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The Senior Lawyer

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

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NYSBA

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A Message from the Section Chair

I am delighted to provide the Chair's Message for the Fall issue of the *The Senior Lawyer*. I view this Message as an opportunity to describe some of the activities of the Section. By doing so I hope to encourage Section members to become active members of the Section and also to invite readers who are not Section members to join the Section and participate in the work of the Section.

Two notable events were part of the Senior Lawyers Section activities this past fall. The first was a thought-provoking and lively discussion at a Section Executive Committee meeting about how to characterize the members of the Section. The dialogue was led by the Honorable Judith S. Kaye, retired Chief Judge of the State of New York, now of counsel to Skadden Arps. It was clear from the discussion that there is no one description that fits all members of the Section. This is not surprising since more than one-third of the members of NYSBA are 55 years of age or older and therefore eligible to be members of the Section. Whether Senior Lawyers Section members remain actively engaged in the practice of law in their firms or other affiliations that they have had for all or most of their professional career or decide to embark on new venture in the law or otherwise, the goal of the Senior Lawyers Section is to have programs, whether or not for CLE credit, committee projects and articles in the *The Senior Lawyer* that are relevant to members' current and future interests.

The second Senior Lawyers Section activity this Fall was a well-attended CLE program, Living to 103—Are You Prepared? The program included presentation on topics as varied as retirement and cash flow, living in Florida but still a New York State resident, technology and the 21st century job search, and ethical issues in selling or closing a practice. Again the variety of topics and presentations were calculated to appeal to members with different objectives in attending the Senior Lawyers Section programs. The program was conceived by Carole A. Burns, who has been the Section's CLE and Program Chair, with the able assistance of Ellen G. Makofsky, who has recently become Co-Chair of the CLE and Program Committee. By the time you receive copies of this edition of *The Senior Lawyer* the NYSBA Annual Meeting will be close at hand. During the Annual Meeting the Senior Lawyers Section will present another timely program, "Strategies for Optimizing and Protecting You and Your Clients' Assets in Retirement." I do hope that you find time in the busy NYSBA Annual Meeting week to attend this program.

The content of *The Senior Lawyer* is consistent with the mission of the Section to provide materials that are relevant to the wide variety of interests of Section members and to the bar generally. In this issue the topics include: recent developments affecting attorney work product doctrine; Article 81 Guardianships; and the work of the NYSBA Task Force on Family Court. Many of the articles have been authored by active members of the Section. I encourage all Section members to submit articles for the Newsletter.

This issue marks the beginning of a transition for *The Senior Lawyer* from the fine editorial stewardship of Willard DaSilva to the incoming Co-Editors, Anthony J. Enea and Stephen G. Brooks. The excellent Newsletter that you have in hand is the result of the collective efforts of Anthony, Stephen and Willard. They are to be congratulated.

The 2014 NYSBA Annual Meeting marks another transition for the Senior Lawyers Section. My term as Chair of the Section ends at the conclusion of the Senior Lawyers Section meeting during the NYSBA Annual Meeting. I have thoroughly enjoyed chairing the Section. Our incoming Chair, Carole A. Burns, has provided the vision and energy behind the Section's excellent CLE Programs. I know that her vision and energy will make her a splendid Section Chair.

Susan B. Lindenauer

Senior Lawyers Section

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A Message from the Co-Editor

As I begin my tenure as a Co-Editor with Stephen G. Brooks, we both wish to thank Section Chair Susan Lindenauer for her trust and confidence. We also want to thank fellow Co-Editor Bill DaSilva for his significant efforts and contributions in making *The Senior Lawyer* a publication of the highest quality.

As in the past, this edition contains an assortment of articles that we are confident you will find of interest. It is our desire to bring to you articles which will not only enrich your professional lives and practices, such as the piece by Jonathan P. McSherry regarding the revocation of a prior Power of Attorney, as well as the interesting article by C. Evan Stewart regarding the attorney work product doctrine, but also articles which will be of relevance and assistance to you in your personal lives.We have included an excellent piece by Lori Somekh dispelling the myths about reverse mortgages. We also have a fascinating piece about Babe Ruth by David Krell that will be of interest to all baseball fans.

It is also our goal to use this publication to keep you informed of the current happenings of the Section and its committees. As part of this edition you will also find a description of the goals and objectives of a number of the Section Committees. We encourage you to join a committee and become an active member of our Section. We also encourage you to submit articles for publication that you believe will be of interest to our members.

In conclusion, we hope you will be find this edition both enjoyable and educational.

Anthony J. Enea

About the Senior Lawyers Section

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

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

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

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

Analysis of the Coordination of Benefits Between Medicare and Qualified Health Plans Purchased Through American Health Benefit Exchanges and the Small Business Health Options Program

By Marcia M. Schiff

Medicare provides federal health insurance to individuals 65 years of age or older and to disabled individuals under 65 years of age. Some Medicare beneficiaries have additional health insurance coverage from a variety of sources such as an employer group health plan, a retiree plan or Medicaid. When there is more than one potential payer of a claim, coordination of benefit rules establish which coverage pays first on a claim. To understand how Medicare coordinates with Qualified Health Plans (QHPs) available through the Exchanges, a few initial questions must be examined: Can Medicare beneficiaries enroll in Qualified Health Plans purchased through the American Health Benefit Exchanges or the Small Health Option Program Exchange? What is "minimum essential coverage"? When is a Medicare beneficiary deemed to have "minimum essential coverage"? Is it based on Medicare eligibility, enrollment or both? Is enrollment in QHPs cost effective for Medicare beneficiaries? Is enrollment in such plans beneficial or detrimental to Medicare beneficiaries?

As of 2014, every individual (citizen, national, non-citizen lawfully in the country who is not incarcerated) who meets residency requirements must have "minimum essential coverage." If such an individual does not have "minimum essential coverage" and he or she is not exempt from the requirement, he or she will face a federal penalty. The Patient Protection and Affordable Care Act (PPACA) signed into law on March 23, 2010 by President Obama creates state-based exchanges. When a state opts not to create a state-based exchange or enter into a state-federal partnership exchange then a solely federally facilitated health insurance exchange will be established. The health insurance exchanges (state-based, partnership or federally facilitated) provide a marketplace for individuals through American Health Benefit Exchanges (AHBEs) and a marketplace for small businesses through the Small Business Health Options Program (SHOP) to obtain coverage and avoid the imposed federal penalties.[1]

Beginning on October 1, 2013, individuals and small businesses can enroll in Qualified Health Plans through the Exchanges. There are new laws and regulations streamlining the enrollment process and implementing these plans and the Exchanges. As such it is important to understand how these new laws and regulations impact Medicare and the coordination of its benefits with the Qualified Health Plans available through the Exchanges.

While having health coverage is mandatory, use of the Health Insurance Exchanges to purchase health insurance is voluntary. Individuals and businesses can opt to purchase health coverage outside of the AHBEs or the SHOP. To assist individuals and to encourage businesses to obtain and provide health insurance through the AHBEs or the SHOP, there will be incentives for them through advance payment of tax credits and cost sharing subsidies to purchase Qualified Health Plans (QHPs).[2] Advance payment of tax credits and cost sharing subsidies are only available to individuals enrolled in QHPs through an Exchange and to individuals not eligible for "minimum essential coverage."

"As of 2014, every individual (citizen, national, non-citizen lawfully in the country who is not incarcerated) who meets residency requirements must have 'minimum essential coverage.'"

"Minimum essential coverage" includes coverage under government-sponsored programs such as Medicare.[3] Originally, regulations deemed that a person aging into Medicare would be eligible for government-sponsored "minimum essential coverage" when requirements for coverage under the program are met. Actual enrollment in the program was not necessary. Individuals who age into Medicare have a seven-month initial enrollment period which begins three months before they turn 65, includes the month they turn 65 and terminates three months after they turn 65. The originally proposed regulations cut short the seven-month initial enrollment period provided to Medicare eligible individuals aging into Medicare by deeming such individuals as eligible for "minimum essential coverage" on the first day of the first full month after the individual turned 65 years of age.

To resolve this problem, it was subsequently decided that an individual is deemed eligible for "minimum eligible coverage" for the purposes of the premium tax credit only if the individual is enrolled in the coverage. Failing to enroll, he or she will be deemed eligible for "minimum eligible coverage" on the first day of the fourth full month after the event establishing eligibility. In this way the final regulations took into account the seven-month

initial Medicare enrollment period. This change allows individuals to enroll anytime during the seven-month initial enrollment period, including the last three months after their 65th birthday and not risk losing their tax incentives until their seven-month initial enrollment period ended or until they enrolled in Medicare, whichever comes first.[4] However, under the revised rule, if a person fails to enroll in Medicare during the seven-month initial enrollment period by the first day of the fourth month following his or her 65th birthday, he or she will face a lapse in coverage or a high cost QHP. This person will lose premium tax credits for a QHP purchased through an Exchange since he or she will be deemed to be eligible for "minimum essential coverage" and he or she will be ineligible to enroll in Medicare until the General Enrollment Period because he or she missed the seven-month initial enrollment period.

The Treasury Department and the IRS have published additional guidance, explaining when or if an individual becomes "eligible for government-sponsored minimum essential coverage" when the eligibility for that coverage is a result of a particular illness or disease.[5] In the case where an individual become eligible for Medicare based on illness or disease, an individual will *not* be considered to have "minimum essential coverage" *until* a favorable determination of eligibility has been reached by the responsible agency. Until this determination is reached the individual will be able to continue receiving tax incentives. Additionally, the Department of Treasury and the Internal Revenue Service acknowledge that there is an issue regarding individuals who do not qualify for free Medicare Part A based on their work history and as such must pay a high Part A premium. If these individuals are deemed enrolled and meeting "minimum essential coverage" requirements under the above referenced rules applying to age eligibility, they will face a great hardship. This population will forgo subsidized qualified health coverage for high cost Medicare coverage. The Department of Treasury and Internal Revenue Service are considering this issue and request comments from the public.

Medicare and QHPs from American Health Benefit Exchanges

The issue surrounding the Coordination of Benefits between Medicare and Qualified Health Plans pertains not so much to eligibility but to the affordability and the benefits of purchasing a Qualified Health Plan through an American Health Benefit Exchange. Individuals over 65 are not excluded from purchasing a Qualified Health Plan through the American Health Benefit Exchanges. A Qualified Health Plan cannot "design benefits or reimbursement in a way that discriminates against individuals because of their age, disability, or expected length of life." However, a QHP may charge older people up to three times more than younger ones.[6]

While Medicare beneficiaries will not face penalties under ACA as of 2014, as previously cited, many will be ineligible for tax incentives and cost-sharing subsidies offered for purchases of QHPs made through the American Health Benefit Exchanges.[7] Without tax incentives and cost-sharing subsidies Medicare beneficiaries face the possibility that a Qualified Health Plan purchased through an American Health Benefit Exchange will cost more than the combined premiums of Medicare Part B, Medicare Part D and a Medigap policy or even the cost of a Medicare Advantage Plan. As such an individual QHP could be more expensive than Medicare coverage. This is especially true for Medicare beneficiaries who may qualify for assistance through the Medicare Savings and/or the Extra Help Programs. Note that an exception to this cost-based analysis may apply to the Medicare eligible individual who must pay for a Medicare Part A premium in addition to other Medicare premiums. For this person, the purchase of a QHP through an Exchange may be a less expensive alternative, especially if the Department of Treasury and the IRS decide such a person can retain tax incentives. A further cost-based analysis of this issue can be performed when new guidelines are established and the premiums for the QHPs are published.

Besides extra expense, Medicare beneficiaries may be hurt by purchasing a QHP through an American Health Benefit Exchange. Medicare beneficiaries will not be able to purchase Medigap, Medicare Advantage Plans or Medicare Part D coverage through the American Health Benefit Exchanges. Generally, Medicare beneficiaries must enroll in Part B during their seven-month initial enrollment period to avoid a late enrollment penalty. Delaying Part B enrollment in lieu of an individual Qualified Health Plan (QHP) could subject the Medicare beneficiary to a 10% Part B premium penalty for every twelve months he or she delays enrollment. If an individual decides to enroll in Part B later he or she must do so during the General Enrollment Period from January to March each year with coverage beginning six months after enrollment (unless he or she qualifies for a Special Enrollment Period). As such a Medicare beneficiary who delays Part B enrollment in lieu of a QHP may face a lapse in coverage.[8]

Delaying Part D enrollment in lieu of a QHP could also subject the Medicare beneficiary to a Part D premium penalty of 1% of the national base beneficiary premium for every month the Medicare eligible individual delays enrollment. To avoid the Part D premium penalty, a Medicare eligible individual must maintain creditable coverage for at least 63 days or more. However, there is no determination yet on whether or not prescription drug coverage provided by QHPs purchased through the American Health Benefit Exchange or the SHOP is considered creditable coverage. Therefore, it is imperative that a person who becomes Medicare eligible promptly enroll in a Part D plan as well.

Medicare beneficiaries can buy separate long term care or dental coverage from Exchanges to supplement Medicare; however, there are no subsidies or advance payment of tax credits available for these purchases.[9] No issues of Coordination of Benefits apply between Medicare and long term care or dental policies since these policies offer benefits that are not offered by Medicare.

Medicare and QHPs from the Small Business Health Operation Program (SHOP)

Prior to 2016 states can limit exchanges to businesses with 50 or fewer workers. Starting in 2017 states can allow businesses with over 100 employees to purchase QHPs from the SHOP.[10] This provides the Exchanges and QHPs time to establish themselves before additional applicants are added to the risk pool. This staggered timeline especially impacts the Coordination of Benefits for disabled workers as will be discussed below. It also prevents businesses from terminating their health coverage and sending their workers individually to the American Health Benefit Exchanges for coverage. As such, small businesses in New York can buy health insurance coverage for its employees through the Small Business Health Options Program (SHOP) Exchange. Such businesses can also take advantage of a Small Business Health Care Tax Credit if they qualify.

Current Employees

When an employee with coverage from a QHP purchased through the SHOP becomes Medicare eligible, the coordination of his or her benefits works as any employer provided health insurance works. It would be a violation of the federal Age Discrimination in Employment Act (ADEA) for a business to drop an employee who continues to work past age 65 from his or her employer's group health plan.[11] Businesses are also prohibited under the Medicare Secondary Payer Rules from reducing current employees' health benefits due to their reaching the Medicare-eligible age of 65. Exceptions to these rules apply for certain small businesses. As such coverage for current employees over age 65 may be coordinated with Medicare and if that group health plan is a QHP purchased from the SHOP, that also may be coordinated with Medicare following Medicare Secondary Payer Rules.

In general, the Coordination of Benefits depends on the number of employees in the company and whether the employee or spouse, if covered under the spouse's employee health plan, is working, retired or disabled.

If the individual is 65 years of age or older, and is working for a company with less than 20 employees, Medicare provides primary coverage and the QHP provides secondary coverage.

If the individual is 65 years of age or older, and is working for a company with 20 or more employees, the QHP provides primary coverage and Medicare provides secondary coverage.

If the individual is disabled and is working for a company with less than 100 employees, Medicare provides primary coverage and the QHP provides secondary coverage.

If an individual is disabled and is working for a company with 100 or more employees, than the employer's group plan provides primary coverage and Medicare is secondary.

Note: The ACA penalizes large companies that do not offer health insurance if any of their full-time employees enroll in exchange plans and receive premium credits.[12] Further, New York is one of the states that have decided to limit its Exchange to businesses with 50 or fewer workers. As such, employers with over 50 employees in New York cannot purchase QHPs through the Exchange until 2016 when companies with up to 100 employees can purchase QHPs through the SHOP. As such until 2016, a disabled worker's primary insurance coverage will not be from a QHP purchased from the SHOP. Employee coverage can be from either a self-insured group plan or one purchased from the private market assuming the company offers health insurance, and if so Medicare will provide secondary coverage. In 2017 when companies with 100 or more employees can purchase QHPs through the SHOP, then the QHP will provide primary coverage for disabled individuals and Medicare will provide secondary coverage.[13]

Retired Employees

In situations regarding retired employees, different rules apply to the Coordination of Benefits between Medicare and a Qualified Health Plan purchased through the SHOP. Normally, in this situation the Coordination of Benefits depends on the worker's age at retirement and not the size of the company. Medicare provides primary coverage for retirees 65 years of age or older and the individual's retiree plan provides secondary coverage.

As stated earlier, the ACA penalizes large companies who do not offer health insurance if any of their full time employees enroll in exchange plans and receive premium credits.[14] However, when dealing with retirees under the Medicare age of 65, exceptions have been made for large companies. This exception has been made to eliminate the "early retiree" dilemma. When an employer does not offer retiree coverage, many individuals who are under 65 years of age and either choose to retire or are forced into retirement due to prolonged unemployment face many years without health insurance coverage until they reach the Medicare eligible age of 65. The Consolidated Omnibus Budget Reconciliation Act (COBRA) provides coverage to employees upon a qualifying event which can include retirees.[15] However, this coverage is expensive and only provides health insurance coverage for up to

36 months, leaving many early retirees unable to afford or obtain adequate health insurance to cover their gap in coverage.

To alleviate the "early retirement" dilemma, the ACA allows such individuals to purchase QHPs through the American Health Benefit Exchanges with tax incentives and subsidies, if they qualify. This provides early retirees with affordable health care coverage until they become Medicare eligible. For these early retirees, the QHP will be their total coverage. Once retirees become Medicare eligible they can no longer purchase coverage through the Exchange. Nor would they want to continue purchasing health insurance from the exchange since any tax incentives and subsidies for which they qualify would terminate upon their eligibility for Medicare, making the cost of QHPs prohibitive. As such, once they become Medicare eligible, they will be treated as retirees 65 years of age or older with Medicare becoming their coverage.

Qualified Health Plans (QHP) do not automatically terminate upon Medicare eligibility. The QHP must be provided with "reasonable notice" as to the termination of coverage. "Reasonable notice" has been set as 14 days or more. If the QHP is provided with reasonable notice, the Medicare beneficiary can choose a specific termination date for the policy.[16] If the QHP is not provided with "reasonable notice," termination of coverage under the QHP will not be effective until fourteen days after the request for termination is made by the enrollee.[17]

There are many benefits for a Medicare beneficiary in designating a specific termination date. First, by choosing a specific termination date the Medicare beneficiary is able to obtain a safe harbor for the tax benefits, allowing him or her to enroll in Medicare anytime during their initial 7 month enrollment period without losing the tax incentives and subsidies attached to the QHP. Second, by choosing a specific termination date the Medicare beneficiary can coordinate the start of Medicare coverage and the termination of his or her QHP, thereby avoiding a lapse in coverage.

There are many disadvantages for a Medicare beneficiary who does not provide "reasonable notice." First, without providing reasonable notice the Medicare beneficiary may need to wait two weeks before the termination of one's QHP is effective. As such, if not timed correctly, the Medicare beneficiary can find herself enrolled in both a QHP and in Medicare resulting in the termination of tax incentives and subsidies but continuation of coverage. It is imperative for the Medicare beneficiary to disenroll from a QHP prior to obtaining Medicare coverage since the triggered loss of tax incentives and subsidies will result in higher premium bills from the QHP. Second, without providing "reasonable notice" the Medicare beneficiary risks losing QHP coverage before his or her Medicare coverage becomes effective, leaving him or her with a lapse in coverage.

Applicants looking to obtain QHPs in AHBEs will be screened for Medicare, CHIP and Medicaid. Those newly eligible for Medicare will not be referred to a QHP but will be referred to apply to Medicare for health insurance coverage.

Understanding how Medicare will coordinate with the Qualified Health Plans purchased through the American Health Benefit Exchanges and the Small Business Health Options Programs is extremely important in order to make sure that those with Medicare retain coverage and avoid extra expense due to late enrollment penalties and reduced tax incentives and subsidies. The implementation of the Health Care and Education Reconciliation Act of 2010 and the Patient Protection and Affordable Care Act is an ongoing process. Additionally, changes in the law will affect how the Coordination of Benefits between Medicare and QHPs are applied. For example, the U.S. Supreme Court recently struck down the Defense of Marriage Act.[18] Since Medicare is a federally sponsored benefit, the coordination of those benefits (if covered under spouse's employee plan) must be applied to same-sex spouses as it is currently applied to heterosexual spouses. As such, regular updates on this subject are necessary in order to keep up with the changes that will occur.

Endnotes

1. 45 CFR 1.155.100 2013, 45 CFR 1.155.140 2013, 45 CFR 1.155.700 2013.
2. Eligible Individuals and families with incomes between 138 percent and 400 percent of Federal Poverty Level are eligible for premium tax credits. Additionally, those who have lived in the U.S. for less than five years with incomes between 100% and 138% of the Federal Poverty Level may also be eligible for subsidies. In addition to premium credits, the Affordable Care Act establishes cost-sharing subsidies for eligible individuals. Act of Mar. 23, 2010, Pub. L. No. 111-148, Stat.119 as modified by Act of Mar. 30, 2010, Pub. L. No. 111-152, 124 Stat. 1029.
3. 26 U.S.C. § 5000A(f)(1)(A)(i) (2011).
4. 26 CFR Parts 1 and 602 (2012). Note different rules apply for those who qualify for Medicare based on ESRD.
5. See 26 CFR Part 601.601(d)(2) (2012); Department of Treasury and IRS Notice 2013-41 (June 2, 2013).
6. Julie Appleby, "A Guide to Health Insurance Exchanges," Paper prepared for Kaiser Health News, January 2013. p. 1.
7. The Patient Protection and Affordable Care Act provides that premium tax credits and related subsidies are terminated automatically upon Medicare eligibility and or enrollment. 42 U.S.C § 18001 (Act of Mar. 23, 2010, Pub. L. No. 111-148, Stat. 119 as modified by Act of Mar. 30, 2010, Pub. L No. 111-152, 124 Stat.1029; Health Insurance Premium Tax Credit 76 FR 50933-4, August 17, 2011, 76 FR 50941, August 17, 2011. See 26 CFR Part 601.601(d)(2) (2012); Department of Treasury and IRS Notice 2013-41 (June 2, 2013). As such, Medicare beneficiaries with free Medicare Part A coverage will not be required and will have no incentive to purchase QHPs through American Health Benefit Exchanges.
8. Leaving a QHP will not automatically provide you with a Special Enrollment Period unless you were accidentally or fraudulently enrolled in the plan. Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers; Final Rule and Interim Final Rule 77 Fed. Reg. 18390 (to be codified at 42 CFR 4.1455.420 2013).

9. Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers; Final Rule and Interim Final Rule 77 FR 18411 (to be codified at 42 CFR 4.155.1065 2013).
10. http://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf.
11. Age Discrimination in Employment (29 U.S.C. § 623).
12. On July 2, 2013, it was announced that the requirement that businesses with 50 or more provide health insurance to their workers or pay a penalty will be delayed until 2015, http://m.usatoday.com/article/news/2484623. As such it is questionable if businesses with 50 employees will participate in the SHOP.
13. http://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf.
14. *Id.*
15. The original health continuation provisions were contained in Title X of COBRA (Act of April 7, 1986, Pub. L. No. 99-272, 100 Stat. 82).
16. Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers; Final Rule and Interim Final Rule, 77 FR 18371-18374, 18394, 18395, 18463 (to be codified at 45 CFR 4.155.330 2012 and 45 CFR 4.155.430 2012); Health Insurance Premium Tax Credit, 76 FR 50933, 50934, 50941.
17. *Id.*
18. *United States v. Winsor*, 570 U.S. __ (2013), 2013 U.S. LEXIS 4935.

Marcia M. Schiff is an experienced health law attorney. A graduate of Hofstra University School of Law, Ms. Schiff has devoted her career to assisting underserved populations through her work for the New York State Senate and various non-profit organizations.

This article originally appeared in the Fall 2013 issue of the Health Law Journal, *published by the Health Law Section of the New York State Bar Association.*

Revoking a Prior Power of Attorney Using the New York Statutory Short Form

By Jonathan P. McSherry

The current New York Statutory Short Form Power of Attorney,[1] if not modified, could result in unintended consequences for the principal. The issue relates to revocation of a prior statutory short form or other general[2] power of attorney. The current law provides that the execution of a power of attorney does not revoke any power of attorney previously executed by the principal.[3] This law is reflected in subsection (e) of the current statutory short form power of attorney.

Typically, in conjunction with financial or estate planning, a principal will execute a general power of attorney (*e.g.*, statutory short form) which grants the agent broad authority to act on behalf of the principal. If the principal wishes to have more than one agent acting at the same time, he or she can appoint co-agents under one power of attorney.[4] The co-agents could act separately or be required to act together.[5] It is rare that the principal would need two separate New York general powers of attorney that are valid at the same time. If the principal is able to execute a new power of attorney, then any authority or restrictions contained in the prior power of attorney can be added to the new one in addition to any new changes.

When executing a new power of attorney, the principal should be sure to revoke his or her prior general power of attorney, especially if the principal wishes to change agents or change the scope of authority granted to an agent. Although this can be done at any time, it is advisable to do it simultaneously with the execution of the new power of attorney. This is not only the easiest method, but it can help avoid potential problems. For example, if the prior power of attorney is revoked before the new one is executed, there will be a period of time in which there is no valid power of attorney. If the principal became incapacitated during that period so that execution of a new power of attorney was not possible, the principal would have no agent to take care of his or her financial affairs and a guardian would need to be appointed. In contrast, if a new power of attorney is executed before the prior one is revoked, there will be a period of time in which there are two separate, and potentially conflicting, valid powers of attorney, which could lead to more problems. However, as a result of the change in the law and use of the current statutory short form power of attorney, the execution of a new general power of attorney will not automatically revoke any and all prior general powers of attorney.

In order to revoke a prior general power of attorney using the statutory short form, the statutory short form power of attorney must be modified. The law allows certain modifications to the statutory short form without disqualifying it from being a valid statutory short form power of attorney.[6] These modifications, which are optional, must be stated in subsection (g) of the current statutory short form power of attorney. More specifically, the principal can include a modification which revokes one or more powers of attorney previously executed by the principal.[7]

A modification should be added to subsection (g) of the statutory short form power of attorney, which provides that all New York general powers of attorney, including all New York statutory short form powers of attorney, are revoked by the execution of the new power of attorney. Sample language for this modification is as follows:

> My execution of this Power of Attorney shall revoke any and all general powers of attorney, including any and all New York Statutory Short Form Powers of Attorney, previously executed by me in accordance with the laws of, and for use in, the State of New York. If I have executed a general power of attorney in accordance with the laws of another state or jurisdiction other than the State of New York, then such power of attorney shall not be revoked by my execution of this Power of Attorney, unless I state otherwise in this "Modifications" section.

The distinction between New York powers of attorney and powers of attorney for other states is important. For example, a principal who spends a significant amount of time in New York and Florida and has assets in both states may want to execute a New York power of attorney for use in New York and a Florida power of attorney for use in Florida. Although a valid power of attorney duly executed in one state may be accepted as valid in another state,[8] the practical use of such power of attorney may be limited and there may be added difficulty and expense in using it. Unless the principal is also executing a new power of attorney for the other state at the time he or she executes a new power of attorney for New York, the principal may not want to revoke the prior general power of attorney for the other state.

Even if a proper modification is included so that the execution of a new power of attorney serves to revoke a prior power of attorney, the principal must still give written notice of the revocation to the agent under the prior power of attorney.[9] Since a principal who has just revoked

a prior agent's authority may not want to provide the prior agent with a copy of the new power of attorney, a separate writing signed and dated by the principal should be given to the prior agent as notice of the revocation. This could be a formal revocation document or simply a letter from the principal to the prior agent. It is important to provide the prior agent with notice of the revocation as soon as possible because termination of an agent's authority or of the power of attorney is not effective as to the agent until the agent has received a revocation.[10] If the prior power of attorney was recorded in the office of any county clerk, then the revocation must also be recorded in the same office.[11]

Notice of the revocation of the prior power of attorney should also be given to all third parties, including financial institutions, who have received a copy of the prior power of attorney or who hold assets of the principal.[12] It is important that such notice be given as soon as possible because termination of an agent's authority or of the power of attorney is not effective as to any third party who has not received actual notice of the termination and acts in good faith under the power of attorney.[13]

Another advantage of revoking all prior powers of attorney in the new power of attorney is that all third parties who receive a copy of the new power of attorney will have notice that any and all prior powers of attorney have been revoked and are no longer valid. Therefore, no separate written notice is necessary. However, it is still advisable to provide separate notice or at least highlight in a cover letter accompanying the copy of the new power of attorney that all prior powers of attorney have been revoked.

If a prior general power of attorney is not revoked upon execution of a new general power of attorney, then the prior general power of attorney, and the authority of any agents designated therein, will remain valid and both agents may act for the principal. In addition, if the agent under the prior general power of attorney is granted the same authority as the agent under the new power of attorney, then each agent may act on their own, with regard to such authority, without the consent of the agent under the other power of attorney, unless the principal specifically states otherwise in the "Modifications" section in subsection (g) of the statutory short form power of attorney.[14]

A further issue concerning revocation of a prior power of attorney may arise with regard to a power of attorney that was previously executed by the principal on or after September 1, 2009 but before September 12, 2010. The new power of attorney legislation enacted on January 27, 2009,[15] which became effective on September 1, 2009,[16] provided that the execution of any power of attorney would revoke any and all prior powers of attorney executed by the principal, unless the principal expressly provided otherwise.[17] At the time, for purposes of the power of attorney legislation contained in the General Obligations Law, a "power of attorney" included any "written document by which a principal with capacity designates an agent to act on his or her behalf."[18] As a result, unless the principal expressly provided otherwise in the document, the execution of a general power of attorney would serve to revoke any and all limited or specific purpose powers of attorney, including, for example, a stock power of attorney, bank power of attorney, or government power of attorney. In addition, the execution of a limited or specific purpose power of attorney would serve to revoke the principal's general power of attorney, unless the principal expressly provided otherwise.

In response to this problem, amended power of attorney legislation was enacted on August 13, 2010.[19] The amendment, which represents the current law, reversed the prior legislation as it related to revocation of prior powers of attorney, by providing that the execution of a power of attorney shall not revoke any power of attorney previously executed by the principal.[20] In addition, certain limited powers of attorney were excluded from the definition of "power of attorney" for purposes of the power of attorney legislation contained in the General Obligations Law.[21] While this new legislation became effective on September 12, 2010, it is deemed to have been in full force and effect on and after September 1, 2009.[22] The correction to the law and its retroactive effect would seem to solve this revocation issue for powers of attorney executed on or after September 1, 2009 but before September 12, 2010, where those powers of attorney made no modification relating to the revocation of prior powers of attorney.

However, for those powers of attorney executed on or after September 1, 2009 but before September 12, 2010 which did include a modification relating to the revocation of prior powers of attorney, there may still be an issue which needs to be addressed if and when the principal wishes to execute a new power of attorney. For example, before the amended legislation, many drafters of general powers of attorney included a modification therein which attempted to prevent that general power of attorney from being automatically, and unintentionally, revoked by the principal's subsequent execution of a limited or specific purpose power of attorney. An example of the language which some drafters used for this modification is as follows:

> This Power of Attorney shall not be revoked by any subsequent Power of Attorney I may execute, unless such subsequent Power of Attorney specifically provides that it revokes this Power of Attorney by referring to the date of my execution of this document.

The rationale for using such a modification is that a principal executing a limited or specific purpose power of

attorney would not intentionally include reference to the prior general power of attorney; therefore, such execution would not serve to automatically revoke the general power of attorney.[23] The problem that remains now is that inclusion of this modification in the prior general power of attorney may cause such power of attorney to remain valid after the new power of attorney is executed, even where the new power of attorney contains a modification which revokes any and all prior powers of attorney.

An argument can be made that execution of the new power of attorney does not revoke the prior modified general power of attorney because the new power of attorney does not specifically reference the prior power of attorney by the date of its execution. Since the current default law provides that the execution of a power of attorney will not revoke any prior powers of attorney[24] and the terms of the prior modified power of attorney govern that document, it could be argued that the modification in the new power of attorney, which attempts to generally revoke all prior powers of attorney, is not sufficient to revoke the prior modified general power of attorney. If that argument is successful, another modification would need to be included in the new power of attorney which specifically references the prior modified power of attorney by its date of execution and provides that such power of attorney is specifically revoked.

In conclusion, a drafter of a New York statutory short form power of attorney should always be sure to include a modification which revokes the principal's prior New York general powers of attorney. In addition, if the principal executed a general power of attorney on or after September 1, 2009 but before September 12, 2010, the drafter should obtain a copy of that document to ascertain whether any modifications were included therein. If the prior general power of attorney contains a modification which requires a specific reference to such document in order to revoke it, then the drafter should be sure to include an additional modification in the new general power of attorney which specifically references and revokes the prior modified general power of attorney.

Endnotes

1. N.Y. General Obligations Law § 5-1513 (Consol. 2011).
2. The author uses the term "general" power of attorney in contrast to a "limited" or "specific purpose" power of attorney.
3. GOL § 5-1511(6) (Consol. 2011). Note: This subsection became effective on September 12, 2010 but is deemed to have been in full force and effect on and after September 1, 2009. 2010 N.Y. Laws 340 § 31.
4. GOL § 5-1508(1) (Consol. 2011).
5. Unless the principal provides otherwise in the power of attorney, the co-agents must act jointly. GOL § 5-1508(1) (Consol. 2011).
6. GOL § 5-1503 (Consol. 2011).
7. GOL § 5-1503(3) (Consol. 2011).
8. *See, e.g.*, GOL § 5-1512 and FLA. STAT. ch. 709.2106(3) (2011).
9. GOL § 5-1511(3)(b) (Consol. 2011). Also see "Caution to the Principal" in subsection (a) of the New York statutory short form power of attorney. GOL § 5-1513 (Consol. 2011).
10. GOL § 5-1511(5)(b) (Consol. 2011).
11. GOL § 5-1511(4) (Consol. 2011).
12. See "Caution to the Principal" in subsection (a) of the New York statutory short form power of attorney. GOL § 5-1513 (Consol. 2011).
13. GOL § 5-1511(5)(a) (Consol. 2011).
14. See subsection (e) of the New York statutory short form power of attorney. N.Y. GOL § 5-1513 (Consol. 2011).
15. 2008 N.Y. Laws 644.
16. 2008 N.Y. Laws 644 § 21, amended by 2009 N.Y. Laws 4 § 1.
17. 2008 N.Y. Laws 644 § 19.
18. 2008 N.Y. Laws 644 § 2.
19. 2010 N.Y. Laws 340.
20. 2010 N.Y. Laws 340 § 26. GOL § 5-1511(6) (Consol. 2011).
21. 2010 N.Y. Laws 340 §§ 2, 6. GOL §§ 5-1501(1) and (2)(j); 5-1501C (Consol. 2011).
22. 2010 N.Y. Laws 340 § 31.
23. Whether that rationale would be upheld in court is uncertain. We know that the modification applies to the general power of attorney in which it is contained. However, it is unclear whether that modification will also apply to the subsequent power of attorney which, by its terms, revokes all prior powers of attorney unless the principal expressly provides otherwise therein. Since a subsequent limited or specific purpose power of attorney likely will not expressly provide that the prior general power of attorney is not revoked, it could be argued that the modification in the prior general power of attorney has no effect at all. This issue, however, is moot with the amended legislation enacted on August 13, 2010, which is deemed to have been in full force and effect on September 1, 2009, since the execution of a subsequent power of attorney would not revoke any prior powers of attorney unless expressly provided therein.
24. GOL § 5-1511(6) (Consol. 2011).

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Good Golly Miss Molly!: The Attorney Work Product Doctrine Takes Another Hit

By C. Evan Stewart

In 1970, the legendary singer-songwriter Joni Mitchell wrote and recorded "Big Yellow Taxi," which included the memorable lyrics: "Don't it always seem to go, that you don't know what you've got till it's gone?"[1] If things keep going the way they have been, it will not be long before folks are singing a similar tune for the attorney work product doctrine.

Readers of this column will recall that there has been some prior mischief in this field.[2] Now, there is more bad news.

"'Don't it always seem to go, that you don't know what you've got till it's gone?' If things keep going the way they have been, it will not be long before folks are singing a similar tune for the attorney work product doctrine."

Forward Into the Past[3]

Before we get to the most recent bad stuff, let us briefly review the bidding. At first, there was good news. In *United States v. Adlman*,[4] Second Circuit Judge Pierre Leval wrote a decision that appeared (once and for all) to clear up a lot of confusion (both in the judiciary and for litigants) as to the proper standard for evaluating when attorney work product materials were prepared "in anticipation of litigation," and thus entitled to protection from discovery pursuant to Federal Rule of Civil Procedure 26(b)(3). Judge Leval ruled that the determinative issue was whether the document was created "because of" the prospect of litigation.

Adlman was a sound decision, and it provided years of certainty—until the First Circuit turned it on its head in *United States v. Textron*.[5] In *Textron*, an *en banc* panel (by a three to two vote) endorsed a new test: whether the documents were created "for use" in litigation; in other words, would the materials "in fact serve any useful purpose for Textron in conducting litigation if it arose."[6] Obviously, by the *Textron* "for use" standard the universe of protected attorney materials was reduced exponentially—at least in the First Circuit (and courts influenced by the *en banc* ruling).[7]

If that were not bad enough, *Adlman* is now being retrenched within the walls of the Second Circuit. Is nothing sacred?

You Press the Button, We Do the Rest[8]

On September 17, 2012, Magistrate Judge Marion Payson (W.D.N.Y.) lowered the boom on the Eastman Kodak Company, ordering the crippled firm to produce communications between its lawyers and an auditing firm they had retained.[9] The lawsuit concerns a dispute in which Kodak is suing Kyocera, which was granted a license in 2002 to use and sell Kodak's digital camera technology. Under the terms of the agreement, Kodak was entitled to hire an independent auditor to determine whether Kyocera was properly paying royalties owed to Kodak. Believing it was not getting its fair share, Kodak invoked that right in 2005; Deloitte & Touche was retained, and it issued three reports: in 2005, in 2006, and in 2009. Kodak sued Kyocera in 2010.

During discovery, Kodak produced 500 communications with Deloitte, but withheld 37 documents and redacted 40 others, all on the basis of the attorney work product doctrine. Kyocera moved to compel the production of those withheld and redacted materials, and the Magistrate Judge granted that motion.

Critical to the discovery dispute is the fact that, after Deloitte's 2005 and 2006 reports—clearly done pursuant to the 2002 agreement and with Kyocera's consent/approval—Kodak notified Kyocera that it was in violation of the 2002 agreement. Kodak's outside counsel *thereafter* retained Deloitte for additional work in 2008. With respect to *that* assignment, Deloitte sent a letter to Kodak's outside counsel setting forth: (i) that it had in fact been retained by Kodak's outside counsel in connection with Kodak's dispute with Kyocera; (ii) that its work "will be covered by the attorney work-product privilege and other applicable privileges;" and (iii) that Deloitte would treat all of its work papers and communications with counsel in connection with the assignment as confidential.[10] Thus, the additional audit work was clearly contemplated as being beyond the earlier, consensual work called for by the 2002 agreement, and by its clear terms it was being done in contemplation of litigation at the direction of Kodak's outside counsel.

Not surprisingly, it was the 2008–2009 work product and communications that Kyocera wanted and that were put at issue before the Magistrate Judge. Given how carefully Kodak's counsel and Deloitte had structured the auditor's work to be consistent with Rule 26(b)(3), what went wrong?

Applying *Adlman*?

The Magistrate Judge started her legal analysis by paying homage to *Adlman* and its forebearers,[11] but then veered off course because of the supposed "heavy burden" that *Adlman*'s "because of" standard imposes on parties that seek to invoke its protections. Really?

The Magistrate Judge next articulated the reasons why Kodak had not met that "heavy burden": (i) a 2011 decision by Judge Harold Baer (S.D.N.Y.) (*GenOn*),[12] which the Magistrate Judge believed to be on all fours; and (ii) her conclusion that the materials were not in fact prepared "because of" the prospect of litigation. Let us look at each separately.

First off, *Adlman* imposes no such "heavy burden"; this is a big foot that Judge Baer decided to place on the scale in his *GenOn* decision, a big foot happily adopted by the Magistrate Judge. Why judges (most of whom grew up as litigators) have a history of imposing glosses on Rule 26(b)(3) is not at all clear;[13] perhaps it is because, like the *en banc* panel in *Textron*, some have a desire to see one side prevail.[14]

Next off, Judge Baer's ruling in *GenOn* is not on "all fours" with the Kodak situation. In *GenOn*, all that was represented to the audited company was that the counterparty firm had retained the auditor pursuant to the parties' contract. That factual predicate then allowed Judge Baer to conclude that the audit, because it was merely triggered under the two companies' contractual arrangement, was done in the "ordinary course of business"; as such, the fact that the audit report was subsequently routed through and used by GenOn's counsel to prepare for litigation did not confer protection under Rule 26(b)(3).

While that is not inconsistent with *Adlman*, it is clearly not the 2008 situation structured by Kodak's counsel with Deloitte. Not leaving well enough alone, Judge Baer—influenced by an Illinois court's ruling that missed the boat on *Adlman*[15]—then took a wrong fork in the road when he also wrote, in dicta, that where a party specifically engages an auditor in anticipation of litigation, the work papers created are not Rule 26(b)(3) work product because such papers do not contain attorneys' mental impressions or litigation strategies. Of course, if that were correct (and it most definitely is *not*), then *no* auditor's work could *ever* be covered by the work product doctrine–by definition, auditors are not lawyers and thus their work can *never* reflect "attorneys' mental impressions or litigation strategies." *Adlman* and Rule 26(b)(3) certainly do *not* stand for that proposition, however; yet the Magistrate Judge (as we will see below) followed Judge Baer's unfortunate dicta detour on this score in the *Kodak* case.[16]

Finally, there is the Magistrate Judge's examination of the withheld/redacted documents themselves.[17] As to the most important documents at issue—those which reflected communications between Deloitte and Kodak's counsel concerning Kyocera's failure to cooperate with the 2008 audit (i.e., Kyocera withheld requested information)—the Magistrate Judge posed a rhetorical non-sequitur which, frankly, makes no sense: "Any suggestion that Kodak would not have questioned Deloitte about Kyocera's cooperation in the audit and disclosure of documents had it not anticipated litigation strains credulity." Huh? And/or so what! In any event, falling back on *GenOn*, the Magistrate Judge waived away all the documents on the basis that none of them "analyze potential legal claims against Kyocera or discuss potential litigation." And so Kodak lost all of the documents it had every reason to believe would be protected from disclosure.[18]

Conclusion: Devil with a Blue Dress On[19]

For a long time after *Adlman*, lawyers and their clients felt reasonably sure that courts would afford attorney work product (i.e., their work done in anticipation of litigation, as well as the work done by third parties expressly at their direction) confidential treatment—if the lawyers did it the right way. Other courts outside the Second Circuit started to chip away at that state of affairs, however; and now the bad seed has spread into the courts of the Second Circuit. Until the Court of Appeals acts to stem this unfortunate tide, litigating work product issues will likely be quite dicey; as the Sergeant in *Hill Street Blues* used to say: "Be careful out there!"

Endnotes

1. Joni Mitchell, Ladies of the Canyon (Reprise 1970). Covers of Ms. Mitchell's definitive version of her song have, to be charitable, not been very good (*e.g.*, Maire Brennan, Amy Grant, Counting Crows, Pinhead Gunpowder).
2. *See* C. Evan Stewart, *Caveat Corporate Litigator: The First Circuit Sets Back the Attorney Work Product Doctrine*, 14 N.Y. Bus. L.J. 46 (Summer 2010). For more recent troubling decisions, see C. Evan Stewart, *Ohio Takes a Bite Out of the Big Apple*, N.Y. L.J., Sept. 7, 2012, at 4, col. 1.
3. As all Firesign Theatre aficionados know, this is the immortal line delivered by Catherwood, the butler—who is in reality Dan, the husband of Melanie Haber (a/k/a Audrey Farber a/k/a Susan Underhill a/k/a Betty Jo Bialowski—"everyone knew her as Nancy")—as he enters a time machine to transport him back to Ancient Greece ("where burning Sappho loved and stroked the wine-dark sea, in the temple by the moonlight, wah de doo dah…."). *See* Firesign Theatre, The Further Adventures of Nick Danger (Columbia 1969).
4. United States v. Adlman, 134 F.3d 1194 (2d Cir. 1998).
5. United States v. Textron Inc. & Subsidiaries, 577 F.3d 21 (1st Cir. 2009) (en banc).
6. *Id.* at 27, 30.
7. For a more fulsome analysis of *Textron* and its ramifications, see Stewart, *supra* note 2.

8. In 1888, George Eastman commercially introduced his new camera, which he called Kodak, with this slogan. For a very long time, the Eastman Kodak Company was the dominant player in the world's camera markets (in 1976, it had a 90% market share in the United States). On January 19, 2012, the company filed for Chapter 11 bankruptcy protection.
9. Eastman Kodak Co. v. Kyocera Corp., No. 10-CV-6334-CJS, 2011 WL 1432038 (W.D.N.Y. Apr. 14, 2011).
10. Kyocera was informed of the additional retention (by Deloitte), and was told the 2008 assignment related to the parties' dispute; neither Kyocera's consent nor its approval was sought by Kodak or its counsel, and Kodak never shared with Kyocera its lawyers' representation arrangement with Deloitte (*e.g.*, Deloitte's letter to Kodak's counsel).
11. Hickman v. Taylor, 329 U.S. 495 (1947).
12. The Genon Mid-Atl., LLC v Stone & Webster, Inc., No. 11 CV 1299(HB)(FM), 2011 WL 2207513, at *3 (S.D.N.Y. June 6, 2011).
13. *See* Stewart, *supra* note 2.
14. In *Textron*, the *en banc* panel's rationale for its new standard was its avowed interest in helping the I.R.S. "in revenue collection." *Textron*, 577 F.3d at 31.
15. G.M. Harston Const. Co., Inc. v. City of Chicago, 2001 WL 817855, at *2 (N.D. Ill. 2001).
16. It should be noted that, later in the same litigation, Judge Baer returned to the fold and properly applied *Adlman*. *See* GenOn Mid-Atl., LLC v. Stone & Webster, Inc., No. 11 CV 1299 HB, 2012 WL 1849101 (S.D.N.Y. May 21, 2012).
17. As she transitioned to that part of the opinion, the Magistrate Judge wrote that she did not feel the need to determine whether Kyocera's consent to the 2008 audit was conditioned upon an understanding that it would be the same or different than the 2005 audit. One material problem with that observation is that neither Kodak nor its outside counsel sought Kyocera's consent for the 2008 audit. *See supra* text accompanying note 10.
18. With the Magistrate Judge so determined to rule against Kodak, perhaps it would not have mattered. However, Kodak could have improved its litigation posture by providing its 2005 retention arrangement with Deloitte, which presumably would have not included the important components set forth in the 2008 Deloitte letter (*e.g.*, anticipation of litigation, confidentiality, etc.).
19. Rock and Roll aficionados know that Mitch Ryder and the Detroit Wheels covered Little Richard's 1958 hit (#4) "Good Golly Miss Molly" (Specialty Records) in a 1966 medley with "Devil with a Blue Dress On" (New Voice), which also was a #4 hit. Mitch Ryder and the Detroit Wheels, Good Golly Miss Molly (Breakout! 1966); Mitch Ryder and the Detroit Wheels, Devil with a Blue Dress On (Breakout! 1966).

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What Sally Soprano Teaches Lawyers About Hitting the Right Ethical Note in ADR Advocacy

By Elayne E. Greenberg

The Problem

Paradoxically, when lawyers opt to mediate or arbitrate, lawyers may still wind up selecting, shaping and advocating in these dispute resolution processes to resemble the very litigation process they have sought to avoid.[1] After all, litigation likely comports with the lawyer's own conflict style, comfort level and concepts of justice.[2] As a consequence of this litigation bias, we see that the metaphorical doors of a multi-door courthouse that once offered a menu of dispute resolution choices are increasingly leading us back to one choice: a variation of the litigation door. Even though the Model Rules of Professional Conduct confirm that a lawyer's litigation preference may be within ethical parameters, this practice may, at times, directly contravene his client's interests. Let me explain.

Consider Sally Soprano. Sally Soprano gained her fame, not as one of Peter Gelb's Metropolitan Opera divas, but as a dispute resolution icon in the well-worn negotiation simulation between an opera singer questionably past her prime and an opera house in desperate need an operatic lead. The private instructions of this negotiation exercise inform Sally's lawyer that she wants the part so much, she would even be willing to perform for free. Many aspiring lawyers in law schools throughout the country and experienced lawyers seeking to hone their negotiation skills in negotiation training courses have enthusiastically played the part of Sally's lawyer. And too many times, these lawyers have supplanted Sally's wishes with their own by negotiating Sally's compensation at the risk of costing Sally the lead. Of course, these lawyers justified their actions, because they believed that compensation was more important than landing the lead role. According to many of the lawyers' thinking, who in their right mind would want to work for free? Sally Soprano teaches lawyers the challenge and importance of representing their clients' wishes, even when those wishes don't comport with the lawyer's own values and biases.

This same lawyer/client tension potentially emerges when lawyers, the ultimate consumers of dispute resolution services, opt to mediate or arbitrate. Lawyers may select neutrals, shape the process and advocate in the chosen dispute resolution process in a way that comports with the lawyer's own conflict style and is more akin to the lawyer's litigation-bent, sometimes at the expense of their client's expressed needs. This issue's column will discuss this tension and suggest ways ethical lawyers might proceed. Part One will explain the correlation between a lawyer's philosophical map and the litigation-bent decisions that shape his or her arbitration and mediation use. In Part Two, I will explore the ethical parameters that guide this discussion. In Part Three, I will suggest strategies for lawyers to better honor their client's wishes and deal with this ethical tension. Finally, I will conclude by framing this problem as part of the lawyering evolution that is experimenting with the most effective ways to integrate dispute resolution into a lawyer's case management.

"Sally Soprano teaches lawyers the challenge and importance of representing their clients' wishes, even when those wishes don't comport with the lawyer's own values and biases."

Part One: Understanding the Lawyer's Litigation-Bent: The Correlation Between a Lawyer's Philosophical Map and Advocacy Decisions

Dispute resolution scholars Tom Stipanowich and Jacqueline Nolan-Haley red-flag that the lawyer's advocacy decisions are increasingly shaping arbitration and mediation processes on a continuum to resemble the litigation default.[3] The lawyer's philosophical map may influence the types of neutral that is selected, the lawyer's style of advocacy and the procedures incorporated into the chosen dispute resolution process. Over three decades ago, Professor Len Riskin described the lawyer's "standard philosophical map" as one that is more consistent with an adversarial system: parties are adversaries; legal conflicts are about rights and rules; the law provides the answers to disputes; and emotions, people and relationships are undervalued.[4] Even though we may take pride in the fact that as individual lawyers we are each our own person, as a group many of us share similar psychological traits that contribute to why some lawyers have a litigation bent.

Goldfien and Robbennolt's study on law students' preferences for mediator's styles contribute that as a group, lawyers tended to measure on the Myers-Briggs Type Indicator (MBTI) as having a Thinking, Introverted orientation.[5] Translated into lay people's terms, lawyers who are thinkers have a bent to defining the problem narrowly and rely on more objective standards such as the

law.[6] Those lawyers with the introvert dimension prefer to keep the information to themselves rather than share information with colleagues, a defining value in a collaborative approach.[7]

Goldfien and Robbennolt's study also gives us some insight into how a lawyer's conflict style and philosophical map may in some cases contribute to shaping dispute-resolution processes into veritable litigation clones. Although many of the study participants indicated a general preference for mediators who were creative and at times used elicitive techniques, the participants also indicated a preference about half the time for lawyer-mediators who were more directive. According to the study, the participants preferred directive and evaluative behaviors in context.[8]

In his aptly penned law review article "Arbitration: 'The New Litigation,'" Tom Stipanowich laments how arbitration is no longer an expeditious forum for justice. How ironic that arbitration has reworked itself to resemble the litigation process it has been trying to avoid. Among the examples he cites to illustrate the judicialization of arbitration include increased discovery, docketing problems that cause endless delays for hearings, judicial review of awards and challenges to arbitrators' impartiality.[9]

Professor Jacqueline Nolan-Haley opines in her award-winning article, "Mediation: The 'New Arbitration,'" how the core mediation values of party self-determination and party control of the outcome are becoming obfuscated by the injection of adjudication-like practices in mediation. Adversarial advocacy and evaluative mediators collide with the purpose of party self-determination. In another example of mediation's lost benefit, the value of mediation becomes muted when it is part of a med/arb process. Mediation as a free standing dispute resolution process or as part of a mulit-step process is being altered to resemble more of an arbitration policy. Multi-step processes are in practice compressed so that the arbitration stage remains at the center.[10]

The optimists among us believe all is not bleak. The legal culture is in the midst of an evolution, and this "backlash" is a natural part of any cultural shift. Similarly, the lawyer's "philosophical map" continues to evolve as more and more law schools teach aspiring lawyers not only the skills of dispute resolution, but the values underlying each process.

Part Two: The Ethical Parameters

Ethically, lawyers should avoid shaping dispute resolution processes into litigation-like forums unless the client agrees to such modification. Although ethical lawyering lore educates that it is the attorney who decides the strategy and the means for achieving the client's objectives, a more careful reading of the Professional Rules of Conduct suggests that this is not an absolute.[11] According to the Professional Rules of Conduct for Lawyers, attorneys may take the lead so long as the client does not object to the means.[12] Injecting another bit of reality into ethical lore, the ethical codes for mediators and arbitrators remind lawyers that respecting party self-determination[13] and achieving justice for both parties[14] are central to these alternative dispute resolution processes. As a natural corollary, lawyers who opt to mediate or arbitrate their client's disputes, believing these processes will advance their client's interests, also have an ethical obligation to calibrate their advocacy in a way that will promote their client's interests in these forums. This discussion is framed, in part, by the lawyer's ethical obligations to their clients as detailed in the Professional Rules 1.2, 1.4 and 2.1.

Prior to selecting a dispute resolution process or means to advance a client's interest, a lawyer has an ethical obligation to consider the multi-dimensions of his or hers client's interests, As the client's advisor, Rule 2.1 prescribes that lawyers "in rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological and political factors that may be relevant to the client's situation."[15] Depending on the interests of the client, the lawyer may recommend mediation or arbitration as a preferable forum instead of litigation. In his commentary, Roy Simon suggests that it "may be advisable under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation."[16]

Whatever the lawyer is recommending, the lawyer still must consult with the client about the means of resolving the dispute. Rule 1.2 (a) provides, in relevant part, that "Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of the representation and, as required by Rule 1.4, shall consult with the client as to the means to which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter.…" However, in those situations where the attorney and client do *not* agree on the means, Rule 1.2 is silent about how the attorney and client should proceed. In his comment, Simon advises that if the attorney and client are not able to reach a "mutually acceptable resolution of the disagreement," the client may discharge the lawyer or the lawyer may withdraw from the case.[17]

The challenge for ethical purposes is how you characterize "means." If lawyers shape mediation and arbitration in a way that it looks like litigation, does mediation and arbitration become so radically altered that they almost become a different "means" that implicate additional ethical action? I suggest that when a chosen dispute resolution process has morphed into a means that is a litigation clone instead of the alternative dispute resolution purpose the process purports to offer, that dispute resolution process has in actuality become a different means.

Part Three: Recommendations

Extrapolating from the ethical codes and comments, I posit that when lawyers shape mediation and advocacy processes into litigation-like processes they ethically need to do more. First, they should make sure that the client is fully informed about the means the attorney is using. All mediations are not alike. Directive mediation is distinctly different than an elicitive mediation.[18] Similarly, all arbitrations are not alike. An arbitration with a panel that includes a party-appointed arbitrator, extensive discovery and a non-binding award is a distinctly different process than an expedited arbitration with a binding award.

Second, when selecting, shaping and advocating in a chosen dispute resolution process, the lawyer must distinguish his personal biases from his professional acumen. As Sally Soprano reminds us, if an attorney's biases are directing his choices at the expense of advancing his client's interests, that attorney's conduct is in direct contravention of the Professional Rules of Conduct for Lawyers.

Conclusion

As our legal culture continues to experiment with the ethical and effective ways to integrate dispute resolution into lawyering, there is not a clear or easy path. Rather, as with any cultural evolution there are steps forward, backlash reactions and supportive cultural shifts that need to take place before dispute resolution is fully and effectively integrated into lawyering. The increase of client-centered dispute resolution processes such as mediation spotlights the tension between a lawyer's own biases about conflict resolution and the client's expressed interests.

Now more than ever, a client's interests need to be center stage. Although some attorneys may pooh pooh this, defending that they know better, more client-centered attorneys appreciate that their clients may know best. Effective attorneys pause and develop a heightened awareness of when the attorney's own biases may collide with the client's interests.

In order for such dispute resolution processes as arbitration and mediation to be true alternatives rather than variants of litigation, increasing numbers of lawyers need to expand their lawyer's philosophical map. Another helpful step would be to continue to revise the Professional Rules of Conduct for Lawyer from a more litigation-centric guide to a more integrated advocacy and dispute resolution guide, to help lawyers resolve the inevitable ethical conundrums that will continue to arise when they use ADR processes as advocates. Bravo, Sally Soprano!

Endnotes

1. *See, e.g.,* Jacqueline Nolan-Haley, *Mediation: The "New Arbitration,"* 17 Harv. Negot. L. Rev. 61(2012); Tom Stipanowich, *Arbitration: The "New Litigation,"* 1 Univ. Ill. L. Rev. (2010).
2. Jeffrey H. Goldfien & Jennifer K. Robbennolt, *What If the Lawyers Have Their Way? An Empirical Assessment of Conflict Strategies and Attitudes Toward Mediation Styles,* 22 Ohio St. J. on Disp. Resol. 277 (2007).
3. Stipanowich and Nolan-Haley, *supra* note 1.
4. Chris Gutherie, *The Lawyer's Philosophical Map and the Disputant's Philosophical: Impediments to Facilitative Mediation and Lawyering*, 6 Harv. Negotiation L. Rev. 145 (2001).
5. Goldfien and Robbennolt, *supra* note 2 at 310.
6. *Id.* at 311.
7. *Id.* at 311.
8. *Id.* at 306.
9. Stipanowich, *supra* note 1.
10. Nolan-Haley, *supra* note 1.
11. Simon's NY Rules of Professional Conduct Annotated 2013 Edition, Rule 1.2 Scope of Representation and Allocation of Authority Between Client, Comment 2 (2012).
12. *Id.* at Rule 1.4 Comment 3 (2012).
13. ABA Model Standards of Conduct for Mediators, Standard I Party Self- Determination (2005).
14. ABA Code of Ethics for Arbitrators in Commercial Disputes Canon I guides that arbitrators have an obligation to conduct the arbitration in a way that protects each party's rights (2004).
15. *See supra* note 11 NY Rules of Professional Conduct 2.1 Advisor.
16. *See supra* note 11 NY Rules of Professional Conduct Rule 2.1 Advisor, Comment 5, Offering Advice.
17. *See supra* note 11 NY Rules of Professional Conduct, Rule 1.2, Scope of Representation and Allocation of Authority Between Client and Lawyer Rule, Comment 2.
18. Leonard I. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 Notre Dame L. Rev. 1,30 (2003). Professor Riskin uses the terms directive and elicitive to distinguish mediator conduct on a spectrum. On one end of the spectrum, the directive mediator directs the mediation process and the parties' mediation outcome. On the other end of the spectrum, the elicitive mediator supports party autonomy and self-determination.

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Reverse Mortgages: Dispelling the Myths

By Lori R. Somekh

The reverse mortgage remains one of the most misunderstood tools among those of us who seek to help seniors and their families. To this day, I hear comments from colleagues that run the gamut from "I recommend these regularly to help my clients," to "These are a ripoff," "Reverse mortgages exploit seniors," to, "The fees they charge are unconscionable."

These are only a few of the common misconceptions floating around about a product that could be a real lifesaver for the right clients. Once upon a time, I had a client with a credit score of 423. She was living on a very, very small fixed income. Once we got her house out of foreclosure by litigating the validity of a predatory loan, she could not afford to live in the home. Nor could she afford to go out and rent an apartment. A reverse mortgage with a lump sum sufficient to pay off the loan, as well as monthly installments paid to her, enabled her to pay off the mortgage and pay the taxes and household expenses, hopefully for the rest of her life. Without the lifeline of a reverse mortgage, that senior could have ended up homeless.

It should be understood that no product or technique is right for all the people all the time. We are always matching our clients' needs with the best possible solutions. However, if we examine reverse mortgages, we will find that there are some important safeguards built into the law to protect seniors from jumping into one of these loans against their best interests.

I. What Is a Reverse Mortgage?

A reverse mortgage is a special type of home loan that allows homeowners to convert the equity in their homes into cash. Reverse mortgages were first introduced in the late 1980s.[1] They serve the purpose of helping homeowners who are "house rich and cash poor" stay in their homes. Generally speaking, the proceeds of a reverse mortgage are tax free (although, by the same token, the interest is not tax deductible) and they do not *necessarily* hinder government benefit eligibility.[2] Reverse mortgages tend to be slightly more costly than regular mortgages. No repayment is required for as long as the homeowner lives in the home. The loan must be repaid when the last living borrower dies, sells the home or permanently moves out. Reverse mortgages are offered by both the private sector, i.e., banks and mortgage companies, and the public sector, i.e., the government. This article primarily deals with the government-backed reverse mortgages, which are offered by private sector lenders, by far the most common.

Reverse mortgages are available for single family homes or owner-occupied two- to four-family homes, condominiums or Planned Unit Developments (PUDs). Mobile homes and co-ops are generally not eligible for reverse mortgages.

II. How Does a Reverse Mortgage Work?

A. Like a regular mortgage—only better. Like a traditional forward mortgage, a reverse mortgage is money borrowed against the equity in a borrower's home. Like a forward mortgage, a security interest is recorded against the home, and the loan must eventually be paid back. This is basically where the similarities end.

B. You do not have to make monthly payments. Unlike a forward mortgage, the borrower does not make payments on the loan. Conversely, a reverse mortgage is often structured so that the bank makes monthly payments to the borrower. Interest is calculated on a negative amortization schedule. This means that instead of being gradually reduced, the principal balance is gradually increased, because interest is accruing and no payments are being made.

C. Eligibility requirements. To qualify for a reverse mortgage, a borrower must be at least 62 years old and living in the house as his or her primary residence. The loan does not become due until the one of two things happens: the borrower either dies or moves out of the house. One main difference between reverse mortgages and forward mortgages is that the borrower is not required to have good credit or a sufficient source of income. This, of course, is because there is no repayment requirement. Here is where the major benefit to the reverse mortgage lies. Very often, indeed usually, a senior with a fixed income cannot qualify for a mortgage, because the senior's income is insufficient to support the loan payments. For the senior who can no longer afford to remain in the home, a reverse mortgage is really the only way to convert that home's equity into cash and allow the senior to remain there.

D. Determining the amount of the loan. The amount of money available depends on the age of the borrower and the value of the home. First, the actuarial life expectancy of the borrower is estimated. There is an inverse relationship between life expectancy and the amount of money that can be borrowed. The older the borrower, the greater the possible loan amount. This is because, from

an actuarial and business standpoint, the shorter the projected life span, the fewer years the mortgage debt will be increasing. Using this same reasoning, the lenders are typically willing to increase the amount of money available as the borrower ages.

The other factor used to determine the maximum amount the lender will lend is the home value. The higher the home value the greater the potential loan amount. Notwithstanding, there is an overall cap on the maximum loan available. The maximum house value the loan to value ratio (LTV) can be applied to is $625,000.00. Although this is commonly, but incorrectly, referred to as the lending limit, it should be thought of as the *house value limit*. For example, if the house value is $2,000,000.00, the lender will not base its LTV on $2,000,000.00. It will base its LTV on $625,000.00.

E. The borrower retains home ownership. Contrary to a common misconception, the reverse mortgage borrower retains ownership of the home and continues to pay taxes, insurance and repairs. The borrower still has all indicia of ownership. There is also an increasing willingness on the part of lenders to permit the homes to be owned by grantor trusts as well.

III. Characteristics of a Reverse Mortgage

A. A reverse mortgage *must* be a first mortgage. In other words if there is any existing mortgage or financing on the home, it must be paid off. It may be paid off with the proceeds of the reverse mortgage, or to put it another way, the home is refinanced by the reverse mortgage.

B. The reverse mortgage is a *non-recourse* loan. This means that the lender cannot look anywhere but to the home for repayment. If the amount due when the borrower dies or moves out is greater than the home's value, the lender cannot seek to recover the deficiency from the borrower or his estate. Thus, the homeowner can never owe more on the reverse mortgage than the value of the home. The homeowner is not liable for any deficiency judgment and cannot be sued personally to recover on the loan. The loan is due when the last surviving borrower dies, sells or permanently moves out.

C. There is a rescission period. Like refinances and home equity loans, reverse mortgages are subject to a three-day right of rescission.

D. What constitutes default? As is the case with a traditional mortgage, there are several acts which may constitute a default and cause the reverse mortgage to become and due and payable immediately. Examples of such defaults are:

1. Failure of the homeowner to pay property taxes or homeowners insurance. In such a case the lender may elect to pay the tax or insurance premium and reduce the loan advance available;
2. The filing of a bankruptcy;[3]
3. Abandonment;
4. Fraud or misrepresentation;
5. Eminent domain;
6. Condemnation;
7. Renting out a portion of the home;
8. Adding a new owner;
9. Changing the zoning classifications;
10. Taking out new debt against the home.

When representing borrowers, it is important to make sure they clearly understand the ramifications of defaulting in the above obligations.

IV. Types of Reverse Mortgages

Initially, there were four types of reverse mortgages: the federally insured Home Equity Conversion Mortgage (HECM) (this is the most common type of reverse mortgage), the Federal National Mortgage Association (FNMA or Fannie Mae) conventional reverse mortgage, the public sector reverse mortgage and the proprietary reverse mortgage. The Fannie Mae conventional reverse mortgage was discontinued several years ago; therefore, now there are three main types of reverse mortgages.

A. Home Equity Conversion Mortgage (HECM): The vast majority of reverse mortgages in the marketplace are the HECMs. The HECM is written by private lenders and federally insured by the Department of Housing and Urban Development (HUD). This type of loan represents over ninety percent (90%) of reverse mortgage products. The money can be used for any purpose, and HECMs are available in all 50 states, the District of Colombia and Puerto Rico. The only caveat is that the home must be at least one year old and meet HUD's minimum property standards with respect to the condition of the home. If these standards are not met, the home can be brought into compliance with HUD standards by the time of closing.

There are five different ways in which HECM reverse mortgage proceeds can be paid to borrowers:

1. Tenure—equal monthly payments for as long as at least one borrower lives and continues to occupy the home at the principal residence;
2. Term—equal monthly payments for a fixed period of months selected by the borrower;
3. Line of Credit—This option allows unscheduled payments or installments at times and in amounts of the borrower's choosing until the line is exhausted;

4. Modified Tenure—This is a combination of Line of Credit with monthly payments for as long as the borrower remains in the home;

5. Modified Term—This provides a combination of Line of Credit with monthly payments for a fixed period of months selected by the borrower.

The interest rate on an HECM will be either annual adjustable rates or monthly adjustable rates. Rates are tied to the one-year U.S. Treasury Security Rate which is published weekly in most major newspapers, such as the *Wall Street Journal*.[4] The rate adjustments do not affect the amount or number of loan advances a borrower may receive, but they do cause the loan balance to grow at a faster or slower rate.

The annual adjusted rate cannot increase more than five percent (5%) over the life of the loan, and cannot increase by more than two percent (2%) in any year. The monthly adjusted rate cannot increase by more than ten percent (10%) over the life of the loan, but there is no limit to the amount the rate can change at each monthly adjustment.

The basic fees applicable on an HECM include: 1) an origination fee, 2) initial and monthly mortgage insurance premiums (MIP), 3)other closing costs, and 4) a monthly service fee.

The origination fee is limited to the greater of $2,000.00 or two percent (2%) of the maximum claim amount on the mortgage. The borrower is not permitted to pay any additional origination fees of any kind to any mortgage broker or corresponding lender. Mortgage insurance premiums protect the lender against the risk that the loan balance might exceed the value of the home (because the balance is insured by HUD). Mortgage insurance premiums consist of two types of charges: a one time premium at closing at two percent (2%) of the maximum claim amount, and an annual premium of one half percent per year on the mortgage loan balance.

The category of "other closing costs" includes other services and charges such as title insurance, appraisals, surveys, credit reports inspections, taxes and recording fees. The costs vary from one jurisdiction to another. A borrower is permitted to finance one hundred percent (100%) of the closing costs.

The servicing fee is a flat fee charged to the loan balance each month, covering the cost of record keeping and processing of the loan advances and mortgage insurance premiums. If the homeowner selects an annual adjusted interest rate, the service fee can be no more than $30.00 per month. The service fee for a monthly adjusting interest rate can be no more than $35.00 per month. These service fees are usually paid up front upon closing of the loan.

A borrower may re-pay all or part of the outstanding balance at any time without a prepayment penalty. Full re-payment will terminate the loan agreement. An HECM can be obtained through any FHA-approved lender.

B. Public Sector Reverse Mortgage: These are reverse mortgages offered by state and local governments, generally at a low cost and generally to be used for a specific purpose only—for instance, to make repairs or pay property taxes. These are often available only to homeowners with low or moderate income. They are the cheapest type of reverse mortgage but also the most difficult to find or qualify for. They also come with the most limitations. Many state and local government agencies offer "Deferred Payment Loans" (DPLs) for repairing and improving the home. These are one-time lump-sum advances with no repayment required as long as the borrower lives in the house. These DPLs are called different things by different agencies and may be difficult for a borrower to find. A borrower can start by calling city or county housing departments or state housing finance agencies to make inquiries. The eligibility rules for public sector reverse mortgages vary from program to program. Generally, there is no origination fee or mortgage insurance premiums and low or no closing costs. They also tend to have low interest rates, or carry no interest at all. Some DPL programs forgive either part or all of the loan if the borrower lives in the home beyond a certain amount of time. If a borrower's needs and eligibility match these criteria, these private sector reverse mortgages can be very valuable.

C. Proprietary Reverse Mortgage: These products are owned and backed by private companies. They can generally be used for any purpose, and they are usually the most expensive type of reverse mortgage product. Proprietary reverse mortgages represent a small percentage of the reverse mortgage market.

V. Safeguards and Counseling Requirements

Unlike any other type of home mortgage, reverse mortgages have some very stringent federally mandated safeguards built into the lending process. To be eligible for Federal Housing Administration (FHA) insurance, an HECM must be executed by a mortgagor who received "adequate counseling by a third party (other than the lender)."[5] HUD must provide, or cause to be provided by entities other than the lender, housing counseling for HECM mortgagors.[6] "At the time of the initial contact with the prospective mortgagor, the mortgagee shall give the mortgagor a list of the names, addresses, and telephone numbers of housing counselors and their employing agencies, which have been approved by the Secretary" of HUD.[7] The law requires borrowers to discuss the program with a HUD-approved counseling agency as a condition of securing the loan.

HUD counselors are required to discuss the following information with each mortgagor:

1. Options other than an HECM, such as other housing, social service, health and financial options;
2. Other home equity conversion options that are or may become available to the homeowner, such as sale-leaseback financing, deferred payment loans and property tax deferral;
3. The financial implications of entering into a HECM;
4. A disclosure that an HECM may have tax consequences, affect eligibility for assistance under federal and state programs and have an impact on the estate and heirs of the homeowner;
5. Any other information the Secretary of HUD may require.[8]

Additionally, reverse mortgages fall under the protection of the Federal Truth In Lending Act (TILA). TILA requires lenders to disclose the annual cost of a reverse mortgage. The total annual loan cost is the projected annual average cost of a reverse mortgage, including all itemized costs.

Pursuant to the Housing and Economic Recovery Act of 2008, the loan origination fee limit is the greater of $2,500.00 or two percent (2%) of the maximum claim amount of the mortgage, up to a Maximum Claim Amount[9] of $200,000.00, plus one percent (1%) of any claim amount over $200,000.00. In any event, the total origination fee amount may not exceed $6,000.00.[10]

Conclusion

Reverse mortgages are an important tool that, when used judiciously, can greatly improve the quality of life for seniors and their families. As elder law professionals, we owe it to our clients to learn about them, and not allow myths, misconceptions, and out-dated concerns to keep us from using them if they can better our clients' lives. Since reverse mortgages are a relatively specialized field, all members of the refinance team, from the mortgage professionals and attorneys to the accountants, should ideally be well-versed in the nuances and special rules affecting reverse mortgages.

Endnotes

1. The Home Equity Conversion Mortgage (HECM) Insurance Demonstration was authorized by Housing and Community Development Act of 1987, Sec. 417, Pub.L. 100-242, 101 STAT. 1908, amending the National Housing Act, Pub.L. 73-479, 48 STAT. 1246 (12 U.S.C. 1715z-20), adding Sec. 255, authorizing elderly homeowners to borrow against the equity in their homes. The regulations for the HECM program were established as part 206 of title 24 of the Code of Federal Regulations (June 9, 1989, 54 FR 24833).
2. More particularly, as summarized in the guide on the subject published by the American Bar Association: the Internal Revenue Service does not consider loan advances to be income; annuity advances may be partially taxable; interest charged is not deductible until it is actually paid— that is, at the end of the loan; and the mortgage insurance premium is deductible on the 1040 long form. *Reverse Mortgages: A Lawyer's Guide*, American Bar Association, 1997. An exhaustive discussion of these topics is beyond the scope of this article and varies from state to state. A knowledgeable accountant or other tax professional should be consulted regarding these and other tax considerations in the jurisdictions relevant to the particular borrower. Similarly, the Guide explains that, although monthly payments received by a borrower does not count to disqualify him or her for government benefits, if the borrower receives Medicaid, SSI, or other public benefits, loan advances will be counted as "liquid assets" if the money is kept in an account (savings, checking, etc.) past the end of the calendar month in which it is received; the borrower could then lose eligibility for such public programs if total liquid assets (cash, generally) is then greater than those programs allow. *Id.*
3. This *ipso facto* clause is unenforcebale in any Bankruptcy setting. See §§ 541(c) and 365(e)(1) of Bankruptcy Code.
4. The annual adjusting rate cannot increase more than 5 percent over the life of the loan and cannot increase by more than 2 percent in any year. The monthly adjusting rate cannot increase by more than 10 percent over the life of the loan, but there is no limit to the amount the rate can change at each monthly adjustment.
5. Section 255(d)(2)(B) of the National Housing Act (12 U.S.C. 1715z-20(d)(2)(B).
6. *Id*. at subsection 255(f).
7. 24 CFR, Part 206.41.
8. National Housing Act (12 U.S.C. 1715z-20).
9. The Maximum Claim Amount is the least of: 1) the appraised value; 2) sale price; or 3) FHA mortgage limit for a one-family residence.
10. Mortgagee Letter 2008-34.

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Problems in the Assessment of Testamentary Capacity

By Eric G. Mart, Ph.D., ABBP (Forensic)

A good deal of anecdotal evidence suggests that the number of challenges to wills and trusts by family members is increasing. Several factors may explain this trend. The first is demographic; the parents of baby-boomers are aging and dying, and the boomers make up a large portion of the population. Additionally, the baby-boom generation has been associated with an increase in litigiousness in American society generally. For these reasons, it is not surprising that this generation would react by accessing the courts when there are disagreements among family members regarding the distribution of an estate. While it is only possible to speculate regarding the underlying reasons for the increase of these challenges in probate courts, the large numbers of cases have created a heightened need for assessments and expert testimony by medical and mental health professionals.

Unfortunately, as with any rapidly developing area of forensic practice, empirical research on the subject of testamentary capacity is not well developed. As a result, courts are often placed in the position of having to weigh the relative merits of expert testimony that is based on clinical judgment unsupported by well-established standards or hard research. Nowhere is this more apparent than when physicians, psychiatrists and mental health professionals provide opinions about the capacity to execute planning documents of a living or deceased individual when the disputed will or trust was executed at some time in the past. This lack of standards and the misunderstanding of issues related to capacity can lead to conclusions and testimony that have the potential to mislead the court and create questionable retrospective judgments about testamentary capacity.

This article will explore problems and misconceptions in the retrospective assessment of testamentary capacity and provide suggestions for more accurate and forensically defensible expert testimony in this area of practice.

Capacity General Definitions

In *Assessment of Older Adults with Diminished Capacity: a Handbook for Psychologists*,[1] the authors note that there has been ongoing confusion regarding the use of the terms *capacity* and *competency*. Many clinicians differentiate between the terms by defining the former term as a clinical descriptor and the latter as a legal term. The authors of the handbook suggest that this confusion can be avoided by using the terms *legal competency* and *clinical capacity*. Regardless of the term which is used, what is generally being assessed is an individual's ability to perform a specific task. Further, the individual being assessed must have a rational understanding of the nature of the task and the decisions being made. For example, in order to make a rational decision about whether or not to have a medical procedure, an individual would need to possess certain information and capabilities. Some of the issues involved in such a decision include the following:

1. An understanding of one's medical status generally
2. An understanding of the condition to be treated by the procedure
3. The possible benefits of having the procedure
4. The risks of having the procedure
5. The risks of not having the procedure
6. A general understanding of the probability of (4) and (5)
7. The ability to hold factors 1-6 in consciousness long enough to make a decision
8. The absence of any condition or process which would significantly affect one's ability to make such a decision (e.g., severe depression, psychosis, cognitive dysfunction) in a rational manner

A distinction must be made between decisional capacity (the process outlined above) and executional capacity. Executional capacity refers to an individual's ability to carry out specific capacities. For example, an individual who has suffered a stroke may be physically unable to pay a bill or transfer money from one account to another, but may be able to tell another person what he or she wants done.

In the past, legal and clinical capacities were viewed globally; individuals were generally deemed to be either capable or incapable of managing their affairs generally. However, in recent years there has been recognition that individuals may have capacity in one area and lack capacity in another. This has led to greater specificity in the assessment of clinical capacities. Some examples of specific capacities include:

1. The capacity to make donations or financial gifts
2. The capacity to enter into a contract
3. The capacity to consent to sexual relations
4. The capacity to live independently
5. The capacity to make or amend a will or trust

An individual may have capacity in some or all of the areas noted above. Further, his or her capacity may vary at different times as a function of changes in psychological or medical condition.

While the legal standards for testamentary capacity are not particularly complex or stringent, problems still arise in making such determinations. One problem which I have observed in such cases relates to the fact that such determinations have both legal and clinical aspects. In cases in which an elderly testator/testatrix wishes to create a will or amend a pre-existing will or trust, the lawyer must make an initial determination regarding the client's capacity. In some cases, the client may be obviously incapacitated. A testator/testatrix may appear disoriented, exhibit bizarre delusional beliefs or paranoia, or have gross deficiencies in memory, such as an inability to recall the names of his or her children or the fact that he or she is married. In such cases it should be obvious to the attorney that some type of mental health assessment is required before changes can be made in estate planning. (NOTE—ethical considerations guide the attorney—the client makes the changes.) In other cases the client may have more subtle cognitive or mental health problems that are difficult for non-clinicians to detect.

In the course of my practice, I have observed a number of common errors which contribute to confusion in cases in which the issue of testamentary capacity is raised. These issues generally stem from the failure of legal and mental health professionals to clearly conceptualize the issues underlying the construct of testamentary capacity. (In the discussion which follows, we use the term "testamentary capacity" to cover all situations in which there is a question about an individual's understanding of an action which affects the individual's property. We understand that the level of capacity required to effectively create legally binding documents varies with the type of document.)

A. Failure of Attorneys to Screen for Testamentary Capacity

In many cases in which an elderly client wishes to create a will or modify an existing will or trust, the attorney who does the work has had an ongoing relationship with the client. Having familiarity with a client can be helpful, since the lawyer may be sensitive to any major changes in the client's mental status. Perceived changes in speech, language, cognition, and responsiveness may alert the attorney to the possibility that the client may lack testamentary capacity and trigger an appropriate referral to a medical or mental health professional. However, in my experience, even attorneys who know their clients well may fail to adequately assess for capacity. This can also be the case when a client seeks out a new attorney to assist with estate planning.

This failure to properly assess the client can occur for many reasons. In some cases, cognitive changes may be relatively subtle and easy to miss, particularly by persons not trained in psychological/psychiatric assessment. Individuals with cognitive deficits often develop ways of disguising their deficits in reasoning or comprehension.

One common way of doing this has been referred to as *acquiescence*; this occurs when the client simply agrees with the statements made by others, giving a false impression of comprehension.[2] By way of example, I was able to observe this in a recent case in which I performed a posthumous assessment of testamentary capacity and possible undue influence. In that case, the testator was profoundly hard of hearing. Records indicated that this individual had suffered a stroke subsequent to an episode of endocarditis (inflammation of the inner lining of the heart). He did not fully recover and developed paranoid delusions, the aforementioned hearing loss, and homonymous hemianopsia (the loss of half the visual field in both eyes). One unusual aspect of the case was that an autopsy was performed because of potentially suspicious circumstances surrounding his death. The autopsy revealed serious damage to the client's left frontal lobe and occipital lobes of his brain. Obviously, this information was unavailable to the attorney who made changes to the client's estate plan. Further, because of the client's hearing problem he and his lawyer communicated by writing on a notepad. This individual had a simple trust and was brought to see the attorney by a female friend who had served as his caregiver for a number of years to consult about his estate plan. The attorney was under the impression that the residue of the client's estate would be evenly distributed between his client's three daughters when the client died, as stated in the trust. The attorney was not aware that the client had already transferred all of his money to a series of joint checking accounts and that the client's caregiver had been designated as the co-owner of the accounts. As a consequence, when the client died, the ownership of the accounts would pass to the caregiver and not to the children. Laboring under this misunderstanding, the lawyer asked the client a series of questions that were predicated on the idea that the money in the estate would pass to the children when this was not the case. These included questions such as "Do you still want the money that goes to your children to be evenly distributed?" and "You have no wish to make any special bequests to anyone else?" The client answered all of the questions in the affirmative, despite the fact that the at-

torney's questions were unintentionally counterfactual. The result of this process was the production of an estate plan which was meaningless, since there were no longer any assets to be distributed.

This could have been avoided if the attorney had asked more probing and open-ended questions, which would have allowed an assessment of the extent to which the client actually understood his financial situation and his reasons for amending his trust. For example, the client could have been asked to describe his assets and his rationale for making changes in his estate plan. At a minimum, some of the questions could have been asked so that a "no" would be required to preserve the original meaning. For example, the question "Do you want your sons to share equally in your property?" could have been asked as "Do you want any of your sons to inherit a larger portion of your property?" Mental health professionals who assess the mental state of elderly clients they suspect of acquiescent responding sometimes address this by asking nonsensical questions such as "Do helicopters eat their young?" to see if the subject answers in the affirmative, and this could also be done by attorneys.

There are many other reasons why possible lack of testamentary capacity may be missed by attorneys. A client may appear oriented and cheerful, and his or her remote memory may appear to be intact. Even input from family members may not help reveal deficits. In my experience, family members who interact with the testator/testatrix may not be aware of substantial cognitive deficits. In some cases, the deficits associated with a dementing condition may have developed insidiously and family members simply became accustomed to these slowly progressing problems. Further, they often do not understand the significance of signs and symptoms they observe. Family members frequently make statements such as "Sometimes grandmother gets lost when she is driving, but she generally does pretty well, and after all, she is in her 80s." The same thing can occur with other symptoms, such as the elderly relative having spoiled food in his or her refrigerator, dressing inappropriately, or frequently misplacing belongings.

Because problems associated with a lack of testamentary capacity can be so easy to overlook, it has been recommended that attorneys working with the estate plans of the elderly routinely perform more comprehensive assessment of possible cognitive deficits. In *The Assessment of Older Adults With Diminished Capacity: A Handbook for Lawyers*,[3] a methodology for attorneys to assess testamentary capacity is provided, including a worksheet developed specifically for attorneys to help structure the assessment. The first component of the worksheet outlines common cognitive, emotional and behavioral signs of diminished capacity which raise potential concerns. Other factors that can produce signs of potential incapacity, such as grief, depression, reversible medical conditions, hearing or vision loss, or low education level, are also addressed. The attorney is then directed to consider any observed signs of potential incapacity in the context of the relevant legal issues in the case. In estate planning, this would involve an assessment of the client's understanding of the act of making or amending a will or trust, their knowledge of their assets, the natural objects of their bounty, their reasoning with regard to any contemplated changes and the consistency of the changes with previously expressed values and desires. In estate planning, this would involve assessing the client's understanding of the act of making or amending a will or trust, reasoning with regard to any contemplated changes, and knowledge of his or her assets and the natural objects of his or her bounty, as well as the consistency of the requested changes with the client's previously expressed values and desires. Finally, the worksheet helps the attorney determine an appropriate course of action based on the information gathered in the previous steps. These may involve proceeding with the contemplated changes to the estate, obtaining a formal assessment from an appropriate medical or mental health professional, or not proceeding based on a conclusion that the client lacks the requisite capacity.

It should be noted that the members of the joint task force strongly caution attorneys not to use psychological procedures such as mental status examinations in performing these types of assessments. They conclude that the use of such instruments by attorneys in this context can create serious problems for a number of reasons, including possible false positive and false negative conclusions, over-reliance on the limited data these instruments produce, and the lack of a strong nexus between the data these instruments produce and the relevant psycho-legal issues being assessed.

B. Conflation of Diagnosis and Functional Capacity

Another problem I have observed with some frequency in cases involving posthumous assessment of testamentary capacity is the tendency of mental health professionals, attorneys and courts to conflate a particular diagnosis in the testator/testatrix with his or her level of functional capacity. In such cases, the fact that an individual has been diagnosed with some form of dementia, brain damage or mental illness is taken as prima facie evidence of lack of testamentary capacity. This is problematic for a number of reasons. The most obvious problem is that a diagnosis, in and of itself, tells the court very little about the testator/testatrix's actual abilities in regard to the psycho-legal issue. Further, most jurisdictions apply a functional capacity test for testamentary capacity rather than a requirement that the testator/testatrix not suffer from a specific disease or condition. This differs from the standards applied in other types of legal cases in which mental health assessments and expert testimony are utilized. For example, with regard to legal insanity, U.S. Federal Law states:

> It is an affirmative defense under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.[4]

Clearly, a mental health professional providing expert testimony that a defendant lacked the ability to appreciate the wrongfulness of his or her actions during the commission of a crime would be required to specify the severe mental disease or defect underlying this lack of appreciation, and a formal diagnosis would be required.

On the other hand, a determination that an individual lacked testamentary capacity at the time a will or trust was created or modified does not require a particular diagnosis. In Case No. 2007-0048, *In re Estate of Frederick W. Whittemore*,[5] on December 26, 2007, the Supreme Court of New Hampshire cited the following definition of testamentary capacity:

> The standard for testamentary capacity requires that the testator: at the time of making [his will], must have been able to understand the nature of the act [he] was doing, to recollect the property [he] wished to dispose of and understand its general nature, to bear in mind those who were then [his] nearest relatives as such, and to make an election upon whom and how [he] would bestow the property by [his] will,…

The language of this decision is typical of the language used in many jurisdictions, in that it emphasizes the testator/testatrix's ability to satisfy the definitions of capacity while de-emphasizing the underlying diagnoses that might be causing any areas of observed clinical or legal incapacity. This is not to suggest that diagnoses have no place in such an evaluation, as the court may wish to know the cause of any observed functional deficits and the probability of remediation. That being said, the presence or absence of a specific diagnosis should not be over-emphasized. This view was put forward persuasively by Greenberg, Shuman and Meyer in their 2004 article "Unmasking Forensic Diagnosis"[6] (Greenberg, Shuman & Meyer, 2004). These authors describe how the use of diagnoses can create more problems they solve:

> In other cases, parties use the existence of a mental disorder as circumstantial evidence of a condition or an event. To prevail on a tort claim for negligence seeking damages for mental or emotional distress does not require that the plaintiff suffer from a particular psychiatric disorder. Substantive tort law does not condition a plaintiff's right to recover damages for mental or emotional distress on the presence of a psychiatric diagnosis. Yet litigants frequently use the presence or absence of psychiatric diagnoses circumstantially to support or defeat a damage claim (Shuman, 1995). What the law calls for and what judges and juries need in such cases is a functional analysis of a litigant: How, if at all, the defendant's actions have affected the plaintiff's life? When used for this purpose, psychiatric diagnosis is both ethically and legally precarious because it is misleading and risks distorting a candid assessment of a litigant's functioning (p. 11).

These authors go on to apply this reasoning to the issue of testamentary capacity:

> The same holds true for other instances in which the law calls for a functional analysis of the litigant rather than a clinical diagnosis. In most competence determinations—testamentary capacity and contractual capacity—the law is concerned with functional capacity. Indeed in such cases not only is a formal psychiatric diagnosis not dispositive of competence, but a finding of incompetence may be based on a condition other than a formal diagnosis (p.11)

It has been my experience that in many cases in which testamentary capacity is at issue, attorneys send the testator/testatrix to a clinical neuropsychologist for assessment. In reviewing the data from these cases, I am often impressed by the quality and comprehensiveness of these assessments. The subjects are administered a large number of well-established neuropsychological tests, sometimes over several days. The reports from these assessments provide a wealth of data about the subject's memory (short term, intermediate and remote), language skills, computational abilities, grapho-motoric skills, and executive functioning. In some cases, hypotheses are put forward about the relationship of observed deficits to medical events (head injury, stroke, depression, etc.), and the results are linked to injuries or degeneration of specific regions of brain anatomy. Probable diagnoses such as Alzheimer's dementia, traumatic brain injury or organic personality disorder are provided. Unfortunately, there is often little information in these reports regarding the forensically relevant issues. For example, does the subject have a general idea of his or her assets, know his or her family members, or have a rationale regarding any changes to the distribution of his or her bounty? These issues, which would be better described by direct assessment using issue-focused interviews or more forensically relevant instruments, such as the Hopemont Capacity Interview or the Independent Living Scales,[7] are neglect-

ed in favor of diagnostically-related instruments that do little to provide the court with relevant information.

C. Over-Reliance on Inadequate Data and Ignorance of Relevant Legal Standards

A different but related problem can arise in cases involving testamentary capacity when medical or mental health professionals place too much reliance on inadequate data. An example from the previously described case will help to illustrate this type of problem. In that case, the testator had been seen for routine examination by his primary care physician some months before he had passed away. In the subsequent trial, this physician testified that in his opinion, the client had testamentary capacity at the time he revised his trust. This opinion was based on the fact that the client had recognized the doctor, seemed cheerful, was oriented to person, place and time, and was able to answer several questions designed to assess remote memory. There was no discussion of the client's financial situation in the session; in fact, it would have been very difficult to have had such a conversation. The client's hearing was so impaired that several witnesses stated that they had to yell in order to make him understand anything they said to him, and that frequent repetitions were also necessary. The physician did not elicit information about the patient's intentions with regard to the disposition of his property, knowledge of the natural objects of his bounty, or reasoning process about his choices. Despite the paucity of any real data about the forensically relevant issue, his physician was convinced that his patient had the capacities necessary to make changes to his estate plan at the time those changes were made. In his cross examination at the probate hearing on the will, it became clear that the physician did not know the elements of testamentary capacity, and his conclusions regarding his patient's capacity were given little weight by the court.

This type of scenario is not unusual, and it is not uncommon to see inadequate instruments and examination techniques used to draw conclusions regarding testamentary capacity and other civil competencies. The problems stem from a number of underlying misunderstandings. One of these is related to the previously discussed conflation of diagnosis with capacity, but for different reasons. For example, some physicians will administer the Mini Mental State Examination (MMSE),[8] or a similar screening instrument such as the Montreal Cognitive Assessment[9] and the Frontal Assessment Battery,[10] to an elderly patient and conclude that a passing score implies (a) the absence of cognitive dysfunction or dementia, and (b) the presence of testamentary capacity. The converse can also occur. There have been studies that demonstrate that scores indicative of moderate dementia are correlated with lack of decisional capacity, but the relationship is modest when scores indicate mild cognitive problems.[11]

A related issue in this type of testimony is related to the provision of forensic testimony by medical or mental health professionals who lack forensic training. Individuals who specialize in forensic work understand that they are working at the intersection of the clinical and legal realms, and they tailor their examinations and testimony to match, to the extent possible, the needs of the legal system. The Specialty Guidelines for Forensic Psychology (Adopted by APA Council of Representatives, August 3, 2011) state in Section 2.04—Knowledge of the Legal System and the Legal Rights of Individuals:

> Forensic practitioners recognize the importance of obtaining a fundamental and reasonable level of knowledge and understanding of the legal and professional standards, laws, rules, and precedents that govern their participation in legal proceedings and that guide the impact of their services on service recipients.

In cases in which testamentary capacity and related matters are at issue, it is important to have a basic understanding of the laws that inform assessments. Clearly, a primary care physician who knows that having testamentary capacity involves knowing the nature and purpose of a will, having a basic understanding of one's financial situation, knowing the natural objects of one's bounty, and having a non-delusional rationale to make changes in a will would never opine that an individual had testamentary capacity on the basis of the patient being oriented to person, place and time. In cases where such testimony is offered by non-forensic witnesses, it has been my clear impression that these witnesses do not know that such legal standards exist. When this occurs, it would be helpful for the attorney to ask explicit questions of the witness to determine the extent to which he or she understood and applied the appropriate legal standard in coming to a conclusion regarding capacity.

A final issue that arises in reports and testimony in cases in which testamentary capacity is at issue is that of ultimate issue conclusions and testimony. There has been a long-standing disagreement among forensic practitioners regarding the appropriateness of such testimony. This issue is moot in jurisdictions in which such testimony is prohibited, but most courts allow experts to testify regarding the ultimate issue. On one side there are those who feel strongly that such testimony is inappropriate for a number of reasons. Those holding this opinion believe that the ultimate issue (in this case the presence or absence of testamentary capacity) is a legal issue and the province of the court. They point out that such determinations are made on the basis of information that goes beyond the scope of medical or mental health evaluations. Further, they generally hold to the opinion that by offering opinions regarding the ultimate issue, experts usurp the prerogatives of the court and are over-reaching. Those who feel that such testimony is appropriate point out that since the ultimate decision on this issue already rests with the court, the presiding

justice is free to give such testimony whatever weight he or she decides is warranted. In my personal experience, I have never seen an expert refuse to answer when asked questions regarding the presence or absence of testamentary capacity. Some authorities have suggested that problems with such testimony can be avoided by using the term "clinical capacity" rather than "competence," since the former is a clinical term of art while the latter is a legal term, but this strikes me as a distinction without a difference. I am inclined to believe it is appropriate to testify to the ultimate issue as long as the expert is careful to make clear the data and conclusions that support such conclusions. In practice, this requires that there is an explicit logical nexus between the data developed in the assessment and the conclusion reached regarding the ultimate issue. The Supreme Court of New Hampshire has required this logical nexus in a decision that has been influential in the field of forensic psychology.[12] In the case referenced, a psychologist was asked what data she relied upon in coming to the conclusion that a child had been sexually abused. She replied that there was no particular fact or facts upon which she relied in coming to her conclusion, but that instead she relied upon the totality of the data she had elicited. The court responded that since there was no explicit logical nexus linking the data to her conclusions, the expert's reasoning remained opaque to the court, and there was no way for the justices to independently evaluate her thought process; in effect, she did not "show her work." In cases involving the issue of testamentary capacity, the court should not have to rely on the *ipse dixit* testimony of an expert witness.

This problem can be remedied when experts make the logical link between data and conclusions clear. Some forensic psychologists have suggested that in the conclusions of a psychological report the expert should list each conclusion that leads to an opinion on the ultimate issue and link it to the supportive data. An example of this might look like this example:

> Based on the results of my evaluation, it is my opinion, held to a reasonable degree of psychological certainty, that Mr. Smith lacked testamentary capacity when he amended his will on 12/13/2011. I base this on the following facts:
>
> 1. Mr. Smith was assessed by his neurologist on 10/3/2011 and found to have moderate dementia of the Alzheimer's type. He had a score of 18 on the MMSE and appeared confused and depressed. He was oriented only to person and not to time or place. He appeared to believe he was still married to his first wife, who had passed away in 1996, when in fact he remarried in 1998. He gave clear signs of significant memory deficits.
> 2. In my examination of 1/10/12, Mr. Smith told me he was in excellent physical condition and was not taking any prescribed medications, when in fact he was being treated for congestive heart failure, high blood pressure, cataracts, depression and diabetes, and was prescribed Paxil, Toprol , Lasix and Aricept. He thought he had only one son when he actually has a son and two daughters. He told me that he had made the changes in his will because his son was stealing his money when this was not the case; his son lives out of state, sees his father only a few times per year, and has nothing to do with his finances, which are managed by his younger daughter. Mr. Smith has a limited understanding of his estate. He told me that he owns his home, which was actually sold one year ago, and he did not know that he has $500,000 in securities and owns property in Florida worth $300,000.

In the example above, the presiding justice would have no difficulty understanding the basis of the expert's opinion and making an independent evaluation of the adequacy of both the data on which the expert relied and the reasonableness of the conclusions drawn.

In conclusion, many of the problematic aspects of expert opinions could be avoided by the use of an explicit methodology that employs adequate methods and emphasizes functional abilities rather than relying on diagnosis. Further, expert conclusions must be informed by an adequate grasp of the psycho-legal issues that guide decisions regarding testamentary capacity. Finally, such evaluations and testimony should allow the court to follow the expert's thought processes sufficiently to be able to make independent judgments regarding the strengths and weaknesses of his or her analysis. Testimony that does not meet these standards may lead to judgments that do not reflect the underlying facts of the case accurately and mislead the court into making flawed decisions about an individual's true intentions and state of mind.

Endnotes

1. ABA/APA Assessment of Capacity in Older Adults Project Working Group, American Bar Association & American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists* (2008).
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12. *State v. Cressey*, 137 NH 402—NH: Supreme Court 1993—Google Scholar, http://scholar.google.com/scholar_case?case=18193272712812611525&hl=en&as_sdt=2&as_vis=1&oi=scholarr (last visited Mar 14, 2013).

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Article 81 Guardianships and Autism Spectrum Disorder

By Anthony J. Enea

For years I have worked with the parents of children diagnosed with Autism Spectrum Disorder (ASD). I have learned that ASD refers to a range of neurodevelopment disorders that most frequently manifest themselves as both verbal and non-verbal communication difficulties, social impairments and repetitive, restricted and stereotyped patterns of behavior. Autism or "classical" ASD is the most severe form of ASD. Milder forms of ASD include Asperger's syndrome, childhood disintegrative disorder and pervasive development disorder–not otherwise specified (PDD-NOS).[1]

It has been estimated that one out of every 88 children age 8 will have an ASD, and that males are four times as likely to have an ASD as females.[2] ASD affects people of all races, ethnicities and socio-economic groups. Sadly, there is no known cure for ASD at this time; however, much progress has been made in diagnosing ASD, discovering potential genetic predispositions for ASD and treating ASD through the use of early behavioral and educational intervention programs.

Unfortunately, in addition to the many challenges the parents of an ASD child may face, they will also eventually be faced with the issue of whether they will need to seek legal guardianship for their ASD child who has reached the age of 18. At age 18, a child in New York is legally considered to be an adult,[3] and a parent is no longer the legal guardian of the child once he or she has reached that age. This regularly presents a predicament for the parent of an ASD child who requires some level of intervention and assistance with respect to decision making for health care and therapeutic issues, financial issues, and the day-to-day management of his or her affairs.

I was recently consulted by the parent of a 21-year-old ASD child. Since the child had reached adulthood, the mother had become extremely frustrated with the difficulties she was encountering in assisting her child with obtaining varied supportive and medical services the child needed. Her frustration reached the boiling point when she was unable to receive any information for two weeks as to where the child had been hospitalized due to the facility's need to comply with HIPAA—because her child was an adult.[4] While a legal guardianship may not be appropriate or necessary for every young adult with an ASD, there are numerous cases where it is both an appropriate and necessary form of intervention.

In deciding whether to seek legal guardianship and what form of guardianship (personal, property or both) is most suitable for the ASD child in question, there are a number of factors to be considered.

Issues

Obviously, one of the first issues that must be addressed is what level of assistance as to personal and property decision making the ASD child will need—both presently and in the future. Does the child have the requisite capacity to manage his or her personal, medical and financial affairs and to communicate his or her wishes with respect thereto? This assessment should involve a detailed review of the ASD child's medical history and any assessments made as to his or her limitations with respect thereto.

"[I]n addition to the many challenges the parents of an ASD child may face, they will also eventually be faced with the issue of whether they will need to seek legal guardianship for their ASD child who has reached the age of 18."

Section 81.02 of the N.Y. Mental Hygiene Law (MHL) requires that appointment of a guardian must be "necessary" to meet the alleged incapacitated person's (AIP) needs for property management, personal care or both. In deciding whether a guardian is necessary, § 81.02(a)(2) specifically provides that the court shall consider the sufficiency and reliability of available resources, as defined in § 81.03, to provide for personal needs or property management without the appointment of a guardian. Section 81.03(e) defines available resources to mean "resources such as, but not limited to, visiting nurses, homemakers, home health aides, adult day care and…residential care facilities." The definition of "resources" also includes powers of attorney, health care proxies, trusts, and representative and protective payees.[5]

Thus, if an adult ASD child (over the age of 18) has the capacity to execute a Durable Power of Attorney (POA) and Health Care Proxy Form (HCP), the need for the appointment of a guardian may be obviated, especially if these documents are drafted in a sufficiently broad manner to meet the present and possible future needs of the ASD child.

One difficulty in assessing the needs of an ASD child is that behavioral and social interactive issues can often be a major factor with respect to his or her needs. Thus, any pre-guardianship assessment should focus not only

on the ASD child's ability to independently perform activities of daily living (feeding, dressing, cooking, bathing and toileting), but also on his or her ability to socially interact, such as to independently go food and clothing shopping, to speak clearly, to read and understand bills and bank statements, to use a credit card and to make change. For example, many ASD adults can reside independently in a home or apartment and make decisions as to their travel and food needs, but are unable to maintain and balance a checking account or handle their financial affairs. If it is determined that a guardian is needed, it is most important to fashion a guardianship that will allow the ASD child the greatest amount of freedom, independence and flexibility while also insuring that his or her personal and property management needs are adequately provided for.

Goals

One of the goals of Article 81 is that the guardianship should be the "least restrictive form of intervention."[6] The guardian should have only those powers necessary to assist the incapacitated person to compensate for limitations and to allow the person the greatest amount of independence and self-determination in light of the person's ability to appreciate and understand his or her functional limitations. In appointing a guardian, the court is guided by the concept of least restrictive form of intervention.

This provision of Article 81—to customize and tailor the rights and duties of a guardian while still allowing the AIP the self-determination and independence suitable for his or her abilities—is what makes an Article 81 guardianship proceeding significantly more desirable than an Article 17-A proceeding under the Surrogate's Court Procedure Act (SCPA), for the vast majority of ASD cases. While the pros and cons of each proceeding have been the topic of many an article, these will not be the focus herein.[7]

While a guardianship for a "developmentally disabled person" would be appropriate under either Article 81 of the MHL or Article 17-A of the SCPA, unfortunately, Article 17-A does not permit tailoring and limiting the authority of the guardian to the specific needs of the AIP. This distinction was highlighted in *In re John J. H.*[8] Surrogate Kristen Booth Glen of New York County, in denying the petition of the parents of an autistic child who, as part of their guardianship application, sought the authority to sell the child's artwork and donate the proceeds as a charitable contribution, held that the Surrogate's Court in an Article 17-A proceeding lacked the power to grant anything other than a plenary property guardianship, which did not include blanket gift-making authority. Surrogate Glen noted what was already well known in the guardianship community—that Article 17-A was "a blunt instrument" that did not permit any of the individualized tailoring that was available in Article 81. Thus, the petition was withdrawn by the child's parents and an Article 81 proceeding was commenced.

In the past there was some question whether an Article 81 proceeding could be utilized for a developmentally disabled minor child; however, in *In re Cruz*,[9] Justice Diane A. Lebedeff of the Supreme Court of New York County held that Article 81 provides no indication that it should not apply to minor children. Justice Lebedeff opined, "There is sufficient, albeit slight, affirmative language in the statute which supports its application to minors, and no language which preludes such application." She added that "[w]here it is clear that the child's functional limitations are permanent, there is good reason to pursue an Article 81 guardianship from the beginning rather than first utilizing S.C.P.A. 17 or 17-A during childhood then commencing a M.H.L. Article 81 guardianship at adulthood." The child in *Cruz* had suffered substantial brain injury during birth, and the medical malpractice claim had been settled for $3.5 million.

While the minor's parents are the legal guardians of the minor's person and can make decisions relevant to his or her person, it is generally when the minor child has inherited or recovered monies that he or she will require a guardianship for his or her property.[10]

Section 81.21 of the MHL delineates the powers that are necessary and sufficient to manage the property and financial affairs of the AIP and those depending upon the AIP. The guardian must afford the incapacitated person the greatest amount of independence and self-determination with respect to property management in light of that person's functional level, and maintain an understanding and appreciation of the AIP's functional limitations and personal wishes, preferences and desires with regard to managing the activities of daily living.

Section 81.21(a) permits precisely the requisite level of tailoring of the guardian's property management powers that is necessary and appropriate for an ASD child. The following illustrate some of the property management powers that may be granted under § 81.21(a):[11]

1. make gifts;
2. enter into contracts;
3. create revocable or irrevocable trusts or property (would include a Special Needs Trust) which may extend beyond the incapacity or life of the incapacitated person;
4. provide support for persons dependent upon the incapacitated person for support;
5. marshal assets;
6. pay such bills as are reasonably necessary to maintain the incapacitated person;
7. apply for government and private benefits;

8. lease and/or purchase a residence;
9. retain accountants and attorneys;
10. defend or maintain any judicial action.[12]

Section 81.22 delineates the personal needs powers granted to the guardian. Again, as in § 81.21 these powers are to be fashioned so as to afford the incapacitated person the greatest amount of independence and self-determination with respect to his or her personal needs.

"[C]learly the decision to seek an Article 81 guardianship for an ASD child is one that must be thoroughly evaluated prior to doing so."

The following is illustrative of some of the personal needs powers granted under § 81.22:

1. determine who shall provide personal care and assistance;
2. make decisions regarding social environment and other social aspects of the life of the incapacitated person (IP);
3. determine whether the IP should travel;
4. determine whether the IP should possess a license to drive;
5. authorize access to a release of confidential records;
6. make decisions regarding education;
7. apply for government and private benefits;
8. consent to or refuse generally accepted routine or major medical or dental treatment;
9. close the place of abode.[13]

It should be noted that under § 81.22(b) no guardian may: (a) consent to the voluntary formal or informal admission of the IP to a mental hygiene facility under Article 9 or 15 of this chapter or to a chemical dependence facility under Article 22; and (b) revoke any appointment or delegation made by the incapacitated person such as a power of attorney, health care proxy or living will.[14]

In spite of the above-stated advantages of utilizing Article 81 for an ASD child, there is still a time and place for an Article 17-A proceeding. Most often, it is used for a person who will not be able to care for himself or herself due to a permanent and unchanging condition.

Decisions

Once the decision has been made to pursue an Article 81 guardianship for the ASD child, there are a number of important decisions and issues that will need to be addressed prior to the filing of the Petition. For example:

1. Who is going to be the guardian? Both parents, or just one parent (most commonly both)? Will a standby guardian be selected?
2. To what extent will the guardian need powers over the person and property of an ASD child?
3. Has the guardianship been discussed with the ASD child? Does he or she understand the nature of the proceeding and has he or she expressed an opinion of the powers being sought by the guardian?
4. Has there been a consultation with those professionals most familiar with the needs of the ASD child to assess what levels of independence are most appropriate for the child?
5. How to insure that the ASD child will be comfortable at the guardianship hearing? Explain to the child as best as possible some of the legal terms utilized at the hearing such as "incapacity," "powers over the property and person."
6. Will it be necessary, as part of the guardianship proceeding, to seek to have approved a Self-Settled Special Needs Trust for the ASD child? Generally, this is necessary if the ASD child has assets or will be receiving assets (inheritance, suit or settlement) that will impact his or her eligibility for such programs as Medicaid and/or Supplemental Social Security Income (SSI).
7. Is the ASD child presently enrolled in any federal or state programs such as Medicaid and/or SSI? Does Medicaid need to be given notice of the guardianship proceeding?
8. Is there a likelihood that the guardian or ASD child may be residing out of state? If so, it may be advisable to address this likelihood in the guardianship petition and obtain and necessary powers with respect thereto.

In conclusion, clearly the decision to seek an Article 81 guardianship for an ASD child is one that must be thoroughly evaluated prior to doing so. It is a decision that will have a far-reaching and profound impact on the life of an ASD child and his or her parents.

However, because of the nature of an Article 81 proceeding, and the inherent flexibility within Article 81, it is a decision that can be tailored and fashioned to the needs and concerns of both the parent and child while at the same time being a decision that can be modified or revoked at a later date if a change in circumstances has occurred. If properly fashioned, it can truly help insure the health and financial well-being of the ASD child for the balance of his or her lifetime.

Endnotes

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8. 27 Misc. 3d 705 (Sur. Ct., N.Y. Co. 2010).
9. 2001 NY Slip Op. 400 83U, 2001 WL 940206 (Sup. Ct., N.Y. Co. 2001).
10. *In re Mede*, 177 Misc. 2d 974 (1998); *see* SCPA 2220(1).
11. MHL § 81.21, (a).
12. MHL § 81.21(a).
13. MHL § 81.22.
14. MHL § 81.22(b).

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Babe Ruth: Sultan of Sweets

By David Krell

Baseball's treasure chest of lore rests on the achievements of standouts, those players that break records, win championships, and exemplify excellence. From Al Kaline to Zack Wheat and everyone in between, baseball's greatest players define, enhance, and, in some cases, revolutionize the National Pastime.

In the 1993 film *The Sandlot*, a great player's ghost advises Benny Rodriguez—the best of the sandlot players—"Remember, kid. There's heroes and there's legends. Heroes get remembered, but legends never die. Follow your heart, kid. And you'll never go wrong."

Heroes and legends. The baseball player fell into both categories

George Herman Ruth.

The Babe.

Beginning his career with the Boston Red Sox in 1914 as a pitcher, Babe Ruth found himself in a New York Yankees uniform for the 1920 season. The reason for the trade stemmed from Red Sox owner Harry Frazee's financial situation. Simply, he could not afford to keep Ruth on the Red Sox payroll because of debts due plus financial interests in the theatrical arena.

Baseball lore depicted Frazee as bargaining Ruth for money to invest in the Broadway musical *No, No, Nanette*. The story appeared logical. But it's only half true.

No, No, Nanette debuted on Broadway in 1925—five years after the trade to the Yankees. Its genesis, however, was another play that sourced Frazee's reasons for getting rid of Ruth. Waite Hoyt explained the details in an interview for the Baseball Hall of Fame. Hoyt was on the Boston Red Sox roster for the 1920 season.

> Before the season opened, we played an exhibition series with the New York Giants at the Polo Grounds. There was a notice posted on our bulletin board that we were invited to a theatrical performance, a light comedy, called *My Lady Friends*, that Harry Frazee was producing. There would be tickets at the box office.
>
> We went to the show, and it was quite amusing, very good. We enjoyed it a great deal. That show was put to music in 1924 and became *No, No, Nanette*…. If you trace it back, it was the sale of Babe Ruth that provided Harry Frazee with the $125,000 to produce that show.[1]

Ruth found a home in New York City, a metropolis where exploits appeared larger. In Ruth's case, the appearances were not deceiving. A 22-year career from 1914 to 1935 yielded a .342 batting average, 714 home runs, and 2873 hits.

His record of 714 home runs stood for nearly 40 years until Henry Aaron broke it in 1974. Aaron ended his career with 755 home runs. Barry Bonds ended his career in 2007 with 762 home runs, but the verdict is shaky regarding acceptance by baseball historians, scholars, and fans because of Bonds's controversies regarding steroid use.

In 1927, Ruth crashed 60 home runs. It was a feat that remained unreachable till Roger Maris hit 61 in 1961. Hank Greenberg came close in 1938 when he hit 58 home runs.

Ruth dominated the 1920s, a gust of fresh air after the Black Sox scandal of 1919 tarnished the game when eight players from the Chicago White Sox were accused of fixing the World Series so the Cincinnati Reds could win it. Though the players were acquitted, the black mark left on the game inspired the newly hired commissioner, Kenesaw Mountain Landis, to bar them from baseball for life. Ruth's success brought people back to the ballpark and inspired the nickname "The House That Ruth Built" for Yankee Stadium.

Ruth's exploits provided a new chapter for baseball and a much needed distraction. The 1920s matched him perfectly—a free-wheeling era in cities where speakeasies violated Prohibition. "In a time of venial sin in a city of venial sin, the man of magnified venial sin would become the Sultan of Swat, the Caliph of Clout, the Wizard of Whack, the Rajah of Rap, the Wazir of Wham, the Mammoth of Maul, the Maharajah of Mash, the Bambino. The Bam. The Big Bam."[2]

Babe Ruth found that the sweetness of success could turn bitter, though. When Ruth tried to register "Ruth's Home Run" and "George H. 'Babe' Ruth" as trademarks for candy in 1926, he struck out.

In *George H. Ruth Candy Co., Inc. v. Curtiss Candy Co.*,[3] the Court of Customs and Patent Appeals held that Curtiss Candy Company's "Baby Ruth" mark for candy bars trumped Babe Ruth's name because of prior use.

> Appellee sets up adoption and use, through predecessors in business, of the notation "Baby Ruth" as early as 1919, and use continually since said year, upon the same class of goods, viz., candy. Ownership of registration of said mark "Baby

> Ruth" for chocolate coated candy bars is also set up by appellee, said registration having been issued on May 27, 1924.[4]

The court addressed the trademark examiner's view of Babe Ruth's trademark rights regarding registration. The rights were strong, but not limitless—the trademark examiner had found that the name "George H. 'Babe' Ruth was registrable under the Trade-Mark Act of February 20, 1905 (15 USCA § 85) because it was written in a "particular or distinctive manner."[5]

The Commissioner of Patents, however, reversed the examiner's ruling because of the similarities between the words "Babe" and "Baby" despite Ruth's universal association with the former.

> The commissioner held that while the name "George H. Ruth," so written, would be registerable under said provision, the nickname "Babe" should not be regarded as a part of the name of the athlete George H. Ruth to the extent of permitting registration of it long years after another has used the quite similar word "Baby" in connection with the word "Ruth" as a mark for this common class of goods, and it was upon this ground that the decision of the examiner was reversed.[6]

So, Ruth's attempt at registering "Babe" was too late given the length of time enjoyed by the "Baby Ruth" mark in commerce. The court, however, avoided discussion of Ruth's underlying rights in using the "Babe" mark at all. It focused solely on the matter at hand—trademark registration.

> We would emphasize the fact that the proceeding before us is statutory, and the question of whether appellant has the right to use said mark is not before us. We simply hold, for the reason hereinbefore stated, that appellant's mark is not registerable under the provisions of said section 5.[7]

The court relied on testimony and the case of *J.B. Williams Co. v. Ernest W. Williams*[8] for its decision regarding confusion between the two marks. *Williams* involved men's grooming products.

> [A] mark "E.W. Williams," presented in the form of a facsimile signature, used upon an after-shaving cream or lotion, was likely to cause confusion with a registration of the word "Williams," used upon shaving soap and an after-shaving preparation prior to any use by the appellee, E.W. Williams, of his mark, and therefore its registration was barred by the first proviso of said section 5 (15 USCA § 85).[9]

Ruth, despite enormous name recognition concerning the "Babe" nickname, could not contravene the principles applied in *Williams* and the cornerstone of trademark law—likelihood of confusion.

> That confusion is likely between appellee's mark, "Baby Ruth," and appellant's mark, "Ruth's Home Run, George H. 'Babe' Ruth," is apparent. It is clear from the testimony that the connection of George H. Ruth with appellant was for the purpose of capitalizing his nickname "Babe" Ruth, used upon candy.[10]

Babe Ruth was an icon responsible for perpetuating the popularity of baseball in the 1920s by smashing home runs, setting records, and leading the Yankees to dominance.

Yet in the field of trademark law, Babe Ruth struck out.

Endnotes

1. Leigh Montville, The Big Bam: The Life and Times of Babe Ruth 102 (First Anchor Books (Broadway Books) (2006).
2. *Id*. at 107.
3. George H. Ruth Candy Co. v. Curtiss Candy Co., 49 F.2d 1033 (1931).
4. *Id.*
5. *Id*. at 1033-1034.
6. *Id*. at 1034.
7. *Id*. Section 5 of the Trade-Mark Act of February 20, 1905 (15 § 85) states: "Provided, That no mark which consists merely in the name of an individual, firm, corporation, or association, not written printed, impressed, or woven in some particular or distinctive manner or in association with a portrait of the individual or merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods, or merely a geographical name or term, shall be registered under the terms of this Act." The section further states that a name can be registered: "Provided further, That nothing herein shall prevent the registration of a trade-mark otherwise registerable because of its being the name of the applicant or a portion thereof."
8. *Curtiss*, 48 F.2d at 398.
9. *Id*. at 1034.
10. *Id*.

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NYSBA Task Force Advocates Major Improvements in Family Court

By Stephen G. Brooks

Introduction

This article describes the work of a vital New York State Bar undertaking: the Task Force on Family Court. The Task Force issued its final report in 2012, which included a set of recommendations for substantially improving Family Court.[1] The Report was approved by the House of Delegates, thus making its recommendations State Bar policy. In order for the Task Force to advocate for the adoption of its recommendations, it has been approved as a continuing project of the Bar.

"Understaffed, underfunded and flooded with unrepresented parties, Family Court is perhaps the court of New York that is most in need of major assistance."

The Challenges Presented by Family Court

In its third year of work, the thirty-five member Task Force on Family Court presses for major improvements in New York's Family Courts. It has recommended twenty-six measures to dramatically improve the Court. Most urgently, it advocates the creation of additional judgeships, accompanied by increased funding for the judges and necessary support staff.

Understaffed, underfunded and flooded with unrepresented parties, Family Court is perhaps the court of New York that is most in need of major assistance. The Task Force's Final Report portrayed the extraordinarily difficult conditions that prevail:

> The issues are as personal and serious as they come—Family Court determines the fate of your children. Delay is taken most seriously in Family Court. An infant who is removed from her mother at birth and spends her first three years of life in foster care will be shaped forever by the experience. A judge, who controls the quantity and quality of the infant's time with her family, is dictating that child's future, according to the social scientists.
>
> The men and women who serve in Family Court, both on the bench and behind the scenes doing back office work or serving as security or intake workers, are dedicated to the work of the Court. By and large, they see themselves as public servants, trying to do the right thing for children and their community. It requires patience and a sense of mission to work in what is sometimes a pressure cooker. There is always more work than time, more people to serve than hours in the court day. When emotions run high for clients of the Court, the anger and hurt, venom and fear are shared, sometimes explosively, with those closest at hand; that is, the judge and Court staff, as well as other clients of the Court.[2]

The Task Force

The Task Force was established in 2010 by Bar President Stephen P. Younger, who said at the time: "To thousands of New Yorkers, family courts are the face of our legal system but, unfortunately, with overcrowded dockets, too few judges, and far too many delays, these courts resemble hospital emergency rooms and our family law attorneys are forced to perform triage."[3]

The Task Force was charged with examining and reporting recommendations concerning the following priority issues:

- Whether more resources are needed for the Family Court and in what areas.
- Whether better case management and staffing processes are necessary.
- Whether the Family Court can make better use of technology.
- How Family Court operations can better serve families who come in contact with the court.
- How counsel are utilized in Family Court.
- Other issues deemed relevant by the Task Force.[4]

The commitment of the Association to strengthening Family Courts has been carried forward by Mr. Younger's successors, 2011–2012 President Vincent E. Doyle III, 2012-2013 President Seymour W. James, Jr. and 2013-2014 President David M. Schraver.

Speaking at the Task Force's first of four public hearings, held in Albany on December 1, 2011, then President Doyle was blunt in stressing the difficulties faced by those who have matters in Family Court:

> Even under the best of circumstances, a Family Court case can be one of the most difficult events that an individual or a family will ever experience. The issues are often very personal and emotional, and the outcomes can have an enormous, long-lasting impact on the lives of the people involved.[5]

The Task Force is chaired by Hon. Rita Connerton, Supervising Family Court Judge of the Sixth Judicial District, and Susan B. Lindenauer, who also chairs the Senior Lawyers Section of the Bar.

The Task Force's Reporter is Merril Sobie, Professor of Law at Pace University and author of *New York Family Court Practice.*

The Task Force held hearings during 2011 and 2012 in each of the state's four Judicial Departments. More than sixty witnesses testified in person and others provided written submissions. The Task Force consulted experts in New York and elsewhere in the country and carried out extensive research.

The Task Force's twenty-six recommendations cover a wide variety of issues that it finds must be resolved to bring the effectiveness of the Court's operations to the point where parties, attorneys, members of the judiciary and court personnel are able to benefit from a more appropriate level of access to justice and a system marked by greater efficiency.

In studying Family Court and formulating the recommendation, the Task Force was mindful of what has been accomplished in the past and the dedication of those who brought improvements to the Court. It stated:

> The creation of the Support Magistrates position as well as the utilization in the Family Courts of court attorney referees and judicial hearing officers, the numerous committees and commissions created to consider and develop best practices, pilot projects, training and legislative proposals demonstrate the strong and ongoing support of the judiciary and the entire court system to effect improvements in the Family Court despite limited resources.
>
> Throughout this report, the Task Force expresses many concerns about the operation of Family Court, but it is important to bear in mind that the problems and challenges that are analyzed result from courts that labor under an overwhelming number of cases, well beyond any level commensurate with available resources. Statewide, those who work in Family Court, whether as members of the judiciary, quasi-judicial officers or in the wide variety of support functions, are dedicated individuals who perform to the best of their abilities, under the daily strain of cases replete with the tragedies of children and their families and achieve exemplary results despite the challenges they face.[6]

Recommendations of the Task Force

Excerpts from the Task Force's recommendations are below. For full text and analysis of each, please see the Report. It is available on the NYSBA website at http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26703

> 1. The Legislature must authorize new judgeships in Family Court. . . . In the short term, judges from other courts should be assigned to sit in Family Court to ease delay.
>
> 2. There must be adequate funding to support judicial and quasi-judicial resources for the court.
>
> 3. [T]he Legislature should establish "Family Court Magistrates," officers who would carry out the duties of, and replace, Court Attorney/Referees, Support Magistrates and Judicial Hearing Officers.
>
> 4. Preliminary assistance should be established for all case types, particularly including child support cases.… If the parties could appear initially before an officer as provided in some states, such as California, the case might be resolved on consent at that level, or at least the parties' needs and expectations could be clarified.
>
> 5. Mediation programs should be greatly strengthened, expanded, and funded. While mediation is inappropriate in certain circumstances, such as matters involving domestic violence, it is especially useful in child custody, child welfare, and child support cases.
>
> 6. Emphasis must continue to be placed on bringing all Family Courthouse facilities up to an acceptable standard with regard to space, technology, accessibility, adequate court rooms, waiting rooms, attorney interview space, children's centers and security.

7. A methodology should be established to avoid or at least greatly minimize "piecemeal" trials or hearings conducted over the course of several months.

8. The ability to conduct outcome assessments should be enhanced and extended to encompass custody, visitation and family offense proceedings.

9. There should be greater uniformity in the operations of the court clerks' offices.

10. The State Bar Association must urge the Legislature to provide adequate funding to permit Family Court to continue the ability to be in session for a full court day, as was the standard in the past.

11. Legislation to authorize an expanded role for technology in Family Court would benefit litigants, especially in Family Court in rural counties.

12. The Task Force recommends that further study should be undertaken to determine the scope…(of frivolous, vexatious or repeated filings), and if the scope warrants action, new methods for addressing it should be employed so long as they do not bar legitimate access to justice.

13. Family Court Act Section 255 should be amended to expand the court's ability to order relevant governmental agencies to provide appropriate services.

14. The Task Force recommends that the Office of Court Administration initiate a collaborative process that would lead to adoption of a statewide protocol for the determination of eligibility for assigned counsel that would be uniform in application, yet provide for an appropriate degree of judicial discretion with due regard to local differences.

15. Unrepresented litigants need greater assistance and advice. Legal information services should be made available statewide. [W]ritten communication from the court should be increased, particularly for unrepresented litigants. These materials should include case specific information and timelines as well as a unifying document articulating basic rights and including local variations in rules.

16. With (an)…increasing population of immigrants comes a number of needs: ensuring that the immigrant community understands the justice system and in particular the Family Court; ensuring that there are sufficient and well trained interpretive services so that litigants may have their day in court; and ensuring that entry into the courthouse, filing of documents and receipt of document and orders from the court are understood by those with limited or no English language proficiency.

17. The Task Force recommends that Family Court take all steps necessary to ensure that litigants with disabilities receive full physical access to courthouse facilities and the assistance needed for representation in the court's proceedings.

18. There is a direct relationship between the availability of representation for low income litigants and adequate additional funding for civil legal services, as well as for mandated representation, whether by assigned counsel or by institutional providers. Further, to meet the need for representation in the Family Court expanded pro bono representation must be part of the picture.

19. Procedures for court-ordered psychological evaluations in child custody and child neglect cases and for reviewing and introducing the resultant forensic reports should be more consistent.

20. There is a need to achieve more uniform availability of kinship guardianship and kinship foster care throughout the State.

21. The "Paperless Court" should be expanded statewide.

22. [T]he Legislature should authorize the court system to implement e-filing in all cases in every county with a presumption that unrepresented litigants would not opt-in.

23. The use of video technology should be explored.

24. Family Court judges, quasi-judicial staff, and court attorneys…must have access to quality continuing legal education opportunities on the entire spectrum of applicable law.

25. The Task Force recommends that a facility be established to provide research, evaluation, education, communication, assistance in implementation and recognition of those who have excelled in developing best practices.

26. The Task Force heard examples of collaborations that benefitted Family Court and those who are involved in its proceedings. The Task Force recommends that further collaborative projects should be developed between the bench, bar and the community.

A Plea for Pro Bono

While the Task Force continues its work to improve Family Courts, there is a major role for members of the Bar that would address some of the immediate needs of the Courts: assisting unrepresented parties and the Courts through pro bono services. It is beyond the scope of this article to discuss the ways in which pro bono attorneys could serve in Family Courts, but suffice it to say that so great are the needs of the Court that each pro bono contribution would be significant. Such work might include: (1) dispensing information that does not amount to legal advice, (2) providing brief legal advice in either one-on-one settings or through regularly scheduled clinics (3) full representation and (4) becoming involved in aiding local Family Courts to improve their operations.

To learn more about pro bono opportunities and activities, see www.probono.net/ny. You might also contact a pro bono program, bar officials or Family Court judges in your area.

Endnotes

1. *NYSBA Task Force on Family Court Final Report,* New York State Bar Association (January 2013).
2. *Id.* at 1.
3. *State Bar President Stephen P. Younger Creates Announces Creation of Family Court Task Force*, Press Release, New York State Bar Association (July 28, 2010).
4. *Final Report*, op. cit. at 2.
5. *Family Court Task Force*, State Bar News, New York State Bar Association (January/February 2012).
6. *Final Report*, op. cit. at 5-6.

Stephen G. Brooks is a member of the Task Force on Family Court's Steering Committee and Chair of its Drafting Committee. He is a Co-editor of *The Senior Lawyer* and Co-chair of the Committee on Pro Bono of the Senior Lawyers Section. He is retired from the active practice of law and lives in Washington, D.C.

SLS Committee Reports

Age Discrimination Committee

The basic purpose of the Age Discrimination Committee is to help senior lawyers, as well as younger members of the bar, to become more familiar with this area of the law *as it may affect their careers* and to help promote changes that will end age-related discriminatory practices affecting attorneys. As part of this effort, the Committee intends to continue the excellent work of the Special Committee on Age Discrimination in the Profession (links to the Special Committee's webpage and to its January 2007 *Report and Recommendations on Mandatory Retirement Practices in the Profession*, which was approved on March 30, 2007 by the Association's Executive Committee and on March 31, 2007 by its House of Delegates, are included on the Age Discrimination Committee's webpage).

For further information and additional links, please visit the Age Discrimination Committee's webpage at www.nysba.org/SLSAgeDiscrimination.

Law Practice Continuity Committee

The mission of the Senior Lawyers Section Law Practice Continuity Committee is to support efforts to assist solo and small firm practitioners in planning for the orderly transition of their practice, as well as to identify ways and mechanisms whereby another qualified attorney can be authorized to intervene and protect the interests of the clients of deceased, disabled or absent solo and small firm practitioners who have not made adequate provision in advance for their inability to continue representing clients.

Legislation Committee

The Legislation Committee reviews pending State and federal legislation of interest to Senior Lawyers, and proposals under consideration by the State Bar Association to support or oppose particular legislation. Where appropriate, the Legislation Committee makes recommendations to the Executive Committee as to action(s) which the Executive Committee may wish to undertake in relation thereto. In addition, the Legislation Committee reviews recommendations and suggestions received from Section members or the Section Executive Committee, or referred from the NYSBA Executive Committee, with respect to prospective legislative proposals.

Membership Committee

The Membership Committee of the New York State Bar Association Senior Lawyers Section may be the most important committee in the Section. Obviously without a strong membership, the Section would not be able to function properly. At present we have a strong membership consisting of more than 2,300 attorneys. There is still a great deal of room for growth. Senior lawyers, those over 55 years of age, who are members of the NYSBA make up more than one-third of the Association's membership. Our job as the Membership Committee is to increase membership as much as possible.

To that end, we have granted one year's free membership to any NYSBA member upon reaching his or her 55th birthday. This has been an excellent way of bringing in new members.

We need to increase the number of attorneys on the Membership Committee. Ideally we would like to have one member from each judicial district so that membership can be promoted throughout the State. Outreach to non-members remains our greatest challenge.

Pro Bono Committee

Civil legal services programs are able to serve only a small portion of low-income New Yorkers who need assistance. Private attorneys who volunteer their time, pro bono, help to reach those who would not otherwise be aided.

While any lawyer can donate pro bono legal assistance, we believe that senior lawyers, whether retired or not, have a wealth of experience to contribute. It is the Pro Bono Committee's mission to meet more of the legal needs of the public, while at the same time providing senior lawyers with an avenue for meaningful service. We welcome your participation on the Senior Lawyers Section's Pro Bono Committee. Please contact SeniorLawyers@nysba.org at the New York State Bar Association if you are interested in joining.

Also, if you are currently providing pro bono service, or starting to consider it, look into the New York State Bar Association's Empire State Counsel Program. The Program is designed to recognize members who annually donate 50 hours or more of free legal services to individuals

or certain organizations. See the "Honors and Awards" tab at: www.nysba.org/ProBonoAffairsHome.

In addition, the Committee encourages you to join the Attorney Emeritus Program of the Unified Court System. See: www.nycourts.gov/attorneys/volunteer/emeritus/rsaa/.

Program and CLE Committee

The mission of the Program and CLE Committee is to present programs of particular interest to our Section's membership. Since our membership is quite diverse, our programs to date have covered a variety of subjects including: financial planning for the transitioning attorney; how to incorporate new technology and applications in your law practice; practice management for a solo or small firm when an emergency strikes; alternatives to the full time practice of law; and the use of social media in the practice of law.

On October 28, 2013, we presented a full-day program, "Living to 103—Are You Prepared?" Whether advising clients or planning for yourself, this program addressed what you need to know—from financial, tax, and long-term care aspects, to the use of technology to find new opportunities for yourself or to aid in your law practice succession plan, and more. We also are considering topics for our 2014 Annual Meeting program and welcome any and all suggestions for program topics and speakers. We encourage you to join us in the work of our Committee.

Publications Committee

The Section's Publications Committee is responsible primarily for *The Senior Lawyer*, a semi-annual journal provided free to Section members. As described on the journal's website, "The Senior Lawyer features substantive articles for lawyers who are age 55 or older and is published to help with career continuity and career changes. Articles that have appeared in past issues include such topics as value of important papers, estate planning, ethical issues, life settlements and retaining and maintaining closed files." The Committee has twelve members, including its three co-chairs, Bill DaSilva, Anthony Enea and Stephen Brooks. More members are welcome and articles from Section members are of particular interest.

Retirement Planning and Investment

For the Retirement Planning and Investment Committee the emphasis is on *Planning*—rather than *Retirement*. We recognize that many of our members never plan to "retire" in the conventional sense.

Our Committee addresses financial and life planning issues and next steps for attorneys and their clients as they prepare for *life on the other side of 55*. Our objective is to provide programs and information on professional options, work/life/leisure balance, and the challenges and joys of "full time" retirement, as well as the insurance and financial planning vehicles which afford us the opportunity to enjoy the "retirement" years, however we choose to define them and whatever we opt to do.

We hope you will join us.

Technology Committee

Focus: The Committee focuses on processes, tools and services relating to the use of technology in the practice.

Activities: The Committee looks for those tools, services and software that assist, streamline and make easier the practice of law. This is done by looking at developments in office hardware and the use of "cloud" technology.

The Committee provides a forum for discussion and analysis of evolving issues at the intersection of technology, computer systems security and effective use of law office technology.

Meetings: The Committee holds technology-related seminars, coordinates with the Law Practice Management Committee of the New York State Bar Association and at other times throughout the year co-sponsors CLE-accredited programs with guest speakers.

Members: Members include lawyers in private practice (solo, small and large firms), corporate counsel and lawyers in civil service whose practices involve legal issues relating to the development, protection, use and abuse of new technology. The Committee was formed in 2010.

Committee involvement is a free benefit of Senior Lawyers Section membership. To join a committee, simply email your request to SeniorLawyers@nysba.org.

Section Committees and Chairs

The Seniors Lawyers Section encourages members to participate in its programs and to volunteer to serve on the Committees listed below. Please contact the Section Officers (listed on page 46) or Committee Chairs for further information about these Committees.

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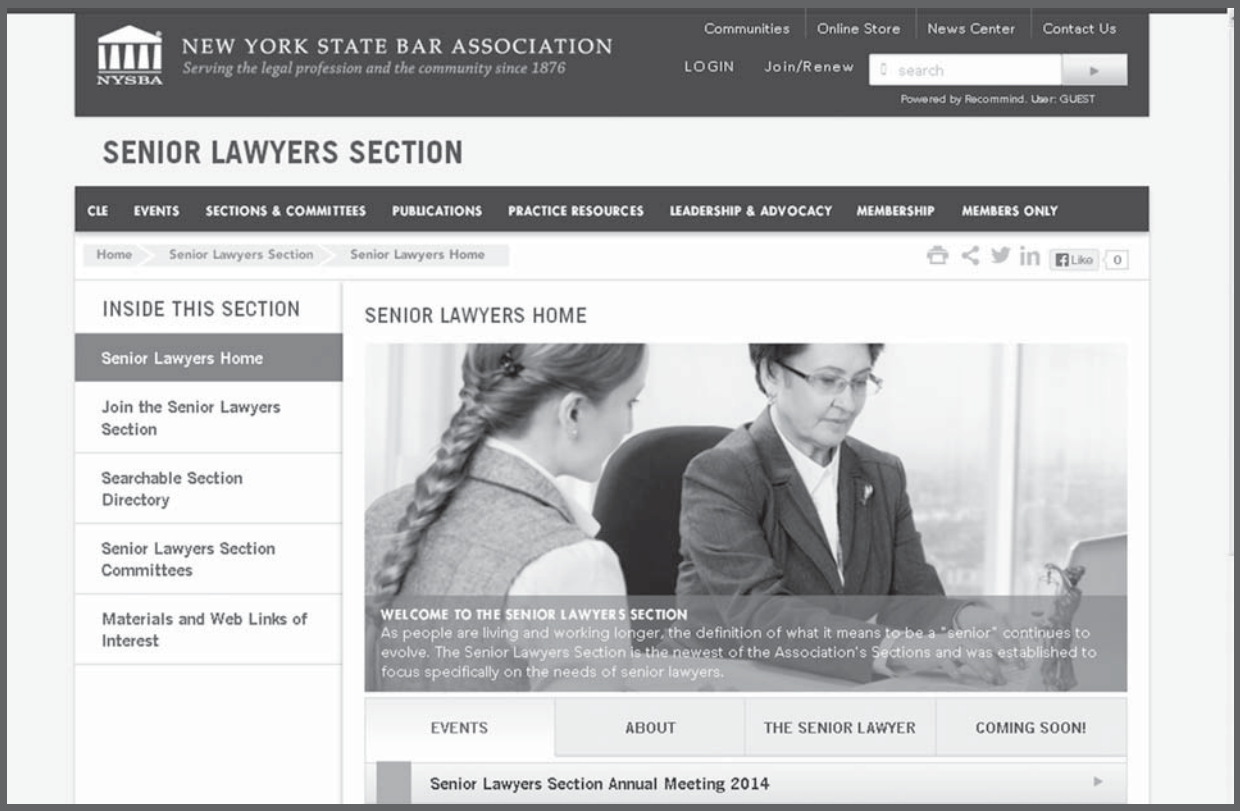

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