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Elder Law Attorney

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of the New York State Bar Association

Message from the Outgoing Chair

Timothy E. Casserly

When I commenced my duties as Section Chair last June, an unspoken goal of mine was to hand off the Section in at least no worse shape than the condition in which it had been passed on to me, while continuing the long-standing commitment to being a Section of inclusion. I was fortunate in that I followed two Section Chairs, namely Ellen Makofsky and Ami Longstreet, who initiated a number of programs, services and resources for our Section members. Being able to follow them allowed me to continue the momentum they built up with our members, committees and clients. Consequently, it is with great enthusiasm that I am able to hand off the Section to our next Chair, Michael Amoruso, a dedicated Executive Committee and an active membership. And to the cynics who say that this enthusiasm is merely the result of my being

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Message from the Incoming Chair

A CALL TO ACTION!

Michael J. Amoruso

I am honored to serve as your Chair of the Elder Law Section for 2009-2010. A true leader hands the reins to the next in line with the underlying organization in better shape than when he or she received it. Tim Casserly is to be commended for his outstanding leadership this past year and we all owe him a debt of gratitude for his commitment and guidance during another tough state budget season. On behalf of our membership and those we service, Tim, thank you again for your tireless leadership.

As I chart the course for our Section over the next year, I call on each of you to BE INVOLVED. There are many opportunities to be involved with our Section, and the personal and professional rewards are plentiful. Some of my closest friends are people who I have

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able to put the word "Past" before Chair going forward, I must say that having had the opportunity to Chair our Section has been one of the most rewarding and gratifying experiences of my 25 years of professional life. As such, I am excited that my many successors will get to enjoy this experience as well.

As mentioned at the onset, one of my goals was to build on the strengths and involvement of our Section not only within the Bar but among our members and our clients as well. Thanks to our Officers, Committee Chairs and Vice Chairs, District Delegates and Bar staff, I can report that we have been successful in many ways. In terms of "inclusiveness," we brought many new members on to our Executive Committee and more than half of the speakers used for our programs and for the Bar's CLE programs were new to the Section audiences. From a financial standpoint, our Section has added approximately an additional ten percent to our existing surplus. This comes as a result of running Section programs that have not only sustained themselves but, with the help of vendors and exhibitors participating, have made a profit. Consequently, we have reduced registration fees for Section programs (and we will continue to do so) to both attract new members and make it affordable to the many devoted attendees who have helped grow the surplus over our Section's 20-year year existence. Further, I have assembled a task force to submit guidelines for how our Section may use our surplus most effectively to benefit our membership with future programs and services.

We have broadened our CLE programs through the use of Webcasts and we have attracted many new speakers to participate in the many CLE lectures offered around the state. We continue to hold outstanding and innovative programs, such as our most recent *UN*Program held in Poughkeepsie in April and Chaired by Shari Hubner and Martin Hersh.

Our Legislative Committee and many Section members have successfully been involved in drafting and successfully lobbying for and against legislation that affects many of our senior clients. (Thank you Amy O'Connor, Mickey Haggerty, Richard Weinblatt, David Goldfarb and Valerie Bogart for your input and

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A Message from the Incoming Chair

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gotten to know through our Section. On the professional side, this Section has given me the opportunity to help shape New York State public policy as it affects those for whom we advocate, seniors and people with disabilities. You can get involved with our Section at a level that makes sense for your time commitment. For example, bring issues that affect your clients to the attention of the Section, join a committee and introduce fresh new ideas and fresh perspectives to the table, actively participate in the work produced by a committee, write an article for the *Elder Law Attorney*, assist us with member recruitment, help propose legislation on topics that affect our clients, participate in one of our community pro bono clinics and / or attend our Section's meetings. Our ability to successfully promote the interests of those we represent depends upon the strength of our united voice as a Section. Feel free to reach out to me if you have any interest in getting involved with our Section.

I pledge to make our Section's meetings more interactive and practice specific. I feel it is vital that our members leave our meetings with a nugget they can take back to their office and use, whether it is practice management, practice development, planning strategy, or other tips that can assist you in representing your clients. Our summer meeting in Washington, D.C., from July 23-25 provides a unique opportunity for you to spend a day in a workshop with our past Section Chairs to learn cutting-edge planning strategies and address issues that affect our practice and profitability. Imagine the benefit to you and your practice of sharing your fact patterns, strategies, business development and drafting keys with **Muriel Kessler, Robert Freedman, Robert Abrams, Walter Burke, Michael O'Connor, Kate Madigan, Louis Pierro, Cora Alsante, Joan Robert, Howie Krooks, Dan Fish, Ellen Makofsky, Ami Longstreet and Tim Casserly!** We also will hear what the Obama Administration and the Centers for Medicare & Medicaid Services (CMS) have on the agenda for our clients with an update from the lobbyist for the National Academy of Elder Law Attorneys (NAELA), learn how to use the new Power of Attorney form in our practices, and discuss ways to make our practices more efficient and profitable. Do not miss this remarkable opportunity! Aside from the Mets vs. Nationals game and the variety of tours that will be available to see our nation's capital, on the evening of July 24 we will hold the "Hail to the Chairs" Gala

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Editor's Message

I wish to begin my message by congratulating our friend and colleague, Tim Casserly, on a job well done as our Section Chair. Over the last year, Tim has done an exceptional job managing our Section's committees and activities. We owe Tim a debt of gratitude for his exemplary efforts. I also wish to congratulate our friend and colleague, Michael Amoruso, on his election as our Section Chair. I urge you to make the effort to support Mike and our Section in the upcoming year.

As in the past, I am hopeful that you will find this edition of the *Elder Law Attorney* (ELA) both educational and enjoyable. Our first featured article is by JulieAnn Calareso, Esq. JulieAnn has written an excellent piece analyzing the impact of the new rules of professional conduct upon the practice of elder law and elder law attorneys. Valerie Bogart, Esq. and Ira Salzman, Esq., as Co-Chairs of our Medicaid Committee, have written an excellent report analyzing the Status of Spousal Impoverishment in the Lombardi program, and the proposed changes thereto.

We are also fortunate to have an excellent piece by Chris Orestis, the President of Life Care Funding reviewing the potential to cash in a life insurance policy for its life settlement value. Finally, the last of our featured pieces is a book review by yours truly, of *Watered-Down Truth*, written by our former Section Chair, Robert Abrams.

Finally, we have three excellent pieces by our regular contributors, Salvatore M. Di Costanzo, Esq.; Ellen G. Makofsky, Esq.; and Judith B. Raskin, Esq.

I look forward to seeing you at our 20th Anniversary Summer Meeting, July 23-26, at the Ritz-Carlton in Washington, D.C. Please make every effort to attend.

Anthony J. Enea

The New Rules of Professional Conduct for Elder Law Attorneys: Something Old, Something New, Something Borrowed, but Hopefully No One Blue

By JulieAnn Calareso

On December 16, 2008, Chief Judge Judith S. Kaye and the Presiding Justices of the Appellate Division announced the adoption of "The Rules of Professional Conduct," a new set of rules governing attorney conduct for all attorneys admitted to practice in New York (hereinafter, the "Rules," or referred to by specific rule number).[1] The Rules were adopted after the New York State Bar Association's Committee on Standards of Attorney Conduct (COSAC) concluded a five-year study which culminated in presenting the Rules to a committee appointed by the Administrative Board of the Courts.[2] The committee then made rule recommendations that were considered and, ultimately, adopted by Chief Judge Kaye and the Appellate Divisions.[3]

New York elder law practitioners are regularly presented with client situations that require a working knowledge of many areas of law. The elder law practitioner's understanding of the state's ethical rules is involved just as regularly and, often, with fewer concrete answers. The ethical considerations faced by elder law practitioners may include questions raised because the attorney has been retained by one child on behalf of a parent, or by one family member on behalf of another. Similarly, elder law attorneys are often retained to handle matters affecting multiple generations of family members, including family members not present at the initial attorney-client meeting and unannounced before the conflict check. Elder law practitioners also frequently handle matters for people suffering from disabilities due to physical limitations or diminished mental capacities. These situations (and the dozens of variations on these situations) require the elder law practitioner to consider the ethical standards adopted by the state before commencing with vigilant representation of the client's (or clients') interests. The state's ethical standards for attorneys are being changed and this article considers how some of those changes will impact the elder law practitioner in daily practice.

The Rules, effective April 1, 2009, replace the current Canons, Ethical Considerations and Disciplinary Rules contained in the New York Code of Professional Responsibility (referred to throughout as the "Code," or by specific Ethical Consideration or Disciplinary Rule number). The Rules embrace the American Bar Association's model rules format. With New York's adoption of the Rules, the ABA's model rules format will be in use in 48 states, with California and Maine as the only exceptions.[4] Like most states, New York's Rules are not an exact enactment of the ABA Model Rules. In fact, of the 48 states that have adopted the model rules format, no two states have adopted an identical set of rules.[5] Nevertheless, the commentaries have indicated that the purpose of moving to the model rules format was, in part, to allow New York lawyers and courts to make use of a national body of ethics law in conducting research and reaching determinations on ethical issues.[6] In addition, the use of the model rule format will better position New York to set national precedent on ethical issues.[7]

Much of the language of the Rules will be familiar to practitioners, as the language contained in the Code was adopted into the Rules where the Administrative Board of the Courts and the Justices of the Appellate Division felt it was suitable.[8] Moreover, any person who has taken the Bar Examination since 1982 (which is two-thirds of all NYSBA members) has been required to take the Multistate Professional Responsibility Examination, which is based on the ABA Model Rules.[9] It is anticipated that this baseline exposure, coupled with the user-friendly format of the Rules, will allow practitioners statewide to easily adhere to and incorporate into their practices the new ethical standards for the State of New York.

The adoption of the model rules format will result in the Rules being presented in a more cohesive and coherent format than the Code. The Rules are presented in eight basic areas: the Client-Lawyer Relationship, the Counselor, the Advocate, Transactions with Persons Other than Clients, Law Firms and Associations, Public Service, Information About Legal Services, and Maintaining the Integrity of the Profession.[10] Grouping the Rules into these categories permits a practitioner to easily locate and identify specific rules governing particular situations. Several commentators have undertaken the Herculean effort to analyze, compare, contrast and comment on the new Rules and the old Code. Those sources, liberally used in the preparation of these materials and cited throughout, should be read by all practitioners seeking to learn the new Rules. While every attorney should familiarize himself or herself with each of the individual rules, the elder law practitioner should pay attention to several of the Rules in particular. These specific rules are discussed below.

Rule 1.5 is entitled "Fees and Division of Fees." This topic was formerly covered in DR 2-106 and DR 2-107. Though Rule 1.5 is very similar to the Disciplinary Rules it replaces, it now contains a subdivision (b) which requires a communication to the client stating the scope of the representation and the basis or rate of the fee and expenses. Such communication must be made before or within a reasonable time after the start of the representation. Rule 1.5(b) does not apply when the lawyer charges a regularly represented client on the same basis or rate and performs services that are of the same general kind as previously rendered to and paid for by the client. This is similar to the written letter of engagement requirement of 22 N.Y.C.R.R. § 1215, although Rule 1.5(b) does not impose a threshold dollar amount on a matter before requiring communication. Of particular note is that Rule 1.5 does not require the communication to be in writing, whereas 22 N.Y.C.R.R. § 1215 does.

Another rule of particular relevance to elder law attorneys is Rule 1.6. This rule is called "Confidentiality of Information" and is the modern counterpart to DR 4-101. The first thing that is apparent about the new rule is its abandonment of the terms "confidences" and "secrets" and the use, in their stead, of the all-encompassing phrase "confidential information." Confidential information now encompasses those things that were formerly confidences or secrets, including "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential."[11] Excepted from the definition is the lawyer's legal knowledge or legal research, and information generally known in the local community or in the trade, field or profession to which the information relates. The attorney may often find himself or herself facing a barrage of confidential information conveyed from the client, or the client's agent, under a Power of Attorney, which the attorney must then strictly safeguard from disclosure from other family members, social workers and health care providers, facility admissions coordinators and other well-intentioned persons. Vigilance in protecting confidential information must be maintained.

The scope of the exceptions for revealing confidential information has been broadened in Rule 1.6(b) to include the permissible revelation of confidential information to "prevent reasonably certain death or substantial bodily harm." This exception may be particularly poignant to elder law practitioners who find themselves safeguarding information revealed by an elderly client, the disclosure of which may assist in keeping that client safe. An example that comes to mind includes the situation where the client has revealed that he or she has been physically or mentally abused by an adult child but has indicated that no action is being, or should be, taken on this matter. An elder law attorney is obligated to maintain that confidential information, but the Rules now permit an exception when substantial bodily harm is reasonably certain.

As elder law attorneys, we are often a client's primary source of counseling and support. It is not uncommon to have a client indicate a desire to have us personally benefit as a reward for our trusted relationship. The Rules, however, spell out the prohibition on solicitation of gifts from clients that were formerly embodied in Canon 5 and Ethical Consideration 5-5. Specifically, Rule 1.8(c) states that a lawyer shall not "solicit any gift from a client, including a testamentary gift, for the benefit of the lawyer or a person related to a lawyer; or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any gift, unless the lawyer or other recipient of the gift is related to the client and a reasonable lawyer would conclude that the transaction is fair and reasonable." Interestingly, "relatives" include spouses, children, grandchildren, parents, grandparents, or other relatives or individuals with whom the lawyer or client maintains a close, familial relationship. However, the Appellate Division did not include the language proposed by the Bar Association including domestic partners in this definition.[12]

The conflict of interest rule embodied in Rule 1.8 carries forward other significant provisions relating to the elder law practitioner. Rule 1.8(f) contains the rule on accepting payment from third parties that was formerly included in DR 5-107(A) and (B). An attorney can only accept payment from a third party when the "client gives informed consent; there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and the client's confidential information is protected as required by Rule 1.6." The elder law attorney often finds himself or herself collecting fees from children who are expending their own money for services for an elder. Perhaps as frequently, children are expending their parents' funds for such services. In such situations, the attorney is obligated to inquire, both of himself or herself and with the family, as to who the client truly is. While many times the interests of the elder and the family member paying the bill coincide, a clear statement to all involved as to whom the attorney represents, with the required disclosure and consent from the elder, is appropriate.

Rule 1.8(h) expands an attorney's ability to limit himself or herself from a malpractice claim. While this is similar in substance to DR 6-102, it imposes an obligation on the attorney to inform the client or former client in writing of the desirability of securing independent counsel on the issue and affords the client or former client a chance to do so. While one would hope that there won't be widespread invocation of this rule, it will provide a mechanism for protecting an attorney from a client seeking to blaze new legal pathways. An elder law attorney may be more willing to challenge a federal provision of the Medicaid statute or engage in an experimental planning technique if assured of being insulated from suit. An attorney may enter into an agreement with a client to limit prospective liability if the client "is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel in connection therewith."

"While it is still wise business practice to surround yourself with competent and qualified geriatric care managers, doctors, psychologists, accountants and theologians as needed, Rule 2.1 authorizes the attorney to take a compassionate role in the representation of the client by raising with the client external factors worth considering."

Duties to former clients remain as they were in DR 5-108(A)(1). However, under Rule 1.9, if the attorney wishes to represent "another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client" the former client must give consent. The Rule imposes a requirement that such consent be done in writing, which is an addition to the old Code provision. The elder law attorney may find herself in such a situation where initial representation involved the whole family. Clarifying who the client is may be key to avoiding future problems.

One of the most common scenarios that an elder law attorney faces is dealing with clients with diminished capacity. Previously, Ethical Considerations 7-11 and 7-12 contained guidance to attorneys in handling such situations. However, Rule 1.14 now embodies this important situation. The attorney is obliged to maintain "a conventional relationship with the client" as much as is reasonably possible. When there is a reasonable belief that a client (1) has diminished capacity, (2) is at risk of substantial physical, financial or other harm unless action is taken, and (3) cannot adequately act in a client's own interest, then the attorney may "take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator or guardian." Even if the attorney invokes Rule 1.14(b), he or she is still bound by Rule 1.6 (protection of confidential information) but is impliedly authorized to reveal confidential information of the client to the extent reasonably necessary to protect the client's interests, according to Rule 1.14(c). While the inclusion of this provision in the Rules is a significant step and a welcome acknowledgment of the prevalence of this situation in our practice, the Rule itself may create its own level of ambiguities and concerns. What is "substantial" harm? Does diminished capacity require a layman's determination or a professional medical one? As this Rule comes into play, these murky issues will surface and, hopefully, be addressed.

The Rules also contain a new provision that is not found in the Code—a duty to prospective clients. While this may be more relevant in a family law or matrimonial context (where attorney shopping is done to prevent opposition from retaining that counsel), Rule 1.18 now clearly defines the relationship between an attorney and a prospective client regardless of whether a formal attorney-client relationship comes to exist. We may find this provision at work in our practice as large family contingents parade into our conference rooms for initial consultations, only to discuss a divergence of objectives.

Elder law attorneys often find themselves in a position as the elder's or family's first contact in seeking to address whatever situation faces them. Oftentimes, a compassionate elder law attorney is able to clearly see that the situation encompasses much more than legal issues. Rule 2.1 gives attorneys permission to "refer not only to law but to other considerations such as moral, economic, social, psychological and political factors that may be relevant to the client's situation." While it is still wise business practice to surround yourself with competent and qualified geriatric care managers, doctors, psychologists, accountants and theologians as needed, Rule 2.1 authorizes the attorney to take a compassionate role in the representation of the client by raising with the client external factors worth considering. The morality of asset preservation techniques, the spiritual components to end-of-life decision-making, and the emotional toll some decisions may take on a family are often questions we find ourselves facing. Rule 2.1 permits us to highlight other considerations a family or client may wish to address in connection with the legal issue at hand.

On a more practical note, Rule 4.4 governs the often occurring instance of crossed wires. In this day and age of increased electronic communications, hitting the "send" button a little too quickly happens all too often. Unfortunately in the world of instantaneous electronic messaging, messages are sometimes sent to the wrong person. Rule 4.4(b) exists to cover those erroneously sent messages. "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." It is respectfully submitted that the choice of the word "document" may create more ambiguity than clarity, as communications these days often embody electronic means (voice mail, text messages, faxes, and e-mails) more than traditional correspondence. Nevertheless, this rule, which is a new provision in New York's responsibility spectrum, although not new to the ethical debate, places the onus solely upon the sender to take remedial action after the erroneous recipient has notified the sender of such event.

While many of us surely feel that our legal fees sometimes translate into what is essentially *pro bono* work—especially in a court-appointed situation—the Rules lay out the lofty ambitions of *pro bono* legal work in detail. Article 6 of the Rules covers Public Service, and Rule 6.1 identifies the goals of *pro bono* service. An attorney also serving as an officer or member of a not-for-profit legal services organization is not exposed to conflicts of interests that might otherwise disqualify him or her from representing clients in their ordinary course of practice according to Rule 6.3. This Rule will further the ability of top-notch practitioners to serve the vital role of leadership in not-for-profit legal service agencies.

Similarly, Rule 6.4 requires disclosure to a client when an attorney is working on a committee seeking reformation of a law, the reformation of which would adversely affect the client. Alternatively, the attorney is obligated to inform the committee of the fact that he or she is representing someone who will be materially adversely affected by the reformation.

While elder law attorneys may not be advertising their practices in the same manner as some of the personal injury Bar, it is always advisable to be vigilant about compliance with the attorney advertising rules. Most practitioners are familiar with the attorney advertising rules due to the significant revision that took effect in 2007.[13] These rules, with which we have become so familiar, are now embodied in Rules 7.1, 7.2, 7.3 and 7.5. The significant revision to the attorney advertising rules in 2007 came about after being examined at length by the court in 2005 and 2006. While the Rules adopt the language from DR 2-101 and DR 2-103, there is a current legal challenge to some of those rules, the outcome of which may indicate whether a modification to the Rules is required. *Alexander & Catalano v. Cahill* was a suit commenced in the Northern District of New York by a Syracuse law firm challenging, on a constitutional basis, the new attorney advertising rules.[14] At the trial level, the case resulted in five specific attorney advertising rules being voided: (1) use of moniker that imply an ability to obtain results (contained in former DR-2-101(C)(7) and now in Rule 7.1(c)(7)); (2) portrayal of judges or fictitious law firms (contained in form DR-2-101(C)(3) and now in Rule 7.1(c)(3)); (3) use of attention-getting techniques that lack relevance in selecting a lawyer (contained in former DR-2-101(C)(5) and now in Rule 7.1(c)(5)); (4) use of client endorsements or testimonials in pending matters (contained in former DR-2-101(C)(1) and now contained in Rule 7.1(c)(1)); and (5) use of Internet pop-up advertisements except on the lawyer's own Web site (contained in former DR-2-101(G)(1) and now contained in Rule 7.1(G)(1)).[15] The state has appealed the decision, and oral argument was heard by a three-judge panel on January 22, 2009.[16] An injunction stands pending the outcome of the appeal. It will be interesting to see how this appeal comes out, as it will affect how attorney advertising continues to occur in New York State.

Another provision that elder law attorneys should be ever mindful of is the provision in the Rules that prohibit a lawyer or her firm from advertising themselves as "specialists" or "experts" in any area of law. Formerly, DR 2-105 embodied this prohibition, and Rule 7.4 now states that a "lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law." There are the exceptions for those attorneys who have received recognition or certification as a specialist by a private organization approved by the ABA for that purpose, such as NAELA. However,

> a lawyer who is certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association may state the fact of certification if, in conjunction therewith, the certifying organization is identified and the following statement is prominently made: The [name of the private certifying organization] is not affiliated with any governmental authority. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law. Rule 7.4(c)(1).

Therefore, NAELA's certification as a "Certified Elder Law Attorney" (CELA) may be displayed and advertised, provided the required disclaimer is also provided. Many times the use of "specialist" or "expert" is used in an offhanded way to emphasis the level of dedication that we pay to the practice of elder law, but a careful practitioner will train himself or herself to remove such jargon from his or her vocabulary so as not to run afoul of this rule.

One final provision for comment is on misconduct by an attorney, which, unfortunately, remains an issue. The Appellate Division rejected an effort by NYSBA to abandon the catch-all phrase "and other conduct that adversely reflects on the lawyer's fitness as a lawyer" that is embodied in former DR-1-102(A)(7) and is now contained in Rule 8.4(h). An attorney is still obligated to report another attorney for "a violation . . . that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer," according to Rule 8.3. This is carried forward from DR-1-103(A). Therefore, we remain obligated to be watchdogs of our peers and a failure to report such violations is, itself, a violation.

The interesting aside in this issue is that of the conduct of an attorney engaging in the unauthorized practice of law for a different jurisdiction, and the conduct of a non-attorney in the unauthorized practice of law. DR 3-101 and the ethical considerations of Canon 3 of the Code of Professional Responsibility are carried forward in the Rule 5.5. Rule 5.5(a) carries forward the prohibition contained in DR 3-101(A) of a lawyer licensed to practice in New York State from practicing law of a different jurisdiction "in violation of the regulation of the legal profession in that state." As elder law attorneys, we are often asked to address issues for our "snow bird" clients, or to assist in the transfer of property located in other states. Careful observance of this Rule is critical, and a solid relationship with other practitioners in other jurisdictions is good business practice, as well as a potentially valuable marketing tool. In addition, the Ethical Considerations of the Code evidence a desire to protect the integrity of the profession and "is grounded in the need of the public for integrity and competence of those who undertake to render legal services."[17] While the Rules do not carry forward that same verbiage, attorneys licensed to practice in New York State should be protective of the practice of law. When an attorney learns of a non-licensed person engaging in the practice of law, it is advisable to contact one of the many local Bar Associations who have committees in place to receive reports of such action, investigate and report such behavior to the appropriate authorities.

As you can see, the Rules present new challenges for New York practitioners who must now be familiar with the Rules and become comfortable navigating them in daily practice. As more and more attorneys read the Rules, discuss them, and begin to adhere to them in practice we will be better able to serve our clients and honor the legal profession.

Endnotes

1. *See* Press Release, New York State Unified Court System, "New Attorney Rules of Professional Conduct Announced," December 16, 2008, available at www.courts.state.ny.us/press/pr2008_7.shtml, hereinafter referred to as ANYS UCS Press Release.@ New York Judiciary Law authorizes the Appellate Division of the Supreme Court to discipline attorneys for professional misconduct.
2. *See id.*
3. *See id.*
4. *See* New York State Bar Association's Committee on Standards of Professional Conduct Proposed Rules of Professional Responsibility, *available at* www.nysba.org (hereinafter referred to as the "COSAC Report"). *See also* Proposed Rules of Professional Conduct, New York State Bar Association, February 1, 2008, *available at* www.nysba.org (hereinafter referred to as the "NYSBA Report").
5. *See* Krane, Steven, *Meet the New York Rules of Professional Conduct*, New York State Bar Association Continuing Legal Education Seminar, "Meet the New York Rules of Professional Conduct: What's New, What's Changed and What's Remained the Same," January 22, 2009, at page 1.
6. *See* NYSBA Report at xiii-xiv; *see also* COSAC Report at v.
7. *See id.*
8. *See id.*; *see also* Simon, Roy, *Comparing the New NY Rules of Professional Conduct to the Existing NY Code of Professional Responsibility (Part I)*, The New York Professional Responsibility Report, February 2009.
9. *See* COSAC Report at vi.
10. *See* Krane; *see also* New York State Bar Association Proposed Rules of Professional Conduct Report, February 1, 2008, Approved by the House of Delegates on November 3, 2007.
11. *See* Rule 1.0(d), which defines "Confidential Information" as what is defined by Rule 1.6.
12. *See* Krane at page 7.
13. The presiding justices of the Appellate Division adopted amended attorney advertising rules effective February 1, 2007. These amended rules are actually one Disciplinary Rule, DR 2-101, codified at 22 N.Y.C.R.R. § 1200.6.
14. *Alexander & Catalano v Cahill*, 2007 WL2120024, N.D.N.Y., July 23, 2007.
15. *See id.*
16. *See Second Circuit Skeptical Over Restoration of Rules Curbing Content of Ads* by Daniel Weis, Law.com, January 23, 2009, *available at* http://www.law.com.
17. *See* New York Code of Professional Responsibility, Canon 3, Ethical Consideration 3-1.

JulieAnn Calareso is an attorney with the firm of Burke & Casserly, P.C. in Albany, New York.

NYSBA Elder Law Section Report of the Medicaid Committee

April 13, 2009

By Valerie Bogart and Ira Salzman

1. Status of Spousal Impoverishment in Lombardi Waiver—

There is a positive development here. The Lombardi waiver was due to expire December 31, 2008, and the Centers for Medicare & Medicaid Services (CMS) had refused to renew it because New York wanted to keep the spousal impoverishment protections. As previously reported, in the last two years, CMS reversed its 20-year old policy on this and now insists that all spousal protections in waiver programs be eliminated. New York State did eliminate these protections in the new Nursing Home Transition & Diversion Waiver and in the TBI waiver in 2007 and 2008. However, over 3,500 couples now benefit from these protections in the Lombardi waiver, so that elimination of these protections would be a severe hardship. New York State requested an extension on the waiver so that it could amend state law in the budget process to eliminate spousal protections, with the option of reinstating them if CMS policy changed either through political action or litigation. Both Valerie Bogart and Rene Reixach have been in a working group to plan litigation on this if the change were to be implemented.

CMS granted an extension through April 15, 2009, which has now been extended until July 14, 2009. In a very creative resolution, CMS agreed that New York State could switch couples in the Lombardi program who benefit from these protections to be included in the renewal of the separate 1115 Waiver, which was submitted in March 2009. The 1115 waiver encompasses New York's Medicaid managed care programs, while the home and community based waivers are generally under the 1915 waiver. While this would be an unusual use of the 1115 waiver, it could solve the problem.

According to the Home Care Association,

> [S]everal key members of New York's Congressional Delegation, including Senator Charles Schumer and Representative Eliot Engel, have been especially proactive in urging CMS' continuation of the spousal protections. In recent weeks, this advocacy has reportedly paid off, with CMS now working cooperatively with the state to seek solutions to these continued protections.
>
> DOH's legal counsel and Medicaid eligibility specialists are presently evaluating the applicability of the latest waiver extension to the spousal protections—and specifically whether the protections will apply to both current **and** new enrollees during the extension period—while DOH and CMS work out the exact method for the continued protections.

Home Care Association, *ASAP Bulletin*, April 9, 2009.

Meanwhile, Section 42 of the state budget[1] does eliminate the current Medicaid spousal impoverishment protections for those individuals in a LTHHCP and for those in an OMRDD home and community-based waiver program to satisfy a requirement by CMS that these protections be removed in order to renew federal waivers for these programs. The budget provides authority to the Department to reinstate these protections without an amendment to state law if the federal government changes its position.

2. Other State budget issues—As the Legislation Committee will report, we had success on defeating various proposals in the state budget. See footnote 1 for the link to budget law (Article VII bill). Issues on which the Committee worked include:

   a. POOLED SNTs—REJECTED the Executive Budget proposal that the Trust may only retain 10% of the Trust remainder at a beneficiary's death and the balance must go to the state to recoup the Medicaid services provided for such Trust beneficiary.

   b. Long-Term Care Assessment Centers—This proposal, to contract out the role of local districts in authorizing personal care, certified home health (CHHA) care, consumer-directed and other long-term care services was scaled back. It will be a demonstration program in one New York City borough and two upstate counties only, applying to new applicants who apply in these areas after January 1, 2010.

      i. Our efforts ensured a provision guaranteeing due process hearing rights.

      ii. They rejected our request to leave assessment of certified home health care out of this assessment process—as proposed, the local district will have to approve extension of CHHA care beyond 60 days. This will add a new bureaucracy where there was none before. Presently, in most counties, CHHAs assess and reassess care directly without prior approval by the local district, unless a dispute arises between the treating physician and the CHHA, which triggers an appeal process involving the local district under the *Catanzano* case and 18 N.Y.C.R.R. 505.23 Appendix. The enacted law is set forth below.

iii. They rejected advocates' request for consumers to be involved in design of the centers and procedures, but require an annual meeting of stakeholders to discuss implementation.

S 29. The Social Services law is amended by adding a new section 367-w to read as follows:

S 367-W. REGIONAL LONG-TERM CARE ASSESSMENT CENTERS. 1. NOTWITHSTANDING ANY PROVISION OF LAW TO THE CONTRARY, THE DEPARTMENT OF HEALTH IS AUTHORIZED TO ESTABLISH A DEMONSTRATION PROGRAM, WHICH SHALL BE THREE YEARS IN DURATION, UNDER WHICH THE DEPARTMENT SHALL DESIGNATE **TWO LONG-TERM CARE ASSESSMENT CENTERS, THE FIRST OF WHICH SHALL BE ESTABLISHED IN A COUNTY WITHIN THE CITY OF NEW YORK AND THE SECOND OF WHICH WILL BE ESTABLISHED IN ANOTHER REGION CONSISTING OF ONE OR MORE CONTIGUOUS COUNTIES ELSEWHERE** IN THE STATE. SUCH CENTERS SHALL SERVE THE PURPOSE OF TRANSFERRING FROM THE SOCIAL SERVICES DISTRICT TO THE REGIONAL LONG-TERM CARE ASSESSMENT CENTERS RESPONSIBILITY FOR ACTIVITIES RELATED TO THE ASSESSMENT OF A PERSON'S NEED FOR, AND THE AUTHORIZATION OF, LONG-TERM CARE SERVICES AND PROGRAMS IDENTIFIED IN SUBDIVISIONS TWO, THREE AND FOUR OF THIS SECTION. THE DEPARTMENT IS AUTHORIZED TO CONTRACT WITH ONE OR MORE ENTITIES TO OPERATE REGIONAL LONG-TERM CARE ASSESSMENT CENTERS.

2. THE REGIONAL LONG-TERM CARE ASSESSMENT CENTERS SHALL HAVE RESPONSIBILITY FOR ASSESSMENT OF LONG-TERM CARE NEEDS OF AN APPLICANT FOR, OR RECIPIENT OF, MEDICAL ASSISTANCE AND FOR AUTHORIZATION OF SERVICES AND PARTICIPATION IN PROGRAMS INCLUDING: **PERSONAL CARE** SERVICES, INCLUDING PERSONAL EMERGENCY RESPONSE SERVICES, UNDER PARAGRAPH (E) OF SUBDIVISION TWO OF SECTION THREE HUNDRED SIXTY-FIVE-A OF THIS TITLE; **CONSUMER-DIRECTED PERSONAL ASSISTANCE** SERVICES UNDER SECTION THREE HUNDRED SIXTY-FIVE-F OF THIS TITLE; THE **ASSISTED LIVING PROGRAM** UNDER SECTION FOUR HUNDRED SIXTY-ONE-L OF THIS CHAPTER; AND PARTICIPATION IN THE **LONG-TERM HOME HEALTH CARE PROGRAM** UNDER SECTION THREE HUNDRED SIXTY-SEVEN-C OF THIS TITLE AND SECTION THIRTY-SIX HUNDRED SIXTEEN OF

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THE PUBLIC HEALTH LAW, INCLUDING THE AIDS HOME CARE PROGRAM UNDER THE PROVISIONS OF SECTION THREE HUNDRED SIXTY-SEVEN-E OF THIS TITLE AND SECTION THIRTY-SIX HUNDRED TWENTY OF THE PUBLIC HEALTH LAW.

3. NOTWITHSTANDING ANY PROVISION OF SECTION FORTY-FOUR HUNDRED THREE-F OF THE PUBLIC HEALTH LAW TO THE CONTRARY, THE REGIONAL LONG-TERM CARE ASSESSMENT CENTER SHALL HAVE RESPONSIBILITY FOR REVIEWING ASSESSMENTS TO VERIFY THAT AN INDIVIDUAL REQUIRES A NURSING HOME LEVEL OF CARE AND, AFTER CONFIRMING THAT AN ENROLLMENT IS VOLUNTARY, FOR AUTHORIZING PARTICIPATION IN A **MANAGED LONG-TERM CARE PLAN** OR AN APPROVED MANAGED LONG-TERM CARE DEMONSTRATION UNDER PARAGRAPH (O) OF SUBDIVISION TWO OF SECTION THREE HUNDRED SIXTY-FIVE-A OF THIS TITLE.

4. THE REGIONAL LONG-TERM CARE ASSESSMENT CENTERS SHALL HAVE RESPONSIBILITY FOR REVIEWING DOCUMENTATION FROM A PERSON'S PHYSICIAN AND A **CERTIFIED HOME HEALTH AGENCY** AND FOR MAKING THE DETERMINATION AS TO THE CONTINUING NEED FOR HOME HEALTH SERVICES AUTHORIZED UNDER PARAGRAPH (D) OF SUBDIVISION TWO OF SECTION THREE HUNDRED SIXTY-FIVE-A OF THIS TITLE **BEYOND SIXTY DAYS**.

5. THIS SECTION SHALL APPLY TO THOSE CONSUMERS WHO APPLY FOR THE SERVICES SPECIFIED IN THIS SECTION ON AND AFTER THE LATER OF JANUARY FIRST, TWO THOUSAND TEN OR THE DATE SPECIFIED IN THE CONTRACT BETWEEN THE DEPARTMENT AND THE ENTITY SELECTED TO BE A REGIONAL LONG-TERM CARE ASSESSMENT CENTER.

6. WHEN A LONG-TERM CARE ASSESSMENT CENTER IS AUTHORIZED TO ASSESS LONG-TERM CARE NEEDS OR AUTHORIZE SERVICES PURSUANT TO THIS SECTION, AN **APPLICANT OR RECIPIENT MAY CHALLENGE ANY ACTION TAKEN OR FAILURE TO ACT IN CONNECTION THEREWITH AS IF SUCH ASSESSMENT OR AUTHORIZATION WERE MADE BY A GOVERNMENT ENTITY, AND SHALL BE ENTITLED TO THE SAME MEDICAL ASSISTANCE BENEFITS AND STANDARDS AND TO THE SAME NOTICE AND PROCEDURAL DUE PROCESS RIGHTS, INCLUDING A RIGHT TO A FAIR HEARING AND AID CONTINUING PURSUANT TO SECTION TWENTY-TWO OF THIS CHAPTER, AS IF THE ASSESSMENT OR AUTHORIZATION WERE MADE BY A GOVERNMENT ENTITY.**

7. THE COMMISSIONER OF HEALTH SHALL SUBMIT A REPORT BIANNUALLY TO THE GOVERNOR, TEMPORARY PRESIDENT OF THE SENATE, SPEAKER OF THE ASSEMBLY AND THE MINORITY LEADERS OF THE SENATE AND THE ASSEMBLY. SUCH REPORT SHALL ALSO BE POSTED ON THE DEPARTMENT'S WEBSITE. SUCH REPORT SHALL INCLUDE, BUT NOT BE LIMITED TO, AN ASSESSMENT OF THE PROJECT, AN ANALYSIS OF THE LEVEL AND COSTS OF SERVICES MANAGED UNDER THE CONTRACTS, RECIPIENT SATISFACTION AND OTHER MATTERS AS MAY BE PERTINENT. **IN ADDITION, THE COMMISSIONER SHALL CONVENE AN ANNUAL MEETING OF STAKEHOLDERS TO DISCUSS IMPLEMENTATION OF THE DEMONSTRATION PROGRAM ESTABLISHED PURSUANT TO THIS SECTION.**

3. Other budget issues of interest to our clients include:

   a. *GOOD: SSI*—REJECTED reduction in State SSI Supplement, so that single SSI recipients receive $761 in 2009, which includes an $87 state supplement.

   b. *GOOD: CHHA Reimbursement*—REJECTED Home Care Episodic Payment Rate Methodology: The budget rejects the Governor's proposal to replace the current CHHA reimbursement methodology with an episodic payment system similar to the Medicare prospective payment system. Instead, a new Home Health Care Reimbursement Workgroup will be established to address the new methodology. Advocates opposed the Governor's proposal because it leads to fewer hours of CHHA care, as happened in Medicare.

   c. *ALP Beds:* The budget rejects the Governor's proposal to allow nursing homes to operate Assisted Living Program (ALP) beds, but accepts the Governor's proposal to authorize the Commissioner to add 6,000 new ALP beds to the current number of beds over five years, provided that for each bed added an existing nursing home bed is either voluntarily decertified or involuntarily decertified by the Commissioner upon finding that it does not meet the public need. Contrary to other recent additions of ALP beds, this explicitly would not require competitive bidding. The budget also accepts the Governor's proposed clarification of the methodology for reimbursement of ALP beds.

   d. *GOOD: Consumer Directed Personal Assistance Program (CDPAP):* The budget adds additional requirements for local districts participating in the CDPAP, including the submission of an implementation plan (updated annually) which shall include enrollment targets, methods of marketing the program, and other information as required by the Department. The budget also requires all individuals receiving home care who are eligible for CDPAP to receive notice annually about the program. Finally, the budget instructs the Department to regularly monitor district participation in the program and provide guidance to the LDSS to improve compliance with implementation plans and to promote consistency among the counties.

   e. *EPIC*:

      i. GOOD: REJECTED proposal to end the EPIC "wrap-around" coverage to Medicare Part D. This means EPIC will continue to cover drugs that are not being covered by the beneficiaries' primary Part D plan because the drug is not on the plan's formulary, or because the Part D plan requires extensive prior approval requirements.

ii. GOOD: Cover Part D Mail Order Purchases—§§ 110–111. Many Medicare Part D plans offer more cost-effective options to their members through mail order pharmacies. Because these mail order pharmacies are not located in New York State, EPIC has been unable to cover these purchases. This change allows EPIC to provide wraparound coverage on out-of-state mail order prescriptions covered by a Part D or other primary drug plan. By using their Part D mail order option, EPIC members may be able to get a greater days supply for a single co-payment. This requirement will become effective July 1, 2009.

iii. GOOD: Require Medicare Savings Program Application—§ 112—EPIC members potentially eligible for the Medicare Savings Programs (MSP) would be required to apply, in order to be deemed eligible for the Part D low-income subsidy (LIS or Extra Help). The LIS benefit significantly reduces both EPIC and seniors' drug costs. Plus, the MSP benefits provide additional savings by paying Medicare Part B premiums and other Medicare costs. This requirement will become effective July 1, 2009. MSP eligibility limit is 135% FPL, deducting Medigap or other health insurance premiums, with no resource test. (2009 $1,219 single / $1,640 couple).

iv. *BAD: Reduction in EPIC Cost-sharing:* The budget rejected both (1) the Governor's proposal to reduce the highest level of cost-sharing for drugs covered by EPIC, and (2) the proposal to eliminate EPIC fees for individuals with incomes between 135 and 150% of the Federal Poverty Level.

f. *Medicaid Managed Care:*

i. *BAD—Managed Care to Dual-Eligibles:* The Department of Health intends to aggressively pursue the enrollment of dual-eligibles in managed care plans that participate in both Medicaid and Medicare programs, most likely beginning this fall. The state expects $3 million in savings during 2009-10 as a result of this initiative. These plans are called "Medicaid Advantage" plans. Advocates are wary of these plans, since they limit access to preferred doctors and hospitals, and impose prior approval requirements on many services.

TIP: Generally, people with a spenddown may be excluded from managed care plans. Therefore, when enrolling clients in the NYSARC trust or other trusts, keep a minimal spend-down instead of reducing it to $-0-.

ii. *GOOD—REJECTED* Governor's proposal to include personal care services in the standard Medicaid managed care benefit package.

g. *GOOD*: Medicaid Simplification Reforms—Win for Advocates

i. *Face-to-face Interview*. The budget eliminates the required face-to-face interview for those applying to Medicaid and Family Health Plus. This provision is effective April 1, 2010. (§ 61)

ii. *Fingerprinting.* The budget eliminates the fingerprinting requirement for those applying to Medicaid. This provision is effective July 1, 2009.

h. *GOOD: Family Health Plus Eligibility Expansions*: The budget includes the Executive's proposal expanding eligibility for Family Health Plus (available to people under age 65 who do not have Medicare or other comprehensive insurance) to gross income of 200% FPL for local districts that elect to participate, contingent upon not expending any additional state dollars.

i. *GOOD: Cost-sharing for Medicaid Buy-in:* The budget rejects the Governor's proposal to institute monthly premiums varying by income for beneficiaries in the Medicaid Buy-in for Working People with Disabilities.

j. *GOOD—Medicaid—Medicare Part D Wraparound:* The budget rejects the Executive's proposal to eliminate the Medicare Part D wraparound coverage available in Medicaid for atypical antipsychotics, anti-depressants, anti-retrovirals used in the treatment of HIV/AIDS, or anti-rejection drugs used for the treatment of organ and tissue transplants.

Endnote

1. Article VII Bill (A158B/S58B) *available at* http://assembly.state.ny.us/leg/?bn=S00058&sh=t or scroll to bottom of http://www.budget.state.ny.us/pubs/0910_budgetPublicationsAll.html.

Valerie Bogart and Ira Salzman are Co-Chairs of the NYSBA Elder Law Section Medicaid Committee.

Life Settlements: Legal Rights and Opportunities for Insurance Policy Owners

By Chris Orestis

A life insurance settlement is the sale of a life insurance policy by the owner while still alive to a third party institutional investor. The seller receives a lump-sum payment in exchange for transferring ownership of the policy and the final death benefit. The investment entity takes over the premium payments and carries the policy for the remainder of the insured's life.

The right of a policy owner to engage in a life settlement was guaranteed when U.S. Supreme Court Justice Oliver Wendell Holmes ruled in 1911 (*Grigbsy v. Russell*) that life insurance is personal property and the owner is protected by all the same inalienable rights that any owner of real estate, stocks or any other assets enjoy. This decision established a life insurance policy as transferable property that contains specific legal rights, including the right to sell the policy to a third party. By the end of the 20th Century, viaticals emerged as an opportunity for AIDS patients to cash out of a life insurance policy while still alive to cover the high costs of care not covered by health insurance. The Life Settlement market became an offshoot of viaticals and has been growing rapidly ever since, with $13 billion in transactions completed in 2008.

A 2003 study conducted by Conning & Co. estimated that 90 million senior citizens owned approximately $500 billion worth of life insurance in 2003, of which over $100 billion was owned by seniors eligible for Life Settlements. The Wharton Business School issued a study that observed, "Life insurance policies are typically assignable, which means that a policyholder is free to transfer their ownership of the policy to another person. A policyholder's right to assign their *policy to someone other than the insurance carrier has existed for some time.*" The study also went on to observe that a life settlement "*gives the policyholder the economic freedom to choose between a number of buyers and, in so doing, to receive the fair market price for their policy.*"

A number of insurance industry organizations, such as the National Association of Insurance Commissioners (NAIC), National Council of Insurance Legislators (NCOIL), American Council of Life Insurers (ACLI), National Association of Insurance and Financial Advisors (NAIFA), American Association of Life Underwriters (AALU) and the Life Insurance Settlement Association (LISA), have also recognized the legal rights of a policy owner to liquidate a life insurance policy through a life settlement. Stuart Reese, chairman, president and CEO of MassMutual Life Insurance Company, said that if a policy is first purchased with protection in mind and is no longer needed after a period of time, then a contract holder does have property rights and "there is a legitimate Life Settlement business which is consistent with the purpose of insurance."

> *"The right of a policy owner to engage in a life settlement was guaranteed when U.S. Supreme Court Justice Oliver Wendell Holmes ruled in 1911 (*Grigbsy v. Russell*) that life insurance is personal property and the owner is protected by all the same inalienable rights that any owner of real estate, stocks or any other assets enjoy."*

Q: Is it time to consider cashing in a life insurance policy for its Life Settlement value?

A: If a policy owner has outlived the purpose of a life insurance policy, has decided that it has become an under-performing asset, or has had a life event that requires liquidity, then selling a life insurance policy through a Life Settlement transaction should be considered.

Eligibility:

- Age 65 or older (younger ages can be considered based on health) all forms of life insurance can qualify.
- Life Insurance policy with a minimum face value of $50,000.
- Process takes 90 days or less.
- There are no caps on the amount of money that can be raised through a Life Settlement.
- A Life Settlement is the sale of an asset, not a loan, and has no restrictions or requirements to be secured or paid back.
- There are no upfront fees paid by the policyholder.
- The policy owner is no longer responsible for paying premiums once a Life Settlement is complete.

- A policy owner is under no obligation throughout the process. Once a Life Settlement is complete, the policyholder will receive a lump-sum payment in exchange for the policy.

A couple of specific applications of this innovative financial option are important for elder law and estate planning attorneys to be aware of:

(1) *Medicaid*—Life insurance policies are unprotected assets and state Medicaid programs expect any policy with cash value beyond a minimal amount to be surrendered. Those proceeds would then be spent down on care before Medicaid dollars would begin. Instead of surrendering a policy for minimal cash value, the owner could instead receive considerably more through a Life Settlement. The use of proceeds is without restriction, and could be used to cover out-of-pocket costs and private pay home health care, assisted living or skilled nursing arrangements until spent down.

Assume, hypothetically, that client, 67 years of age and in fair health, has determined that he and/or his wife will probably need Medicaid at some point in the future. Assume also that client has a 20-year whole life insurance policy with 13 years remaining, with a cash surrender value of $81,039, an interpolated terminal reserve value of $90,050 (available from the life insurance company by requesting IRS Form 712), and a death benefit of $1,000,000 payable to his wife, and in the event she predeceases him, to his children. Client's other assets consist of a modest home (valued at $350,000) and other assets totaling $125,000. Assume further that client's family history indicates a shorter than normal life expectancy, but that his wife is likely to live well into her 90s.

Traditional estate planning might suggest that the preferred approach to the above facts would involve Credit Shelter and Gap estate planning or early gifting of the home or other assets to the client's children to steer clear of the five-year look-back rule, or some combination of the foregoing. But assume that client was concerned about his children's spendthrift tendencies and creditor issues, such as claims by spouses, and therefore was unwilling to turn control of his hard-earned assets over to his children.

An alternative planning strategy is for the client to gift (assign) the life insurance policy to a trust of which his children are the sole Settler's, Trustees and Beneficiaries, thereby removing the proceeds from both his estate and that of his wife's. Because the policy held in the children's trust is relatively illiquid (assume the trust requires unanimous consent of all the children to act) and is subject to a spendthrift provision (which defends against creditor claims), the policy is generally protected from the client's concerns regarding his children as stated above. Assume, too, that the above trust contained a provision which gave the children a pro rata right of withdrawal if any life insurance policy was subject to a vertical or Life Settlement, similar to that provided above.

Though the gift tax value of life insurance is generally its replacement cost (Treas. Reg. § 25.2512-6(a)), that cost can vary depending on the type of life insurance involved. In the above circumstances, the value of the whole life policy probably would be its interpolated terminal reserve value ($90,050) at the date of the gift, plus the unused portion of the last-paid premium.

Now assume that five years later client has been diagnosed with aggressive cancer and is not expected to live longer than four years, though there is a chance he might fully recover but the treatment is very expensive. Assume further that the proposed treatment will quickly use up most, if not all, of the client's remaining assets and that husband and wife now need to apply for Medicaid assistance.

Assume, too, that the client's children have determined that a Life Settlement will pay out an amount greater than any existing cash surrender value for the current assignment of the ownership of the policy. Assume children in fact liquidate the policy through a Life Settlement and use the funds to establish a special or supplemental needs trust for parents to supplement said parents' needs and provide them with luxuries not covered by Medicaid, such as vacations, a leased vehicle, credit cards, etc.

Notwithstanding the unfortunate circumstances described above, an early gifting strategy and a Life Settlement combined with a special or supplemental needs trust for parents, provided for a safety net for the above hypothetical clients. Removing the life insurance policy early, when its value was low, also provided a level of protection from the five-year look-back rule and perhaps some relief from estate taxation.

(2) *Irrevocable Life Insurance Trusts (ILITs)*—For clients who no longer need or want to sustain an ILIT, the option of cashing in the policy for its highest possible value through a Life Settlement should be considered. The trust is the owner of the policy and it can be sold with the proceeds going back into the trust to be administered for the beneficiaries. Through the use of simple amending language to the ILIT, withdrawal provisions could allow for the treatment of the proceeds to be administered as if the still-alive insured were deceased.

Consider, for example, your typical Irrevocable Life Insurance Trust (ILIT). Generally, an ILIT will provide that only *upon the death* of the Settler (i.e., the person who established the trust), the trustee will collect the proceeds of any policy on the life of the Settler and will administer and distribute the assets for the benefit of the beneficiaries.

But what if the Settlor is not deceased but the policy has been subject to a Life Settlement? What if the Settlor survives for many years to come? Can the beneficiaries access the funds in the ILIT as if the Settlor were deceased? Does the Settlor want the beneficiaries to have that access? Regardless of the answer to any of the foregoing, the ILIT should specifically address the issue of Life Settlements.

For example, the ILIT might at some point provide:

> Notwithstanding any provision herein to the contrary, in the event any policies of insurance on the Settlor's life are paid prior to the Settlor's death as a part of any viatical settlement or similar Life Settlement, the Settlor shall be treated for purposes of administering and distributing the proceeds of such policies as being deceased.

Alternatively, the ILIT might provide:

> In the event any policies of insurance on the Settlor's life are paid prior to the Settlor's death as a part of any viatical settlement or similar Life Settlement, the Settlor shall *not* be treated for purposes of administering and distributing the proceeds of such policies as being deceased.

Alternatively, the ILIT might provide a withdraw opportunity for beneficiaries in the event of a Life Settlement, such as the following:

> Notwithstanding any provision herein to the contrary, in the event any policies of insurance on the Settlor's life are paid prior to the Settlor's death as a part of any viatical settlement or similar Life Settlement, any beneficiary for whom a trust is being held pursuant to this Trust may request that the Trustee distribute to such beneficiary such amount or amounts of principal, including all of his or her net trust estate; provided, however, that the Trustee shall not be required to satisfy any such request unless all the Trustees then serving (of which there must be at least two (2) Trustees, at least one of whom must be an Independent Trustee, as defined herein) consent in writing to such distribution. This power of withdrawal shall be validly exercised only if exercised voluntarily and shall not include an involuntary exercise.

The foregoing are just a few examples of some of the simple drafting considerations estate planners might consider with regard to ILITs and Life Settlements.

"The introduction of life settlements into the estate planning world should cause every practitioner to stop and think about the implications such settlements may have and how strategic planning can (or the lack there of) might impact a client and his or her family."

A Life Settlement would also be an applicable option in the case of "SILITs" (Special Needs Irrevocable Life Insurance Trusts). Again, the basic idea being that the Settlor (or children) set(s) up an ILIT with early distribution trigger language, allowing the beneficiaries (i.e., the children) to pull Life Settlement (or cash surrender value) out of the trust and establish a special needs trust for parents if the need arises. Early action before illness is critical. If the parents never need the benefits of the SILIT, so be it. But if they ever do, the investment in the policy premiums may one day act, with direction of the children, to assist them to live a better life despite the need for public assistance. In short, ILITs really aren't just for the rich trying to make good use of their annual gift tax exclusion and can work just as well for public assistance planning.

The Life Settlement industry provides an important and efficient function to the insurance marketplace—and it is a practice established by the Supreme Court. This unique financial tool presents estate planners with new opportunities that are only just beginning to be recognized as such. The introduction of life settlements into the estate planning world should cause every practitioner to stop and think about the implications such settlements may have and how strategic planning can (or the lack there of) might impact a client and his or her family.

Chris Orestis, president of Life Care Funding Group, a national Life Settlement company, can be contacted at 888-670-7773 x 2 or chris@lifecarefunding.com.

Special thanks to Smilie Gregg Rogers, Esq. of Bergen & Parkinson LLC for contributing to this article.

Top Tax Topics Raised at the *UN*Program

By Salvatore M. Di Costanzo

The third annual *UN*Program was held this year April 23 through April 24 in Poughkeepsie, New York. Many thanks to Martin Hersh and Shari Hubner for orchestrating a wonderful program. One of the goals of the *UN*Program was to develop a "top ten" list of important topics and ideas raised during our group sessions. I thought I would take it a step further and further discuss the top tax topics raised at the meeting.

I. New York State Nursing Home Assessment Credit

Under Section 2807-d of the Public Health Law (PHL), hospitals are charged assessments by the Commissioner of Taxation and Finance on their gross receipts received from all patient care services and other operating income, less personal needs allowances and refunds.[1] The definition of a hospital includes nursing homes.[2] Some types of facilities are excluded from the reach of the statute. For instance, any facility dedicated to the care of police, firefighters, volunteer firefighters and emergency service personnel is not charged an assessment.[3]

For residential health care facilities, the assessment is equal to six percent (6%) of the residential health care facility's gross receipts received from all patient care services and other operating income on a cash basis.[4] A residential health care facility includes a nursing home or facility providing health-related services.[5] Gross receipts include all monies received for or on account of hospital or health-related service, including adult day services.[6] Gross receipts do not include amounts received under Title XVIII of the Social Security Act (Medicare).[7] The facility must make estimated tax payments to the Commissioner on a monthly basis due by the 15th day of the following month.[8]

Since 2005, New York State has allowed private pay residents a credit against their regular tax liability equal to the amount of the assessment passed through to the private pay resident and directly paid by the resident.[9] It is important to note that the credit is limited to private pay residents. The credit cannot be claimed for any portion of the assessment that is paid directly to the nursing home by a health insurance policy, with public funds (e.g., Medicaid or Medicare), or that is paid by a trust or other entity. However, the credit is not precluded where a resident assigns his or her long-term care insurance benefits to a nursing home since a resident receiving long-term care benefits is treated as a private pay resident.

The assessment must be separately stated and accounted for on the billing records delivered to the private pay resident from the nursing home. If a nursing home does not itemize the assessment on its invoices to the resident, it must furnish the resident with a summary statement showing the portion of the assessment applicable to the resident. If someone other than the resident is actually paying the nursing home, that person is entitled to the credit, not the resident. Where multiple individuals each make payments to the nursing home, the credit must be apportioned among all individuals.

The credit is claimed by completing Form IT-258, Claim for Nursing Home Assessment Credit, and attaching it to the resident's New York State income tax return. The credit is a refundable credit, that is, if the credit exceeds the resident's regular tax liability, the excess shall be treated as an overpayment of tax to be refunded to the resident.[10]

II. Tax Treatment of Long-Term Care Insurance Premiums

Federal Deduction

For federal purposes, taxpayers may be entitled to a medical deduction for long-term care insurance premiums paid. Only eligible long-term care insurance premiums paid for qualified long-term care insurance contracts are deductible.[11] A qualified long-term care insurance contract is any insurance contract that (a) only covers long-term care services, (b) does not pay or reimburse expenses incurred for services or items that are covered by Medicare, (c) is guaranteed renewable, (d) does not provide for a cash surrender value or other money that can be paid, assigned, pledged or borrowed, and (e) provides that refunds of premiums and all dividends are applied to reduce premiums or increase future benefits.[12]

The amount of eligible long-term care insurance premiums that may be included as a deductible medical expense depends on your age. For 2009, the limit on deductible long-term care insurance premiums is $320 for taxpayers age 40 and younger; $600 for those over the age of 40 but who have not attained the age of 51; $1,190 for those over the age of 50 but who have not attained the age of 61; $3,180 for those over the age of 60 but who have not attained the age of 71; and $3,890 for those over the age of 70.[13]

Although the above amounts may be included as deductible medical expenses, only medical expenses in excess of 7.5% of the individual's adjusted gross income are deductible for purposes of determining deductible medical expenses. Deductible medical expenses are reported on Schedule "A" attached to Form 1040 and, thus, a taxpayer can only realize a tax benefit if the taxpayer itemizes his or her deductions.

New York State Credit

New York State allows a credit for a portion of long-term care insurance premiums paid for qualified long-term care insurance contracts.[14]

For New York State purposes, the definition of a qualified long-term care insurance contract is slightly different. In addition to meeting the requirements of Section 7702B of the Internal Revenue Code, the contract must also be approved by the New York State Superintendent of Insurance, or if the contract is a group contract, it must be a group contract delivered or issued for delivery outside of New York State.[15]

The credit allowed is equal to 20% of the premiums paid during the taxable year.

The credit is claimed by completing Form IT-249, Claim for Long-Term Care Insurance Credit, and attaching it to the taxpayer's New York State income tax return. The credit is a non-refundable credit which means that it cannot exceed a taxpayer's regular tax liability; however, any unused credit may be carried forward.

III. Relevant Provisions of the American Recovery and Reinvestment Act of 2009

On February 17, 2009, President Obama signed into law the economic stimulus legislation known as the American Recovery and Reinvestment Act of 2009 (ARRA).[16] The following two provisions were raised recently at the *UN*Pogram and are worth discussing.

Making Work Pay Credit

In 2009 and 2010, workers are eligible for a credit equal to 6.2% of earned income. The maximum credit is $800 for married taxpayers who file joint tax returns and $400 for all others. The credit is intended to offset the 6.2% Social Security tax on the first $6,452 of earnings for single taxpayers and the first $12,904 of earnings for married taxpayers filing joint tax returns. The credit is also phased out for single taxpayers with adjusted gross income in excess of $75,000 and $150,000 for married taxpayers who file joint tax returns.

In the case of a regular employee who receives a W-2, the credit will be realized in the form of reduced withholdings from each paycheck. If an employee has little or no withholdings, the credit can be taken on the taxpayer's 2009 Form 1040. Self-employed individuals will be allowed a credit against net earnings when determining income from self employment.

One-Time $250 Economic Recovery Payment

By the time this article is published, recipients of Social Security, Supplemental Security Income (SSI), railroad retirement benefits, or veteran's disability benefits should receive a check from the government in the amount of $250. The credit will be delivered in the same way the government currently delivers the individual's Social Security or SSI payment. Thus, if an individual is in a nursing home and has named the nursed home as rep payee, the $250 check will be deposited directly with the nursing home.

Government retirees whose earnings were not subjected to Social Security withholding will be allowed a credit on their 2009 federal individual income tax return. If the taxpayer also has earnings, the $250 payment will offset the Making Work Pay Credit.

There are classes of individuals who will not receive the credit. For instance, children under the age of 18 and SSI beneficiaries who receive benefits at a reduced rate of $55 because they reside in a nursing home or hospital and Medicaid pays over 50% of the cost of their care.

For purposes of determining eligibility under any federal program or under any state or local program financed in whole or in part with federal funds, the ARRA mandates that these payments are not countable as income and are not a countable resource for the month of receipt and the following nine months.[17] The payment is also not considered taxable income.

Endnotes

1. N.Y. Pub. Health § 2807-d(1)(a).
2. N.Y. Pub. Health § 2801(1).
3. N.Y. Pub. Health § 2807-d(2)(b)(iii).
4. N.Y. Pub. Health § 2807-d(2)(b)(vi).
5. N.Y. Pub. Health § 2801(3).
6. N.Y. Pub. Health § 2807-d(3)(b).
7. N.Y. Pub. Health § 2807-d(2)(b)(vi).
8. N.Y. Pub. Health § 2807-d(5).
9. N.Y. Tax § 606(hh); Department of Taxation and Finance Notice, TSB-M-2006(1)(I), January 25, 2006.
10. N.Y. Tax § 606(hh)(2).
11. 26 U.S.C. § 213(d)(1)(D).
12. 26 U.S.C. § 7702B(b)(1).
13. See IRS Publication 502.
14. N.Y. Tax § 606(aa).
15. N.Y. Ins. § 117(g).
16. P.L. 111-5, 2009 HR-1.
17. P.L. 111-5, 2009 HR-1 § 2201(c)(1); *see* GIS 09 TA-DC009.

Salvatore M. Di Costanzo is a partner with the firm of McMillan, Constabile, Maker & Perone, LLP. Mr. Di Costanzo is an attorney and accountant whose main areas of practice include Trusts and Estates, Tax Law and Elder Law. As an accountant, his primary focus is on tax matters, particularly income tax preparation and IRS and New York State dispute resolution. As an attorney, his primary focus is on estate administration, estate planning, asset protection planning, and long-term care planning. Mr. Di Costanzo is a frequent lecturer on the above practice areas.

Advance Directive News: DNR Damages Denied

By Ellen G. Makofsky

Facing the death of a loved one is a difficult task. The task is sometimes made more painful when family members are asked to consider signing a Do Not Resuscitate (DNR) order.[1] A DNR directs medical personnel not to undertake efforts to revive a patient if the patient experiences cardiac or respiratory arrest.[2] A medical institution usually initiates the request for a DNR and asks family members to authorize the treating physician to issue the order. Without a DNR in place, cardio pulmonary resuscitation (CPR) is used in an attempt to restore a patient's heartbeat and breathing. CPR can be traumatic[3] and statistics reveal that hardly any who receive CPR recover to resume their regular lives.[4] In light of the potential trauma for the patient, measured against the slim likelihood of a successful outcome, family members often sanction a DNR. It is a difficult decision for family members, who realize that in signing a DNR they are essentially giving up hope for the recovery of a loved one. Ultimately, DNRs are authorized because family members want to provide for the patient's peaceful passing.

Once the difficult decision is made to sign a DNR, the patient's family has the reasonable expectation that the DNR will be honored. This expectation is not always met, as illustrated in a recent case, *Cronin v. Jamaica Hosp. Med. Ctr.*[5] What's more, family members have little recourse when a DNR order is ignored.

Peter Cronin was 72 and suffering from various illnesses when he was admitted to Jamaica Hospital Medical Center. Members of Mr. Cronin's family twice authorized a DNR on his behalf. Despite the issuance of the DNRs, Mr. Cronin was resuscitated on two occasions. Following the second resuscitation, Mr. Cronin was removed from life-support systems and he died the same day.

Subsequent to Mr. Cronin's death, Colette Cronin commenced an action alleging that Jamaica Hospital Medical Center wrongfully prolonged Mr. Cronin's life by resuscitating him against his express instructions and the instructions of his family. Jamaica Hospital Medical Center made a motion for summary judgment, which the Supreme Court granted, "dismissing the complaint on the ground that the plaintiff was asserting a claim for 'wrongful living' and that no such cause of action could be maintained."[6] The Appellate Division, Second Department, affirmed, holding that Jamaica Hospital Medical Center established that Mr. Cronin did not sustain any legally cognizable injury as a result of the defendant's conduct.[7]

So we have the situation where a difficult decision was made to authorize the issuance of a DNR. Following the imposition of two DNRs, Mr. Cronin endured two unauthorized resuscitations prior to death. The Court looked at what happened and found no triable issue of fact, holding that the status of being alive does not constitute an injury in New York.[8]

The Court's decision veers from the slippery slope of evaluating damages against a medical institution for saving someone's life, even though the action was contrary to a statutory sanctioned DNR directing the institution to withhold those very life-sustaining measures. The DNR statute itself is toothless where it comes to imposing damage provisions for failing to honor a properly executed DNR. As a result of the Court's decision and the legislation as enacted, the Cronin family is not compensated for the damages incurred and the hospital is not incentivized to put procedures in place to assure that in future situations all DNRs will be respected. This is a troubling outcome in response to a difficult scenario.

Endnotes

1. N.Y. Pub. Health Article 29-B.
2. Where there is no direction from the patient or surrogate health care decision-maker, there is a presumption for resuscitation N.Y. Public Health Law § 2962.
3. Although sometimes CPR uses simple techniques, such as mouth to mouth resuscitation or external chest compression, it can also involve the administration of electric shock, insertion of a tube to open the patient's airway, injection of medications directly into the heart and, in extreme cases, open chest heart massage.
4. When evaluating actual success rates for post-CPR survival without a diminished quality of life, the statistics are disheartening. Only 5 percent of hospitalized patients who receive CPR recover and resume their regular lives.
5. 875 N.Y.S.2d 222, 2009 N.Y. Slip Op. 1941 (2d Dep't 2009).
6. *Id.* at 222.
7. *Id.*
8. *Id.* (citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (N.Y. 1986)); *Alquijay v. St. Luke's-Roosevelt Hospital Center*, 63 N.Y.2d 978, 979 (N.Y. 1984); *Becker v. Schwartz*, 46 N.Y.2d 401, 412 (N.Y. 1978).

Ellen G. Makofsky is a partner in the law firm of Raskin & Makofsky with offices in Garden City, NY. The firm's practice concentrates in elder law, estate planning and estate administration. Ms. Makofsky has been certified as an Elder Law Attorney by the National Elder Law Foundation and is a member of the National Academy of Elder Law Attorneys, Inc.

Recent New York Cases

By Judith B. Raskin

Article 17A guardians petitioned to create and fund a revocable trust with their sister's assets in order to name charities as ultimate beneficiaries of her estate. Granted. *In re Schulze*, 2008 Slip Op. 28524; 869 N.Y.S.2d 896; 2008; N.Y. Misc. LEXIS 7360 (Sur. Ct., N.Y. Co. December 30, 2008).

The 17A guardians who were the brothers and sole distributees of their ward, Joyce Shultze, were concerned that their sister's $50 million estate would, on her death, be distributed by intestate distribution to them. The guardians wanted the vast majority of their sister's estate to go to charity. In order to avoid significant estate taxation resulting in a smaller distribution to charity, the guardians sought to create a revocable trust naming charities as beneficiaries. The trust provisions would allow for full use of the funds for their sister's needs during her lifetime. Time was an issue as Joyce, born with Down Syndrome and then 50 years old, was on life support.

The Surrogate's Court granted the request. Unlike Article 81, Article 17A does not expressly provide for gifting. The court found that the objective of tax savings and maximization of gifts to charity were valid reasons to support the creation of the trust. The guardians should not be required to file for an Article 81 guardianship to accomplish their objectives. Prior cases have held that 17A guardians could make gifts on behalf of the ward in appropriate circumstances.

DSS appealed from a decision granting priority to a nursing home's claim over its claim. Reversed. *Swingearn v. Farley*, 2009 Slip Op. 1124; 2009 N.Y. App. Div. LEXIS 1090 (App. Div., 2nd Dep't February 10, 2009).

When the Article 81 guardian petitioned to settle his final account, DSS asserted its claim for medical assistance incorrectly paid and the nursing home asserted its claim for unpaid fees. The court held that the DSS claim had priority over the nursing home's claim. Upon renewal and reargument, the court reversed its determination and held that the nursing home's claim had first priority. DSS appealed.

The Appellate Division reversed, holding that the DSS claim had priority. Social Services Law § 104(1) states that a public official can bring an action as a preferred creditor where the recipient of benefits was later found to have property. The nursing home did not have a judgment and was a general creditor. DSS did not have to initiate a separate proceeding. Asserting its claim in this matter was sufficient.

OMMRD terminated benefits for a person initially deemed to be developmentally disabled but after several years of providing benefits determined he was not. The beneficiary appealed. Appeal denied. *Jason B. v. Novello*, 2009 N.Y. Slip Op. 1244; 2009 N.Y. LEXIS 21 (Ct. of App. February 19, 2009).

In 2003, Jason B. was approved for OMRDD support services after a determination that he was developmentally disabled. After a few years, the private service provider questioned whether Jason B. was in fact developmentally disabled. Upon review in 2006, OMRDD realized that its initial reviewers had misinterpreted test results and erroneously concluded that Jason B. was developmentally disabled. OMRDD notified Jason B. that his benefits would be terminated. A 2006 fair hearing decision held that OMRDD properly terminated benefits. Jason B. appealed in this Article 78 proceeding, which was transferred to the Appellate Division. The Appellate Division held that the benefits could not be terminated because the initial 2003 finding was a quasi-judicial determination and entitled to *res judicata*. DOH appealed.

The Court of Appeals reversed. The 2003 determination was an administrative determination and not the result of an adversarial proceeding. Therefore, no quasi-judicial hearing took place. The evidence presented in 2006 was the same information and testing results that were reviewed in 2003. In 2006, an expert witness interpreted the information differently and Jason B. did not present any evidence to contradict the expert.

Petitioner sought an order directing the bank to release decedent's account where petitioner, as attorney-in-fact, created a trust naming herself as sole beneficiary. *Carlson v. Sovereign Bank*, 2009 N.Y. Slip Op 1113; 2009 N.Y. App. Div. LEXIS 1085 (App. Div., 2nd Dept. February 10, 2009).

On July 30, 2007, Audrey Carlson executed a durable power of attorney naming petitioner as her attorney-in-fact. On August 14, 2007, petitioner as attorney-in-fact created the Audrey Carlson Revocable Trust, which named Audrey Carlson's heirs at law as the beneficiaries. The petitioner then made the trust the beneficiary of Audrey Carlson's accounts with Sovereign Bank. On October 4, 2007, petitioner amended the trust to make herself the sole beneficiary. Audrey Carlson died on October 27, 2007.

Sovereign Bank refused to give petitioner the bank accounts without the direction of an estate administrator or executor or a court order. Petitioner brought this action to compel the bank to release the funds to her. The Surrogate’s Court, Richmond County, ordered the bank to release the funds to the petitioner. The bank appealed.

The Appellate Division reversed and remanded the matter back to the Surrogate’s Court for a hearing, stating that the Surrogate's Court was in error in granting the order without a hearing. An attorney-in-fact must act in her principal’s best interest. The petitioner did not present any evidence that she was acting in her principal’s best interest when she made herself the beneficiary. The Surrogate’s Court was directed to consider whether the heirs-at-law were necessary parties to the proceeding.

Judith B. Raskin is a member of the law firm of Raskin & Makofsky. She is a Certified Elder Law Attorney (CELA) and maintains memberships in the National Academy of Elder Law Attorneys, Inc., the Estate Planning Council of Nassau County, Inc., and NYS and Nassau County Bar Associations. She is the current chair of the Legal Advisory Committee of the Alzheimer’s Association, Long Island Chapter.

Review of *Watered-Down Truth* by Bob Abrams

By Anthony J. Enea

I am confident that you will remember hearing and seeing the horrific news reports of September 2005, after the devastation of Hurricane Katrina in August of 2005, that thirty five (35) elderly and helpless residents of St. Rita's Nursing Home of St. Bernard Parish, Louisiana, had been abandoned by the home's staff and owners and had perished. There were reports that many of the residents had been left in their beds, while the home's owners, Salvador and Mabel Mangano, and the home's staff had fled to safety. As an elder law attorney, I recall finding these reports being particularly distressing and disturbing. I kept wondering how was it possible that the nursing home residents could have been callously abandoned by their families, friends, staff, nurses, doctors, local government, local emergency services, and the home's owners. Based on the news reports, there had been States of Emergency declared in Louisiana on August 27 and a mandatory evacuation order issued by Mayor Ray Nagin of New Orleans August 28, the day before the hurricane's landfall. There appeared to have been sufficient advance notice of the impending disaster. If what was being described by the media was accurate, the safety of nursing home residents nationwide in the event of an emergency was clearly questionable and precarious. In the days immediately after Katrina, the media constantly reported about the plight of St. Rita's residents. Outrage was in abundance on a daily basis in the media. However, as the months, and now years, after Hurricane Katrina passed, the media seemed to lose track of the events at St. Rita's. After seeing the mug shots of the owners of St. Rita's after their arrests being splashed on the news, there wasn't much, if any, national news about whether they had been prosecuted, and what ultimately had happened to them. It was as if the story had just disappeared from our collective attention.

In *Watered-Down Truth*, our former Elder Law Section Chair, Bob Abrams, has fortunately kept the story alive. In a riveting and compelling account with all of the drama of a Puccini opera, Mr. Abrams has meticulously detailed and analyzed the events surrounding the tragedy at St. Rita's and the media frenzy that ensued, including the criminal prosecution of Salvador and Mabel Mangano on 34 counts of negligent homicide and 64 counts of cruelty as a result of their failure to evacuate the residents.

As in every great crime story, *Watered-Down Truth* has its protagonist. In this case he would be Louisiana Attorney General Charles C. Foti, Jr., nicknamed "Foti-Op" as a result of his penchant for being in the public eye. Mr. Abrams reports how within several days of hearing of the fate of 35 of St. Rita's residents, without full knowledge of the facts and the law and without interviewing any witnesses, Mr. Foti began his "crusade" to hold the Manganos criminally responsible. Mr. Abrams likens Attorney General Foti to the "ringmaster of the media circus," which resulted in what Mr. Abrams has referred to as a "public lynching" of the Manganos on the *Nancy Grace Show* on September 12, 2005. Mr. Abrams ponders what motivated Attorney General Foti's prosecution of the Manganos. Was it the media spotlight that he sought or was it something more profound? The prosecution of the Manganos appeared to be selective, especially in light of the fact that residents of the Lafon Nursing Home, which was run by the Sisters of the Holy Family (an order of black nuns), had also decided to shelter in place and not evacuate, which resulted in a number of their residents perishing. Were the Manganos being prosecuted for their decision to shelter in place, or were there racial and political motivations afoot? Were they being prosecuted because of the stigma attached to their profession? All of the above questions are explored by Mr. Abrams.

Mr. Abrams also provides the reader with great insight as to who the Manganos and their family are, what steps and actions were taken in anticipation of Katrina's landfall, and their decision to shelter in place. He insightfully delves into the strategy undertaken by the Manganos' attorney, James Cobb Jr., a highly regarded trial attorney and law professor. As Mr. Abrams aptly described Mr. Cobb's approach, it was a declaration of war on Foti and the government.

In his recount of the trial, and particularly the testimony of various witnesses, including the testimony of the Governor of the State of Louisiana, Kathleen Blanco, Mr. Abrams is able to take the reader right into the courtroom of Judge Jerome Winsberg of St. Francisville, Louisiana (venue had been changed). The reader will feel as if he or she is one of the six (6) jurors in the jury box. Additionally, while the book is primarily focused on the prosecution of the Manganos, in a broader sense it also provides significant insight into the preparedness and response of the federal, state and local governments to Hurricane Katrina. Should the government have known the levees would be breached, and if so, did the government have an obligation to evacuate St. Rita's residents? Clearly, these were the seeds that Mr. Cobb would seek to plant in the minds of the jurors. On the other hand, the prosecution in a three-week period called nearly forty (40) witnesses, including the owners of nearby nursing homes that had effectively and safely evacuated their residents. The prosecution made much of the fact that St. Rita's was the only home in St. Bernard Parish not evacuated. The defense made the decision not to call the Manganos to the stand. Would this hurt the Manganos? The case went to the jury.

It was in my opinion clearly not a black-and-white case; there were definite shades of gray. Did the acts of the Manganos rise to the level of criminally negligent homicide? It would be a decision the jury would need to make.

While I could reveal to you the jury's decision, I will refrain from doing so as the book is definitely a must read.

It is not only enlightening and entertaining, but from the elder law perspective it forces you to reflect upon what laws are in place to protect the residents of nursing homes and what if any action would you undertake to protect your loved ones, friends and clients under similar circumstances.

Mr. Abrams is available for speaking engagements about the book and book signings. For further information, visit www.watereddowntruth.com.

A Message from the Outgoing Chair

(Continued from page 2)

participation.) The most recent E-news, edited by Howard Krooks, documents our most recent successes this spring with the Governor's budget.

In terms of client services and benefits, we are nearing completion of an updated edition of the Senior Resource Guide, co-authored with members of the Young Lawyers Section and edited by myself and James Barnes. A new publication on Advanced Care Planning, overseen by Judy Grimaldi and Tammy Lawlor, is now available for public distribution. Co-Chairs Fran Pantaleo and Lee Hoffman remain active with a number of projects through the Client and Consumer Issues Committee, such as the recent Mitchell Rabbino Decision Making Day held in connection with the American Bar Association's National Decision Making Day on May 16. One more example of our Section's consumer programs is the series being prepared and presented by the Financial Planning and Investment Committee (Laurie Menzie and Walter Burke, Co-chairs) on Financial Literacy for Older New Yorkers, which will be presented in various locations across the state in connection with many area financial planners.

Since our editor, Anthony Enea, though tireless, is not limitless and keeps me to a particular word count, I apologize to the many Section members who have been such active and dedicated contributors to the success of our Section and making the experience of chairing this Section so much more enjoyable than I ever imagined. Having said that, I did, however, reserve some room for a few special acknowledgments.

Through the course of my prior Chair messages, I tried to applaud the efforts of those behind our Section's many accomplishments. However, there are many others behind them and myself who have been anonymous, but equally notable. To Lisa Bataille, Kathy Heider and Lori Nicoll at the Bar, thanks for making our programs and meetings run smoothly. To my partner, Walter Burke, and my firm, thanks for doing billable work while I wasn't. To my assistant, Lisa Teal, thanks for getting to everything that I couldn't. To my wife, Shelly, thanks (for lots of things and) for helping give back to our profession. And to my parents, Jim and Fran, thanks (also for lots of things and) for teaching the importance of giving back so I could experience the enjoyment that comes with it.

To Mike, Sharon, Dave, Anthony and Fran, good luck and enjoy.

Timothy E. Casserly

A Message from the Incoming Chair

(Continued from page 2)

Dinner. This event will be a fun-filled night of dinner and dancing, while also reminiscing about and honoring the work of our past Chairs as they led the Section through often uncharted waters and advocated for our interests in the face of daunting Medicaid statutes such as MCCA, OBRA, Granny Goes to Jail and the DRA. This is a must-attend event!! I want to thank Anthony Enea for his hard work and effort as the Program Chair of this meeting and his Vice Chair, Robert Kurre.

From October 29-31, our Section will head to Lake George to enjoy the crisp Fall weather at the beautiful Sagamore Resort. The Fall meeting will again feature a combination of podium-style CLE and round table workshops to ensure that members get the most out of their learning experience. A special thank-you goes out to JulieAnn Calareso for serving as Chair of this meeting along with Vice Chair Richard Weinblatt. If there are any topics that you would like addressed at the meeting, please reach out to JulieAnn or Richard as they are actively arranging the program. Planning for our Annual Meeting on January 27, 2010 is also under way through the leadership of Marie Elena Puma. Finally, one of our most popular meetings, the *UN*Program (modeled after NAELA's UnProgram), co-sponsored by the N.Y. NAELA Chapter, will continue to build upon three successful years of providing a yellow pad worth of nuggets for our attendees. I am very excited about each of these events and I look forward to seeing all of you at these meetings!

For those of you who know me, it is no surprise that legislation is a passion of mine. We work so hard in our practices each and every day, but the gratification that one feels in taking on the challenge to shape public policy through legislation brings a sense of purpose to what we can offer to those for whom we advocate. As a Section we will aggressively promote legislation that is important to our clients. We will continue to champion the NYS Compact for Long-Term Care and the creation of a Qualified Supplemental Needs Trust to satisfy the elective share for spouses. We also will continue to explore other legislative initiatives that our Executive Committee has begun work on and that our members bring to our attention. Most importantly, you can continue to count on our Section (along with the assistance of the N.Y. Chapter of NAELA) to represent our Section's interests during the next state budget season.

However, my goals cannot be accomplished without the selfless and tireless commitment of our Section's Executive Committee members and our Section Officers. **Chair-Elect Sharon Gruer, Vice Chair David Stapleton, Secretary Anthony Enea and Treasurer Fran Pantaleo** stand ready with me to promote the best interests of our Section and its members.

Most of all, **I call each of you to action!** Get involved with the Section, let your professional life flourish . . . and, who knows, you might even make a few new friends along the way.

Michael J. Amoruso

Section Committees and Chairs

Bylaws
Joan L. Robert
Kassoff, Robert & Lerner LLP
100 Merrick Road, Su. 508W
Rockville Centre, NY 11570
joanlenrob@aol.com

Client and Consumer Issues
Lee A. Hoffman Jr.
Law Offices of Lee A. Hoffman
82 Maple Avenue
New City, NY 10956
lhoffman@leehoffmannyelderlaw.com

Communications
Howard S. Krooks
Elder Law Associates PA
7000 W. Palmetto Park Road, Su. 205
Boca Raton, FL 33433
hkrooks@elderlawassociates.com

Estate and Tax Planning
Marie Elena Rosaria Puma
Vincent J. Russo & Associates, PC
3740 Expressway Drive South
Hauppauge, NY 11749
mepuma@vjrussolaw.com

Financial Planning and Investments
Laurie L. Menzies
Pfalzgraf Beinhauer & Menzies LLP
455 Cayuga Road, Su. 600
Buffalo, NY 14225
lmenzies@pbmlawyers.com

Guardianship
Robert Kruger
Law Office of Robert Kruger
232 Madison Avenue, Su. 909
New York, NY 10016
rk@robertkrugerlaw.com

Anthony J. Lamberti
435 77th Street
Brooklyn, NY 11209
ajlesq@alamberti.com

Health Care Issues
Judith D. Grimaldi
Grimaldi & Yeung, LLP
9201 Fourth Avenue, 5th Fl.
Brooklyn, NY 11209
jgrimaldi@gylawny.com

Tammy Rose Lawlor
Miller & Milone, P.C.
100 Quentin Roosevelt Blvd., Su. 205
Garden City, NY 11530
TLawlor@millermilone.com

Legal Education
Timothy E. Casserly
Burke & Casserly, P.C.
255 Washington Ave. Ext.
Albany, NY 12205
tcasserly@burkecasserly.com

Ami S. Longstreet
Mackenzie Hughes LLP
101 South Salina Street, Su. 600
Syracuse, NY 13202
alongstreet@mackenziehughes.com

Legislation
Amy S. O'Connor
McNamee, Lochner, Titus & Williams, P.C.
P.O. Box 459
Albany, NY 12201
oconnor@mltw.com

Richard A. Weinblatt
Haley Weinblatt & Calcagni
One Suffolk Square
1601 Veterans Memoral Hwy, Suite 425
Islandia, NY 11749

Litigation and Fair Hearings
Beth Polner Abrahams
Law Office of Beth Polner Abrahams
585 Stewart Avenue, Su. 790
Garden City, NY 11530
bpalaw@aol.com

Medicaid
Rene H. Reixach, Jr.
Woods Oviatt Gilman LLP
2 State Street, Su. 700
Rochester, NY 14614
rreixach@woodsoviatt.com

Membership Services
Ellen G. Makofsky
Raskin & Makofsky
600 Old Country Road, Su. 444
Garden City, NY 11530
EGM@RaskinMakofsky.com

Mental Health Law
Sharon Kovacs Gruer
Sharon Kovacs Gruer, PC
1010 Northern Boulevard, Su. 302
Great Neck, NY 11021
skglaw@optonline.net

Practice Management and Technology
Robert J. Kurre
Robert J. Kurre & Associates, PC
1010 Northern Boulevard, Su. 232
Great Neck, NY 11021
rkurre@kurrelaw.com

Publications
Anthony J. Enea
Enea, Scanlan & Sirignano LLP
245 Main Street, 3rd Fl.
White Plains, NY 10601
aenea@aol.com

Andrea Lowenthal
Law Offices of Andrea Lowenthal PLLC
355a Main St
Catskill, NY 12414
andrea@lowenthallaw.com

Real Estate and Housing
Neil Rimsky
Cuddy & Feder LLP
445 Hamilton Avenue, 14th Fl.
White Plains, NY 10601
nrimsky@cuddyfeder.com

Special Needs Planning
Joan L. Robert
Kassoff, Robert & Lerner LLP
100 Merrick Road, Su. 508W
Rockville Centre, NY 11570
joanlenrob@aol.com

Vincent J. Russo
Vincent J. Russo & Associates, PC
1600 Stewart Avenue, Su. 300
Westbury, NY 11590
vincent@vjrussolaw.com

Sponsorship
Salvatore M. Di Costanzo
McMillan, Constabile, Maker & Perone, LLP
2180 Boston Post Road
Larchmont, NY 10538
smd@mcmillanconstabile.com

Veteran's Benefits
Felicia Pasculli
Felicia Pasculli, PC
One East Main St., Su. 1
Bay Shore, NY 11706
felicia@pasculliilaw.com

NEW YORK STATE BAR ASSOCIATION
ELDER LAW SECTION
One Elk Street, Albany, New York 12207-1002

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