NY 14618
miles@dutcher-zatkowsky.com

Publications
David Ian Kronenberg
Goldfarb Abrandt Salzman
& Kutzin, LLP
350 Fifth Avenue, Suite 4310
New York, NY 10118-1190
kronenberg@seniorlaw.com

Adrienne J. Arkontaky
The Cuddy Law Firm
50 Main Street, Ste. 1280
White Plains, NY 10606
aarkontaky@cuddylawfirm.com

Real Estate and Housing
Jeanette Grabie
Grabie & Grabie, LLP
162 Terry Road
Smithtown, NY 11787
jeanette.grabie@gmail.com

Neil T. Rimsky
Cuddy & Feder LLP
445 Hamilton Avenue, 14th Floor
White Plains, NY 10601-5105
nrimsky@cuddyfeder.com

Special Ed
Adrienne J. Arkontaky
The Cuddy Law Firm
50 Main Street, Suite 1280
White Plains, NY 10606
aarkontaky@cuddylawfirm.com

Special Needs Planning
Tara Anne Pleat
Wilcenski & Pleat PLLC
5 Emma Lane
Clifton Park, NY 12065
TPleat@WPLawNY.com

Joseph A. Greenman
Bond, Schoeneck & King, PLLC
1 Lincoln Center
Syracuse, NY 13202
jgreenman@bsk.com

Sponsorship
Jeanette Grabie
Grabie & Grabie, LLP
162 Terry Road
Smithtown, NY 11787
jeanette.grabie@gmail.com

Technology
Frances M. Pantaleo
Bleakley Platt & Schmidt LLP
One North Lexington Avenue
White Plains, NY 10601
fpantaleo@bpslaw.com

Moira Schneider Laidlaw
Shamberg Marwell Hollis
Andreycak & Laidlaw PC
55 Smith Avenue
Mount Kisco, NY 10549-2813
mlaidlaw@smhal.com

Veteran's Benefits
Felicia Pasculli
Felicia Pasculli, PC
One East Main St., Suite 1
Bay Shore, NY 11706
felicia@pascullilaw.com

Section Officers

Chair
Richard A. Weinblatt
Haley Weinblatt & Calcagni, LLP
One Suffolk Square
1601 Veterans Memorial Highway, Suite 425
Islandia, NY 11749
raw@hwclaw.com

Chair-Elect
JulieAnn Calareso
Burke & Casserly, P.C.
255 Washington Avenue Extension, Suite 104
Albany, NY 12205
jcalareso@burkecasserly.com

Vice-Chair
David Goldfarb
Goldfarb Abrandt Salzman & Kutzin, LLP
350 Fifth Avenue, Suite 4310
New York, NY 10118
goldfarb@seniorlaw.com

Secretary
Martin Hersh
Law Offices of Martin Hersh, Esq.
PO Box 567
Liberty, NY 12754
elder.law@verizon.net

Treasurer
Judith D. Grimaldi
Grimaldi & Yeung, LLP
9201 Fourth Avenue, 6th Floor
Brooklyn, NY 11209
jgrimaldi@gylawny.com

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

Accommodations for Persons with Disabilities:
NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at (518) 463-3200.

ISSN 2161-5292 (print) ISSN 2161-5306 (online)

Elder and Special Needs Law Journal

NEW YORK STATE BAR ASSOCIATION
ELDER LAW AND SPECIAL NEEDS SECTION
One Elk Street, Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

NEW YORK STATE BAR ASSOCIATION

Section Chair
JulieAnn Calareso, Esq.
Burke & Casserly, P.C.
Albany

Program Co-Chairs
Tammy R. Lawlor, Esq.
Miller & Milone, P.C.
Garden City

Ronald A. Fatoullah, Esq.
Ronald Fatoullah & Associates
Great Neck

Elder Law and Special Needs Section

Summer Meeting

The Hyatt Regency
Goat Island, Newport, Rhode Island

July 16-18, 2015

The New York State Bar Association's Meetings Department has been certified by the NYS Continuing Legal Education Board as an accredited provider of continuing legal education in the State of New York. The summer meeting has been approved for up to **13.5 MCLE credit hours; 12.5 credits in Areas of Professional Practice and 1.0 in Ethics. The "basic" sessions*of the program are transitional and suitable for MCLE credit for newly-admitted attorneys. A total of 4.0 MCLE credit hours are transitional: 3.0 credits in Professional Practice and 1.0 credit in Ethics.**