NYSBA SUMMER 2004 | VOL. 14 | NO. 3

Elder Law Attorney

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

Chair to Chair

Joan L. Robert
Outgoing Chair

As Section Chair, I used this column on four previous occasions to advise you of our Section's goals, programs and activities. The Elder Law Section, with 2,850 members, is, of course, only one small part of the 72,000 attorneys who comprise the New York State Bar Association. During the current legislative session, the State Bar demonstrated to Section members the value of membership in the "Big Bar." When the Governor's 2004 Budget Bill contained proposals that would alter Medicaid eligibility in New York, the State Bar supported our Section's opposition to these proposals. The State Bar's efforts on behalf of elder law clients illustrate how important it is for elder law attorneys to belong to the State Bar.

The Governor's Budget Bill contains provisions that extend Medicaid eligibility look-back periods; that eviscerate spousal refusal; that begin transfer penalties upon application for benefits; and that impose transfer penalties for community Medicaid. In February, our Section's Special Committee on

(Continued on page 2)

Howard S. Krooks
Incoming Chair

As I step into the role as Chair of the Elder Law Section, I am reminded of one single day that forever altered the course of my professional career. I had been practicing in the areas of corporate/securities law for the first 2½ years of my career when I became involved in a few elder law matters. I subsequently learned of an ABA Commission, then known as the Commission on Legal Problems of the Elderly (currently known as the Commission on Law and Aging), that was holding a conference call. With my interest piqued, I signed up for the call expecting that I would listen to the conversation to hear about the kinds of issues with which the Committee dealt. As the call progressed, I became energized in a way that had eluded my first years in the practice of law. When I got off the call, I went to the partners of the firm and I said, "I'd like to change practice areas." The corporate partner was not too happy, but I knew something he didn't. I knew that there was something about this field, barely called "elder law" back then (this happened in 1991), that would fulfill me in ways which I

(Continued on page 4)

Inside this Issue

Outgoing Chair's Message *(Continued from page 1)*

Medicaid Legislation, headed by Howie Krooks, Vincent Russo and Dan Fish, and Cora Alsante, Lawrence Davidow, Ron Fatoullah, Ellen Makofsky, David Pfalzgraf, Lou Pierro, René Reixach and I prepared a Legislation Report that the State Bar, under the able direction of Ron Kennedy, distributed to state legislators. Recognizing the importance of the State Bar's support of this legislation, President Tom Levin convened a special session of the Executive Committee of the New York State Bar Association, which endorsed our Report. Once our Report in opposition to the legislative proposals became the official policy of the State Bar, the Bar lent not only its prestige but also its finances to secure a lobbyist who ably presented our Section's points to key legislators.

On April 14, 2004, lobbyists Harold Iselin and Michael Murphy, along with Ron Kennedy, guided Section members Howie Krooks, Dan Fish, Ron Fatoullah and me in meetings with key legislators and their aides. The legislators appeared knowledgeable about our concerns as to the legality and effect of the Medicaid proposals. All greeted us with courtesy and respect, particularly when Ron Kennedy mentioned how the State Bar itself had embraced our Section's position. Although I do not know the ultimate outcome of the budget proposals as I write this column in May, we all should be proud to be members of the State Bar and should urge our colleagues who are not members to join. And when you see Tom Levin at future functions, extend to him our thanks for his strong guidance and leadership throughout this year.

The Section's legislative opposition has been spearheaded by incoming Chair Howie Krooks. Filled with boundless energy, expert organizational skills and superior intelligence, Howie will be a superb Chair. He has already broadened our Executive Committee and is beginning to implement his own initiatives in membership involvement, diversity and communications. These new paths will assist our Section in meeting the goals of our Long Range Plan. I congratulate Howie on his past achievements and thank him on behalf of our entire Section for all of his efforts to date.

I also thank all of you for allowing me the opportunity to serve as Section Chair. I have enjoyed working with the various committees on their activities and with the officers—Dave Pfalzgraf, Cora Alsante, Howie Krooks, Dan Fish, Lawrence Davidow and Ellen Makofsky—who offer support, assistance and guidance constantly. State Bar liaison Lisa Bataille has also been outstanding in serving as everyone's "right hand person" and in helping us accomplish our goals.

We elder law attorneys are a special group. We share knowledge freely with each other; we offer support to colleagues in times of need; and we celebrate each other's victories. Although members of a profession known for its adversarial nature, elder law attorneys are a pretty collegial group. Nowhere do the results of the collaborative efforts shine more than in our Section's progress and projects. We should all be proud to be elder law attorneys of the New York State Bar Association. Spread the word—and urge those who do not yet belong to join us. Together we do make a difference in our own practices and in the lives of the frail elderly and persons with disabilities whom we serve.

Joan L. Robert

Editor's Message

The future of elder law. What does it look like? The future of elder law practice, in many ways, is tied directly to both advances in health care for the elderly and available government benefits for seniors who need assistance in meeting the high cost of health care. The future of elder law practice is also seemingly dependent on our elected officials who make health care policy and our Bar Association leaders, who continue their efforts to advocate on behalf of our seniors.

As we begin our future with new leadership, it is most appropriate to dedicate this issue to the future of elder law. As a Section, we say a most grateful "thank you" to the outstanding leadership of Joan Lensky Robert, as we welcome with anticipation the possibilities of what we can achieve working together with our new Section Chair, Howard Krooks. Of course, their messages are informational. But most of all, they are inspiring. Joan and Howie truly are models. Not only in their service to our Section, but more importantly, in their service to the elderly and disabled of our state, and our nation.

Laury Adsit Gelardi, as the Executive Director of the National Academy of Elder Law Attorneys, has one of the most unique perspectives on the practice of elder law in the nation. She has contributed an article that recounts the development of our area of practice, and the valuable contributions our New York State leaders have made, locally and nationally.

Charles Robinson, a leading elder law attorney in Florida, is widely considered to be one of the foremost visionaries on the future of legal practice. His article is a must-read for elder law practitioners, who must always plan ahead for the future success of their practices.

The Minority Leader of the New York State Senate, David A. Paterson, shares his contributions to the New York State Senate Medicaid Task Force. Arguing for reform, Senator Paterson points out some of the serious problems of the Medicaid program, and offers several ideas to improve Medicaid and relieve some of the pressures on our local governments.

Vincent Russo and Marvin Rachlin have written an article that discusses several of the factors that must be addressed when considering the creation of a Supplemental Needs Trust. Whether a disabled individual is to receive an inheritance, personal injury or medical malpractice recovery, it is critical to analyze each case, and the factors discussed, before recommending whether or not to use a Special Needs Trust.

As always, this edition's NEWS section contains timely and useful articles by some of the most experienced practitioners in our Section. Thanks to all of them for their continued commitment.

Please enjoy this edition of *Elder Law Attorney*.

Steven Stern

Request for Articles

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

Steven H. Stern, Esq.
Davidow, Davidow, Siegel & Stern, LLP
One Suffolk Square, Suite 330
Islandia, NY 11749
(631) 234-3030

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

never could have imagined when I went to law school and set out upon my journey to become a lawyer. One phone call changed my life.

One early case that I handled left an indelible impression on me and characterizes the essence of what we, as elder law attorneys, do for our clients. It involved a community spouse and her husband, who was in his 40s residing in a nursing home and suffering from MS. She was struggling to make ends meet with two college-aged children, a mortgage, college expenses, and working two jobs (one as an aerobics instructor and one as a Hebrew school teacher). She came to me seeking an enhanced income allowance in Family Court so that she could afford to meet monthly expenses (and the family could afford to remain in the home where the children grew up). There are no words for the gratification I felt when I was able to explain to this family that I could help them. It is a feeling I will never forget. I remember what happened after the hearing examiner read his decision awarding the community spouse a portion of her husband's income. The entire family ran toward me, almost fighting to be the first to hug me, to thank me. For the first time in my career I felt that I had a real impact on a family that was confronted with real problems. In an instant, life meant something more to me. I had became a problem-solver, and it felt good. It still feels good today.

Back then, the New York State Bar Association Elder Law Section was just one year old and I began going to my first Section-sponsored programs. My interest in the field only grew as a result of my attendance at these programs. I was fascinated by the substantive area of the law. There was so much to learn and I was surrounded by all of these really talented attorneys, some of whom had been practicing in the areas of disability law and legal issues affecting the elderly since the 1970s! What I began to learn is that, just as elder law is different from any other area of law, the Elder Law Section is different from any organization that I was aware of. There exists a camaraderie within this Section and amongst elder law attorneys generally that I have not seen anywhere else. Many of you have become my good friends. I feel a deep sense of gratitude for all that I have learned from each one of you over the years, and it is my great privilege and honor to now serve as Chair of this Section.

Ours is an extremely active Section, and we have the history to prove it. Consider that since the Elder Law Section was formed in 1990, we have experienced the enactment of several new pieces of groundbreaking legislation and confronted attacks on the rights of the elderly and people with disabilities as well as those of attorneys:

- Article 81 of the Mental Hygiene Law
- EPTL 7-1.12
- OBRA '93
- Section 217 of the Health Insurance Portability and Accountability Act of 1996 and the Balanced Budget Act of 1997 (Section 4734)
- *New York State Bar Association v. Reno* (at the time, this was the first lawsuit brought by the New York State Bar Association in its history. The "Big Bar," as it is often called, has since won its second lawsuit, brought against the Federal Trade Commission, where a federal judge ruled that lawyers are not required to send government-mandated "privacy notices" pursuant to the Gramm-Leach-Bliley Act to their clients.)
- New Part 36 Rules pertaining to fiduciary appointments
- HIPAA Privacy Provisions
- Governor Pataki's 2004 Budget Bill—containing numerous provisions restricting Medicaid eligibility for New Yorkers. Once again, due to issues affecting our clients and the active participation of our Section, another "first" in the history of the New York State Bar Association occurred. Through the efforts of our Section, and with the assistance and guidance of then-President A. Thomas Levin; Patricia Bucklin, NYSBA Executive Director; John Williamson, NYSBA Associate Executive Director; and Ronald Kennedy, NYSBA Associate Director of Governmental Relations, the Big Bar hired a lobbyist (Harold Iselin of Greenberg Traurig) for the first time in its 127-year history to help us get our message to the legislature regarding the impact Governor Pataki's proposals would have on frail elderly and disabled New Yorkers.

These are just some of the issues that we have addressed over the last 14 years. We also have dealt with other important issues through the courts (consider recent opinions in *Cricchio, Spetz, Verdow, Shah, Robbins*, and so many more).

Presently, we are facing challenging times on behalf of our clients as some counties have stepped

up spousal recovery efforts and the New York State Medicaid program continues (as of this writing in early June) to remain under attack. If our work on opposing Governor Pataki's Budget Bill has taught us anything, it is 1) that we must establish ongoing efforts to communicate regularly with legislators (as so many of us tell our clients, the time to act is now . . . not in a time of crisis); and 2) that we are not alone in our advocacy efforts on behalf of elderly and disabled New Yorkers (groups such as AARP and Medicaid Matters were instrumental in opposing these changes). We must work to establish ongoing communication with such outside groups to determine how we can help them and vice-versa. Furthermore, the work that we do as elder law attorneys requires that we have a better system to communicate amongst one another throughout the state. A Section member in Onondaga County should have the opportunity to know that another Section member in Nassau County has just confronted and/or litigated the very same issue. What was the outcome of the prior case? How was it handled? Should the same or a different strategy be implemented elsewhere throughout the state? And, finally, we must look at the way in which we identify and cultivate future leaders of our Section if we expect to continue our growth as a Section.

Thus, at our April 28, 2004 Executive Committee Meeting, I set forth a number of goals and objectives for the Section for the upcoming year. They are as follows:

- **Establish Ongoing Lobbying Efforts**—As I mentioned above, we need to have ongoing dialogue with our legislators in Albany to discuss issues of importance to our elderly and disabled population. Our Section needs to be proactive in a way which promotes meaningful reform. We must avoid lobbying Albany at a time when legislation containing devastating provisions already has been proposed and we are then forced to discuss critical issues in a time of "crisis." I have appointed Daniel G. Fish to chair a newly created Lobbying Committee to formalize this effort. Please contact Dan if you are interested in getting involved in this committee.

- **Establish Regular Communication Between the Section and Outside Groups**—Presently, many of our members have relationships and contacts with others without any formal body within the Section being aware of these relationships and/or establishing a line of communication between the Section and the organizations. Given the importance of working with these outside organizations, I have asked the Legal Services and Nonprofit Organizations Committee (Valerie J. Bogart, Chair; Ellen P. Rosenzweig, Vice-Chair) to make this its number one priority this year. Please contact either Valerie or Ellen if you are interested in becoming involved with this effort.

- **Establish Regular Communication Within the Section**—There are over 25 committees within the Elder Law Section, yet no formal way of communicating with Section members regarding committee activities and current projects. When there was news to report to Section members regarding activity within the Special Committee on Medicaid Legislation, we asked committee members Cora A. Alsante and Ellen G. Makofsky to prepare the text of an e-mail message that was then sent to Section members. Other than our outstanding *Elder Law Attorney* publication, which is issued only four times a year, we have no structure in place to regularly report on Section and committee activities. I have formed a new Communications Committee—Steven T. Rondos, Chair; Dean S. Bress, Vice Chair—to address these issues. In early June, the committee held its first conference call and is already looking into creating a newsletter that will be sent to Section members monthly. Please contact either Steve or Dean if you are interested in becoming a member of this committee.

- **Identify Future Leadership**—I have formed a Leadership Task Force to convene for the purpose of looking at how leaders are presently identified within the Section and whether we could/should be doing anything more or differently to identify/cultivate new leaders. The Task Force members include Vincent J. Russo, Chair, and Michael Amoruso, Cora A. Alsante, Daniel G. Fish, Bernard A. Krooks and Kathryn Grant Madigan.

As my term as Chair drew near, many people approached me and asked, "Is there some way in particular that I can support the Section?" I will share with you my response:

- **Attend our Programs/Meetings**—Attending meetings provides perhaps the greatest forum to meet with your colleagues, discuss issues of interest and track trends within elder law. It is a tremendous way to network with others, learn what other practitioners are doing to help their clients and to learn tools that will help you to grow your practice. Your attendance at Section programs also helps finance important Section endeavors, such as Mitch Rabbino Decision-

Making Day and our ongoing lobbying efforts. The next opportunity to attend a meeting is at our 2004 Summer Meeting (Timothy Casserly, Program Chair), to be held at Mohegan Sun in Uncasville, CT, August 5–7. Our 2004 Fall Meeting (René H. Reixach, Program Chair) will be held in Rochester, NY, October 20–22. Our 2005 Annual Meeting (Valerie J. Bogart, Program Chair) will be held in New York City on January 25, 2005. Finally, our 2005 Advanced Institute (to be held downstate) will be held in April 2005 (on a date to be determined). You may also go to our Section Web site at www.nysba.org/elderlaw to learn of future program dates/times.

- **Join a Standing Committee**—There are over 25 committees within the Elder Law Section. Join one or more committees of interest to you. Stay on the cutting edge of developments as committees hold monthly conference calls as well as meet in person at least three times a year (during the Summer Meeting, the Fall Meeting, and the Annual Meeting).
- **Join a Special Committee/Task Force**—There are times when a standing committee does not exist to meet a need of the Section. When this happens, the Section Chair may appoint either a Special Committee or a Task Force to deal with an issue of importance. This happened last year when Joan Robert, Immediate Past Chair, appointed a Special Committee on Medicaid Legislation to oppose the restrictive Medicaid eligibility provisions contained in Governor Pataki's Budget Bill. The Section leadership welcomes input and participation on such Special Committees and Task Forces.

Before I close, I want to take this opportunity to express gratitude to a number of people for both past and future acts of kindness and generosity. First, I would like to say thanks to Joan Robert, Immediate Past Chair, from whom I learned a great deal during her term as Chair. She probably didn't know this, but I was watching her with a careful eye, taking notes as we went along! We owe Joan a great debt of gratitude for her service to this Section. In addition to Joan, our present slate of officers for the upcoming year consists of Daniel G. Fish, Chair-Elect; Lawrence E. Davidow, Vice-Chair; Ellen G. Makofsky, Secretary; Ami S. Longstreet, Treasurer; and David Pfalzgraf, who remains as our Financial Officer. Like so many before me, we have an extremely talented group of hard-working officers, many of whom I have had the pleasure of working with for several years. I'd also like to thank Lisa Bataille, our Section liaison, and Kathy Heider, from the Meetings Department at the New York State Bar Association, who have already demonstrated to me that without them, I am nothing.

Serving as Chair of a NYSBA Section is not possible without a strong support system, both personally and professionally. Many people have made and will continue to make sacrifices so that I can devote the time and attention that this position deserves. I would like to thank my wife, Robin, and my kids, Gavin, Jocelyn and Noah, for being so understanding up until now when the demands of the profession required a late night here or a weekend stint there. I know that I can continue to count on this support for the year that lies ahead, and for that I am grateful. It is also eminently clear to me that this day would not have come without the support of my law partners, particularly the mentoring and guidance that I have been fortunate to have received from my brother and law partner, Bernie Krooks. One need spend only a few minutes with Bernie to know that he is one of those rare individuals, overflowing with legal talent and creative ideas. I have been blessed to work with Bernie since 1991, and for that I am ever so grateful. Finally, I would like to thank my mother, Gladys Krooks, whom I have always thought of as one of the most delightful people I know and from whom I learned what it means to be a human being who conducts him/herself with compassion.

I would like to dedicate this upcoming year to two people that have had a profound impact on my life. One is my father, Joel R. Krooks, from whom I learned to never give up the fight and that we all have an infinite well of resources within us to survive almost anything—it is simply a matter of finding within you what is already there. And the other is my grandmother, Faye Krooks (whom we called "Nanny"), who until the day she died at the age of 93 was full of life (and opinions!), and whom I credit with teaching me the value, wisdom and keen insight which elderly people bring to our society.

I am looking forward to a very productive year and to seeing many of you at Mohegan Sun on August 5–7.

I wish you all the best.

Howard S. Krooks

NYSBA SUMMER 2004 | VOL. 14 | NO. 3

ELDER LAW NEWS

REGULAR COLUMNS

Elder Law: New York Has Substantial Influence

By Laury Adsit Gelardi

Did you know the practice of elder law has its very roots in New York? Did you know elder law is one of the fastest-growing areas of the law? For those of you who are new to the field or who don't practice elder law full-time, you may be remiss in knowing how elder law really developed into a practice area of its own.

In 1986, a group of thirty-five attorneys were brought together by Nancy Coleman, Director of the Commission of Legal Problems of the Elderly (now the Commission on Law and Aging) of the American Bar Association, to discuss their common interest in serving seniors. These thirty-five members included New York attorneys **Vincent Russo** and **Natalie Kaplan**, both private attorneys; **Bob Freedman** and **Dan Fish**, both legal services attorneys at Brookdale; and **John Regan**, a professor at Hofstra University**.** These visionaries were among the first lawyers to recognize that serving the elderly was an all-encompassing and different practice from all others. The phrase "elder law" had been coined and copyrighted by Michael Gilfix of Palo Alto, California. He graciously allowed this small group and, eventually, all practitioners to use this phrase when describing a practice that serves the elderly.

The group decided that "elder law" deserved to have its own national association. They were convinced that elder law was a practice of the future. As they developed this idea, one of the first issues was to determine whether or not to associate with the American Bar Association (ABA) or to start a national association from scratch. As it turned out, the ABA declined their request to become a section and the decision was made: the National Academy of Elder Law Attorneys (NAELA) was born. All of the New York members instantly became NAELA board members and began to shape the practice.

The original members of NAELA gathered at the National Conference on Law and Aging for a couple of years. The first Symposium on Elder Law was held in 1988 in Tucson, Arizona. Much to the surprise of the original thirty-five, over 100 attorneys showed up to attend the Symposium and to expand their law practices to include elder law. **Vincent Russo**, then NAELA Treasurer, accepted the first dues check for $100 and the Academy was off and running.

The Academy was the first to recognize that serving the elderly required a new skills set and a proficiency in a number of areas, and they set out to define the practice. Through the development and evolution of the first Elder Law Certification program, established by the National Elder Law Foundation, the practice was defined as including 27 areas:

A. Disability/Incapacity

1. Planning for Disability
2. Disability Benefit Applications and Appeals
3. Guardianship/Conservatorship (uncontested)
4. Social Security Disability Income

B. Estates and Probate

5. Decedent's Estate Administration
6. Estate Planning
7. Estate and Gift Tax Planning
8. Estate and Planning Matters (contested)

C. Tax

9. Disputed Tax Matters
10. Fiduciary Administration—Inter Vivos
11. Fiduciary Tax Administration
12. Establishment of Trusts

D. Entitlement Programs

13. Medicaid
14. Medicare
15. Veteran's Benefits
16. Social Security

E. Health Care

17. Health Care Decision-Making
18. Health Care Financing
19. Long Term Care Issues
20. Elder Abuse/Fraud Recovery Cases

21. State and Federal Home Equity Conversion
22. End-of-Life Issues

F. Miscellaneous Areas

23. Civil Commitment Issues
24. Age Discrimination in Housing
25. Age Discrimination in Employment
26. Personal Injury on Behalf of Older Persons
27. Retirement Benefits

There was now a recognized need to be proficient in advocating on behalf of the elderly with federal and state governments. As Congress modifies, expands and restricts the benefits available to the elderly, elder law attorneys are often left to analyze and interpret the changes and to explain their effects to Congress and clients.

State bar sections on elder law began to form in 1993. New York was one of the first states to recognize the need for a section, which very rapidly grew to a membership of 2,700. This was in response to the growing need of attorneys to educate themselves on the issues to continue serving their aging clients, the Baby Boomers. The need to be knowledgeable of health care, tax, estate and probate, disability/incapacity, public policy, and entitlements finally gave way to a widely recognized and sanctioned area of the law. The ABA finally developed a Committee on Elder Law in 1992 and the New York members formed a NAELA Chapter in 2004 to expressly advocate on behalf of the elderly with the state legislature.

So, how much of an impact did New York attorneys have on elder law? The list of national Presidents of the Academy from New York includes: **Vincent Russo**, **Dan Fish**, **Bernard Krooks**, and current President-Elect **Lawrence Davidow**. Many of these folks, plus **Howard Krooks**, have all served or are serving as Chair of the New York State Bar Association's Elder Law Section.

The state of New York has a great deal to be proud of and has been represented with integrity, drive and determination to develop an area of the law that is now respected and recognized as one of the fastest-growing areas of the law.

Laury Adsit Gelardi is Executive Director of the National Academy of Elder Law Attorneys.

The Future of Elder Law Practice

By Charles F. Robinson

"Estate planning" is a big term. The practice encompasses planning to avoid or minimize income and estate taxes (or "death taxes," as they are now known), documentation to provide for the orderly passing of assets between generations, financial planning, special needs planning for people with chronic illness or disability, business succession planning, and much more.

"Elder law" tends to deal with life's legal problems surrounding the aging process, from elder housing issues to special needs planning, chronic illness and its effect on client and family, and the legal and financial issues surrounding those illnesses. Elder law attorneys usually focus their planning on these complexities of life in addition to dealing with the many intricacies inherent in traditional estate planning. In other words, the line between elder law and estate planning is blurry, if there is a line at all.

How Did We Get Here?

In this discussion of the future and what may be happening to us next, my emphasis is on transactional (including estate planning and elder law) practice for middle-class clients, rather than the very wealthy or the very poor. Congress has redefined the middle class by raising the floor for estate tax planning consideration to multimillionaires and by making the nursing home Medicaid program available for those we would traditionally label as "middle class."

Something is happening. We feel uneasy. We feel tentative. We feel angry and frustrated. There's competition at every turn. Will the massive change we are going through continue? Can we return to the way it used to be?

When I started in law practice, lawyers drafted cheap wills with the expectation that profit would come from probate administration. Law practice functioned as a guild in those days. The bar had a monopoly on what the bar defined as legal services. As a classic guild, the bar determined

1. Who could be a member;
2. Standards for service quality;
3. Pricing; and
4. Quantity of service to be performed.

Lawyers were ethically bound to follow their local bars' minimum promulgated fee schedules, since pricing services either higher or lower could, more than occasionally, constitute an ethical violation.

Estates were subject to federal estate tax if they exceeded $60,000 in value. Trusts were almost always testamentary, and bank trust departments or lawyers, rarely family members, administered them.

Our guild power started to erode when title companies appeared on the scene and competed effectively against real estate lawyers, particularly in the residential real estate practice.

In 1965, Norman F. Dacey wrote *How to Avoid Probate*, a self-help book complete with perforated living trusts, wills, and related forms. Lawyers made cynical jokes about the book and suggested that the loss of estate business would eventually be replaced by litigation over the poorly drafted trusts. The first run of Dacey's book sold over 600,000 copies.

How to Avoid Probate was contested in court by the New York County Lawyer's Association and enjoined as the unlicensed practice of law (UPL). A strong dissenting opinion suggested that publishing a book is not the practice of law, no matter what the subject matter. When the case reached New York's highest court, the lower court's dissenting opinion was adopted unanimously as the appellate court's opinion.

A few lawyers, often working with financial planners, broke away from the traditional will practice and started preparing living trusts in volume. They charged significantly higher fees, preferring the "pay me now to avoid probate" approach as opposed to the "pay me later, assuming I outlive you and you don't outsmart me by avoiding probate" approach of the traditionalists.

Traditionalist lawyers continued with business as usual. I was one of those traditionalists, a young associate working for a traditionalist lawyer. We continued to crank out $25 wills (2/$35). We believed our will files would "mature" in due time and that our probate practice would make up for the loss-leader wills we prepared.

We were wrong. The anti-probate movement Dacey started continued to gain momentum until many considered "probate" a four-letter word to be avoided at all costs, literally. (We have all seen plenty of examples where a revocable trust became more unwieldy and expensive to administer than a probate administration.) Yet many of us kept doing our will practice and eventually added the living trust as an option that ultimately dominated what had been the will practice. As the living trust became more popular, we found ourselves in a price contest. Potential clients started calling our offices asking for price quotes on living trust preparation. When consumers call for price quotes, they believe they are buying commodity services.

The phone call comes in something like this:

> Hello, Charlie, this is Nate George from ABC CPA and Investments, P.A. I am sitting here with your long-time client Bob Bigbucks. Bob says you have helped him many times over the years. He is a big fan of yours. Our office has done a financial analysis and determined that Bob needs a Qualified Personal Residence Trust, an Irrevocable Life Insurance Trust, and a new QTIP/Credit Shelter Trust. We have allocated $500 for total attorney fees to draft these documents. We will understand if you decline the work at this price, but we have other lawyers who will draft the documents for Bob. He wanted to give you first shot at doing the work. By the way, the client is leaving for a long trip next Wednesday, so we will need everything prepared by Monday afternoon. Will you do it?

The only exclusivity lawyers have in the estate-planning world is in drafting the documents, the lowest perceived value of any part of the estate planning process. ("Don't you just push a button, fill in some names, and my will comes popping out of the word processor?") Financial planners, brokers, and accountants have taken over much of the planning process. I believe the non-lawyers on the estate planning "team" leave drafting to lawyers because lawyers will do the work for less than the cost for planners to do the work. Lawyers are left with a sophisticated, liability-ridden opportunity to be perceived as commodity service providers. Commodity goods and services are sold on the basis of price and service, not on value-added. Few lawyers can compete effectively on volume of service rendered.

Potential clients looking for value-added services will call to tell about their problem and need for a solution. Commodity shoppers will tell the office exactly what they want and ask for a fee quote.

In 1975, the U.S. Supreme Court made it clear that our guild was losing guild status when the court struck down minimum fee schedules. The bar could no longer control the price of legal services. A fellow by the name of Goldfarb worked for the Federal Trade Commission. He went to a significant number of Virginia lawyers allegedly looking for someone to represent him in the purchase of a home in Virginia. Each lawyer quoted the identical fee structure, so Goldfarb sued the State Bar of Virginia for antitrust violations and won his case.[1]

In 1977, the *Bates* case came along, allowing lawyers to advertise. If a lawyer can advertise services and the bar association can't hold members to a fee schedule, the only remaining guild powers are the bar exam and the authority to regulate ethical behavior.[2]

We must maintain our economic viability. In 1998, the American Bar Foundation published a study comparing the earnings of Chicago lawyers in 1995 to Chicago lawyers in 1975. Solo practitioners suffered a 30 percent loss of mean earnings during that time period and a 45 percent decline in median incomes.[3] If the Chicago experience reflects experience in the rest of the country, the status quo may not be an option.

What Are the Risks of "Business as Usual?"

I wrote an article titled "Stampede to Extinction" in which I predicted that 6 out of 10 lawyers in this country would be out of the practice unless we became more tuned in to client needs. What makes me think that many of us are not tuned in?

Start with the *pro se* movement. In Florida nearly 80 percent of marriage dissolutions are now handled without a lawyer on one side and more than one-third without a lawyer on either side. In some cases the couple cannot afford lawyer services, but in many cases the parties don't believe that a lawyer will be worth the cost. We now have the *pro se* Rules of Family Law Procedure. Many of these *pro se* cases were bread and butter to solo general practitioners 10 years ago or less. *Pro se* litigators are not limited to family law cases, so don't be shocked to see your

state adopt *pro se* rules of civil procedure in the near future.

I have been privileged to travel around the United States to speak on the future of law practice. I have been on panels with bar leaders and concerned practitioners, as well as state supreme court justices. There seems to be a near-consensus from the bench that we are in the middle of a huge relevance crisis in our civil justice system. Civil justice takes too long and costs too much.

A professional mediator recently suggested to me that alternate dispute resolution (ADR) is now the "real" dispute resolution, and litigation is the alternate. As long as either traditional or alternate dispute resolution continues, lawyers will be part of the process. What happens to lawyers if (or when) *pro se* or Internet negotiating systems become the dominant way civil disputes are resolved? As of 1999, there were over 45,000 *pro se* litigators in the Florida court system on any given day. The numbers are higher now. The *pro se* trend is nationwide and growing.

In 2003, the traditional trust and estate practice has atrophied to commodity level, with some exceptions. Some lawyers are finding valuable niche practices. Lawyers dealing with very-high-net-worth clients are now offering a set of concierge-type services that extend past traditional trust services. For example, for a client with a net worth over $25 million, the lawyer has taken on the responsibility of overseeing investment and tax advisors, along with the preparation of documents and other traditional legal advice.

So, what's next? We are past the point where the status quo is an option, much less a desirable option. Change is scary, but the risks inherent in the status quo are even scarier. So, now what do we do?

The Risks of Change and Nontraditional Practice

In the mid-1980s, I decided to focus my practice on the needs of middle-class elders. I learned that most did not place a lot of value on traditional estate planning. Death was not the typical concern. My clients were afraid of becoming incapacitated and losing control of their lives. They were, and still are, terrified at the prospect of losing their life savings in the event of an extended nursing home stay.

I went into elder law, before it had a name, to help folks deal with the complex issues of incapacity and impoverishment. Some of my colleagues tried to dissuade me from the new practice, suggesting that I couldn't make a living by teaching people how go broke effectively. As time went by, those same lawyers realized there was a better life to be had in the elder law practice of "doing well by doing good." Elder law became a recognized specialty.

Now elder law practice is maturing. Not only are more lawyers involved full- or part-time in elder law, but also financial planners, CPAs, and others are entering the field. Prices are dropping, government regulation is getting tougher, and, once again, there are no laurels to rest on. Some elder law attorneys are licensed to sell annuities, investments, long-term care insurance, and other products as part of the elder law practice. There is evidence that many consumers like the idea of one-stop shopping for these services (remember my imaginary phone call above). Others are setting up separate ancillary financial planning business entities or affiliating with businesses and sharing commission income.

UPL—A Dog that Won't Hunt

I believe any lawyer planning to practice estate planning or elder law for more than 10 years will not recognize today's practice when he or she looks back 10 years from now. In Florida, we are allowed to be involved in ancillary business activity under Rule 4-5.7 of the Rules Governing The Florida Bar. We are not allowed to practice in a multidisciplinary setting where fees are shared with non-lawyers or where non-lawyers have an ownership interest in the law firm. Any incursion by non-lawyers into law practice leads us to prosecution of those folks for UPL.

When the American Bar Association (ABA) and The Florida Bar each rejected multidisciplinary practice (MDP), bar leaders promised to aggressively pursue UPL. In order to punish UPL it is necessary to define law practice. In other words, what is "PL"? Courts have come up with hundreds of definitions of law practice but none that fits all situations.

Definition of Law Practice

The ABA formed a Task Force on the Model Definition of the Practice of Law. The task force came up with the following definition:

It is presumed law practice when

- Giving advice or counsel regarding legal rights and responsibilities,

- Selecting, drafting, or completing legal documents that affect legal rights of a person,
- Representing a person before an adjudicative body, including but not limited to, preparing of documents or conducting discovery, or
- Negotiating legal rights or responsibilities on behalf of a person.

The proposed definition made me want to sing "Happy Days Are Here Again" or lawyers are "Back in the Saddle Again." Then reality kicked in. The Justice Department and Federal Trade Commission weighed in with the following points:

1. The proposed definition would reduce competition and force consumers to pay higher prices for a smaller range of services.
2. The proposed definition would prohibit lay service providers from closing real estate loans.
3. The proposed definition would prohibit accountants, investment bankers, and insurance adjusters from advising clients about various laws.

The December 25, 2002, *St. Petersburg Times* quoted Hewin Pate, an Assistant U.S. Attorney General for Antitrust, as saying, "Those who would not [otherwise] pay for a lawyer would be forced to do so, and, traditionally, lawyers charge more than lay providers for such services. Without competition from non-lawyers, lawyers' fees are likely to increase. The proposed definition could prohibit Web sites and software makers from helping consumers draft their own documents."

Mary Ryan, then Chair of the ABA Committee on Delivery of Legal Services, provided the quote that we must all memorize and live by in the 21st century: "A lawyer is best defined as someone who provides the best services in a free market, not the only services in a protected market." Now say hallelujah! Actually, Mary Ryan's comment should be printed, framed and hung in a conspicuous place on the wall because it describes 21st century reality.

Be careful what you wish for. The State Bar of Utah decided to lobby for a legislative definition of law practice. The legislature eagerly complied with the following definition:

> (Law practice is defined as) . . . Appearing as an advocate in any criminal proceeding or before any court of record in this state in a representative capacity on behalf of another person.

However, under Utah's definition you can't claim to be a lawyer if you are not a lawyer by using "JD," "Esq.," "attorney," or "attorney-at-law" orally or in writing. Not much turf protection there. Note that the Utah definition leaves transactional lawyers subject to discipline and rules restricting competition such as ancillary business and multidisciplinary practice, but no hope on the unlicensed-practice-of-law front.

A July 29, 2003, story in *The London Times* was headlined "Battle Lines—Law Society looking extinction in the face." The Law Society is the equivalent of The Florida Bar for United Kingdom solicitors. The Tony Blair government wants to take self-regulatory powers away from the Law Society and make the government the solicitors' regulatory agency. Client complaints are up 50 percent in recent years. The Law Society has been slow to move to "one-stop shops" (MDP), in spite of government pressure to do so. Reserved practices (UPL equivalent) no longer include probate, as banks and building societies can now handle probate matters without lawyers.

I believe that when non-lawyers do their work competently, UPL will not come into play. A number of years ago, The Florida Bar UPL team went after actuaries for preparing deferred compensation plans. The Florida Supreme Court couldn't find public harm and allowed the practice to continue. Now that we know UPL is no protection for us, we should be able to compete openly since non-lawyers can compete openly with us, right? Wrong, at least in Florida. For instance, is it an ethical violation to advise an estate-planning client on the need for life insurance and then receive part or all of the commission from the sale? Is it possible for an attorney to offer independent advice and still profit if the client takes the advice? Florida Ethics Opinion 90-7 says I can advise my client that she needs life insurance and tell her I am licensed to sell insurance, or am affiliated with an agency that is one of her choices for the insurance, but it is unethical for me to tell her how much insurance she needs. Go figure.

The Professional Ethics Committee of The Florida Bar has grappled with a draft advisory opinion that has the potential to scuttle the utility of Rule 4-5.7, the Ancillary Business Rule. Our bar leadership, armed with a massive dose of nostalgia, is leading us headlong into the 1950s, a place where lawyers can no longer survive.

A Test to Help Decide Status Quo or Nontraditional Practice

Microsoft founder Bill Gates observes that we tend to overestimate the change that will take place over the next two years and underestimate the change that will take place over the next 10 years. Picture your practice as remaining status quo 10 to 15 years from now. Write a story or scenario describing your practice in 2015 as you would describe your practice today. In writing this scenario, tell how you were able to deal with some of the following possibilities without having to change:

1. Technology changes;
2. Self-help lawyering;
3. Multi-jurisdictional practice (MJP) "driver's license" approach;
4. Non-traditional legal service providers;
5. Internet;
6. How the courts work;
7. Profession's traditional arrogance in the face of change;
8. Public confidence in the profession;
9. Elimination of billable hours;
10. Bar-owned ADR centers;
11. Increased discipline;
12. MDP; or
13. Judicial determination that UPL violates Commerce Clause.

Now take a look at how you might change your practice and write a scenario to get a sense of what your new practice can become. Go through the same possibilities and any more you think possible. If the new scenario doesn't look a lot better than the status quo, consider more practice alternatives until you can draft a scenario that describes the way you prefer your personal and professional life to evolve over the years to come.

Major change is very tough for professionals who have been trained to look to the past (*stare decisis*) to predict the future, but those who won't change may be looking for different occupations in the years to come.

Alphabet Soup—Ancillary Business, MDP, and MJP

Ancillary business practice is defined in Florida Bar Rule 4-5.7 of the Florida Rules of Professional Conduct. Ancillary services are those that traditionally may be provided by lawyers but if provided by non-lawyers will not draw a successful UPL complaint. In other words, ancillary or law-related services are fair game for any provider in the marketplace.

Real estate closing and title insurance services provide a good example of ancillary services. In many parts of the country, independent title companies have replaced lawyers in residential and, in some cases, commercial contracts and in closings as well. Lawyers or law firms have opened separate title companies (ancillary businesses) in order to stay in the real estate closing business. The ancillary business must make it clear to customers that it is not providing legal advice and there is no confidentiality or attorney-client privilege.

An MDP is an entity that provides legal services as one but not all of its services and where lawyers and non-lawyers share ownership and fees. Another form of MDP is an arrangement where law firms and other service providers share a fee that covers services for all members. MDP is currently not allowed under Model Rule 5.4, which prohibits fee-sharing between a lawyer/law firm and a non-lawyer or forming a partnership with a non-lawyer if any of the entities' services include the practice of law. However, a number of states have changed their rules to allow limited MDP practice.

Ancillary business tends to favor large firms. It takes capital to open, staff, manage, and market a new business. Many solo and small-firm practitioners do not have the capital, the time, or the experience to manage their law practices very well, not to mention the additional complications of a separate business. MDP allows for alliances of several disciplines that share fees and responsibility, and provides a one-stop solution for many client problems. A debate on MDP and ancillary business is really beyond the scope of this article, however.

Solo and small law firms including estate-planning practitioners need to consider ancillary business arrangements, MDP, or other nontraditional practices now and for the foreseeable future. We certainly want to stay ethical in our practice; however, we also

need to remain responsive to the changing needs of our clients. The real question is, "What essential or important legal and non-legal services would benefit clients if offered by my firm or an ancillary business owned or controlled by my firm?"

Finding the Future Practice—Trends vs. Cycles

The dictionary definition of cycle is "an interval of time during which a sequence of a recurring succession of events or phenomena is completed." The word comes from the Latin *cyclus* meaning circle or wheel. Cycles repeat. If you wait for a cycle to come back around, you may not have to change significantly to be ready for it.

Trends, on the other hand, may not move away in a straight line, but they do drop you off at a place you have never been before. Therefore, part of our search for the future requires us to focus on trends and minimize change efforts regarding cycles. Let's take a look at some current issues through our trend vs. cycle viewer.

Estate Tax Changes—Trend or Cycle?

Will the estate tax be eliminated or the floor raised so high that estate tax will not be a motivating estate planning consideration? Will budget deficits cause reinstatement of the estate tax to a $1 million exemption equivalent? In other words, is the substantial elimination of estate tax a trend or a cycle?

If estate tax law changes turn out to be a cycle, estate planners will continue to look at traditional estate planning techniques to minimize or eliminate estate tax. You can-fine tune your family limited partnerships, QPRTS, CRATS, CRUTS, etc. If the elimination or massive reduction of the estate tax is a trend, you better look for massive change in your practice.

Jonathan Blattmachr commented that one must only look to Canada for guidance on what happens when estate tax is eliminated. When Canada eliminated estate tax 20 years ago, there was a rush of business to undo and redo estate plans for a year or two. After the rush, estate-planning practice dropped by 90 percent. Are you prepared to bet that the estate tax reduction or elimination is only a cycle? If it is a trend you may be back in the preparation of simple wills or trusts and other probate-avoiders. You may have 90 percent of your time with no work to do. If estate tax change is a trend, you must find a new niche in the estate-planning practice or find a practice that has high value from the clients' perspective. Perhaps you should look for some nontraditional services to enhance your practice.

MJP—Trend or Cycle?

Florida Rule 4-5.5(a) Unlicensed Practice of Law states that a "Lawyer shall not practice in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction." Such practice constitutes UPL. We are also forbidden to assist another in UPL. Isn't it ironic that we can get nailed for unlicensed practice but can't seem to enforce UPL on others not licensed at all to practice?

Lawyers have quietly followed clients around the world drafting documents and probably not considering that they may need licensure in the foreign jurisdiction. In our guild days, we always engaged local counsel to draft the estate plan or the shopping center lease in the other state. Today's expense-watching clients are not so ready to shell out extra attorney fees to satisfy our ethical requirements in this setting.

Of course, litigators have the ability to obtain permission to handle litigation matters by *pro hac vice* motion. There is no equivalent to this motion for transactional lawyers, so they rolled along for a long time as borders became smudged, if not erased.

Then came *Birbrower et al. v. Superior Court of Santa Clara County*.[4] A New York law firm was representing a California corporate client in a pre-litigation dispute. The case was settled before a *pro hac* motion was necessary, and the law firm sent its bill for the agreed fee of $1 million. The client refused to pay, saying that the New York firm was committing UPL in California and was, therefore, not entitled to its fee. The peripatetic law firm world was shocked when the California courts all the way to the California Supreme Court agreed with the client. The court did allow the law firm the right to come back in for *quantum meruit* fees that would not be part of the UPL.

Then-ABA President Martha Barnett appointed a commission to study MJP as a result of the *Birbrower* case. The MJP Commission found that the then-current rule (similar to Florida Rule 4-5.5) was widely ignored. Some entities advocated for state bar sovereignty on law practice (still undefined), and others, like the ABA Real Property, Probate, and Trust Law Section (ABA RPPTL), advocated open borders. The ABA RPPTL argument suggested that technology allows state law to be researched from anywhere and that every lawyer in every state is bound by Model

Rule 1.1. Rule 1.1 requires a lawyer to handle every matter competently. If a lawyer believes he or she has a sufficient grasp of the law of the foreign jurisdiction to handle a transactional matter competently, then he or she should be allowed to handle that matter.

Some state bars argued that their requirements to pass a bar exam for the laws of their states assured the public that all members of the state bar would handle a matter with more competence than a lawyer who is not a member of that particular state bar. The opponents of the argument that bar exam passage equals competence responded with the position that most lawyers are not at their most competent when they are new graduates who have recently taken the bar exam and have no experience as practicing lawyers.

The General Agreement on Trade in Services (GATS) includes reciprocal admission for all signatory countries. The United States is a GATS signer. Therefore, lawyers from many countries are probably in a position to practice law anywhere in the United States under GATS.

Twenty-six states now reciprocate bar membership. Florida will most likely be one of the last states to allow reciprocity, but what if MJP becomes such an overriding trend that we have no choice but reciprocity?

I was invited to participate in the work of the ABA Committee on the Future of the Legal Profession in writing future scenarios for the profession. The committee was a great cross-section of bar politicians and workers. As we studied the MJP issue we ended with consensus that MJP is here to stay and that within 10 to 15 years we will have a "driver's license" bar membership that is valid anywhere we work.

If the movement toward MJP is a cycle, we may be able to dismiss MJP as a priority matter and concentrate on other issues. If MJP is a trend, several questions come to mind.

1. What role will state and local bars have in an integrated MJP system?
2. How will bar associations stay or become relevant to member needs?
3. Will state bar associations take on a disciplinary role only? If so, how will out-of-state attorneys be treated under the disciplinary process? Will we have a national program handling lawyer discipline?
4. Will uniform laws become uniform without significant state differences trapping out-of-state lawyers?
5. If the debate about statutory change moves to the national level, what role will sections such as the Florida RPPTL have in influencing legislation?
6. Will state and local bar sections and committees be relevant to the practice?
7. Will state and local bar associations reinvent themselves to new, powerful, positive roles?
8. Will bar associations at all levels become trade associations actively promoting law practice and the role of lawyers in society?
9. Will the ABA have a new, powerful, relevant role in overseeing MJP?

The Big Question: Will the Legal Profession Reinvent Itself in Order to Provide Highly Valued 21st Century Services to 21st Century Clients?

Technology and the Changing Role of the Estate-Planning Lawyer—Trend or Cycle?

Information availability brings information literacy. Most of the 15th century world was illiterate and accepted the teachings of the church without question. Along came Gutenberg, who invented movable type (printing presses had been around for a long time, invented by the Chinese) in 1454, and the world was never the same. Martin Luther required a literate society in 1517 when he posted his Ninety-five Theses on the church door. His work was published and spread throughout Germany in a short time. Literacy brings new relationships.

As the Gutenberg press changed the relationship between the church and her followers, technology literacy is changing the world. The Internet is available to everyone and has changed the attorney-client relationship. Our 1966 unabridged dictionary defines a client as "one who places a matter in the hands of his attorney," not dissimilar to a parishioner's 15th century relationship to the church. The 2003 dictionary describes client as a "customer." We have moved from a superior/inferior setting to a peer relationship.

The Pareto principle is also known as the 80/20 rule. In law practice, before widespread use of the Internet, the client usually knew about 20 percent of what was needed to handle a legal matter. The lawyer had the advantage of understanding the other 80 percent of the knowledge necessary to accomplish the legal representation. With Internet research easily available and aided by law firm websites, including mine, my clients now come to see me with 80 percent of what they need to know in hand. It is significantly more challenging to provide value-added legal services with the mere 20 percent that is not well understood by clients.

Clients are doing their 1040 income tax returns online. A number of online services assist in drafting wills, trusts, deeds, and many other legal documents. Is the world becoming less complex? I don't think so. The question is, is the financial planner's phone-call scenario described above part of a trend, or is it a cycle? If it is a cycle we only need to hang on until the estate tax comes back, then go back to business as usual.

Richard Susskind is one of the world's leading experts on the use of information technology in law practice. In his first book, *The Future of Law: Facing the Challenges of Information Technology*, Susskind predicts that the legal profession will change beyond recognition. He believes there will be three main categories of transactional-type legal services:

1. Traditional services similar to those matters currently handled by transactional lawyers. Susskind believes traditional services will be high-end matters and will be handled by very large global law firms using extensive technology. His book was written in 1996. It is interesting to note that Clifford Chance, the world's largest law firm with nearly 4,000 lawyers, is practicing much as Susskind predicted.
2. Commoditized services using technology heavily but handled by law firms ready to bid for commoditized work on the basis of cost and service.
3. Latent services may be legal services handled on the Internet without the necessity of an attorney-client meeting or direct relationship. In this scenario, the consumer buys a packaged service and pays with a credit card. The consumer prints forms with a local printer, and the provider of latent legal services may never open a file on the matter.

Susskind's predictions come with some key questions that each of us must consider in light of our own practices and practice settings:

1. What are the likely developments in information technology over the next 10 years?
2. What are the possibilities for law practice in light of the information technology changes?
3. What is the future for lawyers in light of the developments in information technology, and what part is the World Wide Web likely to play in that future?

Susskind's second book is *Transforming the Law; Essays on Technology, Justice and the Legal Marketplace*, published in 2000. *Transforming the Law* is the first work I have found that ties together technology and future planning for lawyers and law firms. Susskind introduces the reader to what has come to be known as "The Susskind Grid." The horizontal axis for the grid has Technology on the left side, Information in the middle, and Knowledge on the far right side of the line. The vertical axis starts with Internal at the bottom, with External at the top.

The lower left quadrant deals with the internal use of technology, such as document management, practice management, human resource management, marketing databases, hardware, networks, and operating systems. This lower left grid is devoted to keeping basic systems running, risk management, and infrastructure. Most law firms I know devote their efforts exclusively to the lower left grid.

The lower right quadrant deals with internal efforts to move from information to knowledge. The lower right is the efficiency, productivity, and knowledge levering place. This is the quadrant for the ever-elusive brief and databank that we have dreamed of producing for as long as I can remember. The buzz phrase for law firms moving on this quadrant is "knowledge management." This is the place where you find Pro-Docs, Hot Docs, and other template-oriented developments.

The upper left quadrant is the home of external technology links. This quadrant is the place for new and improved ways of delivering improved service. Law firms making strategic efforts in the upper left quadrant will have client extranets that clients can access to see the status of matters and billing. Some law firms have set up deal rooms to facilitate negotiations on transactional matters. Strategic use of e-mail is at home in this quadrant.

The upper right quadrant is where Susskind believes much of the profession's future can be found. This quadrant makes use of "virtual attorney-client" relationships, online legal guidance systems and expert systems.

Most law firms in the 21st century make technology purchases grudgingly when some antiquated equipment breaks down and can't be replaced. If Susskind has identified a trend, surviving law firms must start to practice with all four quadrants in their technology strategy.

Susskind also sees basic change from the conventional ways clients find a lawyer. Traditionally, the client perceives a problem where legal help is needed. After the perception of the problem (Susskind calls this a "blatant trigger"), the client identifies a lawyer for a solution to that problem and receives consultative advice.

The future client is more informed and may act proactively or in response to a blatant trigger. The client will do research to determine the source or sources of guidance for the matter. The selection will then be an advisor, including a lawyer, or a choice of online service. The client will end up receiving one type or a combination of services, including traditional consultative advice, unbundled services, or perhaps exclusively online services.

Consider the implications if Susskind is even close to correct in his predictions. Will the attorney-client relationship change to Susskind's category of traditional services offered mainly by large firms to large clients only, or to commodity services offered on the basis of better, faster, cheaper services, or to latent services offered without direct client contact?

If Susskind's predictions come true, do you see significant impacts on your practice? Has the move from a producer-driven economy to a consumer-driven economy changed the attorney-client relationship?

Hamel and Prahalad in their book *Competing for the Future* suggest that great enterprises fail from an inability to escape the past and an inability to create the future. Are we at risk of failure, and do we have it in us to escape the past and create our future?

Stuart Forsyth, former executive director of the Arizona and California Bars, served as consultant to the ABA Futures Committee. Forsyth led the committee through the scenario planning method of finding the future. He suggested the following in his presentation on why we should study and worry about the future of our profession and our transactional specialties. As he said,

- No one can truly *predict* the future,
- But we can:
  - See different *possibilities* (alternative futures);
  - Pick the future we prefer;
  - Take actions designed to foster our preferred future; and
  - Seek to maximize our viability in the event of another future (not the one we prefer).

Leading the Profession to a Preferred Future

If we don't drive the vehicle to our future we will end up wherever others decide to take us. There are many accepted methodologies to do future planning—pick one and use it. Doing nothing will produce the worst results. Institutionalize future planning. We can create positives or default to negatives. I believe the window of self-choice for our profession is closing, and we must move quickly and continuously to determine our place in society. I hope we have it in us.

Endnotes

1. *Goldfarb v. State Bar of Virginia*, 421 U.S. 773 (1975).
2. *See Bates v. Arizona*, 433 U.S. 350 (1977).
3. Report of the American Bar Foundation, 1998, p. 19.
4. 949 P.2d 1 (Cal. 1998).

Charles F. Robinson is an elder law attorney in Clearwater, Florida. His websites are www.Charlie-Robinson.com and www.CharlieRobinsonFuturist.com

The Contributions of Minority Leader David A. Paterson to the New York State Senate Medicaid Task Force

Medicaid must be reformed, so that it can be saved. There is no ideological inconsistency between the goal of providing health coverage to the least fortunate and the goals of cost efficiency, accountability, and flexibility. New York's Medicaid program is inefficient, expensive, unimaginative, and inflexible. Thus, it cannot provide coverage for every New Yorker who qualifies for it.

There are three primary reasons for these proposed reforms: to provide high quality, cost-effective health care to every New Yorker who qualifies for it; to fiscally stabilize the state budget; and to relieve the intense financial pressure on New York's counties.

The logic of the market must be brought to bear on Medicaid—not to make profits but to maximize its efficiency and extend its reach. This is not an argument to cut Medicaid; it is a plan to make Medicaid resources stretch further, to serve more New Yorkers, and to cut down on waste, fraud, and abuse.

New York does not effectively marshal its Medicaid expenditures to leverage improved efficiency, quality, and cost effectiveness. New York should use its vast purchasing power to select its health care partners based on performance. It should not pay for poor results in health care, and it should buy health care services and prescription drugs based on quality as well as cost criteria. While providing Medicaid coverage to every qualified New Yorker, New York State must also use its considerable market power to improve the quality of Medicaid coverage at the same time.

New Yorkers face a serious fiscal crisis this year, with a $5 billion state budget deficit and counties declaring financial emergencies. Reforming Medicaid is a clear path toward solving New York's structural budget deficits and relieving the financial demands the counties bear.

The suggested federal and state Medicaid reforms contained within this report would save New York State an estimated $27.2 billion over the next five years. The state changes alone would save $3.2 billion over five years, and restructuring the local share will save New York's counties and localities $400 million in 2004-05 and at least $6.5 billion over five years.

Who Receives Medicaid

Some 3.4 million New Yorkers receive Medicaid benefits, 17% of the state's population. Half of the 3 million uninsured in New York State are eligible for, but do not participate in, public health insurance programs—including Medicaid.

"Medicaid must be reformed, so that it can be saved."

Demands on Medicaid come from clearly identifiable demographic groups. Most of New York's Medicaid resources are focused on the elderly and the disabled. These two groups comprise 31% of Medicaid recipients, but account for 72% of Medicaid expenditures.

What Medicaid Costs

New York's Medicaid program is the second-largest item in the state budget after public education, and is growing faster than any other major program in the state. In 2003-04, New York spent $13 billion on Medicaid, and New York's total Medicaid expenditures (federal, state, and local) were $41 billion, up 68% since 1995.

Local governments in New York pay far more Medicaid costs than in any other state. In 2003-04, local governments paid some 16% of New York's total Medicaid costs, a sum comprising 84% of total Medicaid contributions by all local governments nationally. This local New York burden has grown 57% over the past four years, from $4.2 billion in 1999-2000 to $6.6 billion in 2003-04.

Why Medicaid Costs Are Rising

Medicaid's rising cost reflects significant demographic changes (increasing numbers of aged or disabled New Yorkers) and increasing health care costs (prescription drugs). Increases in eligibility and expansion of covered services have not been significant drivers of cost in recent years.

The Federal Role in New York's Medicaid Crisis

The current federal Medicaid program disadvantages New York in a number of ways, and these issues can only be resolved at the federal level. The three most pressing issues are: 1) altering the federal formula for New York's Medicaid reimbursement, 2) modifying prescription drug coverage for low-income elderly under the new federal Medicare law, and 3) recovering state Medicaid expenditures on legal immigrants from the federal government.

Suggested Medicaid Reforms

1. Changing the Federal Matching Rate

The Bush administration should change the Medicaid reimbursement formula for federal matching funds, adjusting New York's reimbursement ratio to 57%. New York's current rate of 50% is the lowest in the nation. This modification reflects an analysis based on state poverty rates rather than per capita state income, as 11.5% of New York families live in poverty, 25% above the national average. Adjusting this reimbursement rate to 57% from 50% would provide New York with an additional $3 billion in federal funds, which would represent real progress toward reducing New York's Medicaid burden of $43 billion in 2004-05.

2. Instituting a State Cap on Local Medicaid Contributions

In addition to revising the federal financing of Medicaid, New York State needs to restructure the nonfederal financing of Medicaid. New York State's current financing arrangement places extraordinary burdens on localities, whose revenue systems are overwhelmed by the magnitude and growth of their Medicaid responsibilities.

Therefore, an immediate three-year cap on local Medicaid costs at the 2003 level of $6.6 billion is recommended while a separate bipartisan statewide Task Force studies a permanent solution. This will save the counties an estimated $400 million in 2004, and $6.5 billion over five years. It is clear that the counties and New York City require immediate fiscal relief while an equitable and permanent financing solution is found.

Options to be considered by the Task Force shall include but are not limited to:

- Eliminating each county's open-ended liability, and replacing it with a fixed cost. This could be done through capping the local share at the 2003-04 levels, or by charging localities a set amount per recipient.
- Enactment of a State Matching Assistance Percentage (SMAP), varying the local share paid by counties in relation to the county's poverty rate.
- Modifying the local share of costs associated with certain classes of Medicaid recipients (elderly, disabled).
- A full state takeover.

3. Prescription Drugs

Prescription drugs are the fastest-growing component of health care and represent the highest out-of-pocket cost for lower-income New Yorkers. In 2003-04, New York's federal, state, and local spending on pharmaceuticals was $3.7 billion, up 19% over the previous year's total of $3.1 billion. One quarter of New Yorkers have no prescription drug coverage, and another 25% have inadequate drug coverage.

New York should create a Preferred Drug List (PDL). This PDL must include stronger consumer protections than have been proposed by the Governor and the Senate Majority, and ultimate authority must reside with the prescribing medical professional. In this, New York ought to follow Oregon's successful PDL model.

New York should create a statewide bulk purchasing arrangement to obtain significant discounts from Medicaid pharmaceutical manufacturers. In light of the dearth of national leadership in lowering the costs of prescription drugs, and in order to leverage further manufacturer discounts, New York State should lead a multi-state effort to build a nationwide Medicaid prescription drug bulk purchasing arrangement. To this end, a statewide panel should be created to study, design, and implement such an arrangement and thereafter to negotiate multi-state cooperation.

Once New York implements bulk purchasing in conjunction with a PDL, it is estimated that the state will save $218 million annually, and potentially even more through a multi-state effort.

The Food and Drug Administration must immediately remove its prohibition on prescription drug importation, so that New York can immediately begin importing cheaper prescription drugs from Canada. New Yorkers are painfully aware of the huge prescription drug price discrepancy between our state and Canada. Canadian drug importation has been advocated at every level of U.S. government with Republican and Democratic support, from the U.S. House of Representatives to several state governors to New York City Mayor Michael Bloomberg.

4. Provide Health Coverage for Dual Eligibles Under Medicare, Not Medicaid

Approximately 527,000 New Yorkers are poor enough to qualify for state Medicaid, as well as elderly or disabled enough to qualify for federal Medicare. These "dual eligibles" will lose their Medicaid prescription drug coverage on January 1, 2006. New York will no longer be able to secure the 50% federal matching funds to provide any drugs to dual eligibles. New York State will now have to pay approximately $700 million to the federal government annually for federal reimbursements it will no longer receive.

As is current practice for the Medicaid program, all drugs approved by the Food and Drug Administration should be included on the list of drugs that must be covered by the private Medicare Part D plans. The "claw back" provision in the Medicare statute should be repealed, which would benefit New York State by approximately $700 million annually.

5. Persuade the Federal Government to Reimburse New York for Health Care Expenditures on Legal Immigrants

The 1996 Welfare Reform Act denied most forms of public assistance to the bulk of legal immigrants for five years or until they obtained citizenship, including access to public health care. However, the New York State Court of Appeals ruled in 2001 that withholding Medicaid from legal immigrants violated both the New York and the U.S. Constitutions. As a result, New York State now provides Medicaid coverage to legal immigrants at its own expense.

Governor Pataki should demand that the Bush administration and the Republican Congress repeal the federal restrictions that prohibit the use of federal funds to reimburse New York for money spent on health care services for legally present immigrants.

6. Long-Term Care

Long-term care (LTC) is one of the two most expensive segments of Medicaid expenditures (with prescription drugs). The elderly alone account for about 30% of New York's Medicaid spending, even though they represent only 13.5% of recipients. Furthermore, New York's over-60 population is slated to double, from 3.2 million today to 6.4 million in 2015. Thus, these issues will only become more pressing. Since 60% of all health dollars are spent in the last years of life, by not addressing this issue now, New York's fiscal position will only become more precarious as the population ages.

Currently, 20% of New York's senior citizens receive Medicaid. One-quarter of these recipients receive long-term care. Medicaid pays for more nursing home care in New York State (80%) than in any other state (the national average is 64%). New York has over 4% of seniors receiving Medicaid-funded home care, compared to only 0.3% in other comparable states.

Compared to the aforementioned statistic that 25% of Medicaid recipients receive long-term care, only 17% receive home care services. It is clear that New York should move toward a deinstitutionalization of long-term care. Incentives should be provided for people to stay at home, including reimbursement of visiting care costs and of in-home nursing services. New York should apply for federal waivers that allow Medicaid reimbursement for community care where it is now prohibited, even though community care has been demonstrated to be preferable for the individual and less expensive for the state.

Some estimates hold that if 10% of the current nursing home population were transferred to community alternatives, Medicaid expenditures would fall by $250 million in the first year alone. It is anticipated that the additional deinstitutionalization of nursing homes will have a positive impact on the health care industry—for while the location for long-term care may undergo significant change, New Yorkers will still need trained, dedicated health care workers. In fact, as more people remain at home, the need for experienced home care staff could be expected to increase. It must be ensured that the people who care for our aging relatives receive the education, salaries and benefits they deserve.

To complement this trend toward community care, tax incentives for private long-term care insurance are a step in the right direction; New York State government must point the way forward for its citizens by supporting measures that would make long-term care insurance more affordable and attractive to more New Yorkers.

While New York State does have a managed LTC program, Texas's managed LTC program—the Texas Star Plus program—achieved considerable success rapidly. As a Medicaid pilot project, it provides acute and long-term care services through a managed care system. At present it covers some 58,000 SSI and SSI-related aged and disabled Medicaid recipients, half of whom are dually eligible for both Medicare and Medicaid. Patients can choose among two HMOs or primary care management. This coordinated program offers day-activity and health services, and personal assistance. Two Medicaid waivers (1915b and 1915c) are needed in order to facilitate participation and to provide home and community-based services.

Begun in 1997, the Texas program offers the Medicaid-only patients unlimited prescriptions, adult dental care, an expanded selection of eyeglass frames, pest control, and assistance with meals. By expanding managed LTC services to all the elderly who qualified, Texas's effort coordinated care for this very high-risk group and shifted the emphasis from acute care to less-expensive managed care.

New York should create a statewide commission to determine whether a similar program in New York could yield similar results.

If 10% of the current nursing home population were transferred to community alternatives, New York's Medicaid expenditures could fall by $250 million in the first year alone.

More stringent LTC asset testing and asset transfers are unnecessarily punitive, and the new regime proposed by the Senate Medicaid Task Force and Governor Pataki will punish middle- and lower-income New Yorkers. Since women typically live longer than men, simple elimination of LTC spousal refusal will create a class of poverty-stricken widows, whose life savings could be wiped out within months. While insisting that people pay their fair share, reform must not punish surviving spouses for staying healthy and solvent; there is no need to add penury to loneliness.

7. Expand the Medicaid Recertification Period to Two Years

The Medicaid recertification period should be extended to two years. At present, New York State enrollees are annually required to fill out a detailed application, attaching various forms to document financial and legal eligibility. This process leads to many Medicaid recipients losing their health coverage for months while their recertification issues are resolved. In the interim, these people lack primary care, use emergency rooms for non-urgent care, and develop preventable illnesses that now require hospitalization. This process is an avoidable administrative burden, causes gaps in health coverage for many lower-income people, and, as a result, places a large and avoidable burden on New York State's acute care providers. Extending the recertification period to two years from one would reduce the administrative burden, maintain health coverage for the most vulnerable, and consequently cut costs by reducing the use of New York's acute care system.

There would be considerable cost savings associated with this change. It is estimated that New York State would save $15 million in administrative expenditures and $10 million in cost avoidance, as lower-income individuals would remain healthier and avoid acute care use—a total projected savings of $25 million annually.

8. Family Health Plus

The recent proposed cutbacks by the Senate Medicaid Task Force and Governor Pataki of Family Health Plus (FHP) are wrong for New York State. The FHP program is a striking success, and cuts would undermine the goal of covering as many New Yorkers as possible, without producing any real savings. In only two years, almost 300,000 low-income New Yorkers have received health coverage through FHP, lowering the percentage of uninsured low-income adults from 31% to 28%. The FHP program has emerged as one of the most successful efforts of New York's Medicaid program to extend health coverage to the less fortunate. One of the key goals of Medicaid reform is to strengthen constructive programs like FHP, not simply to cut them back.

Similarly, FHP copays for low-income patients take us in the wrong direction, as they risk making the program less effective by making access to health care less affordable, or even inducing some to avoid health care treatment at all.

9. Disease Management

Creating a Disease Management (DM) program reflecting the successful state models used in Indiana and Florida that cover major chronic illnesses will both cut costs and improve care. New York City is already running DM programs; it stands to reason that this program be extended statewide. Creating a statewide DM program would save an estimated $40 million annually.

10. Increased Use of Technology and Simplification

The administrative requirements for Medicaid patients should be significantly simplified, and information technology should be introduced to the Medicaid program, both to improve efficiency and to cut costs. Specifically, all Medicaid documents should be fully electronic by 2010, following the model of Arkansas's integrated electronic billing, eligibility verification, payment, data collection, and analysis system. Arkansas saved an estimated $30 million during the first 17 months that its new system was implemented.

11. Combating Medicaid Fraud and Abuse

Medicaid is a constant victim of fraud and abuse. Penalties for such fraud (including double-billing for health services or simply charging for services not rendered) should be made more stringent, and increased information technology (in record keeping, billing, and administration) will allow better supervision and examination of services actually performed.

12. A Task Force to Study and Implement Regional Improvements

A bipartisan statewide Task Force should be created to determine why Medicaid expenditures are lower in certain geographic regions of the state and to make recommendations on possible changes in practice or services. This Task Force would report to the legislature with recommendations every six months.

Elected to the New York State Senate in 1985 at the age of 31, State Senate Minority Leader David A. Paterson has emerged as a leading legislative advocate in the effort to secure social and economic justice for all New Yorkers. As a representative of the 30th State Senate District, which encompasses Harlem and the Upper West Side, Senator Paterson works closely with constituents of many different ethnic, economic, racial and religious backgrounds.

In November 2002, Senator Paterson was elected Senate Minority Leader and is currently the highest-ranking African-American elected official in New York State. As the new Senate Minority Leader, Senator Paterson will play an integral role in developing and advancing policy and budget initiatives on behalf of the Senate Democratic Conference.

Previous to being elected Senate Minority Leader, Senator Paterson served as Deputy Minority Leader of the New York State Senate. Appointed to that position in 1995, he was the first African-American ever chosen to serve in this capacity.

Senator Paterson also gained attention on a state and national level for his successful battle to preserve an important legacy of African-American history and culture in New York. The Senator led the fight to save the skeletal remains of Colonial-era African-Americans interred in lower Manhattan's 283-year-old African-American burial ground, when the site was threatened by the construction of a 36-story federal office tower. Although the building was constructed, this victorious community battle ultimately led to the site being designated as a National Historic Landmark.

In his district, Senator Paterson has devoted himself to enhancing the quality of life for his constituency by focusing on affordable housing, education, women's and children's concerns; environmental issues, historical and architectural preservation and improved race relations. In addition, Senator Paterson has worked to provide access to forums for input on important issues such as the effects of welfare reform and the need to improve the City's mass transit system.

On the legislative front, Senator Paterson has championed measures to crack down on bias-related crime, fight domestic violence and child sexual abuse, expand voting rights, protect consumers and ensure the quality of patient care and was proud to lead the debate in the Senate to pass the Sexual Orientation Non-Discrimination Act (SONDA), which became law in December 2002.

The Senator, who is legally blind, is also a leading advocate for the rights of the visually and physically challenged people of New York, and was elected to serve as a member of the American Foundation for the Blind. Senator Paterson is a board member of the Achilles Track Club and completed the New York City Marathon in 1999. A graduate of Columbia University and Hofstra Law School, Senator Paterson lives in Harlem with his wife and two children.

As Senate Minority Leader, Senator Paterson is an ex officio member of all Senate standing committees and the ranking minority member of the Rules Committee.

Book Review

Nursing Homes and Alternatives: What New York Families Need to Know

Reviewed by Bernard A. Krooks, CELA

Aging. It's one of the facts of life we can't avoid. The costs associated with aging can impact your clients from an emotional as well as a financial perspective. We have all heard stories similar to this: "My husband had a stroke and was rushed to the hospital. Fortunately, he's doing better now, but the hospital wants to discharge him to a nursing home. What do I do? How will I pay for the nursing home? If my husband subsequently returns home, how will I care for him? Can I obtain Medicaid benefits for my husband? Will we lose our home?"

> *"This book is a must-read for families dealing with long-term care issues as well as for attorneys and other advisors working with seniors."*

In this scenario, it was the husband who suffered a stroke. It could just as easily have been the wife, mother, father, aunt or uncle who suffers from some other physical or mental ailment. While the stories and the parties may change, the bottom line issue remains the same: How will your clients manage to provide for their loved one's long-term care needs?

Although clients may turn to you for your sage advice and counsel, many consumers are starving for information when confronted with a long-term care situation. In New York, there is an organization called Friends and Relatives of Institutionalized Aged (FRIA), which helps families deal with these tough issues. FRIA is an independent, non-profit organization, which has been in existence since 1976 serving as both a consumer advocate, and advisor for nursing home residents and their families.

When it comes to dealing with long-term care issues, FRIA is an invaluable resource. In its recently published book entitled *Nursing Homes and Alternatives: What New York Families Need to Know (8th Edition)*, FRIA shares its wealth of knowledge. Right from the beginning, the book sets forth FRIA's mission to assist families in their greatest time of crisis; dealing with a loved one's declining health. FRIA certainly succeeds in accomplishing its mission by not only delivering useful and practical information, but also delivering it in a caring and compassionate manner.

This book is a must-read for families dealing with long-term care issues as well as for attorneys and other advisors working with seniors. It addresses the full spectrum of issues facing families seeking care for a loved one, from home care to assisted living to nursing homes and everything in-between.

While the book starts off by recognizing that it is every person's wish to live independently in his own home for as long as possible, it acknowledges that due to the frailties of life, this may not always be possible. Typically, as a person's health declines, he may need some assistance with daily routines (e.g., dressing, cleaning, shopping, cooking, toileting, etc.). In addressing such a scenario, the book offers insights into the many issues related to home care, including the various types of home care services which are available and how to go about applying for Medicaid home care.

For those situations where the individual can no longer be safely maintained at home but is not yet at the point of requiring skilled nursing services, the book addresses adult homes, assisted living facilities and other so-called "middle ground" care options. The book not only provides an explanation of the various types of services available, but it also offers

For further information, please call the FRIA helpline at (212) 732-4455.

practical advice for dealing with quality-of-care issues in these types of settings.

A good portion of the book is devoted to nursing home care, and understandably so. Placing a loved one in a nursing home is a tough thing to do from an emotional, logistical and financial perspective. However, the book does an excellent job of covering everything from hospital discharge issues to the selection of the "right" nursing home to dealing with the nursing home admission process. In addition, the book offers alternatives for coping with the high costs of nursing home care, including how to go about establishing institutional Medicaid eligibility.

As the book winds to its conclusion, it offers a clear and concise explanation of the various types of advance directives available to individuals in New York, including Do Not Resuscitate Orders. There also is a discussion of the guardianship process for those individuals without proper advance directives.

At the end of the book, there are many useful appendices, including a listing of assisted living facilities and nursing homes in the metropolitan area, adult day care programs and certified home health agencies, and statewide agencies and advocacy groups. There are also helpful charts setting forth the eligibility requirements for various government programs as well as a checklist for selecting a nursing home.

In sum, *Nursing Homes and Alternatives: What New York Families Need to Know* is chock-full of information on the many issues facing today's seniors and their families. It is an excellent resource tool, which should be part of every elder law attorney's library.

Bernard A Krooks, Esq. is a founding partner of Littman Krooks LLP, with offices in New York City and White Plains. Mr. Krooks is past Chair of the Elder Law Section of the New York State Bar Association and past President of the National Academy of Elder Law Attorneys. He is certified as an elder law attorney by the National Elder Law Foundation.

When Is the Exception to Using an Exempt Special Needs Trust?

By Marvin Rachlin and Vincent J. Russo

Marvin Rachlin

Many elder law attorneys are presented with cases in which a Medicaid recipient is about to or has received an inheritance, personal injury or medical malpractice recovery.

It is incumbent on the elder law attorney to analyze each case before recommending whether or not to use a Special Needs Trust. The advisability of a Special Needs Trust is a critical decision because Special Needs Trusts require a payback to Medicaid upon the death of the beneficiary who is disabled.

Exempt Special Needs Trusts

A Valuable Tool—When Appropriate

When properly drafted, a Special Needs Trust can be a source of continuing benefit for an individual with disabilities. Funds that would otherwise have to be spent on medical care can be transferred to a Special Needs Trust with no penalty period. The trust can enhance and improve the life of the individual with disabilities, provided it doesn't duplicate or otherwise diminish Medicaid benefits.[1]

Proper drafting of the trustee's discretionary authority can make the difference between an exempt trust that provides additional benefits, or eliminates or reduces Medicaid payments to an individual with disabilities.

Factors to Be Considered

Age of Beneficiary. There was a recent Surrogate's Court order which, at the request of a guardian *ad litem*, authorized the creation of a Special Needs Trust for the benefit of a 72-year-old Medicaid beneficiary. The funding of a Special Needs Trust by or on behalf of an individual who is disabled and 65 or older is subject to a Medicaid penalty, even if the trust was created when the individual was under 65. Creating the trust authorized by the Surrogate in this case would make the Medicaid recipient ineligible for the institutional care she is receiving.

Vincent J. Russo

The authors cannot think of a circumstance when you would recommend the creation of or the funding of a Special Needs Trust for anyone over the age of 65. The funding would be subject to a Medicaid transfer penalty and the remaining assets would be subject to a payback. Not recommending a Special Needs Trust for anyone over the age of 65 is the only hard-and-fast rule you can rely on. All of the other criteria to be examined will be judgmental with several variables.

The age of a Medicaid recipient under 65 also requires consideration. Medicaid is entitled to recover payments made on behalf of a decedent limited to payments that were made within a 10-year period prior to their death and further limiting the recovery to Medicaid payments made when the individual was over the age of 55.[2]

If the Medicaid recipient of the inheritance or recovery is a young adult, the Medicaid estate claim limitations become extremely important. If we assume an individual who is disabled and 25 years of age, such individual could receive Medicaid benefits at any level of care, institutional or community, for the next 30 years before even beginning a period of liability for a possible estate recovery. It becomes necessary, therefore, when the beneficiary is a young adult, to compare the Medicaid transfer penalty consequences to the expansion of Medicaid's recovery rights through the use of a Special Needs Trust.

To make a proper comparison, the net amount available to the beneficiary must be known. If the amount is relatively small, then the possibility exists that a substantial portion of the trust will be used for the special needs of the individual, leaving little or nothing for a recovery by Medicaid. When it is a child who is inheriting or recovering funds, the use

of a Special Needs Trust may be the only alternative. The child may have many years to enjoy the benefits of the trust supplementation, leaving less for an eventual payback. Additionally, it is not likely that a court would authorize a gift or transfer of the infant's funds instead of funding an exempt Special Needs Trust.

Level of Care. The beneficiary's level of care relative to his or her age must also be considered. If community or home care is what is being received and the likelihood is that such care will continue into the foreseeable future, with little likelihood of nursing home care considering the current diagnosis, the possibility of a transfer without a corresponding Medicaid penalty period should be seriously considered. If the beneficiary is substantially younger than 55, the advantage of a transfer without a Special Needs Trust becomes more advantageous. The closer a beneficiary is to age 55, the smaller the advantage is of a transfer in lieu of a Special Needs Trust.

For beneficiaries receiving care in a nursing home, all transfers are subject to the Medicaid transfer penalty rules. Therefore, the benefit of a transfer versus a Special Needs Trust must consider the amount that can be saved if a transfer is made.

If New York State opts to adopt transfer penalties for home care, then your evaluation would have to follow the above guidelines for beneficiaries in nursing homes.

The Amount of the Recovery. The higher the amount of the net recovery to the beneficiary, the greater the likelihood of funds being left for an eventual payback and the longer the penalty period in the event of a transfer. The amount of recovery must be considered together with the age of the beneficiary and the level of care required.

Other than a situation involving an individual over the age of 65, all of the criteria outlined herein must be considered simultaneously.

Exempt Transfers. The decision between non-exempt Medicaid transfers and a Special Needs Trust will be considerably impacted by the availability of an appropriate exempt transfer. A transfer to a child who is disabled and in receipt of Medicaid and/or SSI might not be an appropriate recommendation assuming the availability of an appropriate exempt transfer. Even a beneficiary receiving nursing home care from Medicaid can consider an exempt transfer to avoid a later payback. The only exempt transfers of liquid assets authorized by Medicaid are transfers to or for the sole use and benefit of a disabled child of any age and the transfer to a spouse. Such transfer possibilities should be explored whenever a Special Needs Trust is being considered.

Life Expectancy of the Beneficiary. A Special Needs Trust is often less beneficial for an individual with a short life expectancy.

For individuals with a long life expectancy, the Special Needs Trust may be more attractive even if the individual is under the age of 55. Depending upon the level of capacity of the individual, the ability to have trust funds available to enhance life and supplement care may outweigh any desire to avoid the payback using transfers. There are virtually unlimited benefits that can be provided to a beneficiary who is disabled without duplicating, replacing or diminishing Medicaid benefits.

Medicaid Prior to Creation of Trust. It is necessary to be aware of this issue whenever a Special Needs Trust is being considered for a beneficiary who was in receipt of Medicaid benefits prior to the creation of the trust. For example, if the vast majority of the trust fund remains and if the beneficiary was on Medicaid prior to the establishment of the trust, there is a potential problem regarding the amount Medicaid is entitled to recover.

The language of OBRA 93 regarding the payback requirement provides that the ". . . State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State Plan under this title."[3]

The problem is that the statute refers to the total Medicaid paid to the beneficiary. It should be argued that any Medicaid benefits paid prior to the trust were based on the individual's eligibility. Such payments were not based on the exempt trust provisions of the statute and should not therefore be subject to the payback provisions of that statute. Medicaid should be limited to standard estate claim provisions as to any payment made prior to the trust. Medicaid may prefer a literal reading of the statute and try to recover all Medicaid paid during the beneficiary's lifetime. This issue will eventually have to be decided by the courts.

Rule of Halves Planning. In the absence of appropriate exempt transfers for a beneficiary in a nursing home, a penalty transfer using "Rule of Halves" planning must be considered. It is only after

determining how much can be saved as opposed to how much is needed for private pay during the penalty period that you can properly compare a transfer to a Special Needs Trust.

SSI Beneficiaries. The elder law attorney must be cognizant of the possibility of an exempt Special Needs Trust on behalf of a disabled beneficiary who is receiving Supplemental Security Income (SSI). When faced with SSI eligibility, the use of a Special Needs Trust is more often preferable to a Medicaid transfer recommendation. SSI calculates penalty periods by dividing the value of the transferred asset by the monthly grant. Thus, if there was an $800 monthly SSI grant, a transfer of only $10,000 would create a penalty period of 12.5 months. Any sizable inheritance or recovery would create the maximum SSI penalty period of 36 months. Giving up three years of SSI maintenance payments is usually an unacceptable approach in most cases. Whenever preparing a Special Needs Trust for SSI eligibility, it is important to remember not to duplicate the basic maintenance needs that the SSI grant covers.

It is also necessary that the trust does not authorize the payment of the beneficiary's burial expenses prior to the payback. SSA will not approve a Special Needs Trust unless the payback is the first expense of the trust upon the death of the beneficiary.

Beneficiaries Without Family. There are clients who have no spouse, children or natural objects of their bounty. When such clients in need of Medicaid are about to receive an inheritance or a recovery from a third-party action, there is often no benefit or reason to use a transfer of the assets in lieu of a Special Needs Trust. Such an individual often has no person to whom he or she would want to make a gift. Under such circumstances, it is preferable to set up the Special Needs Trust to enhance the life of the beneficiary.

Conclusion

There is no doubt that there exist a myriad of factors that may be appropriate to consider when deciding whether or not to recommend a Special Needs Trust. The factors raised in this article should always be considered, but by no means should they be the exclusive factors considered. Each case presents varying facts and circumstances that will affect your recommendations, and which should be considered.

The purpose of this article is to raise your awareness of the need to analyze each case prior to making a recommendation regarding a Special Needs Trust. Even when all of the factors are considered, there remains an intangible that must always be part of your deliberation.

A Special Needs Trust, properly drafted, can provide an enormous benefit for a beneficiary who is disabled. Life in any long-term care environment needs as much supplementation as can be provided without compromising Medicaid eligibility. Before making a final decision, consider the value that such a trust can add to the life of the beneficiary. Having done that, you will be able to make a meaningful recommendation to your client.

Endnotes

1. *See* Russo & Rachlin, New York Elder Law Practice §§ 15:19, 15:20 (Thompson-West 2003).
2. OBRA 93-PL103-66, 107 Stat. 312, Soc. Serv. Law § 104.b.
3. 42 U.S.C.A. § 1396p(d)(4)(B)(ii).

Marvin Rachlin is Of Counsel to the law firm of Vincent J. Russo & Associates, P.C., of Westbury, Islandia, Lido Beach, and Smithtown, New York since 1990. He received his LL.B. from the Brooklyn Law School, and was Chief Counsel to the Nassau County Department of Social Services for over 20 years. He is a respected and recognized authority on elder law, and co-author of *New York Elder Law Practice*, published by Westgroup. He was a member of the President's Council on Welfare Reform; a past member of the National Association of Counties, which was created by the Governors of the fifty states to work on national legislation involving problems dealing with welfare and Medicaid; and a Founding Member of the New York Welfare Attorneys Association. He drafted New York State legislation and regulations regarding Medicaid and served on the New York State Governor's Task Force for Child Welfare Reform.

Vincent J. Russo is the Managing Partner of the elder law firm of Vincent J. Russo & Associates, P.C., of Westbury, Islandia, Smithtown and Lido Beach, New York. He has a Masters of Law in Taxation, and is admitted to the New York, Massachusetts and Florida state Bars. He is the co-author of *New York Elder Law Practice*, published by West Publications, *When Someone Dies in New York* and *A Will Is Not Enough In New York*. Mr. Russo is a Founding Member and Past Chair of the Elder Law Section, New York State Bar Association and is currently Co-Chair of the Section's Special Committee on Medicaid Legislation. He is a Founding Member, Fellow and Past President of the National Academy of Elder Law Attorneys (NAELA) and Co-Founder of the Theresa Alessandra Russo Foundation which supports children with disabilities.

New York Case News

By Judith B. Raskin

Article 81

Son petitioned for appointment as Article 81 guardian for his mother to, *inter alia*, determine her place of abode. Daughter brought summary judgment motion to dismiss because her mother had executed durable power of attorney and health care proxy. Motion denied. *In re Julia C.*, N.Y.L.J., March 15, 2004, p. 20, col. 3 (County Ct., Nassau Co.).

Petitioner son sought appointment as Article 81 guardian for his mother. His sister brought a motion for summary judgment to dismiss the petition. She argued that on or about April 24, 1999, their mother executed a health care proxy appointing daughter as agent and son as substitute and a durable power of attorney appointing daughter and son as agents to act separately. Daughter argues that her mother's needs are being met with these documents, including the right to choose her place of abode. Son argues that daughter removed mother from the family after a hospitalization without the authority to do so. He wants his mother to live near him. He stated he never received a copy of the power of attorney.

The Supreme Court denied the summary judgment motion, finding that neither document gave authority to change the place of abode. A health care proxy, even if property executed, does not give the health care agent the authority to determine the place of abode and the AIP's durable power of attorney did not specifically address the power to change the place of abode.

Another hearing will be held to determine the AIP's incapacities and the limited powers needed, if any, to address her needs.

Respondent wife appealed from a decision permitting a guardian to bring a divorce proceeding on her husband's behalf. Reversed. *In re Wechsler*, 2473 (App. Div. 1st Dep't, 2004).

Petitioner was appointed Article 81 guardian for Irving Wechsler after he had been hospitalized following violent actions toward his wife. Pursuant to her authority to "maintain any civil judicial proceeding," the guardian brought a no fault action for divorce on behalf of her ward in a Pennsylvania court. Mrs. Wechsler, the respondent, moved for the Supreme Court to declare that the guardian exceeded her authority. The Supreme Court held that the guardian's authority was sufficiently broad to encompass the divorce proceeding.

The Appellate Division reversed, holding that divorce is a personal matter and could not be brought by the guardian, only by Mr. Wechsler if he had the capacity to bring the action himself. Although the guardian was authorized to bring "any" civil action, such authority has never included a divorce action, which the legislature has always treated separately.

Trusts

Attorneys for trustees argued that their fees as set forth in the trust's annual accounting were not reviewable by the court. The court reviewed and set the attorney fees. *In re Matthew Ryan F.*, N.Y.L.J., February 19, 2004, p. 20, col. 3 (Sup. Ct., Suffolk Co.).

Institutional co-trustees of a court-ordered supplemental needs trust submitted their annual accounting to the Court Examiner. The account included payment of fees to the attorneys for the trustees. Although no objections were raised, the court decided to review the attorney fees.

The attorneys argued that the terms of the trust leave payment of the attorney fees to the discretion of the trustees and such fees are not subject to review by the court.

The court held that it does have the authority to review legal fees, even when no objection is raised. The review is based upon: 1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; 2) the attorney's experience, ability and reputation; 3) the amount involved and the benefit flowing to the ward as a result of the attorney's services; 4) the fees awarded in similar cases; 5) the contingency or certainty of compensation; 6) the results obtained; and 7) the responsibility involved.

The court did set and reduce the attorney fees after finding that the trustees should have done a good part of the work that was handled by the attorneys, such as calls to DSS and other information gathering.

Petitioner sought to establish a supplemental needs trust for her ward with his social security disability payments. Granted. *In re Kennedy*, N.Y.L.J., April 21, 2004, p. 20, col. 1 (Surr. Ct., Nassau Co.).

John Kennedy was under age 65 and received $1,391 per month in Social Security Disability (SSD) payments. He lived in the community and received community-based Medical Assistance. The petitioner, Mr. Kennedy's guardian, sought to protect his ward's income in a court-ordered supplemental needs trust ((d)(4)(A), or payback trust) so that the full amount of Mr. Kennedy's income would be available for his needs.

The court approved the trust. The SSD payments provide families with basic protections in the face of disability, and the attorney general and the DSS had no objection.

The court cited two decisions in New York authorizing funding of supplemental needs trusts. *In re Hyatt*, N.Y.L.J., August 3, 1999, p. 26, col. 1, and *In re Diserio*, N.Y.L.J., May 15, 1996, p. 29, col. 3. It is stated in 96 ADM-8 that income received and then placed in a supplemental needs trust is not deemed available. The court noted that in *In re Ullman*, 184 Misc. 2d 7, 9, the court denied the placement of SSI income into a supplemental needs trust, deeming it against public policy because it is against the principles of the SSI program.

The court required that certain language be added to the trust such as the provision that the state must be reimbursed by the trust before any other payments for expenses are made.

Power of Attorney

In a proceeding pursuant to SCPA 2103, the administrator cta sought return to the estate of decedent's funds that were gifted pursuant to a durable power of attorney. Petition denied. *Salvation Army v. Ferrara*, N.Y.L.J., April 19, 2004, p. 20, col. 3 (Surr. Ct., Rockland Co.).

Administrator cta and sole beneficiary under decedent's will brought a proceeding against decedent's nephew, Dominick Ferrara, for return of $820,000 the nephew gifted to himself pursuant to a durable power of attorney dated January 25, 2000. The durable power of attorney specifically stated, "This Power of Attorney shall enable the Attorney in Fact to make gifts without limitation in amount to John Ferrara and/or Dominick Ferrara."

The administrator argued that the gifting was self-dealing and that the agent failed to rebut the presumption of invalidity. The respondent argued that the gifts were valid.

The Surrogate's Court held that the durable power of attorney was valid and the gifting authority was sufficient to validate the gifts by the nephew to himself.

Prior to the 1997 amendment to the General Obligations Law, section 5-1501, the agent had the obligation to provide clear and convincing evidence of his ability to make gifts to himself even where the durable power of attorney so stated. Effective January 1, 1997, the short-form power of attorney included gift-giving powers up to $10,000 to certain persons and provided that the agent could make additional gifts, including to himself if such language was clearly added to the document. The decedent executed his power of attorney after 1997 and the document contained language sufficient to permit the nephew to make the gifts to himself without the presumption of impropriety.

Judith B. Raskin is a member of the law firm of Raskin & Makofsky, a firm devoted to providing competent and caring legal services in the areas of elder law, trusts and estates, and estate administration.

Judy Raskin maintains membership in the National Academy of Elder Law Attorneys, Inc.; the New York State Bar Association, where she is a member of the Elder Law and Trusts and Estates Law Sections; and the Nassau County Bar Association, where she is a member of the Elder Law, Social Services and Health Advocacy Committee, the Surrogate's Trusts and Estates Committee and the Tax Committee.

Ms. Raskin shares her knowledge with community groups and professional organizations. She has appeared on radio and television and served as a workshop leader and lecturer for the Elder Law Section of the New York State Bar Association as well as for numerous other professional and community groups. Ms. Raskin writes a regular column for the *Elder Law Attorney*, the newsletter of the Elder Law Section of the New York State Bar Association, and is a member of the Legal Committee of the Alzheimer's Association, Long Island Chapter. She is past president of Gerontology Professionals of Long Island, Nassau Chapter.

Legislative News

By Howard S. Krooks and Steven H. Stern

Howard S. Krooks

Spousal Support

As elder law attorneys, one of the greatest challenges in our practices is to assist our community spouse clients in maintaining a sufficient monthly income in order to remain in the community. When a spouse is institutionalized in a nursing home and receiving Medicaid assistance, current Social Services Law section 366-c provides that a community spouse can attempt to seek an increase of his or her minimum monthly income allowance by either appealing at a fair hearing, or by going to Family Court for an order of support. (Social Services Law section 366-c(2)(g); Family Court Act section 412.)

However, in order to obtain the increase in support at a fair hearing, the community spouse must meet the difficult burden of proving "exceptional circumstances" over which "he or she has no control." (Social Services Law section 366-c(8)(b); *Schacner v. Perales*, 85 N.Y.2d 316, 325, 624 N.Y.S.2d 558, 562 (1995).) The New York State Court of Appeals in *Gomprecht v. Sabol*, 86 N.Y.2d 47, 629 N.Y.S.2d 190 (1995) held that the same restrictive fair hearing standard must be applied at court-ordered support hearings. Until the *Gomprecht* decision, the New York courts, in a long line of decisions, had found that Family Court judges had discretion to award support to the community spouse upon a showing of need based on his or her personal circumstances. The effect of the *Gomprecht* court's decision in restricting Family Court judges to the "exceptional circumstances" test is to make it impossible in a small, but important number of cases for judges to make a fair and appropriate decision in light of the real needs of the community spouse.

Legislation has been introduced in the New York State Assembly to amend the Social Services Law, in relation to permitting greater support awards than under the existing standard used in determining community spouse monthly income allowance. This new procedure would return discretion to Family Court judges in making determinations as to orders of support for community spouses. In support of the proposal, the Assembly's justification for the legislation states that the *Gomprecht* ruling ignores the intent of Congress behind the "spousal impoverishment" amendments of 1988. Further, the report provides, "these amendments clearly state that the court support provisions of the federal law were intended to permit state courts to take account of the 'special circumstances' affecting a particular community spouse and to go beyond the rules to be applied at a fair hearing. (House Report No. 100-105 (II) on H.R. 2470, 1998 U.S. Code Cong. & Admn. News 857, 895.)" The bill summary of the legislation provides a review of the facts of the *Gomprecht* case and states that they do not reflect the circumstances of most community spouses who are in need of financial support to live a modest lifestyle.

Steven H. Stern

Real Estate Tax Relief for Seniors

Legislation has been introduced in the New York State Assembly (A.03531), which would provide that all monies spent for the health care expenses of elderly owners of real property shall be excludible from income for purposes of determining eligibility for certain real property tax exemptions. Expenditures for health insurance premiums and expenses related to care, treatment, maintenance and nursing services in nursing homes and health-related care and services in intermediate care facilities are included in the proposal's definition of health care expenses.

According to the Assembly's bill summary, this legislation would apply to those monies used to pay for all health care expenses by the owners of real property and would be excluded when determining their income for the purpose of receiving a 50 percent reduction in their property tax. This would include expenses for nursing homes, nursing services, hospitals, doctors fees and other services and supplies necessary to maintain or correct one's health. It would also include money spent on health insurance.

As justification for the bill, the bill summary acknowledges that the real property tax is a great burden on all elderly persons. It hits especially hard on those who have high medical costs. While they may have sufficient income to pay their property taxes, their real income is greatly reduced when they have to pay for excessive medical costs. This bill would provide some relief by exempting from income those monies used for these high medical costs.

Howard S. Krooks is a partner in the law firm of Littman Krooks LLP, with offices in New York City and White Plains. Mr. Krooks is certified as an elder law attorney by the National Elder Law Foundation and is Chair-Elect of the Elder Law Section of the New York State Bar Association. Mr. Krooks co-authored a chapter ("Creative Advocacy in Guardianship Settings: Medicaid and Estate Planning, including Transfer of Assets, Supplemental Needs Trusts and Protection of Disabled Family Members") included in *Guardianship Practice in New York State*, a book published by the New York State Bar Association. Mr. Krooks has lectured frequently on a variety of elder law topics for the National Academy of Elder Law Attorneys, the National Guardianship Association and the New York State Bar Association. In addition, Mr. Krooks has served as an instructor for the Certified Guardian & Court Evaluator Training: Article 81 of the Mental Hygiene Law Program sponsored by the Association of the Bar of the City of New York.

Steven H. Stern is a partner in the law firm of Davidow, Davidow, Siegel and Stern, LLP, with offices in Islandia and Melville, Long Island. Founded in 1913, the firm concentrates solely in the practice areas of elder law, business and estate planning. Mr. Stern is a member of the National Academy of Elder Law Attorneys and is the current Co-Chairman of the Suffolk County Bar Association's Elder Law Committee. He also serves as a member of the Suffolk County Elder Abuse Task Force's Consultation Team. With a strong commitment to educating the local senior community, he is a frequent speaker and published author and also hosts "Seniors Turn to Stern," a radio program on WLUX dedicated to the interests of seniors and their families.

Fair Hearing News

By Ellice Fatoullah and René Reixach

We actively solicit receipt of your Fair Hearing decisions. Please share your experiences with the rest of the Elder Law Section and send your Fair Hearing decisions to either Ellice Fatoullah, Esq., at Fatoullah Associates, Two Park Avenue, New York, New York 10016 or René H. Reixach, Esq., at Woods Oviatt Gilman LLP, 700 Crossroads Building, 2 State Street, Rochester, New York 14614. We will publish synopses of as many relevant Fair Hearing decisions as we receive and as is practicable.

In re the Appeal of M.O.

Holding

Ellice Fatoullah

The Appellant's monthly spenddown for Medical Assistance should have been adjusted downward by the amount he placed each month into a pooled Supplemental Needs Trust established by a New York not-for-profit corporation with which the Appellant had entered into a joinder agreement.

Facts

The Appellant is age 67 and resides in the community. The Appellant received gross monthly Social Security benefits of $1,078.70 per month in 2003, and that year his Medicare Part B premium deducted from his Social Security benefit was $58.70.

In 2002, NYSARC, Inc., a New York not-for-profit corporation, established the NYSARC, Inc. Community Trust II, a Supplemental Needs Trust. The trust agreement provides that the trust shall be effective as to any beneficiary upon execution of a joinder agreement, and on April 23, 2003, the Appellant executed a joinder agreement indicating initial funding of $358.00.

By notice dated June 11, 2003, the Agency determined to accept the Appellant's Medical Assistance application subject to a monthly spenddown of $358.01, effective April 2003. The Agency computed the Appellant's gross monthly income to be $1,078.71, consisting of his Social Security benefit and $0.01 of interest income. It deducted the $20.00 monthly unearned income disregard and the $58.70 Medicare Part B premium, resulting in net monthly unearned income and total net income of $1,000.01. From that it deducted the monthly Medical Assistance standard of need of $642.00, resulting in Available Monthly Income (Excess Income)(Surplus) of $358.01. On July 18, 2003, the Appellant requested a Fair Hearing to review the Agency's determination.

Applicable Law

René H. Reixach

Administrative Directive 95 ADM-17, dated October 6, 1995, advises that the social services district may offer a choice to certain Medicaid applicants for a determination of eligibility for full Medicaid coverage (which includes nursing facility services) or a determination of eligibility for community coverage (which includes all Medicaid-covered services except nursing facility services). The former includes an examination of resources during the look-back period, while the latter determination only is based upon current income and resources. Individuals applying for, or in receipt of, nursing facility or waivered services can not be offered this option and must have a full review of resources made to determine whether a prohibited transfer has been made during the look-back period.

Section 366.5(d) of the Social Services Law and section 360-4.4(c)(2) of Title 18 of the New York Compilation of Codes, Rules and Regulations (N.Y.C.R.R., referred to herein as "the Regulations") govern transfers of assets made by an applicant or recipient or his or her spouse on or after August 11, 1993. Generally, in determining the Medicaid eligibility of a person receiving nursing facility services or as a recipient of care, services, or supplies at home pursuant to a waiver under section 1915(c) of the Social Security Act, any transfer of assets for less than fair market value made by the person or his or her spouse within or after the "look-back period" will render the person ineligible for nursing facility services for a period equal to the uncompensated value of the assets transferred divided by the average cost of nursing facility services in the region.

A person who is 65 years of age or older, blind or disabled, who is not in receipt of public assistance and has income or resources which exceed the stan-

dards of the Supplemental Security Income (SSI) program, but who otherwise is eligible for SSI, may be eligible for Medicaid, provided that such person meets certain financial and other eligibility requirements under the Medicaid program. (Social Services Law § 366.1(a)(5).)

To determine eligibility, an applicant's or recipient's net income must be calculated, and resources are compared to the applicable resource level. Net income is derived from gross income by deducting exempt income and allowable deductions. The result—net income—is compared to the statutory "standard of need" set forth in Social Services Law § 366.2(a)(7) and 18 N.Y.C.R.R. subpart 360-4. If an applicant's or recipient's net income is less than or equal to the applicable monthly standard of need, and resources are less than or equal to the applicable standard, full Medicaid coverage is available.

The amount by which net income exceeds the standard of need is considered "excess income." If the applicant or recipient has any excess income, he/she must incur bills for medical care and services equal to or greater than that excess income to become eligible for Medicaid. In such instances Medicaid coverage may be available for the medical costs which are greater than the excess income.

Regulations at 18 N.Y.C.R.R. 360-4.6 provide for income disregards for applicants and recipients who are 65 years of age or older, certified blind or certified disabled. These disregards include the first $20 per month of any unearned income and health insurance premiums. Administrative Directive 87 ADM-4 provides detailed instructions regarding the appropriate application of medical bills to offset excess income so that an individual can become eligible for Medicaid. This offsetting process is called "spenddown."

Local social services districts now provide a "Pay-In" program under Social Services Law § 366.2(b)(3) under which Medicaid recipients having excess income simply may remit the amount of the excess to the local district each month and receive an uninterrupted authorization for full coverage for all necessary medical services by participating providers.

Section 360-2.4(c) of the Regulations provides that an initial authorization for Medicaid will be made effective back to the first day of the first month for which eligibility is established. A retroactive authorization may be issued for medical expenses incurred during the three-month period preceding the month of application for Medicaid, if the applicant was eligible for Medicaid in the month such care or services were received.

The New York State Estates Powers and Trusts Law, section 7-1.12, sets out the requirements for the execution of a Supplemental Needs Trust. That is a discretionary trust established for the benefit of a person with a severe and chronic or persistent disability (the "beneficiary") which conforms to all of the criteria set forth in the statute, including the intent to supplement government benefits or assistance for which the beneficiary otherwise may be eligible or which the beneficiary may be receiving.

Social Services Law § 366.2(b)(2)(iii)(B) provides in part that notwithstanding the provisions of clauses (i) and (ii) of this subparagraph, in the case of an applicant or recipient who is disabled as defined in the Social Security Act, the department must not consider as available income or resources the corpus or income of the following trusts which comply with the provisions of the regulations authorized by clause (iv) of this subparagraph: A trust containing the assets of such a disabled individual established and managed by a non-profit association which maintains separate accounts for the benefit of disabled individuals, but for the purposes of investment and management of trust funds, pools the accounts, provided that accounts in the trust funds are established solely for the benefit of individuals who are disabled as defined in the Social Security Act by such disabled individual, a parent, grandparent, legal guardian, or court of competent jurisdiction, and to the extent that amounts remaining in the individual's account are not retained by the trust upon the death of the individual, the state will receive all such remaining amounts up to the total value of all Medicaid paid on behalf of such individual. Section 360-4.5(b)(5) of the Regulations provides the same.

Administrative Directive 96 ADM-8, dated March 29, 1996, provides that exception trusts are trusts that are required to be disregarded as available income and resources for purposes of determining MA eligibility pursuant to Social Services Law § 366.2(b)(2)(iii) and section 360-4.5(b)(5) of the Regulations. A revision, dated September 23, 1997, to Administrative Directive 96 ADM-8, provides that while most exception trusts are created using the individual's resources, some may be created using the individual's income, either solely or in conjunction with resources. Income diverted directly to a trust or income received by an individual and then placed into a trust is not counted as income to the individual for Medicaid eligibility purposes. Verification that the income was placed into the trust is required. In order to eliminate the need to verify this on a monthly basis, it is recommended that the recipient be advised to divert the income directly to the exception trust.

The Administrative Directive also provides that there are two types of exception trusts, one created for the benefit of a disabled person under age 65, and the other is a pooled trust created for the benefit of a disabled person of any age. The pooled trust will be disregarded for MA purposes regardless of the age of the individual when the pooled trust account is established, or when assets are added to the pooled trust account; however, there is no exception to the transfer rules for transfers of assets to trusts after the individual becomes 65 years of age.

Discussion

The record established that the Appellant, age 67, is disabled and has been in receipt of Social Security benefits of $1,078.70 monthly from which Medicare premiums are being deducted. The record established that the Appellant applied for community coverage Medicaid on or about May 2003, and that the Agency accepted the application effective April 2003, subject to a monthly spenddown of $358.01, which was calculated including the Social Security benefits as well as monthly interest income of $0.01.

The Appellant's representative contended that because the Appellant has been making deposits to a pooled trust of some of his income, in an amount equal to the spenddown, that portion of his income is not countable income in determining available income for Medicaid entitlement. The Appellant's representative contended that he previously had submitted to the Agency copies of the NYSARC trust agreement, the joinder agreement executed by the Appellant and NYSARC, with the Appellant's application, as well as verification of deposits to the trust. The Appellant's representative submitted those items at the hearing as well as some evidence of having provided them previously to the Agency.

The Agency did not contend that the pooled trust did not comport with legal requirements for an exception trust. The Agency contended that the Appellant's deposits to the trust would be subject to transfer of assets penalties, but as the Appellant had applied only for community coverage, was accepted for such coverage, and is not presently applying for or in receipt of nursing facility services or waivered services, the transfer rules do not presently apply.

The Agency also contended that the Appellant's deposits to the trust also must be considered income for the purposes of computing his income available for contribution to his care and any transfer of surplus income to the pooled trust must continue to be budgeted. However, as a result of a federal clarification, the Department added language to 96 ADM-8 by means of an errata message dated September 23, 1997, referring to "exception trusts" which include pooled trusts. Districts were advised that income diverted directly to a trust or income received by an individual and then placed into a trust is not counted as income to the individual for Medicaid eligibility purposes. Since income received and promptly transferred to an exception trust is not counted as income for eligibility purposes, it cannot be the basis for a spenddown liability.

The record established that the Agency improperly included deposits to the NYSARC pooled trust in calculating the Appellant's countable income in excess of the exemption level. The record does not support the Agency's determination.

Fair Hearing Decision

The Agency's determination that the Appellant has excess income of $358.01 per month which he must "spend-down" in order to obtain Medicaid coverage was not correct and is reversed. The Agency is directed to redetermine the Appellant's Medicaid income eligibility, effective April 2003, and is directed to exempt monthly income deposited by the Appellant into the NYSARC pooled trust, subject to verification to the Agency by the Appellant of monthly deposits. The Agency is directed to notify the Appellant and his representative in writing of its determination and to restore any lost benefits to the Appellant retroactive to April 2003.

Editors' Comment

In this Fair Hearing, the Agency had contended that even if income had to be disregarded in determining eligibility because it had been placed into a Supplemental Needs Trust, the Agency nonetheless could then count that income in determining the spenddown, thus negating the purpose of putting it into the trust in the first place. This Decision after Fair Hearing rejects that argument where the income is placed into a pooled trust, just as a prior Decision after Fair Hearing, *In re G.G.*, Fair Hearing no. 3660793L, had rejected the same argument when income was placed into a Supplemental Needs Trust established just for one individual with no charitable trustee or remainder beneficiary. This result clearly is required by federal law. Section 1396p(d)(1) of 42 U.S.C. provides that assets placed into any type of Supplemental Needs Trust will be disregarded both in determining eligibility and also in determining amount of benefits. Likewise, Regulations 360-4.1(b)(iv) and 360-4.8(a)(l) provide that an applicant is eligible for full Medicaid coverage if his or her net available income does not exceed the income standard.

The Department of Health has been consistent in encouraging the use of income Supplemental Needs

Trusts since it settled federal court litigation on that issue and issued its September 23, 1997 amendment to Administrative Directive 96 ADM-8 cited in this Decision. Likewise, it has consented to the establishment of Supplemental Needs Trusts for this purpose in at least two court cases, *see, e.g.*, *In re Kennedy*, 2004 N.Y. Misc. LEXIS 290 (Surr. Ct., Nassau Co., April 6, 2004).

This Decision also is correct on the transfer of assets issue raised by the Agency. The Decision rejected the Agency's argument that each deposit of income into the trust would result in a transfer of assets penalty. The Appellant was receiving community Medicaid, as to which no transfer of assets penalty applies. The same result would apply if the Appellant had been under age 65 and had funded an individual Supplemental Needs Trust. Both 42 U.S.C. § 1396p(c)(2)(B)(iv) and Social Services Law § 366.5(d)(3)(ii)(D) provide that there is an exception to the transfer of assets penalty if the assets are placed into that type of Supplemental Needs Trust. There is not such an exception, however, if assets are transferred into a pooled Supplemental Needs Trust, so the Agency would have had good grounds if the Appellant had sought to have income placed into a pooled Supplemental Needs Trust disregarded in determining eligibility for nursing facility or waivered services.

The Appellant at this Fair Hearing was represented by **Aytan Bellin, Esq.**, of New York City.

Ellice Fatoullah is the principal of Fatoullah Associates, with offices in New York City and New Canaan, CT. She is Chair of the Litigation Committee of the New York State Bar Association's Elder Law Section, a Fellow of the National Academy of Elder Law Attorneys, on the Executive Committee of the Elder Law Section of the Connecticut Bar Association, and a Board Member of FRIA, a New York City advocacy group monitoring quality-of-care issues in nursing homes. Ms. Fatoullah was the founding Chair of the Elder Law Committee of the New York County Bar Association, founding Chair of the Public Policy Committee to the Alzheimer's Association - NYC Chapter, and a member of its board for seven years. In addition, Ms. Fatoullah was appointed to serve on the New York State Task Force on Long-Term Care Financing, an advisory group created by Governor Pataki and the New York State legislature to study long-term care reform. She has taught Health Law at both Columbia and New York University Schools of Law, and litigation skills at Harvard Law School. She writes and lectures regularly on issues of concern to the elderly and the disabled. In 2002, the New York State Bar Association's Elder Law Section awarded her their first "Outstanding Practitioner Award". . ."in recognition of her dedication and achievements in the practice of Elder law."

René H. Reixach is an attorney in the law firm of Woods Oviatt Gilman LLP, where he is a member of the firm's Health Care Law practice group and responsible for handling all health care issues. He is Chair of the Committee on Insurance for the Elderly of the New York State Bar Association's Elder Law Section. Prior to joining Woods Oviatt, Mr. Reixach was the Executive Director of the Finger Lakes Health Systems Agency. Mr. Reixach authors a monthly health column in the *Rochester Business Journal* and has written for other professional, trade and business publications. He has lectured frequently on health care topics. Mr. Reixach has been an Adjunct Assistant Professor in the Department of Health Science at SUNY Brockport. He also appeared as an expert witness on Medicaid eligibility for the New York State Supreme Court. Mr. Reixach also has served on many advisory committees, including the New York State Department of Health Certificate of Need Reform Advisory Committee and the Community Coalition for Long Term Care. Among Mr. Reixach's civic and charitable involvements are serving as a Board Member and President of the Foundation of the Monroe County Bar, President of the Greater Upstate Law Project, and a Board Member of the Yale Alumni Corporation of Rochester.

Elder Care News

Accepting the Challenge

By Barbara Wolford

I recently completed the Long Island Alzheimer's Association's professional caregivers certification program, "Accepting the Challenge: Providing the Best Care for People with Dementia." This four-part module was designed to provide the participant with facts about dementia and the progressive deterioration of the brain in those diagnosed with Alzheimer's disease (AD). The focus of the series was to improve the professional caregiver's approach and communication skills, ensuring successful interactions with our clients and their families. An additional component of the syllabus was to provide the attendee with the ability to interpret the five functioning levels of those with AD. and to offer various techniques to assist with creating a meaningful relationship.

I have been a caregiver for a loved one with Alzheimer's disease and have worked as a health care professional for many years. I am still amazed when I attend an educational series by the wealth of new information that continues to be provided to professionals and family caregivers. As more people develop the disease and although no cure has been discovered, clinicians and caregivers continue to strive to educate, develop and explore techniques to help families in the diagnosis, care and reality of the disease.

The first module of the four-part training explores the symptoms of the disease, the effects of the disease on the brain and person. The term dementia covers seventy different types of conditions, but AD encompasses fifty percent of all the dementia diagnoses. Although a definitive diagnosis of Alzheimer's is only authenticated upon autopsy, physicians can accurately diagnosis Alzheimer's disease in ninety percent of the patients they examine. AD has been described this way: if the brain can be likened to a dense forest of trees, when Alzheimer strikes it slowly kills the trees, leaving the forest barren and empty. Actual autopsy slides of the brain document the brain being destroyed and left with an empty crater. This crater can never be filled again and remains void of function for the remainder of the person's life.

AD remains a terminal diagnosis and affects one out of ten families in the United States. The life expectancy upon diagnosis of the disease is now considered to be eight to twelve years. However, each person crippled with AD experiences the disease differently; the disease is progressive and the stages of the disease are predictable.

The left side of the brain houses formal language, ability to recall, recognition and the ability to determine reality. Recall is the first portion of the brain that is lost to AD; recent memories then begin to fade and slowly diminish to where they are lost completely. The person with dementia sees reality as it once was, not the reality of present time. Recognition of loved ones now becomes more of a sense of "I know this person, but what is their name and who are they to me?" Often when the person with dementia looks in the mirror they do not recognize themselves, do not realize that they have aged and think of themselves as they once were. The brain attempts to reorganize and fill in the gaps and this is when the client will confabulate or "make up" information to compensate for the loss of memory and recall.

Since the ability to speak is lost because of the destruction of the left side of the brain, the person begins to compensate with word substitution for the words that they wish to say, and then language retrieval is noted to be very generic, using terms such as "it," "that thing" and "you know what I mean." Often repetitiveness in word phrases becomes more evident and non-verbal communication, such as hand gestures, becomes more noticeable. One of the final stages of loss of word skills is manifested by garbled speech and continual movements of the lips or tongue when speech is attempted.

The right side of the brain stores automatic speech, rhythm and music. The right side of the brain is preserved longer than the left side of the brain when someone has dementia. Many clients with AD can remember words to a song long after they are unable to have meaningful conversations or functional word retrieval. Often music therapy is utilized to modify challenging behavior, especially in the end stages of the disease process.

Frequently, the person afflicted with dementia will not be able to distinguish between yes or no responses. Often they will reply "no" when they wish

to make an affirmative response. It has been recommended that instead of asking questions that would require a negative or positive response, to offer simple directive statements or offer simple suggestions and guidance.

Another compelling symptom of dementia can be the increased usage of profanity or inappropriate language. How often do our clients remark that their loved one would never use profanity, but now it has become an integral part of their ability to communicate. This phenomenon is elicited because as we develop vocabulary, we know what words are appropriate to utilize and we generally refrain from the use of defamatory and derogatory speech. The person with dementia has lost the ability to reason and the sense of inhibition, and these words mean nothing more to them than appropriate expressions of speech.

Research has documented that in the earliest stages of dementia the person can only understand three out of four words. As the disease progresses they may only comprehend one or two words, until no words are understood.

Emotion and impulse control are also negatively affected by the disease of dementia. Caregivers often notice fluctuations in emotion lability from extreme happiness, extreme degrees of sadness, to excessive degrees of anger and frustration. These roller-coaster effects of emotions are attributed to the loss of the brain to control impulse and emotional behaviors. It is important for us to remind ourselves that we as caregivers can control our behaviors, but the person with dementia has no ability to control their erratic or impulsive demeanor.

A key component to providing the best care for our clients or loved ones with dementia is to develop techniques and care patterns that will enable us to cultivate positive approaches to the needs of our loved one. Learning how to communicate and approach the person with dementia can perhaps make caregiving a little less combative and frustrating for us and our loved one.

Module four of the educational series recommended that when approaching someone with dementia, be consistent in one's physical approach. The person should be approached from the front in their direct field of vision; never approach from behind the person, and walk slowly (one step per second). When conversing with someone with a dementia diagnosis it is suggested to adjust your stance to be at eye level with the person to whom you are conversing. When you are at eye level, you are not towering over someone, giving an air of authority which could be considered as threatening by someone with dementia. It is also recommended that you be aware of non-verbal body language and only use touch if you feel the person is comfortable with physical contact. Conversation should be in a pleasant, slow and friendly tone without intimidating or threatening commands.

One of the most challenging events during the day for a caregiver is often during the personal care activities. We often are hurried or need the person with dementia to comply quickly and succinctly with our requests. Caregivers have found that if they use a simplistic approach and do not offer many complicated choices, the care receiver becomes more agreeable to carrying out the task requested. Breaking down the choices into small, manageable steps, offering praise and giving reminders can help to make personal care time less frustrating and combative. The adage of "If at first you don't succeed, try, try again" becomes a common mantra for the caregiver and the task may need to be left unfinished and returned to at a later time. Taking a break may be needed for both the caregiver and the care receiver.

When conversing with someone with a dementia diagnosis it is important to use familiar speech and cues. If we are meeting with an AD client, getting to know them through their family members can be helpful. By utilizing their histories and memories we can begin to communicate effectively with the client and their families. Because communication for the person with dementia is so difficult and frustrating, emotional outbursts are frequently observed. Using redirection techniques and recognizing the signs of frustration may alleviate the outbursts. Perhaps instead of commenting that the person should not be angry or distressed, to simply start the conversation with key phrases such as, "It looks like, it sounds like or it seems like . . ." may reduce the negative behavior. Some professionals recommend reality orientation strategies to assist the AD individual to come to terms with their current situation. We have all encountered the client who believes that their parent is still alive and that they need to find them . . . when we know that their parent has been deceased for many years. To attempt to reorient this person to present-date time and place usually only exacerbates the situation and causes increased anxiety and agitation.

The third module of the professional caregiving training program educated the audience in the five functioning levels of dementia, which is different than the disease stages that many of us are familiar with.

Level 5: This is considered the early stage of the disease. The person is still able to complete ADLs,

drive, communicate, remain active in the community and be fairly independent. Forgetfulness and loss of recall is observed.

Level 4: This person starts to require cues and prompting to complete tasks. Personal care becomes more difficult. This individual may be more aware that they are forgetful and that the disease is progressing.

Level 3: This stage is commonly known as the "hunting and gathering" stage because the person may start to walk aimlessly, move objects, touch things and may not recognize familiar objects or persons. They begin to require much more guidance, structure and support to accomplish tasks. Word retrieval is becoming more difficult.

Level 2: This individual can no longer speak well, eating has become more difficult, weight loss is noticed. They have become dependent on care and begin to require maximal assistance ADLs. This person may still be responsive to stimuli such as music and sound.

Level 1: Responsiveness is now poor, and the person probably has lost the ability to verbally communicate. Generally they are non-ambulatory and require total assistance with bathing, dressing and feeding. This is considered the final stage of the disease.

The families of our clients with AD strive to help their loved ones have meaning in their lives and to create meaningful memories for themselves as caregivers. The final module of the training program provided many ideas and resources for creating a positive environment and activities for the population with dementia.

It was emphasized that it is critical not to view the care receiver as just a diagnosis of dementia, but to look beyond the present and learn who they were, what roles they played throughout their lives and that despite the disease they will have much to offer. It is important for us to gain an understanding of what they enjoyed, the relationships that they had with family members, and who they were before their lives and the lives of their loved ones were impacted by this life-challenging disease.

For further information on "Accepting the Challenge: Providing the Best Care for People with Dementia," contact the local Alzheimer's Association or the National Alzheimer's Association.

Barbara Wolford is the Director of Elder Care Services for the elder law and estate planning firm of Davidow, Davidow, Siegel & Stern. She has been associated with the firm since 1996. Ms. Wolford is a Licensed Practical Nurse who concentrates in assisting families with the complex Medicaid process as well as the assessment procedure necessary for evaluating families' needs. Her background as a former Nursing Home Admissions Director lends itself well to her current position. In addition, she is very active in senior organizations and advocacy by serving as the co-director of the Council for the Suffolk Senior Umbrella Network, a board member of the New York State Coalition for the Aging, a member of the Long Island Coalition for the Aging, a member of the American Association on Aging, Nassau and Suffolk Geriatric Professionals of Long Island and Case Management Society of America.

Public Elder Law Attorney News

Holocaust Compensation Payments: Effect on Eligibility for Medicaid, SSI and Other Federal Benefits

By Valerie Bogart

Valerie Bogart thanks the Conference on Jewish Material Claims Against Germany, Inc. (Claims Conference), http://www.claimscon.org, for providing information contained in this article. Since 1936, Selfhelp Community Services has pursued its mission of providing a wide range of home and community-based services to survivors of Nazi persecution. Today, Selfhelp cares for a greater number of Holocaust survivors than any organization of its kind in North America.

The Victims of Nazi Persecution Act of 1994[1] creates a special right for survivors of the Holocaust. When they apply for federally funded benefits or services that are based on financial need, the payments they have received based on their status as a victim of Nazi persecution are not counted in determining their financial eligibility for these federally funded benefits. This is an exception to the usual rule that counts *all* income and assets when determining eligibility for programs based on need. Part I of this article explains what benefits are exempt and the requirements for separating restitution payments to qualify for exemption. Part II explains how to calculate the amount of reparations a client has received.

Part I: The Policy of Exemption of Holocaust Payments and Requirements for Exemption

What does the Victims of Nazi Persecution Act of 1994 actually say?

"Payments made to individuals because of their status as victims of Nazi persecution shall be disregarded in determining eligibility for and the amount of benefits or services to be provided under any Federal or federally assisted program which provides benefits or services based, in whole or in part, on need."[2]

What are the "federally funded" programs that do not count restitution payments when they determine financial eligibility?

The exemption applies to any benefits or services provided by a program for which eligibility is based, in whole or part, on financial need, IF:

- The program is operated by the federal government, or
- The program is operated by local governments or private organizations, but receives funding from the federal government

These programs include, but are not limited to the following:

- Medicaid[3]
- Supplemental Security Income (SSI)[4]
- Food Stamps
- Federally subsidized housing programs—public housing, Section 8, Section 202
- Home Energy Assistance Program (HEAP)
- Weatherization Referral and Packaging Program (WRAP) (provides low-income elderly with free home energy services designed to lower their energy bills)
- Access-a-Ride—or other para-transit programs for persons with disabilities
- Emergency Assistance for Adults (EAA) (grants to SSI recipients to prevent eviction and utility shut-offs)
- Medicare Savings Programs (QMB, SLIMB, QI-1) (pays Medicare Part B premium and sometimes other Medicare co-insurance)
- Meals on Wheels
- Veteran's pensions based on need
- Temporary Assistance for Needy Families (TANF) (cash assistance for adults taking care of children or grandchildren, if adult not eligible for SSI)
- Title XX block granted services,[5] such as homemaking, child and adult protective services, legal services for the elderly, child care services, foster care, transportation, Meals on Wheels, and employment services.

What about programs funded only by the state, with no federal money? Are my reparations exempt for these programs?

The federal law applies only to federally funded programs. But New York State has enacted its own law that excludes reparations from eligibility for Senior Citizens Rent Increase Exemption (SCRIE) benefits. The law expressly exempts as income ". . . payments made to individuals because of their status as victims of Nazi persecution, as defined in P.L. 103-286. . . ."[6] The reference in the New York State law is to the federal Victims of Nazi Persecution Act of 1994, discussed above. In New York, Nazi persecution payments are also exempt for state-only public assistance benefits.[7]

Which payments are exempt?

Payments made to individuals because of their status as victims of Nazi persecution are exempt. A victim of Nazi persecution may be a person who lived in, or fled from, a country that was under Nazi rule, Nazi occupation or the direct influence or control of the Nazis. As long as being a Nazi victim is *one* of the reasons for the payment to this individual, the payment qualifies for this exemption. It does not matter that there are other eligibility requirements, such as financial need.

Payments that are exempt generally include any payments listed at this link: www.claimscon.org/index.asp?url=compensation_guide.

Some payments require special proof that they qualify for the exemption, in other words, that they should not be counted. For example, under the Supplemental Security Income (SSI) program (and also under the Medicaid program, which usually follows SSI rules), only certain Austrian social insurance payments are exempt. Payments which were based, in whole or in part, on wage credits granted under paragraphs 500–506 of the Austrian General Social Insurance Act are exempt.[8] These paragraphs grant credits to individuals who suffered a loss (i.e., were imprisoned, unemployed, or forced to flee Austria) during the period of March 1933 to May 1945 for political, religious, or ethnic reasons.

Not all Austrian social insurance payments are based on paragraphs 500–506. The Social Security POMS explains that it may be evident from the original award notice whether the Austrian pension is exempt.[9] Some notices contain information about wage credits granted under paragraphs 500–506 of the Austrian General Social Insurance Act. The POMS explains that the notices are written in German, and anywhere in the notice, the following language **may** appear:

> DIE BEGUENSTI-
> GUNGSVORSCHRIFTEN FUER
> GESCHAEDIGTE AUS POLITIS-
> CHEN ODER RELIGIOESEN GRU-
> ENDEN ODER AUS GRUENDEN
> DER ABSTAMMUNG WURDEN
> ANGEWENDET (§500FF ASVG);

TRANSLATION: "The regulations which give preferential treatment for persons who suffered because of political or religious reasons or reasons of origin were applied (§500ff ASVG)."

If it is not clear, write and request the original award notice and ask whether the pension was granted under the above sections of the Austrian law.[10]

Must the payment be received from a European government or the Claims Conference to be exempt?

No. The federal law does not specify that the grant must be given by a European government or by the Claims Conference. Therefore, a grant from a non-profit organization that is based on an individual's status as a Nazi victim is exempt. For example, The Blue Card, Inc. at http://bluecard.org is a non-profit private organization that gives grants to needy survivors. These payments are exempt when given to an individual because of his or her status as a victim of Nazi persecution.

Are interest or dividends earned on saved restitution payments also disregarded?

This policy may vary with each federal program. Many federal programs do not exempt interest earned on reparation payments. For example, SSI does not exempt interest.[11]

Must restitution be kept in a separate account in order to be exempt as a resource?

The rules for each federal program may be different, but most require that the restitution payments be "identifiable" from other assets. The regulations for SSI, for example, state:

> "In order for . . . [restitution payments] to be excluded from resources, such funds must be segregated and not commingled with other countable resources so that the excludable funds are identifiable."[12]

The SSI rules generally apply to Medicaid. The exact meaning of this rule is open to interpretation.

One view is that a separate restitution account is not required, as long as one can identify the portion of the account that was deposited from restitution payments.[13] However, it is recommended that restitution payments be maintained in a separate account (or accounts) in which funds from other sources are not deposited.

Restitution payments may be in any type of account, such as a savings account, CD, stocks, or bonds. In theory, there is no legal reason why an individual may not have more than one restitution account, dividing his or her restitution savings between a savings account and a CD. However, some Medicaid staff have been known to insist on a single restitution account, with no known legal authority. What matters is that these accounts do not contain funds from other sources of income—Social Security, work earnings, etc. Also, keep in mind that interest generated by the account may not be exempt. See above.

What if the client has always combined the savings from restitution payments in the same bank account, CD, or stocks along with other savings, and did not keep it in a separate account?

It is all right if savings from restitution were combined with other savings in the past. However, if the client now wants to apply for a federally assisted benefit, she must now put her savings from restitution payments into a separate account or accounts. It is not necessary to do first in/first out accounting. It is only necessary to calculate the total amount received in restitution over the years, and to place that amount into a separate "restitution" account or accounts—a CD, bank account, etc. See Part II below for how to calculate that total amount.

Is a "Restitution Trust" necessary to hold restitution payments and protect them from a Medicaid lien against the estate of the survivor?

No. First, as long as the restitution payments are in identifiable accounts, separate from other savings and income, the client does not have to put restitution savings into a trust fund in order to ensure that they are exempt from being counted for eligibility for Medicaid, SSI and other federal benefits based on need. Trust funds, including restitution trusts, are estate planning tools that may have other benefits with regard to avoiding probate, etc. However, for the purpose of qualifying for Medicaid or other federal benefits, a trust is not necessary. Second, in 2002, New York State clarified that the government will not pursue any recovery of government reparations payments from the estates of Medicaid recipients after they die. This removes one rationale for using a Restitution Trust, which was to protect the future estate from a Medicaid lien.[14]

Part II: Determining the Amount of Restitution Client Has Received

There are two steps to determining how much the client has received in restitution payments.

1. Obtain Payment History from Source of Payments

The client or advocate will need to write to the government agency or bank in Europe that has issued her payments, and request a payment history. Include her name, address, date of birth, and case reference number. This number should be on correspondence she receives each year about her payment—such as the certificate of life, a recertification document on which the client verifies that she is still alive to receive payments.

It can be difficult to know where to write. The following examples are merely some of the main sources. *If you are unsure where to write, contact the agency that is issuing the payments.*

A. BEG ("Wiedergutmachung")

The BEG payments are issued by various banks in Germany. If the client receives payments directly, the check stub should state the name and address of the bank. If the payments are directly deposited in her bank account, you may need to ask her bank for the name and address of the European bank that issues her checks. For a list of the main German government BEG offices, see Appendix A on p. 45.

B. German Social Security

Write to the address on the payment stubs or correspondence that the client receives. If you are not sure, write to one of the two offices listed below, depending on whether the client did white-collar work (first office) or manual labor in Germany or in a Nazi-occupied ghetto (second office).[15]

If client did white-collar work:
Bundesversicherungsanstalt fur Angestellte
BfA
10704 Berlin/Germany
Tel: 01149/30/865-1
Fax: 01149/30/865-27285

If client did manual labor in Germany or a Nazi-occupied ghetto:
Landesversicherungsanstalt LVA
Freie und Hansestadt Hamburg
Friedrich-Ebert-Damm 245
22159 Hamburg/Germany
Tel: 01149/40/5300-0
Fax: 01149/40/5300-2999/2998

C. Netherlands WUV Payments

Write to:
Consulate General of the Netherlands
Attn: WUV Department
Suite 509
3460 Wilshire Blvd.
Los Angeles, CA 90010-2270
(213) 480-1471 (9:00–12:30 Pacific Time)

D. Claims Conference Article 2 Fund; Program for Former Slave and Forced Laborers; etc.

To obtain the history of payments received from funds administered by the Claims Conference, contact the Claims Conference's offices or e-mail the Claims Conference at: mailto:info@claimscon.org.

2. Convert from Deutschmarks or Other European Currency to Dollars

The statement from Austria or Germany will not list a total dollar amount client has received. Instead, it will list a series of time periods, such as:

> 01/01/1985 to 01/06/1985. This is January 1, 1985 to June 1, 1985.

(Note that the European date format is in a different order than the format used in the U.S. It lists the *day* first, then the month and year.) The statement will say the amount of DM (deutschmarks) or, for recent years, the amount of euros received in each month during the specified time period.

The next step is to convert this amount to dollars. You can obtain conversion rates on the Internet at sites such as http://www.oanda.com. The conversion rates change daily. For this reason, even though the amount of DM may have remained the same for the whole year, the amount of each monthly payment changes when converted to dollars.

Here is an example for someone who received monthly payments of DM 1,192.00 from January through June in 1985. The dollar equivalent ranged from $355.10 to $388.12 during that period.

Payment Date	Conversion Rate	DM	Dollars
1/1/1985	0.3172	1,192.00	$378.10
2/1/1985	0.3157	1,192.00	$376.31
3/1/1985	0.2979	1,192.00	$355.10
4/1/1985	0.3223	1,192.00	$384.18
5/1/1985	0.3185	1,192.00	$379.65
6/1/1985	0.3256	1,192.00	$388.12
		TOTAL	**$1,526.71**

A spreadsheet in Excel format that includes a conversion rate table (from deutschmarks and euros to dollars) going back to 1952 has been prepared by Selfhelp Community Services, Inc. It is available from Selfhelp with a requested donation.[16]

When you have converted all the deutschmarks, euros or other European currency, add up the amounts from all time periods. The total amount is the amount that is exempt or disregarded for eligibility for Medicaid, SSI, and other federal benefits. In the example above, for the period from January 1, 1985 to June 1, 1985, the total amount received was $1,526.71. If this was all the reparations the client received, this is the amount that is exempt or disregarded. Before she applies for Medicaid or another federal benefit:

1. Establish a separate account with the total amount of restitution received (in the above example, the total is $1,526.71). The balance of an existing account may be brought down to this number, to become the restitution account.
2. If the client's restitution payments are now directly deposited into a different account, she should request that they now be deposited directly into her "restitution account."
3. With the application for Medicaid, SSI, or any other federal benefit, submit documentation showing that these funds are exempt. This includes (1) the payment history that you obtained from Germany, the Claims Conference, or elsewhere; (2) a document showing the conversion of European currency to dollars and the total amount (such as the spreadsheet available from Selfhelp); and (3) a copy of the restitution account bankbook or statements.

Endnotes

1. Public Law 103-286 (108 Stat. 1450), appears as 50 U.S.C.S. app. § 1989b-4.
2. *Id*.
3. 18 N.Y.C.R.R. 360-4.6(a)(2); the New York State Medical Assistance Reference Guide, p. 178, <http://www.health.state.ny.us/nysdoh/medicaid/mrg/index.htm>.
4. *See* 20 C.F.R. part 416, app. to subpart K, sec. V(g) (exemption for income), and 20 C.F.R. 416.1236(a)(18) (exemption for resources).
5. 42 U.S.C.S. § 1397.
6. N. Y. Real Property Tax Law § 467-b(1)(c).
7. Soc. Serv. § 131-n(2) (expires and repealed Aug. 22, 2005).
8. *Bondy v. Sullivan*, Unemployment Ins. Rep. (CCH) P16, 1991 U.S. Dist. LEXIS 20615 (N. D. Cal. 1991) (decision awarding attorneys' fees cites unpublished Orders granting summary judgment and injunctive relief, dated Nov. 21, 1990, and Jan. 24, 1991, including finding that Austrian statute under which plaintiff received payments is entitled "Preferential Treatment of Victims for Political or Religious Reasons or for Reasons of Ancestry," Order of Nov. 21, 1990, at 6:5-8, and found that the Official Statements of Legislative Intent accompanying the amendments to Articles 500–506 of the Austrian Act underscore the humanitarian and restitutionary nature of the Austrian payments. *Id.* at 6:18-20.
9. Social Security POMS § SI 00830.715, at http://policy.ssa.gov/poms.nsf/lnx/0500830715.
10. Write to: Pensionsversicherungsanstalt, Friedrich-Hillegeist-Str 1, A-1021 Vienna, Austria, Tel.: 43-503-03; Fax: 43-503-03-288-50; E-mail: pva@pva.sozvers.at; Web site: http://www.sozvers.at. For general information on Austrian Social Security online: http://www.ikg-wien.at/restitution.
11. *See* Social Security Administration Program Operations Manual System (POMS) section SI 00830.710 at: http://policy.ssa.gov/poms.nsf/lnx/0500830710 and http://policy.ssa.gov/poms.nsf/36f3b2ee954f0075852568c100630558/3e5e19ef08186dc885256db500780998?OpenDocument.
12. 20 C.F.R. §416.1236(a)(18) and (b), *at* http://www.ssa.gov/OP_Home/cfr20/416/416-1236.htm.
13. Support for this view is in the Social Security POMS Manual section SI 01130.700, which states, "Identifiability does not require that excluded funds be kept physically apart from other funds (e.g., in a separate bank account)." http://policy.ssa.gov/poms.nsf/lnx/0501130700.
14. N.Y.S. Dep't of Health, "Medicaid Liens and Recoveries," Administrative Directive No. 02 OMM/ADM-3, p. 10. <http://www.wnylc.net/pb/showquestion.asp?faq=56&fldAuto=628>.
15. NOTE: Requests that a printout be mailed to client may also be made online, but this part of the site is only in German, http://www.lva-hamburg.de/internet/lva-hamburg/infopool.nsf/html/index_21.
16. Send an e-mail to vbogart@selfhelp.net or write to Selfhelp Community Services, Evelyn Frank Legal Resources Program, 520 Eighth Avenue, 5th Fl, New York, NY 10018.

Valerie Bogart is senior attorney for the Evelyn Frank Legal Resources Program at Selfhelp Community Services in New York City. She received her J.D. from New York University School of Law.

Appendix A

Main "BEG" Offices of the German Government

Refer to correspondence and/or checks received from the BEG offices to determine which of the offices below handles the payments. Alternatively, the local German Consulate should be able to assist you further.

Amt fuer Wiedergutmachung
Heckingstr. 31
54439 Saarburg/Germany
Tel: +49-6581-921-0
Fax: +49-6581-921-150
E-mail: poststelle@afw.rlp.de

Oberfinanzdirektion Munchen
-Landesentschaedigungsamt-
Prinz-Ludwig-Str. 5
80333 Muenchen/Germany
Tel: +49-89-5995-04
Fax: +49-89-5995-8668

Ministerium fuer Arbeit, Gesundheit und Soziales des Landes Schleswig-Holstein
-Entschaedigungsbehorde-
Postfach 1121
24100 Kiel/Germany
Tel: +49-431-988-0
Fax: +49-431-988-5416

Behoerde fuer Soziales und Familie
-Amt fuer Wiedergutmachung-
Kaiser-Wilhelm-Strasse 85
20355 Hamburg/Germany
Tel: +49-40-42841-2176
Fax: +49-40-42841-2853
E-mail: Dieter.Conradt@bags.hamburg.de

Bezirksregierung Duesseldorf
-Abt Wiedergutmachung-
Fischerstr. 2
40477 Duesseldorf/Germany
Tel: +49-211-475-0
Fax: +49/211-475-9252
E-mail: poststelle@bezreg-duesseldorf.nrw.de

Senator fuer Arbeit und Soziales
-Landesamt fuer Wiedergutmachung-
Contrescarpe 73
28195 Bremen/Germany
Tel: +49-421-361-0
Fax: +49-421-361-5541

Oberfinanzdirektion Saarbrucken
-Wiedergutmachungsstelle-
Praesident Baltz Str. 5
66119 Saarbrucken/Germany
Tel: +49-681-509-1
Fax: +49-681-509-383

Regierungspraesident
-Entschaedigungsbehoerde-
Zeughausstr. 4
50667 Koln/Germany
Tel: +49-221-1663
Fax: +49-221

Niedersaechsisches Landesamt fuer Bezuge und Versorgung -Wiedergutmachung
30149 Hannover/Germany
Tel: +49-511-925-0
Fax: +49-511-925-2633
E-mail: Poststelle@nlbv.niedersachsen.de

Landesamt fuer Besoldung und Versorgung
-Wiedergutmachungsstelle-
70730 Fellbach/Germany
Tel: +49-711-957-0
Fax: +49-711-957-2005
E-mail: Poststelle@lbv.bwl.de

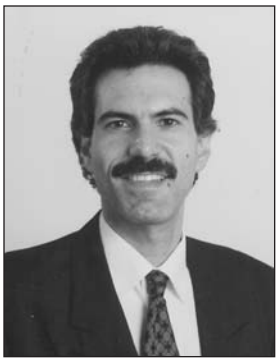
Regierungspraesidium Darmstadt
-Entschaedigungsbehoerde-
Postfach 4809
65038 Wiesbaden/Germany
Tel: +49-611-32-0
Fax: +49-611-32-2055

Landesverwaltungsamt Berlin
-Abt. III, Entschaedigungsbehoerde-
Fehrbelliner Platz 1
10702 Berlin/ Germany
Tel: +49-30-90-0
Fax: +49-30-9012-4001

Public Policy News

Lobbying Efforts Must Continue!

By Ronald A. Fatoullah



The Medicaid program as we know it is currently under legislative attack in New York State. At the time of this writing, Governor Pataki's proposed New York State budget includes changes to Medicaid eligibility laws that will result in fiscal savings for the state, but ultimately at a huge cost to seniors and the disabled. The four main proposed changes to the eligibility rules include:

1. The imposition of a penalty period for transfers made by community Medicaid applicants. New York State has the authority to do this pursuant to OBRA '93;
2. Increasing the look-back period on transfers from 36 months to 60 months for both nursing home and home care cases. This will require a change of federal law or possibly a waiver from CMS (many believe that an 1115 waiver cannot increase the look-back period);
3. Providing that the penalty period for transfers would commence at the time of the Medicaid application rather than at the time of the transfer. Again, this will require a change of federal law or possibly a waiver from CMS; and
4. The elimination of spousal refusal in nursing home cases except for very limited exceptions and for home care cases other than in circumstances where one spouse is absent. The concept of spousal refusal in an institutional setting is mandated by federal law, so once again, this will require a change of federal law or possibly a waiver from CMS.

Many organizations representing seniors are up in arms about these proposals. For example, AARP, which may have missed the boat because of its support for the recent Medicare prescription drug bill, has certainly made sure that it would not alienate New York seniors on these issues. AARP, the Alzheimer's Association and other organizations have become increasingly vocal in their opposition to these changes to Medicaid eligibility rules in New York. In fact, these issues are so important that the Executive Committee of the entire New York State Bar Association, not just the Elder Law Section, endorsed the Elder Law Section's report by telephone conference conducted between its regular meetings.

On behalf of the New York State Bar Association Elder Law Section, I, along with Howard Krooks (Chair of the Elder Law Section), Joan Lensky Robert (Immediate Past Chair of the Section) and Dan Fish recently lobbied against these proposals in Albany on April 14th of this year. We were accompanied by Ron Kennedy, the Associate Director of Government Relations for NYSBA, and Howard Iselin, an experienced lobbyist retained by the Bar. We met with several New York State Senators, Assemblypersons and/or their staff members, including, but not limited to, Assemblyman Steve Englebright's staff, Senator Martin Golden (22nd District, Kings County), Senator Dean G. Skelos, Assemblywoman Ann Carrozza (my Co-Chair of the Section's Legislation Committee) and Senate Majority Leader Joseph Bruno's staff. When we met with Assemblyman Englebright's staff member, Greg Olsen (a longtime advocate of senior issues in his own right), we discovered that the Assemblyman had already drafted a letter outlining the Medicaid eligibility proposals in the Governor's budget and setting forth why they should not become law. As of the date of our meeting in Albany, over 50 Assembly members had signed onto the letter drafted by Assemblyman Englebright.

During our meetings with various Senators and Assemblypersons, we reiterated that these proposals will hurt seniors in their districts, and that the needs of their own constituents will be compromised. In addition, we pointed out that the cost savings that they were hoping to achieve would likely not come to fruition for years to come, if at all. The state of Connecticut applied to CMS for a Section 1115 waiver seeking similar changes over two years ago, and there is currently no sign of approval. Further, even if CMS did approve the waiver, it would likely trigger an immediate constitutional challenge.

It appeared that the most effective lobbying tool were the real-life stories and examples that we relayed during our meetings in Albany. These personal accounts provided concrete examples that the Assemblypersons, Senators and/or their staff could relate to—the real-life hardships, fears and anguish that these proposed changes will undoubtedly bring to seniors and the disabled in their respective districts.

A consistent theme emerged from our meetings. Most of the New York State Senators and Assemblypersons and/or their staff that we met stated that they had encountered widespread opposition to these Medicaid eligibility changes. Every one told us that they did not believe that it was likely that the changes would become law this year. However, *they all stressed that this is an issue that will not go away.*

I personally was encouraged by the reaction from Senator Joseph Bruno's staff. They readily admitted that they were becoming increasingly educated on these issues and that although these proposals were on the "fast track" for approval just weeks prior to our Albany visit, they were now on the "slow track" for further study and review. However, Bruno's staff were quick to point out to us that these issues will "resurface" next year. Their position was that the spiraling cost of the Medicaid program is out of control, the cost cannot be sustained by the state and the counties, and that reform was necessary.

Regardless of what happens during this legislative session and the budget negotiations that will probably continue beyond the end of the session, the Medicaid program as we know it will likely be under attack for the next several years. We cannot rest on our laurels and hope for the best; we must be proactive.

I urge New York State Bar Elder Law Section members to continue or commence their lobbying efforts. Each member can do the following:

a. Whether or not these proposals become law this year, I would suggest that a call be made to local Senators and Assemblypersons thanking them for their support, or, in the alternative, explaining how important their support will be in the future. This is also an opportunity for Section members to provide a short explanation as to why these proposals will be detrimental to their constituents. This is a quick, simple and effective way for members to voice their appreciation and concern.

b. A lobbying date can be scheduled for Section members to meet with their local legislators in Albany when the legislature is in session. Of course, this will be more time-consuming, but can ultimately be very effective. In addition, the satisfaction of meeting with local representatives in person is an experience that will not be forgotten.

c. A letter voicing member appreciation and/or concerns can be e-mailed and/or snail-mailed to local representatives. This should be done in conjunction with a telephone call for maximum benefit.

d. Of course, if a member goes up to Albany or contacts Senators or Assemblypersons, he is representing himself and/or his clients. Members cannot represent the New York State Bar Association or the Elder Law Section, unless they are specifically authorized to do so.

Thus far, the Section's lobbying efforts have been quite effective. Special thanks must be given to Howard Krooks and Dan Fish, Co-Chairs of our Section's Medicaid Reform Task Force that was created to deal specifically with these issues. We are also very fortunate to have the commitment and expertise of Ron Kennedy and Howard Iselin, who have been invaluable resources, and who continue to tirelessly support this cause. Last but not least, special thanks to Lisa Bataille, our Section's staff liaison, who has provided the administrative support that is needed to fight these proposals.

Ronald A. Fatoullah, Esq. is the principal of Ronald Fatoullah & Associates. The law firm concentrates on elder law, Medicaid planning, planning for the disabled, estate planning, guardianships, estate administration, trusts and wills. The firm has offices in Great Neck, Forest Hills and Brooklyn. Mr. Fatoullah has been named a "fellow" of the National Academy of Elder Law Attorneys and is a former member of its board of directors. He is Certified as an Elder Law Attorney by the National Elder Law Foundation. Mr. Fatoullah currently serves on the Executive Committee of the Elder Law Section of the New York State Bar Association, where he chairs its Legislation Committee.

National Case News

By Steven M. Ratner

This column addresses recent cases in jurisdictions other than New York. Questions or comments regarding this column can be sent to the author at smr_law@yahoo.com.

Gayan v. Illinois Department of Human Services, Appellate Court of Illinois (2003)

In *Gayan v. IDHS*, the Appellate Court of Illinois ruled that assets held in an irrevocable trust were an available resource to a Medicaid applicant.

The facts of this case were straightforward. Lucille Gayan, the 80-year-old plaintiff, placed assets valued at $250,000 into an irrevocable trust. According to the terms of the trust, Gayan was to receive a portion of the income for a period of 29 months, at the trustee's discretion. At the end of the 29 months, the trustee was authorized to pay income and principal for Gayan's custodial care, limited to five expenditures set out in the trust:

1. A personal needs allowance in the minimum amount allowed under the Illinois Public Aid Code;
2. Amounts to cover Medicare and other health insurance premiums;
3. Amounts to cover expenses for medical or remedial care not paid for by Medicaid;
4. Amounts to cover non-prescription drugs or other medically necessary items ordered by a physician but not paid for by Medicaid; and
5. Amounts necessary to cover medical transportation.

In July 1999, Gayan entered a nursing home and applied for Medicaid. The IDHS determined that the trust had a value of $250,580.65. It further determined that she had to spend down the majority of her trust in order to become eligible for Medicaid. Gayan sought a hearing to reverse the decision. Gayan's attorney attested to the fact that the trust was intended as a Special Needs Trust. IDHS ultimately held that the trust agreement contained no provisions or terms that precluded the distribution of funds to satisfy the cost of custodial care and therefore the principal of Gayan's trust was an available asset.

On appeal, the court first reviewed the relevant provisions of federal law:

> In the case of an irrevocable trust (i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which . . . payment to the individual could be made shall be considered resources available to the individual.[1]

Applying this law, the court held that all of the assets in Gayan's trust were available resources. The court reasoned that because there were limited circumstances under which principal could be paid for Gayan's benefit, all of the assets held in the trust were available when she applied for Medicaid.

Cramer v. Powell, Kentucky Court of Appeals, October 24, 2003

In *Cramer v. Powell*, a jury's decision to invalidate a will for reasons of testamentary incapacity was reversed and remanded in favor of the proponents of the will.

Paul B. Cramer executed his first will in June 1991, leaving his entire estate to Gayle Powell, a former girlfriend that he eventually severed ties with and evicted from his property. Cramer suffered a stroke in June 1997, leaving him unable to speak. However, he was still able to perform many daily activities, such as grocery shopping, driving and tending to his horses.

Shortly after his stroke, Cramer's old friend, Carol Mangione, began to spend more time with him and helped with certain legal matters, including bringing him to an attorney so that he could make a new will. In December 1997, Cramer executed a will with Carol acting as his interpreter.

In this will, he left his entire estate to his daughter, Tracey. In August 1999, Cramer passed away and Tracey submitted the 1997 will to the Clark District Court for probate. Subsequently, Powell came forward with Cramer's earlier will dated June 15, 1991. Powell filed suit claiming that the 1997 will was not

Cramer's true will, arguing that Cramer lacked testamentary capacity and had been unduly influenced by Carol. The jury ultimately sided with Powell, finding the 1997 will to be invalid.

On appeal, Tracey argued that the court erred when it failed to grant a directed verdict, or in the alternative, a judgment notwithstanding the verdict regarding the issue of testamentary capacity. Tracey argued that because Cramer was still capable of engaging in normal day-to-day activities, he still possessed testamentary capacity.

In addition, Tracey argued that Cramer's decision to leave Tracey his estate was not a result of mental illness or undue influence, but rather a result of his lifelong relationship with her.

With regard to Tracey's first argument, the court found that the jury's verdict was flagrantly against the evidence. The court believed that Powell had completely failed to rebut the presumption of testamentary capacity.

With regard to Tracey's second argument, that Carol unduly influenced Cramer, the court noted that the will in question made no bequest to Carol. Carol only acted as an interpreter for Cramer. Once again, Powell presented no evidence that Carol influenced Cramer in making his decision to leave his estate to Tracey.

The court ultimately reversed and remanded the case for the circuit court to enter an order directing a verdict in favor of the executors.

Estate of Viva Bertha Handy, Minnesota Court of Appeals, December 9, 2003

In *Estate of Viva Bertha Handy*, the state of Minnesota was able to recover the decedent's homestead in an estate recovery proceeding because neither decedent's children nor grandchildren had resided at the home continuously since her institutionalization.

This case involved an elderly woman, Viva Handy, who suffered from Alzheimer's disease. She required extensive assistance to remain in her home. Handy's son, Raymond, with his wife and sons, Matthew and David, moved into a mobile home located next to her farmhouse. Handy's family physically resided on the farm and provided her care until she became institutionalized. After Handy went into a nursing home, the farmhouse became uninhabitable. Her family remained on the homestead consistently through the fall of 1999, only leaving during the winter months because they could not afford to heat the farmhouse.

In the fall of 1999, the Handy family moved to town permanently, but had the intention of returning once they had enough money to repair the property. Raymond had the homestead address on his driver's license, on his checks, paid the electric bill, and kept the property insured. However, Raymond used his town address on other documents, including pay stubs and benefit applications. Handy passed away in October 2000. Her will left the homestead to Matthew and David, with a life estate to Raymond. After her death, the Department of Human Services filed a priority claim against the home to recover the medical assistance payments.

The district court granted summary judgment to the Department of Human Services because the Handy family did not continuously reside in Handy's home from the date of her institutionalization as required under Minnesota Law.

On appeal, the Handy family claimed that they fell under an exception to the estate recovery provision, that excepts:

> A son or daughter or a grandchild who resided in the decedent medical assistance recipient's home for at least two years immediately before the parent's or grandparent's institutionalization and continuously since the date of institutionalization, and who establishes by a preponderance of the evidence having provided care to the parent or grandparent who received medical assistance, that the care was provided before institutionalization, and that the care permitted the parent or grandparent to reside at home rather than in an institution.

The district court granted the county's summary judgment motion, reasoning that Mr. Handy broke the cycle of continuous residence by not returning to the homestead. The appellate court affirmed.

The Handy family made an alternative argument on appeal that they met the residence requirement because David Handy was on active duty with the armed services and the Soldiers and Sailors Civil Relief Act of 1940 protects his residency status during his military service. Although this was a plausible argument, the court declined to consider the issue because it was first raised on appeal.

Flowers v. Red River Center Corp., Louisiana Court of Appeals, December 10, 2003

In *Flowers*, the Louisiana Court of Appeals recently found that a nursing home's failure to follow a patient's health care directive warranted a trial for the alleged violation of the Nursing Home Resident's Bill of Rights.

This case involved a resident of a nursing home, Doris Lee, who signed a health care directive. The directive was contained in Lee's chart at the nursing home. Lee was found in her room unresponsive to stimuli. Ignoring her directive, the nursing home employees attempted to revive Lee by performing life-saving tasks such as CPR, intubation, manual ventilation, chest compressions, an EKG, and the insertion of a tube down her left nostril. The procedures continued until her daughter arrived and demanded the discontinuance of life support.

Lee's children brought suit under the Nursing Home Resident's Bill of Rights, claiming that the nursing home's failure to follow Lee's health care directive caused her and her children to suffer damages. The nursing home claimed that the matter was covered under the state's medical malpractice act (MMA) and should therefore go before a medical review panel before coming to trial. The lower court agreed with the nursing home and Lee's children appealed.

In order for a matter to be governed by the MMA, the incident must have occurred while providing health care to the patient. In this situation, the problems Lee experienced were not "treatment related" because the injuries came as a result of the nursing home's failure to follow Lee's health care directive. The appellate court reversed the lower court and allowed her claim to proceed.

Endnote

1. 42 U.S.C. § 1396p(d)(3).

Steven M. Ratner is the founder of the Law Office of Steven M. Ratner, P.C., a firm committed to serving the needs of the elderly, with offices in Manhattan and White Plains. Mr. Ratner is a frequent lecturer and author on issues within his practice areas and is the author of the Elder Law Chapter in the *New York Lawyer's Deskbook*.

Steven M. Ratner graduated from the University of Oregon School of Law where he was first in his class, a member of the Order of the Coif, and an Associate Editor of the *Oregon Law Review*. Mr. Ratner received an LL.M. in Taxation from New York University where he was a Student Editor of the *Tax Law Review* and the recipient of the Harry J. Rudnick Memorial Award.

Mr. Ratner's work experience includes a one-year clerkship with the Honorable Herbert Y.C. Choy of the United States Court of Appeals for the Ninth Circuit in Honolulu, Hawaii.

Snowbird News

Getting to Florida by Way of Yosemite (Plus Phone Numbers to Enhance Your Practice)

By Scott M. Solkoff

It is with pleasure that I extend a very special invitation to New York elder law attorneys to join The Florida Bar's Elder Law Section in the Yosemite National Park during the summer of 2005.

It has always been the intent of this column to more closely align our practices, to bring Florida information to the New York elder law attorney so that we can together better serve our clients. It is also the intent of this column to further our practices and increase knowledge and revenue by fostering relationships. The Yosemite program is the literal actualization of this column. As incoming Chair of The Florida Bar's Elder Law Section, I was given one "perk," the ability to design a "Chair's Program." My choice to reinvigorate the East Coast Connection met with sound approval by the Elder Law Section's Executive Council, all the more so because it will take place in one of the most beautiful places on Earth—the Yosemite National Park (http://www.nps.gov/yose).

The event includes one and one-half days of programming and time to enjoy the trails and waterfalls. The event is being hosted at the Tenaya Lodge (www.tenayalodge.com) at the park's south entrance. The focus of the program will be for you to leave with (1) new and valuable referral sources in Florida and other states; (2) unique information about national issues; and (3) a refreshing (and thrilling) environment to release tension and stress and to bring the families together.

The success of our practices depends in large part on relationships and information-sharing along the East Coast corridor. While this program includes prominent speakers (such as one of the top HMO litigators in the country) and valuable information ("10 Florida provisions to include in New York planning"), its true focus is on developing and solidifying relationships. Our clients go back and forth along the East Coast corridor and we and our clients benefit from solid relationships across these state lines. Referrals make their way back and forth. What better way to develop solid referral relationships than by sitting next to others of your colleagues, roasting marshmallows and singing "Home on the Range."

By coordinating this program with Howard Krooks, incoming Chair of the New York State Bar Association Elder Law Section, we were able to develop a date that does not conflict with any currently scheduled New York programming. On behalf of The Florida Bar's Elder Law Section, we truly hope you can join us for this first-of-its-kind event. You are free and encouraged to bring your families. Because this event had to be limited in terms of numbers, early registration is important and you will shortly be receiving registration materials along with more complete programming information. Because some families will be making this their summer vacation (now at least partially tax deductible), we wanted to get this basic information out to you as early as possible so you can plan accordingly. If you are interested in learning more about this program, even prior to getting registration information, please feel free to contact me at 561-733-4242.

And . . . speaking of telephone numbers, my column would not be complete if I did not share with you at least one valuable tip to bring to your practice (as if the Yosemite Program is not enough). The Florida Department of Elder Affairs maintains a toll-free telephone number, 1-800-96-ELDER (1-800-963-5337), as a clearinghouse for information on Florida aging resources. You can obtain a wealth of information on such topics as community caregiving programs, adult day cares, memory disorder clinics, housing and facility data, transportation options, end-of-life choices, and Medicare-Medicaid assistance. You can also access this and more information on the Internet at http://elderaffairs.state.fl.us/.

Another important telephone number is that of the Abuse Hotline at 1-800-96-ABUSE (1-800-962-2873). Also run by the Florida Department of Elder Affairs, the Abuse Hotline accepts reports of elder abuse, neglect and/or exploitation. The Florida Statutes now have mandatory use of the hotline for certain persons who have knowledge of an elder being abused. For example, though attorneys are

exempted, guardians must report abuse through the hotline by law. Once a report is taken by the Department, the Department, with cause, should initiate an investigation and send help. This might mean an Adult Protective Services agent, the sheriff's office or the like. Reporters may remain anonymous or may choose to give their name and contact information. Attorneys might counsel their clients to have some proof of making such a report; for this, the FAX number of 1-800-914-0004 is useful. This telephone number can be a useful tool for correcting problems of self-neglect, exploitation or abuse without having to access the guardianship system. It should be noted, however, that once a report is made, the investigation might lead the government to seek guardianship, an "adult protective services" filing, or an involuntary commitment proceeding.

Complaints about abuse at facilities should be directed to Florida's Long-Term Care Ombudsman Council at 850-414-2000. The ombudsmen are appointed by the Governor and have investigatory and advocacy authority for residents of long-term care facilities.

I have forgotten the lawyer, but it was one of the historical figures, perhaps Oliver Wendell Holmes, Jr., who billed his client $5,000 for making a telephone call which solved the client's problem. The client complained and asked for an explanation. Holmes redid the invoice to read: "Making telephone call . . . $25" and on the next line: "Knowing the number to call . . . $4,975." I hope these telephone numbers help you to help your clients.

Calendar the Yosemite trip for summer of 2005, dates to be announced soon. I look forward to hiking with you.

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

Mediation News

Styles of Mediation

By Robert A. Grey

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

If you are going to be involved in a mediation session you should be familiar with and able to recognize the style(s) of mediation employed by your mediator.

There are three main styles of mediation. Some in the mediation field take the position that they are separate and distinct styles, while others hold the view that they are different places on a single style continuum. Either way, it is the author's belief that a competent mediator will have a "default" style preference but also the ability to utilize elements of the other styles when appropriate.

1. Evaluative

Evaluative mediation (also known as "Directive" mediation) resembles judicial settlement conferences and shuttle diplomacy. Generally, the mediation starts as a joint session with all parties present in one room, followed by the splitting up of the parties and their representatives/legal counsel into separate breakout rooms where the mediator meets privately with each side (such separate sub-meetings are called "caucuses").

An evaluative mediator takes the lead in pointing out the legal strengths and weaknesses of each side's case, usually done in caucus to avoid embarrassment and the like to either side in the presence of the opposition. The mediator will "shuttle" back and forth as the medium of communication between the parties (rather than letting the parties develop their own lines of communication with each other). The focus is on legal positions, strengths and weaknesses, not the parties' underlying interests. An evaluative mediator may also give the parties the mediator's own view of the likely outcome of the case if it were to be decided in court. Parties may feel coerced to settle along the lines of the mediator's evaluation of the case, and the mediator tends to exercise a high degree of control over the mediation process, substantive discussions and the ultimate outcome. The goal is settlement of the case with little or no regard to the subjective needs or feelings of the parties.

2. Facilitative

The goal in facilitative mediation is problem-solving. Facilitative mediators will actively seek out common ground by asking questions of the parties in joint session or caucuses, though facilitative mediators tend to have fewer, if any, caucuses than evaluative mediators. A facilitative mediator actively leads the parties toward settlement, though not to the point of making the parties feel coerced to settle. Once areas of consensus are reached the facilitative mediator often injects the mediator's own opinions and views on how the matter should be settled, though not giving an evaluation of the case. Facilitative mediation occupies the relative middle of mediation styles.

3. Transformative

In transformative mediation, settlement is a welcome by-product of the mediation process but not its direct goal. Rather, as espoused in *The Promise of Mediation*,[1] the transformative mediator seeks "empowerment" and "recognition" of the parties by following, rather than leading, the parties' discussion. "Empowerment" is allowing and enabling the parties to frame the issues themselves and develop their own solutions to those self-defined issues. "Recognition" is allowing and enabling the parties to see and hear the other side's definition of the issues, and possibly acknowledge the validity of the other side's viewpoint without necessarily agreeing with it.

The transformative mediator trusts the parties to have the ability and desire to use mediation as an opportunity to resolve their conflict without the necessity of the mediator steering them to the resolution. Therefore, the transformative mediator will generally not inject his or her own opinions and views into the discussion. Settlement often flows naturally from this environment of empowerment and recognition. Even if there is no settlement, the parties have often reached a new level of communication and understanding which may lead to later resolution of the current issues, the narrowing of issues which

need to proceed to trial, and help in preventing future conflicts from becoming as contentious as they might otherwise have become.

There is a misconception that mediation, particularly transformative mediation, is therapy. While mediation may have beneficial effects, it is not therapy.

Transformative mediation is often most effective when there are ongoing relationships. Because guardianship matters usually involve family members and/or close friends who have mutual concerns about the present and future well-being of the AIP, the author recommends the use of transformative or facilitative mediation in the guardianship context.

Endnote

1. Baruch Bush, R. & Folger, J., The Promise of Mediation, (Jossey-Bass 1994).

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

Mr. Grey has experience as a guardian, court evaluator, guardian ad litem and attorney for AIPs in guardianship proceedings. He is the author of the chapter on "Mediation in Guardianship Practice" in the upcoming NYSBA *Guardianship Practice in New York State, 2nd Edition*, and has given presentations on mediation to various law school, bar association and community groups. He is a member of the NYSBA Elder Law Section, NYSBA ADR Committee, Suffolk County Bar Association Elder Law Committee, Queens County Bar Association Elderly and the Disabled Committee, and the National Association of Elder Law Attorneys (NAELA).

Robert A. Grey earned his J.D. degree from New York Law School in 1985, where he was a John Ben Snow Scholar, and his B.A. degree in Economics with an Adjunct in Business Management from the State University of New York (SUNY) at Binghamton in 1982, where he was a member of the International Economics Honor Society (calculation of GPAs and awarding of official honors were against University policy).

He is also a founding member and Deputy Managing Attorney of the NYPD Legal Bureau Civil Enforcement Unit. In 1995 this unit was a recipient of the Innovations in American Government Award of the Ford Foundation administered by the John F. Kennedy School of Government at Harvard University for its achievements in furtherance of the New York Police Department's (NYPD) Civil Enforcement Initiative. He is an 18-year veteran of the NYPD, having been sworn in as a Police Officer in 1986, promoted to Detective in 1991, and to his current rank of Sergeant in 1992.

New York State Bar Association
Elder Law Section

Awards for 2005 Annual Meeting Request for Nominations

The Awards Committee of the Elder Law Section of the New York State Bar Association, comprised of the two Past Chairs of the Section, Cora Alsante and Lou Pierro, and chaired by Immediate Past Chair Joan L. Robert, seeks nominations for awards to be presented during our Annual Meeting at the Marriott Marquis in January 2005.

The Committee seeks nominations in any of the following five (5) categories, although awards may not be presented in all five (5) categories:

(1) To an individual involved in litigation (including a fair hearing) that has advanced the rights of the elderly and persons with disabilities;

(2) To an individual whose actions are in furtherance of the rights of the elderly and persons with disabilities;

(3) To an individual who is considered a "friend to the Section";

(4) To a member of the judiciary whose positions favor or have favored the practice of Elder Law;

(5) NAELA Senior Award

Nomination forms and other supporting materials must be submitted to Joan Lensky Robert no later than November 30, 2004. The Nomination Form is on page 56.

Nomination Form

NOMINEE: _____

FIRM/EMPLOYER: _____

BUSINESS ADDRESS: _____

_____

HOME ADDRESS: _____

_____

TELEPHONE:

(Office) _____

(Fax) _____

(Home) _____

e-mail address: _____

NOMINATOR: _____

ADDRESS: _____

_____

TELEPHONE:

(Office) _____

(Fax) _____

(Home) _____

e-mail address: _____

RELATIONSHIP TO NOMINEE (including how Nominee is known to Nominator and for how long):

_____

REQUIRED SUBMISSION: Two copies of a narrative (500-word maximum, outline form is fine) detailing how the nominee has significantly and specifically demonstrated attributes as described in the attached **REQUEST FOR NOMINATIONS**.

SUGGESTED SUBMISSIONS: Letters or statements, where appropriate, from Section members, clients, judges, former adversaries.

This form and all supporting items must be postmarked no later than November 30, 2004 OR e-mailed by that date to joanlenrob@aol.com OR faxed to 516-766-0738 by that date. If mailed, nominations should be sent to:

Joan L. Robert
Kassoff Robert Lerner and Robert, LLP
100 Merrick Road, Suite 508W
Rockville Centre, N.Y. 11570

Questions?
Call Joan Robert 516-766-7700

Section Committees and Chair

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

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

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

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

Estate and Tax Planning
Stephen J. Silverberg
Certilman Balin Adler & Hyman, LLP
90 Merrick Avenue, 8th Floor
East Meadow, NY 11554
(516) 296-7000

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

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

Guardianships and Fiduciaries
Charles F. Devlin
New York State Office of Guardian
and Fiduciary Services
140 Grand Street, Suite 701
White Plains, NY 10601
(914) 997-8830

Health Care Issues
Ellyn S. Kravitz
Abrams, Fensterman, Fensterman,
Flowers and Eisman, LLP
111 Marcus Avenue, Suite 107
Lake Success, NY 11042
(516) 328-2300

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

Legal Education
Bernard A. Krooks
Littman Krooks LLP
655 Third Avenue
New York, NY 10017
(212) 490-2020

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

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

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

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

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

Litigation
Ellice Fatoullah
Fatoullah Associates
83 Rilling Ridge
New Canaan, CT 06840
(203) 972-8673

Lobbying
Daniel G. Fish
Freedman & Fish, LLP
521 Fifth Ave., 25th Floor
New York, NY 10175
(212) 953-1172

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

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

Long Term Care Reform
Louis W. Pierro
Pierro & Associates, LLC
21 Everett Road Ext.
Albany, NY 12205
(518) 459-2100

Medicaid
René H. Reixach, Jr.
Woods Oviatt Gilman LLP
700 Crossroads Bldg.
Rochester, NY 14614
(585) 987-2858

Medicaid Legislation
Daniel G. Fish
Freedman & Fish, LLP
521 Fifth Ave., 25th Floor
New York, NY 10175
(212) 953-1172

Howard S. Krooks
Littman Krooks LLP
81 Main Street
White Plains, NY 10601
(914) 684-2100

Membership Services
Martin B. Petroff
Lamson & Petroff
270 Madison Avenue, Suite 1101
New York, NY 10016
(212) 447-8690

Mental Hygiene Legal Services Attorneys
Wayne C. Parton
MHLS
998 Crooked Hill Road, Bldg. 20
West Brentwood, NY 11717
(631) 439-1720

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

Publications
Steven H. Stern
Davidow, Davidow, Siegel & Stern LLP
One Suffolk Square, Suite 330
Islandia, NY 11749
(631) 234-3030

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

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

ELDER LAW ATTORNEY

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

ISSN 1070-4817

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

ADDRESS SERVICE REQUESTED

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