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Elder and Special Needs Law Journal

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

Inside

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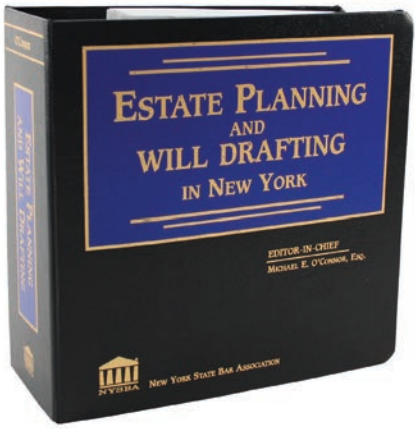
Estate Planning and Will Drafting in New York



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Product Description

Estate planning is a diverse, challenging and sophisticated area of practice that requires the technical skills of a tax attorney; a strong understanding of business, real property and decedents' estate law; and the sensitivity and caring of a personal adviser. Estate planning is much more than will drafting - it is a well-recognized specialty that is a prominent part of the legal profession.

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Message from the Outgoing Chair

Dear ELSN Section Members:

Judith D. Grimaldi

As I close my term as Chair of the Elder Law and Special Needs Section (ELSN), I can look back with satisfaction on our Section's effort to improve the lives of our clients in several areas and to improve our profession and the development of the elder law practice. I hope we will continue to focus on the work begun in consumer protection through education, advocacy and legislation. Our Section has proposed affirmative legislation to direct the banking industry to address abuse of financially frail depositors. The legislation is now before the Executive Committee of the New York State Bar Association, and it is our hope to have this legislation as part of the Association's formal legislative agenda. Our Section thanks both the Section's Committee on Elder Abuse and the Legislation Committee for the work in incorporating the input of the Business Law and Trust and Estates Sections in the effort. Special thanks to Section members who both spearheaded and advocated this important legislation: Jeffrey Asher and Britt Burner, Legislation Committee Chairs; Deborah Ball, Elder Abuse Committee Chair; Deepankar Mukerji, ELSN Section Secretary; Tara Anne Pleat, ELSN Section Chair-elect; Frances M. Panteleo, Trusts and Estates Section Representative; and Peter LaVigne, Business Law Section Chair. We will keep our members posted on the legislation's progress and will involve all in a campaign to educate our community banks' staff to be alert to possible elder financial abuse.

Our further advocacy on revising the Power of Attorney form authorized for use in New York State continues to proceed and we hope the next legislative session will include passing this law to improve the design, execution and use of the Statutory Power of Attorney.

The Section's ongoing challenge continues to be the availability of community based and home care Medicaid services. New York State's managed care system continues to face challenges in financing and delivering quality services throughout the state. Availability of workers to fill the growing need for services is one of the most difficult issues we advocates face, especially in the upstate and rural counties. This advocacy is needed and our Section will be funding a research project to analyze data on the utilization and funding of New York State's Managed Care System to be spearheaded by Section member, Valerie Bogart. Information can be our power, and we hope this study will give us better tools to address this ongoing issue.

The work on housing option continues in the work of the multi-disciplinary Section's Housing Task Force under the leadership of Neil Rimsky and Joseph Greenman. In addition, the Task Force on Medicaid Practice and the Unauthorized Practice of Law has received a broad based response to their survey on non-attorney Medicaid planning services. The survey will be circulated one more time and we ask those who have not completed it to take some time to provide information on agencies or services providing Medicaid planning to the general public. This will help the Section develop an advocacy strategy, and education/public relations campaign to address the inadequate, and at times, harmful advice provided to the unknowing elders and their family caregivers.

It has been a privilege to serve the Section during this year (2018-2019) and I look forward to continuing to contribute and support the incoming Elder Law Section Officers: Tara Anne Pleat, Matthew J. Nolfo, Deepankar Mukerji, Christopher Bray and Fern J. Finkel.

Respectfully submitted,

Judith D. Grimaldi

Message from the Incoming Chair

Tara Anne Pleat

Following **Judie Grimaldi's** leadership, enthusiasm and forward thinking is no small feat. As we enter our 30th year as a Section there are a number of initiatives that began this last year from the initiative to develop and evaluate new residential alternatives, modeled after the Dementia Village in the Netherlands, led by **Joe Greenman** and **Neil Rimsky** of the Real Estate and Housing Committee, to the renewed initiative of assisting our Section members with managing competitive challenges to our businesses with the revival of the Task Force focusing on Challenges to the Medicaid Planning Practice Area (formerly the Task Force on the Unauthorized Practice of Law). The Task Force's leadership includes **Robert Kurre**, **Sal Di Costanzo**, **Laurie Menzies** and **Rene Reixach.** These new initiatives are in their infancy and we look forward to stewarding them into the next year.

This new year is also marked by NYSBA's initiative under President **Hank Greenberg** to bring the Bar Association itself and its technology into the 21st Century and beyond. Over the course of the next several months NYSBA's, and therefore our Section's, online identity is going to change and will do so for the better. The Section Leadership Conference, which took place on May 9th and 10th, was devoted to this digital transformation and the sharing of information and ideas to extend our reach, our connectivity and our relevance. As part of this transformation, NYSBA has asked the Sections to begin to develop a social media presence. To that end, over the course of the next several months you will see an increased presence (and perhaps you will be tagged) on the NYSBA Elder Law and Special Needs Section's LinkedIn page and on Twitter @nysbaelderlaw. If you have cases, fair hearings, or articles that you believe are of particular relevance to the ELSN, please continue to share them on the communities or forward them to **Mike Dezik** at MDezik@WPLawNY.com, the new vice-chair of our Technology Committee who will be responsible for our social media presence over the upcoming year. We ask that you follow our LinkedIn page and share the posts that you find to be relevant, and if you see us Twitter retweet the ELSN's messages; doing so will help us enhance our reach, our influence and our membership. We look forward to the leadership and assistance of **Scott Silverberg**, **Daniel Miller**, and **Anne Della-Iacono** as the Section's digital presence changes.

We will maintain our focus on developing new members and making the Section more accessible and inviting to younger attorneys who are interested in our practice areas. The Membership Services Committee will be led by three new faces: **Emily Kahn**, **Kristen Casper** and **Katy Carpenter.** Katy has worked with NYSBA's Young Lawyers Committee Incoming Chair (and new mom!) **Lauren Sharkey**, on holding membership events around the state, and we look forward to another year of their new and welcoming initiatives for the Section.

The ELSN hosted its summer meeting at the Marriott Long Wharf in Boston, Massachusetts from July 18-20, 2019. Co-chairs, **Jeffrey Asher** and **Judith Nolfo**, worked hard to make this an interesting and diverse meeting for our Section attendees. Thursday began with **Christopher Lyons, Esq.** the Executive Director of AIM Services, Inc., a disability service provider upstate, and **June MacClelland**, former Executive Director of AIM Services, Inc. and parent, explaining how their agency approaches supporting individuals with special needs and their families in an "Executive Hour" devoted to understanding the lives and desires of their consumers and providing Section members with their required diversity credit. Chris and June were followed by **Mary Ann Allen, Esq.,** Executive Director of Wildwood Programs, a disability service provider in the Capital Region. **Mary Ann**, the parent of a young man with autism, gave us both a bird's eye view and real life impact of what changes to the OPWDD system of service delivery will have on the individuals and families the service system supports, and what our clients should expect and how we can help them have a realistic understanding of what the future holds and what to consider in planning for their loved ones with special needs. Thursday afternoon was rounded off with a panel of Surrogate's from around the state which was be moderated by **Edward Wilcenski** and NAELA giant, **Ron Landsman**. The **Hon. Richard Kupferman** from Saratoga County, the **Hon. Peter Kelly** from Queens County, the **Hon. Acea Mosey** from Erie County and the **Hon. Brandon Sall** from Westchester County participated on a panel devoted to Special Needs Trust Practice and issues before their courts, Article 17-A Guardianships and the importance of knowledgeable and trained Guardians *ad Litem* in these cases. Our programming was followed by a two-hour cocktail reception at the Long Wharf overlooking the majestic Boston Harbor.

Friday's program began with another of our NAELA colleagues and Massachusetts attorney, **Neal Winston, Esq.**, focusing on the ABC's of the Social Security Administration with a review of some common and lesser known programs that provide financial support to individuals with disabilities. The second segment was led by **Howard Krooks, Esq.,** reminding us all what sole benefit trusts actually are and when and how they are used. **Howie** was followed by **Ellyn Kravitz, Esq.** and **Cora Alsante, Esq.** who discussed family law considerations

when special needs children are part of the family unit, highlighting issues and pitfalls that will allow us to be more resourceful and market that resourcefulness to our colleagues in the family law sector. Friday's program was rounded out by **Kate Jerian, Esq.** from the ARC New York who gave us an update on where reform of Article 17-A Guardianship stands.

Friday afternoon attendees had a selection of social events to consider: a behind-the-scenes tour of Fenway, a trip to the Isabella Stewart Gardner Museum, or a Freedom Trail Pub Crawl, each intended to offer a sampling of the history and culture of the great and historical City of Boston. Our evening Friday night was a cocktail reception and dinner at the Aquarium. When **Anthony Enea** was Chair back in 2011, this dinner was such a great time that we decided to do our best to replicate it.

To close our meeting on Saturday morning, incoming Chair-elect, **Matthew Nolfo, Esq.** gave us our Summer Update. **Matt** was followed by **Libby Coreno, Esq.** who spoke to us about attorney wellness in a talk entitled the "Science of Stress and the Road to Wellbeing." Finally, our Ethics Committee leaders, **Joanne Seminara**, **Robert Mascali, Paul Ryther** and **Richard Marchese** rounded out the morning with an interactive case study, getting us our ethics credit and keeping us engaged! We hope you enjoyed an informative forward thinking and educational program.

The confirmed programming for the balance of the 2019-2020 year and their locations are as follows:

Fall Meeting, with the Trusts and Estates Law Section, October 24 – 25, 2019 at the Gideon Putnam in Saratoga Springs.

Annual Meeting, January 28, 2020 at the Midtown Hilton in New York City.

The UnProgram, April 30 – May 1, 2020 at the Desmond Hotel and Conference Center in Albany.

Please save these dates as we hope to see each of you at these upcoming Section conferences!

In addition, our Section is co-sponsoring a joint program in the Fall with the Health Law Section focused on end-of-life-decision making in conjunction with their fall meeting, a program that won national awards in its last iteration. The date for this program is November 8, 2019 and it is being held at the NYSBA Bar Center at One Elk Street in Albany. Thank you to our Health Care Issues Committee leadership, **David Kronenberg**, **Tammy Lawlor** and **Moriah Adamo** for their representation of our Section in this collaborative program.

While the dates have not yet been confirmed, we do anticipate a joint venture with the Trusts and Estates Law Section and NYSBA's Committee on Veterans in the Spring of 2020 where a Veterans-focused CLE and clinic will be held. As that program is fleshed out, more details will follow.

This is just some of what we as a Section hope to provide to the membership by way of programming and information this year. We have a host of amazing committees with active and involved leaders, and if you are not yet a part of a committee please email our Section Liaison, Lisa Bataille at LBataille@nysba.org, and request a Section Guide or reach out to me so we can find a fit for you.

In addition to the gratitude owed to outgoing chair, **Judith Grimaldi**, for her leadership and mentorship, the Section's Officers, Immediate Past President **Marty Hersh**; Vice-Chair **Matt Nolfo**; Secretary **Deep Mukerji**; outgoing Treasurer **Christopher Bray**, and incoming Treasurer **Fern Finkel** are owed a great debt of gratitude for the time and effort they each put in to making this Section one of the best in the New York State Bar Association.

We look forward to working with you and seeing you this upcoming year.

Tara Anne Pleat
TPleat@WPLawNY.com

Message from the Co-Editors

Katy Carpenter

Patricia Shevy

Thank you to Judie Grimaldi, and congratulations on a great year serving as Chair of the Elder Law and Special Needs Section! We thank you for your excellent stewardship. We appreciate all of your hard work in supporting our legislative agendas, and by bringing timely discussions to our Section, including the symposium on living communities featuring one of the founders of the famed "Dementia Village" in the Netherlands.

In our last message, we discussed bringing along a small token to our clients in nursing homes and other facilities or to those who are home-bound. In response, a Section member and *Journal* reader, Micheleen Karnacewicz, reached out,

> When I read your Spring 2019 message, I smiled and nodded my head at your 'wish list' nudge that we should all keep in mind when we make home, hospital and custodial visits. I will never forget the gratitude of a young man who joyfully tore into the deli food I brought with me, or the glee that chocolate bars can produce. These simple, everyday treats that we take for granted are treasures to clients who don't have the freedom or means to buy for themselves. You have big hearts. I'm proud to be your reader and ELSN Section colleague.

Thank you Micheleen. Your kind words brought huge smiles.

We hope you have enjoyed the addition of Antony Eminowicz's comic strip to the *Journal*. "Dave" seems to say exactly what we're thinking when working with our clients. Take a look at this *Journal's* comic and think of the client conversations you have had regarding engagement and retainer agreements. Antony has agreed to provide comic relief regularly to our *Journal*, something we all need.

When preparing our message and the *Journal*, we take into consideration both the happenings occurring within our Section and throughout the Association as well as the news in the real world. The real world's news is becoming increasingly reported through online sources and social media. And the algorithms within social media seem to "know" more and more about us. "My 90-year-old partner's children don't want to help take care of him, but they do want his money," popped into Tricia's Facebook newsfeed. Another story was one of entitlement — adult child learned from his parents that he would receive an additional $75,000 in the will of the second parent to pass because the parents gave their other child $75,000 for a down-payment on a house. The child was disgruntled and wanted $75,000 now, or the wills to include an inflation rider to the $75,000 bequest. $75,000 today just won't be worth $75,000 at the time of inheritance! In our practices, we hear similar stories regularly. We routinely become counselors and family mediators in addition to practicing attorneys. Every family is different, with some more difficult than others, and we are often the voice of reason in an effort to ensure that our clients' goals are met while attempting to maintain family harmony after our client's death.

In this *Journal*, we spotlight the Veterans Benefits Committee. Brian Salazar and Nicole Pecorella discuss the implications of unconscious bias against those with mental illness and disabilities when obtaining personal care services and safety monitoring as a stand-alone service. Moriah Adamo's article details the seminal *Jimmo* class action case regarding the maintenance standard applied to skilled nursing facility services. Richard Marchese and Bob Mascali's article focuses on ethical considerations for Medicare Set-Aside accounts. Finally, the third installment of Tales from the Trenches from Linda Redlisky and Christine Mooney highlights the important aspects of Article 81 practice: surcharges and the death of the incapacitated person.

Our practices are becoming increasingly stressful, and the work-life balance for many of us is difficult to maintain. The Association has the resources to help. If you have been to a CLE program lately (or watched a webinar), one Association member who identified himself as an alcoholic generously discussed how working with the Lawyers Assistance Program saved his career and his life. According to a 2017 study published by the American Bar Association, nearly 21% of participating lawyers and judges had problems with alcohol use. When the study focused only on how often the participants drank, more than 36% were seen as problem drinkers. The study also showed that 28% of respondents said they experienced depression, 19% anxiety, and 23% stress, all of which were higher than previous findings in different studies. We have reached out to the Association's Lawyers Assistance Program to provide some basic information to our Section. We'll be reporting in a future *Journal* what resources are available through the Program, and how to access them.

Please let us know if there is an Association benefit or program for which you would like additional information, and we'll do our best to bring it to you in an upcoming *Journal*. We look forward to seeing you at the joint fall meeting with the Trusts and Estates Law Section in Saratoga Springs on October 24-25, 2019.

Tricia and Katy

Message from the President

Diversifying the Legal Profession: A Moral Imperative

By Hank Greenberg

Hank Greenberg

No state in the nation is more diverse than New York. From our inception, we have welcomed immigrants from across the world. Hundreds of languages are spoken here, and over 30 percent of New York residents speak a second language.

Our clients reflect the gorgeous mosaic of diversity that is New York. They are women and men, straight and gay, of every race, color, ethnicity, national origin, and religion. Yet, the law is one of the least diverse professions in the nation.

Indeed, a diversity imbalance plagues law firms, the judiciary, and other spheres where lawyers work. As members of NYSBA's Elder Law and Special Needs Section, you have surely seen this disparity over the course of your law practices.

Consider these facts:

- According to a recent survey, only 5 percent of active attorneys self-identified as black or African American and 5 percent identified as Hispanic or Latino, notwithstanding that 13.3 percent of the total U.S. population is black or African American and 17.8 percent Hispanic or Latino.
- Minority attorneys made up just 16 percent of law firms in 2017, with only 9 percent of the partners being people of color.
- Men comprise 47 percent of all law firm associates, yet only 20 percent of partners in law firms are women.
- Women make up only 25 percent of firm governance roles, 22 percent of firm-wide managing partners, 20 percent of office-level managing partners, and 22 percent of practice group leaders.
- Less than one-third of state judges in the country are women and only about 20 percent are people of color.

This state of affairs is unacceptable. It is a moral imperative that our profession better reflects the diversity of our clients and communities, and we can no longer accept empty rhetoric or half-measures to realize that goal. As Stanford Law Professor Deborah Rhode has aptly observed, "Leaders must not simply acknowledge the importance of diversity, but also hold individuals accountable for the results." It's the right thing to do, it's the smart thing to do, and clients are increasingly demanding it.

NYSBA Leads On Diversity

On diversity, the New York State Bar Association is now leading by example.

This year, through the presidential appointment process, all 59 NYSBA standing committees will have a chair, co-chair or vice-chair who is a woman, person of color, or otherwise represents diversity. To illustrate the magnitude of this initiative, we have celebrated it on the cover of the June-July *Journal*. [www.nysba.org/diversitychairs]

Among the faces on the cover are the new co-chairs of our Leadership Development Committee: Albany City Court Judge Helena Heath and Richmond County Public Administrator Edwina Frances Martin. They are highly accomplished lawyers and distinguished NYSBA leaders, who also happen to be women of color.

Another face on the cover is Hyun Suk Choi, who co-chaired NYSBA's International Section regional meeting in Seoul, Korea last year, the first time that annual event was held in Asia. He will now serve as co-chair of our Membership Committee, signaling NYSBA's commitment to reaching out to diverse communities around the world.

This coming year as well we will develop and implement an association-wide diversity and inclusion plan.

In short, NYSBA is walking the walk on diversity. For us, it is no mere aspiration, but rather, a living working reality. Let our example be one that the entire legal profession takes pride in and seeks to emulate.

Hank Greenberg can be reached at hmgreenberg@nysba.org.

Mental Health and Safety Monitoring: Personal Care Services for Elders with Dementia

By Brian M. Salazar and Nicole Pecorella

I. Introduction

Brian M. Salazar

Nicole Pecorella

Following a Second Circuit Court of Appeals ("Court of Appeals") ruling,[1] social services districts[2] were no long required to provide personal care services (PCS) to individuals who required only "standalone safety monitoring."[3] Safety monitoring is defined as instances where there was no valid personal care task, such as toileting, walking, or transferring, was occurring.[4] In practice, this applied largely to individuals who suffer from mental disabilities, such as dementia or Alzheimer's Disease. These individuals may therefore be prone to forgetfulness, wandering, and bouts of confusion, among other symptoms. Although the New York State Department of Health (DOH) issued guidance following the decision, it remained difficult to fully differentiate between instances of safety monitoring and valid personal care tasks. For example, what becomes of the person who needs assistance walking but is also prone to wander? Is someone prone to falling when left alone an appropriate recipient for PCS? Further, an explicit bar against standalone safety monitoring fostered the opportunity for bias against individuals with mental health disabilities. Their needs could more readily be labeled under standalone safety monitoring, leaving their needs unmet and their well-being in jeopardy. This article discusses (1) the restrictions on obtaining PCS due to standalone safety monitoring, (2) common obstacles individuals with mental health disabilities and their advocates may face, and (3) ways in which individuals with mental health disabilities can still obtain the care needed.

II. The Advent of Standalone Safety Monitoring

In *Rodriguez v. City of New York,* advocates argued that PCS provided without safety monitoring as an independent task were inadequate to allow the appellees, a class of individuals with mental health disabilities, to remain safely in the community.[5] They contended that this constituted discrimination against the mentally disabled under the Medicaid Act, its regulations, the Rehabilitation Act, and American with Disabilities Act (ADA), who would be otherwise eligible for PCS if not for their mental conditions.[6] Specifically, the appellees' argument rested on provisions in the Medicaid Act stating that medical assistance provided to an individual "shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual"[7] and the ADA promulgating that no disabled individual could be denied the benefits of a public entity due to that disability.[8] They further argued that there was precedent in previous Second Circuit decisions, such as *Camacho v. Perales,* which found that the state could not provide more assistance to medically needy individuals as opposed to categorically needy individuals as doing so was a violation of the Medicaid Act.[9]

Chief Judge Ralph K. Winter found the argument unpersuasive. Writing for the majority, he found that the Medicaid program is not required to provide a benefit that it does already provide at all.[10] The relevant sections in the ADA and Medicaid Act, as well as prior Second Circuit decisions, found discrimination only when one group was receiving a public benefit while another group in need of those benefits was not.[11] In other words, refusal to provide standalone safety monitoring was not in violation of the Medicaid program or the ADA because it was not being provided to any recipient of personal care services. The decision found that the appellees were seek-

Brian Salazar currently works for the Independent Consumer Advocacy Network (ICAN) in New York, NY, assisting individuals enrolled in managed long term care plans. Brian is a 2017 graduate of the Benjamin N. Cardozo School of Law, where he served as a Senior Editor for the ADR Competition Honor Society, as well as a Staff Editor for the *Cardozo Journal of Conflict Resolution*. He is also a 2015 recipient of the New York Bar Foundation's Diversity Fellowship in Health Law.

Nicole Pecorella, Esq. currently works for the Independent Consumer Advocacy Network (ICAN) in New York, NY, a department of the Community Service Society of New York. Her background is largely interdisciplinary, focusing on the intersection of race, gender, class, and the law. Nicole is a 2017 graduate of the University of Miami School of Law, where she was a Dean's Scholar and recipi-ent of the Linda Dakis Memorial Scholarship for Domestic Violence Study. She also holds Master's Degree in Gender and Cultural Studies from Simmons College and was a 2013-2014 Hazel Dick Leonard Research Fellow in Gender Studies.

ing an entirely new benefit and not the provision of an already covered one.[12] Winter leaned on a footnote in the at-the-time recent decision in *Olmstead v. L.C.*, where the United States Supreme Court found that the ADA did not impose a requirement on states to provide new services to disabled individuals, and thus only applied to services already provided.[13]

III. Implications of *Rodriguez*: Unconscious Bias and Mental Illness

In *Rodriguez's* aftermath, it became increasingly difficult for individuals diagnosed with mental health disabilities to obtain proper home care. DOH issued a General Information System (GIS) clarifying the distinction between appropriate safety monitoring and standalone, explaining that:

> a clear and legitimate distinction exists between 'safety monitoring' as a non-required independent stand alone function while no Level II personal care services task is being provided, and the appropriate monitoring of the patient while providing assistance with the performance of a Level II personal care services task, such as transferring, toileting, or walking, to assure the task is being safely completed.[14]

Many were denied in part, or all together, under the guise that their requests constituted standalone safety monitoring. In the years following the *Rodriguez* decision, many barriers continue to exist for legal advocates in trying to obtain home care services for those diagnosed with mental illness or disability. Yet procedural and regulatory barriers are only further compounded by the numerous unconscious biases that exist surrounding both mental illness and those deemed worthy of obtaining home health care.

Unconscious biases are stereotypes about certain groups of people that individuals form outside their own conscious awareness.[15] Everyone holds unconscious beliefs about various social and identity groups, and these biases stem from one's tendency to organize social worlds by categorizing.[16] These biases operate undetected and can influence a person's decision making whether aware of their presence or not.

In New York City, in determining whether one is appropriate for home care, a Medical Request for Homecare Form (M11Q) is required, in which a person's physician attests to the presence of a chronic condition and its adverse effects on one's ability to perform the activities of daily living.[17] Alcohol dependence, dementia, Alzheimer's Disease, major depression, and anxiety are all disease diagnosis listed by the International Classification of Diseases (ICD), a disease classification tool published by the World Health Organization and utilized by the Uniform Assessment System.[18] Yet it is not the presence of these illnesses that deem eligibility for home care, but their effects on one's physical ability to care for themselves and perform their activities of daily living that determine whether personal care services are authorized or not.

Trying to prove the chronic nature of mental illness and its effects on a person's physical functioning is further complicated by the stigma of mental illness that exists. This bias functions as a pervasive barrier for persons with mental illness trying to access health care services. According to a study published in the *Journal of Social and Clinical Psychology*, persons with mental illness were often negatively perceived and associated with traits such as blameworthiness and helplessness.[19] For instance, a person may unconsciously associate alcohol dependency with a personal choice a person is making about their behavior, rather than a disease, as classified by the ICD. These feelings of blame may operate on an unconscious level, with the person holding them not even aware of their existence. Nonetheless, a person may still be swayed into thinking home care services are not necessary whether or not they are conscious from where this belief is resonating

IV. Best Practices Moving Forward

It is not uncommon for individuals with mental health disabilities to receive denial notices stating that their PCS request was denied due to standalone safety monitoring concerns. Although advocacy for such an individual may prove more difficult, it is not impossible for someone to overcome this. First and foremost, all PCS requests should be tied to physical needs, even if execution and completion of those needs require safety monitoring.[20] It is possible that an individual's physical needs can encompass or overlap their safety monitoring needs. For example, an individual may be prone to wandering throughout the nighttime, but their toileting needs may be severe enough to warrant a PCS aide there throughout the entire day. Similarly, an individual may have a history of falling but only while attempting to cook or bathe. In those instances, PCS would be included to allow the safe completion of each activity.[21]

Second, it is important to note that prompting and cuing are valid personal care tasks that should be covered by an appropriate PCS authorization. For example, an individual is still eligible for PCS even if they are able to physically walk to and use the bathroom on their own but require someone to direct them to the bathroom and remind them to complete safely complete all of the appropriate stages. This means that an individual may be eligible for 24-hour care with only prompting and cueing, if they need such care to complete their activities of daily living each day.

V. Conclusion

In the aftermath of the *Rodriguez* decision, obtaining PCS for people with mental health disabilities became more difficult. The hardline rule against providing PCS for standalone safety monitoring allowed social services districts to more easily deny requests even when valid PCS tasks were involved. However, there are several avenues PCS recipients and their advocates can take to obtain the proper level of care.

The authors work for the Independent Consumer Advocacy Network (ICAN), New York State's Ombudsprogram for managed long term care. It is funded by the New York State Department of Health. The views expressed in this article do not reflect the opinions, interpretations or policies of ICAN or NYSDOH, and are the authors' own.

Endnotes

1. *Rodriguez v. City of New York*, 197 F.3d 611 (1999).
2. In New York State, this refers to each county's Department of Social Services, except for New York City, where this refers to the Human Resource Administration.
3. GIS 03 MA/003.
4. *Id.*
5. *Supra* note 1.
6. *Id.*
7. 42 U.S.C. § 1396ª(a)(10)(B)(j).
8. 42 U.S.C. § 12132.
9. *Camacho v. Perales*, 786 F.2d 32, 38 (2d Cir. 1986).
10. *Supra* note 1.
11. *Id.*
12. *Id.*
13. *Olmstead v. L.C.*, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999).
14. *Supra* note 2.
15. https://diversity.ucsf.edu/resources/unconscious-bias.
16. *Id.*
17. *See* https://www1.nyc.gov/assets/hra/downloads/pdf/services/micsa/m_11q.pdf.
18. *See* https://icd.who.int/browse11/l-m/en for further reading.
19. Bethany A. Teachman, Joel G. Wilson, Irina Komarovskaya (2006). *Implicit and Explicit Stigma of Mental Illness in Diagnosed and Healthy Samples*, Journal of Social and Clinical Psychology, Vol. 25, No. 1, pp. 75-95.
20. *Id.*
21. *Id.*

Ethical Obligations in the Handling and Settling of a Personal Injury Action When a Plaintiff May Need a Medicare Set Aside Account

By Richard A. Marchese and Robert P. Mascali

Richard A. Marchese

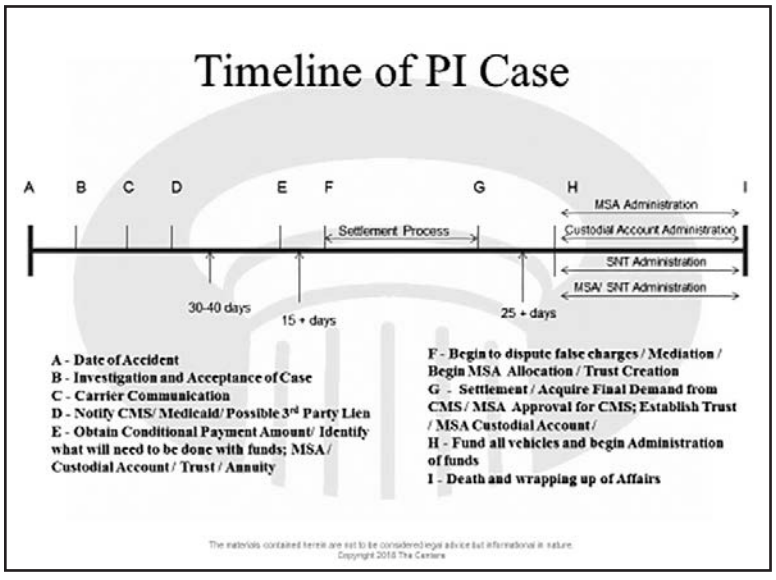
Robert P. Mascali

You have been brought in as counsel on a personal injury matter to establish a special needs trust for the injured plaintiff under age 65, who is now receiving SSD and Medicare. It is anticipated that the plaintiff will continue to need medical care and services relating to the accident. What, if any, advice do you need to render to the client, and what, if anything, should you need to relate to the court approving the settlement about protecting Medicare's interests going forward?

This article will touch on what an attorney needs to take into account when dealing with a plaintiff who is receiving a financial settlement as a result of a tort claim in a liability case. We will discuss when Medicare's interests are implicated, and we will also discuss the ethical obligations of an attorney to his or her client and to the court that is handling the personal injury litigation as to the provisions of the Medicare Secondary Payer (MSP) program. In particular we will explore the question of: "Do we need to establish a Medicare Set Aside account (MSA)?"

Following a brief definition of benefits, we will dig deeper into what an attorney needs to be aware of prior to settlement, at settlement, and finally post settlement.

1. Public Benefits. Generally, the primary benefits that will be reviewed are Social Security Disability Insurance (SSDI), which is an earned cash benefit, and the health care that generally goes along with SSDI, which is Medicare. Medicare has four basic parts which are Part A (Hospital), Part B (Physicians), Part C (Advantage Plans) and Part D (Prescription Drugs).



SSDI / Medicare

Entitlement programs which individuals qualify for by a combination of age and/or the amount of calendar quarters worked, or by one's certification of disability and the requisite calendar quarters worked. Once someone becomes eligible for SSDI, Medicare will follow in generally 30 months from the date of eligibility (this timeframe could be shorter if the SSD waiting period is retroactive from the date of the injury).

Medicaid

Medicaid is a need-based federal and state program that imposes both income and asset limits. Medicaid is primarily funded by the federal government, followed by funding by the state in which one resides. The New York Medicaid asset limit for a single individual in 2019 is $15,450.

2. Taking Medicare and Medicaid's interest into account during the timeline of a case.

• Initial Reporting: This is Mandatory Insurer Reporting (MIR). This is the responsibility of the carrier for the defendant. If this is not done correctly the carrier may face a penalty of $1,000 per day. The current threshold for reporting the settlement is also $1,000.

• Pre-Settlement: During the pre-settlement stage of any case it is the responsibility of the plaintiff/plaintiff's attorney to put the agency/health insurer on notice that the plaintiff is receiving Medicare and/or Medicaid, even if the carrier is not paying any of the medical bills.

• Settlement: At the time of settlement, it again is the responsibility of the plaintiff/plaintiff's attorney, and now the defendant as well, to make sure all government liens are satisfied (many defense carriers are now inserting "hold harmless" language

with regard to both liens and futures into the settlement agreement). This is also the time to establish and fund the vehicles that will properly protect the plaintiff's current and potential public benefits.

•Post-Settlement: Once the Trust/Set-Aside/Custodial Account/Structured Settlement is in place, it is of the utmost importance to insure that there is proper administration of those vehicles.

3. How does an attorney take Medicare's interest into account when settling a third party liability case? This responsibility dates back to the MSP provisions of 42 U.S.C. § 1395y(b)(2)(A)(ii). Although there is no law that states a MSA is mandatory, it is the most common way to protect Medicare's future interest.

•Current Medicare beneficiary: Medicare requests (note: not requires) that the settlement and MSA Allocation be submitted for approval to Centers for Medicare and Medicaid Services (CMS) only if the GROSS settlement is $25,000 or more.

•Medicare-eligible within 30 months of settlement: If the claimant is not yet a Medicare beneficiary, but can reasonably be expected to become Medicare eligible within 30 months of the settlement, and the settlement is above $250,000, Medicare requests that the settlement and MSA allocation be submitted to CMS.

•Not on Medicare or expected to be within 30 months: Medicare's position is that Medicare waives any interest in the settlement.

•On Medicare or expected to be within 30 months, but requires no futures: Per the CMS Memorandum issued on September 29, 2011, when the beneficiary's treating physician certifies in writing that all treatment for the alleged injury related to the settlement is complete, Medicare's interest has been satisfied.

•What if my client is on private health insurance?: Your client who is on a private plan through his or her or his or her spouse's employment still needs to protect Medicare's future interest if future treatment related to the settlement is required.

Note that one CMS official has provided an interpretation of the MSP by saying "[t]he law requires that the Medicare Trust Funds be protected from payment for future services whether it is a Workers' Compensation or liability case. There is no distinction in the law." (Sally Stalcup, MSP Regional Coordinator, Region VI (May 25, 2011 Handout).

CMS often uses the term "protect" when it refers to Medicare's interests. Is your obligation as an attorney to your client or to Medicare (or to both)? Is it your obligation to "protect" Medicare's interests, or is it your obligation to "consider" Medicare's interest in determining whether or not an MSA is needed?

The ethical conundrum is the fact that there currently is no legal requirement to establish an MSA in a liability case. The account is requested, but not required, by CMS. What to do? Let's review the New York Rules of Professional Conduct.

RULE 1.1: COMPETENCE

(a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(c) A lawyer shall not intentionally:

(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

RULE 3.3: CONDUCT BEFORE A TRIBUNAL

(a) A lawyer shall not knowingly:

(2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

Also, please note that Rule 1.8(e) prohibits a lawyer from agreeing to indemnify a client's obligations to a third party as part of a settlement of the client's claim, and Rule 8.4(a) prohibits another lawyer's participation in a settlement that requires such an indemnification. See NYSBA Ethics Opinion #852 - 02/10/2011 as it relates to Medicare liens.

In our opinion, it is better to be safe than sorry, and therefore establishing the MSA is the wise and prudent thing to do. The court should also be kept apprised of need to establish and maintain the MSA. Your client may not be happy about it, but the possibility of having CMS come in years after the settlement, audit their paid claims and request a repayment from the client imposes too great a risk on both the attorney and the client.

The creation, submission and administration of the MSA is something that should be discussed prior to the case settling. It is best practice to utilize a reputable third party for the creation and the submission of the MSA. The MSA can be either self-administered or professionally administered.

•MSA allocation: The allocation process involves the last two years of medical records and the last six months of prescription records only related to the settlement. The allocator will obtain a rated age.

• MSA submission: In most cases the MSA is not submitted to CMS until the case is settled. However, in some cases the settlement is contingent on the review or acceptance of the MSA by CMS.

• MSA administration: If the MSA is submitted, the administrator will need to supply annual accountings to CMS with detailed records as to how the funds were used. The funds in the MSA can only be used on items related to the treatment that would otherwise be covered by Medicare for the specific injuries for which the claimant was awarded damages.

When your client is receiving Medicaid, a Self-Settled Special Needs Trust (SNT) or a Pooled Special Needs Trust is the proper vehicle to protect those benefits. Funds held in a properly established SNT will not count against the Beneficiary. It is possible to establish the MSA within an SNT. *The practitioner has to be very careful when doing this, as the MSA must remain separate and distinct from the other funds in the SNT.*

The SNT can be administered by a corporate trustee, bank or potentially a family member. The disabled beneficiary cannot act as his or her own trustee. It is usually not a wise idea to have a family member act as trustee, as the potential for loss of benefits for improper management is greater when not done by a professional. This type of trust can only be created and funded for disabled individuals under the age of 65 by the parent, grandparent, guardian with a court order, the court or the beneficiary (with the 2016 adoption of the Special Needs Fairness Act).

Is it ethical to have the client act as administrator of the MSA? Does your client have the sophistication to do that? The practitioner must make sure that the client understands the purpose of the MSA. In our opinion, at a minimum the attorney should advise the client of the client's obligations under a self-administered MSA, including: how the MSA is funded (via lump sum or structure or combination of both); how payments are to be made from the MSA; the future medical services and prescription drug charges covered under the MSA; and the accounting/reporting obligations the client is assuming as administrator of the MSA.

In conclusion, the practitioner who is brought in to help protect the settlement funds received by a client in a liability case by establishing an SNT must be aware of Medicare's ongoing interests and consider very carefully the need for a MSA. Balancing an attorney's duties to the client while keeping in mind CMS' position that Medicare's interests must be "protected" has been and remains a problem in light of the fact that CMS still has yet to require a MSA in a liability case. Having a full and complete discussion with your client of the ramifications of establishing or not establishing the MSA, and also the ramifications of having the MSA self-administered by the client, incorporated into the SNT and/or administered by a competent third party professional are key components of navigating through the ethical issues involving the MSP.

Richard A. Marchese is a partner of Woods Oviatt Gilman LLP in Rochester, New York. He is co-chair of the firm's Elder Law and Health Care Practice Group responsible for handling all elder law and health care issues. He concentrates his practice in the areas of long-term care and estate planning, Social Security, Medicare and Medicaid eligibility, long-term disability, estate recovery matters, asset protection, issues of spousal support, and the use of trusts in Medicaid planning. Mr. Marchese also provides counsel to health care providers in matters of compliance with federal and state regulations, defense of government audits and investigations, voluntary self-disclosures, corporate compliance and professional licensure issues.

Prior to joining the firm, Mr. Marchese served for over 15 years as counsel to the Monroe County, N.Y. Department of Human Services, advising the Chronic Care, Home Care and Adult Protective units at that agency. He was a co-director of the Monroe County Provider Fund, Waste and Abuse Demonstration Project, and he now represents Medicaid providers in matters of compliance with government regulations and defense against government audits. He received his J.D. from New York Law School and his B.A. from the State University of New York at Albany.

Mr. Marchese is a member of the Monroe County and New York State Bar Associations and is President-Elect of the New York Chapter of the National Academy of Elder Law Attorneys, Inc. (NYNAELA). He is also a member of the Executive Committee of the Elder Law Section of the New York State Bar Association and a member of the Estate Planning Council of Rochester. Mr. Marchese is a frequent lecturer before both the New York State and Monroe County Bar Associations.

Robert Mascali is senior consultant with the Center for Special Needs Trust Administration, Inc. which is a national nonprofit organization that administers special needs trusts and Medicare Set Aside Arrangements throughout the United States. In addition, Mr. Mascali is "of counsel" with the Bourget Law Group in Falmouth, Massachusetts and with the firm of Pierro, Conner and Associates, LLC with offices in Manhattan and in Latham, New York. In his private law practice he concentrates in the areas of Special Needs Planning for persons with disabilities and their families and care givers, Long-Term Care Planning, and Estate Planning and is admitted to practice in both Massachusetts and New York. He previously served as Counsel to NYSARC Trust Services and was Deputy Counsel and Managing Attorney at NYS OMRDD (Now OPWDD). Mr. Mascali is a member of the New York State Bar Association and its Elder Law and Special Needs Section and serves on the Executive Committee. He is also a member of Massachusetts NAELA and NY NAELA and is the Past President of the New York Chapter of NAELA.

Legislation Committee Report

By Jeffrey Asher and Britt Burner

Each year, our Governor releases a proposed budget bill for the following fiscal year. And, each year, the Legislation Committee of our Section identifies items in the proposed budget bill that affect or have the potential to affect the clients that members of our Section work tirelessly to protect. This year, the Legislation Committee identified four such issues. As is usually the case, for each issue a memorandum is created in which the Legislation Committee makes clear the issue raised by that portion of the proposed budget bill, the position of the Section either in support of or opposition to the provision, and the reasoning behind our Section's position. After these memoranda are circulated to the Governor and legislators, a team of Section members attend "Lobby Day" in Albany. Meetings are set up with key players on health care issues so we can ensure the voice of our Section is heard. Below is a summary of the issues the Legislation Committee identified in this year's proposed budget bill.

Spousal Refusal

New York State is one of the only states that allow the "community" or non-Medicaid spouse to have assets over and above the stated resource limit. This is referred to as "spousal refusal" — refusing to contribute assets or income to the support of the ill spouse. For over 25 years, the proposed budget from the Governor has attempted to remove or, in some way restrict, this protection for community spouses. Yet again, this year, our Governor attempted to eliminate "spousal refusal." The proposal was to change the current language of the Social Services Law from "absence of such relative ***or*** the refusal or failure" to "absent from the applicant's household, ***and*** fails or refuses….".[1] This language essentially removed the spousal refusal protections in the community Medicaid setting where one spouse is in the home receiving Medicaid services and the other spouse is also living in the home. We are happy to report the budget as signed and enacted did not include this provision and the spousal protections remain intact.

Deeming Medicaid Dollars in Estate Recovery

The budget bill added a new section to the Social Services Law that stated: "Any payment made pursuant to the state's managed care program, including payments made by managed long term care (MLTC) plans, shall be deemed a payment by the state's medical assistance program."[2] The Section opposed this language. Currently, Medicaid's recovery is the amount Medicaid actually paid to a MLTC agency for coverage for services, including home care services. The main concern was that this amendment to the Social Services Law would allow the state to recover a windfall amount by allowing it to recover payments it never expended in cases involving community-based long-term care. This amendment would greatly increase the recovery against a legally responsible relative or an estate because the recovery would not be limited to the amount the state pays the MLTC agency but rather would be the full amount paid by the managed care plan. Our Section reasoned that it would be grossly unfair to allow the state to recover amounts it never expended.

During meetings with the Governor's staff, our Lobby Day team was told that this was not the intent of the language. Rather, the amendment was aimed at oversight and recovery against managed care programs for overpayments made. Following up from this meeting, our Lobby Day team proposed alternative language to clarify the Governor's intent while avoiding any unintended negative consequences for Medicaid recipients. The final language reads as follows:

> For purposes of recovery of overpayments pursuant to subdivision thirty-five of this section, any payment made pursuant to the state's managed care program, including payments made by managed long term care plans, shall be deemed a payment by the state's medical assistance program, provided that this subdivision shall not permit the imposition of a lien or recovery against property of an individual or estate on account of medical assistance payments where recovery is made against the individual's managed care provider or provider of medical assistance program items or services. Provided however nothing in this subdivision shall be construed to limit recoveries under other relevant sections of law.

CDPAP

The proposed budget bill repealed and replaced the Consumer Directed Personal Assistance Program (CDPAP) regulations.[3] The replacement language limited the number of Fiscal Intermediaries (FI) that can operate in the state and made the payment of an FI on a per member per month (PMPM) basis rather than based on the number of hours they are processing for a given member. Our Section opposed this repeal and replacement because of the concern that reducing the number of FIs and changing the pay scheme of FIs would limit the number of FIs that remain in operation or affect an FI's ability to assist the CDPAP community. Without the assistance of FIs, many of our consumers would no longer be able to utilize CDPAP. If a competent FI goes out of business or is not user-friendly because of the proposed amendment, especially

in more rural areas, then community Medicaid recipients in these areas will be unable to receive the care they need and have been deemed eligible to receive.

The Governor's 30-Day Amendments removed the "repeal and replace" and replaced the FI language of the existing statute with a requirement that the FI have a contract with the state. It will be in that contract that the state will accept the bid of a FI and will state the PMPM compensation framework. In response, the Legislature rejected the Governor's proposed amendment and proposed its own alternative language.

The final Budget Bill rejected the proposed alternative language in favor of its own. Most notably, the new language, among other provisions: keeps the contract provisions from the Governor's 30-Day Amendments, which shall include the PMPM framework; sets forth the rules by which a FI may bid for a contract with the state and the criteria by which a FI is qualified to contract with the state; outlines the services to be provided by and the responsibilities of a FI; and authorizes the Commissioner of Health to convene and chair a workgroup to "identify and develop best practices pertaining to the delivery of fiscal intermediary services, inform the criteria for use by the department for the selection of [FIs], identify whether services differ for certain consumers and under what circumstances, inform criteria in relation to the development of quality reporting requirements, and work with the department to develop transition plans for consumers that may need to transition to another [FI]." The workgroup will consist of representatives of service centers for independent living, statewide associations of fiscal intermediaries, representatives of managed care entities under article forty-four of the public health law and local social service districts, consumers, and representatives of advocacy groups representing consumers of CDPAP services.

Cost Sharing assistance for Low Income Medicare Beneficiaries

The final issue addressed by the Section was a proposal that would reduce the amount of cost-sharing assistance that New York provides to seniors and people with disabilities who have Medicare for services covered by Medicare Part B.[4] These include physician's services, outpatient care including chemotherapy, ambulance costs, and other outpatient services. Medicare beneficiaries with means can afford a private "Medigap" supplemental policy that pays these out-of-pocket costs, but with premiums over $250/month, the lowest income Medicare beneficiaries cannot afford them. Instead, the lowest income Medicare beneficiaries enroll in the Qualified Medicare Beneficiary (QMB) program or Medicaid, which used to assure meaningful access to Medicare services by paying the Medicare deductibles and cost-sharing, as well as for Medicare Part B premiums.

The Section opposed this proposal. The Assembly and the Senate both rejected this proposal and the language was not included in the final budget bill.

This year, Lobby Day was attended by Britt Burner, Jeffrey Asher, David Goldfarb, Valerie Bogart, Tammy Lawlor, Moriah Adamo, Deepankar Mukerji, Martin Hersh, Christopher Bray, and Tara Anne Pleat. We were guided by Jane Preston and Joshua Oppenheimer of Greenberg Traurig.

Endnotes

1. PART G § 1, proposed to amend Social Services Law § 366(3)(a)(2).
2. PART V § 2, proposed to amend Social Services Law § 364-j to add a new subdivision 34.
3. PART G § 3.
4. PART C §§ 2-3.

Young Lawyer Event in New York City

By Katy Carpenter

The Elder Law and Special Needs Section's Young Lawyer Committee held its fourth event on Saturday, April 27 in New York City. Fifteen recently admitted attorneys met and took part in an Escape Room challenge followed by cocktails and networking atop 230 Fifth's rooftop.

This event is part of ongoing outreach to build a stronger foundation for the younger and newer members of the Section by offering opportunities to meet each other, network, and build working relationships. The group also offers assistance for young lawyers who are interested with finding a mentor within the Section or committee placements.

For any questions, please contact Emily Kahn (ek@walsh-amicucci.com), Kristen Casper (kristen@thelawfirmalbany.com) or Katy Carpenter (kcarpenter@wplawny.com) of the Elder Law and Special Needs Section's Membership Committee.

Thank You!

A huge thank you to Judie Grimaldi for her leadership of the Section and her vision. Outgoing Chair Judie Grimaldi receiving a token of the Section's gratitude for her leadership at the April Meeting of the ELSN Executive Committee by incoming chair, Tara Anne Pleat.

Adventures in a Busy Elder Law/T&E Office

A Comic Strip by Antony Eminowicz

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Tales from the Trenches

By Christine Mooney and Linda Redlisky

Christine Mooney

Linda Redlisky

We hope the summer installment of *Tales from the Trenches* finds you gearing up for some rest and relaxation. We venture to guess the answer to that question is a giant NO in the practices we maintain. Does it feel like the trenches are becoming deeper? This month's edition focuses on two grim but important aspects of Article 81 practice: surcharges and the death of the incapacitated person (IP). In preparation for writing the column, a colleague said, "I wonder what the earliest surcharge case against a guardian might be?" A great question, so we did some digging.

Amongst one of the earliest cases, we found *In re Guardianship of Fardette*[1] wherein the attorney guardian, Robert Slocum, was appointed as the general guardian of the infant. Slocum had been the attorney for the infant in an underlying negligence action. Upon receipt of the settlement proceeds, Slocum was appointed as the general guardian and secured and filed a bond. A sad story, but not unlike what several of us have encountered in our practices, Slocum absconded from the state of New York with the funds and could not be found. The court directed a surcharge against his surety in the order approving the final account and providing for sums that were due to the successor guardian. The surety appealed the finding of the Surrogate's Court, arguing that the amount in question was taken by the guardian prior to the issuance of the surety's guaranty.

In *Fardette* [2] the court held, under section 2596 of the Code of Civil Procedure, "A person to whom letters are issued is liable for money or other personal property of the estate which was in his hands or under his control when his letters were issued, in whatever capacity it was received by him or came under his control." The court ruled on appeal that the surety was liable for the moneys withdrawn by Slocum, although taken prior to the issuance of the bond *and directed the surety to make payment*. *Fardette*, a case from more than a century ago, speaks volumes to the importance and potential liabilities for a guardian and fiduciary who serves with a surety obligation. It should be noted that a quick Shepard's search of *In re Guardianship of Fardette*[3] elicits two cases: *Rouse v. Payne*[4] and *In re Estate of Camarda*,[5] which raise questions about the circumstances in which this precedent regarding liabilities of guardians and potential surcharges can be applied.

Duties of the Article 81 Guardian

The statutory duties of a guardian are codified in Article 81 of the Mental Hygiene Law. Under the provisions of Mental Hygiene Law § 81.20 (a) (3),[6] "a guardian shall exhibit the utmost degree of trust, loyalty and fidelity in relation to the incapacitated person." Furthermore, Mental Hygiene Law § 81.20(a)(6)(ii) states that a guardian is charged with the property management powers of an IP: "to preserve, protect and account for the financial resources faithfully." A breach of this statutory duty can lead to a potential surcharge for a guardian.

Commencing a Surcharge Application: Who's the Surcharge Against?

In the event a successor guardian is faced with the need to bring a surcharge application, there are a host of issues to keep in mind. Be sure you are familiar with the practices of the county in which you practice. An order and judgment appointing a guardian may include a decretal paragraph that does not allow the guardian to act as his or her own counsel without prior leave of the court. Prior to commencing the proceeding, in Article

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Linda Redlisky is a partner at Rafferty & Redlisky, LLP concentrating in elder law, including Medicaid planning and guardianship matters. She routinely is appointed by the court to serve as Court Evaluator, Guardian and Counsel to the Alleged Incapacitated Person in complex matters involving turnover and surcharge proceedings. She is a member of the Executive Committee of the Elder Law and Special Needs Section of the New York State Bar Association, chair of the Client and Consumer Issues subcommittee, and an active member of the Section on Women in Law. She can be reached at redlisky@randrlegal.com.

81 matters, ensure that you have the necessary permissions to act as counsel so that your fee application can be properly considered by the court. Once you are clear about your ability to act as counsel, and that there is a legal cause of action, you should begin the application. A couple of key things to keep in mind when completing the application: the Order to Show Cause (OSC) should contain the necessary exhibits and information that are the basis for the surcharge claim. This includes but is not limited to the following:

1. Any amounts owed or missing from the guardianship accounts;
2. Any funds denoted on the last judicially approved accounting that you were unable to marshal or locate;
3. Any debts or lien obligations incurred by the IP under the tenure of the prior guardian that are relevant to the surcharge application; and
4. Any supporting documentation necessary to support your relevant claims without violating the privacy rights under federal and state law of the IP.

Your next question should be: *Against whom am I seeking the surcharge*? This is relevant because any surcharge application pending before a court requires a surcharge hearing to determine if the guardian is liable. In *In re Sheppard*,[7] the court held that the Surrogate's Court had failed to hold an evidentiary hearing to determine the liability of the administrator of the estate. In *Sheppard*, despite the underlying removal of the administrator of the estate, the surcharge imposition was improper because a hearing had not been conducted.

Therefore, the OSC should request first and foremost to hold the fiduciary responsible for the surcharge. In *In re Zipser,*[8] the court held that the liability of a surety cannot be attached without a finding as to the fiduciary's obligations. The court's holding in *Zipser* was based on earlier findings in *United States v. Westchester Fire Ins. Co.,*[9] wherein, the court stated, "the New York requirement is not a mere procedural step but an ingrained part of the surety's substantive obligation. The surety does not breach, and is not liable on, its bond until the administratrix's wrongdoing has been judicially established in a proceeding – not yet had – to which she (or her representative) is a proper party."

When you are in the trenches and commencing a surcharge application, ensure that the proper parties are named, noticed and that the claims are clearly outlined. The purpose of the surcharge should be clearly delineated. For example, if the IP is presently facing a large nursing home bill due to the failure of the prior guardian to apply for Medicaid benefits, then ensure that the pleadings outline the damages, amount owed, time frame for the Medicaid application and the ensuing harm. While immediate action under those circumstances would be to effectuate the necessary Medicaid application on the IP's behalf, to mitigate the damages, confirm that the application for a surcharge is complete.

The Death of the Incapacitated Person and Its Aftermath

Anyone who serves as a guardian knows the significant amount of time, energy and effort expended for the benefit of the IP. More often than not, the benefit goes both ways. While we have received middle of the night telephone calls with emergencies big and small, we also have developed strong relationships with those whose care we are entrusted. When an IP passes away, it oftentimes is a heartfelt and personal loss. But when a ward passes away with money, it never ceases to amaze us how many never-heard-from-before family members seem to have resurrected our telephone numbers to make various demands. Pre-need funeral arrangements are eschewed as not satisfactory. Demands for the guardianship to pay for a luncheon for her closest 100 friends and relatives to celebrate the IP's life are made. A great-aunt twice removed and her triplet sisters were so devastated by the news and must attend the funeral, but the guardianship should pay for their first-class tickets from California (they need the leg room). Do you have discretion? What is your responsibility?

Responsibilities of the Part 36 Guardian Upon the Death of the Incapacitated Person

The only powers a guardian retains after an IP's death are those necessary to wind down the guardianship (MHL 81.21). These powers include payment of funeral and burial expenses [MHL 81.21(a)(14) and 81.36(e); retaining an account [MHL 81.21 (a)(18)]; paying bills after the death of the IP provided the authority existed to pay such bills prior to death until a temporary administrator or executor is appointed [81.21(a)(19)]; and defending or maintaining any judicial action pending the appointment of an executor/administrator [MHL 81.(a)(20)]. *See In re Kornicki*, 2018 N.Y.L.J. LEXIS 3788 (Sup. Ct. Nassau Cty.) (Diamond, J.S.C.). In other words, unless there is a court order approving payment of transportation expenses of family members and a celebration stipend, do not pay those expenses. If the guardian pays any expenses that are not directly related to winding down the guardianship, the guardian runs the risk of possible reduction of commissions or, worse yet, a surcharge recommendation.

When the guardianship estate does not have sufficient funds to pay pre-existing debts in their entirety, instruction should be sought from the court in the final accounting. For example, in *In re Shannon*, 25 N.Y.3d 345; 34 N.E. 3d 351 (Ct. of App.) (2015), at the time of the IP's death, aside from administrative expenses of the guardianship, there remained an unpaid debt to Medicaid and to the nursing home at which she resided. There were

insufficient funds to pay both debts in their entirety. The guardian petitioned the court to settle her final account and sought instruction as to what to do with the unpaid Medicaid and nursing home bills. Ultimately, the Court of Appeals adhered to a strict construction of MHL 81.44 (d) finding the Legislature intended that a guardian lose all authority over an IP's assets at the time of death except to an amount to pay the administrative expenses of the guardianship. When in doubt, do not pay out!

Lastly, read MHL § 81.44 and make a checklist of things to do when the IP dies. The guardian has 20 days after the IP's death to serve a copy of the statement of death upon the court examiner, the duly appointed personal representative of the decedent's estate or, if no personal representative has been appointed, then upon the personal representative named in the decedent's will or any trust instrument, if known, upon the local department of social services and upon the public administrator or the chief fiscal officer of the county in which the guardian was appointed; and to file the original statement of death together with proof of service upon the personal representative and/or public administrator or chief fiscal officer, as the case may be, with the court that issued the letters of guardianship.

Practitioners Beware: Use Certified Mail

A word of advice: send the notice to the public administrator or personal representative via certified mail return receipt requested, Federal Express or any other method by which the letter can be tracked. It is imperative that the successor be put on notice to get ready to accept funds within 150 days. While the United States Postal Service allows for electronic receipt of signed notifications, you are best served to go the old fashioned route and get the "green card." This is important depending on the county in which the IP's death occurred. It is imperative that you know the requirements of the county and judge under which your case is supervised. For example, in a recent matter a practitioner had the electronic receipts from the notification to the public administrator and the court wanted the "green card."

The Challenges and Responsibilities in Avoiding Liability After the IP's Death

Begin to think about the particular assets in the guardianship: what to do with the now abandoned house, the issue of the homeowner's insurance or collecting the rent if there is a tenant, etc. These are practical issues that should be addressed immediately so that the guardian is not held responsible for any damages that occur to the estate between the date of the IP's death and the date of discharge. If the name and address of the proposed executor is known, send a letter (same tracking method) and set up a phone call or meeting to discuss the transition. Moreover, while the guardian has 150 days from the death of the IP to serve a statement of assets and notice of claim, and turn over all guardianship property to the personal representative or public administrator (with the exception of funds to pay claims, lien or administrative costs of the guardianship), move quickly to limit exposure. The same applies to the filing of the final account. This is where many attorneys (guilty) have put aside a file to deal with the pressing needs of their living IPs and this file gets buried in the corner. It happens. Don't let it happen to you. If you don't properly act, you may find yourself on the receiving end of a Surrogate's Court citation from the public administrator or executor/administrator to turn over property. All of your years of hard work, diligent care and professionalism are all but forgotten. And the person now in charge may be the great-aunt twice removed whose tickets weren't purchased. File the statement of death, file the accounting, and turn over funds within 150 days so that you can both rest in peace.

Endnotes

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2. *Id.*
3. *Id.*
4. *Rouse v. Payne,* 120 A.D. 667, 105 N.Y.S. 549, 1907 N.Y. App. Div. LEXIS 1284 (Supreme Court of New York, Appellate Division, Third Department June 25, 1907, Decided).
5. *In re Estate of Camarda*, 103 Misc. 2d 362, 425 N.Y.S.2d 1012, 1980 N.Y. Misc. LEXIS 2124 (Surrogate's Court of New York, Onondaga County February 26, 1980).
6. New York State Mental Hygiene law § 81.20 (a) (3).
7. *In re Sheppard*, 147 A.D.3d 1239, 48 N.Y.S.3d 544, 2017 N.Y. App. Div. LEXIS 1401, 2017 NY Slip Op. 01416, 2017 WL 704712 (Supreme Court of New York, Appellate Division, Third Department, February 23, 2017, Entered).
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Jimmo: The Maintenance Standard Applied to Skilled Nursing Facility Services

By: Moriah Adamo

Moriah Adamo

In 2011 six aggrieved Medicare recipients joined seven national advocacy organizations to allege that the Centers for Medicare and Medicaid Services (CMS) routinely and systematically engaged in a clandestine scheme to deprive beneficiaries of skilled care.[1] The seminal *Jimmo* class action case triggered an ongoing saga that has been likened to a Dickens novel.[2] In sum, the *Jimmo* plaintiffs alleged that CMS contractors and adjudicators improperly based skilled services authorizations on an "Improvement Standard" rather than the appropriate "Maintenance Standard." Despite the court's ultimate approval of a settlement agreement, and subsequent enforcement litigation,[3] eight years later, the pervasive use of the "Improvement Standard" persists. Medicare contractors continue to deny skilled care on the basis that a patient has not demonstrated functional improvement or has a medical condition that inhibits progress.[4]

The *Jimmo* controversy arises from the misapplication of federal regulation. The governing rule states: "The restoration potential of a patient is not the deciding factor in determining whether skilled services are needed. Even if full recovery or medical improvement is not possible, a patient may need skilled services to prevent further deterioration or preserve current capabilities."[5] CMS conceded the applicability of this Maintenance Standard in the *Jimmo* settlement agreement, which was approved by the court in January 2013.[6] Indeed, as agreed, CMS updated the *Medicare Benefit Policy Manual* (MBPM) to clarify its policy regarding approval of skilled care services. The January 14, 2014 transmittal letter that CMS circulated upon publication of the revised MBPM states:

> **No "Improvement Standard" is to be applied in determining Medicare coverage for maintenance claims that require skilled care**. Medicare has long recognized that even in situations where no improvement is possible, skilled care may nevertheless be needed for maintenance purposes (i.e., to prevent or slow a decline in condition). The Medicare statute and regulations have never supported the imposition of an "Improvement Standard" rule-of-thumb in determining whether skilled care is required to prevent or slow deterioration in a patient's condition. Thus, such coverage depends not on the beneficiary's restoration potential, but on whether skilled care is required, along with the underlying reasonableness and necessity of the services themselves.[7] (emphasis in original)

Still, even with CMS's helpful and relatively clear guidance, the familiar refrains that Medicare coverage is being terminated because a patient has "plateaued" or is "unable to progress" to a higher level of function continue to sound through the halls of skilled nursing facilities (SNF).

To effectively advocate for our clients and secure those coveted "100 days" of SNF coverage,[8] we must understand the application of the Maintenance Standard in the nursing home setting. This requires scrutiny of the Maintenance Standard in the broader context of general qualification for SNF services.

Now, it should be noted that Medicare-approved skilled services can be delivered in various environments: hospitals, SNFs, homes, and outpatient facilities. The setting matters as different criteria apply to each. Perhaps contributing to confusion, authorization of skilled rehabilitation services in a *hospital* remain subject to the Improvement Standard.[9] The Maintenance Standard governs authorizations for skilled services in other settings, but delivery of skilled care in a nursing home necessitates additional criteria.

Many practitioners are familiar with the requirement that a Medicare beneficiary receive a three-day "qualifying" hospital stay prior to admission to a SNF.[10] In addition, a beneficiary must also "require skilled nursing or skilled rehabilitation services, or both, on a daily basis"[11] and such services "as a practical matter, can only be provided in a SNF, on an inpatient basis."[12] These additional conditions for the delivery of skilled services in a nursing home evoke the Maintenance Standard.

Thus, assuming a qualified hospital stay, to justify Medicare reimbursement of SNF services providers must document that (1) the patient needs a skilled service in order to improve, maintain function or prevent deterioration; (2) the need arises daily; and (3) the services cannot be delivered practically in the community at home or on an outpatient basis. The totality of the patient's conditions must support each element to substantiate the claim for SNF coverage. A deeper review of each is warranted.

First, what constitutes skilled services? Simply, skilled services are those ordered by a physician and

provided by a technical professional, therapist, nurse, or physician.[13] The regulations provide a list of covered skilled services, together with qualifying examples.[14] Skilled rehabilitation services are enumerated to include: ongoing assessment, therapeutic exercises or activities; gait evaluation and training; range of motion exercises; various heat treatments, and services of a speech pathologist or audiologist.[15] Notably, maintenance therapy is specifically listed as a covered rehabilitation service.[16] According to the regulatory definition, a reimbursable maintenance program requires the specialized knowledge and judgment of a therapist to develop and monitor a care plan designed to support a current level of functioning.[17]

For a maintenance plan to pass muster, monitoring is key.[18] If rehabilitation care is the *primary* skilled service, the focus cannot be the patient's ability to recover, but rather whether the services require the skills of a therapist or an unskilled aide.[19] The totality of the individual's condition will determine whether ongoing management by skilled personnel is required. Comorbidities must be assessed and documented to determine if skilled oversight of the maintenance plan is necessary. CMS provides the example of a patient with a circulatory problem who requires the administration of a whirlpool bath. While a whirlpool bath in isolation does not require skilled oversight, due to the complicating circulatory problem ongoing skilled assessment is required.[20]

While physical therapy and/or occupational therapy services are most often associated with Medicare-covered SNF stays, an advocate should consider that the beneficiary may need other qualifying skilled services. These services include professional case management, observation and assessment, education, and skilled nursing services.[21] The need for any one of these services to improve, maintain or prevent deterioration will meet the first prong of the SNF analysis.

Once the need for a skilled service to improve, maintain or prevent decline is established, we turn to the "daily need" requirement. This element may seem intuitive, but subtleties exist. The requisite skilled services must be needed *and* provided seven days a week.[22] If rehabilitation services are not available seven days a week, then they must be provided at least five days a week.[23] Exception may be made for one or two days lapses in rehabilitation services if the physician affirmatively orders the break.[24] Note: conspicuously absent from this exception is a patient's temporary refusal or inability to participate in rehabilitation therapy. The need and provision of the skilled care must be consistent, and the patient must participate as ordered.

The final criterion presents a restrictive obstacle to Medicare-covered SNF care. To qualify for SNF benefits the "daily skilled services must be ones that, as a practical matter, can *only* be provided in a SNF, on an inpatient basis."[25] The individual's condition must be considered in light of the availability and feasibility of more cost-effective delivery methods.[26] Unfortunately, the personal cost to the patient of these alternative models may *not* be considered.[27] For example, if outpatient rehabilitation services are available, but can be accessed only by significant private payment, as a "practical matter" the services can still be delivered outside the SNF. Of course, if it is more economical to the *Medicare* program to deliver the care in a SNF, then cost matters.[28] For instance, if a person would have to be transported to an outpatient rehabilitation center by ambulance (a Medicare-covered service), as a practical matter the SNF care is necessary.[29] Practically speaking, CMS utilizes this prong to minimize the overall costs of skilled services within the Medicare program.

To conclude, armed with a better understanding of the Maintenance Standard in the context of SNF services will allow us to more effectively advocate for maximization of our client's benefits. We should communicate with SNF staff, who often remain uneducated about the appro-

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Ms. Adamo is a frequent lecturer on the various Medicaid, Guardianship and estate planning topics. She has co-authored published articles examining various issues involving maximization of Medicaid benefits. Ms. Adamo has lobbied the State Legislatures regarding important Medicaid programs, advocating for protection of disabled New Yorkers. She is the chair of the Community Relations and Public Education Committee at the Nassau County Bar Association. She is the former co-chair of the Nassau County Bar Association's Elder Law, Social Services & Health Advocacy Committee. In addition, she serves as co-chair of the New York State Bar Association's Elder Law and Special Needs Section's Health Care Issues Committee.

Ms. Adamo graduated from Arizona State University, *manga cum laude*, and Touro Law School, *summa cum laude*. At Touro Law School, Ms. Adamo was a faculty fellow, recipient of a judicial clerkship fellowship, a merit scholar, and a member of the moot court team.

priate standards, to assure that medical records accurately reflect all of the client's conditions to support the need for skilled services. When faced with the all too common discontinuance of Medicare based on the Improvement Standard, we should challenge the determinations applying the appropriate criteria to the medical records. Perhaps grass roots advocacy will yield the cumulative effect of systematic change.

Endnotes

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5. 42 C.F.R. § 409.32(c).
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7. CMS Manual System Pub 100-2 Medicare Benefit Policy, Transmittal 179 (January 14, 2014), *available at* https://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/Downloads/R179BP.pdf.
8. 42 C.F.R. 409.61(b) (Days 1-20 are paid in full and day 21-100 are subject to the prevailing co-pay).
9. Medicare Benefit Policy Manual 110.2 (Issued January 14, 2014), *available at* https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/bp102c01.pdf.
10. Medicare Benefit Policy Manual 20.1 (Issued November 2, 2018), available at: https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/bp102c08.pdf.
11. 42 C.F.R. § 409.31(b)(1).
12. 42 C.F.R. § 409.31(b)(3).
13. 42 C.F.R. § 409.31(a).
14. 42 C.F.R. § 409.33.
15. 42 C.F.R. § 409.33(c).
16. 42 C.F.R. § 409.33(c)(5).
17. *Id.*
18. A beneficiary may receive approval for a maintenance plan if other skilled services are also needed.
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20. *Id.*
21. 42 C.F.R. § 409.33(a).
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23. 42 C.F.R. § 409.34(a)(2).
24. 42 C.F.R. § 409.34(b).
25. 42 C.F.R. § 409.31(b)(3)(emphasis added).
26. 42 C.F.R. § 409.35(a).
27. *Id*.
28. 42 C.F.R. § 409.35(b).
29. *Id*.

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New Member Spotlight: Rachael Harding

Interview by Katy Carpenter

Q Where are you from?

A I'm from upstate New York, Saratoga area – specifically Clifton Park. I'm a Shen girl!

Q What brought you to New York City?

A Part of my family lives down here and I always knew I would end up here. Plus, the New York Yankees are here. Enough said!

Q Where is your favorite place you've traveled to?

A I just got back from Israel and it's on the top of my list along with Italy. My favorite time was spent learning the history, walking on the beach in Tel Aviv and floating in the Dead Sea – you do float!

Q Why did you choose to practice in the area of Estate Planning?

A When I began with this firm, I did a little bit of everything: estate planning, litigation, contracts and real estate. I naturally gravitated towards trusts and estates because I like the work and the clients and eventually made it my focus.

Q Did you have a turning point in your career?

A Yes, in a span of two years, I went from being a prosecutor, to a Compliance Director on a political campaign, to my current firm. My former areas of practice brought me to the firm where I am today and helped me become a well-rounded attorney.

Q What's your favorite part about your job?

A The client interaction. I enjoy educating clients and learning all about them – they are fascinating! I enjoy working with different family dynamics that's not so black and white, and at the end of day providing the clients comfort and ease.

Q Tell me about an accomplishment that you consider to be the most significant in your career thus far.

A There are two that come to mind: first, I was appointed as Guardian ad litem in a very interesting wrongful death estate administration proceeding where the decedent lived a 'double life' – he had a wife and grown kids and then another family who thought they were the wife and younger kids, and I was part of the final two years, representing the younger kids (in a 10-year long proceeding), and finally bringing the Surrogate's Court action to a settlement and gave closure to the families.

The second case is where I had a lost will admitted to probate in New York County and made it a personal mission to get the executor appointed, by personally being the one to go through decedent's apartment to locate documents in order to put the pieces together and doing all necessary steps to prove due diligence in trying to find the original, in order to admit a copy of the will. Hard work and patience does pay off.

Q Where do you see yourself in five years?

A Here at the firm [Falcon, Jacobson & Gertler LLP] continuing to grow. I love the people I work with and enjoy that it's a young, growing, dynamic firm. Or maybe President of the U.S., since I will be over 35 at that time.

Q **What did you want to be when you were younger?**

A I'm one of those weirdos who always wanted to be a lawyer, although I never knew which kind. If we are going really far back in my childhood, I also wanted to be a bagger at a grocery store (Price Chopper) and work at a car wash. Unfortunately, I never worked at either, but I guess there's still time.

Q **Tell me a little about your family.**

A My family is very diverse. I have my big maternal upstate Catholic side and my small paternal Jewish New York City side. My paternal grandfather was an attorney. My father is an attorney. My sister just passed the bar, so soon there will be three generations and four members of my family that will be admitted in the 1st department. Family dinners are always "exciting." My paternal grandmother is an honorary lawyer by seeing all four attorneys throughout law school and bar studying. My mother is the patron saint of us all, by not being a lawyer, but rather a retired government employee who's a general do-gooder and puts up with all of us. My maternal grandfather was a salesman, fisherman and hunter, and my maternal grandmother was a seamstress and mother of six children, grandmother of 15 grandchildren and great-grandmother of nine great grandchildren!

Q **Are there hobbies you look forward to on the weekends?**

A I'm a huge Yankees fan and I love sports, including my struggling Hoyas! I play tennis and softball. In the city I have a little balcony, which I turn into a garden and pretend to have a green thumb. I go to many Broadway shows, although usually during the week to avoid the tourists. Other than that, I enjoy traveling, cooking, wine and shopping on Arthur Avenue.

Q **What is the best piece of advice you have to give?**

A Make sure to leave time for yourself. A healthy balance helps you become a better attorney and in this line of work you oftentimes realize life is too short, so enjoy it with what brings you happiness and fulfillment!

Q **Is there anything else you want people to know about you?**

A Recently, I was appointed President of CaringKind-The Heart of Alzheimer's Caregiving's Junior Committee, a cause that's unfortunately close to my heart and which reminds me every day that the work we do as T&E attorneys really is crucial and makes a difference to the client and their family.

Member Spotlight: Felicia Pasculli

Interview by Katy Carpenter

Q Where are you from?

A I like to think Heaven, (or at least that's what I tell my kids)! I am from Astoria, Queens – it's trendy now, not so much back then. The entire maternal side of my family lived there also, so we had a community within a community.

Q What brought you to Long Island?

A We chose Long Island because we like to be near the water and, at the time, a house there was more affordable.

Q Tell me about your family.

A Where to begin … I grew up in a working-class family where I was the first to go to college. I am the oldest of three kids. My dad was very smart, he graduated high school at 16 but it was difficult to find a well-paying job, so he also started boxing – he was fearless – he even boxed while serving during World War II. Won the Inter-City Golden Gloves at 19. My mom was from a more comfortable but insulated background. She raised us but when it was time for me to go to high school, she went to work so they could afford to send me to a private high school.

My parents kept me on a short leash which at times I chafed at. I was subjected to a double standard. I married young and had three children (I now have three grandchildren). I first worked as an editor, but I've always been an advocate.

Q Have you had any turning points in your life?

A Many! My path to law school was atypical. I was 38 when my dad became sick and his capacity started declining. He suffered from brain trauma and was at the VA medical center at Northport, NY. We had been told that a new nursing home was to be built and about 80 long-standing patients transferred there. While visiting one day, a social worker who was a Vietnam veteran confided that the VA was changing course and was going to open the facility for rehab only and summarily discharge the men. Startled, I asked what he wanted me to do. I'll never forget his response. He said, "I don't know but I figure you'll come up with something." He was right. I caused a ruckus alerting the families, veterans' organizations, LI's congressional delegation, and *Newsday*. A Congressional subcommittee was held at the Northport VA and over 900 people attended. We made the cover of *Newsday* and the VA backed down.

At that point, I believed being a lawyer would increase my credibility and value as an advocate, so I went to CUNY at Queens College Law School four days a week. I chose that school because there was a daycare center for my youngest, who was two at the time.

Q Now it's understandable how you came about practicing in the areas of elder law and veterans law.

A It was a natural combination for me. Within a year, I started my own practice. I think that was possible due to my life experiences and public exposure. It's difficult making a living solely from veterans law and if I were independently wealthy, it's all I would do because I believe it's God's work. At least I can get the word out to other practitioners to make sure they know about veterans' benefits in order to fully service their clients.

Q **Tell me about a project or accomplishment that you consider to be the most significant in your career.**

A I am one of the founders of the Long Island Alzheimer's Foundation, established in 1988. At the time, there was no central source of information regarding services for those suffering from dementia. We created a resource manual listing social workers, doctors, attorneys, etc. that specialized in treating Alzheimer's or assisting their families. We also developed innovative programs.

Q **What did you want to be when you were 13?**

A Writing was my first love, but things were very different back then and I didn't believe I could make a living as a writer. Women were usually encouraged to become nurses or teachers.

Currently, I am writing a screenplay about a boxer that my dad knew. I'm taking screenwriting classes in Manhattan, which has been great for guidance and feedback. We have a fabulous teacher and we even have a celebrity in the group, who shall remain nameless.

Q **Do you have any advice for young attorneys?**

A I would recommend studying something of interest in college, not pre-law or political science. Then I would try to scare them – don't do it unless you're strong and have a passion for advocacy. There will be challenging days you will need to survive. Law is not for the faint of heart. However, it gives you the opportunity to truly effect change, and that's very fulfilling.

Q **Is there anything else you want people to know about you?**

A People know too much about me. My filters are dropping at an alarming rate, but I think in some ways it makes me a more effective advocate. I strongly believe in health care for all and income equality and I am politically involved in advocating for both. I want everyone to be taken care of; our country has the money to do it but needs the political will.

Committee Spotlight: Veterans Benefits

Felicia Pasculli, Co-Chair and Sarah A. Steckler, Co-Chair

One of the goals of our committee is to provide educational programs and information to the Section regarding Department of Veterans Affairs (VA) health care and financial benefits available to our clients.

Our Committee has been instrumental in providing the ELSN section with information regarding significant changes to the regulations regarding the VA's pension benefit which took effect on October 18, 2018. Thanks to NAELA's VA Task Force and the efforts of numerous veterans' organizations others, we were able to have some impact on the more draconian aspects of the proposed changes.

Our Committee is addressing a serious issue that will impact all ELSN practices: a decision by the Board of Veterans Appeals regarding a denial of pension benefits to a veteran in an assisted living residence. The VA deemed that the assets in his irrevocable trust were available for his care. The decision states that if the veteran/Grantor retained some or all of the right to income, exclusive use and occupancy of the home to retain tax exemptions, the power of substitution and the right to a limited power of appointment, the principal is available to him.

Felicia Pasculli is going to appeal this decision to the Board of Veterans Appeals, and if need be, to the Court of Appeals for Veterans Claims. The committee will assist with this appeal.

A webinar or other instructional material may be necessary to disseminate information to the Section regarding the impact of this decision on the drafting of trusts that are not only intended to preserve assets for future Medicaid eligibility, but also for the veterans' pension.

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