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The Senior Lawyer

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

Inside

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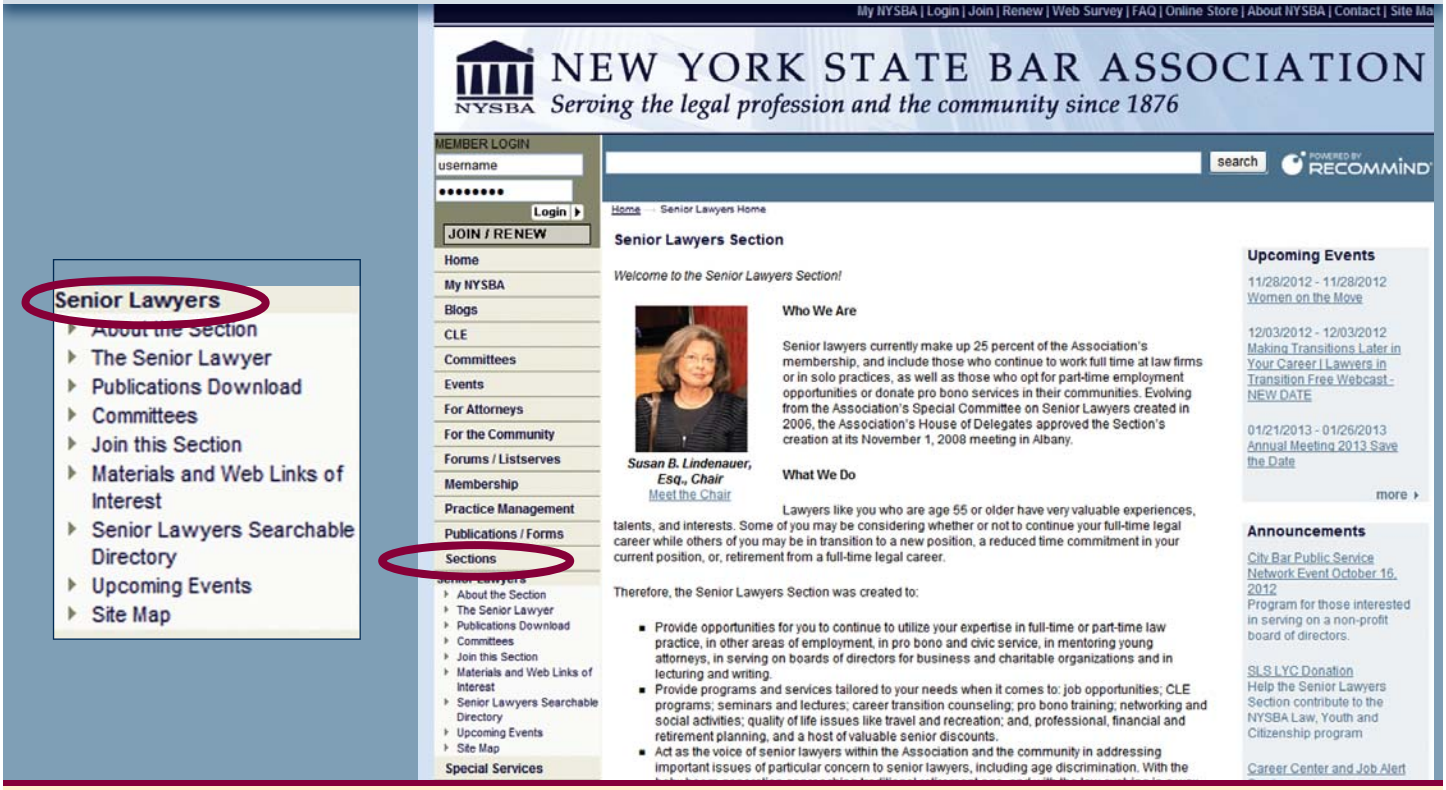

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A Message from the Section Chair

As I sit here preparing my Senior Lawyers Section Newsletter message in mid-October, I look out at autumn in New York with gold, red and orange leaves beginning to appear on the trees. I realize that you will receive this message and the newsletter after the New Year in bare branched and far colder January. My purpose is not to reflect on the change of seasons but rather to reflect on the accomplishments of the Senior Lawyers Section in 2012 and the expectations for 2013. The Section has continued to grow at a pace that is outstanding for a Section that is just about four years old. I believe that our growth in membership is tied to the exemplary programs that the Section presents and the breadth of the content of the Senior Lawyers Section newsletter.

In January 2012, at the New York State Bar Association Annual Meeting, the Senior Lawyers Section presented a program that focused on the varieties of ways that lawyers might approach retirement, including increased emphasis on pro bono service, combining pro bono or other community service with continued practice, moving from one practice setting to another, or continuing to practice without considering retirement. The program also contained thoughtful presentations about how to consider what will be next for you and the need to consider the impact of aging on lives and health. Summaries of some of the January 2012 presentations are to be found in this issue of the Senior Lawyers Section newsletter. They are worth your time as are the other Section newsletter topics. One that is particularly timely as I write is the presentation on "Older Voters Are the New Majority."

In October 2012, the Section presented a program with a provocative title "How to Stay in Touch, Keep Informed, and Provide High-Quality Legal Services without a Formal Office from Wherever You Are." The program was truly a 21st Century topic about how electronic technology has made it possible to have an anywhere law office and presentations included practical and how to go about it discussions and demonstrations about how to use the technology to maintain your office, your files, your research and do so ethically protecting client confidentiality.

In January 2013, at the New York State Bar Association Annual Meeting, the Section will have two important presentations, both of which will be CLE accredited. The first is "Transition Planning For You and Your Law Firm" and the second is on the Attorney Emeritus Program sponsored by the court system. Both should be of great interest to all members of the bar.

In addition, in 2013 the Senior Lawyers Section Committee on Age Discrimination will take a look at the current status of the NYSBA-sponsored effort to move law firms to voluntarily adopt policies that end age-related mandatory partners retirements. Through its Pro Bono Committee the Section has plans to strengthen its relationship with the Attorney Emeritus Program. We have many active and interesting committees. I urge all members of the Section to become active participants on our Committees and in our work.

Susan B. Lindenauer

A Message from the Editor

"Time flies when you are having fun!" So goes an expression that I have used for years. But now that I am qualified to be classified as a "senior citizen" (with discounted movie and museum admission prices), I realize that time flies faster as we grow older (or as I prefer to say, as we mature).

A problem with that "flying time" is that my acceptance of growing "more mature" is much slower than the "time" that "flies." Consequently, I do not consider my age based upon the year of my birth. Instead, my self-perceived age is at least twenty years less.

For that reason, like many others (perhaps most of us), the thought of retirement has not yet arrived. Nevertheless, especially since I have been in the Senior Lawyers Section of our bar association, I am mentally nudged to pursue not "retirement planning" but rather what I call "maturity planning."

The Annual Meeting of our Section a year ago focused on "maturity planning." Only about ten percent of the ever-growing members of our Senior Lawyers Section were able to attend the meeting. Because of the importance of its subject matter and the superb content of the program and the message delivered by its participants, it is essential that the information of that program be disseminated to the ninety percent of our members who did not, for many reasons, attend.

Among the articles in this issue of *The Senior Lawyer* are some of the highlights of that Annual Meeting. As many of us have diverted some of the time-consuming tasks to others, we have had more time available to broaden the scope of our activities. *Pro bono* activities are now a source of providing services to those who are not able to fund legal activities, especially litigation. Lynn M. Kelly, for example, has furnished some of the opportunities for us to provide legal services to those who cannot afford highly paid attorneys. She has given us insight into exploring various kinds of *pro bono* activities.

Dealing with the realities of aging (a process I refuse to accept) is the subject of the presentation of Monsignor Charles J. Fahey.

And then there are especially pertinent articles written by knowledgeable writers in various fields of law. Health care decisions are the subject of the article by Ellen G. Makofsky. "Ethics Matters" is presented by John Gaal.

In addition to the insight of the speakers at our Annual Meeting, are articles written especially for this issue of *The Senior Lawyer* as well as articles of particular interest published by other Sections of our Association.

Each of you has thoughts worthy of our articles for this publication and have read articles written by others, articles that deserve the attention of all of us. You are urged to forward to me any of the articles written by you or by others that you believe will benefit our members. There are practically no bounds to the scope of pertinent subject matter. Of course, accreditation will be given.

Please give me the benefit of your thinking and comments, good or bad, so that you and I and other members of the editorial board may review them and make this publication your Senior Lawyer magazine.

Willard H. DaSilva
Editor

A Second Season of Service—Exploring Multiple Pro Bono Opportunities

NYSBA Annual Meeting Senior Lawyers Section Program—January 24, 2012

By Lynn M. Kelly

I. Why do pro bono when you can decide what to do with your time?

- a. Giving Back to the Community
- b. Self-Development
- c. The Call of Service
- d. Happiness Factor

II. There are increased options for pro bono legal work in New York City through the court system. This presentation will focus on those available through the City Bar which include the Public Service Network, Monday Night Law, and the City Bar Justice Center and also those available through legal service providers

- a. Public Service Network at City Bar Justice Center
  - i. Matches attorneys with volunteer opportunities
  - ii. Data from the City Bar Public Service Network
    1. 1 in 10 (10.6%) volunteers are senior or retired attorneys
    2. 44% of retired attorneys volunteered for a project with a non-legal focus
    3. Retired attorneys contribute more hours than other PSN volunteers
    4. Retired attorneys are able to make a longer term commitment
    5. With the right match, retired attorneys can have a systemic, lasting impact on the nonprofit organization
    6. May continue to have access to resources of their former employer
  - iii. It may take several months and several interviews with different organizations to find the right match. A career counselor/coach can assist in identifying motivations and options.
- b. City Bar Justice Center
  - i. Pro Bono Cases in area of unmet legal need—economic justice, immigrant justice, and access to justice innovations
  - ii. Legal Hotline is a large area of need
  - iii. Training and mentoring offered
  - iv. CLE credit offered
- c. Large General Legal Services Programs with multiple branches—e.g. LS-NYC and Legal Aid
  - i. Training and CLE offered
- d. Mainly Single Site Programs—MFY, NYLAG, UJC, NMIC, NYLPI
  - i. Training and CLE may or may not be offered
- e. Specialized Legal Providers Targeted Group, some designed to use pro bono
- f. Social Service Agencies with Legal Departments—Settlement Houses
  - i. Unlikely training and CLE offered
- g. Neighborhood/Community Groups with Legal Needs—Make the Road
  - i. Unlikely training and CLE offered
- h. Government—Corporation Counsel, DA's offices

III. Professional skill development and fitting into a new practice environment

- a. There is a shared language of lawyers but beware common pitfalls—"takeover trap," "hierarchy," "impatience," "worthy poor"—in transitioning from private practice to poverty law practices.
- b. Limited support resources—learn to do your own word processing.
- c. Don't expect administrative backup.
- d. Discuss office space and resources up front.
- e. Try to assess the Organization's expectations of volunteers.

i. They may be expecting a seasoned expert.

ii. There may be a lack of flexibility on time—some retired lawyers take several months to travel or visit a second home.

iii. Managers are doing a cost-benefit analysis on new volunteers—is the training, space, support and oversight required worth it?

IV. Practice concerns for every new volunteer

a. Do you have malpractice coverage? Will the placement provide it or do you need to purchase it?

b. Will you share office space and where will you keep files?

c. How often will you speak to the coordinator/supervisor?

d. Will someone give you feedback on your work?

e. Where will you meet with the client and how will you keep in touch? Be wary of sharing your personal cell phone number with clients and explore options.

f. Do want a short or long-term placement?

g. Will you have access to electronic research and a library?

V. Ethical and other considerations

a. Attorney Registration—In New York, "[a]n attorney is 'retired' from the practice of law when, other than the performance of legal services without compensation, he or she does not practice law in any respect and does not intend ever to engage in acts that constitute the practice of law." An attorney in good standing, at least 55 years old and with at least 10 years of experience, who participates without compensation in an approved pro bono legal services program, may enroll as an "attorney emeritus." The retired attorney docs not pay the biennial registration fee but may continue to practice law pro bono, provided no fee is charged. N.Y. COMP. CODES R. & REGS. Tit. 22 § lIS.l(g) (2011).

b. CLE requirements are waived for retired attorneys.

c. Use of Professional Letterhead and Disclosure Obligations. A retired attorney may use professional letterhead and may, but is not required, to disclose that or he or she is retired. Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Formal Opinion 2005-6.

VI. Finding a match. Ask for an interview with any organization that you are interested in and try to generate several options from which to choose

VII. Prepare for the interview by thinking carefully about what motivates you to volunteer

a. Do you want to help individual clients?

b. Do you want to help a group or nonprofit?

c. Other considerations—time available, location

d. What are your goals?

VIII. Examples of successful senior attorney placements

a. Henry, retired in-house corporate attorney. Speaks French and interested in helping clients in immigration area of law. Placed with the City Bar Justice Center's Refugee and Asylum Project.

b. Shirley, a retired government lawyer, matched with the City Bar Justice Center's Lawyers Foreclosure Intervention Network, has been partnered on cases with new attorneys afraid to handle a litigated matter on their own. She has brought her many years of experience and wisdom to a high area of need and saved many homeowners from losing their homes while training the next generation of attorneys.

IX. Lawyers Assistance Programs—bar association projects to assist attorneys with stress, depression, gambling addictions, drug or alcohol issues that may accompany or present at time of transition

Lynn M. Kelly is the Executive Director of the City Bar Justice Center.

Impact of Aging on Lives and Health: Dealing with the Realities of Aging

By Monsignor Charles J. Fahey

Laws, natural and positive, enable us to live as individuals and as a society in dignity, pursuing our own interests as well as participating in the promotion of the common good and common goods.

Aging and the Aged Are Universal Phenomena

All things, including human beings, are incomplete pursuing homeostasis; physical, emotional, intellectual and, yes, spiritual. Electrical and chemical interactions are universal and, in the instance of human beings entering into exchanges with other human beings, the pursuit of what is perceived by the individual as useful and satisfying is pursued throughout the life span. For us, love, guilt, power and valued things are the coin of the realm.

It is law that orders the processes and means that individuals and their corporate efforts utilize to realize "the good," or perhaps better, "the goods."

Needless to say, it is lawyers who play a key role in the application of laws in the real world.

All things are continually aging. Society identifies a period of life as the aged or as the old and often infuses the social construction into law to offer certain protections and benefits as befitting persons who, at least as a group, have contributed to society over time and thus benefiting all others who are "not so old"…yet! Sometimes benefits are characterized as rooted in veteranship, not service benefits alone. There are other societal responses to those in physical, emotional and economic need often associated with age. Not all responses are in the public policy arena, but they are evidenced in many ways, formal and informal, rooted in culture and societal experiences.

Law is especially significant to the actually or potentially vulnerable (i.e., illness, accidents, exploitation and impoverishment). The older a person, the more vulnerable he or she is or can become. All living things evidence a life course that involves maturing physically, emotionally, intellectually and, in most instances, spiritually and morally, but also in old age physical decline is accompanied by other diminishments.

All species are renewed continuously as their members individually move through different human periods from birth to death at different times.

Examining an individual's life span we can identify three ages overlapping but distinct. The first is from conception until the physical capacity for reproduction. The second is the period of reproduction and maximum physical capacity (at least in former times) for necessary work, and now a third age normal only in the last century, *terra incognita*, to some extent.

Underlying this reality is cellular activity, initially developmental, in the first age, then at its maximum efficiency in the second, but declining in the third as cellular repair cannot keep pace with its degradation. This manifests itself for those in the third age in ways that are generally universal but also idiosyncratic. For women it begins with the menopause. For all, regardless of gender, there are changes in hair, skin, vision, teeth, hearing, short-term memory, organ reserves and cardio-skeletal resiliency. All of these things give evidence that the individual is no longer necessary for species survival.

While there are commonalities in the third age, each person is an individual with his or her genome experiencing a lifetime of physical/social determinates as well as individual choices, some wise and others foolish.

Progressive Intermittent Frailty (PIF)

The third age is marked by progressive intermittent frailty (PIF) that may be moderate or acute, relatively benign or debilitating, but over the life course is likely to have all of these elements.

Frailty as used here is the disequilibrium between personal capacity and external demands. This disequilibrium is not only rooted in the person with individual events such as diseases, organ failure and accidents, but also in external physical and social elements as well (e.g., loss of significant others, changing neighborhoods and living space that now may no longer be safe as balance becomes less certain). Needless to say, in a highly monetized society decline in income and assets may leave one without the means to compensate for losses.

The End Point of PIF Is Death

Progressive

Manifestations of frailty intensify over time as the cellular disruption intensifies, relationships change and financial resources diminish.

No person is an island. We are social beings. Every facet of our lives is influenced by others. No matter how much an isolate, we have an impact on others. Fortunately, personal relationships for the most part are positive, but we all are aware that tensions at times are a reality. As the significance of events intensifies, they can erupt into

painful, destructive and long-lasting enmities. Whether they be matters of money, housing and/or treatment decisions, disagreements can arise. These are exacerbated when the older person's intellectual or emotional faculties are compromised.

Intermittent

This refers to happenings that may be transit and likely unexpected, though they are likely to intensify the frailty. These can occur within a relatively brief period as well as over the course of the third age. For example, within a day a person may function reasonably well in all areas necessary for decency in daily living and poorly in the next hour and reversing the process within a day or several days. These ups and downs are physical but can be intellectual as well. This reality is challenging for the person, his or her significant others and those who provide care or other services.

Coming to Grips with PIF

We devise various personal and societal strategies to minimize disabling elements though inertia, distraction and denial may get in the way.

Individuals can undertake various behavioral activities, such as exercise, diet and disease management as well. With more subtlety we may select wise courses of action to avoid problems, optimize remaining positives in our lives and compensate for losses (thank goodness for various reminders).

We are fortunate to live at a moment in history with improvements in public health interventions to cleanse the air and our waters as well as to make various vaccines readily available that not only ward off the immediate dangers of various communicable diseases but their long-term consequences as well.

Medical interventions, various prostheses and pharmacological agents not only save lives but minimize to some degree physical frailty.

At no part of our lives can we live alone. We are social beings and live in societies in which our well-being (or lack thereof) is inextricably bound up with others. Thus the need for law and lawyers to help us negotiate the inevitable differences that may or have aroused around us.

The greater degree of vulnerability, the more we need structures and persons to help us navigate our way.

I do not have to remind you of the difficult and even heartbreaking events that can occur as the end of life approaches and even after it occurs. While many of us may defer making choices that remind us of our mortality, it is ethically and spiritually imperative that we do so. In so many instances law and lawyers are essential to assure that lifelong wishes be articulated…yes, formally.

Timeliness is an important element in dealing with challenging and perhaps contentious issues. As the adage goes, never do today what you can do tomorrow. However, when it comes to estate planning and health care decision making, the sooner the better. It is important to have informed decisions in place and better to have potentially contentious stakeholders at least aware, if not supportive, of the decisions while the principal is able to deal directly with and live with the potential consequences of his/her decisions about the future.

In this regard I am reminded of two concepts that are applied to the banking industry especially, but not limited to, mortgages; activities that be characterized as transactional or relational. In the former, emphasis is placed on an individual event with little human interaction; an event is entered into and consummated in a brief encounter, almost "untouched by human hands." Neither originating cause nor the outcome has little continued interest on the party facilitating it, only that it is occurred "for an immediate price."

The relational transaction involves a truly human interaction in which the facilitator (banker, attorney) is engaged with the parties before and after as well as in the process itself. The focus is not only on the outcome (the completed agreement) but on the wellbeing of the parties at all stages.

Some Issues of Dying and Death and Advanced Directives

Death can be anticipated in some instances but often is like the proverbial thief in the night. Ideally, individuals at some point come to grips with their mortality and make preparations. While ideally one would be in a position to make conscious, deliberate decisions about treatments, or no one's death is proximate, it is neither easy, nor in many instances, possible. Reactions accusing health care reform measures as forwarding "death panels" and evoking passionate responses give evidence of the emotion surrounding this challenge; yet thoughtful reflection and planning are in accord with the moral responsibility that goes with being human.

The advanced directive "movement" has been effective in our state to assist in encouraging thoughtful discussions and even codifying instruments to record one's wishes. The New York State Department of Health website has helpful material on living wills, MOLST documentation and health care proxies.

- http://www.seniorlaw.com/livwill-hcp.htm
- http://www.nysba.org/Content/NavigationMenu/PublicResources/LivingWillHealthCareProxyForms/LivingWillEnglish.pd\
- http://www.health.ny.gov/professionals/patients/patient_rights/molst/

- http://www.health.ny.gov/regulations/task_force/health_care_proxy_/guidebook/

A Word About Advanced Directives

Health care treatment decisions are intensely personal. However, they are not without societal consequences; witness the contentious death panel comments accompanying the national health care rhetoric. New York State has dealt extensively with issues about death and dying with some degree of initial public debate.

Of special concern to us all is the actual or potential loss of intellectual ability…a challenge for the person and all who care for him/her, including professionals. As a result there are significant provisions in the public health code governing various approaches to making one's wishes now in the event of incapacity in the future to make timely, necessary decisions about treatments.

A primary responsibility of all professionals (at least in the classic use of the word) is to assist a person to achieve and to maintain the ability to live in decency and with respect for personal autonomy. While there are the legal prescriptions that offer alternative means of recording advance decisions (living wills, MOLSTs and Health Care proxies), at the heart of the matter is the individual making a medically, ethically and in many instances a religiously informed determination that is then codified in one of the instruments. While an attorney can be helpful (though not always necessary) in executing the controlling document, facilitating the process so that the decision is appropriately informed and the others who will be influenced by or subsequently impact the decisions brought into the conversation are essential to relational professionalism…perhaps, a bit of redundancy.

Just as in all significant matters, those matters involving persons in the third age, especially as frailty intensifies, a sensitive, knowledgeable legal advocate is an important element in dealing with this often difficult period of one's life, particularly as the person strives to set all the relationships in one's life aright.

Msgr. Charles Fahey is chairman of the National Council on Aging, a program officer of the Milbank Memorial Fund and Marie Ward Doty Professor Emeritus, Fordham University. He is a priest of the Roman Catholic Diocese of Syracuse, New York.

Elder Efficacy: What to Do and How to Do It

By Robert Abrams

Perspectives

"Chance favors the prepared mind."
—Louis Pasteur

"Optimism is the faith that leads to achievement. Nothing can be done without hope and confidence."
—Helen Keller

"Before anything else, preparation is the key to success."
—Alexander Graham Bell

"Despair is most often the offspring of ill preparedness."
—Anonymous

"The time to repair the roof is when the sun is shining."
—John F. Kennedy

"A goal without a plan is just a wish."
—Antoine de Saint-Exupery

"Planning is bringing the future into the present so that you can do something about it now."
—Alan Lakein

"Let our advance worrying become advance thinking and planning."
—Winston Churchill

"It pays to plan ahead. It wasn't raining when Noah built the ark."
—Howard Ruff

"He who fails to plan, plans to fail."
—Anonymous

What You Need to Know

As we prepare for the elder years, we recognize that we cannot predict the future but can reasonably expect almost anything can happen at any time with little or no notice. Therefore, the time to plan is now and we must plan with elder efficacy; a sense of organized urgency based on our knowledge, experience, maturity and most importantly, our love for our family, friends, and community.

Now, the "To Do" part will take some time but is actually a lot less complicated and emotional than our antagonists—geriatric gamblers, planning procrastinators and those with ED—believe. In fact, the "To Do" part can actually be invigoratingly rewarding and enjoyable, especially if you approach it with youthful enthusiasm.

Just like there are many ways to throw a ball, make a presentation, relax, vacation, etc., there are lots of ways to develop your elder plan. The goal, however, remains the same—create a plan that meets your own unique objectives. It doesn't matter how you complete it, just complete it.

In this light, you may choose your own path to your elder plan and/or you may want to adopt the following suggestions:

A. Get Organized

B. Advance Directives

C. List and Track Healthcare Information

D. Review Health and Other Insurance

E. Complete and Revise Your Financial Inventory

F. Eligibility for Government Benefits

G. Review and Update Your Testamentary Plan

H. Stay Connected to Friends, Family and Community

I. Safety and Common Sense

J. Burial Arrangements

K. Use and Selection of Professionals

A. Elder Efficacy Get Organized

It may take time to get organized. However, it will take less time to organize than it will take to deal with a crisis when you are disorganized. It will also cost less and involve less stress.

ITEM:

1. **Birth Certificate, Passport, Immigration Papers, Driver's License**

REASON:

Government, Financial Institutions and other entities require identification to confirm your identity. Immigration papers may be requested to prove citizenship and/or that the person is in the country legally. If you don't have these documents, you can order them by going to the U.S. Citizenship and Immigration Services website at www.uscis.gov.

ITEM:

2. **Health Insurance, Medicare or Medicaid Cards, Medigap, Drug Coverage, Long Term Care Coverage, Health Savings Account, etc.**

REASON:

Confirm type and extent of health insurance you have. Make sure your health insurance cards and information are readily available.

ITEM:

3. **Social Security Card**

REASON:

Financial entities may request to see your actual social security card. It may also be used to confirm social security number. If you don't know where your card is, order a replacement and, upon receipt, put it in a safe place. You can order a replacement card by going to the U.S. Social Security Administration website at www.ssa.gov.

ITEM:

4. **List of Routine and Emergency Contacts, Including Family Members, Healthcare Professionals and Emergency Services**

REASON:

Availability of a list will help you and those assisting you in an emergency have the ability to communicate with important individuals in a timely manner. In certain emergencies this could be the difference between life and death. It's prudent to keep your own personal and business contact information on this list as well." A copy of this list should be given to your loved ones.

ITEM:

5. **List of Professionals, Including Attorney, Accountant, Insurance Broker, Financial Advisor, etc.**

REASON:

Many of us have one or more advisors. Moreover, if you become unavailable or incapacitated, your family members or attorneys may want to contact one or more of these individuals. If you keep an updated list with current information, your loved ones and advisors will be able to assist you in a timely and efficient manner. Your elder law attorney will likely want this information so he or she can review your elder plan with the other professionals who are assisting you.

ITEM:

6. **Burial, Funeral and Other End of Life Information**

REASON:

The question itself raises the issues as to how you wish to be treated upon your demise and if you have made arrangements. It's important that this information is available to your loved ones upon your demise. If you have not made arrangements you need to determine when it's time to do so. Remember, if you fail to make arrangements now, your family will have to do so immediately after you die. They shouldn't have to make such a difficult decision, which requires time, effort and money as they grieve over your passing.

ITEM:

7. **Organ Donor Card**

REASON:

If you registered to be an organ donor, you need to make sure all paperwork is in order. You need to communicate your wishes to your loved ones and ensure you carry with you an organ donor card, bracelet or some other document/object.

ITEM:

8. **Family Tree**

REASON:

As you prepare, update and review your estate plan, your attorney must know whether or not you have a legal obligation to one or more family members. Special attention will be given to your spouse, children, parents and siblings. This will also provide you an opportunity to discuss if you have any family members with special needs who require special planning considerations.

ITEM:

9. **Marriage License, Divorce Decree, Prenuptial Agreements, Agreements with Domestic Partners, etc.**

REASON:

With marriage, life partners and ex-spouses come an array of legal and moral issues that must be addressed. Make sure you have these legal documents kept in a safe place.

ITEM:

10. **Adoption Papers, Birth Certificates and Other Important Documents for Your Minor and Adult Children**

REASON:

These documents may be needed for your life and estate planning. You should provide your adult children

with the originals or at least copies of these documents so they can use them for planning and identification purposes.

ITEM:

11. Employment Status and History

REASON:

Depending on your age, you and/or your attorney may want to determine what impact working has on your social security, health insurance and other benefits.

ITEM:

12. Current Benefits and Assistance

REASON:

Are you currently receiving disability, worker's compensation and/or any other benefit? If you are, you need to ensure you have all necessary documentation and that you update required information on a timely basis.

ITEM:

13. Pets

REASON:

Do you have one or more pets? Does your pet have a license? Has your pet had its immunization and other shots? Have you thought about who you wish to care for your pet if you're unavailable or unable to do so? Do you have instructions available as to any special needs your pet may have? To make sure your pets are taken care of if you should become unable to do so, you need to be prepared and distribute vital information.

ITEM:

14. Passwords, Keys to House, Car, Safe Deposit Box, etc.

REASON:

Make a list of all your passwords to email and other computer-based applications, house alarm, financial accounts, etc. Also, where do you keep your extra set of keys?

Who has access?

ITEM:

15. Military Discharge and Veteran's Documentation

REASON:

If you served in the military, do you have your discharge papers? The Veterans Administration offers a variety of services and benefits but you need to confirm your eligibility before you can access available benefits.

ITEM:

16. Religious Affiliation and Name of Clergy

REASON:

If you have a close relationship with your clergy and congregation, they should be added to your contact list.

ITEM:

17. Safe Deposit Box and /or Other Storage Venues

REASON:

Do you keep property in a safe place? You need to ensure your loved ones can get to this property if you become unavailable.

ITEM:

18. Obituary

REASON:

If you have specific wishes on how you want your obituary to be written, or have other post-death wishes, you need to let your loved ones know.

ITEM:

19. Legal Documents

REASON:

In addition to the legal documents already listed, you need to keep original copies of your last will and testament, Advance Directives such as a Power of Attorney and Healthcare Proxy and other legal documents including mortgage, business agreements, financial instruments such as stocks and bonds, insurance certificates, etc. in a safe place. It is prudent to keep a copy of important legal documents in a different location.

ITEM:

20. Financial Inventory

REASON:

Keep your financial information on a secure spreadsheet which includes not only a list of your income, assets and liabilities but also all relevant contact information including company address, phone numbers and emails; names and other pertinent information about your advisors.

ITEM:

21. Insurance Coverage

REASON:

Make a list of all insurance coverage you have, the company that provides the coverage, the amount of coverage you have and where your policy contracts are kept. In addition to health insurance, many people have car insurance, a home owner's policy, life insurance, an umbrella policy and special coverage for jewelry and other valuable possessions.

ITEM:

22. Health Information

REASON:

You should provide your loves ones with a list of medical issues which need to be shared with medical personnel and first responders if an emergency occurs. This should include chronic and acute health conditions

as well as the medications you are currently taking. The availability of such information can be a matter of life and death.

Therefore, it is also prudent to keep this information in your home as well as on your person.

ITEM:
23. Key Dates

REASON:
Key dates including application and/or certificate dates for social security, Medicare and other program eligibility; birthdays, anniversaries and other special events of the people you love, etc.

B. Advance Directives

By now, we are all experts on what advance directives are and how important it is for you to appoint another person to make decisions on your behalf if you subsequently become incapacitated.

Simply stated, if you have one or more loved ones, friends, business associates or professional advisors whom you trust to act on your behalf if you become unable to do so, prepare and execute your advance directive now.

If you can afford and/or have access to a knowledgeable attorney, I'd recommend you seek that attorney's assistance and guidance in completing your advance directives. If you elect to do it on your own, you can access forms, with instructions, from a variety of public, for-profit and voluntary organizations.

Healthcare providers such as hospitals and nursing homes are generally required by federal law to provide new patients, free of charge, with information about healthcare advance directives.

C. List and Track Healthcare Information

Create your own electronic personal health record (PHR) which allows you to tract important health information. If and when you require routine and/ or extraordinary medical care, having all your records and treatment history in one place could prove to be a life saver—literally and figuratively.

Many public agencies, such as Medicare and the Veterans Administration, have or will soon provide patient health records to their patients. Google Health and Microsoft's Health Vault are two examples of how businesses believe in the value of assisting customers to maintain their health information. Smaller private companies also provide personal health records.

D. Review Health and Other Insurance

Many insurance professionals will provide a free or low cost insurance check-up. Work with a competent professional to see if your needs are being met to the greatest extent possible and to determine if you can lower some, if not all, of your insurance premiums. If you are a Medicare recipient and/or veteran, make sure you familiarize yourself with these programs.

E. Complete and Review Your Financial Inventory

You can't create an effective plan without knowing your financial condition. If you can afford to work with a financial advisor, many of whom will charge an affordable fee or even assist you free of charge with the hope of getting your future business, you should take advantage of the guidance and advice an objective professional can give.

Most importantly, you need to understand the relationship between your finances, projected longevity, personal and family obligations and your lifestyle.

Elders know how to and must act like mature adults.

F. Eligibility for Government Benefits

As you become more familiar with government benefits and assistance you believe you may be entitled to, you need to take affirmative steps to access them. The more comfortable you are with technology, the easier it will be to find out about programs, and to apply online when available.

First and foremost, familiarize yourself with the National Council on Aging's "Benefits Check Up," an online guide to available government benefits and assistance, at www.benefitscheckup.org.

To access Social Security benefits and applications go to www.ssa.gov To access Medicare benefits and applications go to www.medicare.gov. To access Veterans benefits and applications go to www.va.gov.

For all additional benefits, you may find information on government and not-for-profits organizations' websites. Of course, although we live in a digital world, you may also access information the old fashioned way, by telephone. Recently I heard of an 83-year-old woman who wanted information about a health remedy discussed by a doctor on a television news show. Since she didn't use the Internet, she called directory assistance, asked for the television station's phone number, called the station and asked for the doctor's phone number. Within 15 minutes she was talking directly to the doctor she had seen on TV and getting all the information she needed!

G. Review and Update Your Testamentary Plan

An effective testamentary plan is designed to implement your wishes and, in most cases, to provide for your loved ones.

You need to invest the time and money to ensure that your estate plan is prepared properly.

H. Stay Connected to Your Friends, Family and Community

There is no reason to be alone. Isolation often leads to depression and other medical challenges.

Regardless of your medical, financial and personal condition, you can and must stay engaged with others.

In addition to personal involvement, the Internet provides you with multiple opportunities to communicate with your loved ones, friends and other members of your community.

I. Safety and Common Sense

If you exercise safety precautions and common sense you reduce the likelihood of being in a dangerous and harmful situation and increase your ability to successfully deal with dangerous and harmful situations when they arise.

The following safety and common sense suggestions shall serve as the foundation for your personal security:

❖HEALTH

- Create and maintain your electronic health record and ensure that your physicians, emergency personnel and your loved ones have immediate access to that information.
- Keep a health card in your wallet/purse which summarizes your medical condition, including current medications, and which provides key contact information, including the names, phone numbers and email addresses of your doctors.
- Ensure that you keep copies of your health, Medicare, drug, and other insurance information on your person, in your home and in at least one safe place.
- Make sure that your healthcare advance directives have been properly completed and distributed to your agent(s), physicians and/or other medical providers.
- Take your medication as prescribed and confirm the side effects of each individual medication you take as well as the contraindications that may occur from the combination of medications you are taking.
- If you are on a special diet prescribed by your doctor, make sure you are following it.
- Listen to your body. If you recognize an acute change in your health or behavior, take immediate action. If you or your loved ones notice a change over time, check with your doctor.

DO NOT GAMBLE WITH YOUR HEALTH!

❖DON'T BECOME A VICTIM

- There are lots of scam artists out there who like to prey on older persons. Don't feed their appetite by becoming an easy target.
- At the risk of stating the obvious, do not allow strangers into your home or give personal and financial information to telephone solicitors whom you do not know

❖EMERGENCY AND DISASTER PREPAREDNESS

- On the FEMA website, www.FEMA.gov, the government provides basic information on what you need to do in an emergency and how to prepare for an emergency. Take time to review this information and then follow their advice and guidelines.
- All of us should, particularly those individuals who live alone, have a method to communicate with others and have others communicate with us in an emergency situation. In addition to family and friends, familiarize yourself with policies and procedures created by your local community.

❖BECOME A TECHNOLOGICAL WIZARD

- Almost all of the TO DO suggestions are best designed and implemented with technological solutions.
- Contrary to popular belief, a growing number of individuals 50 years and older not only use technology but have actually become quite proficient at it.
- The following is just a small sample of how technology can keep you safe and improve the quality of your life.
- Communication Tools
  - smart phones
  - video chats
  - alert notifications of pending emergencies
  - email
- GPS
  - no need to get lost
  - locator tool

J. Burial Arrangements

Don't leave this important function to your loved ones to perform immediately after you die. You need to decide how you wish your remains to be handled and then take the necessary action to put a plan in place.

K. Identification and Selection of Professionals

To the extent you can afford it and/or you are able to secure the guidance of skilled professionals to help

you develop your elder plan, I strongly recommend you do so. You should think of yourself as your Elder Planning Team Manager and you should recruit the following professionals for your team:

(i) Elder Law Attorney

(ii) Geriatrician and/or other doctors with familiarity with aging issues

(iii) Financial planner

(iv) Insurance Broker

(v) Accountant and Tax Advisor

Depending on your unique objectives, health and financial status and other personal issues, you may need to invite other professionals to join your team.

Remember, the more informed you are, the more successful information and guidance you can provide the professionals on your team.

If you follow these simple recommendations, you are well on your way to pragmatic planner status!

Many of us tend to postpone or avoid dealing with issues we consider difficult, perplexing or nerve racking. Why is it so difficult to take that first step? Change seems hard. But as the simple recommendations listed above have shown, taking charge of your future can be easier than you think! Don't wait for miracle, don't wait for the inevitable, don't wait at all—

BE A PRAGMATIC PLANNER!

Robert Abrams is the creator and co-editor of the *Legal Manual for New York Physicians*. He has the distinction of being one of the few attorneys in the history of the New York State Bar Association to chair two substantive sections. From 2000 to 2001, he served as chair of the Health Law Section. Earlier in his career, Bob served as Chair of the Elder Law Section.

Mr. Abrams is a founding partner and currently Of Counsel to the health law firm of Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP, located in Lake Success, New York. The law firm provides corporate, litigation and related services for physicians and other health care providers.

He is also is the editor-in-chief of *Guardianship Practice in New York State* (NYSBA 1997); co-author of *Boomer Basics* (McGraw-Hill 2000), an informative reference guide for consumers; author of *Watered Down Truth: A Flood of Lies More Deadly Than Hurricane Katrina*; and served on the Editorial Board of the *New York State Public Health Manual*. His book, *Be a Planner, Not a Gambler: What You Need to Know and Do to Prepare for the Elder Years*, is the catalyst of a national movement to encourage the 70 million Americans 50 years of age or older to prepare for the elder years.

This article is excerpted (Chapter 8) from the book, *Be a Planner, Not a Gambler: What You Need to Know and Do to Prepare for the Elder Years* by Robert Abrams, with Hilary Casper and Marcie Serbie, and is reprinted with permission.

About the Senior Lawyers Section

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

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

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

To join this NYSBA Section, go to www.nysba.org/SLS or call (518) 463-3200.

A Fact-Finding Process Might Be the Solution for Resolving Your Employment Dispute

By Jeffrey T. Zaino

It is common for parties to an employment dispute to first attempt mediation to resolve a dispute. This is typically the first step in many employer-promulgated dispute resolution plans. Mediation is a non-binding process where a skilled mediator guides the parties to a negotiated settlement. If the dispute is resolved in mediation, both the employer and employee then avoid the time and potentially higher costs of either litigation or arbitration. Adversarial proceedings like litigation and arbitration should be the last step in achieving resolution of a dispute. Such proceedings can require extensive information exchange and discovery. If the parties, however, have extreme positions and lack any consensus on the facts of the case, mediation may also be impractical and a futile exercise, particularly in the early phase of a dispute.

What should parties do if faced with a dispute that is not suited for mediation and where they want or need to avoid resorting to litigation or arbitration? A fact-finding process might be the solution. This article will explore how a fact-finding process works and how disputes can be resolved long before a mediation and/or arbitration phase is trigged by an employer promulgated plan or individually negotiated employment contract.

History

The fact-finding process has its roots in international disputes, being first established during the Hague Convention of 1907. The process is commonly used today by international bodies like the United Nations. Recent examples of fact-finding missions and reports by the United Nations are Saddam Hussein's weapons arsenal in 2002 and the Gaza Conflict in 2009. Besides international disputes, fact-finding is used domestically by the federal government, states, towns, unions, and companies when contentious issues arise that require fact-finding investigations and reports. The process also works to address and resolve employment disputes, both individual and collective disputes.

Fact-Finding Process

Like other alternative dispute resolution (ADR) processes, fact-finding is created either by a pre-dispute contract between the parties calling for a fact-finding process or by joint submission after a dispute has arisen. Administrative agencies like the American Arbitration Association (AAA) offer fact-finding procedures and sample contract clauses to trigger a fact-finding process. The following is an example of a fact-finding clause that could be added to an employment contract in conjunction with a standard arbitration provision:

> If a dispute arises out of or relates to this contract, or the breach thereof, the parties agree to first submit their dispute to a neutral fact-finder pursuant to the American Arbitration Association's Fact-Finding Procedures administered by the American Arbitration Association before resorting to arbitration, litigation, or some other dispute resolution procedure.

Pursuant to the *AAA's Fact-Finding Procedures*, "any party may initiate a Fact-Finding process" and the fees are borne equally. It is recommended, however, if fact-finding is triggered by an employer-promulgated plan (a plan that all employees sign as a condition of employment), the employer should bear the majority of the administrative costs and fact-finder's per diem.

Once either party initiates the fact-finding process, the parties can either review a list of fact-finders for a mutually acceptable person or have a neutral administrator appoint the fact-finder. This should occur within days of the initiation and the fact-finder should be an expert versed in fact-finding, employment law, and have an understanding of the employer's industry. No person should serve as a fact-finder if he or she has any personal or financial connections to the parties, or interest in the outcome of the dispute. Like serving as an arbitrator or mediator, the fact-finder should make any and all disclosures upon selection.

The fact-finder, once selected, then works with the parties to establish a schedule for submission of documents and identifies all persons with information pertaining to the dispute. Also, the fact-finder and parties should establish set rules of procedure, including specifics such as length of interviews. The parties should also advise the fact-finder whether or not they want a settlement recommendation included in the fact-finder's report.

The fact-finder should have access to all relevant documents and information and all participants, the parties and those persons with information related to the dispute, are expected to fully cooperate during the interviews. Confidential information disclosed to the fact-finder during the investigation and interviews of the parties and witnesses must remain confidential. A fact-finder should

never be compelled to divulge information disclosed or testify about the investigation in any adversarial or judicial proceeding. The parties should also maintain the confidentiality of the process. This includes expressed suggestions of settlement or admissions by either party and proposals and views made by the fact-finder during the investigation. The complete investigative process should be completed within two weeks but can be shortened or lengthened based on mutual agreement by the parties.

Fact-Finding Report

The fact-finder should prepare a concise report summarizing in detail all facts found during the investigation and include credibility determinations. Close questions of credibility should be identified and explained. Unless agreed to by the parties, the report should not include suggested remedies and/or settlement recommendations. The report will hopefully provide the parties with a far better understanding of disputed facts and make it easier to determine if it is time to settle or pursue other dispute resolution solutions. If mediation or arbitration is deemed necessary after the fact-finding, the fact-finder should not be the mediator or arbitrator.

Employer-Initiated Fact-Finding

Beyond individual disputes between an employer and employee, an employer should also consider initiating fact-finding investigations when facing repeated employee complaints, or claims. A fact-finder can conduct an extensive investigation, evaluate ongoing disputed facts between the employer and employees, and provide the employer and its management team with a better understanding of what is creating a negative environment. The information uncovered during the investigation could go a long way toward eliminating or reducing future employee complaints and claims.

Jeffrey T. Zaino, ZainoJ@adr.org, is the vice president of the Labor, Employment and Elections Division of the American Arbitration Association in New York and oversees the operations, development and panel of arbitrators for the Labor and Employment Arbitration caseloads. Zaino is dedicated to promoting ADR methods and neutral election services for our nation's unions, associations, corporations, and colleges.

This article originally appeared in the Fall 2012 issue of the New York Dispute Resolution Lawyer, *published by the Dispute Resolution Section of the New York State Bar Association.*

For Your Information

Older Voters Constitute New Majority

Another interesting statistic emerging from the 2010 census report is that for the first time, Americans 45 and older make up a majority of the voting age population. Since there are currently approximately 78 million baby boomers who are between the ages of 46 and 65, the nation is rapidly graying, and older voters in the next few years will constitute the new voting majority. These voters are greatly concerned about issues regarding Medicare, Social Security and the current state of the American economy. Approximately 119 million people are now 45 and older, and since older Americans usually have a higher election turnout, it is estimated that in the upcoming presidential election seniors 45 and older could represent about 60% of the votes cast.

This paragraph originally appeared in the Fall 2011 issue of the New York Criminal Law Newsletter*'s "For Your Information" column, published by the Criminal Justice Section of the New York State Bar Association.*

New Alzheimer's Study

In an effort to shed some additional light on the causes of Alzheimer's, which affects millions of people each year, a new study, which was conducted at the University of California at San Francisco, reported that seven risk factors have been identified as contributing to the disease. The factors were identified as smoking, depression, low education, diabetes, too little exercise, obesity and high blood pressure in mid-life. The study reported that if these risk factors could be reduced by 25%, approximately half a million Alzheimer's cases in the United States could be avoided each year. The study stated that worldwide, the biggest impact on Alzheimer's cases is low education because there is less of an opportunity for people to use and develop brainpower that can carry them into old age. Smoking and too little exercise were also identified as having a large and significant impact with respect to Alzheimer's disease.

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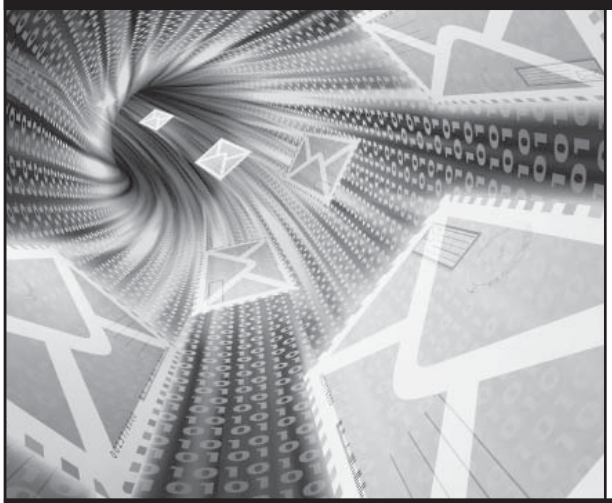

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Willard H. DaSilva
DaSilva, Hilowitz & McEvily LLP
585 Stewart Avenue, Ste. L-16
Garden City, NY 11530
(516) 222-0700
whdasilva@aol.com

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

www.nysba.org/TheSeniorLawyer

Advance Directive News: Topsy-Turvy Health Care Decision-Making

By Ellen G. Makofsky

Surrogate heath care decision-making recently became a topsy-turvy event in *Matter of Zornow*, a Monroe County case.[1] Joan Zornow was a 93-year-old nursing home resident who suffered from advanced Alzheimer's disease. Mrs. Zornow never executed a health care proxy and a dispute arose among her seven children concerning a directive to withhold food and water. A son, Douglas Zornow, contended that his mother had verbally instructed him and other siblings that she did not want artificial nutrition and hydration if she were unable to orally ingest food and water.[2] Two successive Medical Orders for Life Sustaining Treatment ("MOLST") existed for Mrs. Zornow and indicated that artificial nutrition and hydration were not to be initiated and that Mrs. Zornow was not to be hospitalized unless she suffered from pain or severe symptoms which could not otherwise be controlled.[3] Carole Zornow, a daughter, stated that her mother indicated a contrary wish by affirmatively requesting artificial feeding and that her mother repeated the direction to her nurse who then recorded the direction in the nursing facility's health care records.[4] The dispute precipitated a guardianship proceeding whereby Carole Zornow sought the power to make end-of-life health care decisions for her mother.

The Court held that the statements made by Douglas Zornow and his siblings about Joan Zornow's wishes were "too vague, too general, not related to, and [were made] prior to any specific condition and, therefore, did not comply with the clear and convincing standards required by the Court of Appeals.…"[5] On the other hand, the Court found that the statement of Carole Zornow and the nursing home record which included the notation that her mother wanted to receive artificial nutrition and hydration met the clear and convincing standard. With this finding, Judge William P. Polito permanently revoked prior health care directives and the MOLSTs. Carole Zornow and Catholic Family Services were appointed as co-guardians.[6]

Mrs. Zornow lacked capacity, lacked a health care proxy and was a resident of a nursing home, so the Court turned to the Family Health Care Decisions Act ("FHCDA") as the controlling statute in regard to surrogate health care decision-making. Pursuant to the FHCDA, a guardian is the prioritized person with the power to make medical decisions and the decisions must be made in accordance with the patient's wishes, which include the patient's religious and moral beliefs.[7] The Court put great emphasis on the fact that Mrs. Zornow was a Catholic and determined that "the applicable principles to be applied to Mrs. Zornow's end-of-life decision [making] were those of her Roman Catholic religious belief."[8] The Court stated that, "Mrs. Joan Zornow, a Roman Catholic, is obligated by her religious beliefs to continue to receive artificially administered food and water…"[9] and directed the appointed co-guardians to consult with someone well trained in Catholic moral theology to make decisions on artificially administering food and water.[10] The decision does not discuss or attempt to evaluate what Mrs. Zornow's personal wishes were in regard to artificial nutrition and hydration.

"In [the] topsy-turvy [Zornow] *decision, individual wishes in regard to health care are dismissed and a straight and narrow Catholic position is the only acceptable path for a Catholic in need of surrogate medical decision-making. No meandering along the path of faith is permitted."*

What the decision does do, in detailed page after detailed page, is to present the Catholic position on forgoing food and water. The Court rejects the idea that a Catholic may select "cafeteria Catholicism" and pick and choose which part of the faith to follow.[11] In this topsy-turvy decision, individual wishes in regard to health care are dismissed and a straight and narrow Catholic position is the only acceptable path for a Catholic in need of surrogate medical decision-making. No meandering along the path of faith is permitted.

So what does this mean? Are all health care wishes of practicing Catholics to be ignored by surrogate decision-makers where the incapacitated person's wishes do not comport with Catholic doctrine? Let's hope not.

Endnotes

1. *Matter of Zornow*, 31 Misc. 3d 450, 919 N.Y.S.273 (N.Y. Sup. Ct. Monroe Co., 2010).
2. Id. at 275.
3. Id. at 275. (The MOLSTs were executed on September 15, 2009 and September 18, 2009).
4. Id. at 275.
5. Id. at 275, citing *Matter of Westchester County Med Ctr*, 72 NY2d 517, 531 N.E.2d 607 (1988).
6. Id. at 275. The DNR was the only accepted health care directive which was not revoked by the Court.
7. N.Y. Pub. Health Law § 2994-d(4)(A)(i) (Consol. 2010).
8. Id. at 276.
9. Id.
10. Id.
11. Id. at 284.

Ellen G. Makofsky is a partner in the law firm of Raskin & Makofsky with offices in Garden City, New York. The firm's practice concentrates in elder law, estate planning and estate administration. Ms. Makofsky is a past Chair of the Elder Law Section of the New York State Bar Association ("NYSBA") and currently serves as an At-Large Member of the Executive Committee of the NYSBA. Ms. Makofsky has been certified as an Elder Law Attorney by the National Elder Law Foundation and is a member of the National Academy of Elder Law Attorneys, Inc. ("NAELA"). She serves as President of the Estate Planning Council of Nassau County, Inc.

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Ethics Matters

By John Gaal

Q Several months ago I agreed to represent a client for a flat fee. Although it seemed reasonable at the time, now that I am into the case, it is obvious to me that I am being underpaid. I would like to tell my client that in order to be more fair to me, I need to increase the fee we originally agreed upon by about 30% and, if that is not acceptable, I will have no choice but to withdraw. (There has been no court appearance, so I know I do not need court approval to withdraw and since we are still in the early stages of this matter, there would be no prejudice to the client from my withdrawal, so I think I am allowed to withdraw.) Can I do this?

A Abraham Lincoln is often quoted as having said "The matter of fees is important, far beyond the mere question of bread and butter involved. Properly attended to, fuller justice is done to both lawyer and client." *See* Libby, *Changing Times*, ABA Journal at page 26 (August 2011) (quoting from Lincoln, *Notes from a Law Lecture*).

As lawyers, try as we might to set a fee that is fair to both us and clients, at one time or another we have all had cases in which the fee we quoted at the outset of the representation proved to be too low once we came to realize what was involved. When that happens, we are permitted to seek a change in that fee agreement. The Rules of Professional Conduct clearly contemplate as much. See Rule 1.5(b) ("Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client."). However, this does not mean that we have the right to unilaterally change that fee arrangement.

The ABA's Committee on Ethics and Professional Responsibility recently opined on this very issue. In Formal Opinion 11-458, the Committee recognized that fee arrangements are contracts between lawyers and their clients and ordinarily can be modified by mutual consent of the parties, "provided they follow appropriate formalities." The Committee also noted, however, that "[e]ven with client consent…modifications of existing fee agreements are usually suspect because of the fiduciary nature of the client-lawyer relationship." And, "an agreement that is not made roughly contemporaneously with the formation of the client-lawyer relationship will have to bear an extra burden of justification." *Id.*, quoting from Hazard & Hodes, *The Law of Lawyering* §8.11 (3d ed. 2001).

There are several reasons why a client might feel compelled to accept a lawyer's proposal for a fee modification after representation has started, even though he or she does not really agree with it, thus explaining why this extra burden is imposed. For example, a client might acquiesce in a fee modification because a change in lawyers mid-representation is simply too burdensome or because the client might fear the lawyer's resentment throughout the remainder of the representation. *See Restatement (Third) of the Law Governing Lawyers* §18.

Several ethics provisions come into play when considering a fee modification. First, any modification must of course be agreed upon. Unilateral changes in fee arrangements—such as the imposition of a "success fee" after the fact—are not permissible. (Of course, the client and lawyer may mutually agree to such a fee add-on, but it cannot be unilaterally imposed.) Second, as provided in Rule 1.5 of the Rules of Professional Conduct, the modified fee, even if voluntarily agreed to, cannot be unreasonable. ABA Formal Opinion 11-458 recognizes that while the reasonableness of a fee arrangement is typically to be judged at the outset of the representation, the reasonableness of a fee modification should be assessed in light of the circumstances at the time of the modification. Under Rule 1.5, among the factors to be considered generally in assessing the reasonableness of a fee are: (1) the time and labor involved, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood that acceptance of the representation will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation and ability of the lawyer performing the services; and (8) whether the fee is fixed or contingent. Ultimately, the fee must be objectively reasonable under the circumstances.

The Committee also observed that Model Rule 1.4 (which is identical to New York's Rule 1.4), requiring a lawyer to explain a matter to a client to the extent reasonably necessary to permit the client to make an informed decision regarding the representation, demands not only that the lawyer explain the proposed modification of the fee arrangement fully to the client, but the lawyer must also advise the client that he or she need not agree to pay the modified fee as a condition of continue representation by the lawyer. In other words, a lawyer may not ethically threaten to withdraw, or withdraw, from representation of a client because the client refuses to agree to a fee modification.

If these requirements are met, the fee modification is permissible and may even be significant. For example, Formal Opinion 11-458 explicitly notes that circumstances could justify moving from an hourly fee to a contingent fee. Certain types of modifications, however, may require compliance with Rule 1.8(a), which applies to business transactions with a client. (A fee arrangement agreed to at the outset of representation is generally viewed as not falling within this provision.) Thus, a fee modification which involves a lawyer acquiring an interest in a client's business, real estate or other non-monetary property must comply with Rule 1.8(a). So too must a modification by which a lawyer seeks new or additional security for payment under an existing fee agreement. Under Rule 1.8(a), these changes in the fee arrangement must be fair and reasonable to the client; they must be fully disclosed and transmitted in writing to the client; the client must be advised in writing of the desirability of seeking, and must be given a reasonable opportunity to seek, the advice of independent legal counsel with respect to the modification; and the client must provide informed consent to the modification in a writing signed by the client and which contains the essential terms of the modification.

Thus, while mid-representation fee modifications might be justified under certain circumstances, care must be taken to comply with the Rules of Professional Conduct and continued representation cannot be conditioned on the client's acceptance of the modification.

If there is a topic/ethical issue of interest to all Labor and Employment Law practitioners that you feel would be appropriate for discussion in this column, please contact John Gaal at (315) 218-8288.

John Gaal is a member in the firm of Bond, Schoeneck & King, PLLC in Syracuse, New York and an active Section member.

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Getting the Last Word, or, "A Good Stout Rope"

By Eric W. Penzer

Before anything else is done [I direct that] fifty cents be paid to my son-in-law to enable him to buy for himself a good stout rope with which to hang himself, and thus rid mankind of one of the most infamous scoundrels that ever roamed this broad land or dwelt outside of a penitentiary.[1]

As a trust and estate litigator, I have always had a fascination with humorous or otherwise atypical provisions in Last Wills and Testaments. Aside from the standard joke with which I begin many of my lectures ("Did you hear about the testator who wrote in his will, 'To my first wife, Sue, whom I always promised to mention in my will, 'Hello Sue!'"), I've collected a number of unusual testamentary provisions, from reported cases, anecdotal reports in literature and online. These are some of my favorites.

"Dr. Dunlop['s] will contained several unusual provisions, including…a bequest to a brother-in-law 'as a small token of my gratitude for the service he has done the family in taking a sister that no man of taste would have taken.'"

Dr. William "Tiger" Dunlop, of Ontario, Canada, emigrated from Scotland to Canada with his British Army regiment during the war of 1812. He was one of the founders of the town of Guelph, at which was based the new company he was to lead, the Canada Company. One source reports that Dr. Dunlop enjoyed shocking people. At a public meeting in Goderich in 1840, for example, he publicly provided his reasons for not going to church, the first of which was that a man "should be sure to find his wife there," and the last of which was that he never liked singing without drinking. Dr. Dunlop, who died in 1848, left a will dated August 31, 1842. The will contained several unusual provisions, including a bequest to one of his sisters, "because she is married to nobody, nor is she like to be, for she is an old maid, and not market-rife," and a bequest to a brother-in-law "as a small token of my gratitude for the service he has done the family in taking a sister that no man of taste would have taken." My favorite provision from his will, however, is the following:

> I leave my silver tankard to the eldest son of old John, as the representative of the family. I would have left it to old John himself, but he would melt it down to make temperance medals, and that would be sacrilege—however, I leave my big horn snuff-box to him: he can only make temperance horn spoons of that.[2]

We all know of "sweetheart wills" that are intended to benefit a surviving husband or wife. Some people over the years have used their wills as opportunities to express their true feelings for their spouses. Take the 1791 will of one John George, for example, in which he made a not-so-generous bequest to his wife, Elizabeth. This was, of course, prior to any right of election.

> Seeing that I had the misfortune to be married to the aforesaid Elizabeth, who, ever since our union, has tormented me in every possible way; she has done all she could to render my life miserable; that Heaven seems to have sent her into the world solely to drive me out of it; that the strength of Samson, the genius of Homer, the prudence of Augustus, the skill of Pyrrhus, the patience of Job, the philosophy of Socrates, the subtlety of Hannibal, would not suffice to subdue the perversity of her character…weighing seriously all these considerations…I bequeath, to my said wife Elizabeth, the sum of one shilling.[3]

Continuing on the subject of husbands and wives, and family relationships in general, it has been reported that one Irishman left a will containing the following bequest: "To my wife, I leave her lover, and the knowledge that I was not the fool she thought me; to my son I leave the pleasure of earning a living. For 20 years he thought the pleasure was mine; he was mistaken."

In one of my favorite will provisions, a cigar aficionado named Robert Brett, who reportedly was not allowed to smoke in his house (I can sympathize with him), left his entire estate to his wife, but on the condition that she smoke five cigars a day for the rest of her life.

Some testators seek to exert their influence on their children from the grave. One Englishwoman bequeathed £50,000 to each of her three children on the condition that they not spend it on "slow horses and fast women and only a very small amount on booze." Two of the children were females.

In one of the few reported cases cited in this article, the court considered the will of a Canadian testator, who made his grandchildren beneficiaries of his will, "provided they are not lazy, spendthrifts, drunkards, worthless

characters, or guilty of any act of immorality" (*Woodhill v. Thompson*, 18 O.R. [Ch. Div. 1889]). Apparently, the judge determined that the provision was a valid condition subsequent, meaning that each grandchild would get a share of the estate unless and until it were determined that they were lazy, drunkards, etc.[4]

Multimillionaire contractor John B. Kelly, father of Princess Grace (Kelly) of Monaco, left nothing in his will to his son-in-law, Prince Rainier of Monaco, explaining that "I don't want to give the impression that I am against sons-in-law. If they are [the] right type, they will provide for themselves and their families, and what I am able to give my daughters will help pay the dress shop bills, which, if they continue as they started out, under the able tutelage of their mother, will be quite considerable."[5]

Benjamin Franklin bequeathed to his daughter a picture frame studded with over 400 diamonds. Reportedly, he was concerned that she might seek to remove the diamonds, so he requested in his will that she not engage "in the expensive, vain and useless pastime of wearing jewels."[6]

Books could be written of other notorious bequests.

Harry Houdini requested that his wife hold an annual séance so he could reveal himself to her. She did so for 10 years, on Halloween. He never appeared.[7]

Canadian lawyer and investor Charles Vance Miller created the infamous "Great Stork Derby" when he bequeathed his residuary estate to the woman who gave birth to the highest number of children in the decade following his death. Ten years after his death in 1926, four Toronto women—each of whom gave birth to nine children—shared approximately $750,000.[8] (That's just under $21,000 per child.)

Napolean Bonaparte directed that his head be shaved and the hair divided among his friends. Ironically, it was a hair analysis that indicated that Napolean's death may have been caused by arsenic poisoning.[9]

Star Trek creator Gene Roddenberry arranged for his ashes to be flown into space on a Spanish satellite scheduled to orbit the Earth for approximately six years. Also on board were the ashes of LSD researcher Timothy Leary.[10] "Turn on, tune in, drop out" indeed.

Academy Award winning choreographer Bob Fosse died in 1987, leaving $378.79 to each of 66 people (including Liza Minnelli, Janet Leigh, Elia Kazan, Dustin Hoffman, Melanie Griffith, Neil Simon, Ben Gazzara, Jessica Lange and Roy Scheider), to "go out and have dinner on me."[11] They really didn't need the money but I'm sure they enjoyed their dinners.

George Bernard Shaw, who died in 1950, bequeathed a considerable portion of his estate for the purpose of developing a new phonemic alphabet containing 48 letters (each letter representing one individual sound) to replace the standard 26-letter English alphabet.[12] Needless to say, it didn't work.

German poet Heinrich Heine died in 1856 leaving everything to his wife, "on the express condition that she remarry. I want at least one person to be truly bereaved by my death."[13]

"I'm sure each of us knows someone to whom we would like to bequeath the proverbial 'good stout rope.'"

While his name is likely unfamiliar to anyone reading this article, employees of the Walnut Street Theatre in Philadelphia likely know of John "Pop" Reed, a stagehand who worked at the theater for more than 50 years in the first half of the nineteenth century. Reed stipulated in his will that he wanted his head

> to be separated from my body immediately after my death; the latter to be buried in a grave; the former, duly macerated and prepared, to be brought to the theatre, where I have served all my life, and to be employed to represent the skull of Yorick—and to this end I bequeath my head to the properties.

His request was honored and the skull was used in performances and signed by many famous actors of the day. It was discovered during a 1920 renovation of the theater.[14]

It appears that Mr. Reed started a trend. Polish concert pianist André Tchaikowsky, a Jewish holocaust concentration camp survivor and theater enthusiast, died in 1982. In his 1979 will, he bequeathed his skull to the Royal Shakespeare Company for the express purpose of being used as Yorick. Actors were initially hesitant to use human remains as a prop, but one actor began using the skull in 2008, with a special license from the Human Tissue Authority, and it is still in service.[15]

Likewise, in 1955, Argentinean Juan Potomachi bequeathed two hundred thousand pesos to the Teatro Dramático in Buenos Aires, provided it use his skull as Yorick in any future productions of "Hamlet."[16]

My working title for this article was "Pushing the Bounds of Testamentary Freedom." In the end, however, I realized that for many people—not just married men—a Last Will and Testament may be the only opportunity they have to get the proverbial "last word." After all, as the old saying goes, "he who laughs last, laughs best." I'm sure each of us knows someone to whom we would like to bequeath the proverbial "good stout rope."

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Eric W. Penzer is a partner in the trusts and estates litigation department at Farrell Fritz in Uniondale.

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Data Breaches

By Mary Noe

I have fond childhood memories of holding my mother's hand and walking into the enormous Dime Savings Bank in Brooklyn. There were 40-foot high ceilings, marble floors, and glass-topped desk platforms with compartments holding deposit and withdrawal slips. In her other hand, my mother clutched a small, dark, soft covered book with the bank's name. All transactions were documented in the bankbook. That was then. As Tevye said to his wife in *Fiddler on the Roof*, "it's a new world… Golde."

"Just as Willy Sutton robbed banks because that was 'where the money was,' cyber thieves rob customer's information allowing access to bank accounts and credit card information."

The Problem

Today banks serve their customers by electronically storing Personally Identifiable Information (PII) such as name, address, date of birth, social security numbers, and bank account numbers. This information can be analogized to the keys that unlock the bank safe and has created the new source of funds for theft. Just as Willy Sutton robbed banks because that was "where the money was," cyber thieves rob customer's information allowing access to bank accounts and credit card information.

One of the first high profile data breaches occurred in February 2005 at ChoicePoint. ChoicePoint obtains and sells the personal information of consumers, including social security numbers, dates of birth and credit histories to businesses. ChoicePoint acknowledged that more than 163,000 consumer's personal financial records had been compromised. The FTC alleged that ChoicePoint sold information to businesses that lied about their credentials and used commercial mail drops as business addresses. ChoicePoint also violated FTC regulations in using public fax machines to transmit consumer information. ChoicePoint then failed to comply with the proper procedures even after receiving subpoenas from law enforcement in 2001. In January 2006, ChoicePoint settled this data security breach case with the FTC and agreed to pay $10 million in civil penalties and $5 million for consumer protection.[1]

One of the largest known data breaches occurred in 2007 when TJX Companies, (TJ Maxx, Home Goods and Marshalls) filed their report with the Securities and Exchange Commission (SEC) reporting 47.5 million customer records were stolen by hackers.[2] Ultimately, TJX settled with Massachusetts Attorney General and forty states to pay approximately $10 million.[3] It also agreed to pay for credit monitoring to qualified customers, and compensated MasterCard $24 million in losses for fraudulent credit cards transactions.[4] Fifth Third Bank, the processing agent of the credit cards, was fined $1.75 million for violating the payment card industry's self-imposed rules for securing data files.[5]

This article will survey the Federal and New York State laws and regulations addressing data breaches theft and the Federal Court's treatment of these cases.

Federal Response

On November 12, 1999, the Gramm-Leach-Bliley Act was signed into law by President Clinton.[6] Section 501 of the Act titled "Protection of Nonpublic Personal Information" requires Federal agencies to establish guidelines of appropriate standards for the financial institutions relating to the administrative, technical and physical safeguards for customer records and information. The Federal Trade Commission adopted the Safeguards Rule to enforce the Gramm-Leach-Bliley Act for entities and individuals operating in commerce to "…insure the security and confidentiality of customer records and information; protect against any anticipated threats or hazards to the security or integrity of such records; and protect against unauthorized access to or use of such records or information that could result in substantial harm or inconvenience to any customer." The Federal Trade Commission Guidelines created an affirmative duty on the financial institution to protect customers' information against unauthorized access or use. Specifically, a financial institution's management is required to assess the risk to customer information, manage and control the risk and create a security program appropriate to the size and complexity of the institution and the nature and the scope of its activities. The institution's board and management must first approve the institution's written information and security policy and program, and, second, oversee efforts to develop, implement and maintain an effective information security program.[7]

The Safeguards Rule requires each financial institution to "identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information that could result in the unauthorized disclosure, misuse, alteration, destruction or other compromise of such information, and assess the sufficiency of any safeguards in place to control these risks."[8]

Financial institutions must keep the information secure while in their possession and then comply with the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act") for disposal of consumer reports information and records.[9] The Disposal Rule was created by the FTC to implement the FACT Act. Any entity that possesses or maintains consumer information for a business purpose must comply with the Disposal Rule. The Rule does not require destruction of all consumer information, but does require covered entities to take reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal.[10]

There is one other federal statute of relevance: Identity Theft Red Flags.[11] This program includes financial institutions and creditors to create reasonable policies and procedures for detecting, preventing, and mitigating identity theft. The institution must "red flag" activities for possible identity theft, and respond and update changes in risks from identity theft.

The Securities and Exchange Commission (SEC) addressed identity theft of securities industry customers in Regulation S-P. This is a requirement to adopt security programs similar to that of other financial institutions.[12]

New York State Response

States have enacted laws to protect and/or notify their residents whose data has been lost or stolen. The state laws and regulations are modeled on the existing Federal laws and regulations. New York has enacted the following civil laws and regulations relevant to data breaches: General Business Law (GBL) §380, §889-aa, §399-dd, §399-H and State Technology Law §208.

GBL §380, the Fair Credit Reporting Act, outlines the parameters for a consumer reporting agencies to furnish a consumer report. A breach by an officer or employee of the consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to a person not authorized to receive that information can be fined not more than five thousand dollars or imprisoned not more than one year, or both.

GBL §399-dd governs any person, firm, partnership, association or corporation. A violation occurs when anyone intentionally makes available individual's social security account number to the general public. This section also prohibits requesting from an individual to transmit his or her social security account number over the Internet, unless the connection is secure or the social security account number is encrypted. The law requires that the responsible parties take reasonable measures to ensure that no officer or employee has access to such number for any purpose other than for a legitimate or necessary purpose related to the conduct of such business. Additionally safeguards are necessary or appropriate to preclude unauthorized access to the social security account number and to protect the confidentiality of such number. In the event of an intentional breach the court may impose a civil penalty of not more than one thousand dollars for a single violation and not more than one hundred thousand dollars for multiple violations resulting from a single act or incident. Multiple violations are punishable by a civil penalty of less than five thousand dollars for a single violation and not more than two hundred fifty thousand dollars for multiple violations resulting from a single act or incident.

GBL §399-H is the law for disposing of records containing personal identifying information. A business, firm, partnership, association, corporation, business person or third party under contract with any of the above must shred, destroy or modify identifying information so that it is unreadable.

State Technology Law §208 requires state agencies and businesses operating in the state to notify consumers when their personal information is compromised. Notification must be in the most expedient method possible such as mail, email or telephone. If more than 5,000 residents are to be notified, consumer reporting agencies must also be notified.

Court Decisions

Data breaches and losses present serious problems for the victims as well as the businesses. Compensation to a consumer who suffers a direct out-of-pocket loss may seem minor compared to the potential exposure to the thousands or millions of consumers who claim a fear of future loss and proceed by class action. Several class actions have been brought seeking the cost of credit monitoring over an extended period of time. A condition of any settlement of such class actions would likely be the payment of attorneys' fees to class counsel. To date, courts entertaining such suits have either found that the plaintiffs do not have standing to pursue the claims or, if they do have standing, there is no claim for liability based on a fear of a future loss.

In the *Caudle v. Towers et al.* case heard in the United States Southern District New York several laptops were stolen from a pension consultant an employer hired. The laptops contained the employees' social security numbers. There was no claim that any would-be class member had suffered an actual loss due to fraud or theft. They only alleged the risk of future harm. Although the Court concluded that there was standing to sue, it eventually decided that "Without more than allegations of increased risk of future identity theft, the plaintiffs have not suffered a harm that the law is prepared to remedy."[13]

In 2007, several months after TJX filed the data breach with the SEC, banks issuing MasterCard and Visa brought a class action suit against TJX and TJX's credit card processing bank, Fifth Third Bank. The plaintiffs were seeking to recover their costs due to the fraudulent use of the

compromised credit cards. The plaintiffs sued for breach of contract, negligence, negligent misrepresentation, conversion and violation of Massachusetts General Laws. The U.S. District Court in Massachusetts denied class certification and dismissed the actions.[14] The U.S. Court of Appeals, First Circuit affirmed the decisions of the District Court except as to a cause of action for negligent misrepresentation, violation of the Massachusetts statute and transfer to the State Court.[15] Ultimately, the case was settled.

Conclusion

Financial institutions and businesses must comply with both federal and state statutes and regulations that often overlap. Non-compliance can result in not only the financial loss due to identity theft but the penalties imposed by Federal and State Agencies. The laws and regulation continue to change in an attempt to stem the tide of electronic theft. The technology that has made life easy has spurned a new breed of global cyber thieves that costs businesses millions of dollars each year. For now, it is the cost of doing business.

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Mary Noe is Assistant Professor of Law, Division of Criminal Justice and Legal Studies, at St. John's University College of Professional Studies, and Adjunct Professor, Special Education Law, at St. John's University School of Law. She can be reached at noem@stjohns.edu.

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Ethical Obligations Regarding Inadvertently Transmitted E-Mail Communications

By Eric M. Hellige and Durre S. Hanif

On a daily basis, with a click of the mouse, hundreds of e-mails are exchanged between attorneys and their clients. Much of this traffic constitutes harmless correspondence, but often the content of the e-mail includes sensitive, confidential or privileged information. Occasionally, in the constant stream of e-mail exchange, an e-mail will inadvertently be sent directly or copied to the wrong party. This situation presents a serious concern for attorneys charged with maintaining their own confidentiality, as well as that of their clients. Despite how regularly these circumstances arise, there is no clear consensus among the relevant rules of professional conduct or the ethics opinions interpreting the rules on attorneys' ethical responsibilities regarding inadvertently sent or received e-mails, nor does the case law provide consensus concerning any use the recipient may make of inadvertently received e-mails, or their impact on the waiver of attorney-client privilege. As a result, attorneys face a conundrum when they receive inadvertently disclosed e-mails. This article presents attorneys practicing in the State of New York with some basics that will enable them to better deal with inadvertently transmitted communications.

Historical Development

In 1992, the American Bar Association (the "ABA") Committee on Ethics and Professional Responsibility issued ABA Formal Opinion 92-368, "*Inadvertent Disclosure of Confidential Materials*," which provided that

> [a] lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide by the instructions of the lawyer who sent them.[1]

However, the ABA Model Code of Professional Responsibility (the predecessor to the ABA Model Rules of Professional Conduct) provided no real basis for the duties imposed in ABA Formal Op. 92-368. In fact, ABA Formal Op. 92-368 was deigned to admit that "[a] satisfactory answer to the question posed cannot be drawn from a narrow, literalistic reading of the black letter of the [ABA] Model Rules."[2] As a result, the ABA Committee explained that it had derived these duties from five main principles:

> (i) the importance the [ABA] Model Rules give to maintaining client confidentiality, (ii) the law governing waiver of the attorney-client privilege, (iii) the law governing missent property, (iv) the similarity between the circumstances here addressed and other conduct the profession universally condemns, and (v) the receiving lawyer's obligations to his client.[3]

Following the issuance of ABA Formal Op. 92-368, New York weighed in with its responses. The New York County Lawyers' Association Committee on Professional Ethics issued Formal Opinion 730, "*Ethical Obligations Upon Receipt of Inadvertently Disclosed Privileged Information*," in 2002, which basically reiterated Formal Op. 92-368.[4] In 2003, the Association of the Bar of the City of New York (the "ABCNY") Committee on Professional and Judicial Ethics issued Formal Opinion 2003-4, "*Obligations Upon Receiving a Communication Containing Confidences or Secrets Not Intended for the Recipient*," which concluded that

> a lawyer receiving a misdirected communication containing confidences or secrets (1) has obligations to promptly notify the sending attorney, to refrain from review of the communication, and to return or destroy the communication if so requested, but, (2) in limited circumstances, may submit the communication for in camera review by a tribunal, and (3) is not ethically barred from using information gleaned prior to knowing or having reason to know that the communication contains confidences or secrets not intended for the receiving lawyer. However, it is essential as an ethical matter that the receiving attorney promptly notify the sending attorney of the disclosure in order to give the sending attorney a reasonable opportunity to promptly take whatever steps he or she feels are necessary.[5]

In reaching this conclusion, ABCNY Formal Op. 2003-4 backed away from absolute imposition on lawyers of the duties outlined in ABA Formal Op. 92-368. In 2004, the New York State Bar Association (the "NYSBA") Committee on Professional Ethics, in Opinion 782, "*E-mailing Documents That May Contain Hidden Data Reflecting Client Confidences and Secrets*," described the standard of care lawyers should follow when using e-mail communication, stating that "a lawyer who uses technol-

ogy to communicate with clients must use reasonable care with respect to such communication…[t]he extent of [which] var[ies] with the circumstances."[6]

Addressing the Confusion

For many years, confusion remained as to whether the three duties set forth in ABA Formal Op. 92-368 were appropriate statements of professional responsibility to which lawyers must adhere. As a consequence, in the last major revision of the ABA Model Rules of Professional Conduct, the ABA adopted new rules governing inadvertent disclosure. ABA Model Rule 1.6(a), "*Confidentiality of Information*," prevented attorneys from revealing information about a client without consent and required them to protect confidential client information.[7] Comments to the rule required lawyers to safeguard client information from inadvertent or unauthorized disclosure, and to take reasonable precautions to prevent information from reaching unintended recipients.[8] ABA Model Rule 4.4(b), "*Respect for Rights of Third Persons*," reduced the ethical duties imposed on attorneys who receive inadvertent e-mails, leaving only the duty to notify the sender of the inadvertent transmission.[9] As a result of that change, in 2005, the ABA Committee on Ethics and Professional Responsibility issued ABA Formal Opinion 05-437, "*Inadvertent Disclosure of Confidential Materials: Withdrawal of Formal Opinion 92-368 (November 10, 1992)*," withdrawing its previously expressed opinions in ABA Formal Op. 92-368.[10]

Despite the ABA's adoption of rules governing inadvertent disclosure, the New York Lawyer's Code of Professional Responsibility, which governs the conduct of New York attorneys, lacked provisions expressly governing inadvertent disclosure until 2009. State courts and ethics committees struggled with how to deal with such situations, and a body of law developed to expressly address such issues. However, the New York Rules of Professional Conduct, which became effective on April 1, 2009, attempted to rectify this gap by including a provision that specifically addressed inadvertent disclosure. New York Rule 4.4(b), "*Respect for Rights of Third Person*," states that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."[11] Given the brevity of New York Rule 4.4(b), the comments to the rule, which specifically provide that the term "document" includes any electronically stored information that can be read (including e-mails), are more helpful in providing guidance to attorneys. The comments state as follows:

> [1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.
>
> [2] [Rule 4.4(b)] recognizes that lawyers sometimes receive documents that were mistakenly sent, produced, or otherwise inadvertently made available by opposing parties or their lawyers. One way to resolve this situation is for lawyers to enter into agreements containing explicit provisions as to how the parties will deal with inadvertently sent documents. In the absence of such an agreement, however, if a lawyer knows or reasonably should know that such a document was sent inadvertently, this Rule requires only that the lawyer promptly notify the sender in order to permit that person to take protective measures. Although this Rule does not require that the lawyer refrain from reading or continuing to read the document, a lawyer who reads or continues to read a document that contains privileged or confidential information may be subject to court-imposed sanctions, including disqualification and evidence-preclusion. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail and other electronically stored information subject to being read or put into readable form.
>
> [3] Refraining from reading or continuing to read a document once a lawyer realizes that it was inadvertently sent to the wrong address and returning the document to the sender honors the policy of these Rules to protect the principles of client confidentiality. Because there are circumstances where a lawyer's ethical obligations should not bar use of the information obtained from an inadvertently sent document, however, this Rule does not subject a lawyer to professional discipline for reading and using that in-

> formation. Nevertheless, substantive law or procedural rules may require a lawyer to refrain from reading an inadvertently sent document, or to return the document to the sender, or both. Accordingly, in deciding whether to retain or use an inadvertently received document, some lawyers may take into account whether the attorney-client privilege would attach. But if applicable law or rules do not address the situation, decisions to refrain from reading such documents or to return them, or both, are matters of professional judgment reserved to the lawyer.[12]

Addressing the same issue two years later under the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2011, the ABA Standing Committee on Ethics and Professional Responsibility issued two opinions that address attorneys' ethical obligations concerning inadvertently disclosed correspondence under the ABA Model Rules.

ABA Formal Opinion 11-459, "*Duty to Protect the Confidentiality of E-mail Communications with One's Client*" explains that lawyers have a duty to warn clients about the risks of sending or receiving electronic communications where there is a significant risk that an employer or third party may gain access to privileged e-mail correspondence.[13] As a general rule, the ABA explains, lawyers should advise clients about the importance of communicating with the lawyer in a manner that protects the confidentiality of e-mail communications, and warn the client against discussing their communications with others. A lawyer should also instruct the client to avoid using an employer-issued computer, telephone or other electronic device to receive or transmit confidential communications. Despite e-mail becoming a common replacement for letters and in-person meetings, e-mail communications without safeguards can be just as risky as having a confidential face-to-face conversation in a setting where it can be overheard.[14]

The ABA also points to various factors that tend to establish an ethical duty on the lawyer to protect client-lawyer confidentiality by warning the client against using business devices for communications with their own counsel. Clients should be warned if (i) they have engaged in, or indicated an intent to engage in, e-mail communications; (ii) their employment provides access to workplace communication devices; (iii) given the circumstances, the employer or other third party has the ability to access e-mail communications; or (iv) as far as the lawyer knows, the client's employer's policies and the jurisdiction's laws do not clearly protect those communications.[15]

ABA Formal Opinion 11-460, "*Duty When Lawyer Receives Copies of a Third Party's E-mail Communications with Counsel*," explains that when an employer's lawyer receives copies of an employee's private communications with counsel, ABA Model Rule 4.4(b) does not require the employer's lawyer to notify opposing counsel of the receipt of the communications.[16] With ABA Formal Op. 11-460, the ABA has provided a clear distinction for dealing with inadvertently received communications based on how they were disclosed to the unintended recipients. In the case of a communication that is inadvertently sent to an unintended recipient by one of the parties to the communication, ABA Model Rule 4.4(b) "obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly."[17] However, when the communication has been retrieved by an unintended recipient from a public or private space where it is stored, such as in the context of an employer's access to an employee's files, then the ABA opines that ABA Model Rule 4.4(b) does not require the third party to notify opposing counsel of the receipt of the communications.[18]

It is important to note that the ABA Model Rules and the ABA formal opinions are not binding, and merely provide guidance to the states regarding the ABA's position on the rules of professional conduct, and how to interpret those rules. Therefore, attorneys should pay attention to developments on ethical issues in the state laws, ethical rules and case law of their local jurisdiction.

Current Expectations of Professional Conduct

To review, the following are the current positions of the ABA and the State of New York of which every lawyer should be aware when he or she receives an inadvertently disclosed e-mail:

ABA

Sender's Duty When Transmitting E-mails

The sender has no explicit duty regarding the sending of e-mails. A lawyer's general duties with regard to the confidentiality of client information under ABA Model Rule 1.6 apply to e-mail communications as well.[19]

Must the Recipient Notify the Sender Upon Receipt of an Inadvertently Transmitted E-mail?

Yes. Under ABA Model Rule 4.4(b), a "lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."[20] However, ABA Formal Op. 11-460 clarifies that ABA Model Rule 4.4(b) does not impose notification obligations on lawyers that retrieve inadvertently disclosed communications from a public or private sphere, rather than receiving them from a specific sender.[21]

May the Recipient Review an Inadvertently Transmitted E-mail?

Yes. ABA Formal Op. 05-437 states that although ABA Model Rule 4.4(b) "obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly," it "does not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer."[22]

New York

Sender's Duty When Transmitting E-mails

NYSBA Op. 782 notes that "a lawyer who uses technology to communicate with clients must use reasonable care with respect to such communication, and therefore must assess the risks attendant to the use of that technology and determine if the mode of transmission is appropriate under the circumstances."[23] The extent of reasonable care varies with the circumstances.

Must the Recipient Notify the Sender Upon Receipt of an Inadvertently Transmitted E-mail?

Yes. ABCNY Formal Op. 2003-4 concludes that an attorney who receives a communication and is exposed to its contents "prior to knowing or having reason to know that the communication was misdirected…is not barred, at least as an ethical matter, from using the information," but also states that "it is essential as an ethical matter that a receiving attorney promptly notify the sending attorney of an inadvertent disclosure in order to give the sending attorney a reasonable opportunity to promptly take whatever steps he or she feels are necessary to prevent any further disclosure."[24]

May the Recipient Review an Inadvertently Transmitted E-mail?

Yes. The comments to New York Rule 4.4(b) state that while "refraining from reading or continuing to read a document once a lawyer realizes that it was inadvertently sent to the wrong address" honors the policy of the Rules, since there may be "circumstances where a lawyer's ethical obligations should not bar use of the information obtained from an inadvertently sent document, [the] Rule does not subject a lawyer to professional discipline for reading and using that information."[25] The comments to New York Rule 4.4 do, however, warn lawyers to take into account any applicable law or rules before reviewing inadvertently received e-mails. In the absence of such law or rules, "decisions to refrain from reading such documents or to return them, or both, are matters of professional judgment reserved to the lawyer."[26]

Endnotes

1. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992).
2. *Id.*
3. *Id.*
4. NYCLA Comm. on Prof'l Ethics, Formal Op. 730 (2002).
5. ABCNY Comm. on Prof'l and Jud. Ethics, Formal Op. 2003-4 (2003).
6. NYSBA Comm. on Prof'l Ethics, Formal Op. 782 (2004).
7. Model Rules of Prof'l Conduct. R. 1.6(a) (1983).
8. Model Rules of Prof'l Conduct. R. 1.6 cmt. (1983).
9. Model Rules of Prof'l Conduct. R. 4.4(b) (1983).
10. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-437 (2005).
11. NY Rules of Prof'l Conduct. R. 4.4(b) (2009).
12. NY Rules of Prof'l Conduct. R. 4.4 cmt. (2009).
13. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-459 (2011).
14. *Id.*
15. *Id.*
16. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-460 (2011).
17. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-437 (2005).
18. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-460 (2011).
19. Model Rules of Prof'l Conduct. R. 1.6(a) (1983).
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22. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-437 (2005).
23. NYSBA Comm. on Prof'l Ethics, Formal Op. 782 (2004).
24. ABCNY Comm. on Prof'l and Jud. Ethics, Formal Op. 2003-4 (2003).
25. NY Rules of Prof'l Conduct. R. 4.4 cmt. (2009).
26. *Id.*

Eric M. Hellige is a partner at Pryor Cashman and can be reached at ehellige@pryorcashman.com. Durre S. Hanif is an associate at Pryor Cashman and can be reached at dhanif@pryorcashman.com.

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Understanding Depression Among Older Adults

By Lisa Furst and Jacquelin Berman

Mr. R. has missed his meeting with you again, for the second time in the last two weeks. Over the past several months you have recognized changes in Mr. R., as his once vibrant personality has become lackluster. He has lost weight, seems overly emotional and is unable to focus on what you are saying to him. You wonder if he could he be having problems with his memory, but it seems to you as if there is something else going on. Perhaps Mr. R. is suffering from depression.

A. What Is Clinical Depression?

Aging well is possible, but not without sound mental health. The majority of older adults are, and will continue to be, major contributors to our society as they live longer and healthier lives. Mental disorders, such as clinical depression, can rob older adults of their capacity to age successfully. Many of us use the word "depression" in ordinary language to refer to feelings of sadness or disappointment arising in response to difficult situations or life experiences. Everyone feels sadness from time to time—this is a normal and common human emotional experience. Clinical depression, however, is not the same thing as ordinary sadness. Rather, it is a treatable mood disorder that causes a disturbance in one's emotional state and is accompanied by a range of symptoms, including emotional, physical, cognitive and behavioral signs or symptoms.

There are several types of clinical depression, the most common of which are *major depression*, *dysthymia* and *minor*, or *subsyndromal depression*. While these conditions are related, they differ in their exact presentations and vary in terms of the severity and duration of symptoms.

1. Major Depression

Major depression can be experienced as a one-time episode, a series of episodes or a chronic, recurrent problem that continues for months or years. Major depression is characterized by having at least 5 out of a total of 9 symptoms for at least two weeks, nearly every day. These symptoms must also cause significant distress and/or impairment in day-to-day functioning. In order to be diagnosed with depression, someone must experience one or both of the "cardinal" symptoms listed below:

- Depressed mood most of the day, nearly every day
- Loss of interest or pleasure in activities one usually enjoys[1]

Many of us most commonly associate major depression with having a persistently down, depressed or hopeless mood most of the time. However, it is possible to be diagnosed with clinical depression even when a persistently depressed mood is not present. Long-lasting lack of interest or pleasure in activities that one normally enjoys, plus at least four other symptoms, is also considered major depression. In the research literature, this kind of depression has been termed "depression without sadness" and many consider this presentation to be more typical of older adults than younger individuals.[2]

In addition to having at least one of the two cardinal symptoms above, someone must also experience at least four of the symptoms listed below to be diagnosed with major depression:

- Diminished or increased appetite, often leading to weight loss or gain;
- Sleeping difficulties, such as insomnia or sleeping too much;
- Fatigue and/or loss of energy;
- Feelings of worthlessness or excessive or inappropriate guilt;
- Difficulty thinking, concentrating or focusing;
- Noticeable restlessness or slowness of movement arising from mental tension or mood;
- Recurrent thoughts of death or of suicide (not including fear of dying or thinking about mortality as a result of growing older).[3]

2. Dysthymia

Dysthymia is a type of clinical depression in which someone experiences fewer depression symptoms than in major depression, but over a relatively long period of time. Unlike major depression, in which someone might experience "depression without sadness," a diagnosis of dysthymia always includes having a persistently depressed mood, most of the day, nearly every day, for at least two years. In addition to depressed mood, a person with a diagnosis of dysthymia must also experience at least two, but no more than four, of the symptoms below:

- Diminished appetite or overeating
- Difficulty sleeping or oversleeping
- Fatigue and/or low energy
- Poor self-esteem
- Difficulty concentrating or making decisions
- Hopelessness[4]

3. Minor or Subsyndromal Depression

Minor depression, also known as *subsyndromal* or *subclinical depression*, is not yet a type of depression that can be formally diagnosed using the current edition of the *Di-*

agnostic and Statistical Manual of Mental Disorders (DSM), the diagnostic guide used by medical and mental health professionals. However, the research literature on depression increasingly has identified this disorder as a subtype of depression, and it may warrant diagnosis in future editions of the *DSM*.

In research, minor depression occurs as at least two, but fewer than five, symptoms of depression for at least two weeks. Like major depression and dysthymia, minor depression usually includes having a depressed mood or a loss of interest or pleasure in activities normally enjoyed. The major difference between minor depression and major depression is that minor depression has fewer symptoms; the major difference between minor depression and dysthymia is that minor depression often occurs episodically, rather than as a chronic problem lasting at least two years, as dysthymia does. Despite the lower number or duration of symptoms, minor depression can cause significant distress and some researchers believe that it may be a precursor to more severe forms of depression.[5]

B. The Epidemiology of Clinical Depression

In our work with older adults and their providers, we often hear people ask questions such as, "Isn't it normal for people to be depressed when they get old?" or "I'm eighty years old, and I have health problems and I can't do what I used to be able to do—doesn't it make sense that I'm depressed?" All too often, older adults and the people who work with them are quick to assume that depression is a normal function of the aging process; unfortunately, this assumption may delay or prevent timely diagnosis and treatment of depression.

Clinical depression is a mood disorder that affects approximately 16.5% of the adult population in their lifetimes,[6] with approximately 6.7% of adults affected in any 12-month time span.[7] Unfortunately, many people in our society equate aging with depression, and assume that older adults are, by virtue of their age, psychologically frail. Older adults and their practitioners often assume that the prevalence of clinical depression increases with age, but epidemiological research finds that this is not the case. In fact, the prevalence of depression seems to decrease with age. For example, recent data from the Substance Abuse and Mental Health Services Administration's National Survey on Drug Use and Health indicates that in 2008, the 12-month prevalence for adults 50 years and older was 4.5%, compared to 8.7% for adults aged 18-25 and 7.4% for adults aged 26-49.[8] Additionally, a number of studies document that among community-dwelling older adults, the prevalence of depression ranges from 1%-4%.[9]

1. Risk Factors for Depression

While older adults, by and large, do not experience clinical depression more frequently than younger individuals, the development of depression among older adults may be influenced by a variety of risk factors that are particularly germane to this group. It is likely that depression arises within a complex array of biological, psychosocial, and socioeconomic risk factors. These include:

- Chronic physical illness (such as cardiovascular disease, diabetes, arthritis)
- Sensory impairment (vision or hearing loss)
- Mobility impairment
- Functional disability (decreased ability to perform tasks of daily living)
- Relationship loss
- Loss of social status (particularly important in our culture, which does not esteem older adults)
- Past or recent traumatic experiences
- Lack of social and/or emotional support
- Lower income status
- Lower educational attainment

2. Depression and Suicide

If clinical depression occurs less often among older adults, why should we be so concerned about it? The short answer is that in addition to worsening medical outcomes and decreasing quality of life, clinical depression kills. Older adults have the highest risk of suicide of any age group. Older adults who have depression are more at risk of death by suicide than either their peers who do not have depression or the general population.[10] Older adults, though they comprise less than 13% of the population, complete 16% of all suicides.[11] It is estimated that thoughts about suicide are estimated to occur among 5-10% of the general population of older adults.[12]

The risk factors that are associated with suicide include, but are not limited to:

- Older age (suicide risk goes up with age)
- Ethnicity (Caucasian older adults complete suicide at a higher rate than other ethnicities)
- Gender (older men complete suicide at a much higher rate than older women)
- Death of a spouse or partner
- Living alone and/or social isolation
- Chronic medical co-morbidities

In addition to suicide, depression can also increase an older adult's risk for financial exploitation and fraud.

C. Treatment Options for Older Adults

The good news about depression is that effective treatments are available and can benefit older adults signifi-

cantly. The two major types of treatment for depression include various types of psychotherapy and antidepressant medications. Though both types of treatment may be used alone, the optimal treatment for clinical depression is a combination of psychotherapy and medications. A study of older adults with major depression found that up to 90% of those who did not receive treatment experienced subsequent depressive episodes; a relapse rate of 43% was observed in older adults who received antidepressants alone and the lowest relapse rate of 20% was found in older adults who were treated with both psychotherapy and medications.[13]

The most effective forms of psychotherapy for older adults with depression include cognitive-behavioral therapy (CBT), problem solving therapy (PST) and interpersonal psychotherapy (IPT). CBT and PST help older adults with depression to identify the negative and/or distorted ways of thinking that contribute to depressed mood as well as to focus on solving concrete life difficulties that may be contributing to or exacerbating depression. IPT focuses on relationship difficulties that may be underlying depressive symptoms. In general, older adults achieve the same symptom-reduction benefits from antidepressant medications as the general population. Older adults may benefit from a variety of classes of antidepressant medications, but the exact medication best suited to a particular older adult needs to be determined by a number of factors, including current health status, other medications currently being used and other clinical considerations.

D. Where to Go for Help

Older adults seeking an evaluation for and treatment of depression have several options. One is to visit a primary care physician, who can identify any medical conditions that may be contributing to or causing depression symptoms, and who may be able to screen for and provide a diagnosis of clinical depression. Whenever possible, however, it is generally best to refer older adults to geriatric mental health specialists, as many primary care doctors lack the time and training to adequately address the needs of older adults with clinical depression.

To find a geriatric psychiatrist who is a member of the American Association for Geriatric Psychiatry, you can use the search engine found on the Geriatric Mental Health Foundation's website at http://www.gmhfonline.org/gmhf/find.asp. Additionally, older adults and their families can find psychiatrists and other mental health providers who accept Medicare at www.medicare.gov. Another source of information about providers is the National Suicide Prevention Lifeline (1-800-273-TALK), a national network of crisis intervention centers who can link callers to local practitioners in their community.

Depression is a serious illness, and can drastically decrease an older adult's ability to age successfully. But with treatment and support, recovery from depression, and healthy aging, are possible!

Endnotes

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Lisa Furst, LMSW is the Director of Public Education for the Mental Health Association of New York City and the Director of Education for the Geriatric Mental Health Alliance of New York. She is a licensed social worker in New York State and is a graduate of the Hunter College School of Social Work. She is the co-author, with Jacquelin Berman, PhD, of *Depressed Older Adults: Education and Screening*.

Jacquelin Berman received her MSW and PhD in Social Work from Columbia University. As Director of Research at the New York City Department for the Aging (DFTA), she has overseen a range of research and demonstration projects. She is the co-author, with Lisa Furst, of *Depressed Older Adults: Education and Screening*. Dr. Berman is currently the Principal Investigator for a federally funded grant through the Administration on Aging infusing mental health programming in an evidence-based chronic disease program (CDSMP). Dr. Berman recently completed the Elder Abuse Prevalence Study in New York State (the first of its kind in the United States), where she was co-Principal Investigator.

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The Missing Annuity Mystery

By Mark E. Sullivan

Background

I won, I really won it all, thought Mae Lydick. She was listening to the decision of Justice Duskas in Clinton County on June 24, 1986 in the maintenance, property and divorce case she'd brought against her husband. And she listened in awe as the justice read a list of what was to be hers—the parties' mobile home, all of the household furniture, the federal and state tax refunds, and permanent maintenance.

But then she stopped smiling. "He made a mistake," she whispered to her attorney, pointing to Justice Duskas. "He missed something." She was referring to the military pension of her ex-husband. The court awarded it entirely to Donald Lydick.

So Mae Lydick took an appeal. The court erred in refusing to divide the pension, which was marital property. That was Mrs. Lydick's argument in the Appellate Division.[1]

But Mrs. Lydick herself made a mistake. She also missed something. She missed a marital asset with a huge value for her, but which was worthless to her ex-husband.

The missed asset was a survivor annuity for her, should Mr. Lydick die before her. The name of the asset was the Survivor Benefit Plan (SBP).

"[I]t is very important for the former spouse to insist on [the Survivor Benefit Plan] as a part of a military divorce settlement."

It is not known how long the parties were married during the husband's military service, but it's a good guess that Mae Lydick was "the military spouse," that is, the one who usually moves from base to base with her husband every three or four years, and whose mobility makes it close to impossible to land and retain a job that provides good earnings and a retirement plan. That's why it's a mystery that the Survivor Benefit Plan was missing from the trial and appeal. In such cases, it is very important for the former spouse to insist on SBP as a part of a military divorce settlement.

This article, and the subsequent two installments, will explore what SBP is, how much it costs, who pays for it, how to protect the non-military spouse, and how to adjust the benefit amount. Also covered will be deadlines for elections, how to use a court-ordered election when the service member or retiree will not cooperate, dealing with deadlines, and where to send the documents.

What Is the Survivor Benefit Plan?

Since death terminates pension payments, practitioners should be familiar with the Survivor Benefit Plan.[2] SBP is an annuity program that allows retired (or retirement-eligible) active-duty service members (SMs) to provide continued income to specified beneficiaries at the time of the participant's death. The retiree's paycheck is the source of monthly premium payments for SBP coverage, and this is partly subsidized by the government. There is a modest tax break for the retiree because the SBP premium is excluded from the taxable portion of his or her retired pay. The SM decides what benefit amount shall apply and to whom the benefit is paid. The designated survivor will receive a lifetime annuity of 55% of the designated base amount.[3] The SM may select spouse coverage, coverage for the spouse and qualifying children, or coverage for qualifying children only. A former spouse may also be a beneficiary.

The cost for SBP varies depending on the type of coverage selected and the base amount chosen. In general, the premium rate for spouse or former spouse coverage is 6.5 percent of the selected base amount for those who entered military service after March 1, 1990; there is an alternative rate structure for those who entered military service on or before that date.[4] The benefit is 55% of the base amount.

Thus, for example, assume that the total military retired pay for John Doe (before pension division) is $3,000 a month and that he selected the full amount of his retired pay as the base amount for Mrs. Doe's benefit. The maximum SBP payment for Mary Doe would be $1,650 a month (fifty-five percent of retired pay). The premium would be about $195 (6.5 percent of total retired pay), which is deducted from his retired pay.

Any election other than spouse-only at the full-retired-pay base amount requires spousal concurrence. Whenever counsel or the court is using deferred division for the military pension (which is almost 100% of the time), the attorney for the SM's spouse should seriously consider SBP coverage. This benefit allows continued payments if the spouse or former spouse survives the SM. Without this valuable tool in planning for continued income for the nonmilitary spouse, the stream of income ends with the death of the pensioner.

Benefits and Disadvantages of SBP

When counseling Mrs. Doe, the nonmilitary spouse, the attorney should know that there is no simple answer as to whether she should ask her husband or the court for SBP coverage. Too much depends on conditions, facts, issues, and limitations that are unique to the parties' mar-

riage. For example, if Mrs. Doe has a well-paid job and little need for immediate security upon the death of her husband or ex-husband, then she might choose no death benefit at all, or perhaps life insurance only. Should she have no job outside the home and small children to raise, her needs for immediate security upon the death of the family's main provider are obvious. It is essential to know the pros and cons for SBP.

The advantages of SBP coverage for Mrs. Doe are numerous. The first is security. Unlike commercial life insurance, SBP does not require a person to "qualify" for coverage, and neither party must undergo a physical examination. Coverage cannot lapse or be refused while premiums are being paid. The SM generally cannot terminate coverage (except with the spouse's consent), and even then there is only one "window" for the termination.[5] Mrs. Doe will receive payments for the rest of her life upon her husband's death.

"When counseling…the nonmilitary spouse, the attorney should know that there is no simple answer as to whether she should ask her husband or the court for SBP coverage. Too much depends on conditions, facts, issues, and limitations that are unique to the parties' marriage."

Another reason for choosing SBP is cost. Deductions from Mr. Doe's retired pay for SBP premiums are from the total gross retired pay. This reduces his pension income (and her share of it) for tax purposes. Payments are increased regularly by cost-of-living adjustments to keep up with inflation. There are no expenses for commissions, advertising or profit, which commercial life insurance premiums include, and costs are not based on age or financial forecasts.

While cost might be an advantage in one sense, it also is among the disadvantages of SBP. Even though the premium payments are tax-free and are shared by the parties, the coverage is relatively expensive compared to term life insurance, and premiums increase over time due to inflation.

Another disadvantage is inflexibility; as a general rule, once SBP is chosen it cannot be canceled. In addition, there is no equity build-up and no cash surrender value, which would be present in a policy of whole life or variable life insurance. There is also no return of premiums paid if Mrs. Doe dies before her husband.

Payments are suspended for a widow, widower, or former spouse beneficiary who remarries before age fifty-five.[6] No such age or remarriage limitation occurs when one purchases a life insurance policy.

	Checklist for SBP: Pros and Cons
✓	**Advantages of Survivor Benefit Plan**
	Security: There is no "qualification" required; unlike commercial health insurance, no physical exam is required for the military member and coverage cannot be refused or lapse while premiums are being paid. The member/retiree cannot terminate coverage if established by court order sent to Defense Finance & Accounting Service (DFAS).
	Life Payments: Mrs. Doe, the beneficiary, will receive payments for the rest of her life upon the retiree's death (unless she remarries before age 55, which stops benefits so long as she is married).
	Tax-Free: Deductions from the retiree's pay for SBP premiums are from his gross retired pay and thus reduce his pension income (and her share of it) for tax purposes.
	Inflation-Proof: Payments are increased regularly by cost-of-living adjustments to keep up with inflation.
✓	**Disadvantages of Survivor Benefit Plan**
	Expense: Even though the premium payments are tax-free and are shared by the parties, the coverage is relatively expensive (as compared to term life insurance) and premiums do go up.
	Inflexible: As a general rule, once SBP is chosen, it cannot be canceled.
	No Cash Value: Unlike whole life or variable life insurance, there is no equity build-up and no cash value for SBP. And there is no return of premiums paid if Mrs. Doe dies before her husband.
	Not Divisible: SBP is a unitary benefit, cannot be divided between current spouse and former spouse.

Election Options

Let's see how SBP works. For a service member (SM) on active duty who is married or has a dependent child, the election for SBP must be made before or at retirement.[7] An active-duty SM who is entitled to retired pay is **automatically** enrolled in SBP at the maximum authorized level of coverage unless he or she declines (before retirement) to be covered or else chooses coverage at a lower level; if the SM is married, the spouse must consent to this choice.[8] Reservists can make the election upon completion of 20 years of creditable service and they have a second chance to elect SBP coverage upon reaching age 60 if they have deferred the decision.[9]

Divorce terminates SBP coverage for a spouse. There is no provision in the law which makes former spouse coverage an automatic benefit. The only means by which a person who is divorced from a service member may receive a survivor annuity is if *former spouse coverage* is elected.

Dealing with Deadlines

A service member on active duty may elect former spouse coverage at divorce. Military retirees may elect former spouse coverage for a spouse who was a beneficiary under the Plan when divorce occurs after retirement.[10] The election must be made by the member/retiree within one year of the divorce decree.[11] At the time of making this election, the retiree must provide a statement setting forth whether the election is being made pursuant to a court order or a written agreement previously entered into voluntarily by the retiree as part of, or incident to, a divorce proceeding (and, if so, whether such written agreement has been incorporated in, ratified, or approved by a court order).[12] An election filed by the retiree is effective upon receipt by the retired pay center.[13]

If the SM is required to provide such coverage and then fails or refuses to make the required election, the former spouse may still obtain the required coverage by serving on DFAS (or the appropriate retired pay center) a copy of DD Form 2656-10 along with certified copies of the divorce decree and the court decree granting SBP coverage.[14] These must be received within one year of the order providing for SBP coverage.[15] This is called a "deemed election."

Note that this is a second one-year deadline, distinct from the first. In some states a divorce decree need not contain the terms of a property division or marital settlement; it simply recites the facts of the marriage and enters an order dissolving it. Occasionally the dissolution is granted apart from the property division upon a motion to sever or bifurcate the proceedings. Sometimes the decree of divorce or dissolution provides for some of the property division but leaves other terms to be resolved by a follow-up order, such as a QDRO (in the case of a private pension plan). Counsel for the nonmilitary spouse should note carefully these deadlines on the office calendaring system to prevent a catastrophe for the now-former-spouse and a malpractice claim for the attorney.

While a court can order SBP coverage,[16] a court decree cannot in itself create coverage. The SM or former spouse must submit a signed election request to DFAS to establish coverage. This was discovered the hard way in a Virginia case, *Dugan v. Childers*.[17] In that case, the husband retired from the Army and named his wife as his SBP beneficiary. When they divorced, the court ordered him, with his consent, to name his now ex-wife as his SBP beneficiary. He failed to do so and, after his remarriage, he made his new wife the beneficiary instead. He was held in civil contempt by the judge and once again was ordered to name his former wife as his SBP beneficiary. He died without doing so.

At that point, the ex-wife sought to impose a constructive trust on the SBP benefits that had been paid to the widow. The trial judge refused to do this, granting summary judgment instead in the widow's favor. The Virginia Supreme Court affirmed, stating that the ex-wife did not notify DFAS within the specified time limits for her SBP election and, because she did not comply with this rule, she was barred from collecting SBP by reason of federal law and preemption. In short, a state court cannot "divide" SBP benefits in violation of federal statutes and rules. When Congress has decided that there is one specific way for the SM or the ex-wife to ensure coverage, namely, the application process (and specific time limits) set out above, that procedure must be followed.[18]

Termination of SBP Coverage

Entitlement to SBP payments stops upon the former spouse's remarriage if this occurs before age fifty-five, but SBP coverage will be reinstated if the former spouse's marriage ends due to death, divorce or annulment.[19] SBP coverage will continue if the former spouse is 55 or older at the time of remarriage.

Receipt of a valid former spouse election terminates any existing "spouse coverage" by SBP. Unlike civilian retirement annuities, former spouse coverage cannot be combined with coverage for a current spouse in order to provide some measure of coverage to both; there can be only one SBP beneficiary.

Changing SBP Coverage

An election of former spouse coverage is basically irrevocable, meaning that the SM may not terminate SBP participation once it is elected.[20] However, the law allows the SM to request a change in SBP coverage (if not barred by court order) if he or she remarries, or acquires a dependent child, and meets the requirements for making a valid option change. Such a request must be made within one year from the date of marriage or the child's birth.[21]

DFAS requires a copy of the final decree of divorce or dissolution before making any adjustment to the SM's SBP. When SBP is required in a court order, separately or in connection with the division of military retired pay, the proper addresses to use are:

(a) ARMY, NAVY, AIR FORCE and MARINE CORPS: Defense Finance and Accounting Service, U.S. Military Retirement Pay, P.O. Box 7130, London, KY 40742-7130;

(b) COAST GUARD: Commanding Officer (LGL), USCG Personnel Service Center, 444 S.E. Quincy Street, Topeka, KS 66683-3591;

(c) PUBLIC HEALTH SERVICE: Office of Commissioned Corps Support Services, Compensation Branch, 5600 Fishers Lane, Room 4-50, Rockville, MD 20857;

(d) NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION: Same as U.S. Coast Guard.

For Reserve Component members who are not yet receiving retired pay (under age 60), mail the election (certified or registered mail with return receipt attached is strongly recommended) to:

(a) ARMY: U.S. Army Human Resources Command, 1600 Spearhead Division Avenue, ATTN: AHRC-PDR-C, Ft. Knox, KY 40122;

(b) NAVY: Navy Reserve Personnel Center (PERS 912), 5722 Integrity Drive, Millington, TN 38054;

(c) AIR FORCE: Headquarters, ARPC/DPSSE, 6760 E. Irvington Place, Denver, CO 80250-4020;

(d) MARINE CORPS: Headquarters, U.S. Marine Corps, Separation & Retirement Branch (MMSR-6), 3280 Russell Road, Quantico, VA 22134-5103;

(e) COAST GUARD: Commanding Officer (LGL), USCG Personnel Service Center, 444 S.E. Quincy Street, Topeka, KS 66683-3591.

Endnotes

1. *Lydick v. Lydick,* 130 A.D. 2d 915, 516 N.Y.S. 2d 326 (1987).
2. 10 U.S.C. § 1447-1455.
3. 10 U.S.C. § 1451(a)(1)(A).
4. 10 U.S.C. § 1452(a)(1)(A)(iii)-(iv), *see also* TJAGSA Practice Note, *Survivor Benefits: Congress Changes the Survivor Benefit Program*, Army Law., Feb. 1990, at 75.
5. 10 U.S.C. § 1448a.
6. 10 U.S.C. § 1450(b).
7. 10 U.S.C. § 1448 (a)(2)(A).
8. 10 U.S.C. § 1448 (a)(3).
9. 10 U.S.C. § 1448(a)(2)(B).
10. 10 U.S.C. § 1448(b)(3)(A)(i).
11. 10 U.S.C. § 1448(b)(3)(A)(iii).
12. 10 U.S.C. § 1448(b)(5).
13. 10 U.S.C. § 1448(b)(3)(E). DFAS (Defense Finance and Accounting Service) is the retired pay center for the Army, Navy, Air Force and Marines. There are different pay centers for retirees from the Coast Guard and the commissioned corps of the Public Health Service and of the National Oceanographic and Atmospheric Administration.
14. 10 U.S.C. § 1450(f)(3)(A).
15. 10 U.S.C. § 1450(f)(3)(C).
16. 10 U.S.C. § 1450(f)(4).
17. *Dugan v. Childers*, 261 Va. 3, 539 S.E.2d 723 (2001).
18. *See also Silva v. Silva*, 333 S.C. 387, 509 S.E.2d 483 (1998); *King v. King*, 225 Ga. App. 298, 483 S.E.2d 379 (1997).
19. 10 U.S.C. § 1450(b)(2)–(3).
20. The one exception is by mutual consent between the second and third years of coverage. 10 U.S.C. § 1448a.
21. 10 U.S.C. § 1448(a)(5)(B).

Mr. Sullivan, a retired Army Reserve JAG colonel, practices family law in Raleigh, NC and is the author of The Military Divorce Handbook (Am. Bar Assn., 2nd Ed. 2011), from which portions of this article are adapted. He is a fellow of the American Academy of Matrimonial Lawyers and has been a board-certified specialist in family law since 1989. He works with attorneys nationwide as a consultant on military divorce issues and to draft military pension division orders.

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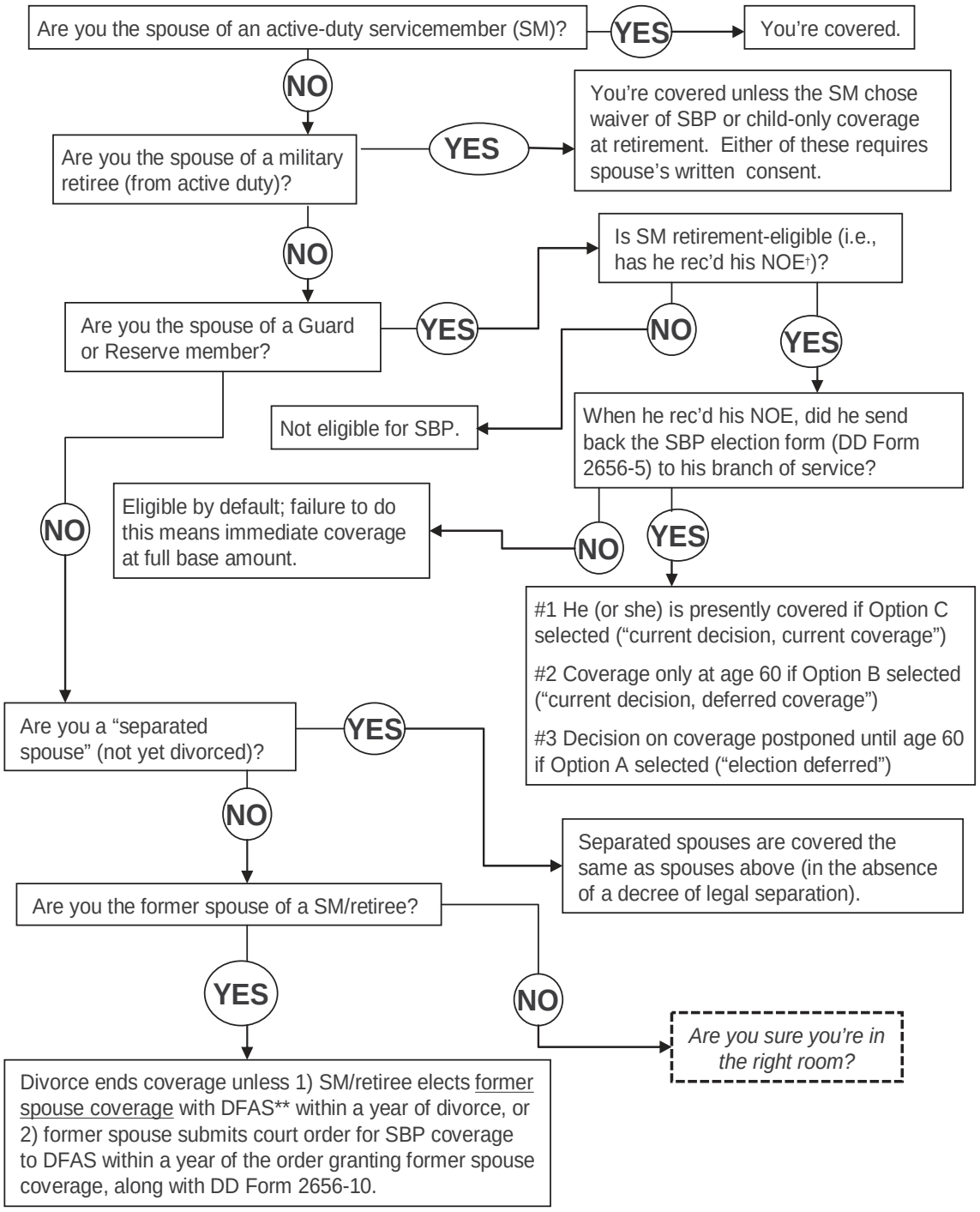
Survivor Benefit Plan – Are You Covered*?



SBP coverage means eligible beneficiary receives 55% of selected base amount if SM/retiree dies first. Info above assumes no prior award of SBP by court order to another beneficiary (and confirmed through ret'ired pay center, usually DFAS).

†*Notice of Eligibility (NOE) is sent to Guard/Reserve SMs upon completion of 20 years of creditable service ("20-year letter").*

***Defense Finance and Accounting Service (or other uniformed services retired pay center).*

Dropping the Ball: Legal Issues in the NFL's Salary Cap Reductions

By Thomas Grove

Introduction

In early March, the National Football League (NFL) issued salary cap reductions against the Dallas Cowboys and the Washington Redskins.[1] In what was a perfect storm for the NFL, free agency began the next day,[2] Peyton Manning was searching for teams,[3] and the New Orleans Saints bounty scandal dominated the headlines.[4] The penalties went seemingly unnoticed, unless one was a fan of either team penalized, and they raise serious issues about fairness. This article will examine what the NFL did, why, and how. It will also discuss the legal arguments that the NFL and the teams could make to impose or to oppose the penalties.

Background

In March 2006, the NFL and NFLPA agreed to extend the Collective Bargaining Agreement (CBA).[5] Under the CBA, the "Agreement shall be effective from March 8, 2006 until the last day of the 2012 League Year," unless certain exceptions applied.[6] Article LVIII, Section 3(a) provided:

> Either the NFLPA or the Management Council may terminate both of the final two Capped Years (2010 and 2011) by giving written notice to the other on or before November 8, 2008. In that event, the 2010 League Year would be the Final League Year, and the Agreement would continue in full force and effect until the last day of that League Year.[7]

In May 2008, the NFL owners voted to opt out of the 2006 CBA.[8] Under Article LVI, "No Salary Cap shall be in effect during the Final League Year."[9] Further, under Section 2 of Article XXIV, "there will be no Guaranteed League-wide Salary, Salary Cap, or Minimum Team Salary in the Final League Year."[10] The owners had agreed to these provisions because it limited free agency, a position the NFLPA had opposed.[11] In contrast, the NFLPA believed that by having no salary cap, NFL teams would spend over the projected salary cap, resulting in a windfall for players.[12]

The 2010 Uncapped Season

Before and during the 2010 season, the NFL issued verbal warnings to all teams, instructing them to not pay salary in the uncapped year to limit their salary cap hits in future years.[13] The type of payment to the player determines what counts against the salary cap. Base salary is "all amounts the Team has paid or is obligated to pay as set forth in all Player Contracts of current and former players covering a particular League Year, including exercised options…."[14] Signing bonuses "shall be prorated over the term of the Player Contract, with a maximum proration of six years, in determining Team Player Salary."[15] According to the NFL, the Redskins and the Cowboys ignored the verbal warnings and structured deals that would push salary into the uncapped year, thus taking it away from future years.[16]

The Cowboys were penalized for the way they structured wide receiver Miles Austin's contract.[17] They signed Austin to a six-year, $54 million extension, with $18 million in guarantees.[18] He previously had a $3.168 million contract, making the total value of his new contract worth over $57 million over seven years.[19] The Cowboys structured the deal to give Austin $17 million in base salary during the 2010 uncapped year.[20] The NFL, which approves all player contracts, approved Austin's contract, even though it knew of the verbal warnings issued to the teams.[21]

The Washington Redskins used restructuring to prevent future cap hits on defensive tackle Albert Haynesworth and cornerback DeAngelo Hall.[22] Under the rules of restructuring, "if a team inserts a player voidable clause—allowing the player to end his contract early—then a signing bonus following the voidable clause will not prorate through the remainder of the contract."[23] Albert Haynesworth had a $21 million bonus and DeAngelo Hall had a $15 million bonus restructured under that rule, which allowed the Redskins to contain $36 million in the uncapped year, instead of prorating it out over future years.[24]

The Penalties

On March 12, the NFL announced that it had docked the Washington Redskins $36 million and the Dallas Cowboys $10 million in salary cap space for their actions during the uncapped season.[25] The NFL Management Council and the NFLPA agreed on March 11 that $1.643 million would be added to the salary cap of 28 other teams.[26] The New Orleans Saints and the Oakland Raiders were excluded because of similar behavior.[27]

On March 12, the NFL stated that the moves by the Redskins and Cowboys "created an unacceptable risk to future competitive balance, particularly in light of the relatively modest salary cap growth projected for the new agreement's early years."[28] The NFL elaborated on that point on March 26 by releasing this statement:

> The reallocation aspect of the agreement is intended to address competitive issues from contract practices by those clubs in the 2010 League Year intended to avoid certain salary cap charges in 2011 and later years. Under the agreement with the NFLPA, the two clubs will be charged a total of $46 million in cap room in the 2012 and 2013 seasons ($18 million per year for Washington; $5 million per year for Dallas). That room, instead, will be reallocated to 28 other clubs in the 2012 and 2013 season as determined by the Club. (The New Orleans Saints and Oakland Raiders, which engaged in similar contract practices at a far different level, will not receive any additional cap room. Those two clubs have not challenged the agreement with the NFLPA.) The agreement will promote competitive balance without reducing the salary cap or player spending on a league-wide basis.[29]

NFL and NFLPA Reasoning

Competitive Balance

The NFL's main argument for the salary cap penalties is competitive balance.[30] The NFL achieves competitive balance through revenue sharing and the salary cap. In the NFL, approximately 60% of revenue is distributed equally among all teams.[31] This 60% consists of revenue from road game ticket receipts, NFL Properties, and television and radio deals.[32] Revenue sharing ensures that small market teams can afford players while also earning profits. The salary cap ensures that all teams are on an equal playing field when it comes to player salary.

The moves made by the Redskins and Cowboys represent a threat to the NFL's competitive balance practices. The NFL will argue that by giving Miles Austin $17 million in base salary, the Cowboys have reduced their potential salary cap for future years.[33] In 2010, that salary would result in a $17 million cap hit.[34] Over the next six years, Austin's average salary cap hit is $6.6975 million.[35] That difference coincides with the salary cap penalty of $10 million. The NFL believes that by front loading Austin's contract during the uncapped year, the Cowboys will pay millions of dollars less against the salary cap, once the salary cap returned.[36] The NFL Management Council believes that this "created an unacceptable risk to future competitive balance, particularly in light of the relatively modest salary cap growth projected for the new agreement's early years."[37]

One way in which this creates a risk to future competitive balance is through the use of the franchise tag. The franchise tag allows each team "to designate one of its players who would otherwise be an Unrestricted Free Agent as a Franchise Player each season during the term of this Agreement."[38] The salary for a franchise player is determined as "the average of the five (5) largest Prior Year Salaries for players at the position or 120% of his Prior Year Salary, whichever is greater."[39] Austin's salary in 2010 contributed to the value of a franchised wide receiver because he was one of the five highest paid wide receivers during 2010.[40] The San Diego Chargers were greatly affected by this increase in the franchise tag, because in order to franchise Vincent Jackson in 2011, they had to pay a one-year guaranteed salary of $11.4 million.[41] They franchised Vincent Jackson, could not reach a long-term agreement with him, and then had to choose between paying him $13.7 million in 2012 or letting him leave via free agency.[42]

The Redskins' decision to restructure the contract of Albert Haynesworth and DeAngelo Hall affected competitive balance in a different way. Instead of signing an existing player to a long-term contract, the Redskins restructured contracts of players already on their team.[43] Restructuring the Haynesworth and Hall deals allowed the Redskins to pay a large sum up front, by taking signing bonus money that is chargeable against the salary cap, and putting it in the uncapped year.[44] In Haynesworth's case, the Redskins could release him and avoid the cap hit that his signing bonus would have had on future years.[45]

The NFL Management Council is the "sole and exclusive bargaining representative of present and future employer member Clubs of the National Football League."[46] A way in which the NFL Management Council could impose penalties is under the NFL Constitution and Bylaws. If competitive aspects of the game are violated, the Commissioner can, after notice and hearing:

> Award selection choices and/or deprive the offending club of a selection choice or choices and/or cancel any contract or agreement of such person with the League or with any member thereof and/or fine the offending club in an amount not in excess of five hundred thousand dollars ($500,000), or in the case of an unrescinded unauthorized sale, transfer, or assignment of a membership or an interest therein to any person other than a member of the transferor's immediate family in violation of Section 3.5 hereof, the greater of (i) five hundred thousand dollars ($500,000), and (ii) an amount equal to 15% of the transaction value.[47]

The Commissioner also has the power to "make any other recommendation he deems appropriate" if that clause is violated.[48]

Apart from the Commissioner, the NFL Management Council Executive Committee may "impose such other additional discipline or punishment as it may decide"[49]

The chair of the NFL Management Council, John Mara, stated that the Redskins and Cowboys were "lucky they didn't lose draft picks" because "what they did was in violation of the spirit of the salary cap."[50] John Mara is the co-owner of the New York Giants, the division rival of the Redskins and the Cowboys, so that could be viewed as motivation for penalizing both teams.[51]

Leverage

The NFL Management Council felt that the actions by the Redskins and the Cowboys deserved punishment. The NFLPA felt that it could leverage the owner's agreement to benefit the players, while also punishing the Redskins and the Cowboys.[52] Based on the revenue sharing formula for 2011, the salary cap would have fallen between $113 and $117 million.[53] In 2011, the salary cap was $120.375 million, so a decrease in the salary cap number would be seen as a failure by the NFLPA to increase the wages of the players.[54] The NFLPA agreed to borrow against future caps to increase the salary cap for the 2012 season.[55] By borrowing from future caps, the 2012 salary cap was set at $120.6 million, higher than the previous year's.[56] The NFLPA believed that borrowing the money was justified because new television contracts go into effect in 2014 and they are substantially greater than the previous ones.[57] The NFLPA stipulated that the $46 million taken away from the Redskins and Cowboys would be divided among the 28 teams that did not engage in these practices, to ensure that player benefits would not decrease.[58] The NFL Management Council agreed to these penalties because they did not harm teams other than the Redskins and the Cowboys. The NFLPA borrowed money from future caps, so NFL teams would have to pay more now, but they would save in future years.[59]

NFLPA Executive Director DeMaurice Smith was up for re-election in 2012.[60] If the cap had been set between $113 and $117 million, Smith might not have been re-elected.[61] Instead, Smith could tell the players that the salary cap increased from 2011, even though they borrowed millions from future caps.[62] Smith ended up running unopposed a few weeks after the cap penalties were imposed.[63]

As part of the deal to end the 2011 lockout, a section of the agreement was a settlement on all antitrust issues related to *Brady v. NFL*.[64] The NFL chose not discipline the Redskins and the Cowboys in 2010 under Article VIII of the NFL Constitution and Bylaws because that would involve admitting to an implicit agreement to keep prices down in the uncapped year. The NFLPA would have evidence of collusion in the year prior to the expiration of the CBA, giving it additional ammunition in a potential lawsuit against the NFL. By coming to an agreement with the NFLPA, the NFL protected itself from potential collusion charges, because the NFLPA agreed to waive all antitrust issues in the 2011 CBA.[65]

The Redskins' and Cowboys' Arguments

The Redskins and the Cowboys will also have valid arguments in response to the penalties. After the penalties were issued the Redskins stated, "Every contract entered into by the club during the applicable periods complied with the 2010 and 2011 collective bargaining agreements and, in fact, were approved by the NFL commissioner's office."[66] Similarly, the Dallas Cowboys issued a statement, saying that they "were in compliance with all league salary cap rules during the uncapped year."[67] The Redskins and Cowboys have filed a grievance against the NFL and the NFLPA.[68] Under the CBA:

> Any dispute (hereinafter referred to as a "grievance") arising after the execution of this Agreement and involving the interpretation of, application of, or compliance with, any provision…of the NFL Constitution and Bylaws…will be resolved exclusively in accordance with the procedure set forth in this Article.[69]

The Special Master who heard the case was Professor Stephen Burbank of the University of Pennsylvania.

You Can't Break a Rule That Isn't There

One of the main points argued by the Redskins and the Cowboys is that because there was no CBA, the NFL Management Council could not promulgate rules relating to spending on player contracts.[70] The rules governing what counts towards the salary cap are collectively bargained between the owners and the players' union.[71] The rules that govern salary spending in the uncapped year were set in the 2006 CBA, and that agreement was silent on how teams may structure contracts during the uncapped year. John Mara admitted that the penalties had "to do with teams attempting to gain a competitive advantage through a loophole in the system."[72] By admitting that the Redskins and the Cowboys took advantage of a loophole, Mara is admitting that the teams took advantage of a situation for which there was no rule.

The Commissioner approves all player contracts.[73] Under Section 8.14(A) of the NFL Constitution and Bylaws:

> The Commissioner shall have the power, without a hearing, to disapprove contracts between a player and a club, if such contracts have been executed in violation of or contrary to the Constitution and Bylaws of the League, or, if either or both of the parties to such contracts have been or are guilty of an act or conduct which is or may be detrimental to the League or to the sport of professional football. Any such disapproval of a contract between a player and a club shall be exercised by the Commissioner upon written notice

> to the contracting parties within ten (10) days after such contracts are filed with the Commissioner. The Commissioner shall also have the power to disapprove any contract between any club and a player or any other person, at any time pursuant to and in accordance with the provisions of Section 8.13(A) of the Constitution and Bylaws.[74]

The Redskins and Cowboys should argue that by not expressly disapproving of the contracts when they were signed, the Commissioner and the NFL Management Council effectively approved them. The clause in the NFL Constitution and Bylaws that gives the Commissioner the power to penalize teams if they violate competitive balance does not apply when there is no salary cap, because the rule that all contracts are approved by the Commissioner applies instead. Under Section 8.13(A) of the Constitution and Bylaws, the NFL is issuing this punishment because of a "violation affecting the competitive aspects of the game,"[75] and the Commissioner can disapprove any contract under Section 8.14(A) "at any time."[76]

The issue then becomes whether Section 8.14(A) applies to a salary cap situation, in a year in which there is no salary cap. Dallas owner Jerry Jones believes that by approving the contracts in 2010, the NFL cannot impose a penalty based on contracts that were approved.[77] At the Owners' Meetings, Jones said, "all of our contracts were approved by the league, and you can't approve a contract that is in violation of league rules. You can't even get it on the books if it isn't in sync with league rules."[78] He even stated that "there were a lot of things rather than Cowboys cap room that I would have rather leveraged the players union to give the NFL."[79] The Redskins and the Cowboys can argue that there was no rule against structuring deals in 2010, and the Commissioner approved the deals without giving them notice. Therefore, the Commissioner does not have the ability to impose penalties based on the way contracts were structured in 2010.

Unfair Application of Competitive Advantage

The NFL's competitive advantage argument is unfair as applied to the Cowboys. An analysis of the similarities among Miles Austin's contract, Chicago Bears defensive lineman Julius Peppers' contract, and Detroit Lions defensive lineman Kyle Vanden Bosch's contract provides evidence of "teams attempting to gain a competitive advantage through a loophole in the system."[80]

Miles Austin's Contract[81]

	Base Salary	Signing Bonus	Miscellaneous Bonus	Cap Hit
2010	$17,078,000	-		$17,078,000
2011	$685,000	$1,570,000	-	$2,255,000
2012	$1,150,000	$1,570,000	-	$2,720,000
2013	$6,732,000	$1,570,000	-	$8,302,000
2014	$5,500,000	$1,570,000	-	$7,070,000
2015	$6,888,000	$1,570,000	-	$8,458,000
2016	$11,380,000	-	-	$11,380,000
Average	$8,235,500	$1,121,428	-	$8,166,857
Difference Between 2010 and Average	$8,842,500	$1,121,428	-	$8,911,143

Julius Peppers' Contract[82]

	Base Salary	Signing Bonus	Miscellaneous Bonus	Cap Hit
2010	$20,000,000	$1,083,333	$13,850,000	$34,933,333
2011	$900,000	$1,083,333	$11,850,000	$13,833,333
2012	$8,900,000	$1,083,333	$1,350,000	$11,333,333
2013	$12,900,000	$1,083,333	$1,350,000	$15,333,333
2014	$13,900,000	$1,083,333	$1,350,000	$16,333,333
2015	$16,500,000	$1,083,333	$1,250,000	$18,833,333
Average	$12,183,333	$1,083,333	$5,166,666	$18,433,333
Difference Between 2010 and Average	$7,816,667	0	$8,683,334	$16,500,000

Kyle Vanden Bosch's Contract[83]

	Base Salary	Signing Bonus	Miscellaneous Bonus	Cap Hit
2010	$10,000,000	-	0	$10,000,000
2011	$4,500,000	-	$3,690,000	$8,190,000
2012	$5,000,000	-	0	$5,000,000
2013	$5,000,000	-	0	$5,000,000
Average	$6,125,000	-	0	$7,047,500
Difference Between 2010 and Average	$3,875,000	-	$922,500	$2,952,500

Under the same reasoning the NFL used to punish the Cowboys, the Bears used disproportionate cap spending of $16.5 million in 2010 and the Lions used disproportionate cap spending of $4.7975 million in 2010. Neither the Bears nor the Lions were penalized. Instead, they both received an additional $1.6 million in salary cap space in 2012,[84] even though their disproportionate spending had the same effect on competition. If the NFL punishes the Cowboys for disproportionate cap spending for signing Miles Austin to an extension, then fairness requires it to punish the Bears and Lions for disproportionate cap spending as well.

The Redskins and Cowboys can also argue that the reason for the unfair application was due to difference in overall spending during the 2010 season.[85] In 2010, the Redskins spent $178.2 million and the Cowboys spent $166.5 million on salaries.[86] In comparison, the Bears spent $131.9 million and the Lions spent $122.9 million.[87] The average team salary was $122.54 million, but the Cowboys and Redskins outspent the average by over $40 million.[88] If the NFL was concerned about teams gaining a competitive advantage in future seasons, it is odd that it chose only to penalize the two highest paying teams during the uncapped year and not teams that also gained a competitive advantage, but spent millions less on salary in 2010.

Another competitive advantage argument the Redskins and the Cowboys can make is the advantage gained by teams that severely underspent in 2010.[89] The NFL CBA defines the salary floor as "84% of the Salary Cap" in 2006 and that percentage "shall increase 1.2%" for each subsequent year.[90] The salary floor shall not "be greater than 90%" and "there shall be no Minimum Team Salary in the Final League Year."[91] In 2009, the salary floor was $107.748 million.[92] In 2010, the salary floor would have been 1.2% greater, setting it at $109,040,976.

In 2010, the San Diego Chargers, Buffalo Bills, Denver Broncos, Cincinnati Bengals, Arizona Cardinals, Jacksonville Jaguars, Kansas City Chiefs, and Tampa Bay Buccaneers all spent under the projected salary floor.[93] The Kansas City Chiefs was the only team in that group that made the playoffs and the combined record of the group was 54-74.[94] In contrast, the 24 teams that spent above the salary floor had a combined record of 202-182, and 11 of them made the playoffs, not including the Redskins or the Cowboys.[95] By severely underspending, those eight teams had a disproportionate amount of success compared to the teams that spent above the salary floor. Only 12.5% of the teams that underspent made the playoffs, compared to 45.8% of the teams that spent at least the minimum. Those teams that did not reach the salary floor clearly affected "the competitive aspects of the game" in 2010.[96]

The NFL fails to account for the effect underspending in 2010 had on future competition. Unlike the Redskins and the Cowboys, the eight teams that underspent gained a competitive advantage in free agency in future years, because once the salary floor returned, they would need to spend millions on player extensions and free agents in order to reach it. As was argued earlier by the NFL, the effect of the Redskins and the Cowboys deals increased franchise tag amounts.[97] These eight teams had more money to spend on free agents than the other 24, so they would affect franchise tags by frontloading contracts to reach the salary floor. In 2012, the Buccaneers entered free agency with a league high $44.6 million in salary cap space.[98] In order to reach the salary floor, the Buccaneers signed Vincent Jackson, Carl Nicks, and Eric Wright for a combined $140 million.[99] Similarly to the Buccaneers, the Denver Broncos, Cincinnati Bengals, and Jacksonville Jaguars had the next highest amount of salary cap space.[100] The salary cap space allowed Denver to pay Peyton Manning $18 million in the first year of his contract.[101] In the same way Miles Austin's contract affected the franchise tag for wide receivers, Peyton Manning's contract will severely impact the franchise tag cost to the Saints to franchise quarterback Drew Brees.

The effect that salary cap space has on free agency goes beyond franchise tags. The average team salary cap space in 2012 was $12.5 million.[102] A team with salary cap space can structure a contract that is severely frontloaded, meaning that it could pay more upfront to a player than other teams. By doing this, the team would benefit by signing good players, helping it reach the minimum and thereby allow it to easily outbid other teams. The player would benefit because he could receive more money

than his value and also receive more money upfront. An example of this practice was done by the Tampa Bay Buccaneers in 2012. Vincent Jackson received a 5-year deal with an average salary of $11 million, but he is receiving $13 million in the first two years of his contract.[103] Carl Nicks received a 5-year deal with an average salary of $9.5 million, but he is receiving $12.5 million in the first two years.[104] This shows that by severely underspending in 2010, the Buccaneers were able to structure free agent contracts in 2012, in a way in which other teams could not under the salary cap. The Redskins and the Cowboys should argue that by underspending in 2010, those teams gained a competitive advantage in future years.

Antitrust Ramifications

The agreement among the NFL owners appears to trigger antitrust questions. Under § 1 of the Sherman Antitrust Act, "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[105] Under this section, price fixing and wage fixing are illegal in labor markets.[106] The issue is whether the NFL owner's agreement is a form of price fixing or wage fixing that would violate the CBA or the Sherman Antitrust Act.

Under the 2006 CBA, anti-collusion is defined narrowly. An NFL team is prohibited from entering into any agreement with another NFL team "to restrict or limit individual Club decision-making" in relation to (a) negotiating with any player; (b) submitting an offer sheet; (c) offering a contract to a free agent or undrafted rookie; (d) exercising a right of first refusal; or (e) concerning the terms and conditions of employment offered in a player contract.[107] Section 1(e) may apply to this situation because an agreement among NFL teams to structure contracts a certain way would concern "the terms and conditions of employment offered in a player contract."[108] The terms of a player's contract would involve the form of the salary in the contract, i.e., base salary and signing bonus.

The anti-collusion clause would not apply to this situation because of the 2011 CBA. Under Article 3, the NFLPA "assigns, releases, and covenants not to sue… in, any suit or proceeding…against the NFL or any NFL Club…with respect to antitrust or…collusion with respect to any League Year prior to 2011.[109] When the NFLPA signed the 2011 CBA, it agreed to forfeit its right to sue the NFL with respect to collusion during the 2010 season.[110] Had the NFLPA sued the NFL under the anti-collusion clause, that would be a violation of the 2011 CBA.[111]

Conclusion

The NFL has taken advantage of its own loophole in the NFL Constitution and Bylaws. By imposing penalties on teams for structuring contracts a certain way after agreeing that the contracts did not violate any rules allowed the NFL to work around the NFL Constitution and Bylaws. The NFL is retroactively imposing penalties because it did not want to give the NFLPA evidence of collusion during the 2010 season. Had the NFL imposed penalties in 2010, the NFLPA would have been able to argue that the penalties were due to a tacit agreement to keep salaries low. Instead, the NFL Management Committee knew that it had to reach an agreement with the NFLPA in order to impose these penalties. Once that was reached, the penalties were imposed. Coincidentally, the two teams penalized are in the same division as NFL Management Committee Executive Chairman John Mara.

In this situation, it appears that the NFL is punishing two teams for their actions during the uncapped year because they outspent every other team. Fairness requires either the penalties to be overturned or for penalties to be imposed on every team that structured contracts the same way or underspent in 2010. The NFL's competitive advantage argument is seriously flawed when other teams structured contracts the same way as did the Redskins and the Cowboys. Further, teams that underspent not only altered the competitive landscape in 2010 by underperforming, they also altered the competitive landscape in 2012 by having more salary cap space than nearly every team.

Although common sense would have dictated that Special Master Burbank rule in favor of the two teams, on May 22, he instead ruled in favor of the NFL and dismissed the case.[112]

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Thomas Grove is a graduate of Pace Law School and the University of Maryland. His legal interests include Intellectual Property and Sports Law, especially salary cap analyses in the NFL, NHL, and NBA. While in law school, he developed an interest in sports analytics and is continually trying to find ways to use numbers to explain issues in sports.

Mr. Grove can be found at various Intellectual Property and Sports Law Symposia around the tri-state area, talking about everything from current issues in the law to the University of Maryland lacrosse team. He can be reached at ThomasMGrove@gmail.com or @ ThomasMGrove.

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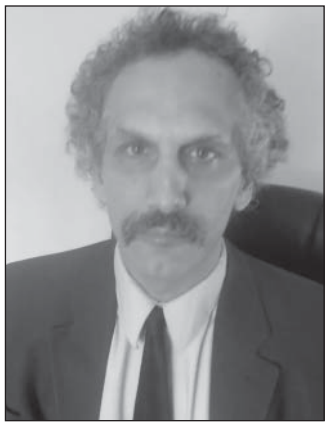
Assessing a Century of Ethics Laws in New York State

By Blair Horner and Russ Haven[1]

Blair Horner



Russ Haven

New York has seen a seemingly endless parade of scandals in state government recently, from the merely embarrassing to those that have resulted in felony pleas and convictions, shaking to its very foundations New Yorkers' trust in their government.

The skullduggery involving state political figures uncovered in *just the past six years* includes the resignation of a sitting governor for patronizing a prostitute; felony pleas for the former state comptroller; the conviction of the former Senate Majority Leader for violating the "honest services law"; and a former Assemblyman dying in federal prison while serving time for a hospital shakedown scheme; among others.

"[L]obbyists and their well-resourced clients are often at the center of government scandals. As a result, lobbying oversight and government ethics go hand-in-hand."

Most, but far from all, of the scandals involved special interests seeking favors from public officials and/or public officials looking to gain personally from their positions in public office. Since lobbyists and their clients want government action (or inaction), the temptation to make an inappropriate offer or accede to an inappropriate overture apparently has too often proved too great for too many.[2]

With its large budget, now north of $130 billion annually, home to Wall Street and major corporate headquarters, and with among the most generous social and health-care services available, New York has more registered lobbyists per legislator than any other state and was third highest state in terms of spending on lobbying.[3]

As a result, lobbying is a growth industry in New York. For 2010, the last year for which final data is available, lobby spending in New York was $213.4 million, with 6,659 registered lobbyists representing 4,091 clients.[4] Just a decade earlier, in 2001, lobby spending in the state was $80.4 million and there were 2,930 lobbyists representing 1,640 clients.[5]

To be sure, lobbyists play an important role in government. But they do much more than analyze the issues of the day. Lobbyists are hired and employed to promote the interests of their paying clients and employers. Lobbyists also act as key liaisons between their clients and lawmakers and are tightly woven into political fundraising and electoral campaigns. Thus, lobbyists and their well-resourced clients are often at the center of government scandals. As a result, lobbying oversight and government ethics go hand-in-hand.

Moreover, unlike Congress, state legislators are part-time lawmakers, and many have outside sources of income. According to NYPIRG's review of the most recent ethics disclosures, 64% of legislators reported outside income, including from work as realtors, landlords, lawyers, and a wide range of activities that create the potential for conflict with their public duties.[6]

New York has a long history of addressing integrity in government issues, with each successive measure part of an evolution of greater transparency and accountability for public officials, lobbyists and clients. Reviewing the more recent history in this area allows a better understanding of how the state got to this point and to see how scandals are reflective of their times over the years.

A Brief History of Lobbying Regulation in New York Since the Dawn of the 20th Century

The Armstrong Committee

The unseemly side of relationships between lobbyists and public officials and the potential for influence peddling was first put on full display for New Yorkers early in the 20th Century when *The World* newspaper reported on a power struggle within the Equitable Life Assurance Society. The scandal was triggered by the attempt of an Equitable Vice President to sell 502 inherited shares of company stock, which, despite yielding only a few thousand dollars a year in dividends, would cede control of the insurer whose assets were valued at more than $400,000,000.[7] The news reports of cavalier insurance executives living lavish lifestyles outraged the public.

As a result, Governor Francis Wayland Higgins[8] requested a legislative investigation. State Senator Armstrong chaired the investigation committee and tapped future governor and U.S. Supreme Court Justice Charles Evans Hughes to lead the inquiry. The committee, formally the New York Legislature Joint Committee on Investigation of Life Insurance Companies, is widely known as the Armstrong Committee.[9]

The Hughes-led Armstrong Committee held its first public hearing on September 6, 1905 and released its report on February 22, 1906. The report focused on the dubious practices of the life insurance industry as it existed in the early 1900s, including its legislative affairs.

The report concluded with the recommendation that:

> The pernicious activities of corporate agents in matters of legislation demand that the present freedom of lobbying should be restricted… The Legislature owes it to itself, so far as possible to stop the practice of the lavish expenditure of moneys ostensibly for services in connection with the support of or opposition to bills and generally believed to be used for corrupt purposes.[10]

In just a little over two months after the report was issued, on April 26, 1906, Governor Higgins signed New York's first lobbyist regulations into law.[11] In signing the bill, the governor said it was "to prevent secret lobbying."[12]

The new law required that:

> Every person retained or employed for compensation as counsel or agent by any person, corporation or association to promote or oppose directly or indirectly the passage of bills or resolutions by either house or to promote or oppose executive approval of such bills or resolutions, shall, in each and every year

register with the Secretary of State, with lobbyists reporting on bills they worked on.[13] Contingent lobby contracts were prohibited.[14] Corporations and associations were obliged to file statements within two months after the end of the legislative session to "detail all expenses paid or incurred in connection with legislation." In addition, a new law was enacted to allow the governor to launch broad investigations, now known as a "Moreland Act Commission."[15]

The Lockwood Committee

In the early 1950s, a major scandal erupted in New York centering on the harness racing industry and involving organized crime figures, prominent Republicans and Democrats, unions and labor racketeering, with two union leaders murdered.

New York's three-term Republican Governor Thomas Dewey responded to the scandal by establishing a Moreland Act Commission to investigate the harness racing industry or "trotters." The Moreland Act Commission found corruption and kickbacks in employer financed union funds.[16] While public officials and political figures had benefited from their ties to the tracks, they were not the focus of the inquiry.

Nevertheless, Governor Dewey called for the creation of a committee to draft a code of ethics to regulate public officials and political leaders when conflicts arise between their public duties and private affairs.[17] A retired state Senator and State Supreme Court Justice, Charles C. Lockwood, was tapped to chair the Special Legislative Committee on Ethics in Government (the "Lockwood Committee").[18]

The Lockwood Committee's recommendations for legislation were passed by the Legislature and signed into law by Governor Dewey in March 1954.[19] These provisions created the core of the state's rules for restricting the business relationships of public officials and staff currently found in the Public Officers Law sections 73 and the code of ethics in Public Officers Law section 74.

Establishment of the Modern Lobbying and Ethics Laws

The Regulation of Lobbying Act

In 1976, Governor Hugh Carey created a Moreland Act Commission to investigate allegations of corruption in the licensing and oversight of nursing homes in the state.[20] In addition to newpaper reports, the Moreland Act Commission on Nursing Homes hearings were televised and a seven-volume report was issued in late February 1976.[21] The televised proceedings, in particular, "kept up a climate of public indignation."[22]

Following closely on the heels of the nursing home investigation, in 1977 the Legislature enacted the *Regulation of Lobbying Act*, the state's first comprehensive approach to regulate the activities of lobbyists and their clients.[23] This legislation ushered in the modern era of lobbying oversight and enforcement.

The *Regulation of Lobbying Act* repealed the 1906 lobby laws and established the New York Temporary State Commission on Regulation of Lobbying, and endowed the new entity with investigatory and enforcement powers.

The new Commission was to be bipartisan, consisting of six members, two chosen by the governor (one enrolled Democrat and one Republican), and one each upon nomination of the Majority and Minority Leaders of the Senate, Speaker of the Assembly and Assembly Minority Leader. Commissioners were given three-year terms and could not hold compensated state or local public office, be

employed by state or local government, or be subject to the jurisdiction of the Commission.

The Commissioners would select a chairman and vice-chairman of different political parties to serve one-year terms. The executive director was appointed jointly by the chairman and vice-chairman, and served a two-year term concurrent with the legislative session. Lobbyist and client reporting requirements were expanded and the lobby commission was also required to issue an annual report.

Significantly the Commission was given the power to "conduct any investigation necessary to carry out the provisions" of the law, including broad subpoena powers. The lobby commission also could impose penalties and make referrals to appropriate authorities.

Ethics Reform

In 1986, wide-ranging scandals coming out of New York City and centering on contracts city agencies had let to private interests for the collection of outstanding city fines, including for Parking Violations Bureau ("PVB") violations, triggered another wave of ethics debate.[24]

The New York City "PVB Scandal" led New York City Mayor Ed Koch and Governor Mario Cuomo to establish the joint city-state Commission on Integrity in Government to "examine instances of corruption, favoritism and conflicts of interest in government and to recommend reforms."[25]

The Legislature rejected the Commission's legislative proposals and passed watered down versions. Governor Mario Cuomo vetoed the legislation as too weak.

After intense new negotiations with the Legislature, Governor Cuomo approved the *Ethics in Government Act.* The new law greatly expanded lawmaker financial disclosures;[26] restricted appearances before state and local agencies; created "revolving-door" regulations to limit the ability of former state officials and employees to lobby erstwhile colleagues; established the state Ethics Commission to oversee executive branch ethics (dominated by gubernatorial appointees); and created the Legislative Ethics Committee (controlled by appointees of the legislative leaders) to oversee legislators' conduct.[27]

The Lobby Commission Emerges as a Real Watchdog: The Philip Morris Lobbying Scandal

The lobby commission came into its own as a watchdog agency as a result of its investigations into the wining-and-dining activities of tobacco giant Philip Morris, unearthed by researchers among the trove of documents from the global tobacco settlement.[28]

In late 1998, researchers reviewing Minnesota's tobacco document archives came across an astonishing document. According to a Tobacco Institute budget, in 1995 the tobacco industry trade group had spent $279,700 on something called the "New York Preemption Plan."[29] This spending was not reflected in the group's lobbying reports filed with the state. Alerted to this finding, NYPIRG, Common Cause/New York, and the League of Women Voters of New York State, filed a complaint with the New York Temporary State Commission on Lobbying charging that the Tobacco Institute had failed to disclose these expenditures and calling on the Lobbying Commission to investigate.[30]

As a result of the investigation, the Tobacco Institute admitted that it had spent $443,072 in 1995 lobbying in New York and that it had funneled those unreported resources to the New York Tavern and Restaurant Association to advocate on its behalf before both state and local governments.[31]

In July 1999, *The New York Times*, basing its investigation on more documents from the Philip Morris online archive, reported that from 1995 through 1997, the tobacco giant spent tens of thousands of dollars on gifts for Albany lawmakers. Internal Philip Morris documents showed that at least 115 current and former legislators of the 211-member Legislature, as well as members of the executive branch, had accepted gifts from the tobacco giant ranging from seats at the men's final of the United States Open tennis tournament, to hotel reservations and tickets to the Indianapolis 500, baseball games and $12,000 in meals for public officials in 1996 alone.[32] In addition, the *Times* also revealed that in 1995 Philip Morris contributed $10,000 to the Hungarian-American Chamber of Commerce, shortly before it underwrote the cost of then-Governor George Pataki's trip to Hungary. The company's top lobbyist joined the Governor and others in Budapest during his trip.[33]

As a result of the investigation by the Lobbying Commission, Philip Morris was fined $75,000 for failing to disclose its lobbying activities as required by law. Its lobbyist was fined $15,000 for her role and banned from lobbying in the state for three years.

The scandal motivated elected officials as never before to show their independence from the tobacco lobby. In late 1999, lawmakers doubled the state's cigarette tax, to the highest in the nation, and earmarked millions for anti-smoking programs. And in 2000, the state enacted first-in-the-nation legislation requiring that cigarettes sold in the state meet fire safety standards.

The scandal also triggered changes to the lobby law, enacted in 2000, which included a tightening of the state's gift restrictions; requiring random audits to verify filings; disclosure of local lobbying activities; and tougher penalties.

Reacting to a number of contracting scandals in 2005, changes were made to the state's lobbying and ethics laws to address problems with the oversight of "procurement lobbying," efforts to obtain contracts to supply state goods and services. The 2005 amendments established procedural safeguards in the procurement process, and closed a loophole that prevented state oversight agencies from pursuing ethics violations against public officials when they left state service.

Governor Spitzer Pushes to Merge Ethics and Lobbying Oversight

The 2006 gubernatorial campaign focused on promises to change the state's ethical climate. Attorney General Eliot Spitzer won the election in a landslide with sixty-nine per cent of the votes cast and a mandate to change business-as-usual in Albany. Once in office, Spitzer forged an agreement to merge the Ethics and Lobby Commissions into a single new entity, the Commission on Public Integrity. The *Public Employees Ethics Reform Act of 2007*[34] also beefed up penalties and banned more than token gifts from lobbyists and clients to legislators and other public officials.

A concern raised by reform groups was that for the first time a single elected official, in this case the governor, would have a majority of picks on the commission regulating lobbyists. Governor Spitzer responded, saying that if the merged entity stumbled or failed, the public would know he was responsible.[35]

The new Commission on Public Integrity got off to a rocky start, with commissioners recusing themselves at the very first meeting due to conflicts between their private clients and Commission investigations inherited from the previous lobby commission.[36]

As is now well known, Spitzer and his staff soon overreached in attempting to get the upper hand on political rival Senate Majority Leader Joseph Bruno, who was resisting the governor's push for reforms to the state's notoriously lax campaign finance system.

On July 1, 2007, a bombshell article ran in the *Times Union* newspaper detailing how Senator Bruno had repeatedly used state aircraft and vehicles to travel for exclusively or primarily political fundraising, not for public business.[37] Bruno fought back saying that his actions didn't violate the state's lax laws and that it was Spitzer who was out of bounds by using State Police resources to monitor and investigate his activities. The debate and investigations over this controversy became known as "Troopergate."

The Troopergate scandal dominated state headlines and touched off multiple investigations, including by the new Commission on Public Integrity, the state Inspector General, and the Albany County District Attorney.

The Inspector General's Troopergate Report

A blistering May 2009 report by the Office of the State Inspector General ("IG") found that the Commission on Public Integrity Executive Director broke the law by providing confidential information on the Commission's own Troopergate investigation of the governor's staff by leaking information to the governor's office.[38] The IG's Troopergate Report specifically criticized the Commission's Chairman and Executive Director. Both ultimately resigned.

In reaction to this report, Governor David Paterson appointed a new chairperson and executive director. The Commission found its footing by undertaking an aggressive investigation of Governor Paterson's use of his office to request and obtain tickets to the first game of the 2009 World Series at Yankee Stadium. After an investigation, which included testimony under oath from the governor, top staff and Yankees' personnel, the Commission determined that the governor had lied about soliciting the tickets; had no intention of paying for them; and that he performed no ceremonial public function at the game. In short, he had solicited and received an illegal gift. The Commission fined the governor $62,125.

In light of the scandals engulfing Albany and with Democrats in charge of the state Senate for the first time in decades, both houses of the Legislature were under pressure to produce sweeping ethics reform. Legislation that would have increased legislators' financial disclosure, created separate ethics and lobbying oversight agencies, established a legislative investigations office overseen by the Legislature, and toughened penalties passed both houses. However, Governor Paterson vetoed the legislation saying that it was not strong enough, particularly regarding legislative oversight. A veto override failed in the Senate.[39]

The 2010 Gubernatorial Election; Cleaning Up Albany Redux

Perhaps not surprisingly, the 2010 race for governor was something of déjà vu all over again: another race for governor, another campaign about who could clean up the ethical morass on the Hudson that was Albany.

The latest round of Albany-based scandals, where sitting legislators were entering plea deals or being indicted on seemingly regular basis, created enormous public pressure to take action to improve the ethical climate of state government.[40]

The common thread running through many of the latest scandals were reports that lawmakers reportedly were making eye-popping amounts of money outside of their legislative jobs in ways that created the appearance, if not reality, of conflicts of interest. These included former Majority Leader Joseph Bruno (running his private

consulting business out of his public office and using his leadership position to leverage clients), Assembly member Anthony Seminerio (receiving monies from hospitals in his district for special legislative treatment), and Senator Pedro Espada (running a health care clinic network in the Bronx and paying himself hundreds of thousands of dollars each year). In these cases and others, it typically has been federal authorities that have taken the lead in investigations and prosecutions.

The Public Integrity and Reform Act of 2011

The 2011 overhaul of the ethics and lobbying oversight structure and regulatory provisions were designed to shed light on lawmakers' outside business activities and reflects the governor's belief that disclosure is a powerful tool for deterring improper behavior and giving the public insight into how government works.[41] It is also based on the assessment that the Legislature's "self-policing" was no longer acceptable, as well as the belief that no one elected official should control appointments to the state's ethics watchdog.

The *Public Integrity and Reform Act of 2011*[42] was hammered out over the first six months of the legislative session in private negotiations between the governor, the Senate Majority Leader and the Assembly Speaker and their staffs.[43] The legislation will require for the first time that comprehensive, *un-redacted* disclosures be made and available to the public in narrow dollar figure ranges for the governor, attorney general, comptroller and legislators and their policymaking staff.[44] It will establish a new fourteen member Joint Commission on Public Ethics ("JCOPE") to oversee executive branch ethics, lobbyist and client reporting and conduct, and have the ability to investigate, but not punish, legislators. Legislators and staff would remain subject to punishment only by the Legislative Ethics Commission.

The governor appoints six of the fourteen members (with three being enrolled Republicans); the Senate Majority Leader and Speaker each appoint three members; and the Senate and Assembly Minority Leaders each get one appointment.[45] Thus, no one elected official dominates appointments.

The JCOPE chair will be chosen by the governor; the executive director will be chosen by the commissioners, and not have a fixed term, but may only be terminated as specified in statute. Financial penalties are toughened and courts will have the ability to strip corrupt public officials of their pensions.

Under the unprecedented disclosure provisions, lawmakers will have to reveal those clients, including law clients that they directly provide services for and who lobby the state. The state also will establish a database of appearances before state agencies, authorities, boards and commissions, to capture activities by firms where lawmakers have no personal involvement to provide a fuller picture of the influence that firms employing lawmakers may wield.[46]

The *Public Integrity Reform Act of 2011* also for the first time presents the prospect of an outside entity having a statutory role in monitoring and investigating legislators. In order to address separation of powers concerns raised by the Legislature, JCOPE will be able to investigate legislators, but must refer findings of violations to the Legislative Ethics Commission ("LEC") for any punishment. The LEC is subject to a timetable to act or the referral report is made public by JCOPE.

This unprecedented level of disclosure responds to the recent scandals where substantial outside income could have been a tipoff that something was amiss, including the activities of Senator Joseph Bruno, Senator Pedro Espada and Assembly member Anthony Seminerio.

The most controversial aspect of the new Joint Commission on Public Ethics is the extent to which it introduced partisan voting requirements for conducting investigations. The voting requirements reportedly were included to assuage the concern, raised publicly by Republican senators, that JCOPE Commissioners could use the Commission for partisan attacks.

As a result, the new law establishes a special "same branch, same party" rule for voting on matters pertaining to the conduct of legislators, the governor, attorney general and comptroller and their top staff. This provision may prove to be the law's "Achilles heel."

For example, in order to continue an investigation or refer a "substantial basis" finding about an alleged ethics violation by a legislator, legislative employee, or candidate to the Legislative Ethics Commission, there must be at least eight of the 14-member JCOPE Commissioners in support, including at least two Commissioners appointed by legislative leaders of the same party. In other words, at least one appointee of the Senate Majority Leader or the Assembly Speaker would have to support proceeding against a Senate Republican or Assembly Democrat who is under investigation. Similar voting rules apply to statewide elected officials and their direct appointees. This effectively gives those leaders' appointments veto power over enforcement against public officials of their party serving in their branch.

Lessons from New York's First Hundred Years of Lobbying and Ethics Oversight

New York's history over the past century provides a number of lessons about how reform comes about and what watchdog agencies need to be successful in guarding the public's interest in government integrity. As the public's expectations about how public officials should

conduct their affairs shifts and the tolerance for self-dealing diminishes, the standard for ethical conduct will likely evolve in favor of improved disclosure, restrictions on potentially conflicting activities, and tougher penalties.

Scandals, Media Attention and Advocacy Drive Reforms

Over the past one hundred years, each substantial step forward in ethics reform and the regulation of lobbyists and their clients resulted from scandals that were kept before the public eye. From the 1906 insurance scandal, with one newspaper placing more than one hundred editorials on it, to the televised 1970s nursing home hearings (coming soon after the televised Watergate hearings), to the highly visible scandals that consistently have rocked Albany over the past decade, fixed public attention drives reforms. For the most part, however, the resulting reforms are often tailored closely to address or to appear to address the latest scandal, not necessarily fix other problems.

Structure and Oversight Independence Are Important

The structure of the oversight body, the independence of the executive director and staff are of critical importance to the functioning of the watchdog agency. For example, leaving control of the Commission on Public Integrity (2007-2011) to a majority chosen by the governor created a real potential for a conflict of interest. Even though the 2007 law granted the commissioners terms of office (a real strength of the law), it also stated that the commission's executive director would serve *at the pleasure of the commission*, with no set term of office. It was clear that this new Commission was at risk of being subject to influence by the governor.

Indeed, the 2009 Inspector General's report painted a picture of how that conflict played out. According to the IG, the Commission's executive director was leaking confidential investigation information to the governor's attorneys. Perhaps it was not surprising that the executive director of a gubernatorally controlled agency, who served at the pleasure of the governor's commission choices, would want to keep the governor in the loop about the investigation into his Administration. While the Commission and the executive director strenuously rejected the conclusions of the IG report, it's not hard to believe how it could have happened. In short, the law provided for a fatally flawed structure of the state's ethics and lobby watchdog agency. The 2011 legislation addressed these concerns by distributing appointments among political leaders. However, the concern with the new law is that the voting requirements may lead to gridlock when political figures or appointees are under investigation.

The Importance of Transparency Through Disclosure and in Agency Proceedings

From 1906 forward, the clear trajectory has been to increasing disclosure of finances, relationships and activities. These disclosures, with the risk of serious penalties for false entries, can provide clues of where to look for conflicts of interest. And the very existence of disclosure requirements may exert a pressure to reject the conduct or relationships that results in a real or apparent conflict due concerns about appearances. Strong disclosures should have these salutary benefits.

Public trust also is important to the functioning and effectiveness of public integrity watchdogs. These agencies must pursue the facts regardless of fear or favor. If they do so they will have the public's trust and their decisions to act—or forbear from action—will be trusted. The comparative secrecy under which the Commission on Public Integrity conducted its business, including repeated recusals by Commissioners, more time in executive session than in public discussion, and releasing its annual reports electronically without holding news conferences, did not give the public a favorable impression of its watchdog.

In contrast, during his tenure Lobby Commission Executive Director David Grandeau ran a more open agency, including public release of the annual reports and access to case transcripts when an investigation was completed.

At the other end of the spectrum, the Legislative Ethics Commission, and its predecessor the Legislative Ethics Committee, has done very little in the way of investigations or enforcements and has conducted its business almost totally in secret.

With respect to the 2011 changes, agency transparency will depend on the makeup of the new Commission and its executive director and how they determine they will conduct Commission business, in the full public view whenever possible, or in secret to the extent they can. It's our hope that the law's emphasis on transparency of the regulated community will spill over to the proceedings of JCOPE and the Legislative Ethics Commission.

Somebody Has to Watch the Watchdogs

A prime lesson from the Inspector General's investigation of the Troopergate matter is that checks create balance and it's important to watch the watchdogs. The report came to the highly disturbing conclusion that the Commission on Public Integrity's executive director, the state's top ethics cop, had violated Commission rules and broken the law by leaking information about its investigations and a matter under review by the Albany County District Attorney to the subject of the investigation, in this case the governor.

People Matter

While agency structure and independence are important—they can promote or inhibit an agency from pursuing its mission—individuals make a huge difference in the way the laws are implemented and the public's interest is served. Individuals like former Lobby Commission Executive Director David Grandeau and former Inspector General Joseph Fisch distinguished themselves through their tenacity and actions regardless of the powerful officials or interests implicated.

"When government is held in high esteem, when the public trust is upheld, everyone in government basks in that reflective glow. In contrast, everyone in government gets splattered each time a public official is found mucking around in the mud of corruption."

Lawmakers would be smart to take an enlightened self-interest and appoint independent, qualified Commissioners with a zeal for achieving the highest ethical standards in government. When government is held in high esteem, when the public trust is upheld, everyone in government basks in that reflective glow. In contrast, everyone in government gets splattered each time a public official is found mucking around in the mud of corruption.

Looking for fresh blood could help. For example, the various appointing authorities to the new JCOPE oversight commission should go beyond the modest restrictions placed on who may serve and look past the highly credentialed group of lawyers that are typically recruited for these positions, but who are more likely to present actual or apparent conflicts and be concerned about their standing in political circles. Academics, clergy, and other citizens without ties to New York's political class all would be excellent choices to serve on a commission whose chief qualification should be common sense and a strong understanding of right and wrong.

Looking Forward

The *Public Integrity and Reform Act of 2011* presents a fresh opportunity to restore public trust in government and the way decisions are made in Albany. Its detailed disclosure provisions, in particular, will provide a new window into the business relationships and outside income that New York's part-time legislators generate from activities that are supposed to be separate from their public duties. The new law also presents the prospect of outside oversight of the legislative branch, where a disturbing number of the reported scandals have originated in the past few years.

However, the various procedural "safeguards" inserted in the new law as protection from partisan attacks could become an obstacle—particularly if the Commissioners view their jobs as protecting what they believe to be the narrow political interests of those who appointed them.

Whether the new ethics law is working should be evident in the first two years. Early signs will be the quality and independence of the Commissioner appointments, the ability to agree upon a high caliber executive director, the formulation of transparency policies for Commission business and agreement upon the various policy and regulatory decisions to implement the new law. In closing, it's important to be mindful of the long view, that democracy is a work in progress and there is no reform to end all reforms. There will be ethics scandals in the future, the public's tolerance limits will be tested, and more reforms will surely follow.

Endnotes

1. The authors are grateful for the research contributions of Nicholas Soares, a graduate student in History and Master of Science in Information Science Programs at the Rockefeller College of Public Affairs & Policy at the University at Albany of the State University of New York and a Legislative Associate with NYPIRG for the Spring 2011 semester.
2. Of course the vast majority of legislators and public officials are honest and diligent. The handful of dishonest officials get disproportionate attention and undermine the public's faith in its government. While most lawmakers are not engaged in criminal activity, at least some may abide by the distinction between "honest graft and dishonest graft," attributed to Tammany Hall politician George Washington Plunkitt. *See* History Matters, "*I Seen My Opportunities and I Took 'Em": An Old-Time Pol Preaches Honest Graft*, <http://historymatters.gmu.edu/d/5030/> (last visited Sept. 1, 2011).
3. Sara Laskow, The Ctr. for Pub. Integrity, *State Lobbying Becomes Billion-Dollar Business* (Dec. 20, 2006), <http://projects.publicintegrity.org/hiredguns/report.aspx?aid=835>.
4. Press Release, Comm'n on Pub. Integrity, *Commission on Public Integrity Issues Annual Report* (May 5, 2011), <http://www.nyintegrity.org/pubs/2011/50511_press.html>.
5. N.Y. Temporary State Comm'n on Lobbying, 2001 Annual Report (2002); *see* Richard Perez-Pena, *Jump in Health Care Lobbying, Then in State Health Care Spending*, N.Y. Times, Mar. 21, 2002, *available at* <http://www.nytimes.com/2002/03/21/nyregion/jump-in-health-care-lobbying-then-in-state-health-care-spending.html?scp=1&sq=new%20york%20temporary%20state%20commission%20on%20lobbying%202001%20annual%20report&st=cse>.
6. Celeste Katz, *NYPIRG: Real Estate, Law Are Top Sources of Outside Income for State Lawmakers*, N.Y. Daily News, Jan. 28, 2011, *available at* <http://www.nydailynews.com/blogs/dailypolitics/2011/01/nypirg-real-estate-law-are-top-sources-of-outside-income-for-state-lawmakers>.
7. Merlo J. Pusey, Charles Evans Hughes, Vol. 1, 140-141 (1951).
8. Governor Higgins, previously a state senator and lieutenant governor, served a single two-year term as governor from 1905 to 1907. *See* Nat'l Governor's Ass'n, New York Governor Francis Wayland Higgins, <http://www.nga.org/cms/home/governors/past-governors-bios/page_new_york/col2-content/main-content-list/title_higgins_francis.html>.

9. JOINT COMM. ON INVESTIGATION OF LIFE INS., N.Y. STATE LEGIS. (1906) (the "Armstrong Committee Report").

10. *Id*.

11. *To Curb Lobbyists; Gov. Higgins Signs Insurance Bill Looking to that End*, N.Y. TIMES, Apr. 27, 1906, *available at* <http://query.nytimes.com/gst/abstract.html?res=9F0CE3D9113EE733A25754C2A9629C946797D6CF&scp=1&sq=new+york+to+curb+lobbyists&st=p>.

12. *Id*.

13. 1906 N.Y. Laws ch. 321.

14. A ban on contingency payments for lobbyists remains a staple of the restrictions on lobbying activity. At its core these prohibitions recognize that bonus payments based upon the success of lobbying create unacceptably high incentives to bend or break ethical rules. Despite being on the books for almost a century, in 2005 the lobby firm of former New York Attorney General Dennis Vacco was fined $50,000 by the lobby commission for violating the contingency ban by entering into a lobby contract that would exchange a $5.5 million success fee payment if a casino gaming license was secured. *See* Tom Precious, *Vacco Firm Pays Fine in Lobbying Investigation*, BUFFALO NEWS, Oct. 6, 2005, *available at* <http://findarticles.com/p/news-articles/buffalo-news/mi_8030/is_20051006/vacco-firm-pays-fine-lobbying/ai_n42892942/>.

15. Governor Hughes' inspiration for Moreland Act powers reportedly was born of his inability to remove the state Insurance Superintendent Otto Kelsey from office. *See* Celestine Bohlen, *Moreland Act of 1907: Governors' Strong Suit*, N.Y. TIMES, Dec. 15, 1988, *available at* <http://www.nytimes.com/1988/12/15/nyregion/moreland-act-of-1907-governors-strong-suit.html> (For a brief history of the Moreland Act, books on its activities, and files related to its investigations between 1915 and 1989, *see* New York State Archives materials *available at* <http://www.archives.nysed.gov/a/research/res_topics_legal_govguide_committees.shtml.> The legislation is named after its sponsor Assembly leader Sherman Moreland).

16. A.H. Raskin, *Track Inquiry Finds Graft in Union Funds*; *Track Study Finds Union Fund Graft*, N.Y. TIMES, Dec. 16, 1953, *available at* <http://select.nytimes.com/gst/abstract.html?res=FA0811F9355D177B93C4A81789D95F478585F9&scp=1&sq=track+inquiry+finds+graft+in+union+funds&st=p>.

17. *See Text of Dewey's Annual Message to the Legislature Urging Ethics Code for Public Officials*, N.Y. TIMES, Jan. 7, 1954.

18. Leo Egan, *Dewey to Discuss Racing Scandals*, N.Y. TIMES, Mar. 12, 1954.

19. 1954 N.Y. Laws ch. 696. The law begins with a statement of legislative intent:

> Declaration of intent. A continuing problem of a free government is the maintenance among its public servants of moral and ethical standards which are worthy and warrant the confidence of the people. The people are entitled to expect from their public servants a set of standards set above the morals of the marketplace. A public official of a free government is entrusted with the welfare, prosperity, security and safety of the people he serves. In return for this trust, the people are entitled to know that no substantial conflict between private interests and official duties exists in those who serve them.

20. Executive Order No. 2, issued Jan. 10, 1975, cited in Patrick J. Dellay, *Curbing Influence Peddling in Albany: The 1987 Ethics in Government Act*, 53 BROOK. L. REV. 1051 (1988).

21. John L. Hess, *The Eternal Nursing-Home Inquiries*; *This Probe Ends With the Promise It Won't Be the Last*, N.Y. TIMES, May 30, 1976, *available at* <http://query.nytimes.com/mem/archive/pdf?res=F5071FFC3D5B167493C2AA178ED85F428785F9>.

22. *Id*. (This article points out that while a package of nursing home reforms passed in 1976, the ethics proposals that came out of the investigation stalled that year).

23. 1997 N.Y. Laws ch. 937 ("The Regulation of Lobbying Act") repealed N.Y LEGIS. LAW 66, which since 1906 had required registration and reporting of certain lobbying activities to the Secretary of State.

24. Selwyn Raab, *Collection Executive Said to Link Manes to Parking Bureau Payoffs*, N.Y. TIMES, Jan. 24, 1986.

25. Josh Barbanel, *State-City Panel Appointed to Seek End to Corruption*, N.Y. TIMES, Mar. 12, 1986, *available at* <http://www.nytimes.com/1986/03/12/nyregion/state-city-panel-appointed-to-seek-end-to-corruption.html?scp=15&sq=michael+sovern+koch+cuomo&st=nyt&pagewanted=print>.

26. The financial disclosures provisions in N.Y. Public Officers Law §73 required reporting on the outside income of state lawmakers to be reported in dollar ranges, but mandated that this information be redacted when publicly disclosed. The 2011 amendments to the state ethics laws will require that financial information be public.

27. Mark A. Uhlig, *2 New York Bills Would Hold Government Officials Accountable for Ethics*, N.Y. TIMES, Jul. 4, 1987, *available at* <http://www.nytimes.com/1987/07/04/nyregion/2-new-york-bills-would-hold-government-officials-accountable-for-ethics.html?scp=2&sq=ethics+in+government+act+new+york&st=nyt&pagewanted=print>.

28. Clifford J. Levy, *Tobacco Giant Spends Heavily Around Albany*, N.Y. TIMES, Jul. 27, 1999, <http://www.nytimes.com/1999/07/27/nyregion/tobacco-giant-spends-heavily-around-albany.html?scp=15&sq=philip+morris+lobby+new+york+clifford+levy&st=cse&pagewanted=print>.

29. TOBACCO INSTITUTE, *1996 Budget-Special Projects* (1996), http://www.tobaccoinstitute.com/.

30. The complaint was made on Sept. 4, 1998 to the Lobby Commission by Common Cause/NY, League of Women Voters/NYS, NYPIRG.

31. BLAIR HORNER ET. AL, NEW YORK'S TOBACCO WARS: HOW THE CIGARETTE COMPANIES CONSPIRED TO PREVENT NEW YORK FROM CLEANING ITS AIR 13 (2001) (This pamphlet is *available at* <http://legacy.library.ucsf.edu/documentStore/n/a/z/naz00c00/Snaz00c00.pdf>).

32. Levy, *supra* note 28.

33. Clifford Levy, *Tobacco Giant Gave to Backer of Pataki Trips*, N.Y. TIMES, Sept. 28, 1999, <http://www.nytimes.com/1999/09/28/nyregion/tobacco-giant-gave-to-backer-of-pataki-trips.html?scp=1&sq=Tobacco%20Giant%20Gave%20to%20Backer%20of%20Pataki%20Trips&st=cse>.

34. N.Y. PUB. OFF. LAW § 73-a.

35. The governor and legislative leaders were well aware that one result of restructuring the lobbying and ethics oversight agency and choosing new commissioners was that then-Executive Director David Grandeau, who was the most effective ethics cop in the state, would end up out of a job.

36. Since the Commission on Public Integrity's start in 2007, several commissioners have come in for criticism due to conflicts of interest. Former Assistant U.S. Attorney for the Northern District Daniel French, appointed by then-Attorney General Andrew Cuomo, recused himself from the first meeting. At the time of his appointment French listed state and federal lobbying among the services provided by his practice; he was representing the Seneca Nation in its land claim and casino negotiations with the state; and he had a client under investigation in relation to the business dealings of Senate Majority Leader Joseph Bruno. *See* Daniel E. Shuey, *Showing Up to Sit Out: Attorney-Commissioners on the New York State Commission on Public Integrity*, 21 GEO. J. LEGAL ETHICS 1025 (2008). Commissioners Richard Emery and Andrew

Celli, partners at the time of in a small New York City law firm, represented Democrat Senator Malcolm Smith in litigation over control of the state Senate. *See* Rick Karlin, *Integrity Panel Members Defend Party Jobs*, TIMES UNION, Jun. 13, 2009, *available at* <http://www.highbeam.com/publications/albany-times-union-albany-ny-p408150/jun-13-2009>. Commissioner Emery also came in for criticism for holding a political fundraising party at his home for then Senator (now Attorney General) Eric Schneiderman. *See* Celeste Katz, *Horner: Public Integrity and Fundraising Don't Mix*, N.Y. DAILY NEWS, Dec. 3, 2009, <http://www.nydailynews.com/blogs/dailypolitics/2009/12/horner-public-integrity-and-fu.html>.

37. James Odato, *State Flies Bruno to Fundraisers; Taxpayers Finance Trips of Majority Leader to New York City Political Events*, TIMES UNION, July 1, 2007.

38. OFFICE OF THE INSPECTOR GEN., *An Investigation of an Allegation That Herbert Teitelbaum, Executive Director of the Commission on Public Integrity, Inappropriately Disclosed Confidential Commission Related to Its Troopergate Investigation* (2009).

39. S.6457, 223rd N.Y. Leg. Sess. (Schneiderman)/A.9544, 223rd N.Y. Leg. Sess. (Silver) passed Assembly and Senate January 20, 2010; vetoed February 1, 2010 (Governor's Veto Message No. 1, 2010). A week later the override vote passed the Assembly, but failed in the Senate.

40. The Legislature, in particular the Senate, went through a particularly tumultuous period, including the summer of 2009 "coup," in which two Democrat senators temporarily threw support to the Republicans, causing chaos and a short-term shift in control, before they returned to the Democrat caucus restoring control to that party. One of those senators subsequently was expelled based on his misdemeanor conviction for assault of his girlfriend. The uncertainty and circus atmosphere contributed to the public's low regard of the state Capitol.

41. One of the then-Attorney General Andrew Cuomo's first initiatives was to establish *Project Sunlight*, a combined database for members of the public to research legislation, lobbying and campaign donations as a window on how state government really operates and monitor the public decision making process. The *Project Sunlight* website has been continued under Mr. Cuomo's successor, Attorney General Eric Schneiderman. *See* SunlightNY.com, <http://www.sunlightny.com/snl1/app/index.jsp>.

42. S.5679 224th Leg. Sess. (The Act was indeed signed into law on Aug. 15, 2011).

43. As of writing, the legislation had not been delivered to the governor nor signed into law. For purposes of this article, the authors assumed the legislation was to be enacted by the time this article is published (Ed. Note: The assumption on the part of the authors was accurate).

44. The disclosure forms will have 108 dollar value categories for public officials to indicate their income from various sources, ranging from "none" ("Category A") to "$10,000,000" ("Category DDDDD"). *See* N.Y. PUB. OFF. LAW § 73-a (3).

45. Under the law even if the Assembly Speaker or Senate Majority Leader—whose party controls the Senate by a one-seat margin—should lose their control of that house, they would still retain their three votes on the Commission notwithstanding their minority status. N.Y. EXECUTIVE LAW § 94(2).

46. Disclosure also was expanded as a check on "front groups" by requiring lobby clients—other than those tax exempt under Internal Revenue Code § 501(c)(3)—including advocacy groups, unions and trade associations, as well as for profit corporations and unincorporated associations, to disclose certain donors of $5,000 or more when these groups meet spending and revenue parameters. Groups exempt under Internal Revenue Code § 501(c)(4) may request a waiver if disclosure of identified donors creates risk of reprisal. *See* N.Y. LEGIS. LAW § 1-h(c)(4).

Blair Horner is the Vice President for Advocacy for the American Cancer Society of New York and New Jersey since May 2011. Between 1984 and 2011, Blair had been the leading reform advocate in Albany, including his long-time work with the New York Public Interest Research Group ("NYPIRG") and his tenure as Special Advisor on Policy and Public Integrity at the Office of the Attorney General of the State of New York, launching that office's "Project Sunlight" database.

Russ Haven, Esq. is Legislative Counsel with NYPIRG and has been one of its lead advocates on reform and government accountability measures and has filed numerous complaints with the state's lobbying, ethics and elections oversight entities.

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Common Sense Suggestions to Reduce Legal Barriers Facing New Yorkers Who Wish to Choose an Agent to Help Them in Obtaining and Paying for Their Health Care

By Albert Feuer

New York law unduly limits the ability of individuals to have an agent they choose help them in obtaining and paying for their health care.[1] This article shows how attorneys may enable individuals to overcome these barriers by preparing HIPAA authorizations and modifying the New York statutory templates for health care proxies and powers of attorney. This article also suggests how the New York Unified Court System Office of Court Administration ("OCA") and the New York State legislature may reduce questions about the intended authority of the agents by changing the rules applicable to powers of attorney, health care proxies, and the privacy of health care information. The suggested changes are so intuitive and beneficial that the New York State Department of Health ("NYSDOH") and many well-meaning health care providers and health plans treat the changes as if they all had been adopted. However, not all providers and plans are well-meaning or willing to act contrary to the law or legal documents. It is particularly important to adopt these changes because when questions about an agent's authority arise, the principal often finds it difficult or impossible to request the health information on one's own, or to execute new agency agreements.

I. HIPAA—The Federal Law Governing Access to Health Care Records

In 1996, the Congress enacted the federal health-privacy law known as Health Insurance Portability and Accountability Act ("HIPAA").[2] HIPAA has two major privacy goals. First, the law enhances an individual's access to his or her health information by requiring the disclosure to the individual of a broad definition of health information. Second, the law diminishes the access of others to the same information by limiting the condition under which such access is available.

HIPAA governs access to an individual's health information, which is defined very broadly as

> any information, whether oral or recorded in any form or medium, that– (A) is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and (B) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.[3]

The general HIPAA rule is that individuals have the right to access their own health information[4] and to determine who else may do the same. Covered entities are those entities for which HIPAA governs the use and disclosure of health information, such as health care providers and health care plans.[5] Covered entities need not give an individual access to that individual's health information if: (1) the information is reasonably likely to endanger the life or personal safety of the individual or another person;[6] (2) the information was obtained under an agreement of confidentiality;[7] (3) the information is psychotherapy notes;[8] or (4) the information was prepared in anticipation of litigation.[9]

HIPAA permits access to a principal's health information which is not at the direction of the principal or the principal's agents.[10] Access may be required by law, *i.e.*, a "mandate contained in law that compels a covered entity to make a use or disclosure of health information[11] and is enforceable in a court of law."[12] A simple request by an attorney at law, or even an attorney's subpoena,[13] does not provide such access because those requests are not automatically enforceable in a court of law.[14]

There are two general ways in which individuals may give agents they choose access to their individually identifiable health information that a covered entity holds. In one, covered entities must provide access, and in the other the covered entities may choose whether to grant access. Principals often provide such access because principals find such delegations relieve the principal of a burdensome task and provide for the possibility that the principal may be unable to request the information when it may be useful to the agent.

A. HIPAA Personal Representatives Have the Right to Access Health Information

First, if the agent is treated under HIPAA as an individual's personal representative,[15] the agent must be given the same access as the individual,[16] i.e., the right to discuss the individual's health information with representatives of the covered entities, and the right to inspect and receive copies of records with covered entities.[17] An agent is treated as an individual's personal representative if under applicable law the agent "has authority to act on behalf of an individual who is an adult or an emancipated

minor in making decisions related to health care."[18] These agents require access to an individual's health information to exercise their authority prudently. Three kinds of decision-makers are generally relevant. Those who make health care decisions pursuant to health care proxies.[19] Those who make health care finance decisions pursuant to powers of attorney.[20] Finally, an executor, who is chosen by the principal to act on behalf of the principal's estate, is also a personal representative.[21]

There is one important limit on the extent to which covered entities must treat an individual's personal representative as the individual for HIPAA purposes.[22] HIPAA personal representatives are entitled only to "information relevant to such personal representation."[23] For example, if the decision-maker responsible for health care decision-making is considering alternative treatments for the individual's coronary condition, it may be argued that information about a broken leg treated several years ago by physicians not then treating the individual is not relevant to the agent's limited responsibility.[24] Similarly, if the decision-maker is not responsible for paying the individual's health care bills, it may be argued that information about the individual's insurance coverage or health condition is not relevant to the agent's limited responsibility.[25] To avoid such questions, individuals may wish to provide their chosen personal representatives with broader HIPAA authority, as discussed *infra*.

HIPAA does not affect state law limits on the selection by a principal of an agent to make decisions related to the principal's health care.[26] State law may limit the persons who are eligible to be a personal representative and their authority. For example, the health care agent under the New York health care proxy law may not simultaneously act as a principal's attending physician.[27] State law may also limit the extent of the decision making by the personal representative. For example, New York statutory short form powers of attorney[28] may not be used for health care decision-making, but only for health care finance decision-making.[29]

Principals may further limit the authority of their personal representatives. For example, the principal may choose to have a health care agent be responsible only for certain decisions, such as those pertaining to the provision of all life-sustaining treatment other than artificial hydration or nutrition. Similarly, the principal may choose to have a health care finance agent responsible only for paying the principal's health care bills, but not for obtaining health insurance benefits.

A principal's attorney at law representing a principal in a dispute pertaining to the principal's health care does not thereby become the principal's personal representative with respect to such litigation because such representation does not generally give the attorney the authority to make decisions related to health care on behalf of their principals. However, there appears to be one exception in practice. ERISA plans generally treat an attorney at law, who shows that he or she is representing an ERISA benefit claimant, particularly with respect to a claims denial, as entitled to the same plan information as the principal, including the principal's health information. The latter is consistent with the ERISA claims regulation mandate.[30]

State law also allows persons not chosen by the principal to make decisions related to health care on their behalf. Those persons are also HIPAA personal representatives. For example, if no will is probated for a decedent, the affairs of a decedent estate are taken care of by an administrator usually chosen from among the decedent's next of kin.[31] Such administrators may address the decedent's health care payment obligations and health care benefit entitlements. Similarly, if an individual with capacity to choose a health care agent does not do so before becoming incapacitated, a person is given such authority as the individual's health care surrogate under the Family Health Care Decisions Act ("FHCDA").[32] As with estate administrators, first priority is generally given to next of kin.[33] These HIPAA personal representatives are not the subject of this article, so they will not be discussed extensively.

B. HIPAA Authorized Agents Do Not Have the Right to Access Health Information but May Be Given Access to Such Information

Second, access, which presumably does not exceed the principal's right to discuss his or her health information and to copy and review records,[34] may, but need not, be provided[35] if the individual executes a written authorization for the agent that satisfies the HIPAA criteria.[36] Unlike disclosures to individuals or their personal representatives, a covered entity must make reasonable efforts to limit disclosures in response to HIPAA authorizations to the minimum necessary to accomplish the intended purpose of the disclosure.[37]

HIPAA authorizations may not generally be made with compound documents, *i.e.*, they may not be combined with another document.[38] The documents must be written in plain language[39] and may only be revoked with a writing.[40] The authorization must contain the following elements:

(i) A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion;

(ii) The name or other specific identification of the person(s), or class of persons, authorized to make the requested use or disclosure;

(iii) The name or other specific identification of the person(s), or class of persons, to whom the covered entity may make the requested use or disclosure;

(iv) An expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure;

(v) A statement of the individual's right to revoke the authorization in writing and the exceptions to the right to revoke, together with a description of how the individual may revoke the authorization;

(vi) A statement that information used or disclosed pursuant to the authorization may be subject to redisclosure by the recipient and no longer be protected by this rule;

(vii) Signature of the individual and date; and

(viii) If the authorization is signed by a personal representative of the individual, a description of such representative's authority to act for the individual.[41]

Documents, such as health care proxies, powers of attorney, or wills,[42] which, as discussed above, make an agent chosen by an individual the HIPAA personal representative of the individual, do not have to satisfy any of these conditions.

C. Federal Enforcement of HIPAA Privacy Rights

HIPAA requires covered entities to have appropriate administrative, technical, and physical safeguards to protect the privacy of protected health information.[43] The U.S. Department of Health and Human Services ("HHS") may review such safeguards.[44] Individuals who have complaints about whether they have received information to which they are entitled under HIPAA or that their information was disclosed contrary to HIPAA may complain to the Office of Civil Rights at the HHS ("OCR at HHS").[45] If the OCR at HHS finds there was a HIPAA violation, the OCR at HHS may move for the imposition of civil penalties[46] or criminal penalties.[47] HIPAA provides no private right of action.[48] However, there may be a private right of action under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), against ERISA plan fiduciaries who improperly disclose a participant's health information.[49] State attorneys general also may enjoin HIPAA violations or move to obtain damages in the amounts of the penalties that the HHS could have obtained. The HHS was required to establish a procedure by February 17, 2012 by which victims of HIPAA violations may receive a fraction of the monetary penalties or settlements collected with respect to such violations.[50] No such procedure has been established. Some commentators have criticized the lack of private right of action for those individuals whose identifiable health information was improperly released.[51] There appears to be little commentary on the lack of a private cause of action by a HIPAA personal representative who is unable to obtain information to which he or she is entitled under HIPAA. This access is the principal focus of this article.

II. Using New York Health Care Proxies and Associated HIPAA Authorizations to Access a Principal's Health Records

New York State permits any competent adult to appoint an agent to make health care decisions on his or her behalf [52] using a document called a health care proxy.[53] The statute describes such agent as the adult's health care agent.[54] The agent, however, is only empowered to make health care decisions if and when there is a determination by an attending physician that the principal lacks the capacity to make health care decisions.[55] If the principal objects to the lack of capacity determination a court must decide if the principal has the capacity.[56]

The statute, after setting forth the requirements for the content and the execution of a health care proxy, sets forth an illustrative proxy form:[57]

Although this format is not required,[58] many practitioners prefer to use either this format or the slightly different one issued by the NYSDOH.[59] This choice minimizes questions about statutory compliance. The most common change to this template is the addition of a revocation provision, thereby minimizing any confusion by the principal about how to do so,[60] such as the following:

> I may revoke this proxy at any time in its entirety by (a) executivng a new proxy, (b) notifying a health care provider orally or in writing of such revocation; or (c) notifying any Agent orally or in writing of such revocation. In addition, at any time when I am able to make my own health care decisions I may revoke the appointment of a specific Agent by notifying such Agent or a health care provider orally or in writing of such revocation.[61]

The health care agent appointed in a health proxy is a HIPAA personal representative because the statute gives the agent the requisite authority[62] as follows:

> Subject to any express limitations in the health care proxy, an agent shall have the authority to make any and all health care decisions on the principal's behalf that the principal could make.[63]

Thus, this provision gives the agent access to all health information relevant to the agent's making any and all the health care decisions on behalf of the principal, subject to the express limitations of the proxy. However, the proxy statute also explicitly describes the authority of a health care agent to obtain the principal's health care records as follows:

> **Right to Receive Information**. Notwithstanding any law to the contrary, the agent shall have the right to receive medical information and medical and clinical

> records necessary to make informed decisions regarding the principal's health care.[64]

This provision arguably substantially reduces the personal representative's HIPAA authority that otherwise results from the agent's decision making rights.[65] The provision may not include the authority to obtain records regarding the principal's health care bills, past or future, or the principal's health care benefits, which many agents would want to consider in making health care decisions. Similarly, using the phrase "medical information and medical and clinical records" rather than the broader HIPAA phrase "health information" may also reduce the HIPAA authority of the agent otherwise provided in the decision making section. For example, dental information is health information which may not be regarded as medical information.

Questions may arise about whether the health care agent is requesting health care information that is not "necessary to make informed decisions regarding the principal's health care" and thereby exceeding his or her authority.[66] Such questions arise most often from health care providers who are no longer treating the principal, and may be concerned about challenges to the quality of their treatment.[67]

Many principals prefer to avoid any of the above questions about their health care agent's HIPAA authority by giving their health care agent access to all their health information with a supplemental HIPAA authorization.

These supplemental HIPAA authorizations are not usually included in current health care proxies. Even if they did not endanger the acceptability of health care proxies,[68] it would be unwise to include a HIPAA authorization within the health care proxy. HIPAA authorizations, which provide access to health information, may only be revoked in writing.[69] Principals, however, often want the ability to revoke health care proxies, which provide health decision-making authority, by an oral statement to a health care provider or a named agent. Thus, a typical health care proxy would not satisfy the written revocation part of the HIPAA authorization requirements. Although it is possible to have distinct revocation provisions for different parts of the proxy, it would probably make the health proxy unduly complex for most principals.

Many principals also wish to have assistance from the health care agent named in their health care proxy when the principal is infirm but still capable of making health care decisions. With the diminution in the number of trusted family doctors who coordinate health care treatment, patients and their advocates often have to take more control over their health care, particularly if they have multiple current and former treating physicians. Advocates can often remove a considerable burden from an ill person by obtaining and distributing health care records among the different physicians. For example, by maintaining copies of health care tests, they can often eliminate the need for tests to be repeated. Moreover, with such involvement the named agent will be aware of the principal's health care providers and health condition in the event the named agent becomes the principal's health care agent.

These supplemental HIPAA authorizations are usually effective immediately. As with a financial power of attorney, the principal and agent usually decide in concert whether to have the authorization exercised immediately or to wait for the principal's loss or diminishment of capacity. In any case, in accord with the prohibition on compound HIPAA authorization described above, the document may not reference the health care proxy. If the HIPAA authorization covered all providers, the principal would not need to execute one for each provider.[70] The authorization provisions would also include the right of the agent to discuss the patient's health care and information, which is often omitted, such as the following provisions:

> I MARY ROE residing at 123 Any Avenue, Brooklyn, New York 11201, authorize JOHN DOE, residing at 888 Any Street, New York, New York 10011, to have the same rights I have under the Health Insurance Portability and Accountability Act ("HIPAA") regarding the use and disclosure of all my individually identifiable health information[71] that is with any of my past, present and future health care providers or with any of my past, present and future health plans.
>
> I authorize all my past, present and future health care providers, and all my past, present and future health plans to discuss my health care and individually identifiable health information with JOHN DOE.
>
> I understand any information disclosed pursuant to this authorization may be redisclosed by the recipient and no longer be protected by HIPAA.

The HIPAA authorization would also contain a brief description in plain language of (1) its indefinite duration and how to revoke it, and (2) the right of the principal to refuse to execute such a broad authorization, or any authorization, such as the following:

> This HIPAA authorization shall be effective immediately upon execution and remain in effect indefinitely.
>
> I may revoke this authorization at any time by delivering a signed and dated writing to JOHN DOE, either in person or

> by first-class mail, FEDEX, UPS or courier, to JOHN DOE's last known address. My revocation shall be effective upon such delivery, but will not be effective to the extent that JOHN DOE, health care provider, or a health plan has acted in reliance upon this authorization.
>
> I understand I may refuse to sign this authorization, and instead may sign an authorization directed only at a named health care provider or health plan.
>
> I understand I may refuse to sign this authorization, or refuse to sign an authorization directed only at a named health care provider or health plan, and instead may sign no authorization.

These HIPAA authorizations, unlike many HIPAA authorizations, do not have limited durations, such as a one-year period, because they are associated with health care proxies are intended be in effect when the proxies are in effect, and perhaps prior to such time. However, health proxies may remain in effect during an indefinite disability. Thus, it would not be practical to give the principal the right to decide periodically whether to renew the proxy and associated proxy. Of course, the principal could revoke the proxy and HIPAA authorization at any time he or she has the capacity to do so.

III. Using New York General Powers of Attorney and Associated HIPAA Authorizations to Access a Principal's Health Records

Powers of attorney, which are written documents by which a principal with capacity designates an agent to act on his or her behalf,[72] are governed by GOL Title 15 of Article 5 unless there is an applicable exclusion.[73] There is an applicable exclusion for powers created pursuant to other statutes.[74] The exclusion specifically includes powers to make health care decisions, *i.e.*, health care proxies.[75] HIPAA (health care information) authorizations are implicitly included because they are created pursuant to HIPAA, a federal statute.[76] Title 15, however, governs powers of attorney appointing agents to make health care finance decisions.

Title 15 powers of attorney must meet three major requirements.

First these powers must meet requirements about the style and execution of the form. They govern the size and clarity of the type face, and how the principal and the principal's agent, known as the principal's attorney, may execute the power.[77]

Second, these powers must contain specific warning language for the principal, which describes the ability to revoke such powers and the inability of these powers to grant the authority to make health care decisions.[78]

Third, these powers must describe an agent's fiduciary responsibilities under a power of attorney.[79]

None of these requirements is applicable to health care proxies, which are not Title 15 powers of attorney.[80]

A principal may use one of two approaches to authorize an agent to make his or her health care finance decisions.

The first approach uses the general purpose template set forth in the statute as the New York Statutory Short Form of Power of Attorney (the "Short Statutory POA").[81] This form permits the principal to check item (K) and thereby give the agent authority with respect to "health care billing and payment matters; records, reports, and statements." A construction statute specifically addresses the access to health care records by this language gives as follows:

> the language conferring authority with respect to "records, reports and statements," must be construed to mean that the principal authorizes the agent:
>
> 1. To access records relating to the provision of health care and to make decisions relating to the past, present or future payment for the provision of health care consented to by or on behalf of the principal or the principal's health care agent authorized under state law. In so doing the agent is acting as the principal's personal representative pursuant to sections 1171 through 1179 of the Social Security Act, as added by sections 262 and 264 of Public Law 104-191 [HIPAA], and applicable regulations. This authority shall not include authorization for the agent to make other medical or health care decisions for the principal;[82]

As with the similar health care proxy section this explanation is unnecessary and arguably reduces the HIPAA authority of the personal representative. Why is the authority to access records limited to those pertaining to certain consented health care? It is not clear if it is sensible to require consent. For example, emergency care is often provided without consent. More important, item (K) does not give the agent any authority to determine or obtain any health benefit payments to which the principal may be entitled, and the construction statute makes no attempt to imply such authority.[83]

The other items that may be checked on the template do not unambiguously provide the requisite authority to obtain health care benefits payments from health care insurers, government programs or employers. Those items also require the principal to give far more authority to the health care agent than the principal may prefer. Checking item (O), which gives the attorney authority over all other

matters,[84] may not work. The difficulty is that the billing construction statute explicitly provides that item (K) authorizes the "health care decisions" described,[85] which is an exception to the rule that Title 15 powers of attorney may not authorize health care decisions.[86] Checking item (F), which gives the agent authority with respect to "insurance transactions," may not authorize the pursuit of benefit claims (including learning of pre-treatment coverage) under health care insurance plans, although the right to choose health care policies is set forth in the pertinent construction statute.[87] The difficulty is that the pertinent claims section of the construction statute seems to be limited to obtaining "the proceeds of any contract of insurance."[88] This phrase is usually associated with life insurance, rather than health care insurance. In fact, some health insurers have reportedly taken the position that section (F) is not applicable, and it is questionable why it should be necessary to give the intended health care finance agent responsibility for life insurance matters. Similar questions arise with respect to whether the reference to "government programs" in item (J) encompasses government health insurance plans, because the pertinent construction statute is totally silent about the significance of the phrase.[89]

Many attorneys thus add a modification to the Short Statutory POA addressing the authority of the health care finance agent with respect to benefit entitlements, to benefit disputes and to discussions with relevant parties, such as the following:

> Authority to (1) determine and make the appropriate payments, if any, for my health care; (2) determine and obtain my health care insurance benefits, if any; (3) determine and obtain my government health care benefits, if any; (4) determine and obtain my employer health care benefits,[90] if any; (5) represent me in any disputes, administrative proceedings and/or litigation with respect my health care payment obligations or my health care benefit entitlements, and (6) obtain appropriate care for me (as determined by me, my health care agent, guardian, my health care surrogate, or any other person authorized to make my health care decisions).
>
> Authority to (1) review and obtain copies of my health care records that is relevant to the authority set forth in the above paragraph, and (2) discuss my health care information that is relevant to the authority set forth in the above paragraph with any of my health care providers, employers or health plans. My agent may delegate this authority to any attorney at law retained to assist in these matters related to my health care.
>
> I understand that this authority does not authorize my agent to make health care decisions for me.

Under applicable law, the first paragraph gives the agent authority to make a decision related to the principal's health care.[91] Thus, the agent is a HIPAA personal representative.[92] Therefore, under HIPAA the agent has the right to inspect and receive copies of the health care records described in the second paragraph.[93]

The second paragraph explicitly confirms that right (but does not change that right), so the principal knows that he has given the agent such rights. Moreover, the principal explicitly grants the agent the right to discuss health care information, which is often omitted,[94] so that the agent may fulfill his health care responsibilities most efficiently.

However, as with the health care proxy, the limits on the agent's representation may generate questions whether individually identifiable information being sought is "relevant to the representation." Such questions tend to arise most often when (1) the health care finance agent is disputing the principal's payment obligation or benefit entitlement; (2) the health care finance agent is seeking information about different contemplated treatments to better determine their costs, after taking into account applicable health plan benefits, to assist the health care agent, who is responsible for deciding upon treatment.

Thus, supplemental HIPAA authorizations identical to those presented in the health proxy discussion are often used, although it is possible to include such authorizations as part of the power of attorney. The power of attorney often has revocation provisions similar to a HIPAA authorization, so the health proxy issue of distinct revocation provisions does not arise, although it would probably be advisable to present the HIPAA authority as a declinable option. The principal is far more likely to understand that he or she may decline to grant such additional authority if the authorization is a free standing document, rather than part of the extensive document that must be used for a power of attorney, even one limited to health care finance issues. Principals who choose one person to be their health care agent and another to be their health care finance agent often wish to limit the health information that the latter may obtain, so it is advisable to clearly permit such a limitation.

This approach has a serious disadvantage. Modifications undermine the very reason the statutory short form power was adopted. As with the health care proxy template, the aim is to eliminate the time and expense required to review non-standard grants of authority. Thus, most practitioners try to include few if any substantive modifications of the statutory short form power.[95]

The second approach addresses this disadvantage by not using the Short Statutory POA but by one which contains a grant of authority, such as

> I grant my agent the authority to (1) determine and make the appropriate payments, if any, for my health care (including my health care plan premiums);[96] (2) determine and obtain my health care insurance benefits, if any; (3) determine and obtain my government health care benefits, if any; (4) determine and obtain my employer health care benefits, if any; (5) represent me in any disputes, administrative proceedings and/or litigation with respect my health care payment obligations or my health care benefit entitlements, and (6) obtain appropriate care for me (as determined by me, my health care agent, guardian, my health care surrogate, or any other person authorized to make my health care decisions).
>
> I grant my agent the authority to (1) review and obtain copies of my health care records that is relevant to the authority set forth in the above paragraph, and (2) discuss my health care information that is relevant to the authority set forth in the above paragraph with any of my health care providers, employers or health plans. My agent may delegate this authority to any attorney at law retained to assist in these matters related to my health care.

The power of attorney need not, but may, have additional grants of authority.

As with the first approach, the first paragraph gives the agent authority under applicable law to make a decision related to the principal's health care.[97] Thus, the agent is a HIPAA personal representative.[98] Therefore, under HIPAA the agent has the right to inspect and receive copies of the health care records described in the second paragraph.[99] Moreover, the principal explicitly grants the agent the right to discuss health care information, which is often omitted, so that the agent may fulfill his health care responsibilities most efficiently.

Principals often use the same considerations as with the first approach to decide whether to use the same supplemental HIPAA authorization used with the Short Statutory POA, namely whether such additional access is likely to be useful or necessary versus whether the principal wants to provide the particular agent with such unbridled access.

The second approach has two disadvantages. First, considerable time and money may have to be used to explain the significance of a power of attorney that is not generated from the state sanctioned template, even one limited to the narrow task of appointing a health care finance agent. Second, it is a burden for a principal to execute multiple powers of attorney each directed at specific issues, particularly if the principal wishes to delegate many responsibilities to a single agent.

IV. The Interaction between HIPAA and New York Health Care Privacy Rules

HIPAA applies three general preemption principles to state law. First, states may enhance HIPAA protections by making it easier for individuals to obtain their health information and harder for others to be permitted to obtain such information. Second, states may not diminish HIPAA protections either by making it harder for individuals to obtain their health information or by making it easy for others to be permitted to obtain such information. Third, states may require an individual's health information be provided to the individual or others.

HIPAA generally preempts all state law,[100] which includes common law.[101] However, there is an exception for "more stringent" provisions of state law that relate to the privacy of health information.[102] In a set of guidance in the form of FAQs available on the internet, the HHS declared:

> In general, a State law is "more stringent" than the HIPAA Privacy Rule if it relates to the privacy of individually identifiable health information and provides greater privacy protections for individuals' identifiable health information, or greater rights to individuals with respect to that information, than the Privacy Rule does.[103]

There is additional elaboration in the HIPAA definitions, which includes the phrase "more stringent."[104] The USDHHS will not make determinations regarding whether a state law is more stringent than HIPAA.[105] An October 15, 2002-memo from the NYSDOH discussed the relation between HIPAA and New York State laws.[106]

An example of a more stringent state law is PHL § 2782, which gives greater privacy protection to an individual by permitting only certain persons to obtain confidential HIV information,[107] and prohibiting general releases from being used to obtain such information.[108] Thus, HIPAA general authorizations must permit the principal to decide whether to include or exclude confidential HIV information if access to such information is sought. Moreover, those authorizations must include the following or substantially similar language:

> This information has been disclosed to you from confidential records which are protected by state law. State law prohibits you from making any further disclosure of this information without the specific written consent of the person to whom it pertains, or as otherwise permitted by law. Any unauthorized further disclosure in violation of state law may result in a fine or jail sentence or both. A general authorization for the release of medical or other information is NOT sufficient authorization for further disclosure.[109]

The statute explicitly permits agents under health care proxies to obtain confidential HIV information,[110] but exempts providers from using the statutory disclosure language when they disclose such information to those agents.[111] The statute and regulations are silent whether a proxy is considered a release which must contain specific language about HIV confidential information. However, even if, *arguendo*, the proxy is treated as a release for purposes of these rules, the "notwithstanding any other law" provision of the proxy law[112] would trump this requirement.

The statute authorizes another HIPAA personal representative chosen by a principal, an executor, to obtain confidential HIV information, but only if the information is needed to fulfill the executor's responsibilities.[113] Wills are not releases, so there would be no need to include language in it authorizing access to confidential HIV information. However, the provider may only disclose such information if it is accompanied by the requisite language.[114] Such a requirement, which may be satisfied together with HIPAA and does not pose an obstacle to HIPAA's purposes and objectives, is not contrary to HIPAA.[115] Thus, the requirement is not preempted.

The statute makes no mention of health care finance agents acting pursuant to Title 15 powers of attorney. HIPAA preemption provisions allow such personal representatives to obtain confidential HIV information. The exception to the general HIPAA preemption rules for more stringent state laws is inapplicable. Such laws may not make it more difficult for the individual or his personal representative, who is treated for HIPAA purposes as the individual,[116] to obtain health information than does HIPAA.[117] Similarly the statutory requirement that the power of attorney creating the health care finance agent specifically reference the right to obtain HIV confidential information would also be preempted. This is consistent with the treatment of third-parties who reimburse health care providers—general releases give them access to HIV confidential material.[118] As with executors, the requirement that the health providers only disclose confidential HIV information if the information is accompanied with the prescribed statutory language would not be preempted.

There is also a statute which imposes criminal and civil penalties for those who willfully disclose HIV information in violation of PHL § 2782.[119] As discussed, *supra*, HIPAA would preempt the law with respect to disclosures to health care finance agents who are HIPAA personal representatives. The statute explicitly imposes no criminal or civil penalties on a health care provider who fails to provide HIV information to a health care agent.[120] HIPAA penalties may, however, be imposed by the OCR at HHS.[121]

There is one major New York State general privacy statute, PHL § 18. It governs a subset of the HIPAA health care providers, and does not cover any health plans.[122] The section governs access to patient information, which is a subset of the health information that HIPAA addresses. Patient information essentially is information concerning or relating to the examination, health assessment or treatment of an individual.[123] It does not include billing records.

The statute provides access to an individual's patient information to persons called qualified persons,[124] which include the individual and some HIPAA personal representatives of the individual, but none chosen by the individual. This access is defined as the right to review or obtain copies of the individual's patient information not subject to a statutory exclusion.[125]

PHL § 18 gives qualified persons a private right of action to obtain an individual's private information, which is consistent with the HIPAA deference to disclosures required by state law.[126] A medical records access committee appointed by the New York State Health Commissioner may review denials to access.[127] Qualified persons may bring a special proceeding to appeal denials by this committee.[128]

PHL § 18 does not limit the disclosure of patient information to qualified persons. No provision prohibits its disclosure to other persons, unlike the prohibition in the section protecting confidential HIV information.[129] Instead, there is an acknowledgment that there may be disclosures that are "otherwise authorized by law"[130] because records of such disclosures must be included in a patient's records. The statutory words suggest that this includes, but is not limited to, a disclosure pursuant to certain written authorizations by the principal.

The NYSDOH has acted on the basis that the "otherwise authorized by law" phrase includes HIPAA authorizations by the individual or the individual's HIPAA personal representatives. In August 2005, the NYSDOH promulgated such a form entitled, HIPAA Compliant Authorization for Release of Medical Information and Confidential HIV* Related Information, which makes no mention of PHL § 18.[131]

The New York Law Revision Commission acted on the basis that the "otherwise authorized by law" phrase included health care finance agents who are HIPAA personal representatives. Its final 2008 commentary on the recent legislation justified the addition of the current medical billing item to the statutory short power of attorney and the associated construction statute for that item on the basis that providers would not release patient information to health care finance agents unless "express language [were] added to the power of attorney document authorizing such release.[132] The prior statutory short power of attorney referred only to "[general] records, reports and statements."[133]

Much confusion may have been generated about the effect of PHL § 18 by its inappropriate HIPAA references. The statutory statement that qualified persons are deemed HIPAA personal representatives makes little sense.[134] An individual is a qualified person,[135] but is not his own HIPAA personal representative. A distributee is a qualified person if the individual's estate has no appointed personal representatives,[136] but is not the decedent's HIPAA personal representative because he has no decision-making authority related to the decedent's health care by sole virtue of being a distributee.[137] The access of qualified persons to patient information has nothing to do with whether they are HIPAA personal representatives, but stems solely from the state statute providing access which is enforceable in the courts. Moreover, unlike personal representatives who have the same access as their principals,[138] qualified persons have no right to discuss the principal's health information with the principal's health care providers but only the right to inspect and copy patient information.[139]

The apparent aim of the statute of providing a mechanism for access to patient information for persons with an appropriate interest would be better served by including as qualified persons those individuals authorized pursuant to HIPAA to request patient information, such as those seeking information pursuant to the supplemental authorizations discussed *supra*, than with a catch-all statement that the release of patient information is subject to HIPAA.[140]

The *Mougianis* decisions generated substantial confusion about the applicability of PHL § 18 to agents chosen by principals. A health care agent under his mother's health care proxy sought copies of his mother's medical records from a hospital from which he had withdrawn his mother. The lower court decided that the agent was entitled to a PHL § 18 review of his access to the records because an agent under a health care proxy is deemed a PHL § 18-qualified person.[141] The court did not ask why the requester needed to be a PHL § 18-qualified person even though as discussed above, PHL § 18 does not prohibit the distribution of medical records to other persons. The appellate court correctly held that such an agent is not a PHL § 18-qualified person, but also held the proxy has access under the health care proxy rules, which give access to the principal's health information "[n]otwithstanding any law to the contrary."[142] However, showing that PHL § 18 does not block access does not show that a proxy has an alternative right to compel the hospital to provide the patient information—the court presented no alternative private right of action. If the appellate court had mentioned the reference in PHL § 18.6 to "as otherwise authorized by law" discussed above or the HIPAA preemption of those state laws which attempt to limit the access of individuals or their personal representatives to individually identifiable health information, it may have been more apparent such a source was needed. Such references would have suggested that an individual's health care finance agent, or the executor of an individual's estate, may similarly access his or her patient information regardless of whether their authorizing statutes explicitly supersede other statutes.

Finally, no agent chosen by an individual was considered a qualified person until 2004, when the legislature added to the list "an attorney representing a qualified person or the subject's estate who holds a power of attorney from the qualified person or the subject's estate explicitly authorizing the holder to execute a written request for patient information under this section."[143]

The attorney has no decision-making authority related to health care, so he is not a HIPAA personal representative, but would presumably be able to make requests for patient information pursuant to an HIPAA authorization in the form of a power of attorney that mentioned PHL § 18. If the attorney could rely on a government form, the power of attorney would not have to be a Title 15 power.[144] The legislature appeared to expect that such a form would be issued.

The attorney addition to the qualified person list[145] was an apparent reaction to the 2004 Recommendations of the Advisory Committee on Civil Practice to "enhance the efficiency of the processing of medical malpractice cases" by having a plaintiff execute a single power of attorney authorizing his attorney to obtain all medical records rather than execute multiple authorizations.[146] The recommendations reported that the OCA planned to promulgate such a form so attorneys to obtain medical records in civil and criminal cases after the enactment,[147] but has never done so. Instead, on October 2, 2005, less than a year after the enactment the OCA promulgated a form entitled Authorization for Release of Health Information Pursuant to HIPAA.[148] However, the OCA authorization, like the above DOH form, does not mention PHL § 18 or permit the attorney to obtain all medical records, but instead directs a specified "health provider" to deliver specified records to a specified person, the attorney. Many attorneys nevertheless often use these authorizations, instead of subpoenas duces tecum.

New York common law also gives individuals private rights of action with respect to their health information.

There are a number of pre-HIPAA decisions, including a New York decision[149] that an individual has a property right to their health records, although the extent of the resulting access rights is often unclear.[150] As discussed, *supra*, PHL § 18 does not preclude such actions particularly for entities or health information that it does not address. HIPAA does not preempt this common-law right for the same reason it does not preempt the similar right to private action under PHL § 18—the HIPAA deference to disclosures required by state law.[151]

There is a far more extensive common-law finding a post-HIPAA private right to bring a common-law action against a health provider for breaching the duty not to disclose confidential health care information, although the New York courts did not discuss the applicability of HIPAA.[152]

The U.S. Supreme Court has held there is a strong presumption against the preemption of state causes of action.[153] The court stated that, "It is, to say the least, 'difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct, ….'"[154] The California courts applied such principle to find that the federal Real Estate Property Settlement Act which required certain disclosure of loan costs but like HIPAA provided no private cause of action for those who suffered from such violations could bring state causes of actions for such violations because those causes promoted compliance with the federal statute.[155]

HIPAA, *a fortiori*, seems to explicitly permit these common-law actions. The pertinent common-law is a state law related to health information privacy and provides penalties in addition to those of HIPAA and thus would not appear to be preempted by HIPAA.[156] Commentators have thus argued that state common law may be used to enforce HIPAA.[157]

V. Recommendations to the NYS Legislature and the OCA

In order that the person the principal wishes to be responsible for the principal's health care finances may best fulfill such responsibilities, it is advisable to amend Title 15 of the General Obligation Law (Financial and Estate Planning Powers of Attorneys) so that the Statutory Short POA, which is intended to be a widely used template, addresses all the principal's health care finance issues. Specifically it should include an explicit option that the attorney shall act on the principal's behalf not only with respect to health care billing, but with respect to health care benefits, and disputes with respect to such billing or benefits. It should also permit the agent to facilitate decisions by the principal's health care decision-maker on appropriate health care, which may depend on the availability of financial resources for different health care options.

This may be done by changing item (K) of the Short Statutory POA from "(K) health care billing and payment matters; records, reports, and statements" to "(K) health care payment and benefit matters; records, reports, and statements."

Similarly, the first sentence in Item 1 of the construction statute, GOL § 5-1502K, may be changed from:

> To access records relating to the provision of health care and to make decisions relating to the past, present or future payment for the provision of health care consented to by or on behalf of the principal or the principal's health care agent authorized under state law.

to:

> To determine and pay the principal's health care payment obligations, to determine and obtain the principal's health care benefit entitlements, to represent the principal in any dispute with respect to the principal's health care payment obligations or health care benefit entitlements, and to obtain appropriate care for the principal (as determined by the principal or the person with authority to make such decisions). To access all of the principal's health care information relevant to the representation described in the first sentence. To discuss with the principal's past, present, or future health care providers, employers and health plans any of the principal's health care information relevant to the representation described in the first sentence.

Similarly, the statute may provide that the health care finance agent's authority to obtain the principal's health care information, like that of the health care agent the principal selects pursuant to the Health Proxy Law, who is also a HIPAA personal representative of the principal, is not affected by any other state law, and that the health care agent is making no health care decisions, by changing the final two sentences in Item 1 of the construction statute, GOL § 5-1502K, from:

> In so doing the agent is acting as the principal's personal representative pursuant to sections 1171 through 1179 of the Social Security Act, as added by sections 262 and 264 of Public Law 104-191, and applicable regulations. This authority shall not include authorization for the agent to

make other medical or health care decisions for the principal.

to:

Notwithstanding any law to the contrary, the agent shall have the right to receive and discuss the principal's health care information relevant to the representation described in the first sentence. This authority shall not include authorization for the agent to make health care decisions for the principal.

So that there may be no question that the Title 15 power of attorney provisions do not interfere with the many HIPAA authorizations, such as, supplemental ones I propose that permit an agent to obtain health care records from the principal's health care providers or health plans, and to discuss the principal's health care with the principal's health care providers and health plans, such as the supplemental ones I propose, HIPAA authorizations should be explicitly excluded in item 11 of GOL § 5-1501C from the general power of attorney rules for estate and financial planning.

So that there may be no question that the power of attorney creating a health care finance agent gives the agent access to HIV confidential information under HIPAA, it is advisable to describe such person in PHL § 2782 as a qualified recipient in a manner similar to that applicable to executors. Both would have their access rights limited to that needed to fulfill his agent responsibilities. It is advisable not to limit the qualified recipients to those using item K of the Statutory Short POA, particularly if the item is not revised to provide responsibility for obtaining health care benefits as well as paying health care bills.

So that the person the principal wishes to be his health care agent may best fulfill such responsibilities as long as the principal wishes him to be his agent, it is advisable to amend the health care proxy statute to give health care agents access to either all of the health information that HIPAA otherwise provides to personal representatives, or to the more limited health information described in the FHCDA. Specifically:

- Amend the proxy statue by taking elements from PHL § 2994-d.3(c) to change PHL § 2982.2 from:

  Right to Receive Information. Notwithstanding any law to the contrary, the agent shall have the right to receive medical information and medical and clinical records necessary to make informed decisions regarding the principal's health care.

  to:

  Right to Receive and Discuss Information. Notwithstanding any law to the contrary, the agent shall have the right to discuss and receive health care information necessary to make informed decisions regarding the principal's health care, including information about the patient's diagnosis, prognosis, the nature and consequences of proposed health care, and the benefits and risks of and alternative to proposed health care.

  It is advisable to amend the corresponding FHCDA Section PHL § 2994-d.3(c) similarly.

- Insert a provision in the PHL § 2981(d) template so that the means to revoke the template health care proxies is apparent from the face of the documents, such as the following:

  I may revoke this proxy at any time by (a) executing a new proxy, (b) notifying a health care provider orally or in writing of such revocation; or (c) notifying my agent orally or in writing of such revocation.

- Add a PHL § 2985(f), and a corresponding provision to § 2981(d) so that revocations of health care agent appointments, like revocations of the authority of attorneys are apparent from the face of the document are under Title 15 powers of attorneys, should be permitted, which may done by adding a PHL § 2985(f), and a corresponding provision to the § 2981(d) template, such as the following:

  (f) A competent adult may revoke a health care proxy appointment of an agent by notifying the agent or a health care provider orally or in writing or by any other act evidencing a specific intent to revoke the appointment of the agent.

So that the individual the principal wishes to assist the principal in obtaining and/or paying for his or health care may best fulfill such responsibilities, it is advisable to add the following to the list of the qualified person under PHL § 18, who are the only persons who are explicitly permitted to obtain the principal's patient information from their health care providers with a court special proceeding, to include the following:

- any individual who has a HIPAA compliant authorization to the extent of such authorization, who is either their health care agent under Article 29-C of the Public Health Law-Health Care, Agents and Proxies or their health care finance agent under Title 15 of Article 5 of the General Obligations Law."

Thus, there would be no question principals may, if they wish, give health care agents or health care finance agents access to all their health care information. Attorneys at law already have such authority with appropriate powers of attorneys. Other persons with HIPAA-compliant authorizations do not need a private right of action to obtain health information.

- "estate executors and administrators,"

  Thus, so that there would be no question that the principal's estate need not incur the costs of retaining attorneys at law to obtain health care information pertaining to the decedent's health care payment obligations or benefit entitlements. If executors are so authorized, administrators should be granted the same authority as executors in the same manner that the health care surrogates under PHL § 2994-d have the same such authority as health agents under PHL § 2982.

To avoid any confusion, the provision in PHL § 18 that qualified persons are deemed HIPAA personal representatives, that phrase should be deleted.

Finally, it is advisable that the New York State Office of Court Administration issue a HIPAA-compliant template which may be used by attorneys at law to obtain health records from any of the principal's health care providers similar to the template it has issued permitting an attorney at law to obtain health care records from a specified health care provider [OCA-Official Form No. 960]. Attorneys could then do this without using the extensive power of attorney that would otherwise be required to comply with the general requirements of Title 15 of the General Obligations Law. The template like the current template could give clients the ability to decline to provide access to HIV information, mental health information, and substance abuse information. It is advisable that the template notify the client that he or she may instead direct specific providers to give their attorneys the health information, so the client would have a real choice whether to give the attorney so much authority.

Conclusions

New York authorizes individuals to choose health care decision-makers and health care finance agents, who are treated as HIPAA personal representatives able to act in the place of their principals. HIPAA also authorizes individuals to choose agents to obtain health information on their behalf. It is advisable that the state and practitioners take the following steps to remove undue burdens from principals who wish to choose such agents to help them in obtaining and paying for health care:

- the readily accepted Short Statutory POA be modified to give principals the option of checking a box to give an agent responsibility for all the principal's health care finance issues, not merely for the principal's health care payment obligations.
- the state health care proxy, the family health decisions, and power of attorney statutes be modified so that health care agents and health care finance agents are explicitly granted the authority to access their principal's health care records that HIPAA grants, or authority much closer to that granted.
- the readily accepted statutory health care proxy and NYS DOH health care proxy templates explicitly describe how the proxy may be completely revoked and how the appointment of an agent may be revoked.
- the state health care information privacy statutes explicitly acknowledge the right of HIPAA personal representatives to generally obtain the health care information that their principals could obtain.
- practitioners offer their clients (1) powers of attorney that permit the appointment of health care finance agents with full authority pertaining to the principal's benefit entitlements; (2) health care proxies that describe how they may be revoked, and (3) HIPAA authorizations that permit their client's agents to obtain the health care information that the principals prefer,
- the OCA prepare a template for attorneys at law whose clients prefer that their attorneys request and obtain health care information directly from any of their clients' health care providers, rather than having to execute authorizations on behalf of their attorney for each provider.
- the state health care information privacy laws explicitly address HIPAA authorizations, not only those for attorneys at law considering medical malpractice actions, so that agnets may more easily obtain but for those who, wish so that agents may more easily obtain health care information directly from the principal's health care providers and if necessary may invoke a private right of action.

Endnotes

1. For purposes of this article we will not consider an individual's health providers who in such capacity often act as the individual's agent for health care. Nor will we consider individuals who are not capable of choosing agents for matters relating to their health care, such as infants and the mentally retarded.
2. Sec. 1171 through 1179 of the Social Security Act (42 U.S.C. 1320d-1329d-8) as added by sec. 262 and sec. 264 of Pub. L. 104-191, 110 Stat. 2021-2031.
3. Section 1171(4) of the Social Security Act, 42 U.S.C. 1320d.
4. 45 C.F.R. § 164.524. For simplicity, this article will describe the information accessible by HIPAA as health information, rather than as the subset which is individually identifiable health

information, or the further subset of protected health information, to which HIPAA actually provides access. 45 C.F.R. § 164.501 Definitions.

5. *See e.g.*, 45 C.F.R. § 164.103.
6. 45 C.F.R. § 164.524(a)(3).
7. 45 C.F.R. § 164.524(a)(2)(v).
8. 45 C.F.R. § 164.524(a)(1)(i).
9. 45 C.F.R. § 164.524(a)(1)(ii).
10. We are not considering how health care providers may access their patients' identifiable individual health information or the ability of public health authorities to obtain such access.
11. *See* n. 4.
12. *See* 45 C.F.R. § 164.512(a) and the definition of "required by law" set forth in 45 C.F.R. § 164.501.
13. New York Civil Practice Rule 2303(a) ("CPLR") provides that subpoenas duces tecum must be served on each party who has appeared in the action before the production of the documents, which means an individual would have notice his health care provider had been served.
14. *But see* 45 C.F.R. § 164.512(e)(1) for the steps the attorney may take in such circumstances. *Cf.* Andrew King, Comment, *HIPAA: its Impact on ex Parte Disclosures with an Adverse Party's Treating Physician*, 34 Cap. U. L. Rev. 775, 792-798 (2006) (those steps are similar to getting a court order), CPLR § 3122(a), and David Horowitz, *HIPAA…Help*, N.Y.S. Bar J. 20 (June 2005) ("HIPAA… Help").
15. 45 C.F.R. § 164.502(g)(1).
16. *Id.*
17. 45 C.F.R. §§ 45 C.F.R. 164.502(a)(1), (a)(2), 164.524(a)(1) and (b)(1).
18. 45 C.F.R. §§ 164.502(g)(1), (2). There is an exception if the covered entity believes treating the agent as a personal representative would endanger the individual or had previously abused or neglected the individual. 45 C.F.R. § 164.502(g)(5).
19. *See e.g.*, N.Y. Public Health Law Article 29-C (PHL), which describes health proxies recognized within New York.
20. *See e.g.*, N.Y. General Obligations Law Title 15 (GOL), which describes power of attorneys recognized within New York which may provide such authority.
21. 45 C.F.R. §§ 164.502(g)(1), (4).
22. *See also* Kathleen M. Burke, Alice Herb and Robert Swidler, *Three Stubborn Misconceptions About the Authority of Health Care Agents*, NYSBA Health L. J. 63, 64 (Summer 2005) (hereinafter designated as "Health Care Agent Misconceptions").
23. 45 C.F.R. §§ 164.502(g)(2), (4). There are two major limits on such access. First, the access may be denied if the provider has a reasonable belief that the individual has been or may be subject to abuse, neglect or would be endangered by the representative. 45 C.F.R. § 164.502(g)(5). Second, the access may be denied if the provider has a reasonable belief that substantial harm to the individual or another person may result from the access. 45 C.F.R. § 164.524(a)(3)(iii).
24. A conscientious treating physician of the individual may, however, learn of such injury and decide after review that the individual's treatment and degree of recovery are quite relevant.
25. Conscientious health care decision-makers often want to know the available financial resources because those resources may help the decision-maker determine the prudent treatment.
26. http://www.hhs.gov/ocr/privacy/hipaa/faq/personal_representatives_and_minors/219.html [August 24, 2011].
27. PHL § 2981.3(c).
28. GOL § 5-1513.
29. *Id.* Parts (a) and (f).
30. 29 C.F.R. § 2560.503-1(b)(4). There seems to be no reported litigation on the attorney's right to this information and little commentary on this point. *Cf.* Greta E. Cowart, *HIPAA'S Privacy Regulations and Their Impact on Group Health Plans*—ALI-ABA COURSE OF STUDY MATERIALS (Sept. 2009) which discusses safeguards an ERISA plan must adopt with respect to disclosures to its own attorneys, who are treated as the plan's HIPAA business associates.
31. *See* NYS SCPA § 1001. If there are no next-of-kin, a government official, the public administrator, takes on such responsibility.
32. PHL Article 29-CC.
33. PHL § 2994-d. However, in addition to next of kin, a domestic partner is not only considered but given high priority in selecting a surrogate. *Id.* 1(b).
34. 45 C.F.R. §§ 164.524(a)(1) and (b)(1).
35. 45 C.F.R. § 164.502(a)(1)(iv).
36. 45 C.F.R. § 164.508.
37. 45 C.F.R. §§ 164.502(b)(1) and (2).
38. 45 C.F.R. § 164.508(b)(3).
39. 45 C.F.R. § 164.508(c)(2).
40. 45 C.F.R. § 164.508(b)(5).
41. 45 C.F.R. § 164.508(c)(1).
42. A person named in a will as executor, however, unlike the other two HIPAA personal representatives, must be approved by a court. The local surrogate's court must approve probate of the will and find the nominee qualified. N.Y. Surrogate's Court Procedure Act § 1414 (SCPA).
43. 45 C.F.R. § 164.530.
44. 45 C.F.R. § 160.308.
45. 45 C.F.R. § 160.306 and Statement of Delegation of Authority to Office for Civil Rights, 65 Fed. Reg. 82,381 (Dec. 28, 2000).
46. 42 U.S.C. § 1320d-5.
47. 42 U.S.C. § 1320d-6.
48. *See e.g.*, Cynthia Marcotte Stamer, *Medical Privacy* in Susan J. Stabile and Jayne E. Zanglein, ERISA Litigation at 1319 (3rd Ed. 2008 & Supp. 2010).
49. *Id.* at 1279-1280. *See also* Jamie Lund, *Comment, ERISA Enforcement of the HIPAA Privacy Rules*, 72 U. Chi. L. Rev. 1413 at 1443 (Fall 2005).
50. 42 U.S.C. § 17939(c).
51. *See e.g.*, Joshua Collins, Comment, *Toothless HIPAA: Searching for a Private Right of Action to Remedy Privacy Rule Violations*, 60 Vand. L. Rev. (2007) and Daniel J. Oates, Comment, *HIPAA Hypocrisy and the Case for Enforcing Federal Privacy Standards Under State Law*, 30 Seattle Univ. L. R. 745 (2007).
52. PHL § 2981.1.
53. PHL § 2980 Def. 8.
54. PHL § 2980 Def. 5.
55. PHL § 2981.4. This section requires that the determination be made pursuant to PHL § 2983.1 which requires a writing. *See also Stein v. County of Nassau*, 2011 U.S. App. LEXIS 7296 at *5 (2nd Cir. April 8, 2011) (the court observed that there was no showing of such a determination—the issue before the court was whether the agent had established the existence of this authority to the police she had sought to persuade to direct an ambulance with the principal to a certain hospital).

56. PHL § 2983.5.

57. PHL § 2981.5(d).

58. *Id.*

59. See http://www.health.state.ny.us/forms/doh-1430.pdf [August 24, 2011]. An explanation of health care proxies is also provided at this site.

60. *Cf. In the Matter of University Hospital of SUNY Upstate Medical Center*, 194 Misc. 2d 372, 754 N.Y.S.2d 153 ((Sup. Ct. Onondaga Co. 2002). A hospital was prevented from issuing a DNR order pursuant to a health care proxy and associated living will because the court held they were revoked. Neither document seemed to describe how they could be revoked.

61. The health care proxy statute, unlike GOL § 5-1511.1(d) for powers of attorneys, does not mention revocations with respect to a specific person named in the proxy. However, even if, *arguendo*, such revocations are not permitted for health care proxies, one would expect such a named agent to decline to serve following such an attempted revocation by the principal.

62. 45 C.F.R. §§ 164.502(g)(1), (2). There is an exception if the covered entity believes treating the agent as a personal representative would endanger the individual or had previously abused or neglected the individual. 45 C.F.R. § 164.502(g)(5).

63. PHL § 2982.1.

64. PHL § 2982.3.

65. One may also argue that HIPAA preemption prohibits this state statute from limiting the HIPAA authority that results from the decision-making authority granted by a different part of the same statute.

66. *But cf.* Corine A. Carey, *Protecting Patient Privacy in the Era of Health Information Exchange*, NYSBA Health Law Section Meeting at 103 (Jan. 26, 2011) who argued that such limits be imposed on the access rights of health providers to protect the privacy of patients. It is unlikely that a principal would have a similar concern about a personal representative the principal selects to make his or her health care decisions, but in such case the supplemental HIPAA authorization would be inappropriate.

67. *See e.g.*, *Mougiannis v. North Shore-Long Island Jewish Health Systems*, 25 A.D.3d 230, 806 N.Y.S.2d 623 (2nd Dep't 2005) (Hospital had to be compelled to provide medical records to health care agent after the agent withdrew principal [her mother] from hospital because of concern about the quality of care). There is a question whether such reluctance would threaten the health of the principal, because at an earlier proceeding the hospital had "assured petitioner that her mother's treating physicians could gain access to *necessary medical information* by directly contacting the Hospital." N. Y. L. J. Vol. 231, May 19, 2004 (LaMarca J.) (emphasis added)

68. *Cf.* Health Care Agent Misconceptions at 63-65, which argues that no additional HIPAA authorization is needed and including such authorizations in a health care proxy may lead to rejections of otherwise valid health care proxies.

69. 45 C.F.R. § 164.508(b)(5).

70. This would be an issue if the principal is unable to execute an additional HIPAA authorization but still has capacity to make health care decisions. In such case, the agent could not rely upon the health care proxy to obtain any health care information.

71. I deliberately did not use the phrase "protected health information" or "protected health information as defined under HIPAA," which is the subset of the individually identifiable health information accessible under HIPAA. Such phrases seem to be inconsistent with the plain language requirement for HIPAA authorizations and obscure rather than clarify the kind of information to which the principal is giving access. I also prefer to use a narrower phrase than health information to emphasize the privacy concern of the HIPAA authorization.

72. GOL § 5-1501 Def. 2(j). Definition (k) of a principal also excludes arrangements which are not relevant to this article.

73. GOL § 5-1501.1 Definition (k), which defines a principal, also excludes arrangements which are not relevant to this article.

74. GOL § 5-1501C item 11.

75. *Id.*

76. *Id.*

77. GOL § 5-1501B.1(a)-(c).

78. GOL § 5-1513(a) describes the agent's fiduciary responsibilities.

79. GOL §§ 5-1505 describes the agent's ficudiary responsibilities.

80. GOL § 5-1501C item 11.

81. GOL § 5-1513.

82. GOL § 5-1502K.

83. *Id.*

84. GOL § 5-1502O.

85. GOL § 5-1502K item 1. It is advisable, as discussed, *infra*, to delete this language.

86. GOL § 5-1502b.1(d)(1).

87. GOL § 5-1502F.2

88. GOL § 5-1502F.4.

89. GOL § 5-1502J.

90. Although employer health care benefits and insurance health care benefits are both health care plan benefits, their plan representatives often prefer powers of attorney to distinguish the benefits. Thus, many practitioners do so. It should be noted that small employer self-administered employer plans are not subject to HIPAA. 45 C.F.R. § 160.103. Such exempt plans, however, generally respect Title 15 powers of attorney appointments of health care finance agents.

91. Health care finance agents are authorized to make decisions related to health care rather than health care decisions. The final sentence of item 1 of GOL 5-1502K fails to make that distinction.

92. 45 C.F.R. §§ 164.502(g)(1) and (2). There is an exception if the covered entity believes treating the agent as a personal representative would endanger the individual or had previously abused or neglected the individual. 45 C.F.R. § 164.502(g)(5)

93. 45 C.F.R. §§ 164.502(a)(2)(i), (g)(2) and 164.524(a)(1).

94. Sometimes this omission is deliberate by principals who wish to control carefully the health information their agents have access to. Covered entities can more easily keep records of which records were made available to an agent than which information is released orally.

95. There are two common modifications. First, there is a provision that prior powers may be revoked and/or the current power may be revoked only with a specific reference. Second, there is a grant of authority to hire, discharge and pay reasonable fees to professionals, which are necessary and proper for the agent to carry out his or her duties.

96. Attorneys are often quite concerned about leaving no question that health insurance premiums are a health care expense.

97. Health care finance agents are authorized to make decisions related to health care rather than health care decisions. The final sentence of item 1 of GOL 5-1502K fails to make that distinction.

98. 45 C.F.R. §§ 164.502(g)(1), (2). There is an exception if the covered entity believes treating the agent as a personal representative would endanger the individual or had previously abused or neglected the individual. 45 C.F.R. § 164.502(g)(5).

99. 45 C.F.R. §§ 164.502(a)(2)(i), (g)(2) and 164.524(a)(1).

100. 45 C.F.R. § 160.203.

101. 45 C.F.R. § 160.202 Definition of state law.
102. 45 C.F.R. § 160.203(b).
103. HHS FAQ, "How do I know if a State law is more stringent than the HIPAA Privacy Rule?" http://www.hhs.gov/ocr/privacy/hipaa/faq/preemption_of_state_law/403.html. [August 24, 2011].
104. 45 C.F.R. § 160.202.
105. HHS FAQ "Will HHS make determinations as to whether a provision of State law is more stringent than or contrary to a provision of the HIPAA Privacy Rule?" http://www.hhs.gov/ocr/privacy/hipaa/faq/preemption_of_state_law/408.html. [August 24, 2011].
106. http://www.health.state.ny.us/nysdoh/hipaa/pdf/hipaa_preemption_charts.pdf [August 24, 2011].
107. PHL §§ 2782.1-4.
108. 10 NYCRR § 63.5(a). There is an exception for releases by health insurers.
109. PHL § 2782.5(a).
110. PHL § 2782.1(a).
111. PHL §§ 2782.1(a) and .5(a).
112. PHL § 2982.3 gives proxy agents access to health information notwithstanding any other law.
113. PHL § 2782.1(q).
114. PHL § 2782.5(a).
115. HHS FAQ "How do I know if a State law is contrary to the HIPAA Privacy Rule?" http://www.hhs.gov/ocr/privacy/hipaa/faq/preemption_of_state_law/402.html [August 24, 2011].
116. HIPAA has exclusions to this treatment, such as in abuse situations, the agent named as the health care agent is no longer treated as the principal's personal representative. 45 C.F.R. § 164.502(g)(5). None of these exceptions are applicable.
117. HHS FAQ, "How do I know if a State law is more stringent than the HIPAA Privacy Rule?" http://www.hhs.gov/ocr/privacy/hipaa/faq/preemption_of_state_law/403.html. [August 24, 2011].
118. PHL § 2782.5(a) and 10 NYCRR § 63.5(a).
119. PHL § 2783.
120. PHL § 2783.3.
121. 42 U.S.C. §§ 1320d-5 and 6.
122. *Cf.* 45 C.F.R. § 160.202 and PHL §§ 18.2, 18.1(b), 18.1(c), 18.1(d).
123. PHL §§ 18.2 and 18.1(e).
124. PHL § 18.1(g).
125. PHL §§ 18.2 and 18.3.
126. 45 C.F.R. § 160.512(a).
127. PHL § 18.4.
128. PHL § 18.3(f).
129. *Cf.* PHL § 2782.1.
130. PHL § 18.6.
131. NYS Form DOH-2557 (8/05).
132. *See* http://www.lawrevision.state.ny.us/reports/revised_final_commentary_2008.pdf at 11 [August 24, 2011].
133. *Id.*
134. New York L. 2004 ch. 634 introduced this statement in PHL § 18.1(g).
135. PHL § 18.1(g).
136. *Id.*
137. 45 C.F.R. §§ 164.502(a)(2)(i).
138. 45 C.F.R. § 164.502(g)(1).
139. PHL §§ 18.2(a), (d).
140. New York L. 2004 ch. 634 introduced this catchall in PHL § 18.3.(i).
141. *Mougiannis v. North Shore-Long Island Jewish Health Systems*, N. Y. L. J. Vol. 231, May 19, 2004. 2004 N.Y. Misc. LEXIS 3196 (S. Ct. Nassau, May 6, 2004) (LaMarca J.).
142. *Mougiannis v. North Shore-Long Island Jewish Health Systems*, 25 A.D.3d 230 at 236, 806 N.Y.S.2d 623 at 628 (2d Dep't 2005).
143. PHL § 18.1(g) added by L. 2004 ch. 634 effective on the October 26, 2004 date of enactment.
144. GOL § 5-1501C.3. Some attorneys appear to use powers that are not government forms and do not comply with Title 15.
145. Attorneys representing estates had been added in New York L. 1992 ch. 277. Estate fiduciaries are not qualified persons.
146. LEXIS statutory history of PHL § 18 [August 24, 2011]. *See also* "HIPAA…Help."
147. *Id.*
148. OCA-Official Form No. 960.
149. *Striegel v. Tofano,* 399 N.Y.S.2d 584 (N.Y. App. Div. 1977) (a patient has a common-law right of access to dental records regardless of the limitations of CPLR 3102(c), whose relevant sections have not changed).
150. See generally Joy L. Pritts, *Altered States: State Health Privacy Laws and the Impact of the Federal Health Privacy Rule*, 2 YALE J. HEALTH POL'Y L. & ETHICS 325,332-334 (2002).
151. 45 C.F.R. § 160.512(a).
152. *See e.g.*, *Burton v. Matteliano*, 81 A.D.3d 1272, 916 N.Y.S.2d 438 (App Div. 4th Dep't 2011), *Daly v. Metro. Life Ins. Co.*, 4 Misc. 3d 887, 891, 782 N.Y.S.2d 530 (N.Y. Sup. Ct. May 20, 2004), and *Doe v. Community Health Plan—Kaiser Corporation*, 268 A.D.2d 183, 709 N.Y.S.2d 215 (NY App. Div. 3rd Dep't 2000) (dismissal motion denied regarding common law claim that clerk allegedly disclosed confidential medical information—HIPAA not considered).
153. *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485.
154. *Id.* at 487.
155. *Washington Mutual Bank v. Superior Court*, 75 Cal. App. 773, 782-784 (Ct. Ap. 2d. App. Div. 1999).
156. 45 C.F.R. § 160.203(b).
157. *See e.g.*, Joshua Collins, Comment, *Toothless HIPAA: Searching for a Private Right of Action to Remedy Privacy Rule Violations*, 60 VAND. L. REV. 199, 225-233 (2007) (discusses both breach of privacy actions and breach of confidentiality actions) and Peter A. Winn, *Confidentiality in Cyberspace: The HIPAA Privacy Rules and the Common Law*, 33 RUTGERS L. J. 617, 667-672 (2002).

Albert Feuer is the principal attorney in the Law Offices of Albert Feuer in Forest Hills, New York.

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The Dos and Don'ts of Preparing and Supervising the Signing of Wills for the Elderly, Impaired and Infirm

By Joseph H. Gruner

Ann Landers once wrote in her column, "Where there's a will, there's a lawsuit." Although that is not always the case, there is some truth to that statement.

The fundamental obligation of any attorney involved in preparing a will on any level, from the simple to the complex, and in supervising its execution, is to exercise independent professional judgment on behalf of the testator. At the same time, the attorney must at least consider the possibility of a will contest that could destroy the testator's estate plan. Even though a majority of will contests fail, the risk of a will contest increases when the testator was elderly, infirm or impaired. Fortunately, there are various important factors for the attorney to consider and steps the attorney can take during the initial meeting with the testator, the actual execution of the will, and the time between these events, to reduce the chance of a will contest in the first place.

For the purposes of this article, the term "elderly, infirm and impaired" is intended to describe a person who is suffering from some degree of deficiency or limitation involving eyesight, hearing, memory, reading, understanding, concentrating, or other mental or physical disability that may bring into question the issues of competence and undue influence. Obviously, the attorney preparing the will must know the criteria for determining whether the testator has the requisite testamentary capacity and is acting from his or her "free will." Before the will is prepared and signed, the attorney must firmly believe that the testator has a rational plan for the distribution of his or her property after death, knows the nature and extent of the assets and property in his or her estate, knows the natural objects of his or her bounty (including relatives, friends, caretakers, and may even be charities and other organizations), knows who will actually receive a bequest and who will receive nothing, and knows the significance of the will as governing the distribution of property after his or her death.[1]

The attorney preparing the testator's will has a duty to be reasonably alert to indications that the testator may not have testamentary capacity because he or she is elderly, infirm or impaired, or may be subject to undue influence. Where these issues are indicated, the attorney must make a reasonable inquiry and then make a reasonable determination based on the evidence. An attorney should not prepare or supervise the signing of a will unless the attorney reasonably believes that the testator is competent and free from undue influence. In making the required determination, the attorney must have undivided loyalty to the testator. The attorney should refuse to prepare the will if a reasonable inquiry discloses potential undue influence by someone to whom the lawyer also owes any obligation of loyalty, such as a friend or another client. It could be a conflict of interest for the lawyer to represent the testator in such circumstances. The lawyer should discuss with the testator measures that will reduce or eliminate the likelihood that the will may be contested. A will may be determined to be procured through undue influence because the will was prepared by the beneficiary's lawyer or a lawyer chosen by the beneficiary, which resulted in the testator acting without independent and disinterested advice. In fact, case law provides that even though a will execution was attended by an independent attorney, this does not automatically rule out that the plan was the product of undue influence.[2]

Undue influence can be defined as inappropriate manipulation, deception, intimidation or coercion intended to mold the mind of the testator to suit the beneficiary's purposes. To be "undue," the influence must amount to mental coercion that led the testator to carry out the wishes of another instead of his or her own because the testator was unable to refuse or was too weak to resist.[3]

When a claim of undue influence is raised in a will contest, the court, in order to refuse to grant probate of the will, must find that another person employed some relational leverage to obtain an unfair advantage over the natural objects of the testator's bounty, and the will's provisions constitute a marked departure in favor of the person charged with undue influence from a prior natural plan of disposition.[4]

Often times, it is difficult to find evidence of coercion, manipulation, deception, compulsion and intimidation since the perpetrator usually attempts to hide such conduct. But if the perpetrator succeeds the result is an impairment of the testator's ability to make free choices about the distribution of the testator's estate in his or her will.

There is a significant difference between someone encouraging a testator to remember him or her in the testator's will, and someone using deceptive, manipulative and coercive actions to get named in the will. Mere advice or urging to make a will without more does not constitute undue influence.[5]

An inference of undue influence can arise when the beneficiary actively participated in the procurement, preparation and execution of the will and disproportionately benefits from it.[6]

Undue influence can even be exerted over a person who has testamentary capacity, and can result in the will being voided. However, there must be an element of coercion, compulsion, or restraint, so that the document does not represent the free will of the testator.[7]

Clues suggesting the possibility of undue influence may derive from an unusual amount of control, coercion and exclusion, such as when the alleged perpetrator keeps other family members and friends away from the testator, tells tales about other heirs to alienate them from the testator, and controls visits, mail, and telephone calls from friends and relatives to the testator. But the mere fact that the testator may have been vulnerable to undue influence does not mean that undue influence was exercised at the time the will was signed.[8]

The following suggestions focus on the initial meeting prior to preparing the will, when there are reasonable concerns regarding capacity and undue influence:

- Meet with the testator alone.
- Ask the testator probing questions regarding health (eyesight, hearing, reading ability, medications, hospital stays), relatives, friends, shopping, cooking, etc. Listen carefully to the answers and take notes of the answers given.
- Obtain information directly from the testator regarding names, addresses and telephone numbers of relatives and friends, bank accounts, brokerage accounts, pensions, Social Security payments, expenses, accountant, tax returns, cash, health insurance, life insurance, and long term care insurance.
- If the testator is not ambulatory, conduct the initial meeting at the testator's home so you can observe the testator's living conditions.

You should hear loud warning bells and see red flashing lights when:

- the person who refers you to the testator, or a friend or relative of the referring party, is to be named as a beneficiary under the testator's will;
- the testator either has no relatives or does not stay in contact with relatives;
- the testator wants to disinherit a relative without a specific reason or cause;
- the testator lives alone; or
- the proposed beneficiary is the person the testator is dependent upon for companionship, shopping and care, or is an unusual choice of beneficiary based on the circumstances—such as a healthcare aide, a hairdresser, a caregiver, a distant cousin, a neighbor, or a "friend" who has had the opportunity to unduly influence the testator.

Be especially vigilant and exercise caution when confronted with any of the above circumstances.

Let some time pass between the initial meeting and the signing. It's a good idea to deliver a draft of the will to the testator at least a few days prior to the signing so that the testator has an opportunity to review the will and digest its provisions in private, even if the testator does not take that opportunity.

The following suggestions focus on the actual execution of the will, and are just a few steps that will douse some of the fuel from the dispute fire:

- Will Execution Ceremony: One of the best ways to avoid a will contest related to the execution of the will is to have the will executed properly. It helps to have a "will signing ceremony" that has become your regular custom and practice. Years and hundreds of wills later, when you may have trouble even remembering the testator's name, you can at least testify that you know you took certain steps in that testator's ceremony, asked certain specific questions, and followed certain specific procedures because you always do it in every will signing you supervise.
- Attesting Witnesses: If there is a reason to suspect the possibility of a will contest, you may want to consider using friends, relatives or neighbors of the testator who have known the testator for a number of years, are not named in the will, and who will be able to testify if the situation arises. Obviously, do not use the beneficiaries or anyone closely associated with the beneficiaries as witnesses. If there are no such witnesses available, use office staff to witness will signings.
- Contemporaneous Affidavits: If there is a reason to suspect the possibility of a will contest, you may want to consider obtaining affidavits from the testator's close family and friends including, if possible, his or her attending physician(s), prepared at or near the time of will execution, as contemporaneous expressions by people who knew the testator well over a long period of time, were aware of the testator's condition on or about the day the will was signed, and can effectively testify about how the testator's condition that day compares to the affiant's perception of testator's condition for periods of time prior to the execution.
- Discussions Prior to Execution: In the presence of the attesting witnesses, some of whom may be meeting the testator for the first time at the will execution, have discussions with the testator and have the testator read something aloud, so that the witnesses can truthfully sign the affidavits.
- Self-Proving Affidavit: Consider expanding your self-proving affidavit or even drafting a separate

one for witnesses to sign contemporaneously which will outline and preserve the witnesses' observations of the testator's state of mind and expressed intent.

- Formality: Don't overlook the formality of the will signing. Make sure you are alone with the testator and witnesses. Never allow any other relatives or friends (particularly those who are beneficiaries) in the room when the will is being executed. Go over the contents of the will again and make certain that the testator expresses his or her understanding of its contents to the witnesses. Make sure witnesses are comfortable with the competence of the testator before the will is executed.
- Videotaping: If poorly done, it could do more harm than good. However, if the stakes are high, you can hire a professional to create a video of the testator on the day of the will execution to demonstrate to the world the testator's competence and freedom from undue influence.
- Serial Re-Execution of Estate Documents: If you suspect that a will might be challenged based on incompetence or undue influence grounds, consider having the testator come back to your office and republish or re-execute the same will a number of times over the course of a few months or a year. It will strengthen the case that the testator was competent and acting without undue influence, and will, for obvious reasons, make the caveator's task of setting the will aside difficult and expensive.

If you keep in mind the things you will likely have to prove in order to make out a *prima facia* case of a valid will execution,[9] how that proof might be perceived by perfect strangers years down the road, and act accordingly, you will have gone a long way towards discouraging questionable will contests.

Endnotes

1. *See* Matter of Kumstar, 66 N.Y.2d 691 (1985).
2. *See* In re Kaufmann's Will, 20 A.D.2d 464 (1st Dep't 1964); In re Delmar's Will, 243 N.Y. 7 (1926).
3. *See* In re Walther's Will, 6 N.Y.2d 49 (1959); Rollwagen v. Rollwagen, 63 N.Y.2d 504 (1876).
4. *See* In re Kruszelnicki's Will, 23 A.D.2d 622 (4th Dep't 1965).
5. *See* Matter of Knight, 87 Misc. 577 (Sur. Ct. New York County 1914).
6. *See, e.g.*, Matter of Kryk, 18 Misc. 3d 1105A (Sur. Ct. Monroe County 2007); Matter of Kindberg, 207 N.Y. 220 (1912).
7. *See* Matter of Walther, 6 N.Y.2d 49 (1959).
8. *See* Children's Aid Society v. Loveridge, 70 N.Y. 387 (1877).
9. SCPA § 1408.

Joseph H. Gruner is of counsel to the law firm of Gaines, Gruner, Ponzini & Novick, LLP, with offices in White Plains, New York. Mr. Gruner practices extensively in the areas of estate planning and wealth preservation, estate administration, and elder law (guardianship proceedings, Medicaid eligibility, long term care insurance, nursing home admittance, advance directives and trusts). He is a member of the National Academy of Elder Law Attorneys, the Trusts and Estates Law Section and the Elder Law Section of the New York State Bar Association, the Westchester County Bar Association, and the New York County Lawyers Association. **Joe Gruner gratefully acknowledges the invaluable contributions and assistance of Caitlin Scheir, an associate at Gaines, Gruner, Ponzini & Novick, LLP.**

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cabb1@optonline.net

Willard H. DaSilva
DaSilva, Hilowitz & McEvily LLP
585 Stewart Avenue, St. L-16
Garden City, NY 11530-4701
whdasilva@aol.com

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DaSilva, Hilowitz & McEvily LLP
585 Stewart Avenue, St. L-16
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lappandlapp@optimum.net

James P. Duffy III
36 Maple Place, Suite 207
Manhasset, NY 11030
jpduffy@bergduffy.com

THE SENIOR LAWYER

Editor
Willard H. DaSilva
DaSilva, Hilowitz & McEvily LLP
585 Stewart Avenue, Suite L-16
Garden City, NY 11530
whdasilva@aol.com

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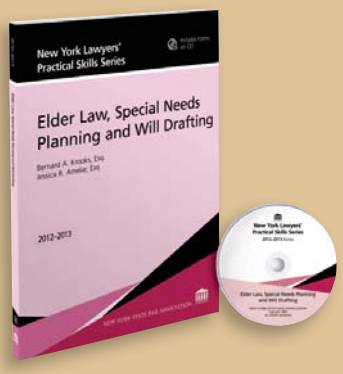

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Jessica R. Amelar, Esq.
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