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New York
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The Beat of New York Law

Working with Aging Clients: Recurrent Ethical Issues

By Sofiya Nozhnik, Esq.

According to the United States Department of Health and Human Services' Administration on Aging, in 2009, the older population (defined by the agency as "persons 65 years or older") numbered 39.6 million, or 12.9 percent of the U.S. population, which was about one in every eight Americans.[1] The agency estimates that by the year 2030, there will be about 72.1 million older persons. The graying of America means that not only legal practices, such as estate and asset protection, disability, and Medicaid planning are on the rise, but in general, legal practitioners are now working with aging clients more often than ever before.

Legal practitioners working with aging clients may find themselves facing a number of recurrent ethical issues. It is not unusual for the family to be involved in most aspects of an aging individual's life. When an aging client decides to seek legal representation, his or her family members may provide mental, financial, or logistical support. In Part I, this article will discuss practice tips that attorneys may find useful in addressing ethical issues of client identification and confidentiality that are inherent in dealing with family members of an aging client.

Another common situation faced by legal practitioners working with aging clients concerns client competency, where over the course of representation, an attorney may notice that the client's mental capacity has begun to decline. If a situation is severe, where an aging client is at risk of physical, financial, or other harm and cannot adequately act in his or her own interest, the legal practitioner may have to undertake protective actions as dictated by the Rules of Professional Conduct. However, in most other situations, aging clients with evidence of declining capacity may still be able to make or participate in legal decisions. In Part II, this article will discuss a technique called "gradual counseling" that legal practitioners may find useful when working with such aging clients.

Client Identification and Confidentiality

Sam calls your office asking whether you can help his 70-year-old father, Donald, prepare advance directives. When you meet with Donald at your office, he insists that Sam, who brought him to the consultation, stays in the room during the meeting. Following the consultation, Sam writes a check to you for your services. A few days later Donald calls your office telling you that he wants Sam to be able to call you on his behalf and ask for updates.

The above-mentioned scenario presents at least two problems. First, who is your client, Sam or Donald? Second, once you identify Donald as your client, what, if anything, are you allowed to share with Sam?

It is incumbent upon a legal practitioner to identify who the client is because it is to the client that we owe duties of loyalty, confidentiality, diligence, and competence. However, it is just as important for the practitioner to understand why an aging client would want the family involved.[2] Attorneys must recognize that their aging clients are adults experiencing increasing limits on their autonomy as they age.[3] Physical and financial independence may increasingly be threatened.[4] As a result, it becomes imperative to explain and clarify to both the client and the family members the importance of attorney-client relationship and confidentiality.

The following client identification and confidentiality practice tips are suggested by the National Academy of Elder Law Attorneys in its Aspirational Standards and Commentaries.[5]

When addressing the issue of client identification, it is suggested that a legal practitioner use an intake form that asks, for instance, "Who is seeking legal advice and services?" or "For whom (or whose interests) are legal services requested?" Although the responses to the questions may not always identify the client, they will reflect the person's perception. Information from the referral source or the office staff making the appointment may be helpful in

{ *See* **Aging** *on page 9* }

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Advising Clients About Living Wills and Health Care Proxies

By Ira Salzman, Esq.

There are very few things that an estate planner typically does for a client that are more important than giving advice about living wills and health care proxies. These documents will normally determine what kind of health care the client will receive if the client lacks capacity to make health care decisions. These documents can determine when and under what circumstances life support can be terminated when a client lacks the capacity to make that decision.

The Difference Between a Living Will and a Health Care Proxy

A living will is a written statement that expresses a client's desires with regard to health care treatment if the client becomes unable to express those desires. It can include, but need not be limited to, instructions concerning termination of life support. A living will does not name an agent to make decisions if a client lacks capacity to do so.[1] The underlying assumption behind a living will is that family members and/or health care providers will somehow obtain a copy of the document and be able to follow the instructions it contains.

A health care proxy delegates authority to another to make health care decisions for the client should the client become incapacitated.[2] In some other states, a health care proxy is called a durable medical power of attorney, which is perhaps more descriptive. The health care proxy can, but is not required to, contain specific instructions about when and under what circumstances specific kinds of health care should be provided.

What Happens If a Client Has Not Signed a Health Care Proxy?

If a person has not signed a health care proxy and cannot make medical decisions because of incapacity, decisions for that person are made pursuant to New York's Family Health Care Decisions Act.[3] Pursuant to this statute health care decisions for incapacitated individuals who are being treated in a hospital or residential care facility can be made by individuals called "surrogates."[4] Surrogates are authorized to serve in accordance with the following priority list; if a person with a higher priority declines to act, the next person on the list, in order of priority, has the right to act:

A. A guardian authorized to decide about health care pursuant to Article 81 of the Mental Hygiene Law;
B. The spouse, if not legally separated from the patient, or the domestic partner;
C. A son or daughter 18 years of age or older;
D. A parent;
E. A brother or sister 18 years of age or older;
F. A close friend.

If none of the above individuals are available and willing to act, then health care facilities have certain limited authority to make

{ *See* **Proxies** *on page 11* }

A Safe Harbor

On August 1, 2013, The Weinberg Center for Elder Abuse Prevention at the Hebrew Home at Riverdale (The Weinberg Center) received a call from a legal services organization. An 87-year-old cognitively impaired client, Mrs. Y, was a victim of elder abuse and needed immediate emergency shelter. The referring organization's attorney learned that Mrs. Y's building superintendent (super) moved in with Mrs. Y to "care" for her, and instead was taking thousands of dollars from Mrs. Y. Unfortunately, a community attorney assisted the super in executing a fraudulent power of attorney on Mrs. Y's behalf, despite the fact that she clearly lacked the requisite capacity to do so. This power of attorney gave the super full authority to drain almost all of Mrs. Y's life savings. She was recently widowed and lonely, and her early stages of dementia left her confused about her finances. Once discovered, Mrs. Y was quickly assessed by a medical team, brought to The Weinberg Center, and the super was arrested. As Mrs. Y's judgment was increasingly compromised, a guardian was appointed for her and she is living safely and comfortably, her remaining assets providing for her care.

By Deirdre Lok, Esq.

By 2030, 9.6 million Americans will be 85 and older. These so-called "*old* old" are the fastest growing section of our population, and attorneys can expect a concomitant exponential growth of aging clients in the coming years. As a result, attorneys will increasingly face clients with medical complications, and questionable cognitive functioning, and who may be at risk for abuse. High unemployment rates, increased mental health diagnosis, and a lack of affordable housing and healthcare converge to create a perfect storm of risk factors for community-based neglect, financial, physical, emotional, and/or sexual abuse.

New York State has no laws that mandate reporting elder abuse, and attorneys may find themselves in situations where they are unsure how to accurately and appropriately identify, address, and refer cases of potential elder abuse. When a client is over the age of 60 and is unsafe at home due to ongoing or imminent elder abuse, The Weinberg Center is an emergency residential shelter where victims' psychosocial, healthcare, and legal needs may be met.

The Hebrew Home is a holistic environment where shelter residents benefit from extensive services, including a full medical staff able to provide 24-hour care, a rehabilitation department, a memory care unit, a vision center, and a wide array of therapeutic activities. The Weinberg Center's legal professionals address all of the victim's legal needs, which may include revoking a misused power of attorney, applying for an Order of Protection, pursuing a criminal case against the abuser, litigating eviction notices, freezing assets, or petitioning the court to appoint a guardian. Throughout the creation and execution of this individualized legal strategy, victims are provided a safe space to recover from the trauma of abuse.

Elder abuse cases can be referred to the Weinberg Center by the New York City Department for the Aging, Police Department, District Attorneys' Offices, Adult Protective Services, hospitals, and community-based agencies, including legal organizations. Every referral is reviewed on a case-by-case basis due to the complex needs of each victim. Admission is not based on an ability to pay; in fact, Medicaid benefits can often be secured on behalf of shelter clients.

Attorneys are often in the best position to take action to stop elder abuse. If you suspect elder abuse and have a client in need of emergency shelter, please call 1(800) 56-SENIOR.

Deirdre Lok, Esq., a NYCLA Member, is Assistant Director and General Counsel at The Harry and Jeanette Weinberg Center for Elder Abuse Prevention at the Hebrew Home at Riverdale and Adjunct Professor, the Elder Rights Clinic, Brooklyn Law School.

Proving Age Discrimination: Filing Claims Under Various Laws

By Jael Dumornay, Esq., Jamie Sinclair, Esq., and Jacob Tebele, Esq.

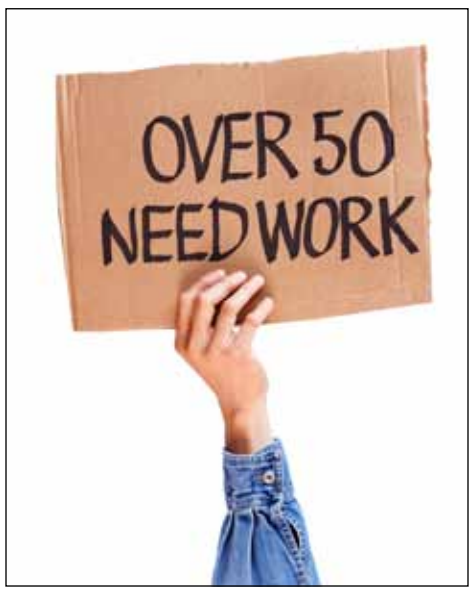
Edited by Stephen McQuade, Esq.

Attorneys representing older workers in age discrimination claims must carefully consider whether their clients could be afforded any relief under the law and which avenue is best suited to provide this relief. While every attorney is responsible for determining whether the potential client has a credible case and could be afforded relief under the law, recent precedent has shifted the landscape in age discrimination cases and has created the need to carefully consider all potential causes of action under federal, state, and city laws. Importantly, under today's precedent, age discrimination cases brought under the New York State Human Rights Law (NYSHRL) or New York City Human Rights Law (NYCHRL) often utilize a more lenient and pro-plaintiff causation standard as compared to those claims brought under the federal Age Discrimination in Employment Act (ADEA).

This article analyzes the differences between the NYCHRL, NYSHRL, and ADEA causation standards for age discrimination claims and addresses why it is imperative that practitioners allege claims under all three avenues where available.

The Starting Point: The Federal "But-For" Standard

The ADEA provides, in pertinent part, that "[i]t shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[1] Prior to 2009, in most circuits, an ADEA plaintiff could prove his or her age discrimination claim through two avenues, the *McDonnell Douglas*[2] analysis or the *PriceWaterhouse v. Hopkins*[3] mixed motive analysis. Under the *McDonnell Douglas* analysis, an ADEA plaintiff must first establish a *prima facie* case by demonstrating that he/she belongs to a statutorily protected class; that the employer was aware of this individual's status in a statutorily protected class; that he/she was subjected to an adverse employment action; and that such adverse employment action was motivated by this individual's status in a statutorily-protected class. Once an ADEA plaintiff establishes a *prima facie* claim, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory, business reason for the adverse employment action. When the employer articulates such a reason, the burden of production, as well as the ultimate burden of persuasion, shifts back to the plaintiff to show that the employer's reason is a pretext for discrimination. Alternatively, under the *PriceWaterhouse* mixed motive analysis, if an ADEA plaintiff establishes that his age was a motivating factor in the adverse employment action, the burden shifts to the employer to establish that it would have taken the same action irrespective of the plaintiff's age.



However, in *Gross v. FBL Financial Services Inc.*,[4] the Supreme Court addressed these burdens and the causation standards for ADEA claims and interpreted the statutory language "because of such individual's age" to signify that the ADEA plaintiff's age must be the reason for the adverse employment action. Thus, the Court held that it was insufficient for an ADEA plaintiff to prove that age was merely a motivating or contributing factor for the adverse employment action. Rather, the Court concluded that an ADEA plaintiff must prove "but-for" causation.

The Court's decision in *Gross* shifted the landscape in ADEA cases and placed the heavy burden of "but-for" causation on ADEA plaintiffs. The impact of this shift is exemplified by the way in which subtle age discrimination affected older workers. A 2012 report by the Government Accountability Office found that older workers, defined as those age 55 and older, faced particularly long periods of unemployment since the recession of 2007.[5] Specifically, the median duration of unemployment for older job seekers was nine weeks longer than that of younger job seekers.[6] By 2011, over one-third of all unemployed older workers had been unemployed for over one year.[7] This report concluded that one of the major impediments to these older workers re-entering the work force was perception-based age discrimination. However, it is unlikely that the vast majority of these individuals would be able to meet the high "but-for" causation standard and successfully prove an age discrimination claim.

Application of the More Stringent Federal Standard to Claims Brought Under State and City Laws and Later Adoption of the "Motivating Factor" Test

In the aftermath of *Gross*, it was well established that the "but-for" causation standard applied to ADEA claims. As a result, New

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Message from Barbara Moses President of NYCLA

Dear Readers,

Over the last several months, NYCLA's Task Force on Judicial Budget Cuts has been working diligently to determine the impact of recent budget cuts on the federal courts in New York. After an extensive investigation, the Task Force published its report, "Continuing Effect of Judicial Budget Cuts on the U.S. District Courts for the Southern and Eastern Districts of New York," concluding that recent budget cuts, followed by sequestration, have resulted in reduced access to justice and decreased public safety. Without prompt budget relief, the rule of law will be jeopardized.

Two years ago, when NYCLA first examined the effect of budget cuts on the federal courts, the Task Force voiced concern. Since then, thanks to sequestration, the judicial budget has been slashed even further, and the situation has become increasingly perilous. Through interviews with judges and court personnel, and a thorough canvassing of reports and other resources, the Task Force concluded that our federal courts are now on the brink of crisis.

The Task Force report highlights both the extent of the recent cuts and their draconian effects. For example:

- Public safety in the Southern District of New York (SDNY) and Eastern District of New York (EDNY) has been compromised due to staff reductions in the Probation Department, which supervises criminal offenders after conviction, and the Pretrial Services Office, which is responsible for defendants awaiting trial. Fewer officers are responsible for more cases, have less time to spend on presentence reports, and are unable to monitor criminal offenders and defendants as closely as in the past.
- Security at the courthouses in the Southern and Eastern Districts has also suffered. Court security officers are being required to work reduced hours, creating security vulnerabilities throughout the system. Together with the elimination of security systems and equipment, this deficit creates a substantial risk to the safety and security of judges, employees, jurors, and litigants. Nor is this a hypothetical risk. The SDNY and EDNY face security and terrorism concerns that are unique among federal district courts. Thus far in 2013, there have been 42 threats made to EDNY judges and court officials, including a plot to assassinate a United States District Judge.
- Due to the loss of manpower in the Clerk's Office and elsewhere, the SDNY and EDNY may be forced to curtail their hours of operation, delay civil trials, and possibly even close for entire days at a time, while imposing unpaid furloughs upon courthouse staff. Meanwhile, both the SDNY and the EDNY have postponed replacing obsolete equipment and put off other technology upgrades and infrastructure repair. Although these measures save some costs in the short term, they will ultimately result in additional delays and more expensive repair efforts.
- Alternatives to incarceration, such as alcohol, drug and mental health treatment, have been cut dramatically, increasing the risk of recidivism. In the SDNY, substance abuse treatment services have been cut by 43 percent and mental health services by seven percent.
- The Federal Defenders, critical to the defense of indigent criminal defendants, were especially hard hit by sequestration, resulting in staff furloughs, delays in criminal proceedings and the inability to accept all eligible cases. As a result, cases that could and should be handled efficiently by the Federal Defender have been shifted to private attorneys through the Criminal Justice Act Panel, which is ultimately more costly to the taxpayers.
- Funding constraints have caused a staffing crisis at the SDNY's Bankruptcy Court, which is among the most active such courts in the country. The SDNY draws all types of bankruptcy filings from around the world, including well-recognized mega cases. Moreover, the same economic trends that are used to justify the budget cuts have resulted in substantial increases in bankruptcy filings, further exacerbating the problem.

> NYCLA urges voters and elected officials alike to recognize the critical role of the federal court system in all of our lives—whether or not we are litigants—and support the modest funding it needs to function effectively.

NYCLA urges Congress, at a minimum, to enact what is now S.1371, which would provide the judiciary with a $496 million increase in funding for FY 2014—roughly seven percent more than the funding received by the courts in FY 2013 and enough to restore what was lost to sequestration. Absent adequate funding, the courts cannot effectively and efficiently adjudicate the cases that come before them, nor can the Federal Defenders provide the representation that the Sixth Amendment demands.

The federal judiciary is not merely another federal agency. Although it costs less than 0.2 percent of the federal budget—20¢ out of every $100—the judiciary is a separate and co-equal branch of our government with a mandatory constitutional role in our democracy. It should not be a pawn in partisan games, nor a victim of Congressional gridlock. NYCLA urges voters and elected officials alike to recognize the critical role of the federal court system in all of our lives—whether or not we are litigants—and support the modest funding it needs to function effectively.

The Report and these findings would not have been possible without Task Force on Judicial Budget Cuts Co-Chairs Michael Miller and Hon. Stephen Crane and the hard work of Task Force members Vince Chang and Michael McNamara. We thank you for your dedication to bringing further awareness to this important issue.

As always, NYCLA's leadership welcomes input on all of the issues important to this Association, including budget cuts. Feel free to tweet me @nyclapres or send me an email at bmoses@maglaw.com.

Barbara Moses, President
New York County Lawyers' Association

"Does Your Body Have a Mind of Its Own?"

By Maria Guida

In the office, boardroom, or courtroom, are you in control of your body language when you speak? Or does your body "have a mind of its own?" The answer is directly related to the way you are perceived by others.

Consider the following: A 2007 study by the American Optometric Association found that vision was the number one sense that people would not want to live without. Dr. Vince Young, an ophthalmologist at Albert Einstein Medical Center in Philadelphia, says, "Americans tend to fear vision loss more than anything—more than memory loss or heart disease."

This finding has direct relevance to the way attorneys speak during the business day, whether inside or out of the courtroom.

Savvy attorneys (like actors) are always mindful of the fact that, when jurors, clients, prospects, and "the other side" can see you, they are not just "seeing," but watching you carefully. They are noticing—consciously or subconsciously—four basic non-verbal communication pathways, including your body language and gestures.

They are forming perceptions about you every second, and the perceptions they hold about you are powerful and lasting.

Messages communicated through body language vary according to culture. Here are just three basic points about general perception among people raised in the United States. How often we forget them!

- A smile is the most direct way to say, "I'm happy to be in your presence." Be generous with your smiles! Attorneys can use the smile to engage, disarm, and even confuse the listener! Use smiles strategically and *genuinely*.
- The head nod is very important in communication and tells the communication partner "I understand" and/or "I agree." It helps elicit a positive response in your communication partner and is particularly effective when you are involved in negotiation. Be generous and strategic with your head nods!
- Raising your hand or fingers in front of your mouth during business discussions can be perceived to be a withholding of information or reluctance to be completely forthcoming.

Remember that jurors and other face-to-face listeners are not just passively seeing; they are watching you carefully and *interpreting* meaning from every aspect of your body language.

Do the following. Rehearse a short talk in front of a trusted colleague, and be willing to discuss and consider the feedback you receive about your body language. Strive to make any necessary adjustments in your physical demeanor, even if it takes you out of your comfort zone. The more you practice new behaviors, the more comfortable these behaviors will feel on your body.

This will have a dramatic impact on the way you are perceived.

Maria Guida is a speaking strategist/coach at major law firms and law associations, as well as a corporate and television spokesperson. As an actor on Broadway, TV, and film, she has worked with Paul Newman, James Earl Jones, and Kevin Kline. Maria can be reached at 718-884-2282 or via email at maria@successfulspeakerinc.com.

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NEW YORK COUNTY NYCLA LAWYERS' ASSOCIATION

Message From the NYCLA Foundation
A Time To Give Back

With Thanksgiving right around the corner, November is a quintessential month for reflecting and counting blessings. Here at NYCLA we are thankful for all of our members—and for all they do to better our community. Our members take on leadership roles and serve to provide other members with educational opportunities to better their careers; they lead initiatives to drive improvements in the New York legal community through advocacy and policy work; and financially support the organization so we can offer leading benefits.

We also give thanks in the form of help to the legal community. In keeping with NYCLA's mission to provide "free legal services for the indigent, low-income and other persons in need," we organize various *pro bono* projects. NYCLA is helping those who cannot get adequate representation:

> Here at NYCLA we are thankful for all of our members—and for all they do to better our community.

- NYCLA partnered with the New York County District Attorney's Office to offer five free classes in September and October aimed at helping small business owners understand and comply with state and city tax laws and regulations. Many small business owners in New York lack the knowledge necessary to comply with the complex laws and regulations that can land them in trouble with the District Attorney's office. The workshops, covering labor, tax compliance, construction law, and licensing, aimed to help prevent this from happening.
- A new *pro bono* program, the Veterans Discharge Upgrade *Pro Bono* Pilot Program, will help to provide much needed services on behalf of veterans who have served our country. It will provide *pro bono* legal assistance to unrepresented veterans seeking to upgrade the characterization of their discharge from the military services and will help fill a large unmet need for veterans seeking to obtain military benefits, many of whom suffer from undiagnosed or misdiagnosed post-traumatic stress disorder and traumatic brain injury.

NYCLA needs your help to continue to administer such programs. The NYCLA Foundation, the fundraising arm of NYCLA, is a major component of our ability to continue our mission. This Thanksgiving as you reflect and give thanks, please consider making any size donation to the NYCLA Foundation by going to www.nycla.org and choosing "Giving to NYCLA."

Lewis F. Tesser
President
NYCLA Foundation

DISCRIMINATION

Continued from page 2

York State courts began applying the "but-for" causation standard when adjudicating parallel state and city law claims. One such case was *Ehmann v. Good Samaritan Hospital*[8] where the Nassau County Supreme Court considered an employee's age discrimination claim against Good Samaritan Hospital. In granting the hospital's motion for summary judgment, the court acknowledged the decision in *Gross* and noted that NYSHRL age discrimination claims should be analyzed in the same manner as ADEA claims. It further indicated that the plaintiff had to show that her age was the "but-for" cause of the adverse employment action. The Third Department in *Dekenipp v. New York*[9] faced a similar legal issue in dealing with a plaintiff who alleged age discrimination after he was twice denied a promotion in favor of younger employees. The court cited the federal *Gross* case which imposed the more stringent "but-for" standard in ADEA cases. It then noted the confusion regarding whether the more stringent standard applies to NYSHRL claims. It eventually side-stepped the issue, finding instead that regardless of which standard applied, the plaintiff had failed to establish a claim in the first place by not proving that the defendant's proffered non-discriminatory reasons were pretextual. It should be noted, however, that notwithstanding the court's side-stepping of the issue, the decision still differed substantially from the courts application of the pro-plaintiff NYCHRL. Subsequent court cases have continued to highlight this distinction and accompanying ambiguity.[10]

While local courts initially mirrored the ADEA causation standard, courts later reflected on the differences between the federal, state and city age discrimination statutes and ceased the application of the "but-for" standard. In *Weiss v. J.P. Morgan Chase*[11], the court held that a NYCHRL plaintiff seeking to prove age discrimination is only required to prove that age was a "motivating factor" in the employer's decision. Relying upon the *New York City Local Civil Rights Restoration Act of 2005*[12], the Court in *Weiss* explicitly rejected the application of "but-for" causation as applied to NYCHRL age discrimination cases. After *Weiss*, additional courts began applying the motivating factor analysis to claims brought under the NYCHRL. One such case is *Bennett v. Health Management Systems.*[13] The court in Bennett gave credence to the possibility of employers having mixed motives for their actions, which, in turn, would discount the effectiveness and practicality of the "but-for" standard. The court labeled such a decision-making process as "partial discrimination" and held that such discrimination was prohibited by the NYCHRL.[14] A similar conclusion was reached in *Saenger v. Montefiore Medical Center*[15]. The legal landscape is a bit murkier for age discrimination claims brought under the NYSHRL as compared to similar claims brought under the NYCHRL. Recent decisions by state and federal courts have left unclear whether the "but-for" causation standard should be applied to cases under NYSHRL.[16] In *Najjar v. Mirecki*,[17] the Southern District of New York considered a claim that the plaintiff's employer engaged in age and disability discrimination by terminating plaintiff's employment shortly after he returned to work from treating a medical condition. Even though the New York Court of Appeals had not addressed this issue, the Southern District of New York unequivocally asserted that for ADEA and NYSHRL age discrimination claims, "plaintiff[s] must raise a triable issue that age was the "but for" reason for the adverse employment action."[18] The court, finding that the plaintiff had failed to meets its burden under both the ADEA and NYSHRL, granted the employer summary judgment on these claims. However, since the plaintiff also alleged age discrimination under the NYCHRL, the Court considered these claims under the motivating factor standard and denied summary judgment.

The *Najjar* decision demonstrates why it is imperative that practitioners carefully consider and allege age discrimination claims under federal, state and city law, where applicable. In the *Najjar* case and in many age discrimination cases, the sole claims that remain are those brought under local law.

Conclusion and Practical Applications

As the *First Department*[19] has observed, it is clear that the NYCHRL requires an independent liberal construction analysis *in all circumstances* and an analysis "targeted to understanding and fulfilling what the statute characterizes as the NYCHRL's 'uniquely broad and remedial' purposes, which go beyond those of counterpart state or federal civil rights laws.

Given the increasingly clear, albeit not completely uniform, legal distinction among age discrimination claims brought under the federal, state, and local statutes, attorneys and their potential clients must seriously consider the advantages and pitfalls of the available courses of actions. Should they sue in state court or federal court? Should they sue under ADEA or under the NYSHRL, or if applicable, the NYCHRL? For those cases that involve mere circumstantial evidence without clear indicia that age was *the* "but-for" reason for the adverse employment action, filing solely under ADEA could result in an early and successful motion for summary judgment by the employer. Maintaining a successful claim under the NYSHRL may be equally as difficult because courts have routinely applied *the* "but-for" causation standard to NYSHRL age discrimination claims. In contrast, the NYCHRL is definitely the most lenient and plaintiff-friendly of the three statutes and when possible, plaintiffs' attorneys should avail themselves of its liberality.

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[1] 29 U.S.C. § 623 (a)(1)
[2] 411 U.S. 792 (1973)
[3] 490 U.S. 228 (1989)
[4] 557 U.S. 167 (2009)5 Unemployed Older Workers, Many Face Long-Term Joblessness and Reduced Retirement Security, Government Accountability Office (September 19, 2013; 10:41 am) http://www.gao.gov/assets/600/590882.pdf. This report summarized testimony given by Charles A. Jeszeck, Director of Education, Workforce, and Income Security for the GAO, given before the United States Senate Special Committee on Aging.
[6] Id.
[7] Id.8 2010 NY Slip Op 32616(U) (Sept. 17, 2010).
[9] 97 A.D.3d 1068 (3rd Dept. 2012). Also see Fagan v. U.S. Carpet Installation, Inc., 770 F.Supp.2d 490, 495 (E.D.N.Y. 2011) (explaining that because NYSHRL and ADEA use the term "because of," the state law will be analyzed under the same standard as ADEA claims).
[10] For example, see Mikinberg v. Bemis Co., Inc., No. 12-850, 2013 U.S. Dist. LEXIS 5995, at **11-12 (S.D.N.Y. Jan. 15, 2013) (acknowledging that in light of Gross, different causation standards may apply to claims brought under ADEA and NYSHRL). 11 2010 WL 114248 (S.D.N.Y. Jan. 13, 2010).
[12] Specifically, the Restoration Act amended the construction provision of the NYCHRL to read: The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed.
The New York City Human Rights Law (NYCHRL) was amended by the Local Civil Rights Restoration Act of 2005 (LCRRA) (Local Law No. 85 [2005] of City of NY) to clarify, among other things, that it should be construed, regardless of the construction given to comparable federal and state statutes, "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible."
[13] Bennett v. Health Management Systems, 2011 NY Slip Op 9206, 92 A.D.3d 29, 936 N.Y.S. 2d 112 (1st Dept. 2011)(citing Weiss v. JP Morgan Chase and noting that it not uncommon for employers to have multiple or "mixed motives" for their actions).
[14] Additionally, the court noted that in the context of summary judgment motions, the question would be whether there exists a triable issue of fact that discrimination was one of the motivating factors behind the employer's adverse action. Under the New York City Administrative Code 8-101, discrimination can play no role at all in regards to employment.
[15] 706 F. Supp.2d 494 (2010). In Saenger, the court said that at least in regard to NYCHRL claims, there is a strong basis for applying the more lenient "mixed-motive" / motivating factor standard in which a plaintiff only needs to show that age was a motivating factor in the employer's adverse employment action. Also see Kaiser v. Raoul's Restaurant Corp. et al, 2012 NY Slip Op 31416 (U) (wherein the court opined that the NYCHRL preserves the "mixed-motive" standard in discrimination cases and declared that a discriminatory reason cannot be a contributing factor to an otherwise legitimate action); Colon v. Trump International Hotel, NO. 10 CIV. 4794 (JGK) (citing the strong argument that the NYCHRL standard only requires age to be a "motivating factor", not the "but-for"factor); Loeffler v. Staten Island Univ. Hospital, 582 F.3d 268 (2d Cir. 2009) (quoting the New York Local Civil Rights Act of 2005 for the proposition that the NYCHRL and its federal counterpart are distinct and that "similarly worded provisions of federal and state civil rights laws [are to be viewed] as a floor below which the City's Human Rights law cannot fall".); and Giliberti v. Silverstein Props., Inc., 2012 NY Slip Op 31433 (U).
[16] Hirschberg v. Bank of America, N.A., 754 F.Supp.2d 500, ___ (2010)(declaring "[i]t remains an "open question"…"whether a plaintiff alleging age discrimination under the NYSHRL…must establish `but-for' causation" just as an ADEA plaintiff is required to do pursuant to the Supreme Court's decision in Gross.); Gorzynski v. Jetblue Airways Corp., 596 F.3d 93, 105-06 (2d Cir. 2010)(assuming that the "but-for" causation standard for ADEA claims also applied to NYSHRL age discrimination claims).
[17] 2013 WL 3306777 (SDNY 2013)
[18] Id.

Is There a New "Contested" Future for Guardianships?

By Clifford A. Meirowitz, Esq.

The population is aging, and people are living longer with disabilities that prevent them from managing their person and property. Planning ahead by executing advanced directives, such as a durable power of attorney and a health care proxy, establishes a mechanism whereby a trusted family member or friend can assist an Incapacitated Person (IP). This obviates the need for a court-appointed Guardian. Unfortunately, often no advanced directives are in place. Further, advanced directives may exist but an agent may be negligent, neglectful, abusive, or dishonest, requiring court intervention. Also, sometimes advanced directives are obtained by undue influence or when a person lacks mental capacity to execute them. As a result, guardianships are initiated to appoint individuals or institutions to manage a person's affairs under court supervision.

Under Article 81 of the Mental Hygiene Law, the court seeks to impose the least restrictive form of intervention and tailor an order appointing a Guardian to the needs of the individual. Courts resist taking rights away from an individual unless it is absolutely necessary. Guardianships are brought only as a last resort. They are unique in the mix of legal, personal, financial, and family issues that color such proceedings. This dynamic often leads to discord. Fact patterns may include siblings fighting over decisions regarding a disabled parent, second spouses fighting with the alleged incapacitated person's (AIP's) children from a first marriage, caregivers or substantially younger girlfriends or boyfriends assuming control of finances, receiving large gifts, marrying an AIP with diminished capacity, and being named as a beneficiary of an AIP's Will.

Litigation often involves issues of dignity, independence, placement, care, control and, of course, money. In many cases, families willingly pay out of pocket for the AIP's expenses, and their only motivation is love and affection. However, money is frequently a subject in contested proceedings and at times blossoms into the central issue. Negotiations among opposing counsel often resemble those of estate litigation, except the subject of the proceeding is alive and generally in need of his funds for his care. Orders appointing a guardian may memorialize or reference global settlements that address personal needs issues but also the disposition of property both during and after the life of the IP. The outcome of a contested matter may also include dismissal, the appointment of a temporary guardian, a special guardian for a limited purpose, a guardian of the person or property only, a guardian of the person and property, co-guardians or an independent neutral third party.

Further, the courts have a strong preference for appointing family members and look to the AIP's wishes, preferences, and values in making appointments. However, frequently in contested matters, the court will appoint an independent Guardian from a list maintained by the Office of Court Administration. In high-asset cases, it is very easy for a court to select a Guardian. However, in low-or no-asset cases, contested or uncontested, the court often finds it difficult to find a suitable person to accept the appointment as Guardian. In many of these cases, the IP is a Medicaid recipient and while he or she may have some income, the amounts are not substantial.

In such cases, the court frequently looks to not-for-profit guardianship organizations. Many not-for-profits that accept Guardianship appointments are compensated by the court carving their fee from a portion of the IP's monthly income. The rationale is that such expenditures are necessary for the administrative cost of the proceeding to ensure the medical and physical well-being of the IP. This minimal compensation permits some not-for-profits to function. The not-for-profits, in turn, provide a valuable service to the court in that they provide the judge with a pool of potential guardians in difficult cases where it might otherwise be problematic, if not impossible, to find a guardian to accept the appointment because of lack of funds.

> Planning ahead by executing advanced directives, such as a durable power of attorney and a health care proxy, establishes a mechanism whereby a trusted family member or friend can assist an Incapacitated Person (IP).

Unfortunately, a troubling issue in contested guardianships involves the Human Resource Administration's (HRA) increasingly aggressive challenge to Guardians being compensated pursuant to court order by means of having their monthly fee excluded from the Medicaid calculation of Net Available Monthly Income (NAMI) involving an IP Medicaid recipient. The NAMI is the amount of a nursing home resident's monthly income that is expected to be contributed toward the cost of his care.

Essentially, HRA argues that the Medicaid NAMI calculation is solely the responsibility of a local Social Services District and it has the discretion to decide which expenses will be excluded from NAMI. HRA asserts that its interpretation of its own regulations be given deference and upheld if reasonable and relies on cases such *Matter of Deanna W. v. Rosenblatt*, 908 N.Y.S. 2d 692, 694 (2010) to support this position.

Ironically, a Guardian's involvement in these matters is often necessary for the IP to have access to Medicaid services, which HRA seems to acknowledge. It seems to recognize that fees may be properly excluded from the NAMI calculations if determined to be reasonable by the Social Services District. However, HRA's attorneys suggest that the Guardians requested fees be excluded from the NAMI at the time the Medicaid application is made and, if unsuccessful, pursue administrative remedies to challenge the denial. Realistically, this is unduly burdensome by adding layers of bureaucracy, uncertainty, time, expense, and stress on the Guardian.

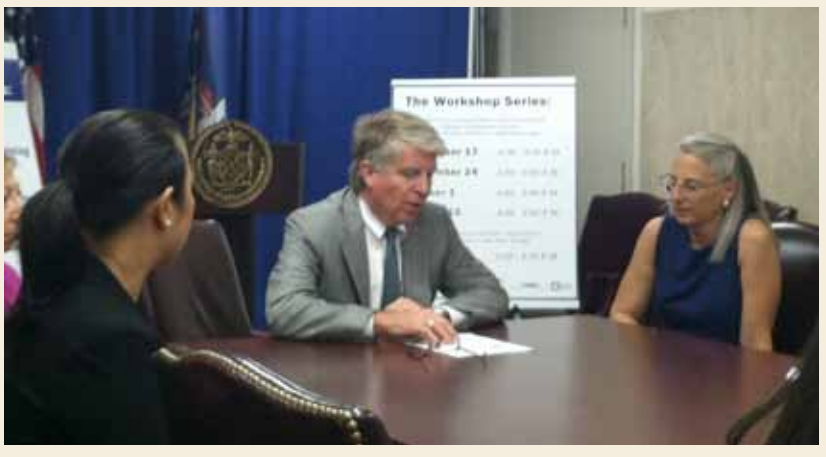
It will be interesting to see the position taken by the courts moving forward with respect to the issue of guardian compensation and its exclusion from the NAMI. Without some level of compensation, some not-for-profits will not be able to function adequately, and without the not-for-profits, or some suitable substitute, there would be a crisis in the court system.

Anecdotally, there appears to be an increase in contested proceedings. As a result, it is important for guardianship attorneys to familiarize themselves with litigation skills in this context, i.e., cross petitions, motions to dismiss, the importance of making a record, etc. They must also be prepared to examine and cross examine witnesses, including expert witnesses. Many guardianships are not conducive to a contest if for no other reason than it places a loved one, generally a senior, in the middle of an ugly court fight at a time when he or she is vulnerable and suffering from diminished capacity. Our adversarial system may ultimately not be the best approach in guardianships because of the unique mix of legal, personal, financial, and family issues. However, that is our system and lawyers must be prepared for battle.

Clifford A. Meirowitz, Esq., a NYCLA Elder Law Committee and Estates and Trusts Section Member and former NYCLA Elder Law Committee Chair, concentrates his practice on elder law, estate planning, wills, trusts, guardianships, Medicaid planning, probate, and related litigation. He was selected for NY's Super Lawyers in 2009-2013 and NY's Best Lawyers in 2012-2013.

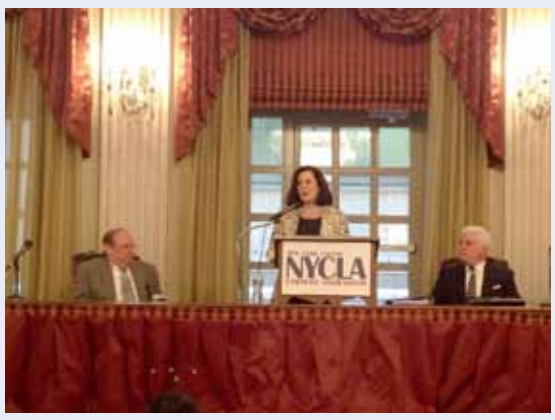
Recent Events

Home of Law Receives Some TLC
NYCLA leadership and volunteers helped spruce up the Home of Law and cleaned old books out of the building on Sunday, August 25.



DA Vance and NYCLA Announce Financial Workshops for Small Business Owners
On September 13, Manhattan District Attorney Cyrus R. Vance, Jr. (center), and NYCLA President Barbara Moses (right), announced a partnership between the District Attorney's Office and NYCLA to offer five free classes aimed at helping small business owners understand and comply with State and City tax laws and regulations.

NYCLA Young Lawyers' Section Holds Mentor Auction
Law students bid at this super fun and high-energy event on September 10 for the opportunity to "shadow" a lawyer or a judge for a day and make a valuable connection.



CLE Presents Jack Newton Lerner Award
Sylvia DiPietro received the Jack Newton Lerner Award for Excellence in Continuing Legal Education at the Jack Newton Lerner Landlord-Tenant Practice Institute on September 20 while former award recipient Hon. Stephen Crane (left) and award presenter Michael Miller (right) listen to her acceptance speech.

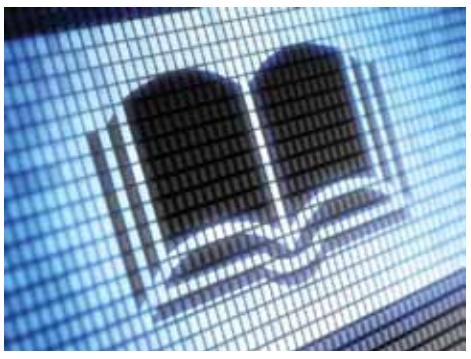
The 2013 Public Service Award recipients are joined by Manhattan District Attorney, Cyrus R. Vance, Jr. (third from right); NYCLA President, Barbara Moses (second from right); and NYCLA Public Service Awards Committee Chair, Catherine Christian (far right). Award recipients, from left to right: Kevin M. Cremin, Director of Litigation for Disability and Aging Rights, MFY Legal Services; Mark Gombiner, Staff Attorney for Federal Defenders of New York Inc.; Celeste L.M. Koeleveld, Executive Assistant Corporation Counsel for Public Safety, New York City Law Department; Felix Lopez, Director of the Legal Services Department, Gay Men's Health Crisis; Irina Matiychenko, Director of the Immigrant Protection Unit, New York Legal Assistance Group; Bonnie Sard, Assistant Manhattan District Attorney; and Betty E. Staton, President of Brooklyn Program, Legal Services at NYC.

NYCLA Presents 23rd Annual Public Service Awards

The 23rd Annual Public Service Awards were presented to a group of lawyers in the public sector who have distinguished themselves as role models, innovators and problem solvers of complex legal issues. The event took place on September 25 at the Home of Law and featured Special Remarks by New York County District Attorney Cyrus R. Vance, Jr.

Criminal Justice Co-Chairs Geoffrey Bickford (far left) and Alison Wilkey (second from right) along with NYCLA President Barbara Moses (far right), congratulate Criminal Justice Fellowship winners Bernard Eyth (second from left) and Caroline Glickler (center).

Library Notes



By Dan Jordan

Jury Verdicts and Settlements

NYCLA Members can look up Jury Verdicts and Settlements at the Library through Westlaw/WestlawNext in the Westlaw database JV-ALLPAT. Searches just for New York can be made through the NY-JVPAT database or for the entire 2nd Circuit, through the JV-2nd-Pat database.

Alternatively, the highly experienced Reference staff can also run a search through a more comprehensive Westlaw verdict and settlement database and e-mail the results to you quickly. Convenience comes at a price, but the Library's fee-based services offer good value to the busy NYCLA Member.

The Less I Know…

If I am starting research in a subject area that I am not particularly familiar with, I have a certain protocol I follow. The less I know about an area the sooner I turn to the ALRs, also known as the American Law Reports. The ALRs, which include the ALRs 1st through 6th and ALR Fed, provide annotations that offer an extensive analysis of a particular narrow legal question from a broad point of view (all 50 states for the ALRs and all circuits for the ALR Fed). Four of the seven annotations from the most recent ALR volume are:

88 A.L.R.6th 1
Oral Statement as Constituting "Affirmation of Fact" Giving Rise to Express Warranty Under UCC § 2-313(1)(a) Gary D. Spivey, J.D.

88 A.L.R.6th 319
Expectation of Privacy in and Discovery of Social Networking Web Site Postings and Communications Ann K. Wooster, J.D.

88 A.L.R.6th 679
Liability Arising from Air Shows or Other Aerial Exhibitions for Injury and Death of Spectators and Participants Marjorie A. Shields, J.D.

88 A.L.R.6th 627
Preemption of State Statute, Law, Ordinance, or Policy with Respect to Employment- and Education-Related Issues Involving Aliens Deborah F. Buckman, J.D.

Each article, which may run hundreds of pages, is updated regularly, has a subject index, and a Table of cases and statutes index that serves as a jurisdiction index. If you are only interested in the New York angle of a question, the jurisdiction index helps you hone in on the New York answers. I consider the ALRs to be very practical law review articles with the benefit of being kept up to date.

Another feature at the end of each article is the Research References, which point the reader toward Thomson Reuters West publications, including references to the Digest Topic & Key Numbers, scores of Westlaw and print titles, treatises, and trial strategy publications like *Proof of Facts* and *AmJur Trials* and forms.

The ALRs are available in the NYCLA Library at no charge through WestlawNext/Westlaw, as are thousands of other databases. There is no charge for printing from the NYCLA computers, and our subscription allows you to e-mail retrieved items to yourself.

Have you signed up yet for the New York State Library-Attorney Borrower's Card?

For information about free Internet-based access to legal information, contact Dan Jordan, NYCLA's Director of Library Services, at djordan@nycla.org for an application for the NYSL-ABC. *Most NYCLA members qualify.*

To make suggestions about book, ebook, or database purchases for the NYCLA Library, please contact Dan Jordan, Director of Library Service, at djordan@nycla.org or at 212-267-6646, x201.

Holiday Toy Drive

Help brighten the holiday season for a needy child by donating a new unwrapped toy to the NYCLA Holiday Toy Drive benefiting Henry Street Settlement. Receptacles will be in the NYCLA Home of Law Lobby from Monday, November 18th through Friday, December 20th.
Program sponsored by the Young Lawyers' Section

Electronic Research Center CLE Programs

November

Westlaw: Introduction to Westlaw Next
November 7 – 10-11 a.m.
1 MCLE Credit: 1 Skills; Transitional

Westlaw: Business Law Research on Westlaw Next
November 7 – 11:30 a.m.-12:30 p.m.
1 MCLE Credit: 1 Skills; Transitional

Lexis: Basic Legal Research
November 14 – 10:30-11:30 a.m.
1 MCLE Credit: 1 Skills; Transitional

Lexis: Advanced Legal Research
November 14 – 12:00-1:00 p.m.
1 MCLE Credit: 1 Skills; Transitional

Lexis: Shepard's Citation Service
November 14 – 1:30-2:30 p.m.
1 MCLE Credit: 1 Skills; Transitional

Westlaw: Advanced Research on Westlaw Next
November 19 – 1:30-2:30 p.m.
1 MCLE Credit: 1 Skills; Transitional

Westlaw: Public Record Research on Westlaw Next
November 19 – 3-4 p.m.
1 MCLE Credit: 1 Skills; Transitional

U.S. Bankruptcy Court Electronic Case Filing System
November 20 – 10 a.m.-12:30 p.m.
2.5 MCLE Credits: 2.5 Skills; Transitional (Also NJ)
Member: $65; Non-member: $85; Non-legal Staff: $35

December

Westlaw: Introduction to Westlaw Next
December 5 – 10-11 a.m.
1 MCLE Credit: 1 Skills; Transitional

Westlaw: Real Property Law on Westlaw Next
December 5 – 11:30 a.m.-12:30 p.m.
1 MCLE Credit: 1 Skills; Transitional

Lexis: Basic Legal Research
December 12 – 10:30-11:30 a.m.
1 MCLE Credit: 1 Skills; Transitional

Lexis: Advanced Legal Research
December 12 – 12:00-1:00 p.m.
1 MCLE Credit: 1 Skills; Transitional

Lexis: Expert Witness
December 12 – 1:30-2:30 p.m.
1 MCLE Credit: 1 Skills; Transitional

Westlaw: Advanced Research on Westlaw Next
December 17 – 1:30-2:30 p.m.
1 MCLE Credit: 1 Skills; Transitional

Westlaw: Form Finder / Form Builder on Westlaw Next
December 17 – 3-4 p.m.
1 MCLE Credit: 1 Skills; Transitional

U.S. Bankruptcy Court Electronic Case Filing System
December 18 – 10 a.m.-12:30 p.m.
2.5 MCLE Credits: 2.5 Skills; Transitional (Also NJ)
Member: $65; Non-member: $85; Non-legal Staff: $35

Unless otherwise noted, courses are free and open to the public.
Register at nycla.org

Questions? Contact Irina Chopinova at ichopinova@nycla.org or 212-267-6646 Ext. 203.

In The News

A roundup of recent national and local news stories featuring NYCLA and its members

New York Law Journal
Citing Budget Cuts, Judge Rejects Juror-Protection Measures
September 24, 2013

This article mentions NYCLA's report on budget cuts to the federal court system.

Law360.com
NY's 'Gay Marriage' Judge Recalls Whirlwind After Ruling
September 20, 2013

This article features discussion that took place at NYCLA's September 19 Continuing Legal Education program, *Road to Victory: U.S. v. Windsor*, Proposition 8 and their Aftermaths.

New York Law Journal
Events Aim to Educate Asian-American Business Owners
September 17, 2013

This article covers a partnership between NYCLA and the NY County DA's office to "prevent New York's small business owners—particularly those from foreign countries—from inadvertently running afoul of state and local laws and regulations."

Law360.com
Voter Apathy Could Doom Later Retirement For NY Judges
September 16, 2013

A state proposed constitutional amendment to raise the retirement age of judges is discussed in this article that mentions NYCLA's support.

New York Law Journal
Groups Back Amendment to Raise Retirement Age
September 16, 2013

NYCLA is mentioned in this article as one of two lawyers' groups that have endorsed the proposed constitutional amendment to allow some state judges in New York to remain on the bench until age 80.

New York Law Journal
Pro Bono Requirement Modified to Help LL.M. Students
September 16, 2013

Responding to concerns voiced by law school deans, New York will give foreign master of law degree students more time to meet the requirement that new lawyers perform 50 hours of *pro bono* service before being admitted to the bar. This article mentions that "A task force within the New York County Lawyers' Association chaired by Catherine Ann Christian, an assistant Manhattan district attorney and former NYCLA president, is studying the *pro bono* requirement as it applies to L.L.M. students."

New York Law Journal
NYCLA Sounds Alarm on Dire State of U.S. Judiciary Budget
September 11, 2013

This article says, "With crucial funding decisions nearing in Congress as the Sept. 30 end of the fiscal year approaches, the New York County Lawyers' Association is trying to raise awareness about what it calls the dire state of the federal judiciary budget."

New York Law Journal
Defense Groups Take Conflict Cases Under City's New Plan
September 6, 2013

Matter of the New York County Lawyers' Association v. Bloomberg, 155 is discussed in this article. It says, "On Monday, The Legal Aid Society and criminal defense groups in Manhattan, Brooklyn, Queens and the Bronx will begin representing indigent defendants in cases where the primary defense organization is barred by a conflict, taking the place of 18-b attorneys in most cases."

Wall Street Journal, WSJ.com and WSJ Law Blog
Federal Courts 'Crisis' Seen Due to Cuts
September 5, 2013

This article focuses on the effects of the budget cuts to the courts and goes in depth citing examples found by NYCLA's Task Force on Judicial Budget Cuts. It says, "The New York federal courts are unique, and thus, cuts to the budget… have particularly detrimental effects, according to the report from the New York County Lawyers' Association. According to the bar association's findings, the overall budget for the SDNY is now lower than it was in 2008, minus rent paid to the General Services Administration, while the 2013 budget for the EDNY is lower than it was in 2005."

Thomson Reuters Westlaw
Federal courts facing crisis after budget cuts, N.Y. bar group says
September 5, 2013

This article also covers the deep budget cuts to the federal judiciary and offers insight from NYCLA's recent report.

Law360.com
NY Lawyers' Group Says Judicial Cuts Jeopardizing Courts
September 4, 2013

"Deep and lingering judicial budget cuts have compromised public safety and eroded efficient administration of the courts in the Southern and Eastern Districts of New York, according to a report released Wednesday by the New York County Lawyers' Association."

Staten Island Advance
Letter to the Editor: Columnist's judge-bashing has no place in debate
August 27, 2013

A letter submitted by NYCLA in response to the Aug. 20 Daniel Leddy column, "Stop-and-Frisk Legal Fight Is Far from Over," says that Daniel Leddy should know better than to devote his column this week to a scathing attack on U.S. District Court Judge Shira Scheindlin, who recently held that the New York Police Department's stop-and-frisk policies violate New Yorkers' constitutional rights.

New York Post
Bloomberg slams stop-frisk judge: 'What does she know about policing? Absolutely zero'
August 16, 2013

This article about federal judge Shira Scheindlin's stop-and-frisk ruling mentions a statement NYCLA published after she was criticized over this controversial topic.

Law360.com
Bloomberg Attack On Stop-And-Frisk Judge Riles Some Attys
August 14, 2013

This article talks about comments by New York City Mayor Michael Bloomberg against the judge who ruled against the city's "stop-and-frisk" policy and NYCLA's reaction.

The Guardian
New York's stop-and-frisk trial comes to a close with landmark ruling
August 12, 2013

This article mentions that NYCLA wrote a letter to the *New York Daily News* in response to an article criticizing Judge Scheindlin's ruling.

New England Law Review
Foreword: Crisis in the Judiciary
Summer 2013

Volume 47 of this publication features a forward by NYCLA's Immediate-Past President Stewart D. Aaron about the current crisis facing the judiciary.

AGING

Continued from page 1

identifying the client. The attorney should then confirm the identification of the client with the persons present during the initial consultation.

When other family members bring or accompany a client to a meeting with an attorney, the attorney should explain why a confidential meeting is important. If a physically frail, aging client insists that a younger family member be present for the entire meeting, the attorney should make sure the client understands the benefits of a private, confidential meeting even if the client nevertheless rejects the opportunity to meet privately.

Acceptance of a payment of client fees by a third party is governed by Rule 1.8(f) the New York Rules of Professional Conduct, directing legal practitioner to accepts payment of client fees by a third party only after: (i) the client has given informed consent; (ii) determining that such payment will not influence the attorney's independent professional judgment on behalf of the client or interfere with the attorney-client relationship; and (iii) ensuring that the client's confidential information is protected.

Finally, the attorney should explain the obligation of confidentiality to the client and the family members to avoid misunderstanding and to ascertain and respect the client's wishes regarding the disclosure of confidential information.[6] An attorney should begin the initial consultation with an explanation of the confidentiality rules. When a client requests disclosure, the attorney should help the client understand the possible risks and consequences of disclosure. The waiver or release of confidentiality should be placed in writing.

Client's Competency

You have been representing Rose for many years. In light of Rose's declining health, she decides she would like to sell her home and move into an assisted living facility. She retains you once again. Over the past month, you begin to notice that Rose is having memory problems and gets easily confused. On some occasions, Rose says that she would want her children and grandchildren to inherit her house. On other occasions, Rose calls you and discusses selling the home and does not mention any desire to possibly leave it to her children.

The above-mentioned scenario presents at least three problems. First, how do you, a legal practitioner with no mental health background or training, assess Rose's mental capacity? Second, if you conclude that Rose's mental capacity is diminishing, should you continue representing her or withdraw from representation? Third, if you decide to continue representing Rose in light of her diminishing capacity, is there anything you can do to still maintain a normal attorney-client relationship with her?

Comment [6] to Rule 1.14 of the New York Rules of Professional Conduct provides some guidance to legal practitioners in determining the extent of the client's diminished capacity, directing practitioners to "consider and balance such factors as: (i) the client's ability to articulate reasoning leading to a decision; (ii) variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and (iii) the consistency of a decision with the known long-term commitment and values of the client."

Suppose that after evaluating Rose's behavior in light of the above-mentioned factors, you conclude that there are some mild capacity concerns, but they are not substantial. According to Rule 1.14 "[w]hen a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a *conventional relationship* with the client." [emphasis added]. Comment [1] to Rule 1.14 elaborates further that "[c]onventional client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters."

So what can you do to properly advise and assist Rose who is displaying some signs of diminishing cognitive capacity? In her 1988 article "Elderlaw: Representing the Elderly Client and Addressing the Question of Competence," Linda F. Smith, Professor at the University of Utah, S.J. Quinney College of Law, suggests using a technique of gradual counseling that is useful in compensating for age-related differences in memory and problem-solving ability, and when there are questions about capacity.[7]

Professor Smith suggests that the legal practitioner: (1) reconfirms the client's basic goal or problem to be solved; (2) gets feedback from the client to ensure he or she agrees with the practitioner's statement of the problem; (3) ascertains the most important values the client expresses, restates these values and confirms with the client, and recognizes that the values of an aging client may differ from those of the attorney; (4) describes the best option for attaining the client's goal and asks for the client's feeling about that option; (5) explains each relevant option and gets the client's reaction; and (6) gives the client feedback that might be helpful.

Conclusion

Working with aging clients often compels a legal practitioner to change his or her lawyering approach. In an effort to accommodate an aging client's needs and wishes, an attorney may have to interact with the client's family members more often than the attorney is accustomed to, as was described in Part I. However, the attorney still has ethical obligations to clarify who his or her client is and to explain to both the client and the family members that a payment of the client's legal fees by a family member does not create an attorney-client relationship between an attorney that the paying family member nor can client information be shared with family members without the client's written approval. The American Bar Association has materials to help the family understand the importance of ethical rules.[8]

Furthermore, working with aging clients requires legal practitioners to be alert and attentive to possible signs of diminishing capacity. There may be situations where an attorney has to undertake protective actions and withdraw from representation. In most other situations, continued representation is possible, requiring an attorney to maintain a conventional relationship with the aging client. Yet, in order to accommodate the aging client's cognitive changes, a legal practitioner may consider adopting a gradual counseling lawyering technique described in Part II that focuses on helping a client understand and make choices through a process of clarification, reflection, and feedback.

[1]http://www.aoa.gov/AoARoot/Aging_Statistics/index.aspx. [2] This article does not address the issue of undue influence on the aging client by a family member. However, a legal practitioner working with aging clients should be vigilant to possible signs of undue influence. [3] Commission on Legal Problems of the Elderly of the American Bar Association and Legal Counsel for the Elderly, Inc., Effective Counseling of Older Clients. The Attorney-Client Relationship, available at http://www.americanbar.org/content/dam/aba/administrative/law_aging/2012_aging_bookD15289_effectivecounselingolderclients.authcheckdam.pdf. [4] Id. [5] National Academy of the Elder Law Attorneys, Aspirational Standards For The Practice Of Elder Law With Commentaries, available at http://www.naela.org/App_Themes/Public/PDF/Media/Aspirational-Standards.pdf [6] Id. [7] Linda F. Smith, Representing the Elderly Client and Addressing the Question of Competence, 14 J. of Contemporary L. 61 at 92-96 (1988). [8] The ABA Commission on Law and Aging, Understanding the Four C's of Elder Law Ethics, available at http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011_aging_4c_broch_jul_25_2011.authcheckdam.pdf.

Sofiya Nozhnik, Esq., a Member of NYCLA's Elder Law Committee and Trusts and Estates and Young Lawyers' Sections, is an Associate with the Law Office of Antar P. Jones, PLLC and practices in the areas of Estate Planning, Guardianships, and Surrogate's Court proceedings. She is fluent in Russian. Sofiya would like to thank Kim F. Trigoboff, an attorney specializing in elder law, for her guidance and encouragement in writing this article.

Upcoming Events

November

Law and Literature Committee Award Ceremony and Program
Tuesday, November 12 – 6 p.m. • CLE credit available

Join NYCLA's Law and Literature Committee as it presents its prestigious Law and Literature Award to Professor James Simon. For the past 15 years, the NYCLA Law and Literature Award has recognized the contributions of authors, who through their writings of fiction, non-fiction or poetry, have enhanced the public's understanding of the legal profession, legal systems, or legal issues. Prior recipients of the award include Jeffrey Toobin, Anthony Lewis, and Louis Auchincloss. This year's award winner, Professor James Simon, through his books about Presidents and Chief Justices of the Supreme Court, has explored the relationship of these two key figures in American history.

Jumpstart Your Practice: Planning for 2014
Thursday, November 14 – 6 p.m.

When you understand where your best clients come from, you can be proactive about targeting your marketing efforts for a more profitable and rewarding clientele. That's the focus of this interactive workshop designed for attorneys who want to jumpstart their planning for 2014. Participants will come to this workshop having completed a brief diagnostic questionnaire. The workshop will facilitate an exchange of questions and ideas on what each attorney can do, given their practice development strengths and opportunities, to plan their efforts in the year ahead. No names of clients will be discussed. We will look at your practice by type of business or individual and referral source. Participants will also learn about best practices of other lawyers and law firms, and how these best approaches can offer clues to improving their own practice development initiatives. Workshop facilitator: Russ Korins, Esq., Director of Marketing, Cohen Tauber Spievack & Wagner, P.C.

Holiday Season 2013 Kickoff
Wednesday, November 20 – 6:30 p.m.
Fiddlesticks, 56 Greenwich Avenue
Hosted by NYCLA's Young Lawyers' Section
$15 members/$25 non-members *Includes cover and appetizers. Happy Hour drink specials available: $4 beer/wine; $5 mixed drinks.

December

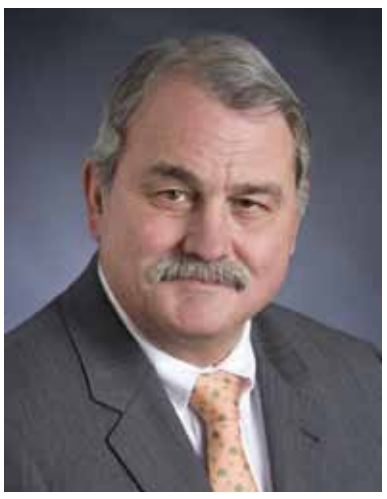
99th Annual Dinner—Celebrating Service to the Bar and the Community
Tuesday, December 17, 2013
Reception – 6:30 p.m., Dinner – 7:30 p.m.
Waldorf Astoria Hotel

Gather with colleagues and the New York legal community for an evening of celebration at NYCLA's **99th Annual Dinner**. This special event will ***Celebrate Service to the Bar and the Community*** and will honor the Law Firm Partners and In-House Counsel who lead the *pro bono* efforts of their firms and corporations.

All events, unless otherwise noted, will be held at NYCLA Home of Law, 14 Vesey Street. Visit the Association's website, nycla.org for more details, schedule changes and additions, and to R.S.V.P. for events, which are subject to change.

99th Annual Dinner To Celebrate Service to the Bar and the Community

NYCLA to Honor Sager, Sherburne, and Authors at Annual Dinner



On **Tuesday, December 17**, the New York legal community will gather for an evening of celebration at the Waldorf Astoria Hotel for **NYCLA's 99th Annual Dinner**. This special event will Celebrate Service to the Bar and the Community and will honor law firm partners and in-house counsel who lead the *pro bono* efforts of their firms and corporations. Annual awards to be given include:

- **The William Nelson Cromwell Award** will be presented to **Jane C. Sherburne**, *Senior Executive Vice President*, *General Counsel* and *Corporate Secretary of Bank of New York Mellon* for her leadership and dedication to *pro bono* service.
- **NYCLA's Diversity Award** will be presented to **Thomas L. Sager**, *Senior Vice President* and *General Counsel of DuPont* for his leadership, efforts and achievements in increasing diversity in the legal profession.
- The **Boris Kostelanetz President's Medal** will be presented by **Michael Suchsland**, *President of Thomson Reuters Legal*, to the authors of the critically acclaimed six-volume treatise *Commercial Litigation in New York State Courts*, published by NYCLA and Thomson Reuters.

This black tie event will begin at 6:30 p.m. with a reception and will follow with dinner at 7:30 p.m. *Visit nycla.org to reserve your space.*

Ethics Hotline

The Committee on Professional Ethics accepts both written and telephone inquiries on ethics matters and provides advisory opinions. For additional information, call the members listed below.

Questions to the Hotline are limited to an inquiring attorney's prospective conduct. The Hotline does not answer questions regarding past conduct, the conduct of other attorneys, questions that are being litigated or before a disciplinary committee or ethics committee, or questions of law. This notation shall not be construed to contain all Hotline guidelines. For a full discussion of Ethics Hotline guidelines, please see the article below, "Guidelines on NYCLA's Ethics Hotline," published in the September 2006 issue of *New York County Lawyer.*

November 1-15
David Wiltenberg, 212-837-6880

November 16-30
Gordon Eng, 203-769-8812

December 1-15
Wally Larson, 212-225-2359

December 16-31
Malvina Nathanson, 212-608-6771

Please Note: Assignments are subject to change.

Attention NY Practicing or Retired Lawyers Age 55+

Register for the New York State Unified Court System's "Attorney Emeritus" status and help make an impact on the lives of those in need of legal advice and guidance.

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PROXIES

Continued from page 1

health care decisions for their patients.

The authority of a surrogate to act commences upon the determination by an attending physician that the patient is incapacitated. After that determination, the surrogate has the right to make any and all health care decisions on the patient's behalf that the patient could make in accordance with the criteria established in the statute. The surrogate is required to make decisions in accordance with the patient's wishes, including the patient's religious and moral beliefs or, if they are not reasonably known and cannot be determined with reasonable diligence, in accordance with the patient's best interests. Decisions to withdraw or withhold life-sustaining treatment can be made upon a medical determination that treatment would be an extraordinary burden, and that the patient has an illness or injury which can be expected to cause death within six months whether or not treatment is provided, or the patient is permanently unconscious. Life-sustaining treatment can also be withheld if the provision of treatment would involve such pain, suffering, or other burden such that it would reasonably be deemed inhumane or extraordinarily burdensome under the circumstances and the patient has an irreversible or incurable condition.

Relying on the Family Health Care Decisions Act May Not Be Appropriate for Many Clients

There are many reasons why a client may not want to rely on the Family Health Care Decisions Act as a mechanism for decisions to be made with regard to health care should the client become incapacitated.

First, the priority established by law may be inconsistent with the client's wishes. For example, the client may want to have a sibling make health care decisions, but under the law parents have priority over siblings.

There may be multiple individuals (i.e., children) with equal priority to make health care decisions under the Family Health Care Decisions Act. The law does not have an easily usable mechanism to establish who would make health care decisions if people with the same priority disagree.

If a client is relying on the statutory list, it probably means that the client has not communicated his or her preferences with regard to family members. This means that whomever ends up making decisions would be forced to guess about what the client would want under the circumstances. The client could end up having the right person make the decisions and still have a bad result.

In addition, the authority of someone acting under the Family Health Care Decisions Act with regard to termination of life support is more limited authority than someone acting with a health care proxy. This may be inconsistent with the client's wishes.

The Decision-Making Process for People with Health Care Proxies

After consultation with an appropriate medical professional, the agent under a health care proxy has the right to make health care decisions in accordance with the principal's wishes if known, or if they are not known and cannot be determined with reasonable diligence, in accordance with the principal's best interests. The only restriction on the right of the health care agent to terminate life support is that if the wishes of the principal with regard to the administration of artificial nutrition and hydration are not known and cannot be determined with reasonable diligence, the agent does not have the authority to make decisions with regard to those measures.[5]

Advising a Client about How To Pick a Health Care Agent

The New York health care proxy law permits the principal to name one agent and alternates. It is not always easy for a client to determine whom to pick. The law does not permit the naming of two people, to act at the same time. In addition, the correct choice is not necessarily the obvious one. Here are some general guidelines.

First and foremost, the client should pick a person who the client literally trusts with his or her life. The truth of the matter is that most people's obvious choice for health care agent is the person who will inherit their money when they die.

Second, a health care agent needs to be sophisticated enough to manage the health care system. The usual job of a health care agent is to make sure that the principal receives proper care and treatment from hospitals and other health care institutions. Health care institutions are often large bureaucracies. It sometimes takes significant time and effort to make sure that the right level of care is being provided.

Third, the health care agent needs to have the strength of character to make difficult decisions. Sometimes deciding what health care to provide to a person is not an easy choice. It requires someone to carefully assess the risks and benefits. In addition, not everyone has the ability to tell the physician to stop providing care to a loved one, even if he or she knows with certainty that termination of life support is what the loved one would want.

Fourth, the health care agent needs to have the persistence to obtain accurate information. This is important in order to make sure that the principal receives the care and treatment that is needed. This is particularly important with regard to decisions to terminate life support. There are two main underlying assumptions to a decision to terminate life support. The first is that the prognosis of the physician is correct. The second is that it is appropriate to forgo possible advances in medical technology that, at least theoretically, could occur in the near future. A health care agent needs to be able to evaluate information provided by health care professionals in this context and obtain second opinions when necessary.

Fifth, if possible the client should be encouraged to choose a health care agent who lives relatively nearby. That way the agent can meet with health care professionals if necessary.

Helping a Client Structure a Conversation with Family Members

Being a health care agent can be an enormous burden. It means taking responsibility for and managing someone else's health care. In extreme situations, it can mean making decisions to terminate life support. It is the kind of responsibility that makes people lose sleep at night.

It is, therefore, important to emphasize to the client that if the client is going to ask someone to undertake this responsibility, the client owes it to that person to make the job as easy as possible. This means that, as difficult as it is, it is important that the client have a conversation with the agent in which the client makes his or her wishes clear. Depending on the client's family dynamics, it may be important to have the conversation in the presence of other family members. The kinds of issues that the client should discuss with the agent can include the following:

- What treatment would the client want if the client is in a coma or persistent vegetative state?
- If the client has suffered a permanent brain injury that makes the client unable to recognize people or talk to them in a coherent way and, in addition, has an immediate life-threatening illness that can be reversed with treatment, would the client want that illness treated?
- When and under what circumstances would the client want pain medication even if it shortens life?

Completing the Health Care Proxy Form

Copies of the New York State Department of Health Health Care Proxy Form can be obtained on its website.[6] The website includes a discussion of the form and instructions concerning how to fill it out. The key issue for most people is how to complete the part of the form that is headed "optional."

By signing the health care proxy form without modification, a client gives the agent the authority to make any decision that the client could make about health care, including termination of life support, with two exceptions. The unmodified form does not give the agent the authority to terminate artificial nutrition or artificial hydration.

If the client wants the agent to have that authority and the client has not named an alternate agent, the following language should be added to the optional section of the form.

My health care agent knows my wishes concerning the termination of artificial nutrition and artificial hydration.

If the client has named an alternate agent, the following language should be added to the "optional" section of the form.

My health care agent and alternate know my wishes concerning the termination of the artificial nutrition and artificial hydration.

The Advantages and Disadvantages of a Living Will

If the client is not going to sign a health care proxy and there is no one available to act for the client under the Family Health Care Decisions Act, then it is certainly better for the client to have a living will than nothing at all. At least that way there will be some official statement of the client's wishes, particularly with regard to the termination of life support. However, whether or not clients who sign health care proxies or are relying on the Family Health Care Decisions Act for health care decision making should also have a living will is something that the attorney and the client need to decide on a case-by-case basis. There are two inherent problems with living wills. First, there is no statutory or standard form for a living will in New York that is interpreted in a uniform way. This means that even a well-drafted living will or one that is prepared by one of the major not-for-profits in the area and is widely used is ultimately subject to interpretation by those who need to determine the client's wishes.

Second, it is hard to draft a living will that provides specific instructions with regard to all possible future events. This means that inevitably, those responsible for the client's care will need to interpret the general instructions in a living will in the context of specific circumstances. Except in the extremes, a living will can be inherently ambiguous.

Under the law, a living will is a document that can act as a restraint on the authority of a surrogate acting under the Family Health Care Decisions Act or an agent acting under a health care proxy. The reason for this is that both surrogates and health care agents must take the known wishes of the patient into account when they make health care decisions and a living will is obviously evidence of those wishes. Some clients will actively want to impose such a restraint. Other clients will make the decision that they trust the judgment of the person who will be acting on their behalf and do not want the judgment of the agent second guessed by the legal department of a health care institution that reads a living will differently than the surrogate or agent.

Conclusion

As with many other areas of the law, planning for incapacity is one of those things that can be relatively simply to do in advance. The failure to plan can lead to disaster. Assisting clients with this kind of planning is one of the very most important things that we can do for them.

[1]See 10 N.Y.C.R.R. § 400.21(b)(3) and 10 N.Y.C.R.R. § 700.5(b)(3). [2]10 N.Y.C.R.R. § 400.21(b)(2) and 10 N.Y.C.R.R. § 700.5(b)(2). [3]Public Health Law Article 29CC. [4]Public Health Law § 2994d. [5]Public Health Law § 2982. [6]http://www.health.ny.gov/forms/doh-1430.pdf

Ira Salzman, Esq., is a former Chair of NYCLA's Elder Law Committee. He is currently the Co-Chair of the Legislation Committee of the Elder Law Section of the New York State Bar Association and practices elder law in Manhattan.

NYCLA Comments on and Supports Issues

NYCLA frequently reports, comments on, and supports issues affecting the New York City legal community and has recently commented on or supported the following issues:

- NYCLA Adopts Resolution on the Proposed Constitutional Amendment to the New York State Constitution on Judicial Retirement Age;
- NYCLA Adopts Task Force on Judicial Budget Cuts Report on Budget Cuts in the Federal Courts;
- NYCLA submits a letter in response to media regarding District Court Judge Shira A. Scheindlin's Decision on New York City's Stop-and-Frisk Policy.

Learn more on the News & Publications section of nycla.org.

What's Tweeting?

A sample of law-related posts on Twitter this past month

@Forbes: If the police arrest you, should they be able to snoop through your phone? These states say yes: bit.ly/14LJ3rM

@ABAJournal: Revenue per lawyer jumped more than 8 percent at larger law firms in 2012 dlvr.it/3k9BvH

@ABABarServices: Should the requirements for law school be more like B-school? on.tnr.com/137kR2z

@RobertHalfLegal: Do you travel for work? Here are five tips for maximizing your productivity on the road: ow.ly/mBJ30

@LawyerCoach: Insightful observations by @pwoldow about why lateral law firm hires often fail ow.ly/mtO3l

@NYLegal_History: Did you know that Law & Order, 12 Angry Men, and Miracle on 34th Street were all filmed at NY County Courthouse? ow.ly/nEwwQ

@NYLawJournal: Court Made 'Fundamental Error' on Soda Ban, City Says at.law.com/Gwo87h#sodaban#nyc

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