

Elder and Special Needs Law Journal

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



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- Elder Abuse Committee
- Aging Outside the Traditional Family
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Message from the Chair

2015 has been an amazing year for our Section, and I am truly honored and humbled to be serving as Chair. For those I have not yet met, allow me to take just a moment to introduce myself. My law practice is in New York's Capital Region with my partners at the law firm of Burke & Casserly, P.C. I live in the Town of Niskayuna in Schenectady County and have two elementary school-aged children, Josephine (age 10) and Dominic (age 9). I am married to a fellow attorney and member of our Section, Jack Calareso, who is a solo practitioner, with a business, litigation, estate litigation, and commercial real estate practice. Though my offices are located in Albany County, our practice extends throughout the surrounding counties across Upstate New York. As if being a full-time working mother with two busy children is not enough, I am active in my community and serve on boards of non-profits, work the concession stand at baseball games, and every once in a while enjoy playing hooky from work by catching a Red Sox game at Fenway Park or playing a round of golf with my husband.



If you've read my biography, you know that law is a second career for me. I decided to attend law school knowing that I needed to find something better for myself, but not being sure what that really meant. I was fortunate to have had that "aha!" moment during law school and knew I wanted to focus on elder law, special needs planning, and trusts and estates. The fates aligned and looked favorably on me, as I was welcomed into an established and reputable firm focusing in these areas. I am fortunate to be able to say that Burke & Casserly has been my home since I graduated from law school in 2003.

As the Chair of the Elder Law and Special Needs Section, I have set lofty goals for myself—(1) recruit new members to our Section by focusing on practicing attorneys transitioning into the areas of Elder Law and Special Needs Planning through new membership and mentoring initiatives; (2) engage, on a more substantive level, the 2,500+ Section members currently in our Section, by making committee participation easier and more accessible; and (3) continuing our Section's excellence in the use of technology to make Section events more accessible to all Section members. I intend to accomplish this by abiding by the wisdom of Teddy Roosevelt—not by speaking softly and carrying a big stick—but rather, as he once said, "The best executive

is the one who has sense enough to pick good [persons] to do what [s]he wants done, and self-restraint to keep from meddling with them while they do it."

Shortly after being elected as an Officer of our Section, I found myself discussing with others the suitability of a "young" (in legal practice experience, but certainly not in years or life experience!) person to serve such lofty position in our Section. I pointed out that the Section leaders who had the forethought to start me on the leadership path did so with great care and wisdom, and had sandwiched me between two amazing lawyers who had breadth of knowledge and skill (and, it turns out, patience for me!).

Richard Weinblatt, Esq., the Immediate Past Chair of our Section, and David Goldfarb, Esq., Chair-Elect, are the best bookends a Section Chair could possibly dream of having. There is no federal or state legal issue that they have not encountered in their vast professional careers. There is no practice management or ethical dilemma that they have not seen or experienced themselves within their own legal practices. Most importantly, there appears to be no limit to their willingness to share their guidance, leadership skills or experiences with me and others. And, in case you don't know them for yourselves, they are genuinely fun guys to hang out with!

I would be remiss, however, if I didn't also give a nod of appreciation to the people who are working with me during this year in addition to Richard and David, namely Marty Hersh, Esq., our Section's Vice-Chair (see the terrific article in this edition of our *Journal* to get to know Marty better!), Judith Grimaldi, Esq., our Secretary, and Tara Anne Pleat, Esq., our Treasurer. The ongoing guidance we get from Marty Finn, Esq. in his capacity as our Financial Officer also gives me great comfort for all things financial! Finally, the Executive Committee itself is comprised of Chairs, Co-Chairs, Vice-Chairs, our District Delegates, Liaisons to various other groups or NYSBA Sections, and Members at Large, all of whom, collectively, advance the work of the Section and advocate for and educate Section members and the consumers we serve.

Despite the fact that we are turning our clocks back shortly and are facing the change of season, I do want to thank those people who have helped to make 2015 so successful so far, and those who are poised to keep it continuing. We weathered, literally, the storm that found us rescheduling our 2015 Annual Meeting into February, and we enjoyed the sunset over Narragansett Bay in Newport. Our Committees have been hard at work, too!

Our Newport Summer meeting, from July 16-18, 2015, brought together over 150 attorneys, many spouses, children and guests, and gave us a chance to enjoy the wonders of Newport while bettering our professional selves. The program Co-Chairs, Tammy R. Lawlor and Ron Fatoullah, put together an exceptional educational event that was interspersed with fun and the sights of Newport. Our event could not have been possible without the generous support of our sponsors, **AMR Care Group, NYSARC Trust Services, Premier Home Health Care Services, Inc., Orange County Bank, Quontic Bank, and RDM Financial Group, Inc.** In addition to our sponsors, we had seven additional exhibitors who, together with our sponsors, not only offset the costs of our meeting but also brought valuable information and products for our attendees.

We were also quite fortunate to have a special guest in Newport, President-Elect of NYSBA Claire Gutekunst and her husband, Arthur Perlman. It was wonderful to have Claire work with our Executive Committee at our Thursday meeting and to address our conference attendees on Friday. She shared President Miranda's agenda and goals for the Association, as well as her vision for the Association for when she succeeds to the NYSBA Presidency in 2016. Claire and Art were full participants in our conference—enjoying the tea garden at the Marble House (the Vanderbilt Mansion) and sailing Narragansett Bay with conference attendees. Others attended the Championships at the Tennis Hall of Fame, while others meandered through the streets of Newport, enjoying the shopping, sights and sunshine.

Claire and Art were not the only good “sports” in Newport, as Section past-Chair David Stapleton was recruited and gamely went along with performing the ceremonial dance around the clambake pit, invoking our native ancestors and resulting in the necessary steam to prepare our delicious clams and lobsters. Thank you, David!

You can see some of the wonderful happenings from Newport here in the pages of this *Journal* and on our Section's webpage. A heartfelt thank you to all the happy photographers whose smartphones captured images along the way.

Newport has not been the only success of our Section recently. And the ongoing success of our Section is due to the current and past Officers, a terrific Staff Liaison from NYSBA, and dedicated Committee members. Some of you may have had the chance to participate in Committee meetings at the Summer Meeting, or perhaps this fall as the various committees have gotten up and running. A full list of the Committees, their leadership, and their meeting times is available on our Section's webpage. I invite you to check it

out at www.nysba.org/elder/. Should you have any questions, just email me (jcalareso@burkecasserly.com) or our Section's staff liaison, Lisa Bataille (lbataille@nysba.org) and we will connect you with a committee's leadership.

Why should everyone participate in a Committee? The reasons abound: *meet fellow practitioners*. If you are using the Community on the NYSBA website, you know that the Elder Law and Special Needs Section is active, supportive, encouraging and filled with knowledgeable practitioners. Service on a committee provides you additional resources and contacts—a larger network of colleagues (many of whom become friends!). Another reason: *share your knowledge*. You have experience, even if you are a new practitioner. Whether it is life experience or experience in the particular subject matter of the Committee, you have something valuable to share. Another reason: *learn more*. Committees are often on the forefront of addressing issues that arise in its substantive area, and committee members are the resource for the other Section members on these issues. Finally, another reason: *we need you*. When we have the same people doing all the work year after year, not only does it become dull, it becomes burdensome for those workhorses. New people bring new energy, permit different perspectives to come out, and allow unique voices to be heard. We need you. We won't overwork you, I promise.

I have asked our Committee Chairs (or Co-Chairs, in some cases) and their Vice-Chairs to also follow Roosevelt's advice with me and, themselves, delegate: identify and establish committee goals and objectives, and then form work groups within each committee to carry out that work. You can participate in all or any of the issues that a particular committee addresses. And, if you would prefer to work on a committee that permits our Section to continue to flourish without tackling a substantive issue, we could definitely use your help on our Publications Committee (putting this amazing *Journal* together), the Technology Committee (ensuring our Section and its members stay on top of the new technology that NYSBA is promulgating), the Membership Committee (ensuring that we are growing in our numbers and continually recruiting people who will keep our Section flourishing over the upcoming years), the Diversity Committee (working to attract diverse members and ensure our Section is meeting the needs of diverse practitioners), or the Sponsorship Committee (which works to secure sponsors and exhibitors for our meetings, enabling costs to remain as low as possible). Go ahead, call me...I'll bend your ear and help you pick the committee best suited for you. But, after that, I'll hold you to your promise of becoming involved and active. Ask around. I have a reputation for that!

As you plan your winter and spring, I encourage you to save these dates and join our Section for some or all of them:

- **Section Fall Meeting**, October 23-24, 2015 at the Gideon Putnam Hotel in Saratoga Springs, being chaired by Felicia Pasculli and Bill Pfeiffer.
- **Basics of Elder Law Practice**, a Continuing Legal Education seminar offered by our Section in conjunction with NYSBA's CLE Department to be offered in five locations across the state: Westchester on November 5; Long Island on November 19; Rochester and New York City on December 1; and Albany on December 8, along with a webcasting on December 1.
- **Section Annual Meeting**, chaired by Joan Robert and Elizabeth Briand, Tuesday, January 26, 2016 at the Hilton in New York City, Joan and Liz are putting together a Surrogate's Court Panel discussion for us, along with the traditionally fabulous Elder Law Update and many other exciting things!
- Section's 8th **UnProgram**, Poughkeepsie, April 14-15, 2016.
- **Summer 2016 Meeting**, July 21-23, Philadelphia, PA.

As you read the list of upcoming events, you may wonder about the UnProgram. This is a truly unique offering that our Section is proud to bring to you. We have offered the UnProgram seven times in the past, and our Section has followed the format pioneered by the National Academy of Elder Law Attorneys. Small groups of attorneys gather to discuss topics most germane to their practices. Topics are not preplanned; discussions are facilitated rather than presented. Topics are often repeated, and discussions often carry over to lunch and dinner.

Our Section has decided to run "UnPrograms" in the even numbered years, and we are fortunate to be able to return to Poughkeepsie in 2016. However, a concentrated work group of Section members has redesigned the 2016 UnProgram, keeping the typical format but adding some traditional CLE credits. We are sure you'll love it! Our CLE offerings will include ethics and practice management. We can't say what the small group discussion topics will be—that's for you, the attendees, to decide! People who have come to prior UnPrograms have given us such positive feedback that we are excited to be able to offer it again. As one attendee said about the UnProgram, "Going to the UnProgram gave me such enthusiasm and energy for my practice. I left with such good ideas and such a feeling of community. I wish we could do this every year!" I hope you will consider joining us in Poughkeepsie in April.

And if all of this was not enough, our Committees are hard at work. In the next edition of our *Journal*, I will highlight some of the terrific efforts some of our Committees are undertaking. It's never too late to get involved!

I look forward to seeing what challenges lie ahead of our Section, and what opportunities present themselves to us. I look forward to getting to know more members from across the state and introducing new members to our Section. Serving as the 25th Chair of the Section is a great honor. I look forward to sharing it with you all and being awed at what you can accomplish. After all, as General George S. Patton once said, "Don't tell people how to do things. Tell them what to do and let them surprise you with their results." I look forward to the surprises.

JulieAnn Calareso

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Message from the Co-Editors in Chief

Dear Friends:

As we write our first (and second) message as Co-Editors in Chief, we are so grateful for all the members who have assisted us, submitted articles, entries and photographs. We are honored to be at the helm of *the Elder and Special Needs Law Journal*, but we are still on the learning curve.



Judith Nolfo-McKenna

Do you remember the feeling when your mom or dad removed your training wheels, and held tightly to the back of the bike seat as you pedaled furiously while they ran beside you? For a moment, you felt secure and sure-footed, and then the hand suddenly and inexplicably released, and you felt yourself flying down the sidewalk on your purple banana seat bike quickly trying to maneuver the known and unknown bumps on the road ahead? That is perhaps the ideal metaphor for our editorial beginnings. So, Tara and I beg your indulgence as we proudly present our Summer/Fall edition.

The *Journal* has been skillfully managed by our predecessors, David I. Kronenberg and Adrienne J. Arkontaky, for three successful years. Our entire Section extends our gratitude for their personal and professional sacrifice in providing us with issue after superb issue. Tara and I hope to follow the well-traveled path they have set down before us.

This past summer also brought the beginning of a new term for the officers of our Section. We enthusiastically welcome our new Chair of the Elder and Special Needs Law Section, JulieAnn Calareso. JulieAnn has been an indispensable part of our Section for many years, and we know this next year will be a tremendous success under her leadership. JulieAnn has encouraged many new members of the Section to become involved in one of the multitude of committees in this Section. The energy and enthusiasm of each and every committee is contagious. The friendships which arise out of being involved are priceless.

We also bid farewell to our exceptional outgoing Chair, Richard A. Weinblatt. Richard's tireless efforts and enthusiasm touched each of us, and we are deeply grateful for his tenure. At Richard's request, I became involved with the Elder Abuse Committee (our committee spotlight this issue) and a new world was introduced. Through the tenacious efforts of the entire committee, many of our Section members became well educated on this crucial area of the law.

As the new Co-Editors, we are very hopeful that many new and existing members will contribute an article to the *Journal*. There is no better way to educate others and share professional experiences than by contributing your talents to our *Journal*. We encourage members to work together on articles, and to contact us if you have new ideas or insights for the *Journal*.



Tara Anne Pleat

We also encourage all our Section members to attend our seasonal Section meetings. Our Fall Meeting is in the beautiful city of Saratoga Springs. Tara and I can both confirm it is a delightful venue, brimming with excellent restaurants, shops and historical discoveries.

Now, let us explore the current issue of *the Elder and Special Needs Law Journal*.

We are pleased to spotlight a new committee each issue, beginning with the Elder Abuse committee this issue. This committee has worked unrelentingly to educate and advocate this extremely relevant subject. With the Committee Spotlight, we hope new Section members will learn about our committees and their efforts, and become a contributing member.

In this and subsequent issues, we will highlight one Section member whose dedication and contribution is inspiring. In the next few issues, we will introduce many of our Officers. In this issue, we are pleased to highlight Marty Hersh, our new Vice-Chair of the Section.

We will also offer several columns each issue. This issue, Bob Krueger will continue his excellent column on Guardianship.

In this issue, we are excited to offer "Communities for Dummies." As all of you know, the previous NYSBA Listserve format was replaced by Communities, which was meant not only to be a discussion forum, but also a document-sharing forum. In addition, several committees and subcommittees have developed a community for their purposes. We hope to continue and expand our Section's Communities through this column.

Our Summer Meeting in Newport was incredibly enjoyable and informational. We commend our Co-Chairs of the meeting, Tammy Lawlor and Ron Fatoullah, as well as our new Section Chair, JulieAnn Calareso, for a job very well done. All of the Section

members realize that creating and coordinating such a meeting is a tremendous effort. I am sure you will join us in thanking Tammy and Ron for their efforts. We have featured a wonderful summary of the event by the Co-Chairs, as well as some moments captured in photographs. We hope the photographs published in this issue capture a bit of the atmosphere of the event.

As track season is but a memory in Saratoga, the city will be ready to receive our Section members at the Fall Meeting in Saratoga Springs. As you may know, JulieAnn, Tara and I all live and work in this

area, so we are very excited and proud to welcome all our Section members. We look forward to the excellent program being developed by our Co-Chairs of the Fall Meeting, Bill Pfeiffer and Felicia Pasculli. You will enjoy all this vibrant city has to offer, and autumn will be a stunning backdrop to our event.

Both Tara and I thank you for your support, contributions and most of all, your patience as we embrace our new roles.

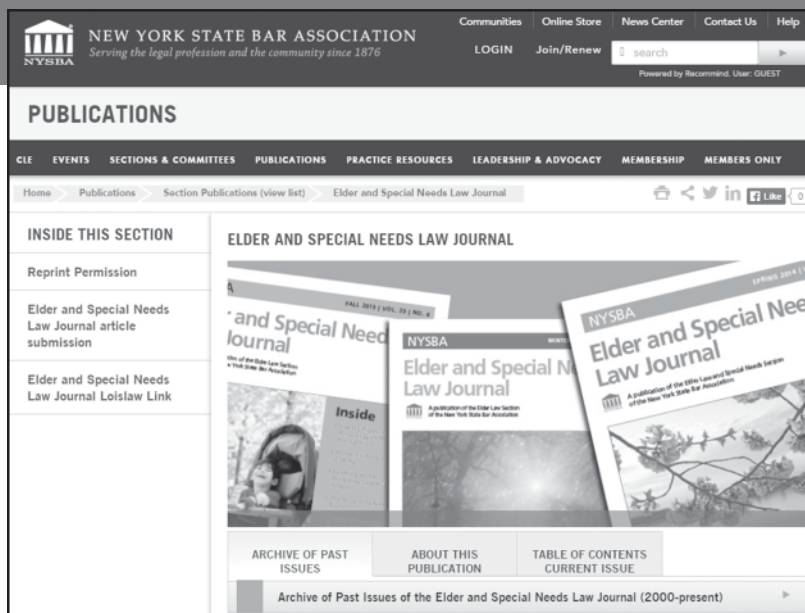
Judith Nolfo-McKenna

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- Past Issues of the *Elder and Special Needs Law Journal* (2011-present) and the *Elder Law Attorney* (2000-2011)*
- *Elder and Special Needs Law Journal* (2011-present) and *Elder Law Attorney* (2000-2011) Searchable Index
- Searchable articles from the *Elder and Special Needs Law Journal* (2011-present) and the *Elder Law Attorney* (2000-2011) that include links to cites and statutes. This service is provided by Loislaw and is an exclusive Section member benefit*

*You must be an Elder Law and Special Needs Section member and logged in to access. Need password assistance? Visit our Web site at www.nysba.org/pwhelp. For questions or log-in help, call (518) 463-3200.



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Welcome to the Community!

By JulieAnn Calareso, grateful for the assistance of Moira Laidlaw and the Section's Technology Committee

Whether you are a new Elder Law and Special Needs Section member, or a Luddite resenting NYSBA's transition to new technology, we hope that over the next few issues of the *Elder and Special Needs Law Journal*, we can introduce you to some of the fabulous features of our website and the Section resources we have there.

The first thing that you should do is to ensure you are accessing our site through Google Chrome. Using this search engine ensures maximization of the tools and features available to you. Using other search engines (Internet Explorer, Firefox, Safari) may result in the website appearing jumbled and disorganized. It may also prevent you from being able to access all materials.

This may be a good time to let you know that this article has been written as if you were accessing our Section's website and Community from a computer and not a mobile device. When I first attempted to access the revamped website and Community, I found doing it from my laptop was easier than trying it my on tablet. My colleagues at the office set up their profiles from their desktops at work. Only one brave soul (much more technologically advanced than I) did it from soup to nuts on a smart phone. Future articles will delve into mobile device accessibility, but for now, I hope you can access our Section's site and Community from a computer.

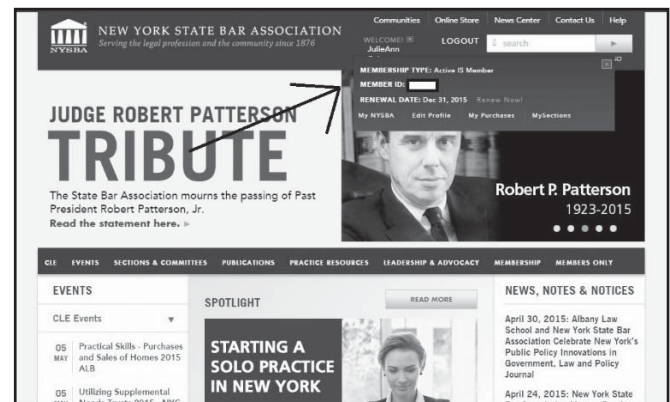
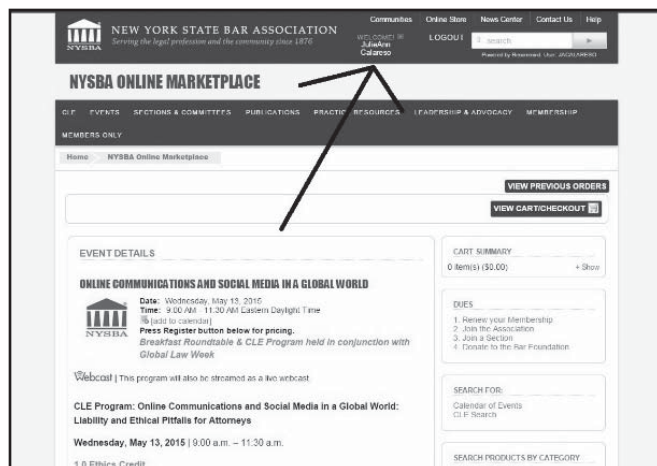
Now that we have accessed www.nysba.org through Google Chrome, the next thing you should do is SIGN IN. In the upper right corner, there is "log in." If you don't remember your NYSBA log in information, there is a "forgot password" link. Follow it, and then come back to this article when you've been able to reset the password.



All right! You have either successfully remembered your password and logged in, or you've followed the links and reset your password. You are now in! You may also decide whether you want Chrome to remember your password for you so you don't need to log in each time, or NYSBA offers that feature as well.

Once into the NYSBA website, you must now decide if you want to access the resources on our Section's website pages or go to the Community.

Before doing that, though, let's set up your profile. If you click on the drop down arrow to the right of your name (slightly right of center of the screen), you will see some info. It tells you if you are an active NYSBA member, and the date your membership is up for renewal. (Go ahead, make a detour and click through to re-up your membership if you're near the renewal date...after you've learned how to use the website and Community, you're not going to want to miss out on the amazing benefits Section membership brings with it!)



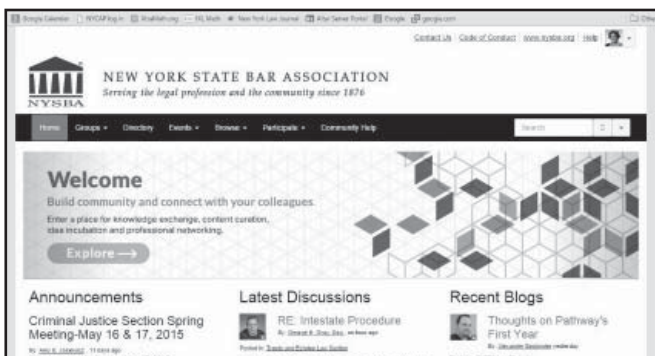
With your membership squared away, let's edit your profile. Use the drop-down Menus to fill it out. Don't forget to hit save!

Now, let's go back to our goal of either exploring our Section's website or getting you into the Section's Community. Our Section's technology committee, fearlessly led by Moira Laidlaw and Fran Pantaleo, will be writing articles in future editions of the *Journal* discussing and highlighting different features of our website. So, I'll assume you'll be a cooperative Section member and read those articles when they become available.

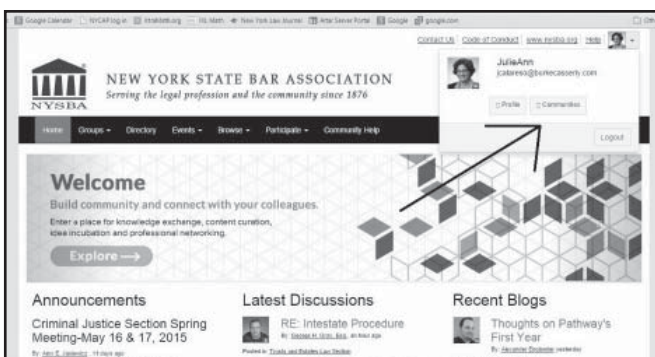
For now, let's presume you want to check out "The Community."

WHAT?!? What the heck is the Community? The Community is an online place where discussions can happen, where documents can be shared, and where people belonging to a certain group or interest area interact. So, logically, all 2,500+ members of the Elder Law and Special Needs Section of NYSBA are part of the Community. (If you are a member of another NYSBA Section, you are part of that Community, too! If you serve on a committee of NYSBA or our Section, you are a member of that Community, too!)

If you look in the upper right corner of the screen, you'll see "Communities." Click on that. After doing that, in the far, far right hand upper corner, you should see your photo. No photo?!? Go back to your "profile" and get one up! It's great to have your picture there, because then people who are exploring the Community and Section website offerings can put a face to the name and/or email address. You will find it very beneficial when you start attending our Section meetings to see familiar faces!



So, once your photo is there, you'll see a small drop-down menu it you click on the small arrow to the right of your picture. Again, click on "Communities." (You may find this a lengthy process, but once you are in and set up, you can set password remembrance and tag the Section's Community homepage to be a favorite, and then you'll go right there!)



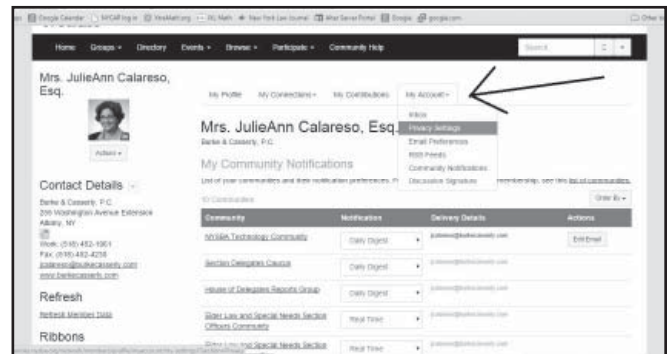
By clicking on "Communities" under your photo, you immediately go to your Communities. As a member of the Elder Law and Special Needs Section, you

will automatically find yourself as a member of our Community. Congratulations! You're there!

Now, we just need to customize your settings and you'll be all set! I'll also digress here and let you know that, if you prefer, NYSBA has posted a short video about Communities on the NYSBA website. Access it by going to <http://communities.nysba.org/home> and clicking on "Community Help" where you can find a video entitled "HOW DO I USE THE COMMUNITY SITE?" If you're a visual person, this will help you tremendously. If you like step-by-step instructions, keep reading!

You have already taken the time to establish your Profile for your NYSBA membership. If, while under the Community, you click on "My Profile," you will see that you can link your LinkedIn profile to your NYSBA Community account. This way, you can update LinkedIn and then, periodically, update your NYSBA Community profile by clicking "update." This is definitely the "hitting two birds with one stone" type of advantage. Boost your Community rating (discussed later!) while keeping LinkedIn updated. Two things off your "marketing to-do" list!

If you instead select the "My Connections" tab, you'll see three different types of connections—contacts, networks, and communities.



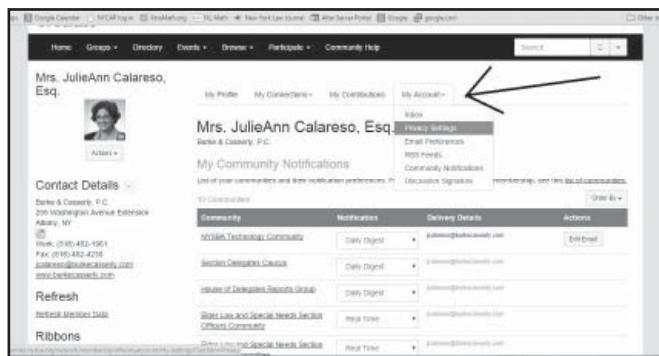
On the fourth tab over, you'll see it is labeled "My Account." This is the magic spot where you can determine whether you want to receive the Community Posts in real time (showing up in your email In Box as they appear); in a digest (once a week); or not at all—leaving it to you to go onto the Community to retrieve them. You can also explore other features as well.

Before going much further, I want to share a helpful hint that I utilize. It has to do with the email platform we use in our office. We have chosen Outlook. I have set up a special "rule" in Outlook that says that any email coming in to my email address with the word "[Elder]" in the subject line will be automatically redirected into a separate Outlook folder. Note that the word Elder is capitalized, and it is encased in the brackets. In this way, if an email arrived from someone with the subject line "Looking for a great Elder Law Attorney in the Albany area," the email would not be re-

directed to my separate folder. Only if it said “Looking for a great [Elder] Law Attorney in the Albany area” would that email be redirected. So, I suggest that you consider establishing a rule within your email software to establish and redirect all posts into a separate folder. I do this, and then, each evening, or when I’m on hold with the IRS, or when I have a few spare moments, I can check that separate folder and read what’s going on in the Community. (If you need assistance with this, check out the “help” section of your email platform.)

Returning to the “My Account” tab, let’s explore the options in the pull-down menu. The “In Box” is not your general email, but rather a place where someone can send you a private message on the Community. I’ll admit, since the email addresses of most people I’m trying to contact privately are shown in their profile, I very rarely use this feature.

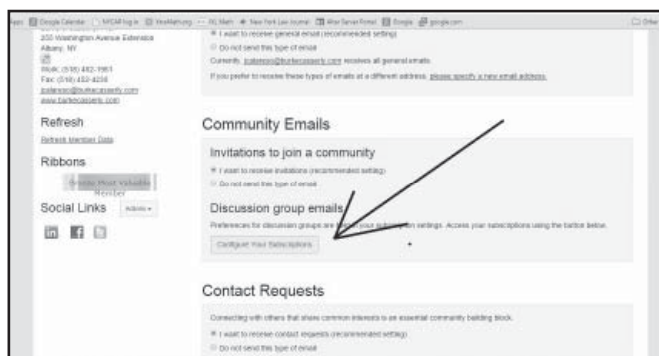
Another option under “My Account” is Privacy Settings. I’ve got everything “public,” but I’m just not that exciting of a person and so have nothing to hide. You can customize your preferences.



The most significant option under My Account is the “Email Preferences.” When you click on this option, there are four basic things that you must select. General emails are from the Association, and are a valuable resource for learning about what is going on throughout NYSBA. Community emails contains the chance to be alerted to invitations to join a community.

It is the second item in this second box that is the magic we’re looking for—“Configure Your Subscriptions.”

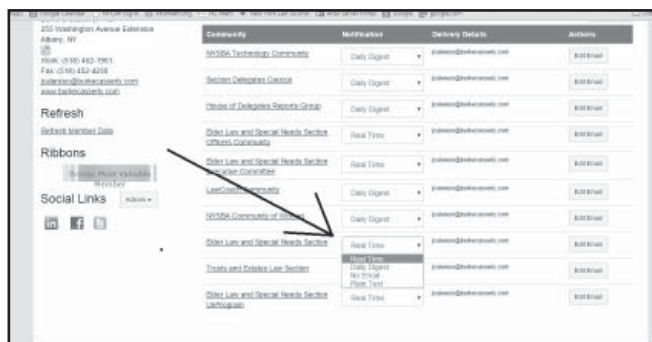
Go ahead. Click on it.



You will then see the Communities that you are subscribed to.

You will then have the opportunity to change settings and the way in which you receive emails concerning posts.

If you select “Elder Law and Special Needs Section” you will see a drop-down menu in the center column. Your choices are “Real Time,” “Daily Digest,” “No emails,” and “Plain Text.”



Select the one that works best for you. [Because I have set my emails to arrive and be automatically re-directed through a Rule in my Outlook, I have selected “Real Time” for my Elder Law and Special Needs Section emails from the Community. Others, such as other Sections’ communities, or some of the more specialized communities I am in, I have selected “Daily Digest.”] Admittedly, if I were unable to set up a rule for redirecting the emails that arrive from the Community into a separate folder, I would have to subscribe to the “Daily Digest” for our Section, simply because we are such a vibrant and active Section—there’s always posting going on!]

You will also see that you have the opportunity to change the email address to which the emails arrive. So, some practitioners set up a second email address only to hold emails from the Community. It’s up to you as to how you do it!

Well, after selecting how you wish to receive alerts from the Community, you are all set and the only thing left to do is to figure out how to post things to the Community, how to reply to Community posts, how to add things to our Community’s library, and how to retrieve things from it. Our Technology Committee will be sharing those tips in our next column!

But for now, I encourage you to watch the Community, enjoy your new access to it, and get to know some of your fellow practitioners.

Why You Should Consider Donating a Lapsing Insurance Policy to a Charity

By Anthony J. Enea and Michael L. Meyers

It is estimated that approximately fifty (50%) percent of life insurance policies owned by seniors will be allowed to lapse without any benefits ever being paid out other than any remaining cash surrender value. With approximately \$19.2 trillion of life insurance in force in the United States at any given time, the amount that may lapse without paying any meaningful benefits to either the consumer, his or her family and/or a charity of their choosing, is staggering.¹

For a variety of reasons, consumers allow their life insurance policies to lapse. Whether it be that they can no longer afford the premiums or the reasons for originally purchasing life insurance no longer exist, their policies are allowed to lapse.

Until the recent formation of the “Insuring a Better World Fund” (IABWF), we do not believe a single entity existed that aggregated and administered policies for the benefit of charity when the policy was no longer wanted or would be lapsing. The IABWF is able to accomplish the aforesaid while at the same time relieving the consumer of the obligation of paying the premiums due on said policy. Additionally, the consumer will be entitled to a charitable deduction based on the fair market value of the donated policy.

The IABWF does not purchase the life insurance policies and is not a life settlement. It is a charitable entity operated by the Inter-Vivos Foundation, a tax-exempt, publicly supported Section 501(c)(3) of the Internal Revenue Code (IRC) charity.

In order for the IABWF to consider accepting your life insurance policy, there are various factors that must be assessed and complied with:

1. The insured/owner of the policy generally must be 65 years of age or older and have experienced a change in health since the policy was issued;
2. The insured would need to provide information about his or her current health (although no medical exams will be required);
3. Any and all types of life insurance policy will be accepted, whether it be term, universal, whole life or second to die, will be acceptable;
4. The policy must have a minimum death benefit of \$400,000; and
5. The policy must have been purchased more than 3 years ago.

Once the IABWF accepts the policy, it will pay all the premiums for and administer all of the accepted policies.

The IABWF will then distribute the death benefits after the payment of all the premiums and after expenses on a pro-rata basis to the charities selected by the donor of the policy, and approved by the Board of Directors of the IABWF, to insure the charity is appropriate and maintains its charitable status.

In essence, a charity selected by the consumer will receive a substantial portion of the death benefit of a life insurance policy that would not have paid a single dime if it were allowed to lapse.

All of this is accomplished, plus the donor of the policy will be able to receive a valuable charitable deduction for income tax purposes based on the approved fair market value of the policy under Section 170 (e) of the IRC.

This is accomplished because the IABWF is a charitable entity that aggregates and administers thousands of donated life insurance policies. The IABWF is able to help support numerous charities and their endeavors without any cost to the charities while allowing the consumer to obtain a tax benefit. While we are generally reluctant to promote any single charity, however, when a charity is able to make something out of nothing, it deserves our attention.

Endnote

1. American Council of Life Insurers Fact Book (2014) Chapter 7 Page 1; “Lapse Based Insurance” by Gottlieb and Smetters (November 17, 2013) and Business Wire (September 17, 2013) and ICR Custom Marketing Research and Business Wire (April 18, 2013) and Conning Research and Consulting.

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The Elder Abuse Committee's mission is to raise awareness within the New York State legal community about issues of exploitation and mistreatment of older adults. Elder abuse is a widespread, growing problem and attorneys are effectively positioned to serve as watchdogs in identifying, addressing and remedying incidents of elder abuse within their pool of clients and potential clients. Through substantive educational programming, resource creation and distribution, and community building, the committee's goal is to increase legal practitioners' proactive and informed responses to elder abuse.



Elder Abuse Committee

- Initiating outreach to the broader legal community via published articles and presentations
- Educating the broader legal community to identify and address issues of undue influence within their client population
- Facilitating networking opportunities to share expertise as well as challenges

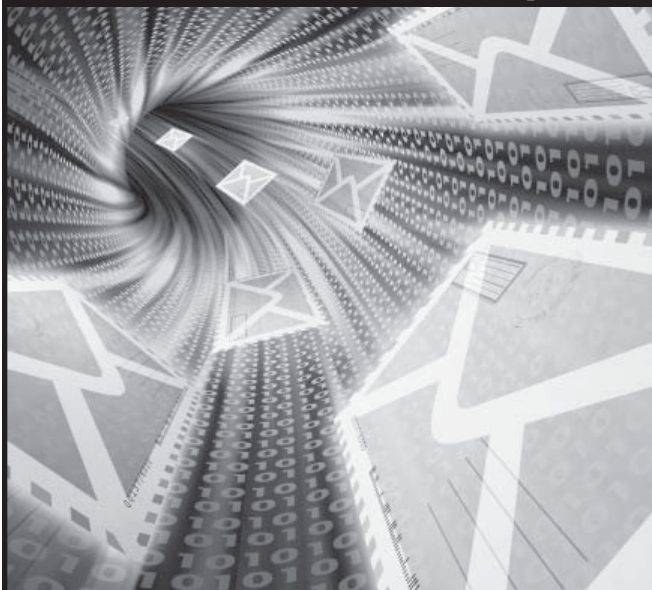
The Committee's activities will include:

- Creating and gathering educational materials for distribution at Bar Association meetings and other gatherings.
- Programming with experts in different types of abuse including physical, emotional and sexual abuse, as well as financial exploitation and neglect.
- Planning events with professionals from other disciplines/agencies such as medical doctors, psychologists, APS workers and financial advisors to learn about potential tools, remedies and action steps.

In the two years since its founding, the Elder Abuse Committee has published regular articles in the *Elder and Special Needs Law Journal* and presented CLEs to the legal community on issues related to our mission and activities. The committee holds monthly calls for members to discuss recent successes and challenges in addressing elder abuse in their practices and communities. The Committee has begun exploratory investigation into mandatory reporting legislation, and is also in the midst of crafting an ethics poll on the topic of elder abuse in partnership with the Ethics Committee.

The Committee is comprised of civil and government attorneys as well as those who work specifically with elder abuse victims. We are always eager to welcome new members interested in actively advancing the mission of the Committee. For more information, please contact joy.solomon@hebrewhome.org.

Request for Articles



If you have written an article you would like considered for publication, or have an idea for one, please contact *Elder and Special Needs Law Journal* Co-Editors:

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

www.nysba.org/ElderJournal

Aging Outside the Traditional Family: Problems and Possibilities

By Cate Russell and Hina Qureshi with Deirdre Lok

This article is part of an ongoing series brought to you by the Section's Elder Abuse Committee. The authors are students at the HELP (Helping Elders through Litigation and Policy) Clinic at Brooklyn Law School, taught by Jane Landry-Reyes, Esq. of Brooklyn Legal Services, Elder Law Project, and Deirdre Lok, Esq. of the Harry and Jeanette Weinberg Center for Elder Abuse Prevention. Through the clinic, students carry a case-load advocating for older adults in Brooklyn Housing Court and participate in a seminar exploring the legal ramifications of aging in our society.



Cate Russell



Hina Qureshi



Deirdre Lok

Introduction: A Growing and Vulnerable Single Elderly Population

As the United States' substantial baby boomer population ages, a significant and growing portion is doing so outside the confines of the traditional nuclear family. The number of single-person households (including the never-married, divorced, and widowed) steadily increased from eighteen percent in 1970 to nearly twenty-seven percent in 2003, according to U.S. Census Reports.¹ Demographic trends also suggest that U.S. households are childless at increasing rates. According to U.S. census data, the number of women who have not given birth by the ages of 40 to 44 jumped from approximately ten percent in 1980 to nearly nineteen percent in 2010.² This trend is likely to grow as the baby boomers age. Legal structures should adapt to reflect the United States' cultural shift toward more single-person households and provide greater protections for this vulnerable population in old age.

The elderly population struggles disproportionately with illness and disability. Even absent serious illness, the elderly often have limited mobility and diminished senses that make it difficult to navigate ordinary tasks without assistance. Compared to the elderly aging within families, single adults are particularly vulnerable because societal expectations and legal presumptions about their caregiving are unclear. This population's relative isolation also makes them disproportionately vulnerable to elder abuse. By contrast, for those aging in traditional families, these vulnerabilities are mitigated. For example, caregiving expectations are

relatively stable for those with adult children. Children are often present to monitor their elderly parents' condition, to hire caregivers or provide care themselves, to coordinate medical care and hospital stays, and to transition their parents to assisted living facilities when needed. For elderly patients who lack immediate family members, and adult children in particular, hospital discharge planners struggle to coordinate safe discharges for patients who lack an obvious caregiver.

It is important to note that a majority of elder abuse is perpetrated by family members, most commonly adult children or spouses.³ Therefore, older adults aging within traditional families are certainly not automatically insulated from abuse as they age, and should still have safeguards in place. However, people aging outside traditional family structures often lack the default caregivers and decision-makers who are often heavily relied upon in our society, creating unique gaps in service.

Gaps in Coverage Under the Family Medical Leave Act

Similarly, while designating emergency contacts, health care proxies, or powers of attorney is a relatively simple task for those with spouses or children, it can be daunting for those who live alone. Nevertheless, individuals can easily make nontraditional choices for health care proxies and powers of attorney by contract. Even when an individual fails to designate a health care proxy, states like New York in its Family Health Care Decisions Act,⁴ recognize that "close friends" can perform this role when family members are unavailable. By contrast, individuals simply cannot use contracts to create legally recognized relationships for the purposes of government benefits, like employment protections under the Family Medical Leave Act (FMLA).⁵

The FMLA only affords employment protections for a narrow category of caregivers: spouses, parents, and children. Even siblings are excluded. While friends and siblings often provide precisely the same caregiving services as spouses, parents and children, the FMLA does not protect them because of their relationship status. This gap in coverage can be critical, especially for those with limited resources. For covered caregivers, the FMLA requires employers to provide up to 12 weeks of unpaid leave per year, to continue providing the same medical benefits, to restore employees to the same position, and if the same position is unavailable, to restore employees to another position that is substantially equal in pay, benefits, and responsibility.

Alternative Models: “Friends-Helping-Friends” and Reciprocal Beneficiaries

To address this critical gap in coverage for single elderly adults, there is a growing need to legally recognize relationships like friendships, which exist outside marriage and the traditional nuclear family. Legally recognizing friendships for some purposes could alleviate some of the uncertainties and vulnerabilities faced by single and childless elders. In fact, recognizing the primacy of friendship in their lives, some single elders have formed support networks for mutual caregiving with their peers. A “friends-helping-friends model” is growing in popularity among aging single, widowed and divorced women.⁶ The purpose of these associations is to be available as a support network for one another in situations where others would ordinarily rely on their immediate family for support. These models often involve joint living arrangements, and are even accompanied in some cases by contractual agreements that designate mutual caregiving rights and responsibilities between friends. But these joint living arrangements and contractual agreements exist without legal support because friendship is not a legally recognized relationship and comes with none of the legal rights that are enjoyed by parents, spouses, and children in most jurisdictions. Without these legal rights, the friends-helping-friends model for illness and old age “is a luxury of those who can afford to do it with no help from the government or their employers.”⁷

The need to recognize a broader array of personal relationships is particularly acute in the elder care context. But the problems that arise in this context highlight broader concerns that have been raised by a small movement to elevate the legal status of friendship, and challenge the privileged status of marriage, in our society writ large. For single adults living outside the traditional family model, friendships are often their primary source of support. As the growing trend towards more single-person households continues, the law should extend protections that it has reserved

for marriage and close family to friends that perform the same supportive role in one another’s lives. In addition to medical leave, spouses possess other legal rights that would be equally beneficial for adults who maintain mutually supportive relationships with close friends. These additional rights include the right to bring wrongful death suits, hospital visitation rights, and default health care decision-making rights during incapacitation. Another particularly crucial right for elderly friends in joint living situations is the right to remain living in a joint home after a friend’s death.

Hawaii state law provides a good alternative model for supporting friendships in ways that could ease vulnerabilities for elder single adults as they age. A 1997 Hawaii law⁸ allows single individuals to register with the state as “reciprocal beneficiaries,” without making any assumptions about the nature of their relationship. Reciprocal beneficiaries need not be in an intimate relationship, can be of the same or opposite sex, and can even be related. Reciprocal beneficiary status confers certain rights on this mutual relationship that would otherwise be reserved for marriage alone. These include inheritance rights, workers’ compensation rights, rights to sue for wrongful death, health insurance and pension benefits for state employees, hospital visitation rights, and health care decision-making rights.⁹ Other states should adopt similar models, which would give elder single adults far more flexibility and security in structuring their living and medical care arrangements as they age.

Conclusion

Demographic trends toward a growing population of single and childless elders are clear. This elderly population faces special vulnerabilities because they lack clear and stable support networks. This vulnerability is worsened by gaps in coverage under the FMLA. For single elders who could rely on close friends for caregiving in times of need, the FMLA fails to provide employment protections when friends care for seriously ill friends. This critical gap in coverage discourages alternative support networks that the law should support as the aging single population grows. Rather than reserving critical legal benefits for traditional marriages, states should follow Hawaii’s model and provide an array of benefits to mutually supportive beneficiaries. This model would support mutual caregiving arrangements for vulnerable single adults as they age and prevent a potential crisis in caregiving for this growing population.

For questions or to join the Elder Abuse Committee, please contact joy.solomon@hebrewhome.org. For a list of state-wide elder abuse resources, please visit nysba.org/ElderAbuseResourceGuide/.

Endnotes

1. Jane Gross, *Alone in Illness, Seeking Steady Arm to Lean On*, N.Y. TIMES, Aug. 26, 2005, <http://www.nytimes.com/2005/08/26/health/26alone.html?scp=1&sq=%2522grace%20mccabe%2522&st=cse&r=3&>.
2. Phyllis Korkki, *Childless and Aging? Time to Designate a Caregiver*, N.Y. TIMES, Sept. 11, 2012, <http://www.nytimes.com/2012/09/12/business/retirementspecial/for-childless-older-people-legal-and-logistical-challenges.html>.
3. The National Center on Elder Abuse at the American Public Human Services Association, *The National Elder Abuse Incidence Study*, September 1998, pg. 7.
4. Family Health Care Decisions Act, 2010 Laws of New York, Art. 29-CC § 2994.
5. Family Medical Leave Act, 29 USC 28 §§ 2601, 2611-2619, 2631-2636, 2651-2654.
6. Jane Gross, *Older Women Team Up to Face Future Together*, N.Y. TIMES, Feb. 27, 2004, <http://www.nytimes.com/2004/02/27/national/27RETI.html?ex=1217390400&en=9a707456311ee029&ei=5070&pagewanted=all>.
7. *Id.*
8. Haw. Rev. Stat. § 572-1.
9. Lesbian, Gay, Bisexual and Transgender Family Law § 8:19.

AID IN DYING: A TERMINALLY ILL PATIENT'S RIGHT TO CHOOSE AND WHAT PRACTITIONERS NEED TO KNOW

Wednesday, December 16, 2015

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Protecting Nursing Home Residents from Chemical Restraints: Action Is Needed to Reduce and Eliminate Widespread Inappropriate Antipsychotic Drugging

Submission to the United Nations Universal Periodic Review of
United States of America Second Cycle
Twenty Second Session of the UPR

Human Rights Council
April-May 2015

Submitted by:
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Richard Mollot

The Long Term Care Community Coalition (LTCCC) is a U.S. nonprofit organization dedicated to improving the quality of life and quality of care for people who use and/or reside in nursing homes and other types of long term care (LTC) facilities in New York and nationally. The Coalition is comprised of a range of professional, civic, aging and disability organizations. It uses the perspectives gained from its members to identify the major issues affecting quality of care and quality of life for elderly and disabled LTC consumers and undertakes studies and in-depth analyses of those issues in order to gain insights and develop meaningful recommendations for both policymakers and stakeholders. Nursing home resident rights and other legal, policy and regulatory issues related to nursing home care have been the focal point of LTCCC's work since the organization was incorporated in 1989.

I. Summary

1. The 1987 U.S. Nursing Home Reform Law¹ and its implementing regulations set forth strong standards for the care of nursing home residents in the United States. Under the law, each resident must be provided the care he or she needs, as an individual, to attain and maintain his or her highest practicable physical, emotional and psychosocial well-being. There are explicit safeguards to prevent physical and chemical restraint use and unnecessary drugging of nursing home residents. However, despite these longstanding requirements, and a U.S. Food and Drug Administration (FDA)² "black box warning" against use of antipsychotic drugs on the elderly, approximately one in five U.S. nursing home residents are administered antipsychotic drugs every day. These drugs are essentially used as a form of chemical restraint, stupefying residents so that they are more easy to care for. In addition to destroying social and emotional well-being, these drugs greatly increase risks of stroke, heart attack, Parkinsonism and falls. There is a strong correlation between antipsychotic drugging and mortality for the elderly. This correlation increases the longer an individual is drugged.
2. This submission raises concerns relating to cruel, inhuman and degrading treatment; abuse and neglect of vulnerable populations (both nursing home residents in general and elderly individuals with Alzheimer's Disease or other dementia in particular); and denial of the rights to be informed of and consent to treatment.
3. Our findings and concerns are based on the results of numerous studies, including many conducted over the years by (or for) the United States government, as well as our own studies on inappropriate antipsychotic drugging rates and the widespread and persistent failures of the government to prevent this drugging and uphold longstanding standards for nursing home resident care. In addition, our concerns are informed by numerous cases (both legal cases and anecdotal reports from families and the grassroots organizations with which we work) from across the country that substantiate the pervasiveness of this problem and the significant harm it causes to thousands of nursing home residents and their families every year.
4. Our recommendations are fundamentally simple: the United States government should enforce longstanding standards of care and treatment of nursing home residents and, particularly, of the

numerous residents suffering from Alzheimer's Disease or other forms of dementia.

II. Legal Framework

5. As noted above, the 1987 Nursing Home Reform Law provides substantial protections to ensure that U.S. nursing home residents receive adequate and appropriate care and are free from chemical and physical restraints. Virtually all nursing homes participate in either the Medicaid or Medicare programs (or both), and, as a result, the U.S. government is the primary payer of nursing home care. Thus, in terms of both the legal Requirements for Participation³ and the contractual requirements that facilities agree to when admitting and retaining residents, nursing homes are required to meet the standards set forth in the Reform Law and implementing regulation and, importantly, the U.S. has both the right and the obligation to ensure that these standards are met. To that end, it is also worthwhile to note that the Reform Law's standards of care, quality of life and dignity are applicable to each nursing home resident. In other words, the standards are not general requirements (such as to have a set number of staff or purchase a specific amount of food per facility). Rather, and critically, the Reform Law requires that sufficient care and services are provided to meet each resident's individual needs. Thus, as regards staffing and food, nursing homes are required—and paid—to have sufficient staff to ensure that every resident is able to attain, and maintain, his or her highest practicable functioning and well-being, and sufficient and appropriate foods to meet the nutritional and preferential needs of each resident.
6. The Reform Law's standards are set forth in the Code of Federal Regulations⁴ and operationalized via a system of "F-tags" in which, roughly, each provision of the Code has a corresponding F-tag which surveyors (inspectors) use to cite nursing homes for "deficiencies" (i.e., failure(s) to meet minimum standards). F-Tags, in turn, are cited in the "Statements of Deficiencies" that are the written record of a surveyor's findings. While the federal agency, CMS, has ultimate responsibility for enforcing these standards, it contracts with the states to conduct oversight of the nursing homes within each state. There exists an extensive system by which CMS monitors state performance to ensure that residents are safe and receive care that meets or exceeds standards. Both the state and federal agencies have a range of penalties that can be imposed on nursing homes when a failure to meet standards is identified, ranging from fines and mandatory trainings to removal from the Medicaid/Medicare payment systems. In turn, CMS can impose penalties on state agencies that fail to sufficiently protect residents.
7. In 2013, we conducted a study to identify the federal regulations relevant to chemical restraint use and inappropriate drugging. The resulting report⁵ identified 26 F-tags (and their related CFR provisions). These include three principal standards: residents must be kept free from unnecessary drugs (F-329),⁶ residents must receive necessary care for their highest practicable well-being (F-309)⁷ and residents must be free from chemical restraints (F-222).⁸ The remaining 23 standards either directly or strongly relate to the chemical restraint context. These include F-154 ("The resident has the right to be fully informed in advance about care and treatment..."),⁹ F-223 ("The resident has the right to be free from verbal, sexual, physical, and mental abuse..."),¹⁰ and F-240 ("A facility must care for its residents in a manner and in an environment that promotes maintenance or enhancement of each resident's quality of life.").¹¹
8. While the Reform Law and the various provisions of the CFR provide for strong protections against chemical restraints and the use of antipsychotic drugs on nursing home residents, the U.S. government has failed to adequately enforce these protections. As a result of this persistent failure, approximately 20% of U.S. nursing home residents are given antipsychotic drugs inappropriately every day.
9. The U.S. government itself has recognized the seriousness and pervasiveness of this problem. In 2011, U.S. Inspector General Daniel Levinson noted "Too many [nursing homes] fail to comply with federal regulations designed to prevent overmedication, giving nursing home patients antipsychotic drugs in ways that violate federal standards for unnecessary drug use." The Inspector General concluded, "Government, taxpayers, nursing home residents, as well as their families and caregivers should be outraged—and seek solutions."¹² This statement related to the findings of a study conducted by his office which found, *inter alia*, (1) "Eighty-three percent of Medicare claims for atypical antipsychotic drugs for elderly nursing home residents were associated with off-label conditions; 88 percent were associated with the condition specified in the FDA boxed warning;" (2) Fifty-one percent of Medicare atypical antipsychotic drug claims for elderly nursing home residents were erroneous....; and (3) "Twenty-two percent of the atypical antipsychotic drugs claimed were not administered in

accordance with CMS standards regarding unnecessary drug use in nursing homes.”¹³

10. Following this report and the statement by the Inspector General, LTCCC’s executive director¹⁴ and five other nursing home resident representatives¹⁵ met with CMS’s then Acting Administrator Donald Berwick to advocate for a reduction in chemical restraint use and inappropriate antipsychotic drugging. Following that meeting, CMS launched a national campaign to reduce antipsychotic drugging and improve dementia care in U.S. nursing homes. This campaign was launched in March 2012, with an initial goal of a 15% reduction in U.S. nursing home antipsychotic drugging by December 31, 2012 with further, more ambitious, goals expected to follow. In the two years (plus) since its launch, CMS has conducted a range of educational programs and initiatives to both improve the nursing home industry’s understanding and practice and to improve enforcement of those standards by state and federal survey agency staff.
11. The results of this initiative have, unfortunately, been lackluster and (as noted earlier) the rate of inappropriate and dangerous antipsychotic drugging remains unacceptably high. The federal campaign failed to come close to achieving its initial goal and, in fact, did not achieve the 15% reduction for an additional full year. Importantly, from our perspective, despite the Inspector General’s report, the FDA’s “black-box” warning and numerous studies showing the significant harm associated with antipsychotic drug use, the U.S. government has failed to take meaningful steps to enforce longstanding laws and regulatory standards. In short, regardless of whether or not the educational component of the federal campaign has been successful, the U.S. government has continued in its failure to take substantive steps, within its authority and mandate, to protect the tens (if not hundreds) of thousands of nursing home residents who continue to receive antipsychotic drugs inappropriately and illegally.
12. Two recent studies demonstrate this failure to protect residents from inappropriate drugging and chemical restraint. Last year, one of our partners in advocacy on this issue, the Center for Medicare Advocacy, undertook a study with Dean Lerner Consulting which assessed federal deficiencies cited against nursing facilities for antipsychotic drugging. That study “reviewed all antipsychotic drug deficiencies cited in seven states over a two-year period. [It] found that 95% of the deficiencies were described as “no harm,” meaning...that the facilities were unlikely

to be sanctioned, regardless of actual effects on residents.”¹⁶

13. Earlier this year (2014), we conducted a study that assessed enforcement trends, nationally and for New York State, for the three principal antipsychotic drugging/chemical restraint F-tags.¹⁷ Our study found, **“Many nursing homes are using antipsychotics at very high rates, up to (and sometimes even beyond) 50% of their residents.** This is especially surprising given that the data are risk-adjusted, meaning that these figures do not include drugs given to residents who have one of several antipsychotic conditions identified by CMS. Presumably, **few if any of the incidents of drugging reported on Nursing Home Compare should be happening at all, no matter at the rates we are seeing across the state and the country.**”¹⁸ Among the state and national findings in this study, perhaps most relevant to this submission are our findings regarding citations for inflicting chemical restraints on nursing home residents. For the three-year period of 2011 through 2013 (2011 being the baseline year for the federal campaign and 2013 being the last complete calendar year), there were only 124 citations in the entire U.S. for F-222 (out of a population of over 1.3 million nursing home residents, and a risk-adjusted antipsychotic drugging rate of over 20% of that population over those years).¹⁹ In addition, we found that roughly half the states had no F-222 citations whatsoever, in any of those three years, for chemical restraint of residents.

III. U.S. Compliance with Its International Human Rights Obligations

14. In addition to federal law and numerous regulations, the U.S. government’s failure to protect nursing home residents from chemical restraints violates several international conventions and covenants. The U.S. ratified the UN International Covenant on Civil and Political Rights in 1992. Article Seven of that covenant prohibits torture and cruel, inhuman or degrading treatment or punishment.²⁰ In 1994, The U.S. ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²¹ In addition, The Universal Declaration on Human Rights states, in Article 5, that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

IV. Recommendations

15. The United States should take immediate and robust action to significantly reduce inappropriate antipsychotic drugging of current nursing home residents and ensure that future residents are adequately protected from chemical re-

straints. To accomplish this, CMS should implement its core mandate and ensure that nursing homes are held accountable for meeting relevant and longstanding standards of care. State survey agencies should be monitored more closely and held accountable for enforcing regulatory standards. To effectuate this, CMS should establish stronger guidelines with concrete citation levels. For instance, when an individual is given antipsychotic drugs under circumstances that conflict with professional standards, this should be identified as harmful. In addition, agencies should be expected to assess for compliance with all relevant regulations when a drugging violation is uncovered. CMS should monitor and audit, on an ongoing basis, state agency performance in relation to facility and state level antipsychotic drugging rates and use the results to address performance issues. Rather than dedicating agency resources to industry trainings and collaborations, CMS should dedicate resources to identifying and implementing additional ways to ensure that standards are achieved. CMS should also take concrete steps to improve the quality of data available on Nursing Home Compare, the country's principal resource for nursing home quality information, so that the public is better positioned to make informed choices about the quality of care in the nursing homes in their communities.

V. Conclusion

16. Despite significant, known risks to physical health and mental well-being, the illegal and inappropriate use of antipsychotic drugs on nursing home residents persists at high rates across the United States. This is the result of the failure by the U.S. government, and its state agents, to ensure that tens of thousands of residents, most of whom have Alzheimer's Disease or other forms of dementia, are protected from inappropriate drugging and chemical restraint. In the face of this widespread and persistent pernicious problem, we recommend that the U.S. government agency, CMS, take immediate and robust action to fulfill its quality assurance mandate by enforcing the provisions of the 1987 Nursing Home Reform Law.

Endnotes

1. Nursing Home Reform Law, 42 U.S.C. §§1395i-3(a)-(h), 1396r(a)-(h) (Medicare and Medicaid, respectively) (December 1987). The Reform Law's text is available at: <http://law.justia.com/cfr/title42/42-3.0.1.5.22.html#42-3.15.22.2>.
2. The FDA Alert on atypical antipsychotic drugs was issued in April 2005. In June 2008 the FDA included conventional antipsychotics, "notifying healthcare professionals that both conventional and atypical antipsychotics are associated with an increased risk of mortality in elderly patients treated for dementia-related psychosis.... Antipsychotics are not indicated for the treatment of dementia-related psychosis." (Accessed on September 14, 2014 at <http://www.fda.gov/drugs/drugsafety/postmarketdrugsafetyinformationforpatientsandproviders/ucm124830.htm>).
3. Requirements for Long Term Care Facilities, 42 CFR 483. Published February 2, 1989, effective August 1, 1989. According to the description on the U.S. Centers for Medicare and Medicaid Services website, "The provisions of this part contain the requirements that an institution must meet in order to qualify to participate as a SNF in the Medicare program, and as a nursing facility in the Medicaid program. They serve as the basis for survey activities for the purpose of determining whether a facility meets the requirements for participation in Medicare and Medicaid." Available at <http://www.cms.gov/Regulations-and-Guidance/Legislation/CFCsAndCoPs/LTC.html>.
4. *Id.*
5. Mollot, Richard J. and Butler, Daniel, Federal Requirements & Regulatory Provisions Relevant to Dementia Care & The Use Of Antipsychotic Drugs (November 2013). Available at <http://www.nursinghome411.org/?articleid=10066>.
6. 42 CFR 483.25(l)(2)(i, ii).
7. 42 CFR 483.25.
8. 42 CFR 483.13(a).
9. 42 CFR 483.10(d)(2).
10. 42 CFR 483.13(b).
11. 42 CFR 483.15.
12. Daniel R. Levinson, "Overmedication of Nursing Home Patients Troubling" (Statement, May 9, 2011). Available at http://www.oig.hhs.gov/testimony/levinson_051011.asp.
13. U.S. Department of Health and Human Services, Office of the Inspector General, Medicare Atypical Antipsychotic Drug Claims for Elderly Nursing Home Residents, OEI-07-08-00150 (May 2011).
14. Richard J. Mollot, the author of this submission.
15. Janet Wells (National Consumer Voice for Quality Long Term Care), Toby Edelman (Center for Medicare Advocacy), Anthony Chicotel and Michael Connors (California Advocates for Nursing Home Reform) and Claire Curry (Legal Aid Justice Center).
16. Edelman, Toby and Lerner, Dean, "Examining Inappropriate Use of Antipsychotic Drugs in Nursing Facilities" (December 12, 2013). Available at <http://www.medicareadvocacy.org/cma-report-examining-inappropriate-use-of-antipsychotic-drugs-in-nursing-facilities/>.
17. Mollot, Richard J., "Antipsychotic Drug Use in NY State Nursing Homes: An Assessment of New York's Progress in the National Campaign to Reduce Drugs and Improve Dementia Care" (March 2014). Available at <http://www.nursinghome411.org/?articleid=10082>. Approximately eight percent of U.S. nursing home residents are in New York State facilities.
18. *Id.* at page 6. [Emphases in original].
19. *Id.* at page 20.
20. <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.
21. <http://www.hrweb.org/legal/cat.html>. It defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

Testimony for a Hearing on Antipsychotic Drugs in Nursing Homes

Presented before
The New York State Assembly Committee on Health
Richard N. Gottfried, Chair

Presented by
Richard J. Mollot
Executive Director
Long Term Care Community Coalition
February 18, 2015



Richard Mollot

I. Introduction

Thank you for the opportunity to testify on this important issue and for your and the Committee's long-standing commitment to improving care and quality of life for New York's 105,000 nursing home residents.

My name is Richard Mollot. I am the executive director of the Long Term Care Community Coalition (LTCCC). LTCCC is a non-profit organization dedicated to improving care and quality of life for residents in nursing homes and assisted living. As a coalition, we include a range of organizations and individuals representing the interests of the elderly and disabled, and their caregivers, across New York. Importantly, though we strive to constructively engage New York's provider community, our membership is entirely consumer-based and our advocacy is unique in that it is solely focused on the interests of long term care consumers. Many of our members—some of whom you will be hearing from today—are consumers themselves. Many work closely with residents, as ombudsmen and advocates. LTCCC focuses on systemic advocacy, conducting research on long term care issues to identify the root causes of problems and develop meaningful recommendations to address them.

II. The Drugging Problem in Nursing Homes

I thought it might be useful to provide a brief background on this serious and widespread, yet under-recognized issue.

Inappropriate antipsychotic drug use is a problem in nursing homes across the country. Despite the FDA's "black box" warning against using powerful and dangerous antipsychotics on elderly patients with dementia, they are frequently used to treat symptoms of the disease, including so-called behavioral and psychological symptoms of dementia. These drugs are often used as a form of chemical restraint, stupefying residents so that they are more easy to care for. In addition to destroying these residents' social and emotional well-being, these drugs greatly increase risks of stroke, heart attack, Parkinsonism and falls.

In 2011, U.S. Inspector General Daniel Levinson stated, "Too many [nursing homes] fail to comply with federal regulations designed to prevent overmedication, giving nursing home patients antipsychotic drugs in ways that violate federal standards for unnecessary drug use." The Inspector General concluded, "Government, taxpayers, nursing home residents, as well as their families and caregivers should be outraged—and seek solutions."

"[Antipsychotic] drugs are often used as a form of chemical restraint, stupefying residents so that they are more easy to care for. In addition to destroying these residents' social and emotional well-being, these drugs greatly increase risks of stroke, heart attack, Parkinsonism and falls."

In March 2012, the federal government began a campaign to address this problem. States were charged with reducing their drugging by 15% by the end of that year. A few states succeeded. However, New York was not one of them. In fact, NY only achieved about half that goal. Today, in 2015, approximately one in five nursing home residents in the state will be given these drugs. In New York City, the numbers are even worse: city nursing homes have an average drugging rate of over 25%—one in four residents. This is despite the fact that only about one percent of the population will ever be diagnosed with a psychotic condition. And, importantly, being diagnosed with a psychotic condition does not—or at least should not—mean that an individual can be given these drugs with impunity.

To that end, I would also like to say a few words about the social and emotional well-being of people with dementia. As several of my colleagues will testify, people with dementia have emotional, social and intellectual needs; just because we have difficulty understanding them, and have seen their ability to remember

and express themselves diminish, does not mean that their needs have dissipated. However, too often, we treat people with dementia as if they no longer exist as people, and their actions as “symptoms” that must be quelled rather than as a sign of what they are feeling, which—as for all of us—can range from joy to fear, comfort to pain, etc....

III. Why Does the Antipsychotic Drugging Problem Persist?

Current standards for dementia care have been in place for over two decades, since passage of the federal Nursing Home Reform Law in 1987 and promulgation of its supporting regulations. In a 2012 report,¹ we identified 26 federal standards as being especially relevant in the context of dementia care and inappropriate antipsychotic drugging. These include:

1. Freedom from unnecessary drugs (42 CFR 483.25(l)(2)(i, ii))
2. Necessary care for highest practicable well-being (42 CFR 483.25)
3. Freedom from chemical restraints (42 CFR 483.13(a))
4. Right to be fully informed of, and refuse, treatment (42 CFR 483.10(b)(3), 483.10(d)(2) and 42 CFR 483.10(b)(2)(4))
5. Activities of daily living do not decline unless the decline is unavoidable (42 CFR 483.25(a)(1) (i–v))

In New York, the State Department of Health (DOH) has principal responsibility for ensuring that these standards are enforced for all residents in licensed nursing homes. The state is paid to carry out this responsibility by the federal government. In addition to the well-being of over 100,000 residents, effective oversight ensures the integrity of the billions of public funds spent every year on nursing home care in NY.

Thus, in order to answer the question, “why does this problem persist,” last year we assessed DOH’s record of enforcement. Following are few highlights from our report, *Antipsychotic Drug Use in NY State Nursing Homes*.²

IV. Enforcement of Drugging Standards in NY State Nursing Homes

As discussed in the earlier section on national enforcement, there are three principal F-tags that are used to cite nursing home deficiencies related to poor dementia care and inappropriate use of antipsychotic medications: F-329, F-309 and F-222. Given the persistence of high levels of inappropriate use of label antipsychotic drugging in New York State nursing homes,

one would expect to see an increase in both the number of citations and levels at which they are identified as causing harm to nursing home residents. This expectation is grounded in the fact that nursing home surveyors have received significant training over the past two years to help them: (1) better identify inappropriate dementia care and antipsychotic drugging practices; (2) better understand the significant harm that these inappropriate practices inflict on residents and (3) be more skilled at substantiating and citing poor care practices and resident harm.

We assessed citation data from the Nursing Home Compare data sets for F-329, F-309 and F-222 citations for New York State nursing homes, focusing on the three full years that are both included in Nursing Home Compare and relevant to the time frame of the campaign to reduce inappropriate antipsychotic drugging: 2011, 2012 and 2013.³

NYS Citations 2011–2013

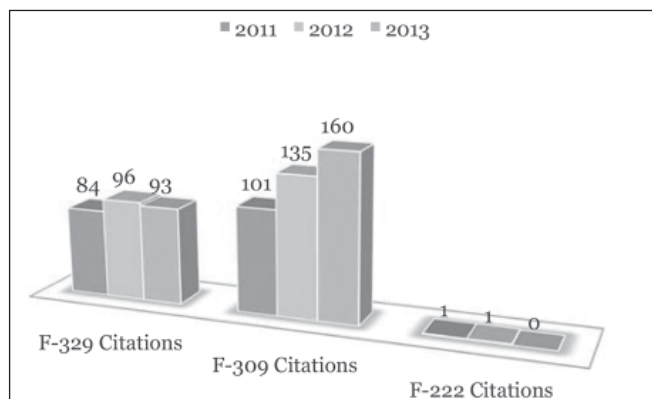


Figure 1. NY State Citations Relevant to Antipsychotic Drugging

With over 600 nursing homes, and over 100,000 nursing home residents, New York has by far the largest nursing home population in the country. Yet, despite marching orders to hold providers accountable for inappropriate drugging—and persistently high rates of drugging across the state—rates of citations for the three principal standards (F-tags) related to the antipsychotic drugging campaign are relatively low and, overall, have not increased substantially over the course of the antipsychotic drugging campaign.

As a point of comparison, we reviewed New York’s F-222 citations on Nursing Home Compare in respect to those of California, the state with the second largest nursing home population in the country. Despite having a nursing home population that is seven percent (7%) smaller, California has almost 16 times as many F-222 citations on Nursing Home Compare: 31 for California and only two for New York. In 2013, the second year in which the antipsychotic drugging campaign was in full swing, California had six F-222 violation citations. New York State had none.

NYS Enforcement of F-329—Free from Unnecessary Drugs

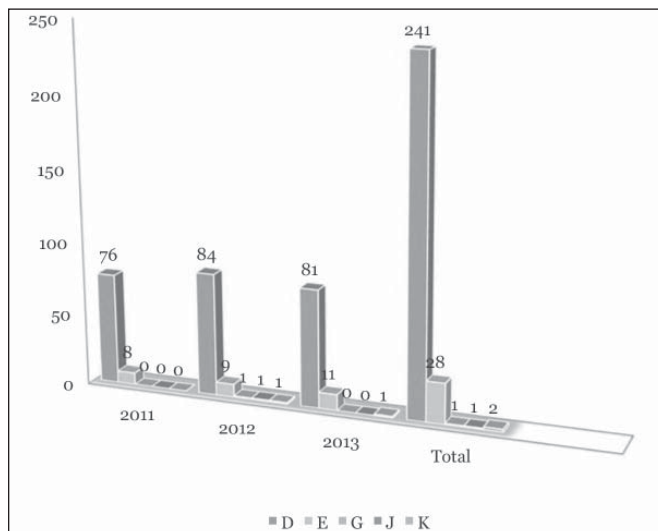


Figure 2. NYS Enforcement of F-329—Free from Unnecessary Drugs

Figure 2 shows the range of New York State F-329 citations for 2011–2013. The vast majority of citations are at the “D” level, followed by “E” level citations. As the scope and severity grid indicates, however, these coding levels indicate that, according to the surveyor, the violation caused no harm to residents. Only “G” and higher level citations indicate a finding of harm. As Figure 2 shows, there were less than a handful of harm level F-329 citations over the entire three-year period in all of New York State.

NYS Enforcement of F-309—Necessary Care for Highest Practicable Well-Being

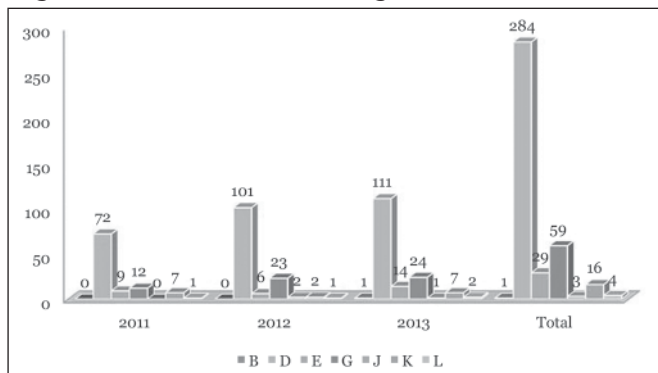


Figure 3. NYS Enforcement of 309—Necessary Care for Highest Practicable Well-Being

As discussed earlier, F-309 been a significant focus of the CMS campaign to identify and cite improper dementia care and inappropriate antipsychotic drug use, though it is applicable to a range of nursing home problems. Nevertheless, between 2011 and 2013 there was only a moderate increase in F-309 citations in New York State (particularly between 2012 and 2013). As compared to F-329, it is encouraging to see more F-309 violations identified as causing resident harm, though harm level citations still comprise a small minority (approximately 25%).

NYS Enforcement of F-222—Right to Be Free from Chemical Restraints

As previously noted, New York has only two F-222 citations on Nursing Home Compare, one in 2011 and one in 2012. Both are level “D”—“no actual harm.” There were no (zero) citations for F-222 in all of 2013. Of all of the states that cited for F-222 between 2011–2013, New York ranked last in terms of citations per number of residents.

V. Recommendations and Conclusion

Given the time constraints of the hearing, we would like to conclude with three general recommendations:

1. The NYS Department of Health must improve enforcement of these critical standards, rather than focusing its resources on educating and encouraging providers to do better. Providers are supposed to be trained professionals, and are paid to provide a professional level of care. Why do we accept “on-the-job-training” for those entrusted with our most vulnerable citizens?
2. In addition to DOH, the Office of the Medicaid Inspector General should improve its auditing and oversight activities to crack down on inappropriate and illegal drugging. Year after year we have been told that this is a priority for the OMIG, and year after year we wait for something to happen, while thousands of residents are given harmful and expensive drugs every day.
3. We must equip and empower nursing home residents—and the family members, LTC Ombudsmen and advocates who speak for those residents who can no longer speak for themselves—so that they can be knowledgeable health care consumers, able to make informed decisions about their (and their resident’s) care. As Inspector General Levinson said, families should be outraged and seek solutions. We must provide them with the knowledge and resources they need to make this a reality.

Thank you again for your interest in this serious issue and for this opportunity to present testimony before the Committee.

Endnotes

1. Mollot, R., LTCCC, *Federal Requirements & Regulatory Provisions Relevant to Dementia Care & The Use Of Antipsychotic Drugs* (Updated 2013). Available at <http://www.nursinghome411.org/?articleid=10066>.
2. Mollot, R. LTCCC, *Antipsychotic Drug Use in NY State Nursing Homes: An Assessment of New York’s Progress in the National Campaign to Reduce Drugs and Improve Dementia Care*, pp. 39-41 (2014). Available at <http://www.nursinghome411.org/?articleid=10082>.
3. The first year, 2011, serves as the baseline for the federal campaign and 2012 is the calendar year in which the initial campaign goal was supposed to have been met. Because the goal was not met the campaign continued, without a new goal, through 2013.

Guardianship News: Combat Pay

By Robert Kruger

Many of us have accepted the role as a Guardian at some point in our practice. Attempting to describe the job of a guardian is nearly impossible, as the scope of the guardianship varies in each case. Although the two case studies I offer in this article are selective, I trust they are not so singular as to be uninformative. The two guardianships cases described below achieved fever pitch between late 2014 and early 2015, and illustrate just how consuming such matters can be while serving as a Guardian. Of course the names and events have been altered sufficiently to protect confidentiality.



Case Study #1 Paul

Paul is a retired teacher. Paul's memory, at age 93, is, no pun intended, a memory. This shell of a man is mild mannered and, within limits, charming. His few relatives (he never married) live some distance away and are, within the constraints of their own lives, mildly interested. He resides in a one-bedroom apartment in Greenwich Village, where he has lived for at least 40 years. Before my appointment, a neighbor watched over him, as did a woman who cleaned his apartment weekly. His teacher's pension and social security were ample at that time to meet his needs. During the day, when the weather permitted, Paul would sit in a local park with the *New York Times* crossword puzzle, open and untouched. Unfortunately for Paul, he was befriended by a former tenant of his building who had been evicted by the Cooperative Board, who claimed she was a nuisance, which is no easy feat in New York City. This troubled woman set her sights on Paul's finances and, perhaps, marriage with Paul. We can breathe a collective sigh of relief at this juncture that Paul is gay.

With the enthusiastic encouragement of a geriatric care manager, we moved Paul about two miles downtown to a senior residence (not a true assisted living facility but one with an on-site home care agency to provide some necessary assistance and protection for Paul). To surround him with familiar things, we made arrangements to move his valuables, particularly his art work, memorabilia, bedding and as much furniture as could fit into his new apartment. We had three overriding objectives in making this move. First, we felt

that he needed companions more than eight (8) hours a day and that he was resisting their presence in his present setting. Second, he was, apart from one neighbor, isolated and alone. We thought that his new residence could provide him, besides the necessities of life (such as three quite excellent meals a day), a social life. And indeed, given the preponderance of women at this residence, he quickly became the "belle of the ball." The third reason for the move was to get him away from his troublesome new friend. Yet, despite his social successes at the new residence, he pined to return to his old apartment. He was unhappy. We hoped he would adjust. He did not.

Instead, he escaped. Repeatedly. The new residence, as you may deduce, was not a locked facility. So he eloped, or tried to. Two of his adventures were terrifying. In the late fall of 2014, on a rainy and penetratingly cold evening, he walked out of the facility and back to his apartment, sans keys, overcoat, hat or plan. His care manager at the time was visiting Paul that very day and thought that things were under control, so she went home. To return to his former apartment, Paul had to cross West Street, a 12-lane speedway, every bit as dangerous as the "Boulevard of Death" in Queens. The doorman at his old apartment building had the name of his guardian and he was shortly returned to the new facility. Obviously I was appalled, as I knew he could have been killed. Fortunately, we had increased the number of hours for his aides and one aide returned him to the facility. If not, I would have been compelled to travel to him from my home in Westchester, where I would have had to force him to return to the new dwelling under protest.

We then increased his aides to round the clock companions, who were instructed to be on high alert when accompanying Paul. We still thought that, over time, he would adjust. He did not. He was unrelenting in his desire to return to his old apartment and we were increasingly concerned, even before the second incident that our plan would fail.

One evening in early 2015, approximately one month after the first incident, Paul escaped again while on his way to the dining room. He saw a cab pull up in front of the residence in the process of discharging a passenger. Paul jumped into the cab, but his aide was able to jump in after him. Paul wanted to go to his old home; the aide asked that they be returned to the new residence. Had this scene not been terrifying, it would have been a Marx Brothers comedy. The cabdriver, bless his soul, deposited Paul at the hospital emergency room.

The hospital psychiatrist refused to prescribe psychotropic medications because Paul did not manifest psychotic behavior. The hospital hoped to discharge him expeditiously and without medication. Given Paul's past behavior, we strongly disagreed. So, I spent a few days negotiating his discharge. During his hospital stay, Paul's behavior further deteriorated. By this time, we intended to return him to his old apartment, but with appropriate medication to reduce his agitation and his resistance to his aides, who would continue with round-the-clock care. The hospital still refused to medicate Paul. In the absence of cooperation from the hospital, we believed that we had no choice but to return Paul to his home, even without medication. We were fortunate that soon after he was visited by a nurse practitioner, who prescribed medication that reduced his agitation. It was also of some considerable benefit that he grew surprisingly fond of his companions and accepted their presence and their assistance. Of course, we returned his furniture and other personal effects and restored his apartment to status quo ante.

The point of this cautionary tale is that, as his appointed Guardian, the above events consumed copious amounts of time and energy. We were always on high alert, ready to take phone calls and discuss options. I cannot begin to describe the amount of time spent on phone calls, especially with the new care manager, hospital staff, doctors, psychiatrists, nurses and discharge planners. There were also calls to and from the administrative staff at the new residence and the home care agency the residence has on site. It is misleading to measure our involvement in time alone; it is more accurate to measure it in psychic energy.

Pearl

Paul's case was harder on the professionals as he was putting his life in danger by eloping from his new placement. Pearl was putting her life in danger because she would not allow anyone into her apartment to help her. For over two years, the only person who saw her consistently, who purchased food and cooked for her, was a troubled niece whom Pearl financially assisted. When Pearl kicked her out, as she often did, no one even saw Pearl except for occasional sightings by the staff at the front desk of her apartment building. Neither I nor the care manager could have picked Pearl out of a police lineup. The scope of my role as Guardian for Pearl was gathering sufficient funds (1) to prevent eviction for non-payment of maintenance, (2) to prevent foreclosure and sale on her co-op loan in default and (3) to make periodic deposits from her checking account to enable Pearl, or more likely her niece, to purchase supplies. Obviously, that was unsatisfactory. We were reluctant to force entry into the apartment and her nieces had asked us not to call the police. So, my tasks

in this case were rather limited at this time. I would write checks, visit the apartment and deal with building management and periodically converse with the care manager about becoming the next news alert on Page 6 of the *New York Post*. I could even imagine the headline "Woman found dead on the floor of her apartment, had negligent and indifferent court-appointed guardian."

To backtrack a bit, Pearl had a guardian for years before I arrived. One of the Community Guardian organizations was the first. That guardian actually had the police forcibly remove Pearl from her apartment and bring her to a hospital, where she was examined by a psychiatrist and released, because she was not psychotic. I am sure that DSM 5 has a category for Pearl. She was so obviously paranoid that one would have hoped for more from a presumably trained psychiatrist. While we did not call the police, we did call the Mobile Crisis Team and the admissions staff at the local psychiatric hospital and were told the same thing. We can't hospitalize her, not even to medicate her, because she is not, we were told, symptomatic.

To return to the narrative, when the Community Guardian resigned, Pearl's nephew stepped in for two years before he resigned. The Court, looking no doubt for suckers, found me. Pearl fell into our hands by accident, when she fainted from malnutrition in the hallway of her building and was hospitalized. She had, quite literally, no food in her refrigerator. Nothing, not even a bit of ketchup. Actually, our fears about Page 6 came close to reality but once Pearl was in the hospital, we thought we were in control. Not quite, because the treating psychiatrist at the hospital would not prescribe Pearl any medication. Of course, the hospital wanted to discharge her untreated but we refused to return her to her home. We placed her in a nursing home where, at least, the treating psychiatrist at that facility did prescribe medications, and Pearl began to stabilize.

Now, at this point, I digress. I may have been underutilized for over two years but during Pearl's hospitalization, it was Paul redux. There were calls to the care manager, the hospital staff, psychiatrists, nurses and discharge planners. It seemed we were constantly fielding calls, constant interruptions and difficult resolutions. And Paul's crisis overlapped with Pearl's. At this point, the differences between Paul and Pearl blur except that Paul, because he was not in a locked facility, remained at risk until he was calmed and medicated.

Returning Pearl to her home was strongly advocated by her nieces and, regardless of their motives, we agreed to try. It was a condition of Pearl's discharge

from the nursing home that companions were present 24/7. To return her home, we commenced a thorough cleaning of the apartment, some major shopping, including significant clothing purchases (her clothes were infected with lice and were tossed), and her television service and cable reinstated. Lastly, we changed the locks to prevent Pearl from locking her companions out of the apartment.

* * *

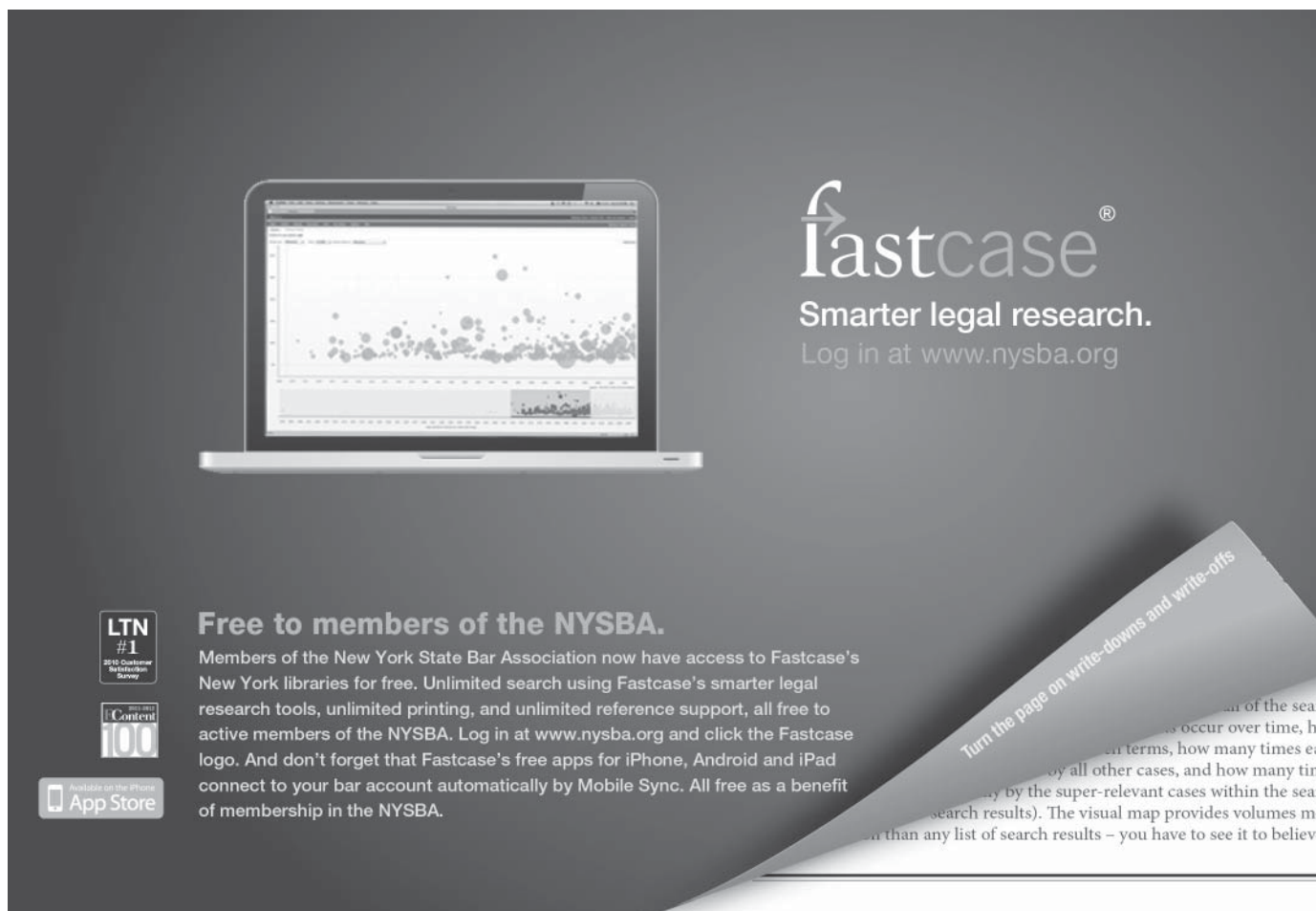
Today, Paul has adjusted well. He likes his companions and, as long as nothing upsets his routine, he does fine. Pearl is another story. Pearl suffered a psychotic break in April. At her request, the police were called; Pearl wanted the police to remove the companions. The police precinct has had more experience with Pearl than I have. They took their orders from me and brought her to the hospital. She has just been returned to the same nursing home as before.

* * *

In summation, guardianship is not, in the vast majority of cases, a political plum. It is actually a very heavy responsibility.

I can be reached at rk@robertkrugerlaw.com or (212) 732-5556.

Robert Kruger is an author of the chapter on guardianship judgments in *Guardianship Practice in New York State* (NYSBA 1997, Supp. 2004) and Vice President (four years) and a member of the Board of Directors (ten years) for the New York City Alzheimer's Association. He was the Coordinator of the Article 81 Guardianship training course from 1993 through 1997 at the Kings County Bar Association and has experience as a guardian, court evaluator, and court-appointed attorney in guardianship proceedings. Mr. Kruger is a member of the New York State Bar (1964) and the New Jersey Bar (1966). He graduated from the University of Pennsylvania Law School in 1963 and the University of Pennsylvania (Wharton School of Finance (B.S. 1960)).



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Recent New York Cases

By Anne E. Dello-Iacono

Invalid Power of Attorney

Plaintiff's daughter allegedly sustained personal injuries while she was a student at defendant Siena College. The plaintiff brought a personal injury lawsuit against the College acting under authority of a power of attorney signed by herself and her daughter. The power of attorney was not prepared by an attorney, but was a pre-printed form found on the internet. The defendant filed a motion for summary judgment asserting that the plaintiff lacked authority to bring the lawsuit, as the power of attorney did not comply with the requirements of GOL §5-1501B(1)(d) and was therefore invalid. The Court granted defendant's motion for summary judgment on the grounds that the instrument did not contain the "exact wording" required by statute to be considered a valid power of attorney.

Berrian v. Siena College, 2015 NY Slip Op. 05431 (App. Div. 2d, June 24, 2015)

Court Voided Gift Made by Agent

Following the death of his wife, Mr. Borders executed a power of attorney in favor of his children, defendants Brian and Elaine. Plaintiff, a sibling of the defendants, lived with their father and allegedly had numerous creditors. Defendants used their power of attorney to transfer the property to themselves, reserving a life estate to their father in a deed recorded on November 20, 2008. The defendants asserted that the transfer was made in order to prevent plaintiff from obtaining title to the property and making it available to plaintiff's creditors. Shortly thereafter, Mr. Borders executed a deed transferring ownership to the plaintiff, reserving a life estate, on November 26, 2008.

The Supreme Court, Erie County, determined that the November 20, 2008 deed to defendants was null and void. The Defendants appealed and the New York Appellate Division, Fourth Department, upheld the decision.

The Appellate Division determined that the father's intent was to transfer the property to plaintiff, as evidenced by the deed he executed on November 26, 2008 in favor of plaintiff. The Court found that the defendants were not acting according to their father's

wishes or in their father's best interests, but were acting to protect their future inheritance.

Borders v. Borders, 2015 N.Y. App Div. LEXIS 3970; 2015 NY Slip Op. 04022 (Erie County, May 8, 2015)

Power of Attorney—Duty of Third Party

William Sanford, plaintiff, is the former husband of Gerlinde Sanford, who died in 2010. Gerlinde Sanford had a retirement account with defendant TIAA-CREF, which named plaintiff as sole beneficiary. Ms. Sanford executed a power of attorney the day before she died, appointing Gerd K. Schneider and Georgia A. Schneider as her agents. On the day Ms. Sanford died, the Schneiders presented the power of attorney to TIAA-CREF and requested a change of beneficiary on the account, reducing plaintiff's portion to a 50% interest.

Plaintiff claimed that the power of attorney was invalid because Gerlinde Sanford lacked capacity at the time it was executed. Plaintiff alleged that TIAA-CREF wrongfully distributed funds from Ms. Sanford's account while it was aware, or should have been aware, that the power of attorney was invalid.

At some point in time, TIAA-CREF had been notified that, according to a nurse's note, Gerlinde Sanford was confused before she signed the power of attorney. After receiving information about the nurse's note, TIAA-CREF waited over a month to distribute the funds to allow plaintiff to submit documents in support of this claim. When no documentary support was provided, TIAA-CREF released the funds to the designated beneficiaries. Mr. Sanford alleged that TIAA-CREF should have investigated further.

The Court found that TIAA-CREF lacked "actual knowledge" of Gerlinde Sanford's incapacity, as required under N.Y. Gen. Oblig. Law § 5-1504(3), and was therefore entitled to rely on the power of attorney.

Sanford v. TIAA-CREF Indiv. & Inst. Servs., LLC, 14-1496-cv (2d Cir. 2015)

Compensation for POA Agent

Petitioner, Ivars Berzins, Esq., commenced this proceeding to pay himself from estate funds for services provided to decedent, Maria Smulyan, as her agent under a durable power of attorney.

Petitioner represented decedent and her late husband in various legal matters during the 1990s. In 2004, decedent executed a Will and a power of attorney, prepared by petitioner, appointing petitioner as her ex-



ecutor and agent. In the fall of 2008 decedent asked petitioner to take over her care and for the next six years petitioner supervised decedent's care and managed her finances. The power of attorney form did not address whether or not petitioner would receive compensation for his services as agent.

At the time of decedent's death in 2014, her estate was valued at approximately \$3,800,000. Petitioner commenced a proceeding seeking permission to pay himself \$122,142.50 based on the 379.7 hours of services he provided to decedent at his regularly hourly rate for legal work, or in the alternative, he requested that he should be compensated as though he were her court-appointed guardian pursuant to SCPA 2307, 2309 and MHL. The GAL opposed the relief requested and filed objections to the extent the Petition sought compensation that was not reasonable for services rendered as attorney-in-fact.

The Court noted that GOL §5-1506(1) states that an agent under a power of attorney is not entitled to compensation unless the principal specifically provides for such in the instrument. The Court determined that this provision is the result of an amendment that became effective in 2009 and therefore was not applicable to decedent's power of attorney created in 2004, as this section of the amendment is not retroactive.

The Court also determined that petitioner's compensation would not be based on his hourly rate for legal services because the services provided were not legal in nature. Petitioner was awarded \$79,432.50.

Matter of Smulyan, 2015 N.Y. Misc LEXIS 2425; 2015 NY Slip Op. 31189(U), (Sur. Ct. New York County, July 13, 2015)

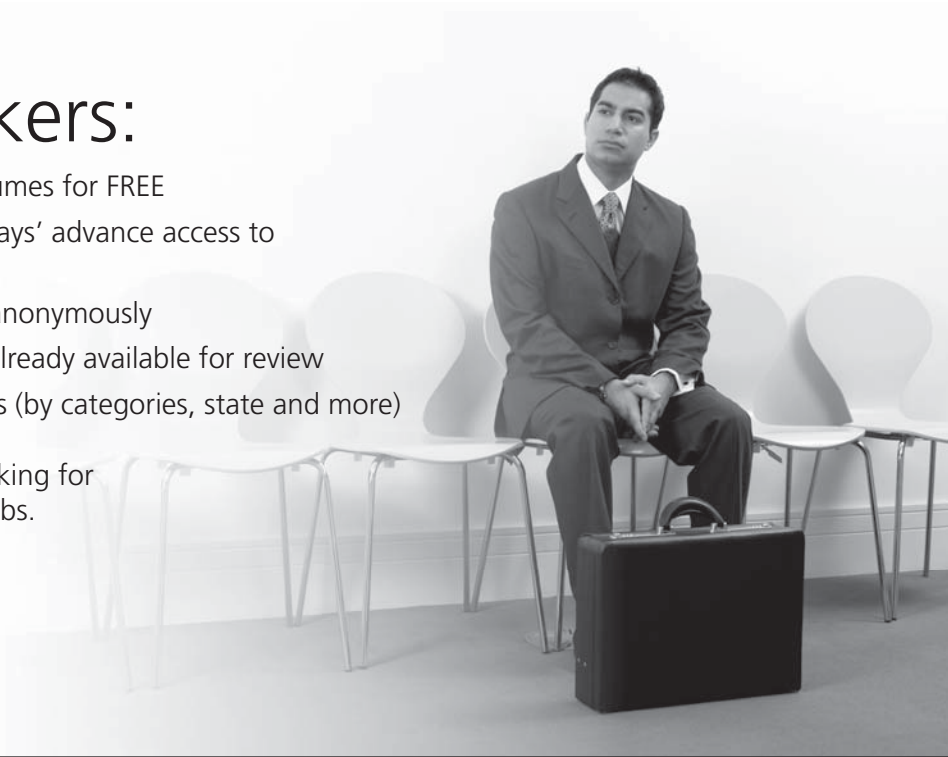
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Adventures in Fly Fishing: An Interview with Marty Hersh, Self-Proclaimed “Disney Nut”

By Jessica Coombs

Q Marty, tell me a little bit about where you’re from—Liberty, New York—where exactly is that?

A It’s about halfway between Manhattan and Binghamton and about ten minutes from where Woodstock took place. It’s a very rural area.

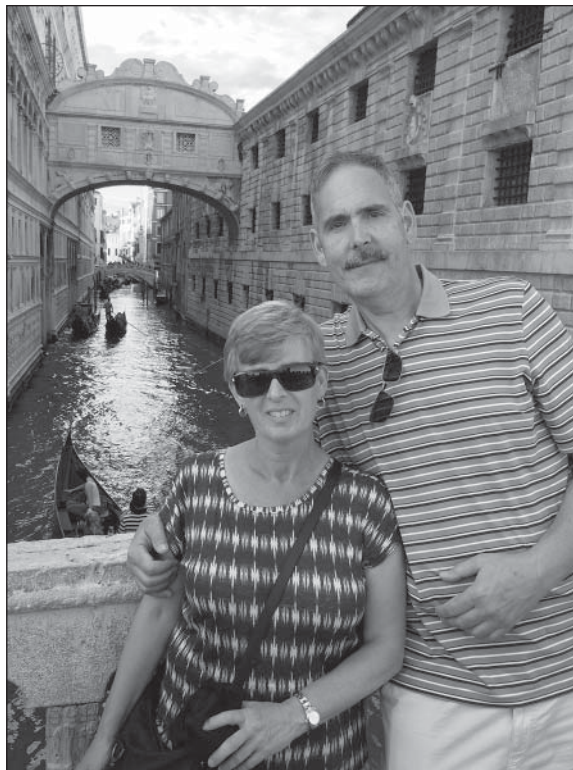
Q What brought you there?

A Well, I’m originally from Hartsdale, in Westchester. I went to Pace Law School, and after graduation I found a job posting through the school’s career placement center for a two-attorney firm in Monticello, New York, which is about ten minutes from Liberty. It was perfect for me because of how close it was to some great fly fishing spots, and great golf courses. So I would work during the week and fly fish and golf on the weekends, I loved it.

Through golfing I found my next job with a solo practitioner in the same area doing collection work. I spent ten years there, working on a lot of Medicaid issues. In 1996, I left to start my own firm. I ended up with a lot of referral sources through different hospitals that I previously worked with at the collection firm. I primarily did a lot of guardianship work in the beginning. Now, my work is about half crisis Medicaid planning and half estate planning.

Q Sounds like that keeps you pretty busy. I hear in your free time you love to travel?

A Yes, it’s a running joke actually, when the Section is planning events, “When’s Marty on vacation”? Now, with the age of technology and the great staff I work with, I could communicate with clients from the middle of the Mediterranean if I needed to.



Marty Hersh and his wife in Venice

I’m actually traveling tomorrow with my wife. We will start out in Switzerland, then head to Amsterdam, and we will end our trip in Paris. We are doing a river cruise this time and we are really looking forward to that.

Q Wow, that sounds amazing! Where else do you enjoy traveling?

A Well, we are Disney nuts. When our kids were little we would go to Disney three to four times a year. About 11 years ago, we bought a house down there [in Florida] just outside of Disney. We still spend just about every Christmas there.

We’ve also been on somewhere between thirty and forty Disney Cruises. Those took us all over the place: the Baltics, the Mediterranean, through the Panama Canal (both ways), and, of course, the Caribbean.

Q Tell me about the most bizarre place you’ve ever traveled and where you want to travel that you haven’t yet?

A I’d have to say Morocco would be the most bizarre. My wife and I went there on our honeymoon. We had a great time, but it’s a very backwards country. Everything there is very different compared to the United States.

We really would like to travel to China; we haven’t been there yet. We are planning a trip there soon.

Q Well, I guess the rumors are true, you certainly are well traveled! Could you provide a fun bit of Trivia about yourself?

A Sure. Well, this is related to fly fishing—I actually hand planed my own bamboo fly fishing rod. Traditional fly fishing rods were made by taking a piece of bamboo and shaving it into six strips which are then tapered together to create a rod. I made my own.

Q So fly fishing is a big hobby of yours?

A Oh, yeah. I go about two to three times a week when I can. I'm about twenty minutes away from some of my favorite streams.

When I was just out of law school and working in Monticello, I actually did some research and found out, through looking at the assessment rolls, who owned the properties that I enjoyed fly fishing on. I wrote to each of them, introducing myself and requesting permission to fish on their property. I explained that I catch and release, which most people prefer.

Q Did anyone respond?

A Yes, I got one response from an older gentleman granting me permission. But he ended up passing away shortly thereafter so I never really got to fish on his property.

Q Wow, that's too bad! So let's end with a fun question—if Hollywood made a movie about your life whom would you want to play you?

A Hmm, that's a tough one! I would have to say Tom Sellek. But only because he's tall and has a mustache.

Great, thank you for your time!

Jessica Coombs is an Associate Attorney with Burke & Casserly, P.C. in Albany. Originally from Westmoreland, NY, near Utica, Jessica attended the University at Albany, graduating in 2010 with a Bachelor of Arts in Psychology. She then went on to attend Albany Law School, graduating in May of 2014. During her time there, she was a member of Albany Law's NAELA chapter, as well as a Managing Editor for the Government Law Review. At Burke & Casserly, Jessica looks forward to devoting her career to estate planning and administration, elder law, and business succession planning.



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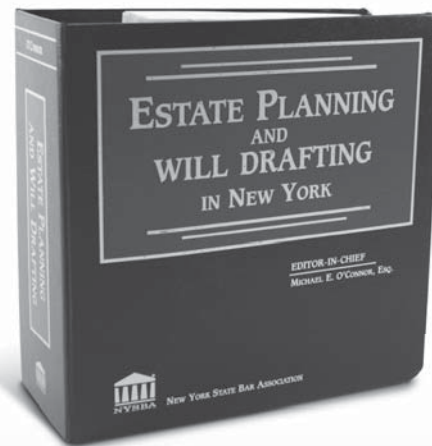
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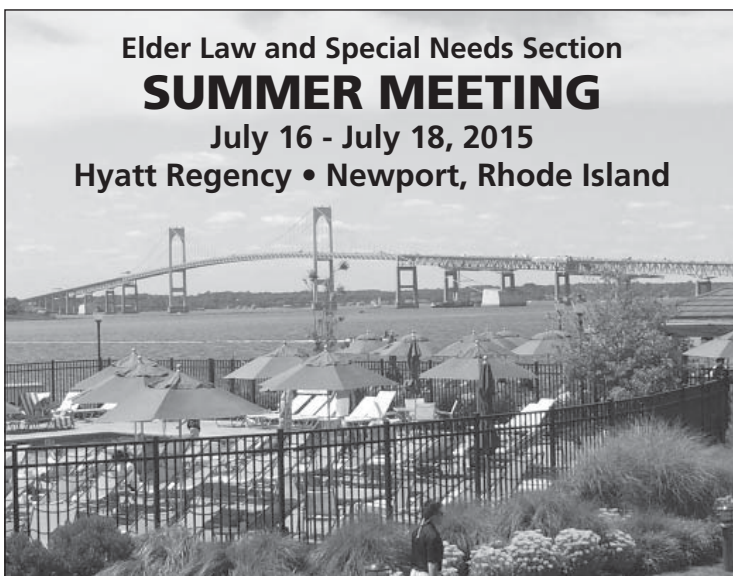
Elder Law and Special Needs Section Summer Meeting

By Tammy Lawlor and Ronald Fatoullah

The Elder Law and Special Needs Section Summer Meeting took place July 16 through July 18, 2015 at the Hyatt Regency in Newport, Rhode Island. The meeting was co-chaired by Ronald A. Fatoullah, Esq. and Tammy R. Lawlor, Esq., and included a variety of updates and discussions for both seasoned attorneys and those newly admitted. We sincerely thank the sponsors of the meeting, AMR Care Group, NYSARC Trust Services, Inc., Orange Bank & Trust Co., Premier Home Health Services, Inc., Quontic Bank and RDM Financial Group. We also thank the exhibitors, who included Agewell New York, Arthur B. Levine Company, Israeloff, Trattner & Co., CPAs, LCG Community Trust, Life's Worc Pooled Trusts, and Parker Jewish Institute for Health Care and Rehabilitation. We appreciate their continued support of the Section, which helped to enhance the overall success of the program.

The program was kicked off by David Goldfarb, Esq. of Goldfarb, Abrandt, Salzman & Kutzin, LLP, who provided recent Fair Hearing decisions, an update of regulations, and interesting new case law in the areas of practice administration,

Elder Law and Special Needs Section **SUMMER MEETING** July 16 - July 18, 2015 Hyatt Regency • Newport, Rhode Island



powers of attorney, special needs trusts and various other aspects of elder law. David also spoke about power of attorney issues, recent cases and the importance of exacting language. David also discussed the Emergency Medical Services and Surprise Bills Law which became effective March 31, 2015. The law seeks to provide some protection to consumers for surprise bills from out-of-network physicians. In addition, David

gave participants a Medicaid update which included considerations on managed care in nursing homes and return of gifts.

Following this, David DePinto, Esq., of DePinto, Nornes and Associates, provided an Estate Tax update.

David also spoke about the NYS estate tax exemption, the lack of portability in NYS and how to handle estate tax cases where the estate is slightly over the "cliff." This was followed by James H. Cahill, Jr., Esq. of Cahill and Cahill, P.C. who provided extremely helpful tips on how to avoid a Will contest if possible, and how to handle a contested estate. The day was concluded with a very informative group presentation on Succession Planning in Practice Manage-



ment, given by Michael J. Garibaldi, Esq., Ronald Fatoullah, Esq. and Ellen Makofsky, Esq. The panelists emphasized the importance of having a clearly written delineated succession plan regardless of one's age. Ron suggested that retirement from the practice of elder law need not be an "all or nothing" event. He suggested that we constantly check to make sure that we follow our passions when considering how to create and implement a succession plan. Ron explained how he followed his passion and started a wealth management firm while continuing to grow his law practice.

Participants were then invited to a clam bake at the Waterfront Pavilion, where they enjoyed award-winning New England clam chowder and fresh local seafood. A calypso steel-drum band provided perfect background music for watching the beautiful New England sunset.

On Friday, Committee meetings met in the morning to discuss current issues and to strategize on preparing an agenda for their committees for the upcoming year under the leadership of Section Chair JulieAnn Calareso, Esq. Participants were then provided with a Medicare update under the Affordable Care Act presented by Casey Schwarz, Esq. of the Medicare Rights Center. Subsequent to that, there were two Guardianship tracks to discuss both beginner and advanced issues. The beginner level also qualified for transitional CLE credits as required by newly admitted attor-



for the community spouse.

To balance work and play, guests and their families had the choice of either attending the Hall of Fame Tennis Championships or taking a sailing cruise on the Narragansett Bay. The evening winded down with a lovely cocktail reception sponsored by AMR Care Group. At the reception, there were delectable hors d'oeuvres and cocktails and it was held at the Marble House, a local social and architectural landmark that allowed guests to peruse the mansion and grounds of this beautiful 19th century summer house owned by the Vanderbilts.



Before departing for home or enjoying the rest of the weekend in Newport, attendees spent Saturday morning listening to an informative presentation on Ethics by Daniel L. Abrams, Esq. Dan spoke about the "Ethics of listening, and not listening, to clients." Lastly, attendees were able to choose various roundtable discussions on topics such as Guardianships (Anthony J. Lamberti, Esq. and Lissett C. Ferreira, Esq.), Health Care Issues (Tammy R. Lawlor, Esq.), Home Care Medicaid (Valerie J. Bogart, Esq.), Estate Planning (James H. Cahill, Jr., Esq.), Medicaid Planning (Jeffrey Rheinhardt, Esq.), Estate Taxes (Salvatore M. DiCostanzo, Esq.), Chronic Care Medicaid (Rene Reixach, Esq.) and Special Needs Planning (Joseph A. Greenman, Esq.).

The Summer Meeting was a chance for attorneys to receive updates in the various aspects of Elder Law, Estate Planning and Special Needs Law, while enjoying an opportunity to network with colleagues both new and old in a beautiful locale. We believe that the Program co-chairs succeeded in organizing an event that balanced information with entertainment and recreation. The speakers and moderators did a phenomenal job of notifying attendees of important updates with lively and informative presentations. We look forward to seeing everyone next year.

Ronald Fatoullah, Esq. is the principal attorney and founder of Ronald Fatoullah & Associates, a firm that concentrates in elder law, estate planning and special needs with offices in New York City and Long



Island. Mr. Fatoullah is a member of the Executive Committee of the NYSBA's Elder Law and Special Needs Section, and he is chair of its Financial Planning and Investments Committee. Mr. Fatoullah is also President of J.R. Wealth Advisors LLC, a wealth management firm with offices in New York City, Long Island and Los Angeles, CA.

Tammy Rose Lawlor, Esq. is a partner at the law firm of Miller & Milone, P.C., a firm that concentrates in elder law, estate planning, special needs and health care with multiple offices on Long Island. Ms. Lawlor is a graduate of the Hofstra University School of Law. She also holds an MBA in Finance. Ms. Lawlor is a member of the Executive Committee of the NYSBA's Elder Law and Special Needs Section, and she is chair of its Health Care Issues Committee.

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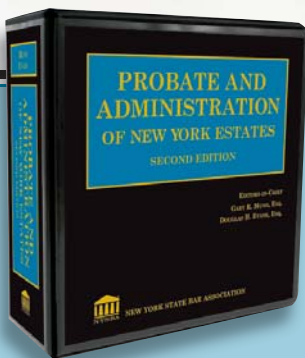
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